

CONSTITUTIONAL REFORM ACT 2005

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Supplementary

Section 19: Transfer, modification or abolition of functions by order

48. **Section 19** gives the Lord Chancellor power to do any of the following things by order: to transfer, modify or abolish an existing function of his office; to provide for such a function to be exercised concurrently with another person; or to provide that such a function that is exercisable concurrently with another person ceases to be so exercisable. Subsection (2) makes it clear that such an order can, if necessary, amend or repeal other enactments, subordinate legislation, and other instruments or documents. The power does not apply in respect of functions of the Lord Chancellor that are listed in Schedule 7 to the Act.
49. This power extends wider than the power to transfer ministerial functions under the Ministers of the Crown Act 1975. There are two main differences compared with the power in the 1975 Act: the new power is not restricted to the transfer of functions to other Ministers; and the new power also allows for the modification or abolition of a function. The new power also extends wider than the power to make supplementary provision in section 143 of the Constitutional Reform Act 2005. The power in section 143 may only be used if the Lord Chancellor considers it necessary or expedient for the purposes of, in consequence of, or for giving full effect to, any provision of the Act. There is no such restriction on the power under section 19.
50. An order under section 19 is subject to affirmative resolution procedure in any case where it amends a public general act and in most cases where it amends subordinate legislation which was itself subject to affirmative resolution procedure (see section 144(5)(b) and (c) of the Act). In any other case an order under section 19 is subject to negative resolution procedure. .
51. One of the purposes of this power is to ensure that effect may be given to the Concordat agreed with the Lord Chief Justice (see paragraph 7 above), in particular with regard to functions set out in legislation (whether primary or secondary) made during, or soon after, the passage of the Constitutional Reform Bill through Parliament. (The power is limited to amending legislation made in, or under, Acts passed up to and including in the session in which this Act is enacted). These provisions are also intended to be used in relation to, for example, functions of the Lord Chancellor conferred by private, personal or local Acts which may have been missed and thus have not been addressed in the substantive provisions of the Act. This power is also intended for use in relation to the functions of the Lord Chancellor under charters or other governing instruments of private institutions, such as colleges or universities. Where they wish to alter or remove the role of the Lord Chancellor, this power would avoid the need for each of the institutions concerned to make their own separate arrangements.
52. Where, by an order under this section, a function has been modified or has become exercisable concurrently with another person, the order may also provide for the

function to be added to Schedule 7 (Protected Functions of the Minister). The effect of this will be that the power will not thereafter be transferable to another Minister under the Ministers of the Crown Act 1975: see below. This power is intended to avoid the need for a separate order under section 20 of the Act where a function is modified under this section and there is a need to include it within Schedule 7. It is expected to apply principally to functions of the Lord Chancellor created in primary legislation since the introduction of the Bill.

Schedule 7: Protected Functions of the Lord Chancellor

53. **Schedule 7** lists various protected functions of the Lord Chancellor which may not be transferred to other Ministers by a Transfer of Functions Order under the Ministers of the Crown Act. These include functions relating to the custody or use of the Great Seal; functions conferred on the Lord Chancellor by the Constitutional Reform Act or modified by that Act; other listed functions; and listed functions in relation to Northern Ireland. The listed functions may not be transferred by an order under section 19 of the Act or by an order under section 1 of the Ministers of the Crown Act 1975 (as amended by section 20 of the Act).
54. **Schedule 7** may be amended so as to include new functions by any of the following. First, an order under section 19 of the Act, if the order provides for a function of the Lord Chancellor to become exercisable concurrently with another person or for a function to be modified (see section 19(7) of the Act). Secondly, a Transfer of Functions Order under section 1 of the Ministers of the Crown Act 1975, if the order provides for a function to be transferred to the Lord Chancellor, to become exercisable by him concurrently with another person, or to remain exercisable by him but to cease to be exercisable by another person (see section 1(7) of the 1975 Act, inserted by section 20(2) of the Constitutional Reform Act 2005). Thirdly, an order under section 21 of the 2005 Act (see below)

Section 20: Protected functions not transferable under Minister of the Crown Act 1975

55. **Section 20** amends sections 1 and 5 of the Ministers of the Crown Act 1975 so that the power to transfer functions under section 1 of that Act does not apply to the functions of the Lord Chancellor specified in Schedule 7. In general, these functions relate to the Great Seal, the judiciary or the organisation of the courts. This will mean that the specified functions cannot be transferred to another Minister by a Transfer of Functions Order under the 1975 Act.

Section 21: Amendment of Schedule 7

56. **Section 21** provides a power for the Lord Chancellor to add statutory functions of the Lord Chancellor (including those exercisable by him concurrently with another person) to Schedule 7. This only applies to statutory functions under legislation passed in the same Session as, or in Sessions prior to, the Session in which the Act was passed. Its principal purpose is to add to Schedule 7 functions of the Lord Chancellor created in primary legislation since the introduction of the Bill for the Constitutional Reform Act.

Section 22: Transfers: supplementary

57. **Section 22** applies where a function of the Lord Chancellor is transferred to another person under the Act itself, or by an order made under section 19. Its purpose is to ensure that there will be a smooth transition when the function is transferred. It therefore provides for the continuing validity of actions relating to the function taken before the transfer. . References to the Lord Chancellor, his Department or any officer of his Department that occur in Acts or other instruments are to be read as referring to the person who will undertake the function in the future or his department or officers (as appropriate). Legal proceedings involving the Lord Chancellor in relation to a function

*These notes refer to the Constitutional Reform Act 2005
(c.4) which received Royal Assent on 24 March 2005*

which is transferred can be continued by or against the person who assumes the function. Printed documents and forms that relate to a transferred function also continue to be valid despite references to the Lord Chancellor, his Department or his staff. Subsection (2) provides that where Her Majesty will in future perform a function of the Lord Chancellor, the Lord Chancellor will still continue any associated action in relation to that function.

Part 3 the Supreme Court

Summary

58. **Part 3** of the Act creates a Supreme Court of the United Kingdom (which is generally to be known as 'The Supreme Court' in the Act and other legislation) and makes provision for the transfer to the Supreme Court of the appellate jurisdiction of the House of Lords and the devolution jurisdiction of the Judicial Committee of the Privy Council. The new Supreme Court will be separate from Parliament.