

LORD CHANCELLOR DEPARTS

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Lord Irvine of Lairg will enter the history books as the last fully-fledged holder of the ancient office of Lord Chancellor, having resigned on the 11th June 2003. Lord Falconer of Thoroton was appointed to the new post of Secretary of State for Constitutional Affairs. The newly created Department of Constitutional Affairs takes over the work of the Lord Chancellor's Department, plus the work of the now defunct Welsh and Scottish Offices, with two cabinet ministers acting in future as spokespersons for Scotland and Wales. The offices of Secretary of State for Wales and Scotland are under temporary stewardship, pending abolition.

Consultation is underway to set up a US style Supreme Court to replace the judicial function of the House of Lords. It is unclear what the jurisdiction of this Supreme Court will be. If it is limited to constitutional matters, the Court of Appeal could become the highest civil appellate court, as originally envisaged in 1873 when the Supreme Court of Judicature was established. Following protests about the abolition of the judicial role of the House of Lords the court was reinstated. Nonetheless, the rationale behind having a two tier appellate system is not apparent. It is not yet clear what will happen to the Law Lords or who will sit in the new Supreme Court but it does seem that the UK is about to embrace a distinct continental style public law / administrative court hierarchy. If the new Supreme Court has a broader public law role, the court could take over appellate jurisdiction from the Court of Appeal for challenges to high court orders pursuant to applications for judicial review under Order 54 Civil Procedure Rules 1998. If that is the case then challenges to the conduct of arbitration and adjudication procedures could find their way to the new court. Does this also pave the way for a written constitution empowering the Supreme Court to overrule unconstitutional legislation and what impact will this have on the Human Rights Act 1998? The remoulding of the Supreme Court of Judicature also conveniently coincides with the changing nature of the European Union and the creation of a European Constitution and affords an opportunity for the government to tailor the judicial system in to the changing structure of the European Court of Justice and a newly emerging European Union justice system, with its own multi jurisdictional police force and prosecution service.

The apparent abolition of the Lord Chancellor's Office seemed to have created a constitutional vacuum. The House of Lords had no leader until Lord Falconer was belatedly appointed Lord Chancellor the following morning. Statute currently provides that the presence of the L.C. is required on the Woolsack in the House of Lords and thus an amending statute will be required to abolish the office. The target date for the abolition of the Office appears to be Summer 2006. A consultative process will now be instituted to determine what will replace the Lord Chancellor's Office and to design the new Supreme Court. Some form of judicial appointment body is envisaged. Whether this body is also tasked with appointing members to the new Supreme Court is not known. It is not even clear whether members of the court will have to be lawyers. It is quite extra-ordinary that such a major constitutional reform process has commenced without any prior consultation and without any debate in either House. As with the on going reform of the House of Lords, effective if not legal abolition of yet another longstanding constitutional institution has taken place before what is to replace it has even been worked out.

The Lord Chancellor's Office has long since been viewed as an anachronistic breach of the doctrine of the Separation of Powers. The LC held a seat in the cabinet, participated in legislation and headed up the judiciary. Abolishing the Office is being heralded as a major step towards separating the judiciary from politics but will this be the case? Lord Faulkner, a cabinet minister, will not sit as a judge, but the Department of Constitutional Affairs will continue to administer the court system. Plus ça change . . . !!! To the extent that the judicial process is necessarily constrained by financial resources, it is difficult to imagine that a complete separation between the legal system and politics can ever be achieved. Perhaps that is why the overtly political title Ministry of Justice has been avoided.

How all of this will impact on the future of ADR is difficult to predict. The LCD has actively promoted ADR as a means of reducing the burden on the courts. We will all have to wait, with baited breath, to see whether or not Lord Faulkner progresses matters further in this regard but it would appear unlikely. He has already been tasked with reforming the criminal justice system. One might imagine that he will have more than enough on his hands completing that and finalising the new constitutional arrangements.

The next major ADR initiatives are most likely to come from the European Commission, which is in the process of conducting a review of mediation processes at the present time, with a view to introducing a regulatory mechanism. The preliminary papers have already excluded third party determination from its remit so the implications for expert determination, adjudication and arbitration are minimal. However, since judicial mediation is quite common in mainland Europe, significant changes may yet be on their way, which could well impact upon the UK