

**EXPLANATORY MEMORANDUM TO  
THE TRANSFER OF FUNCTIONS (LORD CHANCELLOR AND SECRETARY OF  
STATE) ORDER 2005**

**2005 No. 3429**

1. This explanatory memorandum has been prepared by the Department for Constitutional Affairs and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Description**

- 2.1 This Order in Council transfers functions relating to legal aid and to the funding of legal services from the Secretary of State for Constitutional Affairs to the Lord Chancellor. It provides for functions relating to rule making in the Human Rights Act 1998 to be exercised concurrently by the Secretary of State for Constitutional Affairs and the Lord Chancellor. The Order also transfers from the Lord Chancellor to the Home Secretary the function of appointing a Conservator under the Wimbledon and Putney Commons Act 1871.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

- 3.1 None.

4. **Legislative Background**

- 4.1 Functions under the Legal Aid Act 1988, section 58, 58A and 58B of the Courts and Legal Services Act 1990; parts 1 and 2 of the Access to Justice Act 1999; and sections 2(3)(a), 7(9)(a), and 20(2) and (4) of the Human Rights Act 1998 were transferred from the Lord Chancellor to the Secretary of State for Constitutional Affairs by the Secretary of State for Constitutional Affairs Order 2003 (S.I. 2003/1887). This Order transfers these functions back to the Lord Chancellor.
- 4.2 This Order also transfers back to the Secretary of State for the Home Department the function of appointing a Conservator under the Wimbledon and Putney Commons Act 1871, a function earlier transferred by the Secretary of State to the Lord Chancellor by the Transfer of Functions (Miscellaneous) Order 2001 (S.I. 2001/3500).

5. **Extent**

- 5.1 This Order applies to functions exercisable in relation to England and Wales. Nothing in this Order alters the functions of the National Assembly for Wales, the Scottish Ministers or the devolved authorities in Northern Ireland.

## **6. European Convention on Human Rights**

As the instrument is subject to negative resolution procedure, no statement is required. The Convention Rights are in any event not engaged.

## **7. Policy background**

- 7.1 In June 2003, the Prime Minister announced the Government's plans to abolish the office of the Lord Chancellor. On 17 July 2003, by Order in Council, various functions, including those relating to legal aid and to the funding of legal services, were transferred to the Secretary of State for Constitutional Affairs.
- 7.2 During Parliamentary debate on the Constitutional Reform Bill 2004, it was agreed to retain the Lord Chancellorship as an Executive, non-judicial, Ministerial office. Consequently, the Constitutional Reform Act 2005 ends the judicial role of the Lord Chancellor and modifies the way in which some of the functions vested in that office will in future be handled.
- 7.3 The decision to retain the office meant that certain legal aid functions were split between the Lord Chancellor and the Secretary of State for Constitutional Affairs – with functions in primary legislation vested in the Secretary of State for Constitutional Affairs and functions in secondary legislation, made up to 17 July 2003, vested in the Lord Chancellor.
- 7.4 Following the enactment of the Constitutional Reform Act 2005, further consideration was given to the contours of the reformed Ministerial office. It was decided that all functions relating to legal aid and the funding of legal services should be relocated in the office of the Lord Chancellor. The Government amendments to the Criminal Defence Service Bill 2005, on 17 October 2005, were in line with this decision.
- 7.5 The provisions of the Human Rights Act 1998 referred to in the Order relate to rule making for tribunals and courts. The Order provides for the exercise of these functions by the Lord Chancellor and Secretary of State for Constitutional Affairs concurrently so that these functions can be included in an order under section 19 of the Constitutional Reform Act 2005 and amended further in line with the principles agreed in the Concordat to place the Lord Chief Justice's future role in the exercise of these functions on a statutory basis.
- 7.6 In addition, the Order will transfer back to the Home Secretary the responsibility for appointing a Conservator under the Wimbledon and Putney Commons Act 1871. This function had been transferred to the Lord Chancellor from the Home Secretary by a Transfer of Functions Order in 2001. When proposals were announced to reform the office of the Lord Chancellor, the Conservators asked for the function to be transferred back to the Home Secretary, who has agreed to the transfer.

## **8. Impact**

8.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies

## **9. Contact**

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