



From The Honorary Secretary
Professor Nick Wikeley, M.A. (Cantab.), Barrister, John Wilson Chair in Law
Faculty of Law, University of Southampton, Highfield, Southampton SO17 1BJ
Tel: 023 8059 3416; Fax: 023 8059 3024; e-mail: njw@soton.ac.uk

RESPONSE TO CONSULTATION PAPER CP13/03

CONSTITUTIONAL REFORM: REFORMING THE OFFICE OF THE LORD CHANCELLOR

Introduction

The Society of Legal Scholars (SLS), formerly the Society of Public Teachers of Law (SPTL), is the foremost learned society for legal academics and jurists. Its purpose is the advancement of legal education and scholarship in the United Kingdom and Ireland. The Society was founded in 1908 and currently has over 2,300 members worldwide. This response was drafted on behalf of the Society by Professor Diana Woodhouse of the Department of Law at Oxford Brookes University. It was debated and approved at the meeting of the Society's Executive Committee at the Institute of Advanced Legal Studies on 7 November 2003.

The Society of Legal Scholars welcomes the Government's proposal to abolish the office of Lord Chancellor and transfer departmental functions to a Secretary of State for Constitutional Affairs who will no longer sit as judge or assume the role of head of the judiciary.

There is one general point the Society wishes to make before addressing the questions posed in the Consultation Document. This relates to the assumption that the 'duty to safeguard the independence of the judiciary, both within Government and outside' should transfer to the Secretary of State for Constitutional Affairs. Given that the Secretary of State will no longer have any judicial functions, and in future may not even be a lawyer, the Society questions the wisdom of him or her having this duty. Indeed, this proposal found no support amongst members of the Society's Executive. Two views were expressed in Executive. Some members took the view that in a liberal democracy one of the explicit tasks of the executive should be to protect the independence of the judiciary. This group was concerned at the creation of a potential vacuum which the removal of the Lord Chancellor might produce. They believed that the goal of protecting judicial independence would be best achieved by placing a statutory duty on the Attorney-General in this respect. If so, it would arguably no longer be appropriate for the Attorney-General to appear in court on behalf of the government in sensitive cases. Other members of Executive considered that making the defence of judicial independence the responsibility of a minister or indeed the Attorney-General retains the institutional link between judges and government, confirms judicial reliance upon a member of the executive and perpetuates the secrecy surrounding judicial/executive relations. This would, in their view, be contrary to the government's aim of meeting public expectations of judicial independence and transparency.

In relation to the questions posed in the Consultation Paper, the Society responds as follows:

1. Ecclesiastical Patronage

How should this patronage best be exercised once there is no longer a Minister of the Crown with the office of Lord Chancellor?

- 1.1. Of the three options presented, it would seem most appropriate for the Lord Chancellor's patronage powers to be exercised by the Diocesan Boards of Patronage of the Church.
- 1.2. At a time when there is concern about the patronage exercised by ministers (see House of Commons Select Committee on Public Administration, Fourth Report (2002-03) *Government by Appointment: Opening up the Patronage State*, HC 165) transferring further patronage responsibilities to the Prime Minister would be inappropriate.
- 1.3. Given that the abolition of the office of Lord Chancellor is a modernising act, it would be similarly inappropriate for the patronage to be retained by the Secretary of State for Constitutional Affairs. Unlike the Lord Chancellor, he or she does not have the historical link with the Church which gave some logic to the Lord Chancellor having patronage responsibilities. This link has now been broken.

2. Visitorships

How should the Visitorial role of the Lord Chancellor best be exercised in the future? And by whom?

- 2.1 Given that the number of occasions on which the Lord Chancellor will be required to exercise a visitorial role will be greatly reduced by legislation which will establish an Office of the Independent Adjudicator, the creation of a new office to undertake the same role as the Lord Chancellor seems unnecessary.
- 2.2 The most appropriate option would be for the Secretary of State for Constitutional Affairs to advise the Queen, on a case-by-case basis, who should exercise her Visitorial jurisdiction.

3. Royal Peculiars

How should the roles of providing advice to Her Majesty in relation to Royal Peculiars and carrying out visitorial functions in respect of them be carried out in future?

- 3.1 The Society has no view on this.

4. Where the Lord Chancellor has a function in relation to specific schools, charities or other bodies not connected to his Department or Visitorial responsibilities, do you see any value in continuing such involvement?

- 4.1 No; it would be contrary to the modernisation agenda for this involvement to continue. The link is now purely historical and serves no purpose. In instances where the Lord Chancellor's involvement was originally a safeguard, there are now other safeguards in place and it is inappropriate for the Secretary of State for Constitutional Affairs to retain powers of patronage, unconnected with his departmental responsibilities.

7 November 2003