

# CONSTITUTIONAL REFORM ACT 2005

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### *Other provisions about the judiciary and courts*

##### *Section 12 and Schedule 1: Powers to make rules*

30. **Section 12** introduces Schedule 1, which deals with powers to make rules of court that are currently vested in the Lord Chancellor alone, rather than in a rule Committee. By virtue of these provisions, the rules will now be made by the Lord Chief Justice with the concurrence of the Lord Chancellor. Part 1 of Schedule 1 sets out the procedure by which the rules will now be made. Part 2 of the Schedule amends the statutes which confer the rule-making powers so as to incorporate the new procedure.
31. . The requirement that the Lord Chancellor should concur with any rules made by the Lord Chief Justice mirrors the existing statutory powers of the Lord Chancellor to allow or disallow rules made by rule committees. A new power to direct that the Lord Chief Justice make rules to achieve a specified purpose is vested in the Lord Chancellor. Again, this mirrors the situation for rules made by rule committees which are dealt with in Schedule 4 to the Act. In relation to certain family procedure rules, the procedure under part 1 of Schedule 1 to the Act will only have temporary effect, until sections 75 to 80 of the Courts Act 2003 are brought into effect and the Family Procedure Rule Committee is established.

##### *Section 13 and Schedule 2: Powers to Give Directions*

32. **Section 13** introduces Schedule 2, which deals with powers to give directions that are currently vested in the Lord Chancellor. By virtue of these provisions, the directions will now be given by the Lord Chief Justice, generally with the concurrence of the Lord Chancellor. Part 1 of Schedule 2 sets out the procedure by which the directions will now be given. Part 2 of the Schedule amends the statutes which confer the direction-giving powers so as to incorporate the new procedure. The Lord Chief Justice may, with the approval of the Lord Chancellor, delegate his functions under the new procedure; the expectation is that the powers would usually be delegated to the Head of Criminal, Civil or Family Justice (as appropriate). The new procedure is similar to that which will apply to the rules dealt with in section 12 and Schedule 1 (see paragraphs 30 and 31 above).
33. The concurrence of the Lord Chancellor is not needed for directions concerning guidance as to the application or interpretation of the law or the making of judicial decisions. Nor is the Lord Chancellor's concurrence needed for directions that relate to criteria for determining which judges may be allocated to hear particular categories of case; but the Lord Chancellor must be consulted before such directions are given.

##### *Section 14 and Schedule 3: Transfer of appointment functions to Her Majesty*

34. **Section 14** introduces Schedule 3, which provides that appointments to the judicial offices listed will in future be made by Her Majesty The Queen rather than the Lord Chancellor as currently. Paragraph 1 of the Schedule transfers to Her Majesty the

power under section 6 of the County Courts Act 1984 to appoint civil District Judges to county courts and gives the Lord Chief Justice the power to assign them to their districts. It also provides that their salaries shall be determined by the Lord Chancellor with the concurrence of the Treasury, and may not be reduced. This protection brings civil District Judges more closely into line with District Judges (Magistrates' Courts) and with more senior members of the judiciary. Paragraph 2 makes corresponding provision for the assignment of civil District Judges to District Registries of the High Court. Paragraph 3 transfers to Her Majesty the power to appoint High Court Masters and Registrars, and re-enacts with amendments the qualifications for appointment or promotion to the posts of the senior High Court Masters and Registrars. The table in paragraph 3(4) refers to the qualifying office for appointment as Senior District Judge of the Family Division as 'Registrar of the Principal Registry of the Family Division'. This office was renamed 'District Judge of the Principal Registry of the Family Division' by the Courts and Legal Services Act 1990, and the reference is to that office. Paragraphs 5 and 6 transfer to Her Majesty the power to appoint the Senior District Judge (Chief Magistrate).

35. All of these offices are also listed in Schedule 14, and appointments will in future be made by Her Majesty on the advice of the Lord Chancellor, after selection by the Judicial Appointments Commission.

***Section 15 and Schedules 4 and 5: Other functions of the Lord Chancellor and organisation of the Courts***

36. **Section 15** introduces Schedule 4 which provides for the transfer of certain functions of the Lord Chancellor and the modification of other functions of the Lord Chancellor (including those functions that he exercises in relation to Northern Ireland under legislation with UK wide extent). The modified functions will, in general, now be exercised with either the concurrence of, or after consultation with, the Lord Chief Justice of England and Wales or another senior judge, as appropriate. Provision is made for some of those functions that are transferred away from the Lord Chancellor to be exercised either with the concurrence of, or after consultation with, the Lord Chancellor. Section 15 also introduces Schedule 5 which makes similar provision for functions that the Lord Chancellor exercises under legislation relating to Northern Ireland.
37. **Schedule 4** makes the amendments referred to in section 15 by modifying enactments containing or relating to the functions in question. The effect of the amendments made by this Schedule may be summarised as follows:
- The existing statutory functions of the Lord Chancellor that relate to the following matters in England and Wales will be transferred to the Lord Chief Justice: (i) the posting and roles of individual judges within the framework of the court system; (ii) the responsibility to make rules relating to deployment of magistrates; (iii) the authorisation and assignment of judges, allocation of work and the distribution of business within the same level of the court system, (e.g. between divisions of the High Court); and (iv) the nomination of judges to deal with specific areas of business and to fill judicial leadership posts such as the Presiding Judges.
  - The existing statutory functions of the Lord Chancellor that enable him to determine the framework for the appointment of judicial office holders to committees, boards and similar bodies in England and Wales will remain with the Lord Chancellor, while the statutory functions that enable him to appoint individual judges to such bodies will be transferred to the Lord Chief Justice.
  - As regards the making of court rules in respect of England and Wales, where statutory committees presently exist, the relevant provisions will be modified to take account of the division of the Lord Chancellor's functions between him and the Lord Chief Justice. The appointment of non-judicial members of rule committees will continue to be made by the Lord Chancellor and judicial members will be appointed by the Lord Chief Justice. In addition, there will be a new power for the

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Lord Chancellor to require rule committees to change rules or to make new rules to achieve a specified purpose, and to allow rules made by such committees. He may disallow rules but is required to provide written reasons. (See section 12 and Schedule 1 for rule making powers not related to rule making committees.)

- Statutory references to the Vice-Chancellor are amended to provide for the new title of “Chancellor of the High Court”. Statutory references within the Courts Act 2003 relating to the Head of Civil Justice are amended to bring them in line with the positions of Head of Criminal Justice and Head of Family Justice in sections 8 and 9 of the Act. A new position of “President of the Queen’s Bench Division” is also created; this post will not be held by the Lord Chief Justice, but by a separate office holder who will be a Head of Division in his own right.
  - The Lord Chief Justice will replace the Lord Chancellor as the office holder before whom judges in England and Wales will take their oaths. The Lord Chief Justice will take his oath before the Master of the Rolls, the President of the Queen’s Bench Division, the President of the Family Division and the Chancellor of the High Court (formerly the Vice-Chancellor).
  - Certain existing statutory functions of the Lord Chancellor are now to be exercised only with the concurrence of, or after consultation with, the Lord Chief Justice of England and Wales. Where the function relates not only to England and Wales, but also to Northern Ireland or Scotland (or both), an equivalent concurring or consultative role has been provided for the Lord Chief Justice of Northern Ireland or the Lord President of the Court of Session (as appropriate). In addition, where the Lord Chancellor exercises an appointment or removal function in relation to an officer who sits wholly or mainly in Northern Ireland or Scotland, the Schedule provides that he must either consult with, or seek the concurrence of, the Lord Chief Justice of Northern Ireland or the Lord President of the Court of Session (as appropriate).
  - Where amendments are made to other Acts by the Schedule to confer functions on the Lord Chief Justice of England and Wales, the Lord Chief Justice of Northern Ireland or the Lord President of the Court of Session, a provision is added in each case permitting them to delegate the function to another judicial office-holder, except where the function relates to removals from judicial office. In the case of the Lord Chief Justice of England and Wales, the function may be delegated to any “judicial office holder”, as defined in section 109 of the Act. These are the Master of the Rolls, the President of the Queen’s Bench Division, the President of the Family Division, the Chancellor of the High Court, a Lord Justice of Appeal, a puisne judge of the High Court and the holder of any office listed in Schedule 14 to the Act. In the case of the Lord Chief Justice of Northern Ireland the function may be delegated to the holder of any office listed in Schedule 1 to the Justice (Northern Ireland) Act 2002 or to a Lord Justice of Appeal. In the case of the Lord President of the Court of Session, the function may be delegated to any judge of the Court of Session who is a member of the First or Second Division of the Inner House of that Court.
  - All of this means that the following statutory functions will remain with the Lord Chancellor: (i) those concerning the framework for the organisation of the courts system, including setting the geographical and jurisdictional boundaries within England and Wales; (ii) the provision and allocation of financial, material and human resources for the administration of justice; (iii) those relating to the pay, pensions and terms and conditions of the judiciary and the provision of staff and resources for training of the judiciary; and (iv) the determination of the overall number of judges and the distribution of business between different levels of courts in England and Wales;
38. [Schedule 4](#) includes provisions preliminary to the making of arrangements for ending the Lord Chancellor’s ecclesiastical patronage and, as announced by the Government on 2 March 2004, for its future exercise by the Prime Minister. These changes will be

completed by non-legislative means. Schedule 4 also transfers the Lord Chancellor's functions in relation to appeals under section 11 of the Ecclesiastical Licences Act 1533 and section 5 of the Public Notaries Act 1843 to the Chancellor of the High Court.

39. **Schedule 4** further provides that the Lord Chancellor's power (with the concurrence of HM Treasury) under section 14 of the Local Land Charges Act 1975 to set fees for local land charges will, with the exception of fees for personal searches, be devolved to registering authorities in England. Registering authorities are defined by section 3 of the 1975 Act and include most local authorities. Each registering authority in England will be required to set fees for the local land charge services they provide. Registering authorities will be able to set a fee for each service, description of service or group of services which recovers up to, but not more than, their costs of delivering that service. These fees must be published shortly before the beginning of every financial year and before the date the local authority sets for any changes to take effect. In setting and publishing fees, registering authorities will have to have regard to such guidance as the Lord Chancellor may issue, which guidance will be laid before both Houses of Parliament.
40. **Schedule 5** transfers some of the Lord Chancellor's functions to the Lord Chief Justice of Northern Ireland. In some cases the concurrence of, or consultation with, the Lord Chancellor is required before the Lord Chief Justice may exercise the function. Schedule 5 also modifies some of the Lord Chancellor's functions to provide the Lord Chief Justice with a consultative or concurring role. The Schedule enables the Lord Chief Justice to delegate functions transferred to him by the Act (where there is no existing power of delegation) to other office holders to ensure flexibility and that the Lord Chief Justice can continue to fulfil his primary role as a judge. (The office holders to whom these functions may be delegated are the same as those referred to in relation to Schedule 4: the holder of any office listed in Schedule 1 to the Justice (Northern Ireland) Act 2002 or a Lord Justice of Appeal.)
41. The Schedule provides that the Lord Chancellor, in consultation with the Lord Chief Justice of Northern Ireland, will be responsible for setting the organisational framework of the court system, the destination and allocation of proceedings and for providing resources for the administration of judges. The Lord Chief Justice will be responsible for sitting times and places of courts, the assignment and authorisation of judges and the distribution of business within the same level of court. The Lord Chief Justice, after consultation with the Lord Chancellor, will be responsible for nominating to various posts and providing judicial training.
42. The Lord Chancellor's functions of appointing members, or judicial members, of rule committees are transferred by the Schedule to the Lord Chief Justice, with a consultation role in relation to the appointment of non-judicial members for the Lord Chancellor. Provisions relating to rules made by a Committee are also amended to provide the Lord Chancellor with a power to require rules committees to make rules to achieve a specified purpose. There is also a requirement on the Lord Chancellor to provide written reasons in the event that he disallows rules made by a rules committee. The Lord Chancellor's function of making rules without a committee is, in general, to continue to be exercised by the Lord Chancellor but with a consultation role for the Lord Chief Justice.
43. The Justice (Northern Ireland) Act 2002 provides the framework for appointments in Northern Ireland, in particular for the establishment of a Judicial Appointments Commission for Northern Ireland, which will be established in June this year. This Schedule does not alter those arrangements other than to make a number of technical amendments or to correct anomalies. In particular, it brings a number of judicial appointments within the scope of the Northern Ireland Judicial Appointments Commission and makes a number of amendments to take account of changes flowing from the reform of the office of the Lord Chancellor, for example, prescribing qualification requirements.

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44. The Schedule also provides for the repeal of certain functions of the Lord Chancellor, which are now redundant.

***Section 16: Functions of the Lord Chief Justice during vacancy or incapacity***

45. **Section 16** provides that if there is a vacancy in the office of Lord Chief Justice, or if he is incapacitated, the functions of the Lord Chief Justice may be exercised by the Master of the Rolls or the next most senior Head of Division, as set out in subsection (3). If any of these offices are themselves vacant the functions may be exercised by the next most senior Head of Division as specified in the section. Any decision as to whether the Lord Chief Justice is incapacitated, or has ceased to be incapacitated, must be agreed in writing by at least three of the four Heads of Division.