

EXPLANATORY MEMORANDUM TO
THE CONSTITUTIONAL REFORM ACT 2005
(TEMPORARY MODIFICATIONS) ORDER
2005 No. 227

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

2. **Description**
 - 2.1 This order will allow references to ‘The President of the Supreme Court’ in sections 45-46 of the Constitutional Reform Act 2005 (CRA) to be read as ‘The Senior Lord of Appeal in Ordinary’. Sections 45-46 of the CRA allow the President of the Supreme Court to make rules of court. Rules need to be made before the court is operational, so that they are in place on its opening, but there will be no President until the court is opened. We therefore want the Senior Lord of Appeal (who will automatically become the President when the Court is opened) to be able to make the rules.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**
 - 3.1 None

4. **Legislative Background**
 - 4.1 The CRA received royal assent in March 2005. The Act allowed for the creation of a United Kingdom Supreme Court, to replace the Appellate Committee of the House of Lords. The Supreme Court is due to become operational in 2008, and upon its opening will need fully developed rules of court to allow it to function properly. These rules will therefore be drafted in advance of the opening of the Court.
 - 4.2 The CRA Section 45 states that the President of the Supreme Court may make rules governing the practice and procedure to be followed in the court. The position of President will not exist until the Court becomes operational. The modification contained in this order is therefore needed so that the Senior Lord of Appeal in Ordinary is able to make the rules instead. Under the CRA, whoever is the Senior Lord of Appeal in ordinary upon creation of the Court, will automatically become the President, so there is little practical difference but the terminology needs to be amended.

5. **Extent**
 - 5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

- 6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- 7.1 At present, the exercise of the highest level of jurisdiction in the UK is shared between the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council. The Appellate Committee receives appeals from the courts in England and Wales and Northern Ireland, and in civil cases from Scotland. The Judicial Committee of the Privy Council, in addition to its overseas and ecclesiastical jurisdiction, considers questions as to whether the devolved administrations (the Scottish Parliament, the National Assembly for Wales and the Northern Ireland assembly) are acting within their legal powers.
- 7.2 This means that the highest appeal court in the land sits within the legislature. The Supreme Court is being brought into existence as the Government's view is that the highest court must be demonstrably independent of the legislature.
- 7.3 Part 3 of the CRA moves the 12 Lords of Appeal in Ordinary to a new Supreme Court separate from Parliament. The appellate jurisdiction of the House of Lords and the devolution jurisdiction of the Judicial Committee of the Privy Council will transfer to the new Court.
- 7.4 The judicial decisions of the 'House of Lords' are in practice decisions of the Appellate Committee and the current arrangements potentially confuse the judicial and legislative roles of the House. Creating a Supreme Court will help to avoid this.
- 7.5 The considerable growth of judicial review has brought the role of judges more into the public eye, and as such, it is vital to avoid the perception that any decisions could be perceived to be politically motivated. The European Convention on Human Rights, established in law by the Human Rights Act, stresses that judges must be independent, impartial and free of any prejudice or bias, both real and perceived. For this to be ensured, judicial independence needs not just to be preserved in practice, but also to be buttressed by appropriate and effective constitutional guarantees. The establishment of a Supreme Court will provide those guarantees. It will provide clarity in the UK's constitutional arrangements, and give people confidence that the institutional arrangements for our highest court are robust and will endure.
- 7.6 The new Court will also take on the devolution jurisdiction of Judicial Committee of the Privy Council. This would create the proper apex for constitutional issues for the court. Currently there is a danger of a case coming to the Judicial Committee as a devolution issue and to the House of Lords as an ordinary appeal. This proposal will avoid that.
- 7.7 The practicalities of the arrangements for the Appellate Committee in the House of Lords are also open to question. Space within the Palace of Westminster is at a premium, especially at the House of Lords end of the

building. Although the facilities for the hearings are good, the administration side of the Committee has suffered. The position as it is cannot be improved on without detriment to other peers working within the House. A separate Supreme Court with its own facilities will ensure that these issues are properly addressed.

- 7.8 The creation of procedural rules for this new Court are an important part of the success of the Court. The amendments we are requesting in this modification order will help ensure that the rules can be made in a timely manner, allowing for proper consultation with the relevant bodies.

8. Impact

- 8.1 A Regulatory Impact Assessment was prepared for the bill and is attached to this memorandum, with updated estimates of running costs.

9. Contact

Vanessa Watling at the Department for Constitutional Affairs Tel: 0207 210 8274 or e-mail: vanessa.watling@dca.gsi.gov.uk can answer any queries regarding the instrument.

REGULATORY IMPACT ASSESSMENT

1. Title of the Proposal

Constitutional Reform Bill

2. Purpose and intended effect of measure

The Objective

The proposals in the Constitutional Reform Bill abolish the office of the Lord Chancellor; create a new Judicial Appointments Commission for England and Wales; and create a new Supreme Court for the United Kingdom. No burdens are created by these measures beyond a small increase in fees for civil cases. This assessment therefore, focuses on the proposals for the Supreme Court.

The United Kingdom Supreme Court will be an amalgamation of the jurisdictions of the House of Lords Appellate Committee and the devolution jurisdiction of the Privy Council. The Supreme Court will be the highest appeal court in the United Kingdom. It will be housed in a separate building and will have distinct administrative and funding arrangements.

The UK Supreme Court will continue the work of the House of Lords Appellate Committee and the devolution jurisdiction of the Privy Council. It is not anticipated that there will be any alteration in case load or in the nature of the cases coming before the court.

The first judges of the Supreme Court will be those Lords of Appeal in Ordinary who comprise the Law Lords when the Act is brought into force. It is anticipated that their salaries and future pensions will continue to be drawn from the current arrangements.

Devolution: The provisions relating to the Supreme Court apply fully to England & Wales and Northern Ireland. They apply to Scotland only in relation to civil law.

Background

Currently the House of Lords provides the highest appeal court in the United Kingdom. Its current statutory framework is contained in the Appellate Jurisdiction Act 1876.

The Privy Council hears cases concerning devolution matters under the Scotland Act 1998, the Northern Ireland Act 1998 and the Government of Wales Act 1998.

The Government does not consider it appropriate any more that the highest appeal court in the United Kingdom is contained within the legislature. The Government considers that the creation of a United Kingdom Supreme Court will put the relationship between the executive, the legislature and the judiciary on a modern footing, which takes account of people's expectations about the independence and transparency of judicial system.

The Human Rights Act, specifically in relation to Article 6 of the European Convention on Human Rights, now requires a stricter view to be taken not only of anything which might undermine the independence or impartiality of a judicial tribunal, but even of anything which might appear to do so. The fact that the Law Lords are a Committee of the House of Lords can raise issues about the appearance of independence from the legislature.

Risk Assessment

The measures in the Bill do not address any risk as such. Rather they are intended to improve the transparency of our constitution. Specifically, the creation of the United Kingdom Supreme Court helps improve the perception of the independence of the judiciary, as the members of the court will no longer be potentially able to act as both legislators and judges.

3. Options

Before recommending the proposals for the new Supreme Court which will increase, albeit only slightly, fees for civil cases, the Government explored other options. The three options, including the proposals in the Constitutional Reform Bill, are set out below.

Option 1: Do nothing.

Option 2: Partial approach to removing the Law Lords from the House of Lords through House of Lords Standing Orders.

Option 3: Legislate to create a new United Kingdom Supreme Court.

4. Benefits

Option 1: This is not a viable option. The Government does not consider it appropriate that the highest appeal court in the United Kingdom sits within its legislative framework. There are no benefits to this option.

Option 2: This is not a viable option. A partial approach to removing the Law Lords will not provide a full solution. Standing Orders will not be able to transfer the devolution jurisdiction of the Privy Council to a Supreme Court, nor will they provide the appropriate authority to authorise expenditure to provide suitable accommodation for the Court.

Option 3: Legislation to create a new Supreme Court will create a single apex to the United Kingdom's judicial system; it will create a clear and transparent appointments process for the members of the Supreme Court; it will create a Supreme Court distinct from the legislature, enhancing the independence and perception of independence of the judicial system.

Directly affected business sectors are minimal

5. Costs

The estimated annual running costs for the Court are projected to amount to £9-10m.

The Costs of the Supreme Court attributable to civil business will be recovered through a number of means, including direct fees to the Court, fees defrayed across the rest of the civil justice system and contributions from the devolved administrations. The exact mechanics for fee recovery will be addressed by a working group made up of departmental experts, Treasury officials and representatives of the Law Lords.

6. Consultation with small business: the Small Firm's Impact Test

The Small Business Service agree that the impact on small businesses will be minimal.

7. Competition Assessment

n/a

8. Enforcement and Sanctions

n/a

9. Monitoring and review

n/a

10. Consultation

The Consultation Paper *Constitutional Reform: A Supreme Court for the United Kingdom* had broad support.

The Government has recently published a summary of responses to the consultation paper which can be found at <http://www.dca.gov.uk/judicial/judges/pubs.htm#reform>

11. Summary and recommendation

To note the proposal and the minor burden in the form of a small increase in fees.