SELECT COMMITTEE ON THE CONSTITUTION

The Office of Lord Chancellor

Oral and written evidence

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WEDNESDAY 22 OCTOBER 2014

Members present
Lord Lang of Monkton (Chairman)
Lord Brennan
Lord Crickhowell
Baroness Falkner of Margravine
Lord Goldsmith
Lord Powell of Bayswater
Baroness Taylor of Bolton
Baroness Wheatcroft

Examination of Witnesses

Sir Alex Allan KCB, Permanent Secretary, Department of Constitutional Affairs then Ministry of Justice, 2004-07, and Sir Thomas Legg KCB, Permanent Secretary of the Lord Chancellor’s Department, 1989-98

Q63 The Chairman: Welcome, gentlemen. We are very pleased to see two of you here today. We would have liked to have seen three, but unfortunately Sir Hayden Phillips is unwell. We thought we would get in touch with him after this session and give him an opportunity to comment on anything he felt he would like to say to us. We will probably send him a copy of the transcript of what has been said. I hope you will be content with that.

You are aware that we are investigating the role and position of the Lord Chancellor, reviewing progress or otherwise since 2005. We are not in any way contemplating the personality of the present Lord Chancellor. It is a matter of the constitutional role and how it is evolving. We are extremely grateful to the pair of you for being here today, because you
both have enormous experience. You have been at the coalface, so to speak, during the evolutionary process. Can I ask, to start with, a rather general question? What role do you think the Lord Chancellor plays in upholding the rule of law across government? Sir Thomas, would you like to start?

Sir Thomas Legg: Lord Chairman, I speak of course from a distant past, although I think there are still some continuities from what I can see of what is happening now. It is true that, certainly in my day, the Lord Chancellor did have a vague, unformulated, but reasonably understood position in Cabinet, as the guardian of certain constitutional proprieties, particularly those relating to relations with the judicial branch of government. I am not sure how far it extended beyond that, and that depended a lot on personalities and circumstances. But certainly, in anything to do with relations with the judiciary, the Lord Chancellor—together to some extent with the law officers, but particularly the Lord Chancellor—had a role, and it is pretty clear that that was accepted at the time of the Constitutional Reform Act, because Section 1 refers to it without saying precisely what it was, which was probably wise.

The Chairman: I was tempted to ask you at some stage if you would like to give us a definition of how you thought the rule of law could be defined, but perhaps it is too soon in the discussion to do that just now. Perhaps you would like to think about it, and we may come back to it. Sir Alex, would you like to comment on that?

Sir Alex Allan: I was involved during the transition period, in that I took over from Sir Hayden Phillips after Lord Falconer had taken over from Lord Irvine as Lord Chancellor, and while what was then the Constitutional Reform Bill was going through Parliament, and I then was involved through the transition to the new regime. I agree very much with Sir Thomas’s comments about the rule of law. One thing that is clear is that it is the law officers who are responsible for legal advice to the Government, not the Lord Chancellor. But the Lord Chancellor does have this role, particularly in respect to issues involving the judiciary, and a general oversight of constitutional issues.

The Chairman: We gained the impression, talking to the Lord Chancellor, that he regarded the maintenance of the rule of law as something that applied equally to all Ministers, and indeed, all organisations and people involved in government. Do you think that is an accurate definition, and do you think it is a sensible definition?

Sir Alex Allan: Certainly, the ministerial code that, wearing another hat, I have an involvement in, does require Ministers to uphold the law, to follow the law. To that extent, certainly, it is the responsibility of all Ministers to uphold the law and not to do things that are illegal. So, yes, to that extent it applies. The Lord Chancellor has, as Sir Thomas and I have been saying, a general fallback, oversight role, rather than being involved in, very often, any specific cases.

The Chairman: The legal profession, in their evidence to us, or some aspects of the legal profession, have indicated that they regard the Lord Chancellor’s role as above those of other people, as being the constitutional conscience of perhaps the Government or of the rule of law. Do you think that is a defensible position?

Sir Thomas Legg: I think myself that is putting it a bit high. Plainly, the Minister of Justice, who has responsibility for constitutional as well as legal matters, must be accorded a special
responsibility and role in maintaining the culture of the rule of law. The problem about the rule of law, returning to your speculation before, is that it is of course a phrase that can have a very broad or focused meaning. In a broad sense, it importantly means that we shall have a government of laws and not of men and that is to do with attitudes almost as much, at some levels, as precise details and rules. On the other hand, at the other end of the scale, it can mean very precise things about, particularly, the relationship between the Executive and the legislature on the one hand, and the judiciary on the other. I broadly would agree with the evidence of the legal profession. Conscience is a tricky concept in this context, but I certainly would agree that the Justice Minister must be given a special responsibility in this field.

Q64 Lord Crickhowell: The present Lord Chancellor said that he doubted the Lord Chancellor had ever been the Government’s constitutional guardian or conscience, and that he felt the overall guardianship role was held by the Prime Minister. I must say, that made me sit up and question it. In the days when I was in Cabinet the Lord Chancellor might at times have wanted to say, and did say, things to the then Prime Minister that might have made us think again. We certainly have had the case of Lord Falconer having to say some quite firm things to the Prime Minister of the day about public comments that had been made about a decision taken by a judge. So it does not seem to me that the Prime Minister can be held to be the principal guardian. What is your comment about that?

Sir Thomas Legg: Perhaps Sir Alex and I speak from different eras to a certain extent. I know what the present Lord Chancellor might have been driving at, in the sense that I suppose the Prime Minister has to set the tone for the whole team. But certainly in my day, the Lord Chancellor would have been regarded and was regarded—and regarded himself—whichever party in government he was serving, as having a special role in this respect.

Sir Alex Allan: I think there is a particular issue about relations with the judiciary and comments about the judiciary, where it seems to me that the Lord Chancellor has an acknowledged role in commenting on and addressing colleagues who he may feel are making inappropriate comments about the judiciary or about judicial decisions. So there is that role. More generally, as Sir Thomas said, clearly the Prime Minister has overall responsibility for the conduct of the Government and to that extent I can understand the current Lord Chancellor’s comment.

Q65 Lord Powell of Bayswater: The old Lord Chancellors were, in a sense, a three-legged stool. They had their role in relation to the judiciary, they had their role as Speaker of the House of Lords, and they had their role as the conscience of the Government. They lost one role at least with losing the speakership of the Lords. Do you think there is a certain amount of scrambling around for arguments to justify continuing to have a Lord Chancellor in the light of the, in practical terms, diminished role?

Sir Alex Allan: Of course, the Lord Chancellor is now also the Secretary of State for Justice, and has taken on considerable additional responsibilities. So I do not think there is any question that the current balance of portfolios would leave the incumbent short of issues or actions to deal with. The Lord Chancellor was always also, of course, responsible not just for the issues you mentioned but, linked to them, legal aid and the management of the court service, both of which are pretty substantial issues.
**Lord Powell of Bayswater:** No, I accept that. I meant the effort to argue that there has to be a separate Lord Chancellor and the office should be preserved. As you say, the Lord Chancellor and the Secretary of State for Justice are merged. But does he still need to be called Lord Chancellor?

**Sir Thomas Legg:** My own answer to that is that it is not absolutely necessary, no. Stripped of all the accretions over the centuries, the formal position of what Lord Chancellor means is that you hold the Great Seal. For about the last six centuries, not before that, that role has been increasingly connected with justice functions of government. It does not have to be, it is not logically necessary, but it just has been. It may not be an accident that the same result has happened in France, where the Minister of Justice is also the Garde des Sceaux and he keeps the seal of France. The world would not come to an end if the Minister of Justice was not also the Keeper of the Seal, but it has for many centuries been connected with that. Somebody has to hold the Great Seal and operate it. It is right, in my opinion, that it should be a senior Minister. That does make a certain amount of cultural and constitutional sense, but it does not go further than that, I agree.

**Sir Alex Allan:** It was an issue, obviously, during the passage of the Constitutional Reform Bill, whether the office should remain, and the Government’s initial proposal was that it should not. During the passage through Parliament there was a lot of discussion of this issue and it was decided to maintain the title and the office. Of course, there are a large number of functions attached to the office of the Lord Chancellor including, for example, public records and a number of other ones. As we discovered during the passage of the Bill, abolishing the office is extremely complicated.

**Q66 Baroness Taylor of Bolton:** I wanted to follow up on what was being said about “conscience of the Government”, and I accept perhaps “conscience” is not quite the right word. But you were talking about it in terms of rule of law and the relationship with other Ministers. Some of us who have worked with Lord Chancellors in the past have seen the constitutional role as being extremely important. We have had a lot of constitutional reform in the last decade or so and there seems to be an impression—at least to some of us who were there—that the Lord Chancellor had a sort of overview of all of that and acted, in a way, as a custodian of the constitution in terms of looking at change and making sure that things held together. Do you think that that is a role for the Lord Chancellor? Do you think that somebody needs to perform that role within government?

**Sir Alex Allan:** There are a lot of issues lumped under “constitution” as a whole. When I was first in the department it had been renamed the Department for Constitutional Affairs before it subsequently became the Ministry of Justice. There are a huge number of issues relating to the constitution, which I do not think need in any sense to be under the Lord Chancellor. Indeed, under this Government, they have largely been put under the Deputy Prime Minister, and the functions supporting them transferred to the Cabinet Office. While there may be, in terms of the top-level issues about the rule of law and the judiciary, a function that is necessarily tied to the Lord Chancellor or whatever office includes that role, a lot of the constitutional issues do not necessarily need to be there at all. If you look at party funding, for example, there is no particular reason why that is anything to do with the Lord Chancellor.
Sir Alex Allan KCB, Permanent Secretary, Department of Constitutional Affairs then Ministry of Justice, 2004-07, and Sir Thomas Legg KCB, Permanent Secretary of the Lord Chancellor’s Department, 1989-98 — Oral Evidence (QQ 63-75)

**Sir Thomas Legg:** If I may just add to what Sir Alex has said, thinking about the way it worked in my era, I would be uncomfortable about the idea that the Lord Chancellor was then understood in any very broad sense to be the conscience of the Government in constitutional matters. I do not think it was seen as broadly as that. The Lord Chancellor had a certain position in the Cabinet because he was then a senior lawyer, and something went with that. But if he was wise, he would keep his powder dry for a very few occasions to speak about constitutional issues, and would reserve it usually for occasions when it involved more or less identifiable legal issues. I think the definition that you were employing then would certainly not have been the case in my day. I think it would be going too far. The Lord Chancellor did have a certain position, but it was not generally the conscience of the Government.

For my part, I think it is a wise provision that has been made in the new arrangements that the Ministry of Justice has a certain responsibility as a department for constitutional matters, because we need a department of government—perhaps we need it more than in my day—that has knowledge and experience in these things. The present temporary arrangements may or may not last. It is good that there should be a department of state that is responsible for them. That must give the Ministry of Justice a degree of oversight in such matters, but I still would not go quite so far as to say that he or any other Minister, other than perhaps the Prime Minister, can have oversight of the whole field of government in these things.

**Baroness Taylor of Bolton:** Are you making a distinction there between very specific policy changes, be it on voting age or party-political funding, as was mentioned, as opposed the very broad impact of a multitude of constitutional changes that might not fit together? I am thinking of the present situation where a lot of ideas are being thrown up that are individual pieces of policy, but who is going to make sure that the show is kept on the road and that other unintended consequences do not come from what are quite fundamental changes? Somebody needs to have an overview of all those things, going back to when we were doing devolution in the late 1990s, in the way that the Lord Chancellor did then.

**Sir Thomas Legg:** I am making that distinction, yes. I recall, for what it is worth, that as a very junior official I was responsible for the Bill that lowered the age of majority from 21 to 18, but by doing that we did not lower the voting age. Another bit of government did that.

**Sir Alex Allan:** You obviously would know very well, Lady Taylor, the fact that it was the then Lord Chancellor, Lord Irvine, who chaired the committees of Cabinet dealing with all the constitutional issues was partly personal, rather than necessarily attaching to the office of Lord Chancellor. His personal position, his relations with the Prime Minister, contributed to that arrangement, I think.

**Q67 Lord Goldsmith:** If I could come back to the central question, if I may, to get the benefit of your views from your considerable experience—as Sir Alex said, from slightly different eras, and I think that is helpful—which is what we mean by the rule of law, because it is inherent in the discussion that we are having. Would you recognise the distinction between the rule of law and rule by law? The fact that the Government must abide by the law, and all Ministers must abide by the law, is in the ministerial code. As has been said, it is the Attorney-General’s job to advise the Government what the law is so that people can do that.
But there is more than that, is there? This is the question I am putting to you, even if we cannot encapsulate what we mean by it, which comes out most clearly when there are proposals to change the law. If one reads the evidence of the Lord Chancellor last week, there is a sort of hint—I may be reading too much into it—of, “Well, of course, we can change the law and then we will be sticking to the rule of law”.

We have seen some examples of this in previous Governments—for example, the proposal to increase the time that you could hold somebody pre-charged to 90 days, which I personally, in office, opposed. If the law had been changed, it would have been in accordance with the law to have done that, but I would have said at the time it was against the rule of law to allow that degree of detention of someone who had not been subject to trial. Identifying this may be very difficult to do. I just wonder, from your experience, whether you see that distinction, and whether it was something that your Lord Chancellors would have recognised as something that they should be taking an interest in or advising on.

Sir Thomas Legg: I suppose this is where one gets into the difference between a formal approach to legislation and law on the one hand and a values-based approach on the other. I am sure there is such a distinction, but it is extraordinarily difficult and subjective to apply it in individual cases. That, of course, is one of the difficulties that Ministers have in government. I do think that the Lord Chancellor and—I hardly need to say this to you, Lord Goldsmith—but the law officers also have an important role in that. If I remember rightly, in my day, the Attorney-General was usually a member of the Legislation Committee, and there was a reason for that. So it is not just the Lord Chancellor, it is the trio, or it used to be said and I expect it still is.

It is perhaps relevant to this, although I am not claiming to know exactly how, that all during my career in the public service, which was entirely in the Lord Chancellor’s Department, unlike Sir Alex, the role of law in government seemed to grow and grow. Whether that is a good thing or a bad thing is for discussion, but, in the 1960s, when I first joined the department legal issues were not very important in government. By the 1990s, when I retired, they had grown in importance and since then even more so. So this has become more of an issue in our time.

Lord Goldsmith: But if you are right that there is a values-based approach to the rule of law, not just a technical approach to what the law is, that may lead to questions as to whether it is right that every single Member of Parliament and every single Minister has the same responsibility for upholding the law, which is what this Committee was told by the Lord Chancellor last week. I wonder whether you have a view on that.

Sir Thomas Legg: With great respect to the Lord Chancellor, if that was his view, I do not think I agree with it. Of course, every person holding public office in our democracy has a responsibility to uphold the rule of law. Of course that must be right. But I personally agree with you that some Ministers and officials perhaps have a greater responsibility, because that is an inevitable result of the distribution of functions.

The Chairman: The rule of law is going to be a drumbeat throughout our session, so we will move on to the next question, of which we have given you advance notice.
Q68  **Lord Crickhowell:** A number of our witnesses, including some very distinguished judges, questioned the adequacy of the legal advice available to the Lord Chancellor in the Ministry of Justice. Last week, Mr Grayling and the Ministry of Justice Legal Director, Rosemary Davies, assured us that there were a very large number of lawyers there, they were all of the highest possible quality and the advice was extremely good. But the Lord Chief Justice, Lord Judge, told the Committee, “I think that the Lord Chancellor’s Department is short of lawyers at the top. I am not going to give any specific examples, but sometimes proposals come down the road to the Lord Chief Justice about which you would say to yourself, ‘Did anybody not tell the Lord Chancellor that this problem, that problem, or the other problem, might arise?’” He went on, “I make that point about both of the first two Lord Chancellors that I was talking about and the present Lord Chancellor. This is not directed at Mr Grayling; it is the same with any Lord Chancellor. He needs good legal advisers. I do not think that the Ministry of Justice is filled with lawyers who understand the constitutional subtleties.” Have you any comment on those conflicting views?

**Sir Alex Allan:** I would not want to comment on the current position in the Ministry of Justice, which I do not know about. But certainly, in my experience, the Lord Chancellor has been supported by excellent lawyers from the government service. When I was there we had Richard Heaton, who is now the First Parliamentary Counsel; we had Rowena Collins-Rice, who is now the legal secretary to the law officers—both very distinguished government lawyers. I certainly would not have said that the Lord Chancellor was short of good or indeed excellent legal advice. There is also of course the issue that, as I said earlier and as Lord Goldsmith acknowledged, it is the law officers who are responsible for legal advice to the Government as a whole and so you would expect them to have a significant role in some of these issues.

Q69  **Lord Powell of Bayswater:** We have so far been looking at this mostly in terms of Ministers and their role, but we are told, rightly so, that civil servants also have a substantial responsibility for upholding the rule of law. This may apply perhaps more to the Allan era than the Legg era, but at meetings of Permanent Secretaries were rule of law and judicial issues much discussed?

**Sir Alex Allan:** Yes, when they were relevant. I would have sat there and would have, if these sorts of issues emerged, certainly spoken up on them. The Treasury Solicitor and First Parliamentary Counsel would also both be there. I would have seen my role particularly in relation to speaking up about relations with the judiciary, and occasionally those sorts of issues did emerge and I would speak up. There certainly was the opportunity to raise them at Permanent Secretary level, which I and the First Parliamentary Counsel and the Treasury Solicitor would have done.

**Lord Powell of Bayswater:** You would have agreed how they might then be pursued with Ministers, as appropriate—

**Sir Alex Allan:** Yes.

**Lord Powell of Bayswater:**—and who would do it?

**Sir Alex Allan:** Exactly. Yes.
Sir Alex Allan KCB, Permanent Secretary, Department of Constitutional Affairs then Ministry of Justice, 2004-07, and Sir Thomas Legg KCB, Permanent Secretary of the Lord Chancellor’s Department, 1989-98 — Oral Evidence (QQ 63-75)

Sir Thomas Legg: For what it is worth, the same was true in my day as well. I think I recall, although I could not exactly say when, that we had a fairly lively discussion about the use of judges for public inquiries at one of those meetings. So it did and could come up in the way that Sir Alex described.

Lord Powell of Bayswater: I thought that regular meetings of Permanent Secretaries were not so frequent in your time, perhaps, as in Sir Alex’s.

Sir Thomas Legg: No. They happened every Wednesday just as they do now.

Sir Alex Allan: The same as they do now.

Q70 Lord Goldsmith: I wanted to ask you a little bit about the relationship in your day between Lord Chancellors and the law officers. To some extent, you have dealt with this already, but it might just be helpful to have, if you could, a little bit more of a picture of the regularity of meetings between the Lord Chancellor and the law officers, and the sort of topics, without going into confidential details, that were discussed, so we have a picture of how it operated.

Sir Thomas Legg: In my day, they were always close, not least because very often Lord Chancellors were former law officers. But for functional reasons also, they had close relations. In my day as Permanent Secretary, anyway, we did not have a regular slot every week or every month for a meeting with the law officers, as we did with the senior judges, but there was constant toing and froing between them and the Lord Chancellor. Indeed, a daily or more than daily discussion with the Lord Chancellor might often begin, “The Attorney-General has just told me X. What are we going to do about it?” So it was a very close relationship.

Sir Alex Allan: Yes. As you will know, Lord Goldsmith, they were very close relationships, with lots of meetings. As Sir Thomas Legg says, we did not necessarily have a regular, scheduled slot each week or whenever, but there were certainly a lot of meetings ad hoc. Following up Lord Powell, I would have meetings with the Treasury Solicitor, Legal Secretary to the law officers and others whenever issues arose and, similarly, right down the department, so there was a lot of contact.

Q71 Lord Crickhowell: Can I take from that that the position of the Attorney, his presence in Cabinet, is a reference to the role of the former Lord Chancellor in Cabinet? In my day the Attorney only attended Cabinet by invitation; nowadays we have a huge gathering around the Cabinet table and we are told that the Attorney is always there in attendance at Cabinet meetings. That struck me thinking about it since. The great many of the major issues come up in Cabinet committees—you have already referred to the very important Legislation Committee, which I sat on at one time—and there is the question of the importance of the presence there of someone who raised these issues. Do you think there is a difference in the situation where the Lord Chancellor was a Member of the Cabinet and of the key Cabinet committees? It may be the Attorney is not always there at the critical moments.

Sir Alex Allan: In some ways the Cabinet committee system relies on making sure that the relevant advice is produced for the committee and the whole network of official committees. Discussion beforehand should identify issues so that, if the Attorney-General was not a member of a particular committee but an important legal issue had been raised
when this was being discussed at official level, the Attorney-General would be invited to attend. The process would work through that way. I find it hard to envisage a situation where you would have an important legal issue being discussed without proper informed legal input around the table at a Cabinet committee.

Sir Thomas Legg: Certainly, the system is not working properly if the law officers are not involved when anything of that sort comes up. In a sense, I suppose this is an issue that is linked to your Committee’s project, but it is separate from the position of the Lord Chancellor. That is because, as Sir Alex was saying—and, of course, I do not need to repeat it to you—it is the law officers who advise the Government on law, not the Lord Chancellor. Certainly, all through my time that distinction was carefully maintained. It is a problem of government—perhaps for the people at the centre of government—to ensure that the law officers, who are, in some ways, the most unsung but among the most important people in the system, are involved across the board in ways in which the Lord Chancellor cannot be involved in anything that may involve legal advice to the Government.

Q72 The Chairman: Do you see the law officers’ obligation as being to speak out whenever they sense any issue affecting the rule of law or should they only wait until they are asked? Sitting in a Cabinet room with about 30 ministerial colleagues, it takes a brave law officer to speak out unasked when the Lord Chancellor is there as well. Is there a potential problem there?

Sir Thomas Legg: I suspect there is an actual problem there. That must be one of the difficult and challenging things about being a law officer. It probably is very difficult but, again—if I were advising law officers, of whom you have several on your Committee—they need to keep their powder dry. If you ask whether the Attorney-General and the Solicitor-General have an obligation to draw the attention of their fellow Ministers to substantial issues of legal values, as well as the precise law, my answer would be yes. That goes with the job.

Lord Goldsmith: I am just going to give a disclosure here because people keep on talking about the fact that there was a time when Attorney-Generals did not attend Cabinet very often but they do now. This changed, I believe, in my time and it changed in my time because what had happened was that I would read Cabinet discussions—because we always got the minutes of Cabinet—and I would say, “Why on earth was I not there, because there is an important issue?” You cannot tell from the agenda that the issue is going to arise because the agenda only has two items on it, domestic issues and international issues, and you have no idea what they are going to be. I then said—I cannot remember whether Sir Alex was present at that time—“I think it is better if the Attorney-General turns up because then if something does arise at least we can put up a flag, ideally so that we look at it and give formal advice afterwards, rather than allow things to go by default”. That is simply the historical reason, which is prosaic and not very romantic.

The Chairman: We have all had problems with government agendas that do not indicate what is going to be discussed.

Q73 Baroness Wheatcroft: There are concerns that by combining the role of Lord Chancellor and the Justice Department relations between the Lord Chancellor and the judiciary have become more remote. Lord Irvine has told the House that in his day it was very important that the Permanent Secretary maintained very close relationships with the judiciary and that
helped him a great deal. I wonder if you could tell us quite how you, Sir Thomas, as a legal gentleman, as well as a law officer, had your relationships with the judiciary and how both of you feel that works now between the officials and the judiciary.

_Sir Thomas Legg_: I cannot speak with much detailed knowledge about how exactly it is now, though, of course, I hear things from judges and lawyers and colleagues and so on. Certainly, in my day, it was a very close high-priority relationship that one had with the judges, as Permanent Secretary to the Lord Chancellor. You were pretty constantly meeting senior judges and going to see them about one thing or another. We had regular meetings, as well as ad hoc ones. The Lord Chancellor had a regular monthly meeting with the most senior judges. He often had interstitial meetings with the Lord Chief Justice. I would also go and see the Lord Chief Justice in practice about once a week, although we did not formally have a weekly slot, and other more senior judges, too, such as what we then called the Senior Law Lord. I would go and see other judges pretty often. Even that was regarded by the standards of previous eras as not as frequent as it had been. At least according to legend, my predecessor, Sir George Coldstream, went to see the Lord Chief Justice every morning before he went on from his flat in Lincoln’s Inn to see the Lord Chancellor. It was not like that in my day but it was still very close.

_Sir Alex Allan_: One point to note about the Lord Chancellor’s relationships with the judiciary is that it has, of course, changed with the Constitutional Reform Act because the Lord Chancellor used to be head of the judiciary in Sir Thomas’s day and was responsible for appointing judges. Now you have the Judicial Appointments Commission. I also used to have very frequent meetings with the Lord Chief Justice and other senior judges and it is a very important part of the role of the Permanent Secretary, both before and after the reforms, because even though the role of the Lord Chancellor has changed formally in relation to the judiciary the main point of contact between the judiciary and the government machine is through the Ministry of Justice/Lord Chancellor’s Department. The Permanent Secretary has a very important role and certainly needs to be well informed on what the issues are to be able to discuss them with the senior judiciary. That continued both before and after the reforms, and it is important that it does.

Baroness Wheatcroft: Just as the role of Minister has now changed dramatically, the role of the Permanent Secretary or the job specification obviously has. Do you think that it is going to be possible for those relations to be continued as healthily as they were?

_Sir Alex Allan_: It has certainly changed partly because, obviously, the Permanent Secretary supports the Lord Chancellor and the Lord Chancellor’s role has changed. Of course, now the Permanent Secretary is responsible for the Prison Service, as well as the functions that were previously in the Lord Chancellor’s Department. As I said, I think that it is very important that the relations with the judiciary are maintained and there are a host of issues where it is important that there are discussions and close relations with the judiciary. While the relationship may, in a formal way, change, the necessity to maintain a close dialogue with the judiciary is maintained.

Baroness Wheatcroft: But it sounds as if the dialogue was often on a fairly informal basis. Do you think there might be a need to formalise it?
Sir Alex Allan KCB, Permanent Secretary, Department of Constitutional Affairs then Ministry of Justice, 2004-07, and Sir Thomas Legg KCB, Permanent Secretary of the Lord Chancellor’s Department, 1989-98 — Oral Evidence (QQ 63-75)

**Sir Alex Allan**: I am agnostic about that. So long as the contact and the relationship is there, whether there is a formal set of meetings with some title or whether it is done through simply ad hoc meetings, I do not think that makes a huge difference.

The Chairman: We have only a few minutes left but there are a couple more topics that we would like to touch on, so we will move straight on.

**Q74 Baroness Taylor of Bolton**: Some of this has been covered because all these questions are interrelated, but when the Constitutional Reform Act was passed in 2007 and when the position of the Lord Chancellor was not abolished, how did people think that the role would develop? What did you think would happen to the role of the Lord Chancellor and could you compare that with what has happened?

**Sir Alex Allan**: At the time there was a huge amount of work in bringing in all the changes. The Act was formally passed and then there were a whole lot of issues around setting up a Judicial Appointments Commission and a number in setting up the Supreme Court and so on. I do not think there was any shortage of issues around. Then, of course, probably before we had had time to think about what the long-term position might be, there was the famous not-fit-for-purpose comments by the then Home Secretary and the decisions to change the allocation of portfolios. The Lord Chancellor, as Secretary of State for Justice, became responsible for the Prison Service and so the issue about the nature of the role changed dramatically.

**Q75 Baroness Taylor of Bolton**: Does that surprise you or was it just so much up in the air that it was—

**Sir Alex Allan**: It would be quite a light ministerial portfolio if you had split it out again and took just the Lord Chancellor functions as a single ministerial portfolio. That would be a fairly light load for a Minister and that would obviously have implications for the holder in the seniority of the position. Clearly, the full portfolio, as it exists at the moment, is a heavy ministerial portfolio.

**Baroness Taylor of Bolton**: Too heavy?

**Sir Alex Allan**: I do not know. Not as far as I am aware.

**Q76 Lord Brennan**: The Committee in this inquiry is going to be concerned to be satisfied from the public interest that there is a legal framework within the Lord Chancellor’s Department that satisfies the obligations on the rule of law, the judiciary, the role in Cabinet and general constitutional advice. The concern that many of the public will have, as well as some of us, is that if you have a Lord Chancellor who is not a lawyer, a Permanent Secretary who is not a lawyer and, by circumstance, law officers, one or both who have limited professional experience, how does the framework survive that kind of situation? How can you reassure us that it can? I understand that you are not a lawyer, Sir Alex, but the department has got even bigger since you left because of prisons. What framework is there? You have told us about First Parliamentary Counsel, the Treasury Solicitor and experienced lawyers, but it gives the impression of a system that is reactive rather than proactive in terms of these issues. In particular, apart from a general framework of legal advice, do you think that the Clerk of the Crown in Chancery, for example, should be separately given the
Sir Alex Allan KCB, Permanent Secretary, Department of Constitutional Affairs then Ministry of Justice, 2004-07, and Sir Thomas Legg KCB, Permanent Secretary of the Lord Chancellor’s Department, 1989-98 — Oral Evidence (QQ 63-75)

obligation to act as the legal adviser’s secretary to the Lord Chancellor in the Lord Chancellor’s role, whereas the Permanent Secretary will be principally concerned with all the other parts of the ministry?

Sir Alex Allan: The Clerk of the Crown in Chancery is a rather strange role. Sir Thomas may have different views about this, but in some ways—and I do not mean to be disrespectful to this House—I always saw it as slightly peripheral to my role as Permanent Secretary. It involved a number of functions here, including carrying the writs through the corridors for the new Parliament, a role in the Chamber at prorogation and a few technical roles, and things went out in your name, but it did not seem to me to be a particularly significant role.

The point that you raise, though, is a different one about whether there should be a very senior source of legal advice to the Lord Chancellor. As I indicated, I felt in my time that the legal advisers to the Lord Chancellor were extremely able; their subsequent careers have demonstrated that. I think it is important that there is a strong legal team in the Ministry of Justice but whether you need somebody right at the top who is legally qualified I am not convinced about. Indeed, it is a slight shame that Sir Hayden is not here because he was the one for whom there had to be a change in the law to enable him to become the Permanent Secretary, because previously it was a requirement that he be legally qualified.

Sir Thomas Legg: It was indeed and we did change the law to allow Hayden and other successors to take office. The former Permanent Secretaries, of whom I was the last, also had the advantage—rather unique to civil servants—of holding office “during good behaviour”, and it was probably right to abolish that. If I may say so, Lord Brennan, I am agreeing with Sir Alex. The post of Clerk of the Crown does not have a lot to do with what you are concerned with. The Clerk of the Crown is very much to do with the office of the Great Seal and whoever is the Clerk of the Crown should, I am sure, be close to whoever is the Lord Chancellor, as holder of the Great Seal. The two offices were only combined as a result of cuts in 1880 when Mr Gladstone founded the office of Permanent Secretary with a view to creating a Ministry of Justice. He saw an opportunity to save a salary by putting together the posts of Clerk of the Crown and Permanent Secretary. It is a bit of an oddity constitutionally because as Clerk of the Crown one is a servant of Parliament, as Sir Alex has said, and as Permanent Secretary one is a part of the Executive. We have to have a Clerk of the Crown and, although, as Sir Alex says, it is not a post perhaps of enormous importance, there are risks connected with it that mean that someone reasonably senior ought to hold the job. You are responsible for an important part of the holding of general elections and somebody needs to be accountable for that. But it does not have a lot to do with what you are concerned with Lord Brennan, which is the legal framework. There is a real problem about this, which applies to the ministerial as well as the official level, because the career paths of lawyers and politicians have diverged so much in our time that it is now difficult for Governments, who do not have a big pool of first-class lawyers from which to draw Lord Chancellors, law officers and, in another sense, legal officials. I am afraid there is no easy answer to that.

I would offer one final comment or suggestion. Like Sir Alex, I have no reason to be concerned about the quality of legal advice available to Lord Chancellors. What I think the former Lord Chief Justice, who has given evidence to you, may have really had in mind is that the culture of the Ministry of Justice is less legal than before. There are simply fewer lawyers
Sir Alex Allan KCB, Permanent Secretary, Department of Constitutional Affairs then Ministry of Justice, 2004-07, and Sir Thomas Legg KCB, Permanent Secretary of the Lord Chancellor’s Department, 1989-98 — Oral Evidence (QQ 63-75)

than there used to be and those that there are do not see the judges as often as they did. If I were responsible for human resources in the Ministry of Justice I would probably try to adopt a policy of recruiting a fair number of lawyers, not just as legal advisers but simply as administrators, and particularly to use as the people who form the interface with the judiciary. Although lawyers are not necessarily particularly better experts on constitutional matters than others, they are very much better at getting on with the judges. The judges feel much more comfortable with them and can unbend more easily with them. That is worth bearing in mind in staffing the Ministry of Justice.

The Chairman: Thank you very much. On that note we will draw things to a close. Can I thank you both very much for coming? I hope we may hear from Sir Hayden on the question asked by Lord Brennan and, indeed, on others in due course. But you have been an excellent, forthcoming and effective interacting double act, if I may say so, and the Committee is most grateful to you. Thank you.
Inquiry on the office of Lord Chancellor

1. I thank the Committee for the opportunity to make this submission. Before I begin, a small caveat. This submission is written from the perspective of a foreign, Commonwealth, lawyer. I have conducted previous research into the roles of the Law Officers in the Australian context; it is based on this scholarship that I provide this submission. I believe that the Lord Chancellor’s role must be considered in light of others within government, including the Law Officers, other officers with obligations to the rule of law, including the DPP and the Treasury Solicitor, and other government lawyers. In the UK context, this consideration ought also to be conducted in light of other guardians of the rule of law and judicial independence that have been created, including the JAC and the JCIO.

2. The submission is presented in a format that addresses the questions of the Committee as posed.

Q1 – What are the current functions of the Lord Chancellor, as distinct from those of the Secretary of State for Justice?

3. The Constitutional Reform Act 2005 (CRA) made significant changes to the ancient office of Lord Chancellor. Traditionally, the Lord Chancellor sat across the different branches of government: sitting as a judge in the House of Lords and the Privy Council as well as holding other judicial roles, sitting as the presiding officer in the House of Lords in addition to being a senior member of Cabinet and the Privy Council.

4. Today, the Lord Chancellor no longer holds a judicial post and is no longer the presiding officer of the House of Lords. The office is held concurrently with the office of Secretary of State for Justice. As Secretary of State for Justice, the officeholder is responsible for criminal justice, penal policy, human rights and rehabilitation, the EU and international justice policy.

5. Despite no longer holding a position within the judiciary branch, s 1 of the CRA states that the Lord Chancellor maintains his or her ‘existing constitutional role in relation to [the rule of law].’ Section 3 also provides:

   The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary.

6. These obligations are reinforced by the Lord Chancellor’s oath in s 17 of the CRA. In addition, the Lord Chancellor maintains a role in the appointment and discipline of judges.

Q2 – To what extent are those functions genuine powers, and to what extent are they nominal powers?
7. The Lord Chancellor’s obligations to the rule of law and judicial independence are important constitutional responsibilities. This is despite their indefinable and often contentious nature. They may be ‘imperfect obligations’, but they remain important to the proper functioning of the UK constitutional system, particularly when performed in an independent manner by a person who is legally qualified (see further answer to question 8 below).

Obligations to the Rule of Law

8. The rule of law is a contested topic on which many diverse opinions are held. Further, the rule of law is one of many foundational principles of the British constitutional order and as such may need to be balanced against others if they come into conflict. It is not a constitutional absolute.

9. There is a normative expectation that government will respect the legal constraints imposed upon it and the interpretations of those constraints by the judiciary. Every executive officer has an obligation to first interpret and then obey the law. The judiciary stands behind this obligation. However, alone, the judges are insufficient guardians of the rule of law. Some matters, such as those that rest in constitutional convention, are non-justiciable. Some matters will never be challenged because there is no individual with sufficient standing to do so, or desire to do so. Some aspects of the rule of law are themselves unenforceable.

10. The Lord Chancellor’s obligations to the rule of law may not manifest as ‘powers’, but as ‘responsibilities’ to warn and advise on how proposed policies and actions may impact on the different aspects of the rule of law. There are important advantages to the citizenry in having an independent, legally trained officeholder with status and respect within the Cabinet specifically tasked with warning and advising on the congruence between government action and the rule of law.

Obligations to the judiciary

11. The Lord Chancellor has specific obligations relating to the appointment and discipline of the judiciary in addition to the office’s role in upholding judicial independence. I consider here the broader obligation to uphold judicial independence, although this role is necessarily connected with and influenced by these other responsibilities of the office.

12. The broader obligation to uphold the independence of the judiciary is, like the obligation to the rule of law, an imperfect obligation with contested content. I see it as manifesting in two ways.

13. The first is as an obligation to warn and advise on the impact of any proposed government policies and actions on judicial independence, for example, directly in relation to judicial remuneration or pension, or more indirectly in relation to judicial review or sentencing policies. There is a role in encouraging ministerial colleagues to respect judicial independence and not engage in inappropriate criticism of the judiciary. There is also an obligation to ensure that the judiciary is provided with sufficient resourcing, as is captured in
Dr Gabrielle Appleby, Deputy Director of the Public Law and Policy Research Unit, University Of Adelaide — Written evidence (OLC0018)

the Lord Chancellor’s oath in s 17 of the CRA. This forms part of the Lord Chancellor’s wider obligation to the rule of law. In this way, the Lord Chancellor provides the judiciary with an important voice within government. This again emphasises the need for this officeholder to perform the role independently, and to have sufficient status and respect within government.

14. The second is an obligation to defend the judiciary from improper public attacks in the public sphere, and particularly attacks that may be perceived as politically motivated originating from the other branches of government. In this way the Lord Chancellor provides the judiciary with a voice outside of government.

15. In Australia in the 1990s, heated debate between the government and the judiciary arose over the question of whether the Attorney-General (there is no office of Lord Chancellor in Australia) has an obligation to defend the judiciary. This debate is informative for the Committee’s consideration of the importance of the Lord Chancellor’s obligations to uphold the independence of the judiciary, and as such I have set out the key arguments below.

16. The Australian debate arose after the federal Attorney-General, Daryl Williams QC, denied that the Attorney’s office had an obligation to defend the judiciary in the public sphere. Sir Gerard Brennan, who was then Chief Justice of the High Court of Australia, responded to the Attorney-General and explained the importance of having an independent, senior government officer defending the judiciary. His Honour explained that while an Attorney-General’s function was not ‘to attempt to justify [judicial] reasons for decision’, there was an important function to ‘defend the reputation of the judiciary, explain the nature of the judicial process and repel attacks based on grounds irrelevant to the application of the rule of law’. Sir Gerard went on: ‘if the attack is from a political source, the response must be from a political identity.’ Former Chief Justice of the High Court Sir Anthony Mason also highlighted the importance of the role: ‘My belief is that nothing short of a defence by the Attorney will attract prominent media attention and counter-balance the adverse publicity.’

17. The Attorney-General continued to defend his position: It is the courts, either individually or collectively, who are most suited to speak in their own defence. Such an approach sits well with the concept of the courts as the third arm of government.

18. The Attorney argued that Sir Anthony’s position was untenable because of the more political role that had been adopted by the Attorney-General in Australia. He said that Sir Anthony’s position ‘ignored the contemporary role of an Attorney-General and ignored the real risk of a conflict between the interests of the judiciary and the executive interests of the government of which the Attorney-General is a member.’ However, Williams accepted that in rare cases it may be incumbent on the Attorney to intervene to protect the integrity of the judiciary.

19. By providing the judiciary with a voice in the public sphere, the Lord Chancellor defends their independence from the immediate attack. The Lord Chancellor also alleviates
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the need for the judiciary to respond to these attacks, further defending their public perception of independence from the political sphere. However, as the Australian controversy demonstrates, to do so without conflict, the Lord Chancellor must maintain an appropriate level of independence from the political interests of the government of the day.

Q3 – How in practice does the Lord Chancellor uphold the rule of law and judicial independence?

20. See answer to Q2, above, regarding the nature of the Lord Chancellor’s obligations to the rule of law and judicial independence.

The combination of the office with Secretary of State for Justice

Q4 – Are the offices of Lord Chancellor and Secretary of State for Justice best performed by the same person?

21. There are dangers in the continued combination of the roles of Lord Chancellor and Secretary of State for Justice. The current structure relies heavily upon the judgment and independence of individual officeholders while placing them in a position that increases the likelihood of politically compromised decision-making.

22. Under the current constitutional framework, the fulfilment of the Lord Chancellor’s responsibilities rely heavily on the judgement and independence exhibited by an individual officeholder. Section 1(b) of the CRA may expressly retain the Lord Chancellor’s constitutional role in protecting the rule of law, and s 3(1) may enshrine the office’s obligation to upholding the independence of the judiciary, but these legislative obligations engage terms the content of which is inherently difficult to determine because of their complexity and uncertainty. As I have already explained above, disagreement will inevitably arise in determining whether actions will contribute to the rule of law, or whether reforms (for example, in relation to judicial appointments or discipline) will uphold or detract from judicial independence. There will also be disagreement about whether these principles must be derogated from in the name of other constitutional goals. Thus, while the CRA has attempted to secure independent, non-political obligations to these concepts from the Lord Chancellor, separate from that officeholder’s role as the Secretary of State for Justice, much judgement is left to the individual officeholder as to how to interpret the responsibilities of the office.

23. What this means is that some Lord Chancellors may exhibit fierce independence from their Cabinet and party in the interpretation and execution of the office’s obligations to the rule of law and judicial independence, drawing a sharp line between their role as Lord Chancellor and their role as Secretary of State for Justice. Indeed, it would appear from the evidence of both Jack Straw and the former Lord Chief Justice Lord Phillips of Worth Matravers to the House of Lord’s Select Committee on the Constitution that Straw was able to achieve this. However, others may act more politically and give preference to the government of the day’s policy objectives in performing both roles. This becomes an even more likely danger if/when the position is filled by a mid-career politician still pursuing more senior ministerial appointments.
24. There are more subtle issues than the overt manipulation of the Lord Chancellor’s vague obligations to the rule of law and judicial independence by a politically minded individual officeholder. The combination of the roles creates a danger of institutional ‘capture’. An individual will undoubtedly be involved closely with the Ministry of Justice when wearing the Justice Secretary hat, and also be closely involved in Cabinet’s decisions, at least in the justice area. Capture can occur because the individual subconsciously frames obligations through the objectives and concerns of the department or Cabinet, rather than bringing independent judgement to bear on questions relating to the rule of law and judicial independence. The goals of the department or Cabinet interfere with the individual’s capacity to appraise proposals realistically and independently. This may be even further aggravated where an individual seeks promotion within the Cabinet.

25. The potential for conflict to arise between the two roles is very real. The Secretary of State for Justice is responsible for criminal justice, penal policy, human rights and rehabilitation, the EU and international justice policy. It is easy to envisage conflict arising between the judiciary and the government in these areas, for example, in the areas of judicial review of human rights standards (as has already arisen in the latest proposed changes), or in the area of penal policy (for example, in relation to judicial review of prison administration, or sentencing policy). In Australia, for instance, where the Attorney-General is responsible for a large political portfolio, including criminal justice, very public conflicts have arisen between the office and the judiciary. For example, in 2008, the South Australian Deputy Chief Magistrate brought a defamation action against the Attorney-General, who had given a press conference and a radio interview in which he had referred to the Deputy Chief Magistrate’s comments on the relevance of factors in sentencing as ‘daft’ and ‘delusional’.

26. The danger of the continued combination of the positions of Secretary of State for Justice and Lord Chancellor is that the ancient Office’s status creates a veneer of legitimacy even for those individuals that are exercising both roles in a political manner. The ancient title of Lord Chancellor provides the actions of an officeholder with reputational legitimacy. In the context of the Law Officers, Neil Walker has explained that the amorphous nature of duties to such concepts as the ‘public interest’ allows unscrupulous officeholders to pursue narrowly political ends in their name, and invoke, as an alibi, the gravitas of the position they hold.

Q5 – Can judicial independence and the rule of law be defended in Cabinet by a minister responsible for wider departmental policies and budgets, which may point to different priorities? Is an independent voice required?

27. As set out in our answer to Q4 above, it is my submission that there is a danger of political interference in the Lord Chancellor’s defence of judicial independence and rule of law when the role is combined with wider criminal justice responsibilities.

28. Accordingly, I argue that an independent voice is required to ensure independence of judgment in the pursuit of these two fundamental constitutional functions. I will address the
question of whether this independent voice must be provided by the Lord Chancellor in my answer to Q10, below.

_Criteria for appointment as Lord Chancellor_

_Q6 – How effective have the criteria for appointment as Lord Chancellor in section 2 of the Constitutional Reform Act 2005 been? What does it mean for an appointee to be “qualified by experience”?

NA

_Q7 – Should there be statutory criteria for the appointment?

NA

_Q8 – What are the advantages and disadvantage of the office of Lord Chancellor being held by a lawyer?

29. There is no requirement that a Lord Chancellor be qualified as a lawyer. Section 2 of the CRA provides:

2 Lord Chancellor to be qualified by experience

(1) A person may not be recommended for appointment as Lord Chancellor unless he appears to the Prime Minister to be qualified by experience.

(2) The Prime Minister may take into account any of these—

(a) experience as a Minister of the Crown;

(b) experience as a member of either House of Parliament;

(c) experience as a qualifying practitioner;

(d) experience as a teacher of law in a university;

(e) other experience that the Prime Minister considers relevant.

30. The incumbent Lord Chancellor, the Right Honourable Chris Grayling MP, is not a qualified lawyer. There are two advantages of requiring the office of the Lord Chancellor to be held by a lawyer:

(1) Deliberation about rule of law and judicial independence

31. The Lord Chancellor has statutory obligations to the rule of law and to maintain judicial independence. Legal education and training is necessary for deliberation about the content of these obligations. Lawyers have a more sophisticated grasp of the role of the judiciary within the constitutional framework, and the importance of judicial independence to the integrity of the institution. In the context of interpreting a similarly amorphous governmental concept, the ‘public interest’, Alan Hutchinson has explained:

[Government lawyers have a significant contribution to make in debates within government about how to determine what the public interest demands; they often have the training,
experience, and knowledge to help develop a nuanced and sophisticated approach to identifying the public interest and crafting a range of practical strategies for its realization in practical circumstances.

(2) Balancing obligations

32. The importance of appointing a lawyer to the position is underscored if the two roles of Lord Chancellor and Secretary of State for Justice remain fused. The necessity of balancing competing obligations inherent in this combined role will be supported by the ethical training and experience of a legal professional. A lawyer has twin ethical obligations: to his or her client – to pursue and protect the client’s interests – and the law and justice – as an officer of the court. The Lord Chancellor and Secretary of State for Justice also have twin obligations which they must carefully navigate: to his or her government – as a member of Cabinet and within his or her ministerial portfolio – and to the rule of law and justice – as Lord Chancellor.

Q9 – Should the Lord Chancellor be someone who when appointed does not seek further ministerial advancement? Should he or she be a member of the House of Lords?

33. As I have observed above, the Lord Chancellor’s obligations to the rule of law and judicial independence call for independent judgment. The current framework, necessarily, leaves much of the judgment as to whether certain actions would contribute to or derogate from these values to the individual officeholder. This gives rise to the possibility of inappropriate political considerations affecting an individual’s judgment. This possibility is exacerbated where the individual holds the office of Lord Chancellor in combination with a more political office, and where the individual is a mid-career politician still in pursuit of more senior positions.

The Future of the Office

Q10 – Should there be a Lord Chancellor? If so, what should be his or her functions? If not, who should perform those functions?

34. While there are other officers who could fulfil the obligations currently bestowed on the Lord Chancellor, there are nonetheless advantages in keeping the office. However, my support for the continuation of the Lord Chancellor in fulfilling these obligations is contingent on that role being filled by an individual with appropriate personal qualifications and status and the role being separated from that of Secretary of State for Justice.

35. While all government officers have an obligation to the rule of law (see above), there is certainly a constitutional advantage in having a Minister, such as the Lord Chancellor, specifically charged with overseeing this obligation across the Cabinet and government. However, there are other Ministers who also have obligations to the rule of law who may adequately perform this role. In 2007, the Attorney-General’s oath was amended to require the officeholder to ‘respect the rule of law’. Unlike the reformed Lord Chancellor’s Office, the Law Officers do not also head a large and political department and by convention do not sit in Cabinet. These practices are designed to protect the Law Officers from overt political
influence so that their obligations to justice and the public interest may be exercised independently. While the Law Officers are not without their faults in this regard (as the pressure that was brought to bear on the Attorney-General’s advice on the legality of the Iraq War, and other recent episodes, demonstrate), the framework around the offices (in contrast to the combination of roles of Lord Chancellor and Secretary of Justice) at least acknowledges the potential for corrupting influences in this role.

36. As is acknowledged in s 3(1) of the Constitutional Reform Act itself, the obligation to uphold the independence of the judiciary falls not only on the Lord Chancellor. The Law Officers (Attorney-General and Solicitor-General) also have an obligation to protect the independence of the judiciary. As do other Ministers. By expressly identifying the Lord Chancellor’s obligation to uphold the judiciary’s independence, s 3(1) of the CRA creates a potentially inaccurate and therefore dangerous impression that this office will play, and is best placed to play, a primary role in doing so.

37. Are there advantages in having these roles vested in the Lord Chancellor and not the Law Officers? There are certainly disadvantages to relying on the Law Offices to take primary responsibility for ensuring that the government’s obligations to the rule of law are met. At least since the early twentieth century, as a general rule neither the Attorney-General nor the Solicitor-General have been appointed to Cabinet, on the grounds that it is more appropriate for the maintenance of their independence and impartiality that they be seen as less political Ministers. However, this means that the Law Officers may not necessarily become aware of issues before the Cabinet that raise rule of law concerns. The Lord Chancellor, in contrast, sits in Cabinet and therefore has greater capacity for ongoing rule of law oversight of government actions. There is status and prestige associated with the office that may increase its influence, although this is not guaranteed and will vary depending upon the status and respect of an individual officeholder.

38. From within Cabinet, the Lord Chancellor will be more closely involved across the continuum of decision-making. Robert Rosen has argued that the later a lawyer is involved in decision-making, the more power must be wielded by the lawyer to effect any change, as organisations are already committed to a particular course of action.

39. The advantages associated with having the Lord Chancellor in Cabinet must be recognised while also recognising the dangers. Membership of Cabinet creates the potential for overt or unintended, subconscious, political influence. This is exacerbated in the current framework with the combination of the Lord Chancellor’s role with that of a political ministry.

40. Thank you again for the opportunity to make this submission.

29 August 2014
Archives and Records Association — Written evidence (OLC0024)

This submission has been prepared by the Legislation and Standards Working Group of the Archives and Records Association (ARA). ARA is the professional body for archivists, archive conservators and records managers in the United Kingdom and Ireland working in the public, private and third sectors. The Legislation and Standards Working Group represents the interests of ARA's members by providing comment on, and engaging in, consultations on legislation and related matters. This submission is made on behalf of ARA.

Q1  What are the current functions of the Lord Chancellor, as distinct from those of the Secretary of State for Justice?

The Lord Chancellor has functions arising from the Public Records Act 1958 (see http://www.legislation.gov.uk/ukpga/Eliz2/6-7/51/contents/enacted). These functions concern The National Archives and also ‘public records’ generally. For the avoidance of doubt, the term ‘public record’ relates to the origin of the records not to whether they are publicly accessible – records created and/or in the custody of bodies subject to the 1958 Act are public records. They include records of the courts of law, government departments and their executive agencies, the armed forces, parts of the NHS and some (not all) NDPBs.

Under s 1(1) of the 1958 Act the Lord Chancellor is responsible for the direction of the Public Record Office (now known as The National Archives) and for the execution of the Act generally, including ‘shall supervise the care and preservation of public records’. Under s 2(1) he appoints the Keeper of Public Records and under s 2(5) he may make Regulations prescribing fees to be charged for various services.

The Lord Chancellor has a specific responsibility under s 3(4) of the Act for approving, or refusing to approve, proposals by public record bodies to delay transfer of their records to The National Archives or another approved archives office beyond the specified statutory deadline (originally 30 years, now being reduced gradually to 20 years). This is an important provision which should ensure that records are not withheld from archival preservation without due cause. He is advised in this by an Advisory Council, appointed by him under s 1(2) of the Act and chaired ex officio by the Master of the Rolls. (The Master of the Rolls was Keeper of Public Records under previous legislation and his involvement as chairman maintains an important historical link.)

Records transferred in accordance with the statutory deadline are not necessarily available to the public – they can be transferred as ‘closed’ for a further specified period. Since January 2005 the Freedom of Information Act (FOIA) has determined whether records are open or closed, not the Public Records Act. The Lord Chancellor no longer makes decisions on access to public records but he must be consulted in certain specified circumstances under s 65 and s 66 of the FOIA so he still has a responsibility, albeit more limited, in relation to access to public records. (The specific circumstances are that an exemption applies and it is a matter of whether the public interest lies in disclosing or withholding the information. If the body making this decision is minded to refuse to disclose, it must consult the Lord Chancellor before making its final decision.) He may also be consulted at the time of transfer.
but he has no power to make decisions. Again, he is advised by the Advisory Council referred to above.

The Lord Chancellor has some other responsibilities under the 1958 Act. He appoints ‘places of deposit’, i.e. other archive services authorised to preserve public records, e.g. local authority archive services which take the records of local magistrates courts, coroners, NHS hospitals etc. His approval is required for destruction of transferred records to take place (under s 6). He has specific responsibility for court records under s 8. Under paragraph 7 of Schedule 1 he determines whether records are public records,

Some of the Lord Chancellor’s responsibilities have been delegated to officials at the National Archives – see Annex B to the Executive Agency Framework Agreement at http://www.nationalarchives.gov.uk/documents/executive-agency-framework-agreement.pdf.

One further responsibility should be mentioned: under s 46 of the FOIA the Lord Chancellor must issue a code of practice on records management. This code applies to all bodies subject to the FOIA and also to bodies that although not subject to the FOIA are subject to the Public Records Act, e.g. the security and intelligence agencies. He has no responsibility for promoting or enforcing this code.

Q2 To what extent are those functions genuine powers, and to what extent are they nominal powers?
We believe they are genuine powers although some of them have been delegated to officials at The National Archives.

Q4 Are the offices of the Lord Chancellor and Secretary of State for Justice best performed by the same person?
Realistically, practically any administrative arrangement can be made to work with good will and intelligence. However, there are real advantages in maintaining the present association of roles. The Lord Chancellor’s role with regard to public records retains a historic link to the law courts but also gives a measure of independent oversight of the public records system. However, the Secretary of State has cognate functions because of his responsibility for other information legislation, specifically data protection and freedom of information.

Q5 Can judicial independence and the rule of law be defended in Cabinet by a minister responsible for wider departmental policies and budgets, which may point to different priorities? Is an independent voice required?
Looking specifically at responsibility for records, we see good reasons supporting both options. We believe that an independent voice has a value, particularly in exercising general oversight and promoting transparency and accountability across the board, but there may be disadvantages also.

Q10 Should there be a Lord Chancellor? If so, what should be his or her functions? If not, who should perform these functions?
In our opinion, the functions of the Lord Chancellor with regard to public records should be continued. If it were decided to abolish the office, these responsibilities could pass to the
Minister responsible for other information legislation and policy. Archives are about accountability and preservation of authentic evidence for whatever future use. This sits better with an information legislation function than with a cultural one. But, what really matters is that the functions are articulated and accommodated.

August 2014
A custodian of access to justice

1. APIL welcomes the opportunity to provide evidence to the Select Committee on the Constitution as part of its inquiry into the Office of Lord Chancellor.

2. People who have been injured through no fault of their own rely on the courts to provide justice, and the help and assistance they need to put their lives back together. It is important, therefore, that an individual office holder exists to protect the rule of law, to ensure the courts remain available for all, and to ensure that we have an independent and fair justice system. We support the continued existence of the Office of Lord Chancellor, but believe that a number of changes are needed to ensure that the Lord Chancellor carries out the roles and duties expected of him. Without those changes, we would question the need for the Office as it currently exists.

3. Since the passage of the Constitutional Reform Act 2005, the Office of Lord Chancellor has changed substantially. The Lord Chancellor must still, however, defend the independence of the judiciary and, as set down in the oath in section 17 of the Act, “ensure the provision of resources for the efficient and effective support of the courts...”. While it is not the role of the Lord Chancellor to provide legal advice to the Government, a function which is carried out by the Attorney General, the Lord Chancellor has a duty to defend the rule of law, and ensure that any political changes do not affect the independence of the legal system.

Appointment of Lord Chancellor

4. Under section two of the Constitutional Reform Act 2005, there is now no longer a requirement that the Office of Lord Chancellor must be held by a legally qualified person. Instead, the Lord Chancellor must be “qualified by experience”, and section two includes five areas of experience which the Prime Minister can take into account. While the Prime Minister may consider the person’s “experience as a qualifying practitioner”, he can also choose a Lord Chancellor based on the person’s experience as a minister or as a member of either House of Parliament. The Prime Minister, however, may wish to ignore that particular criteria and appoint a Lord Chancellor based on “other experience that the Prime Minister considers relevant”, but no further clarification is provided on what this experience could be.

5. We do have concerns that there is no longer a requirement for a Lord Chancellor to be legally qualified. A Lord Chancellor does need to be fully informed as to the workings of the legal system, so he can be aware of any consequences of changes to the legal system which may be introduced, allowing him to continue to protect the independence of the judiciary, and defend the rule of law. Section two should therefore be amended to state that the Lord Chancellor must have experience as a qualifying practitioner, and we believe that the Lord Chancellor should be appointed from the judiciary, as has happened previously. Lord Sankey, Lord Chancellor from 1929 until 1935, for example, was a Lord Justice of Appeal.
before his appointment and Lord Simonds was a Lord of Appeal in Ordinary before his appointment as Lord Chancellor in 1951.

Combination of the role

6. Since 2003, the Office of Lord Chancellor has been held by a Secretary of State who also has responsibility for heading a Government department. The role of Lord Chancellor was first combined with the role of Secretary of State for Constitutional Affairs, but this department was abolished in 2007 and replaced with the Ministry of Justice. The Secretary of State for Justice, who serves as Lord Chancellor, is responsible for all issues relating to the civil and criminal justice system, including prisons and probation, which were policy areas not traditionally dealt with by the Lord Chancellor.

7. Combining the Office of Lord Chancellor with a Secretary of State running a high-spending department presents a conflict of interest, and can result in split loyalties towards and between the judiciary and the Prime Minister. As Lord Chancellor, it will be the office holder’s responsibility to protect the rule of law, the independence of the courts, and accessibility of the legal system. As Secretary of State, however, the Lord Chancellor will want to follow the Prime Minister’s agenda, which could include identifying financial savings, as well as promoting a political agenda, which could potentially affect the running of the courts and access to justice.

8. We therefore support the separation of the positions of Secretary of State for Justice and Lord Chancellor, and the Lord Chancellor should revert to being a stand-alone position and office. The sole duty of the Lord Chancellor should be to defend the rule of law, and not to serve the political interests of the Government of the day.

A role above politics

9. For the Lord Chancellor to be able to carry out his duties and responsibilities effectively, it is imperative that the office is above party politics, similar to that of Speaker of the House of Commons. Being appointed as Lord Chancellor should be seen as a prestigious appointment, and possibly one that is awarded at the end of someone’s long and distinguished legal career.

10. Historically, it has been the case that the Office of Lord Chancellor has been the last public position held by the office holder, with some exceptions. The Earl of Birkenhead, for example, later went on to serve as Secretary of State for India after holding the Office of Lord Chancellor, while Lord Caldercote was chosen to become Lord Chief Justice. More recently, Ken Clarke remained in Cabinet as Minister without Portfolio after serving as Lord Chancellor.

11. It would be inappropriate for the Office of Lord Chancellor to be held by someone who would seek to use the office to advance his political career. The Lord Chancellor should be the voice of the legal system, and should defend that system regardless of political and other pressure. If the office were to be held by a career politician, someone who may wish to advance his career further up the ministerial ranks, he would want to ensure he receives
favourable press and may want to follow the political rhetoric of a newspaper popular with his party’s voters.

12. It would be wrong to assume that a career politician, who is interested in supporting the policies of the Prime Minister to advance his own career, would put defending the courts and the rule of law ahead of his own ministerial prospects.

13. There have been, in the past, Lord Chancellors who have had a ministerial career before their appointment, such as Lord Simon, who served as Lord Chancellor from 1940 to 1945, having previously served as Home Secretary, Foreign Secretary, and Chancellor of the Exchequer. We are not opposed to this. Upon appointment as Lord Chancellor, however, the office holder should surrender all political allegiances and act in the best interest of the courts, regardless of previous political ideology.

14. In defending the rule of law, championing the independence of the judiciary, and protecting access to justice, the Lord Chancellor needs to be the judiciary’s voice to Government, and not the Government’s voice to the judiciary. Only an independent and knowledgeable Lord Chancellor can achieve this.

15. Any government needs to show that it is serious about defending the rule of law and the independence of the judiciary, and an independent Lord Chancellor is vital to achieve this. We regard this as an essential and vital role. If, however, the Office of Lord Chancellor is not given the proper independence it needs, or if it is held by a career-driven politician with no legal experience or knowledge, we do have to question the need for the position purely as a ceremonial role.

August 2014
Inquiry on the office of Lord Chancellor

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the invitation to submit written evidence to the House of Lords Select Committee on the Constitution Inquiry into the office of Lord Chancellor.

2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar’s high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

4. Our response to the questions which have been posed by the Constitution Committee, under three main headings, is set out below.

The Office of Lord Chancellor

Q1 What are the current functions of the Lord Chancellor, as distinct from those of the Secretary of State for Justice?

5. Under the Constitutional Reform Act 2005, which was brought forward as part of a “suite of constitutional reforms” to put the relationship between the executive, the legislature and the judiciary on a modern footing, the office of Lord Chancellor was retained but it was stripped of most of its original functions. Section 1 provides that the Act:
   “... does not adversely affect-
   (a) the existing constitutional principle of the rule of law, or
   (b) the Lord Chancellor’s existing constitutional role in relation to that principle.”

6. Although the rule of law is not defined in that (or any other) Act of Parliament there is a corpus of reasonably settled understanding about the content of this important constitutional principle. Crucially in this context, it includes upholding the independence of the judiciary. Indeed section 3 of the Constitutional Reform Act introduced a statutory duty for the Lord Chancellor (and other Ministers of the Crown) to uphold the independence of the judiciary.
7. In relation to the Lord Chancellor there are specific duties in section 3(6) namely that the Lord Chancellor:

   “must have regard to –
   (a) the need to defend that independence;
   (b) the need for the judiciary to have the support necessary to enable them to exercise their functions;
   (c) the need for the public interest in regard to matters relating to the judiciary or otherwise to the administration of justice to be properly represented in decisions affecting those matters.”

8. Although section 19 of the Act makes provision for the transfer, modification and abolition of functions of the Lord Chancellor, the power to change the functions of the Lord Chancellor is subject to several protected functions referred to in Schedule 7 of the Act which cannot be transferred to other Ministers of the Crown.

9. Some further indication of the current functions of the Lord Chancellor is also given in the terms of the oath of the Lord Chancellor taken on or after his acceptance of the office as provided in section 6A of the Promissory Oaths Act 1868. Under that Act the Lord Chancellor swears to:

   “… respect the rule of law, defend the independence of the judiciary and discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for which I am responsible.”

10. The Lord Chancellor also remains the designated Minister for many hundreds of specific statutory functions in relation to the courts and tribunals service, the judiciary, the legal profession and the provision of legal aid. In relation to the regulation of legal services, for example, the Lord Chancellor has important responsibilities, under the Legal Services Act 2007, in relation to appointments to the Legal Services Board (the oversight regulator of the legal profession), to secure the provision of resources for the board and to lay before Parliament an annual report about its activities.

11. In 2010, in their Post-Legislative Assessment of the Constitutional Reform Act 2005, the Ministry of Justice stated “the office of Lord Chancellor … has been successfully modified and remains operational.” This somewhat downbeat assessment of a substantial piece of legislation underplays what we believe to be the vitally important constitutional role of the Lord Chancellor for upholding the independence of the judiciary. The Lord Chancellor acts as the “constitutional conscience” of the Government and, we believe, he should be able to give a view in Cabinet about how a particular proposal or issue may impact on our constitutional arrangements and in particular on the judiciary.

12. The need for a “guardian of the constitution” has increased. Since the Lord Chancellor has been shorn of his judicial functions (with which the Bar Council does not take issue), there is no longer a Judge at the Cabinet table who is able, qua judge, to represent the views of the judiciary directly to the executive. In addition relations between the judiciary and the legislature have been placed on a different footing. The enactment of the
Constitutional Reform Act 2005 removed the right of the Lord Chief Justice to speak directly to legislators during debates in the House of Lords.

13. As the third arm of the constitution with a responsibility to uphold the rule of law the judiciary are probably the weakest part. Unless their independence is upheld, there is a risk they will become weaker.

14. Although there has been a significant increase in the appearance of senior members of the judiciary to give evidence before parliamentary select committees, a development which we welcome, in matters affecting the rule of law and access to justice it is important that, where appropriate and at the right moment in the formulation of policy and legislation on such matters, the voice of the judiciary is heard in government. We consider that it needs to be heard through a senior Minister of the Crown, speaking as the lead “guardian of the constitution”. The Commons Justice Committee and the Lords Constitution Committee plainly also have important roles to play as supporting constitutional guardians, but their ability in practice to influence the development of legislation and policy on these matters at the right moment is likely to be quite constrained. The guardianship responsibility that we consider should continue to be exercised by the Lord Chancellor is not one that the Attorney General could properly fulfil. He (and not the Lord Chancellor) is the Government’s senior legal adviser, and he attends Cabinet only by invitation.

15. We address the built-in conflict in the role of the Lord Chancellor in relation discharging this function in paragraphs 21-23, below.

Q2 To what extent are the current functions of the Lord Chancellor genuine powers, and to what extent are they nominal powers?

16. It might be argued that the role of the Lord Chancellor as keeper of the Government’s constitutional conscience is more reactive than pro-active today, and that the office of Lord Chancellor is a “sort of vestigial organ” attached to the Secretary of State for Justice. However the Lord Chancellor does retain genuine powers, exercisable and from time to time exercised from the centre of the apparatus of government, for the protection of judicial independence. He also retains significant policy-making capacity for formulating, developing and delivering government policy on the administration of justice (not least in relation to legal aid and matters relating to funding access to justice), on law reform (in particular in those, largely politically uncontroversial, areas of the law which have been the subject of review by the Law Commission) and to an (increasingly limited) extent on judicial appointments at the highest levels. These are not nominal powers, and we do not think they should be diminished.

Q3 How in practice does the Lord Chancellor uphold the rule of law and judicial independence?

17. Having regard to his underlying responsibility to respect the constitutional principle of the rule of law, to defend the independence of the judiciary and to ensure that the administration of justice is properly resourced, the Lord Chancellor can (and on occasion does) remind others sitting round the Cabinet table of the rule of law in the judicial system,
and their own duty as Ministers of the Crown to uphold the continued independence of the judiciary.

18. There is a convention that Ministers do not criticise decisions of judges which, from time to time, is breached. For example, when the Prime Minister and the Home Secretary said they were “appalled” by a decision of the Supreme Court, which they said seemed to “fly completely in the face of common sense”, there was both an opportunity and a responsibility for the Lord Chancellor (at the time Kenneth Clarke QC) to remind his colleagues of their constitutional duty to respect the independence of the judiciary. Only a senior member of the government carrying sufficient weight in Cabinet could be expected to discharge this responsibility effectively and consistently with his oath of office.

19. The Lord Chancellor can also seek to uphold the rule of law and judicial independence in two other ways. First by having regular (we understand, monthly) meetings with the Lord Chief Justice. Secondly, he can use the opportunities which may be available to him as a member of key Cabinet committees (and of the Cabinet itself) to remind colleagues of their important responsibilities in relation to the rule of law in the broadest sense beyond judicial independence. He may thereby act, for example, as a counter-balance to the important role of the Home Secretary in satisfying the public interest in national security or of the Secretary of State for Defence, for example, of the importance of adherence to international treaty obligations. He may also give an assessment of the views of the judiciary (for example on judicial remuneration and pensions in the context of discussions about public sector pay).

20. In these ways the Lord Chancellor can act as “a hinge” between the executive and the judiciary. How effectively the interchanges operate in practice between these two parts will depend to a considerable extent on the personality of individual Lord Chancellors, their standing in the government and, as we argue below (see the response to Q8), whether the holder of the office is a lawyer.

The combination of the office with the Secretary of State for Justice

Q4 Are the offices of Lord Chancellor and Secretary of State for Justice best performed by the same person?

Q5 Can judicial independence and the rule of law be defended in Cabinet by a Minister responsible for wider departmental budgets, which may point to different priorities? Is an independent voice required?

21. The tensions between the functions of the Lord Chancellor and Secretary of State for Justice when combined in the same person have surfaced in recent parliamentary and other debates about reform of legal aid and reform of judicial review. They culminated in the 13th report of the Joint Committee on Human Rights, which provided the stimulus for this inquiry. The potential for conflict was built-in to the constitutional settlement in 2005 and has undoubtedly increased following the machinery of government changes which took place in 2007 with the creation of the Ministry of Justice and assumption of responsibilities for
prisons and other matters formerly handled by the Home Office which were transferred to the new Secretary of State for Justice and Lord Chancellor.

22. We have thought carefully about the combination of roles and the conflicts to which they may give rise. Plainly there needs to be accountability to Parliament for the expenditure of significant amounts of public money on the administration of justice (including legal aid) as well as prisons and other functions within the ambit of the Ministry of Justice. In our view the provision of such accountability needs to acknowledge and respect the need under our constitution for judicial autonomy and independence.

23. We consider it is possible to balance the competing and sometimes conflicting demands of these two roles provided that the Lord Chancellor is a very senior lawyer in the Government who does not seek further ministerial advancement. In our judgment, the Lord Chancellor and Secretary of State for Justice should continue to be combined, for political reasons. They should not be severed. If the Lord Chancellor was shorn of responsibility for legal aid and became simply lead constitutional guardian in practice he would become a junior, more light-weight Minister whose weight in Cabinet would be correspondingly reduced. His ability to defend judicial independence would be weakened. We are open as to whether the Lord Chancellor should sit in the House of Lords or in the Commons but for a relatively large spending department representation in the Commons (at least at a sufficiently senior ministerial level) is obviously desirable.

Criteria for Appointment as Lord Chancellor

Q6 How effective have the criteria for appointment as Lord Chancellor in section 2 of the Constitutional Reform Act 2005 been? What does it mean for an appointee to be “qualified by experience”?

Q7 Should there be statutory criteria for appointment?

24. Section 2(1) of the Constitutional Reform Act 2005 provides that a person may not be recommended for appointment as Lord Chancellor unless he appears to the Prime Minister to be “qualified by experience”. Sub-section (2) provides a non-exhaustive list of experience which the Prime Minister may, but is not obliged to, take into account. The experience includes political experience, experience as a legal practitioner or senior judge or as a legal academic. However sub-section (2) also includes “other experience that the Prime Minister considers relevant”. As a result recommendation for appointment to the office of Lord Chancellor can be based on very wide grounds which need not relate to experience in practice in the legal profession or indeed to political experience, desirable though such experience (on its own or in combination) might be. On the face of it the Prime Minister could recommend anyone for appointment as Lord Chancellor. We believe that section 2 is so widely drawn as to be virtually meaningless.

25. It seems difficult to imagine that the Prime Minister’s decision to make a recommendation could be judicially reviewed in practice. We consider that there is little if any merit in having statutory criteria for appointment to the office. We believe that the convention should be maintained that the Lord Chancellor should be a very senior lawyer.
26. The argument is sometimes made that one no more needs to be a lawyer to be responsible in government for legal matters than one needs to be a member of the medical profession to be responsible for health services. This argument is based on a false analogy. Governments merely arrange for the provision of healthcare, but they actually create law. It is therefore in our view highly desirable that the Lord Chancellor should have experience as a lawyer and preferably be someone with a deep understanding of the delicate balance on which our constitutional arrangements have been based, who can defend the values on which the constitution is based in particular the independence of the judiciary.

27. We think that the focus on specific criteria is not appropriate for this office (any more than it would be for the Secretary of State). It is difficult to conceive that in making a recommendation for appointment as Lord Chancellor the Prime Minister would not have regard to the personal qualities and attributes of his candidate, in particular their ability to command the respect of members of the Government, parliamentarians and the judiciary. It is with reference to considerations such as these (combined with experience as a very senior lawyer), rather than on specific statutory criteria, that the appointment should be based.

Q8 What are the advantages and disadvantages of the office of Lord Chancellor being held by a lawyer?

28. We believe it is highly desirable that the Lord Chancellor should be a lawyer. In our judgment a lawyer will be best placed to understand the constitutional principle of the rule of law and to uphold the continued independence of the judiciary. The Lord Chancellor must not only understand the rule of law but also respect it. He (or she) must have sufficient weight in Cabinet to carry the necessary authority with senior political colleagues (including the Prime Minister) when concerns about the rule of law are raised. We consider that there is a weakness in the current position in the Ministry of Justice when the Lord Chancellor has no legal experience (within the meaning of section 2 of the Constitutional Reform Act 2005) and the Lord Chancellor’s Permanent Secretary is no longer required to be legally qualified. It was precisely this problem that was feared by the House of Lords in 2004 and it has come to pass ten years later.

Q9 Should the Lord Chancellor be someone who when appointed does not seek further ministerial appointment? Should he or she be a member of the House of Lords?

29. Appointment to the office of Lord Chancellor used to be regarded as the pinnacle of a successful political or legal career. The office holder was presumed not to share the political ambitions of other ministerial colleagues. Since 2005 this assumption no longer remains valid. We do not think that this change is for the better. The appointment may now be seen as a stepping stone on the career path of an ambitious mid-career politician. That path may be one from which the office holder is reluctant to stand up to colleagues (of, if necessary, the Prime Minister) about weighty matters in which the rule of law and judicial independence are in issue. Such an individual might be more susceptible (or more vulnerable) to being reshuffled. In our view the Lord Chancellor should be a heavyweight who does not seek further ministerial appointment. He should be fearless in fulfilling the requirements of the oath of his appointment.
30. We do not have strong views about whether the Lord Chancellor should be a member of the House of Lords. A major spending department should be represented at a senior level in the House of Commons and we note that since 2005 three out of four Lord Chancellors have sat in the Commons (and all four held ministerial appointments prior to their appointment as Lord Chancellor) but we do not consider it is essential for the holder of this office to sit in the Commons. Lawyers in the Commons are nowadays more likely than their colleagues in the Lords to be at an earlier stage of their careers and therefore likely to be seeking to make ministerial progress, with the result that it may be difficult to fill the appointment from the House of Commons consistently with that criterion. This may tip the balance in favour of the Lord Chancellor sitting in the House of Lords with a Minister of State representing the Ministry in the Commons.

Future of the Office

Q10 Should there be a Lord Chancellor? If so, what should be his or her functions? If not who should perform those functions?

31. There should continue to be a Lord Chancellor. The Lord Chancellor’s functions should be those set out in the Lord Chancellor’s oath namely to respect the rule of law, defend the independence of the judiciary and ensure the provision of resources for the efficient and effective support of the court system for which he is responsible. The Lord Chancellor should be the lead guardian of the constitution. He (or she) should be, by convention, a very senior lawyer to whom is entrusted lead responsibility in government, by virtue of their experience and standing, to maintain the delicate balance between upholding the rule of law and protecting the independence of the judiciary while respecting the interests of the executive. He should act as the Government’s constitutional conscience. This role is unique.

32. The Lord Chancellor’s responsibility for the legal system differs fundamentally from that of the Secretary of State for other departments such as education, health and transport. They exist to fulfil the policy aims of the Government of the day. Justice is not a service that governments can choose to provide or not. It is a vital part of our constitutional arrangements. It needs to be defended and promoted to make the separation of powers a continuing reality which will safeguard our democratic way of life for the future.

September 2014
Introduction

We are grateful for this opportunity to respond to the call for evidence on the office of the Lord Chancellor from the Select Committee on the Constitution. We do not seek to respond to every question, but rather focus on role of the Lord Chancellor (questions 1 to 3), the combination of that office with the Secretary of State for Justice (Questions 4 and 5), and the advantages of the Office of Lord Chancellor being held by a lawyer (Question 8).

In addressing these issues, we identify a number of recent examples. The concerns to which these examples give rise are not intended to be critical of the current office holder, but are rather intended to reflect the significant tension between the two roles.

The role of the Lord Chancellor

The Constitutional Reform Act 2005 (CRA) brought about significant changes to the role of the Lord Chancellor, removing its judicial functions and its place as presiding officer in the House of Lords. We note that there remain three, key constitutional functions of the Lord Chancellor which are distinct from those of the Secretary of State:

(a) the discharge of duties to uphold the rule of law and to uphold the independence of the judiciary (the latter of which now being a specific, statutory duty set out in s. 3 CRA);
(b) the exercise of limited remaining powers over judicial appointments; and
(c) the fulfilment of the duty ‘to ensure that there is an efficient and effective system to support the carrying on of the business of the courts of England and Wales’ (s.1 Courts Act 2003).

Although we recognise the significant reduction in the scope of the role which was brought about by the CRA, we do not share the view expressed by some that the role of Lord Chancellor has been “to all intents and purposes abolished”. As Graham Gee has forcefully argued, the Lord Chancellor continues to play an important, practical role in defending the independence of the judiciary, for example by encouraging ministers to respect the convention not to criticise judicial decisions, and by responding to legitimate judicial concerns, such as those over salaries and pensions. Further, we consider that the symbolic importance of retaining an office-holder with particular responsibility for such constitutionally significant functions should not be underestimated.

The combination of the Office with the Secretary of State for Justice

We are in general agreement with the position of the Joint Committee on Human Rights (JCHR), which concluded that there is an inherent conflict in the combined roles of the Lord Chancellor and Secretary of State for Justice, as evidenced by the promotion and introduction of the recent reforms to judicial review.
3.2 In this respect, we also concur with Sir Stephen Sedley’s conclusion that the dual functions of Lord Chancellor and Secretary of State for Justice were exposed to be plainly incompatible in the context of judicial review. On the one hand, the Secretary of State for Justice is a political minister and beholden to pursuing the policies of Government. On the other hand, the Lord Chancellor conventionally is supposed to uphold the interests of the justice system.

3.3 The judicial review reforms were justified in significant part by the alleged negative impact of judicial review proceedings on the Government’s long-term economic plan. Such concerns clearly come into potential conflict with the protection of judicial independence and defence of the rule of law. At the very least, there is a risk of a perception that the Lord Chancellor’s responsibilities cannot be properly fulfilled, where they come into conflict with the political responsibilities of the Secretary of State for Justice.

3.4 Reconciling the competing policy demands of the Lord Chancellor and the Secretary of State for Justice has also arguably been problematic in respect of recent reforms to Legal Aid, and, in particular, the introduction of a residence test. On the one hand the policy requirements of the Secretary of State for Justice (limiting legal aid in order to harmonise the scheme with wider Government commitments) appeared incompatible with key duties of the Lord Chancellor on the other (to safeguard legal aid in order to ensure access to justice).

3.5 Similar concerns arise regarding, for example, the position of the Human Rights Act. Clearly there is an on-going debate regarding the continued role of the Human Rights Act. A central aspect of such debate includes the role of the European Court of Human Rights. If, for example, Government policy were determined to be that the Human Rights Act should be abolished, in part justified by criticism of the European Court of Human Rights, it would seem to fall naturally to the Secretary of State for Justice to promote that policy. Yet the Lord Chancellor has an obligation to defend the independence of not just domestic courts, but also international courts. The conflict in such roles is clearly apparent.

3.6 Equally, maintaining the independence of the judiciary should be of paramount importance and mitigating against undue executive influence should be guarded against by the Lord Chancellor. In this respect, we agree that an important part of the Lord Chancellor’s role should be to “encourage colleagues to respect the convention that ministers should not criticise judicial decisions or the judges who deliver them” given that Ministers are “constitutionally obliged to accept the independence of the judiciary”. However, there have been a number of examples of comments being made on judgments, and in particular on those that are politically sensitive, which are arguably the judgments that require the most respect and defence by the Lord Chancellor.

3.7 Clearly, a robust and necessary defence of the rule of law is likely to become ever more difficult should the position of Lord Chancellor continue to be intertwined with the external pressures of the role of the Secretary of State for Justice. In such circumstances, it is almost inevitable that the economic and political concerns of the ministerial role will be prioritised over the duty to uphold the rule of law.
4. **Criteria for appointment as Lord Chancellor**

4.1 With respect to the criteria for appointment as Lord Chancellor, we simply observe that we consider there to be clear and significant benefits in the office holder being a lawyer (or legal academic). In simple terms, we consider that the legal system (in all senses, from the physical courts to constitutional theory) is best defended by someone with a developed knowledge of that system. Although we acknowledge that such knowledge is not the sole preserve of lawyers, it is much more likely to be found in lawyers than elsewhere.

4.2 We also note that potential conflicts of interest can be further reduced by appointing Lord Chancellors near their end of their careers, thereby avoiding the possibility of political ambition influencing independent judgment.

5. **Conclusion**

5.1 In light of the above, we believe the merged nature of the role invites a greater propensity for the political demands of the Secretary of State for Justice to outweigh the constitutional duties of the Lord Chancellor. This is of serious concern when, as found by the House of Lords Select Committee on the Constitution: “the role of Lord Chancellor is of central importance to the maintenance of judicial independence and the rule of law.”

5.2 Given the importance of the role and for the reasons outlined above, it is our opinion that the duty to uphold the rule of law and defend the independence of the judiciary is, in fact, best performed by the Lord Chancellor as separate to the Secretary of State for Justice. Crucially, there should be an independent Lord Chancellor with more clearly defined, overriding duties to defend the rule of law and ensure the independence of the judiciary, above all else.

29 August 2014
The Bingham Centre for the Rule of Law — Written evidence (OLC0022)

Inquiry on the office of Lord Chancellor

1. The Bingham Centre for the Rule of Law welcomes this inquiry, particularly insofar as it draws timely attention to the need to preserve and enhance the rule of law in all aspects of our governance. We are confining our replies to only some aspects of your inquiry, referred to below.

2. We adopt the definition and the various ingredients of the rule of law as set out in Tom Bingham, The Rule of Law (2010), and in particular are concerned that there be institutional means to uphold the accessibility, certainty and predictability of the law, equal application of the law and access to justice and rights by means of fair trials and an independent judiciary.

3. The role of the Lord Chancellor has, in the past been ‘political’ in the sense that he or she is an appointment of the government of the day. However, the role has also been, by convention, in an important sense ‘independent’ insofar as the Lord Chancellor is expected to exercise a ‘constitutional role’ in respect of ‘the existing constitutional principle of the rule of law’ (as is recognised by these words in the Constitutional Reform Act 2005, section 1).

4. We believe that it is profoundly important to have at the centre of government a minister who acts as guardian of the rule of law, which is an integral value of our democracy and who is qualified to recognise and appreciate the importance of the rule of law. Normally (Question 6) this would require the experience and standing of a senior lawyer or constitutional authority.

5. In answer to your Questions 4 and 5: We believe that the duty upon the Lord Chancellor in respect of the rule of law falls also upon the Lord Chancellor’s other persona, Secretary of State for Justice. Since the two positions can hardly be practically separated, the Lord Chancellor’s rule of law duties must therefore adhere to the Secretary of State for Justice.

6. Although you do not precisely ask this question, we believe that the rule of law duties of the Lord Chancellor under the Constitutional Reform Act are not mere ‘target duties’ (see de Smith’s Judicial Review (7th, ed. 2013, para. 5-05 ff.). The rule of law has been accepted by our courts as a ‘constitutional principle’ which the courts will generally apply, except perhaps in the very unlikely event of primary legislation that excludes it clearly or by necessary implication (see AXA General Insurance Ltd. v Lord Advocate [2011] UKSC 46).

7. Although judges would be wary of impinging upon decisions which are properly within the realm of public policy rather than constitutional principle, some policies which violate the rule of law have been successfully challenged in the courts (see de Smith, above, paras. 5-040 and 11-049) and this may apply also to the failure to have due regard to the rule of law in general. The Human Rights Act 1998 permits challenge both to official
decisions and legislation which violates those aspects of the rule of law prescribed under the European Convention of Human Rights (such as Article 6).

8. We make no comment on whether or not the role of the Lord Chancellor is transferred to the Secretary of State for Justice, or vice versa. Either way, we believe that the duty to uphold the rule of law should remain because the role/s involve key issues relating to the rule of law such as senior judicial appointments, as well as the oversight of matters such as legal aid, access to judicial review and important aspects of economic regulation and criminal justice.

9. We make one further comment. To get a full picture of the Lord Chancellor’s role it is ideally necessary to consider also the functions relating to the rule of law of other leading institutions and office holders involved in law-making and application, legal advice to government, civil litigation on behalf of the government, criminal prosecutions, prisons and probation, and judicial appointments. To understand the full context of the Lord Chancellor’s role therefore, it should be considered in relation to other offices such as the Attorney General and Solicitor General, (who also combine a political with an ‘independent’ role) and non-political positions such as the Office of Parliamentary Counsel in respect of legislative drafting; the Treasury Solicitors; Departmental legal advisors; the Director of Public Prosecution and the Crown Prosecution Service; the Judicial Appointments Commission, and indeed the office of the Lord Chief Justice of England and Wales and its counterparts in other parts of the United Kingdom. Only then could it be properly seen whether there is sufficient built-in protection of the rule of law in relation to government decision-making across the board.

10. We have not unfortunately been able to conduct such a broader, holistic inquiry but believe that it would now be timely to consider the role of these other positions and institutions in respect of the balance between their duties to further the political aims of the government of the day and their duties (if any) to uphold and respect the rule of law, and to warn about potential violations of the rule of law.

29 August 2014
Chartered Institute of Legal Executives — Written evidence (OLC0017)

Introduction

1. The Chartered Institute of Legal Executives (CILEx) is the professional association and governing body for Chartered Legal Executive lawyers, other legal practitioners and paralegals. CILEx represents around 22,000 members, which includes approximately 7,500 fully qualified Chartered Legal Executive lawyers.

2. CILEx welcomes the opportunity to provide a response to the House of Lords Select Committee’s call for evidence in relation to the Office of the Lord Chancellor. In order to inform our response and to gather evidence, CILEx contacted its members and asked the following questions:
   
i. Are the offices of Lord Chancellor and Secretary of State best performed by the same person?
   ii. What are the advantages of the office of the Lord Chancellor being held by a lawyer?
   iii. What are the disadvantages of the office of the Lord Chancellor being held by a lawyer?
   iv. Should there be a Lord Chancellor?
   v. If yes, what should be his/her functions?

3. The anonymised case studies represent our efforts to reasonably and fairly express the views of the respondents who expressed an opinion. The views expressed in the verbatim examples are those of the respondents and not those of CILEx unless stated otherwise. We cannot check the accuracy of the verbatim statements used as to law or fact.

Summary

4. In summary, the majority of respondents thought the office of the Lord Chancellor continues to play a vital role in our unwritten constitution. Given the importance of the role in relation to the rule of law and independence of the judiciary, the majority of respondents felt the role should be held by a lawyer. 70% of respondents did not agree that the role of Lord Chancellor and Secretary of State is best performed by the same person. CILEx sees a bigger role to play for the Government law officers in upholding the rule of law and the independence of the judiciary.

The Office of the Lord Chancellor

5. The Office of the Lord Chancellor dates back to at least Norman times when the holder acted as secretary to the King, which also entailed the use of the Sovereign’s seal. The constitutional role of the Lord Chancellor significantly changed following the implementation of the Constitutional Reform Act 2005 (the 2005 Act).
6. Although the 2005 Act expressly states that it did not hitherto change the constitutional role of the Lord Chancellor in relation to the rule of law, it did however modify the office of the Lord Chancellor and functions relating to that role. Importantly, it put in statute the following:

i. recognition of the rule of law1;
ii. the need to uphold the independence of the judiciary2; and
iii. the need to ensure the necessary support to enable the judiciary to exercise their functions3.

7. Given the constitutional changes to the role of the Lord Chancellor, the majority of the Lord Chancellor’s functions are now legislative.

8. Further functions are:

i. An overarching responsibility in respect of judicial functions, together with encouraging a diverse judiciary4;

ii. To accept, reject or request reconsideration of the Judicial Appointments Commission’s recommendations for appointments to the High court or panel recommendations for senior appointment to the Court of Appeal or the Supreme Court;

iii. To ensure an effective and efficient court system, together with the necessary provision of resources and accounting to Parliament5;

iv. Shared responsibility with the Lord Chief Justice in relation to judicial complaints supported by the Judicial Conduct and Investigations Office; and

v. Functions under the Legal Services Act 2007, amongst others to add any legal activity to the list of reserved legal activities.

To what extent are those functions genuine powers, and to what extent are they nominal powers?

9. The Lord Chancellor continues to have extensive statutory powers in relation to the following statutory functions:

i. The provision of legal aid (criminal and civil), the accreditation of persons providing such services, together with accounting responsibilities to Parliament under the Legal Aid, Sentencing and Punishment of Offenders Act 2013 (LASPO);
ii. Oversight responsibility of the judicial appointments system and related functions thereof;

iii. Important statutory functions relating to the regulation and provision of legal services under the Legal Services Act 2007 (the Lord Chancellor has recently approved the Order needed so that CILEx members can be authorised to practise independently in the reserved areas of probate and conveyancing); and

iv. Important powers in relation to the administration of tribunals under the Tribunal, Courts and Enforcement Act 2007 and the appointment of the Chairman of the Law Commission.

10. The above powers are not simply nominal functions but incredibly important functions that have an impact on access to justice and the rule of law. The scope changes to legal aid, and changes to the criminal legal aid contracts under LASPO have caused huge ripples in the justice system. The provision of legal aid can hardly be described as a nominal power.

How in practice do Lord Chancellors uphold the rule of law and judicial independence?

11. The rule of law is a creature of the common law, of convention and firmly integrated within our unwritten constitution. Historically, one of the important duties of the Lord Chancellor has been to stand up for the rule of law when other ministers are proposing legislation or action with which it is incompatible.

12. The 2005 Act put this duty on a statutory footing but does not define the rule of law. For example, by section 19 of the 2005 Act, the Lord Chancellor must take an oath respecting the “rule of law” and to “defend the independence of the judiciary” together with ensuring the “provision of resources for the efficient and effective support of the courts”.

13. Further, the duty to uphold the independence of the judiciary in the 2005 Act is given not just to the Lord Chancellor but to all ministers of the Crown.

14. It is difficult to assess how in practice Lord Chancellors have upheld the rule of law and the need to respect judicial independence. It was observed by Lord Goodhart6 that the value of the office of Lord Chancellor is based on two conditions which may not always be satisfied now:

i. Lord Chancellor must be prepared to stand up and defend the rule of law and the independence of the judiciary under pressure; and

ii. That when it comes to the crunch, the Prime Minister must be prepared to back their Lord Chancellor.

15. In the absence of evidence in political memoires, one can only look at anecdotal evidence. There is evidence that in 1939, when draconian legislation was proposed

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by the then Lord Chancellor, Lord Maugham objected by stating “As Lord Chancellor and as judge, he could not approve a procedure which was wholly illegal”7. In more recent times, the evidence suggests that Lord Mackay spoke little but when he did speak, the Cabinet listened8. It is also widely thought that Lord Irvine’s insistence on upholding legal convention and judicial independence gave rise to tensions which hastened his departure from office. It is reported that when Lord Irvine held this office he had to argue in Cabinet in support of judicial independence on ‘many many’ occasions9.

16. It remains to be seen whether the new style Lord Chancellors will have the political ‘clout’ in Cabinet to robustly make their views heard. Conflict will arise if a middle ranking Cabinet member is Lord Chancellor with further career aspirations, who may feel that standing up to proposed policy changes may block career advancement.

Are the Offices of the Lord Chancellor and Secretary of State best performed by the same person?

17. 70% of CILEx respondents answered this in the negative. One respondent observed:

“The two offices have differing (and sometimes conflicting) responsibilities”

18. The Secretary of State for Justice is a political minister in a Government which has collective responsibility for its political views, while the Lord Chancellor, historically, had the different role within Government of standing up for the interests of the justice system and the rule of law.

19. These two roles are inherently conflicting and this was recently recognised by Joint Committee on Human Rights. It gives credence to the view that it is time for there to be a thorough “review of the effect of combining in one person the roles of Lord Chancellor and Secretary of State for Justice and of the consequent restructuring of departmental responsibilities between the Home Office and the Ministry of Justice”.10

20. Regardless of the title of office held, it is clear that the role is not going to have the power and authority in Cabinet as that of the old style Lord Chancellors.

Can judicial Independence and the rule of law be defended in Cabinet by a minister responsible for wider departmental polices and budgets, which may point to different priorities?

21. The office of the Lord Chancellor was seen as the pinnacle of a distinguished legal and political career. This had the advantage that the office holder had nothing to gain or lose in terms of career advancement when upholding the rule of law or standing

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7 AWB Simpson, In the Highest Degree Odious (Crenden Press 1992)
8 Woodhouse, D, The Office of the Lord Chancellor (Hart Publishing 2001)
9 http://www.publications.parliament.uk/pa/cm200203/cmselect/cmlcd/611/3040203.htm Q29
up for judicial independence thereby courting unpopularity amongst ministerial colleagues, or indeed the prime minister. This is no longer the case.

22. Post the 2005 Act, Lord Chancellors may be mid-career politicians inevitably seeking promotion to one of the other great offices of state, like the Home Office or the Foreign Office. Expecting a career focused politician, perhaps only in post until the next Cabinet reshuffle, to be willing or able to defend the rule of rule and or judicial independence seems quixotic.

23. Under section 3 of the 2005 Act, the duty to uphold independence is expressly conferred on all ministers, but with a special supplementary duty on the Lord Chancellor to have regard to the need to “defend” judicial independence.

24. Strangely, however, the express duty to uphold the rule of law under the 2005 Act does not extend to the Attorney General (AG). It is clear that the AG has a very important role to play in relation to the rule of law and independence of the judiciary. For example, Lord Goldsmith, former AG, regarded upholding the rule of law as one of his responsibilities11. In view of this it does seem at odds as to why the role of the Attorney General received little attention when the 2005 Act was making its passage through Parliament.

25. Given that it is not the role of the Lord Chancellor to advise Government, the role of the law officers – who are regarded as the final authorities on legal issues in government – deserve much greater recognition.

What are the advantages of the office of the Lord Chancellor being held by a lawyer?

26. Membership feedback overwhelmingly supports the view that the Lord Chancellor should be a lawyer. For example, verbatim comments were as follows:

“A lawyer has the benefit of experience within the legal sector and the current needs/demands of legal services and functions in providing justice for all. A Minister/Secretary of State may take advice but he is versed with experience as to the needs and parameters the legal profession should be subject to and should be able meet. A lawyer can balance the factors on an even keel and provide more informed direction to both Government and Parliament. With that in mind a Judge can be appointed on his merits of performance rather than his character prima facie!”

27. One respondent made the point:

“a lawyer will be better placed to ensure that the judiciary maintain the rule of law”

28. A majority of respondents were of the opinion that future Lord Chancellors should be lawyers as they would have a better understanding of the law and the legal system.

What are the disadvantages of the office of the Lord Chancellor being held by a lawyer?

29. Verbatim comments from respondents were as follows:

“A lawyer may be biased in the eyes of the public and/or Parliament. However, would you rather employ inexperience over experience? I think not. To carry out the duties of the Lord Chancellor the public require an “insider” to fully evaluate the merits of performance, especially where the Judiciary are concerned”

30. Another respondent made the point that although the “old guard” can stifle innovation, the increasing diversity in the legal profession can only be a good thing. The point was made as follows:

“You could argue that innovation is hampered by using the “old guard”, but with the diversity in the legal profession now (Barrister, solicitor, FCILEx, Costs lawyer etc.) that shouldn’t be an issue”

31. Similarly, another respondent commented that lawyer may be:

“Set in their ways and perhaps limited knowledge of some aspects”

32. Two respondents stated that there would be no disadvantage to the office of the Lord Chancellor being held by a lawyer.

Should there be a Lord Chancellor?

33. In our survey 77.8% of those that responded were of the opinion that there should be a Lord Chancellor. 22.2 % of those responded were undecided.

If yes, what should be his or her functions?

34. The following comments were made as to what functions the Lord Chancellor should have:

“Appoint judges/QCs, supervise judges and act when necessary to remove/discipline judges, ensure that the judiciary are independent of the government and are not being pressurised by ministers into making judgments favourable to them government”

“Leading the legal profession”

35. One respondent made the comment that it was an important function of the Lord Chancellor to uphold “true judicial independence”.

Conclusion

36. CILEx supports the view of its members that the office of the Lord Chancellor should not be abolished. The Lord Chancellor continues to have an important function to
play in our constitution notwithstanding the 2005 Act changes. It is important, however, the Lord Chancellor continues to hold office by undertaking the Lord Chancellor’s oath after acceptance of office. If anything, the oath will help to focus the mind of future office holders of the importance in our constitution of the rule of law and independence of the judiciary. More importantly, it differentiates the role from other ministerial positions by emphasising its constitutional importance in our legal system. As Lord Hope said in evidence recently, “we would lose something intangible with its departure”12 in the event the office was abolished.

27 August 2014

12 http://www.parliament.uk/documents/lords-committees/constitution/ucCC300714ev3.pdf page 28
The Chairman: I welcome Lord Falconer and Mr Clarke. We are very grateful to both of you, as you are both extremely busy. Thank you for coming to talk to us about our inquiry into the role of the Lord Chancellor. It occurs to me that you are both new-breed ex-Lord Chancellors but you would, equally, have qualified under the old category as well and we are very grateful for you coming to share your experiences with us. I would like to start the questions by asking you how the role of Lord Chancellor was envisaged at the time when the changes were introduced and then how you think it has developed over the period since. Perhaps we should start chronologically with you, Lord Falconer.

Lord Falconer of Thoroton: The changes were intended to make the Lord Chancellor both a Cabinet Minister responsible for courts and the departmental responsibilities that the Lord
Chancellor had, but also to retain and entrench his or her role as being a defender of the rule of law and the justice system. If you look at the structure of the Constitutional Reform Act, it starts off with a provision that says, “The Lord Chancellor’s role of being the guardian of the rule of law is not affected by this”. I do not want to sound self-aggrandising, but it says, “The person that is appointed as Lord Chancellor has got to be a special sort of a person” — that is at Section 2 — and then Section 17 says, “He or she has to swear an oath saying, ‘I am going to protect the rule of law, the independence of the judiciary and the justice system’”. It says specifically in relation to that oath, “He or she has to do it by reference, among other things, to the resources by the justice system”. Parliament envisaged the role of the Lord Chancellor as being a departmental Minister but with these special added responsibilities and, therefore, these special qualities.

The Chairman: But if I may just interrupt you there, the wordings that you quoted are fairly neutral. It does not indicate whether he changes from a high status in terms of responsibility for the rule of law or a status that is equivalent to everyone else in the Government and —

Lord Falconer of Thoroton: I do not think the words are neutral at all. It said, first, that it does not affect the Lord Chancellor’s role in relation to the rule of law; secondly, it says specifically, “Unlike any other Cabinet Minister there are certain qualities he or she has got to have”, and, thirdly, there is the wording of the oath in Section 17: “Uphold the rule of law, the independence of the judiciary and ensure there is a properly resourced justice system”. What is neutral about that, I ask rhetorically?

The Chairman: The phrase was, “Respect the rule of law”.

Lord Falconer of Thoroton: Yes.

The Chairman: But every government Minister, and the ministerial code, has that obligation.

Lord Falconer of Thoroton: But it starts with Section 2 which says, “It does not change the role of the Lord Chancellor in respect of the rule of law”.

The Chairman: Does it spell out what the role of the Chancellor was before that note came into—

Lord Falconer of Thoroton: If you looked at the debates that went on in Parliament at the time there was absolutely no doubt that the function of the Lord Chancellor was to be a guardian of the rule of law.

The Chairman: Thank you. Sorry, I interrupted you, please carry on.

Lord Falconer of Thoroton: No, I had reached the conclusion.

The Chairman: All right, we will come back to how it is being developed then. Mr Clarke, would you like to comment?

Mr Clarke: I was just an observer. I was also obviously an opposition MP at the time but a former lawyer who became a politician. I hear what Lord Falconer says. My recollection is that the whole thing was a bit of a shambles. I did think the Lord Chancellor’s post would eventually be changed because it was something you could not defend to the outside world. To try to explain to a foreign politician that we had someone in the Cabinet who was the senior judge responsible for appointing all the other judges, who was a politically appointed Cabinet Minister and sat in the legislature, that sounded like something you had made up. If
any African dictatorship adopted a similar role for anybody in its Government, we would have said that it was impossible.

I did not expect it to be reformed—it came as a surprise to everybody, simply because it worked well and it did work well, if I may say so, because of the personal qualities of the people who had held the post. I had never known a Lord Chancellor abuse in the slightest the constitutional possibilities of this bizarre combination of roles. Lord Mackay was one of the most respected members of the Government. He was genuinely a Lord Chancellor. He was not very party political. He was, undoubtedly, a formidable presence in the Cabinet. He was trusted by both the lawyers and the politicians. He was the epitome of somebody who would do the job.

I do not remember one ever annoying me, as a lawyer or a politician, including Lord Irvine. They were fine. They understood. They did respect the rule of law. They understood what the constitution was about but sooner or later it was going to go. This reform was produced as a slightly back-of-the-envelope job and there was slight chaos on the first day when it was obvious that nobody had thought through the legislative consequences and so on. The actual content of the legislation that emerged was, as I recall, a matter of compromise to try to calm down the infuriated judiciary and legal profession, who had reacted rather badly to all this.

The Lord Chancellor has become a departmental Minister because he has responsibility across a wide range of things. The original proposal, I recall, was that Lord Chancellor was going to be abolished. We were not going to have a Lord Chancellor any more; we were going to have a Secretary of State for Justice. They had to put the title of Lord Chancellor back in to reassure people that he was, in some vague way, going to carry out his former constitutional role.

When I was appointed I was surprised to be appointed—very pleased to be appointed. The Prime Minister, who could not make me Business Secretary, which is what we had agreed before the election, was very delighted to find that I was rather pleased to be asked to be Secretary of State for Justice. I was reliving my youth, going back to my days at the Bar—the only surviving members of the Bar I know are all judges now. I was thrilled to have a couple of years, I thought, in this particular role. He asked me what I thought of the division of responsibilities in this new set-up, when you had blown up the old department and suddenly then produced this Justice Department out of it. I said that I thought it was pretty ropy. I thought it a very odd combination to have the Prison Service alongside the Courts Service and so on, but my strong opinion was to stop reorganising departments. Forming new departments and giving them silly names has not got anybody anywhere. One day, I said, “Try doing a rational change of responsibilities but wait for a very quiet time in politics before you do that because for six months the reorganised departments will not be able to do anything. Then it will settle down and you will not be clear quite what you have achieved by moving things about”.

I just took it up and I was delighted to find my responsibilities were for criminal justice, the Courts Service, the Probation Service and the Prison Service, which I very much wanted to reform, and set about my task. I had excellent relationships with everybody in the justice system, which is really what my role there depended on. I have an extremely high regard for the rule of law and an extremely high regard for the independence of the judiciary, which I
think needs to be reinforced ever more and more, and a great interest in the subject matter I was doing.

But I do not think any of these constitutional issues actually arose in my time. I never found I had to go back to the Act to see what my particular role was. I just behaved as Secretary of State for Justice in the Cabinet and got on with facing the radical problems we faced. I agreed a huge reduction in my budget that I had drawn up myself with my excellent ex-Treasury Permanent Secretary, Suma Chakrabarti. This was the first time anybody had tried to take 30% out of anything to do with law and order, so it was quite a tall order, but it was a figure that we arrived at ourselves. The thing I concentrated most on, and what I really wanted to do, was the reform of the prison system and to reverse this tabloid newspaper-run sentencing policy that had gone on for some years and had caused a crisis in the prison system. It seemed to me obvious that one had to reduce the prison population and introduce a new focus on rehabilitation, dealing with the waifs and strays in the Prison Service, making sure that prison was the right punishment for serious offenders, which it most undoubtedly is, I agree, but not driving money out of the justice system by seeing it all swallowed up by an ever-burgeoning Prison Service.

The Chairman: Thank you very much. I now understand why on the “Today” programme interviewers occasionally interrupt their interviewees.

Mr Clarke: John Humphrys has stopped asking me to give short answers.

The Chairman: I am tempted to give Lord Falconer right of reply but I did not want—

Mr Clarke: I have given Lord Falconer perhaps a little that he would like to respond to.

The Chairman: Yes, but I would like also to hear how he sees the development of the position and the role since the changes came into being.

Lord Falconer of Thoroton: I think the role has broadly developed in the way that was envisaged. I can think of no more appropriate people to be Lord Chancellor defending the rule of law and being effective departmental Ministers than Jack Straw and Ken Clarke. Also Ken describes what he did as Lord Chancellor exactly as you would have wanted: somebody who instinctively understood the constitution and the importance of defending the rule of law. Let me give a very good example of that. I do not know if you remember, but the Home Secretary at one stage said that some judge had refused to deport somebody because they were too much in love with their cats to be deported, which was a completely and typically ridiculous thing for a Minister to say about a judge. Ken instinctively, I am quite sure, without reference to Section 1, 2, 3, 4 or 5 of the Constitutional Reform Act, told the next journalists whom he saw that that was probably the most ridiculous thing he had ever heard in relation to anybody saying it and that it was undermining the judges.

If you end up in a situation where there is not a cat’s chance in hell that the person holding the office of Lord Chancellor will defend the judges in the way that Ken did, then you have a problem in relation to the position, because the judges do not instinctively think they have somebody in government, irrespective of collective responsibility, who will stand up for them. The judges are, in one sense, the weakest part of the constitution. They cannot defend themselves. They are always vulnerable to the Government being cross about them and being rude to them. They need somebody like Ken Clarke to defend them. That is why Section 2 was put into the Act.
I have real anxieties at the moment that there is not that sense that there is a figure big enough within the Government to defend the rule of law, which is one of the two pillars of our constitution—the rule of law and democracy. I think Jack and Ken were utterly brilliant. I completely agree with Ken that the start of the reforms may have been a bit shambolic, but do not be distracted by that from analysing the importance of the changes. As Ken says, there was a need for the changes and making sure that they work in the future, and the key thing to making them work is that the person doing it has to be both a member of a Cabinet with collective responsibility but also somebody, just as the Lord Chancellor in the past, just as the Attorney-General, with responsibility to something higher than simply party politics. The structure of the Act makes that clear. I would like to repudiate again, if I may, your suggestion that it is neutral about that. It is not neutral about it.

The Chairman: That is very helpful.

Lord Falconer of Thoroton: That is why, when you look and see the way that the job is performed, you have to see the person doing these twin things. It has developed well but, as I say, I have anxieties about how it is going at the moment.

The Chairman: Thank you very much. You have raised a number of topics that the Committee would be keen to pursue. I will bring in Lady Wheatcroft, if I may.

Q77 Baroness Wheatcroft: Lord Falconer, you have made it very clear that the upholding of the rule of law is something that is particularly, in statute, the responsibility of the Lord Chancellor. You will have seen the evidence that we had from Chris Grayling last week.

Lord Falconer of Thoroton: Yes.

Baroness Wheatcroft: He is equally clear that upholding the rule of law is the responsibility of every Cabinet Member and he would not, despite being asked repeatedly, say that it was in particular the responsibility of the Lord Chancellor. Now, maybe this is because of a different interpretation of what we are talking about. Is the rule of law simply standing up for the judges and the independence of the judiciary, in which case, whatever Mr Grayling said last week, it clearly is the responsibility of the Lord Chancellor, or is the rule of law something more than that?

Lord Falconer of Thoroton: It is, I think, three things. First, it is making sure that the judges are properly protected within the Government, which means proper terms and conditions, no unjustified attacks and no undue pressure put on them. Secondly, it is to ensure that the Government complies with the law and that the way the Government operates means it obeys court orders, obeys both domestic and international law and does not deliberately either flout court orders or break the law. Thirdly, it is to ensure that there is a functioning justice system that means that people’s legal rights can be vindicated. Those are the three things that constitute, in my view, the rule of law and respecting it.

I did read Grayling’s evidence. I thought it was horrific. I thought that the way he had absolutely no understanding of the fact that his role was a special role to protect those three things was appalling and he appeared to see himself as being no different from the Health Secretary or the Education Secretary in respect of the rule of law. It seemed to me completely to undermine what the Constitutional Reform Act had sought to do and it was heartbreaking and disappointing. It indicated to me, I am sure unwittingly, that the Prime
Minister had failed to comply with the obligation placed upon him by Section 2 of the Act to appoint somebody to the job with special qualities that would suit him to performing the job.

Baroness Wheatcroft: That is pretty clear. Thank you, Mr Clarke.

Mr Clarke: I agree absolutely 110% with the way Lord Falconer describes the rule of law. It is more than just the independence of the judges. It is the fact that everybody is subject to the law, including the Government and the Executive, which, in a modern state, is extremely important. It gets ever more important because the modern state is complex, bureaucratic and now actually goes into just about every feature of the daily lives of the ordinary citizen. Anyway, I will not compete with Lord Falconer’s, if I may say so, excellent definition of what the rule of law complies.

I apologise that I did not read Chris Grayling’s evidence; I obviously should have done, but I cannot comment on it. I have to say that, although I hope I complied with the very high standards Lord Falconer laid down, there was no incident in my tenure of the office when I felt my statutory duty was compelling me to do this. There were often occasions when I felt compelled to intervene, but that was usually alongside the Attorney-General, who I see as in the position of giving independent legal advice to the Government. There were occasions when I—probably Dominic Grieve would agree—heavily weighed in as well to help the Attorney-General with his difficult task of just pointing out what the rule of law implied.

On the much smaller and narrower matter, which is important, of the criticism of judges, in new Governments—I can play the old veteran now, of course—you always get very inexperienced Ministers and there were occasions when I did step in with colleagues and say, “This is not conducive to good order and discipline if every time an unpopular decision is made by a judge some Cabinet Minister starts denouncing it”. I persuaded my colleagues at least to leave British judges alone. Foreign judges they seemed to regard as fair game. I did just occasionally step in because, as you say, they cannot reply for themselves. Although, in fact, on the infamous cat occasion—it was a Nigel Farage speech that had been taken word for word by one of my colleagues and was complete nonsense—the Judicial Office felt compelled to put out a statement pointing out that this was fictional.

Q78 Baroness Wheatcroft: You mentioned the special qualities that the Prime Minister should have looked for in appointing the Lord Chancellor. What are those qualities above and beyond those that we might want to see in any Cabinet Minister and does it involve being a lawyer?

Lord Falconer of Thoroton: First of all, it involves understanding what the rule of law means in a way broader than simply what everybody understands the rule of law means, which means complying with the law. Secondly, it means having personal qualities that mean that you will actually stand up for the rule of law. Thirdly, it means understanding that there will be occasions where your obligation requires you to do something other than simply comply with the collective responsibility. Now, the Act explicitly envisages that the person holding the job does not need to be a lawyer. My belief, and I believe the belief of Parliament at the time, is that a person who has the qualities that I have described does not necessarily need to be a lawyer. If you think about people like Roy Jenkins, Merlyn Rees, Willie Whitelaw, William Hague, people like that, you have no difficulty about them doing it. I am worried
that we now find ourselves in a position where it might be that the person does not necessarily have those qualities. Should we think that one does now need to have a lawyer to do the job? Many, many lawyers would be hopeless at the job but, if we have ended up in the situation we have ended up with, saying it has to be a lawyer does not mean you guarantee you will get somebody who will be good at it, but it may mean that you have a better chance of getting somebody who understands some of the role. I do not know. I throw that out for consideration.

Baroness Wheatcroft: Thank you.

The Chairman: Thank you. We will bring in Lord Goldsmith now.

Q79 Lord Goldsmith: Just looking at Section 2, it does not say a great deal though, does it, Lord Falconer? It says that the Prime Minister must not appoint someone who does not appear to him to be qualified by experience, but then the categories of experience are very broad, including the wonderful catchall at the end, “Other experience that the Prime Minister considers relevant”. Would you, in the light of experience, because you were the one who piloted this—I am not criticising you for that—now amend the Act so as to make clearer what you have now described as what you think the qualities of the Lord Chancellor ought to be?

Lord Falconer of Thoroton: We drafted it in the way that we did, or that Parliament decided upon, in order that a signal should be given to the Prime Minister that you need somebody of special quality, but obviously you do not want to be too prescriptive in relation to the sort of person whom the Prime Minister can appoint. You might be right that it is just too general. Maybe the way to draft it, if one had another shot at it, would be to go through the particular qualities: understanding the constitution, understanding the importance of the rule of law, being willing to stand up against party-political consideration, recognising that the responsibility in Section 1 and Section 17 involved departing from collective responsibility where appropriate to do so. Those are the qualities you are looking for. I am not averse to the idea of redrafting it, but I honestly would not have thought that it was necessary until I saw the position that we now find ourselves in.

Mr Clarke: If I may say so, it is very difficult to draft this. I do not think there is much difference of opinion between any of us from what you said before. As for the ideal qualities that have been set out, in an ideal world one assumes and trusts that you are trying to appoint every Member of the Cabinet who has most of those qualities. You are not assuming that in every other post you are appointing people who do not understand the application of the rule of law and they need to be told all the time what they are doing. It is still complicated by this strange British paradox. In the old system, both Lord Chancellors and the Attorney—I think the Attorney in giving legal advice is very independent and is very important—were always party politicians. They have been party politicians for centuries, practically, and they always are bound by collective responsibility. This is about those underlying rules that the British Government always applied to them and apply to them now and sometimes the lawyers—it does not to have to be the lawyers; other people were very concerned about international law or something—can have a real row with their colleagues inside the Government about what is or is not happening. In British politics they do not go out giving interviews about it and they do not go out and say they disagree or anything. On
key things, the way it has always worked in every Government, and I think still does, is that the Prime Minister and the Cabinet simply will not sail on doing something that the legal advice says to them is not lawful. In my experience, when I was on the National Security Council, the Army are as keen as the legal profession to make sure they are not ordered to do things that are illegal.

Q80 Lord Goldsmith: I am taking the role of John Humphrys now. We wanted to move on to respective responsibility of Lord Chancellor and law officers, which you touched on. I just want to pick you up on one point to see whether you see any merit in this and to know what you think it actually says about the role of the Lord Chancellor. You identified the position of the law officers, Lord Chancellor, party politicians, all of that and said that they are “bound by collective responsibility”. One area, I would suggest, in which collective responsibility does not apply is in relation to legal advice. If the Attorney-General at the Cabinet table or the Cabinet Committee table says, “You cannot do this; this is wrong”, if it was a policy discussion, and everyone else took a different view, he or she would have to follow that view, but if he took the view that it was legally wrong he would have to continue to say that, whatever consequences there would be. Is that a difference?

Mr Clarke: I agree. The Attorney-General is a tough and important role. If the Attorney-General sits there and says, “This is unlawful”, the fact is you cannot do it. You require a good Attorney-General—and I do not think we have had one—to sit there and just say, “You cannot do that”. Frankly, Ministers may complain but they are not going to do it. The Attorney would resign. The only one I can ever remember threatening to resign was Michael Havers, who killed off the career of another Cabinet Minister by just making it clear that he was not putting up with this.

Lord Goldsmith: He was not around in my time.

Lord Falconer of Thoroton: I completely agree with Lord Goldsmith that the issues of legal advice are not issues of collective responsibility. They are simply issues about the view that the Attorney-General ultimately forms and his or her view is not a position about which the Government can form a collective view. It is only the Attorney’s view, ultimately, that prevails.

The Chairman: He has the right, indeed, an obligation to be proactive rather than reactive in promoting it?

Lord Falconer of Thoroton: Yes, absolutely. But I think that the problems, with respect, are not generally on, as it were, what is legal and what is not. It is what is pushing things to a limit, which then undermines the functioning of the justice system. So what is the point that is reached in relation to, for example, the funding of a justice system where you get to a point where there is not adequate access to justice? What, in relation to a criminal justice policy, is pushing something so far as to be beyond what are appropriate limits, that are not generally black-letter law issues but are much more about the functioning of a justice system? My experience was that if the Attorney and the Lord Chancellor were both people who had an instinctive feel, as Ken has an instinctive feel, for the limits of the justice system and what it can withstand, that is an incredibly important instinct to have in both these roles. Both the Attorney and the Lord Chancellor acting together are quite a powerful force in government.
Mr Clarke: An Attorney is a good lawyer and has to do what good lawyers have to do, to try to find and suggest some solutions to the problem and not just keep pointing out the problem. That is fine. Within the Government, the Attorney, I think, would normally expect the Lord Chancellor to help him out and weigh in and just, presuming he agrees, reinforce the necessary advice.

Q81 Baroness Taylor of Bolton: When you were talking about the 2007 Act a few moments ago, the word “shambolic” was used. There was an acknowledgement by you, Lord Falconer, that everything was not absolutely smooth in the passage of that or indeed in the development of policy. Was one of the reasons for that and was the feeling at the time that these changes were announced a fear that civil servants would act in a sort of “Yes Minister” way and block the changes if there was too much consultation in advance, and might that be one of the reasons why some of these details were not thought through?

Lord Falconer of Thoroton: No, I do not think there was any fear that civil servants would block the changes or not help—

Baroness Taylor of Bolton: Or the establishment?

Lord Falconer of Thoroton: Well, I do not know whether this is what was thought of in advance. The effect of announcing that it was going to happen, in retrospect I am sure, is what ultimately made it happen.

Baroness Taylor of Bolton: Yes.

Lord Falconer of Thoroton: Had there been a more gradual process, although that would have led to many, many more of the lacunae of the problems coming out, it would probably have led as well to the whole thing running into the sand because it is not a reform that has electoral leverage and there are other things to get into parliamentary rows about. The announcement, having been made, gave it a huge degree of impetus that it would not otherwise have had. The judges were absolutely furious about what had happened and were, for understandable reasons, resistant to the change because they got no warning. If you speak to the judges now, with the idea of going back to an old-style Lord Chancellor, the idea of the Lord Chancellor appointing all the judges, the idea of there not being a Supreme Court, they would reject that as being a very retrograde step. I can completely understand why they felt so angry, because they should have been consulted, but once the announcement had been made it had political oomph. It meant that the Prime Minister was behind it and the Prime Minister, like many Prime Ministers, had no interest in constitutional reform to speak of and therefore to have given his support to this particular reform meant that it happened. I am very glad that it did.

Baroness Taylor of Bolton: When you were saying that, were you drafting it now, you might have had some extra words in there about the nature of the role and the kind of person, what you are saying is that having responsibility for being Lord Chancellor is not just another Cabinet position—

Lord Falconer of Thoroton: Correct.

Baroness Taylor of Bolton: It has an extra dimension and there is some concern among some people that it is being treated just as another Cabinet position and indeed potentially as a stepping stone to other offices. At the time the Bill was going through there was
discussion about whether it should be the last position. I think that is quite difficult to legislate for, but certainly in the past the Lord Chancellors have been at the peak of their career rather than on the way up. As for this business of defending judges, if you are a politician on the way up, it is actually quite difficult on occasions to say things that could politically be damaging to your own reputation.

Lord Falconer of Thoroton: Yes. First of all, I agree with you that the role of the Lord Chancellor has responsibilities in addition to that which all the other Cabinet Members have. Secondly, because the role involves standing out against your colleagues and separating yourself from collective responsibility, it will from time to time involve damaging your relations, maybe with the Prime Minister and maybe with other people in the Cabinet, which may have maybe adverse consequences for your career. That is why Section 2 is so important: the Prime Minister has to appoint somebody who is willing to do that. I would not want to rule out further advancement for a Lord Chancellor who deserved further advancement. Interestingly enough, in the 20th century, one Lord Chancellor became Foreign Secretary, one became Secretary of State for India—this is before the Second World War—and I would not want to stop people’s careers being advanced, particularly if a Lord Chancellor performs well and bravely in the rule of law role. It might well be that he or she looks the most appropriate person to do a difficult job, but if and in so far as what underlies your question is whether the middle-ranking Cabinet Minister finds that trying to climb the greasy pole to get another job is something that might undermine his or her willingness to stand up for the important constitutional values that the Lord Chancellor has to stand up for, I think that is something that the Prime Minister has to take into account in applying Section 2.

Q82 Baroness Taylor of Bolton: Although this is not a big issue, do you think it matters which House the law officers are in, the Commons or the Lords?

Lord Falconer of Thoroton: No, I do not. It is the personal qualities of the Lord Chancellor and the law officers that matter and whether they are in the Commons or the Lords does not matter. They have to be accountable to Parliament, but I do not think it matters which House that is in. At the point that some of the Home Office’s responsibilities came to the Lord Chancellor’s Department—prisons and probation—the Prime Minister said to me, “Look, if that happens, the job will obviously have to be in the Commons because it is a job engaged in day-to-day politics”. I think generally most of those sorts of jobs do have to be in the Commons but, as long as the Prime Minister today does not have too many of those jobs in the Lords, it is possible to have one or two of those jobs in the Lords. Andrew Adonis did transport; Peter Mandelson did a whole range of responsibilities that would not normally be in the Lords. I do not think that the issue generally for Cabinet posts is, “Should it be in the Commons?” It is, “Are there enough in the Commons to make one or two in the Lords justifiable?”

Baroness Taylor of Bolton: Okay.

The Chairman: Lord Brennan.

Mr Clarke: If I may, very briefly because Lord Falconer has said it all, I think you have to accept that in practice it has become another Cabinet post. It is the Secretary of State for Justice. I assumed that it was the last post that I was going to ever hold in government when
I was appointed, so I am in a good position to comment, but you are not going to have some elder statesman every time who is not expecting to go on. It is a senior Cabinet post but it is another Cabinet post now and it is one of those that is more likely to be in the Commons than the Lords. Things connected to the criminal justice system, to sentencing, to the nature of the criminal law combined with the Prison Service, which is always a political hot potato, or can be, mean that it is more likely, I think, that in future it is going to be in the Commons than the Lords. It would be very difficult for a Commons Minister to act as the spokesman for a Lords Minister on some of the very hot-potato, tabloid-newspaper issues that day to day the Secretary of State for Justice is handling.

The Chairman: Thank you. I think we must move on. I am conscious of the time. Lord Brennan.

Q83 Lord Brennan: At present neither the Minister nor the Permanent Secretary are lawyers in the Ministry of Justice. This may continue in time to come. If they are not lawyers, bearing in mind the Lord Chancellor’s specific responsibilities that we have been discussing, it is obvious that that Minister and the Permanent Secretary should able to rely on knowledge and experience of the law from some source within the Ministry and not just the important advice they can obtain from the law officers. So at the top end of the Ministry if there is not a lawyer, how do we ensure that there is an adequate corpus of knowledge and that there is an adequate continuity of experience that will assist non-lawyer Ministers in the future?

The Chairman: A short answer is allowed.

Lord Falconer of Thoroton: First of all, the key thing, and law is an important element of this, is that the person at the head of the department has an understanding of the importance of the rule of law and the constitution—not necessarily detailed provisions of the law but those basic points. Section 2, by ensuring that you have such a person, should provide you with the first protection in relation to that. When I was Lord Chancellor, there was never a lawyer who was the Permanent Secretary and I do not think, though you have just had some Permanent Secretaries in front of you, generally they were qualified lawyers; they were civil servants. Hayden Phillips, Alex Allan, Suma Chakrabarti, Ursula Brennan—they are all non-lawyers and I am not sure what was the case even before that. Was Denis Dobson a lawyer? I do not think he was. Ricketts? I do not think they were lawyers. But the point is basically that, if you do not have to have a qualified lawyer as the head of the department, what do you do? Well, I say you have a person who understands the constitutional situation. There was a legal department within the Lord Chancellor’s Department—I found this when I was the Lord Chancellor—that was peopled by pretty heavy-duty lawyers. When I was there, there was a man called Mr Richard Heaton. Before that, there had been a man called Mr Paul Jenkins, who became the Treasury Solicitor. You have also access and close relations with the Attorney-General, so you have always access to good-quality legal advice. But I think the key thing is the quality of the person at the top.

Mr Clarke: The department was a very good department when I was there. I was pleasantly surprised by the very high-quality people I had working with me. I greatly enjoyed it. I did have a legal department. There was one lady, whose name I cannot remember, who I thought was quite an outstanding lawyer, and it did not help me that much being a lawyer. I
used to give legal opinions, of course, but I did preface them and kept in my own mind and I
would always begin by saying, “I have not practised for more than 30 years myself” or, on
international law, “I last looked at this when I was a graduate student. I have not actually
ever been involved since then”. I did not take my own legal advice although I had access to
legal advice. I think it has always been like that. The contact with the judges is quite
important. The most important part was pretty regular contact and in my case it was very
easy and I was on excellent terms with the Lord Chief Justice—and the rest of the judiciary—and the President of the Supreme Court, both of whom I got on with very well. The Lord
Chief Justice is an old friend of mine. I was not cut off from pretty heavyweight legal advice if
anything came up. Any Lord Chancellor, I think, is going to be seeing those two pretty well all
the time. You are not somehow completely obliviously unaware or cut off from those who
are very much the heavyweight lawyers of the day.

The Chairman: Thank you. I think we will move quickly on. I am conscious we will soon be
into injury time. Lord Powell.

Q84 Lord Powell of Bayswater: My question has been answered, but you might resolve a
conflict of evidence. On the question of legal support in the Ministry of Justice for the Lord
Chancellor, we were told by a former Lord Chief Justice, “The department is short of lawyers
at the top; it is a pity that the Lord Chancellor does not have more qualified lawyers”. On the
other hand, Mr Grayling apparently told us that he was perfectly happy with the legal
support; indeed he reportedly said that he had a whole floor of lawyers. Like Mr Clarke, I
have not read his evidence. I did read the Maastricht Treaty but I have not read his evidence.
Which is it? Are there enough lawyers or not?

Lord Falconer of Thoroton: Well, there are enough lawyers to deal with the detail of the
legal questions that they have. There is no judge or Lord Chief Justice I have ever met who
does not think that every department that they are dealing with is inadequately supplied
with lawyers, because the nature of what is happening inevitably is that what they are
seeing is the very many sort of legal disasters that strike Governments all the time and end
up in court. I am not sure that there is necessarily a conflict of evidence in the sense that I
never felt short of the detailed advice that I needed on the law, but it may well be that what
the ex-Lord Chief is referring to is, in effect, “The person I am talking to from time to time
did not seem to understand the bigger constitutional and legal issues”. I am not sure that
that is going to be resolved, whether you have a floor of lawyers or two floors of lawyers.

The Chairman: Thank you. Contact with the judiciary has already been touched on but I think
Lord Crickhowell might have a supplementary.

Q85 Lord Crickhowell: Yes. We have heard that the present Lord Chancellor and Permanent
Secretary have very regular meetings with the Lord Chief Justice. One of the consequences
of the Constitutional Reform Act, of course, was that senior judges no longer sit in the House
of Lords. That means that the contribution that they often did make has disappeared and
their ability to make representations or to make comments has disappeared. We have had
changing opinions, I think, from the Lord Chief Justice and the President of the Supreme
Court about the circumstances in which they would wish to go beyond the laid-down rules
under Section 5 of the Act to make written representations to Parliament. Mr Grayling was
strongly opposed to allowing senior judges to make regular representations to Parliament,
as this would risk politicising the judiciary. He asserted that normally the Lord Chancellor should be the conduit for concerns coming from the judiciary. In the light of some of the things that have been said at the Committee this morning, it seems to me that if, as has been suggested to us, the Lord Chief Justice or indeed the Lord President were concerned about what was being done in any way and they wanted to make representations to Parliament, the appropriate thing to do would be to say to this Committee—it would be an appropriate Committee—that they would like to come and give evidence and this Committee would almost undoubtedly immediately convene a meeting where they could do so. That might be a suitable way, if circumstances arose where they felt they needed to put a view to Parliament, of doing so without taking the action that Mr Grayling thought was politicising the whole business too much. Have you any comments about that?

Lord Falconer of Thoroton: Yes, I agree with that. I agree with the proposition that if the Lord Chief Justice or a senior member of the judiciary, the Lord President or the Chief Justice of Northern Ireland, was very concerned about something, there would not be very much difficulty to find an appropriate place for one of the Chief Justices to give evidence. I think it is inappropriate for there to be a row on the Floor of the House of Lords between the Lord Chancellor, if he is in the Lords at the time, and the Lord Chief Justice. It has happened in the past. I do not know if you remember, but Lord Lane gave a speech when Lord Mackay was seeking to introduce rights of audience in higher courts for solicitors, which Lord Lane very strongly opposed. He made an impropriate speech, saying words to the effect that totalitarianism does not necessarily turn up at the front door with a toothbrush moustache and an upraised right arm. It is hard to imagine more inappropriate language to use when facing the issue of whether solicitors should have rights of audience in the higher court. Ultimately that is demeaning for the judiciary and it politicises the judiciary, so I do not think that is the appropriate way to do it. I very strongly would embrace the idea that Lord Crickhowell has put that judges, as they indeed are doing, give evidence appropriately to Select Committees and talk about policy issues not individual cases. They are doing it and they are being treated with great deference by the Committees. Some would say, maybe even some of the judges would say, with too much deference. I do not mean that they should be challenged for their decisions but there are some policy choices for the judges to make, such as whether we should focus our effort to ensuring that childcare cases are dealt with at such a speed that there is not so much money for civil justice, which are decisions that the judges are making. I just take that as an example. Those are issues that I think the judges should be willing to debate with Select Committees in an uncharged way, unlike what would happen if one went back to the old system.

Mr Clarke: They have to be careful. They should not do it too often. It is more effective and magisterial if you have occasional interventions by the judges, whether giving evidence or otherwise. Lord Neuberger does say things now when he is concerned about things. I think he gets it right. He does not overdo it but I have read comments that seemed to me to have slight policy implications. It may arise more as a problem. There is a growing fashion among politicians of all parties to think that unelected judges are somehow people who ought to defer in the end to elected politicians so long as they command a majority in the House of Commons. So this whole tricky issue could well start arising. You do get, certainly at our end of the House, the most extraordinary opinions expressed occasionally to someone, a more
traditionalist person like me, who does not think that unelected judges have a duty to respect the current political campaigning position of some Minister.

**The Chairman:** Thank you very much. I think it was always optimistic to assume that within 45 minutes we could contain two such experienced and eloquent talents. I wish we could have gone on, because we could have gone on for quite a long time, but I know that you have other commitments, as indeed we do. You have been extraordinarily helpful, very clear and lucid in your expositions and you have given us quite a lot to think about so I am most grateful. On behalf of the Committee, thank you both very much.

**Lord Falconer of Thoroton:** Thank you.

**Mr Clarke:** Thank you.
Mr Terence Ewing — Written evidence (OLC0007)

1. The Lord Chancellor is currently responsible for the courts, and is a government appointed Minister.

2. The role is jointly shared with that of the Minister of Justice and is therefore a political appointment of the government of the day.

3. Quite rightly, the Lord Chancellor no longer sits as a judge in the Supreme Court, formerly the House of Lords as this was clearly in breach of the separation of powers.

4. The Lord Chancellor is also quite rightly no longer head of the judiciary.

5. It would seem that the role has become virtually redundant apart from a ceremonial one, with the Minister of Justice being responsible for that Ministry.

6. The role should either be abolished completely, or be subject to being an independently appointed office holder, free from political appointment and influence.

7. It might be also that the role should be completely independent from government and being solely responsible for the running of the court system and that all of this role should be transferred to this as office holder from the Minister of Justice, whose role should then be concerned with legislation only and not the actual running of the court system in England and Wales.

8. The Lord Chancellor should not be a member of the cabinet or the Government of the day, and his appointment should possibly be subject to renewal by Parliament at appropriate intervals of say five years.

15 July 2014
In this evidence, I draw on research conducted between 2011-2014 with Robert Hazell (UCL), Kate Malleson (Queen Mary) and Patrick O'Brien (UCL) as part of an AHRC-funded project on *The Politics of Judicial Independence in the UK’s Changing Constitution*. This included 150 confidential interviews with judges, politicians, officials and others involved in the administration of justice in the UK. Although drawing on research conducted jointly with Hazell, Malleson and O’Brien, this evidence is my own interpretation of our findings.

1. What are the current functions of the Lord Chancellor (as distinct from those of the Secretary of State for Justice)?

1.1 There are eight main functions of the new-style Lord Chancellors:

   - (i) to ensure that there is an efficient and effective court system, including by providing the necessary resources and accounting to Parliament for their efficient and proper use;¹³
   - (ii) to decide the framework for the organization of the court system, including determining the total number of judges after consulting with the LCJ;¹⁴
   - (iii) to determine the pay, pensions and conditions of judicial service, taking into account recommendations of the Senior Salaries Review Body;¹⁵
   - (iv) to determine (with the LCJ) the aims of HMCTS, to endeavour to agree its budget with the LCJ, and to supply sufficient staff and resources;¹⁶
   - (v) a shared responsibility (with the LCJ) for complaints, supported by the Judicial Conduct and Investigations Office, and accounting to Parliament for the operation of the complaints system as a whole;¹⁷
   - (vi) to accept, reject or request reconsideration of the individual selections made either by the JAC for vacancies in the High Court or by ad hoc panels for the most senior appointments (i.e. Court of Appeal, Heads of Division, LCJ and the UK Supreme Court);¹⁸
   - (vii) an overarching responsibility for the judicial appointments system as a whole, including approval of the JAC’s objectives, supplying it with resources and accounting to Parliament for its activities. In this, the Lord Chancellor must take

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¹³ Courts Act 2003, s1; and Tribunals, Courts and Enforcement Act 2007, s39.
¹⁴ The Concordat, para 29.
¹⁵ The Concordat, para 29
¹⁶ HMCTS Framework Document paras 2.1 and 7.2.
such steps as he or she considers appropriate “for the purpose of encouraging judicial diversity”;¹⁹ and

(viii) to defend judicial independence inside government.²⁰

Most of the Lord Chancellor’s responsibilities apply to the courts in England and Wales, with some broadly equivalent responsibilities vis-à-vis the UK Supreme Court (e.g. the Lord Chancellor is under a statutory duty to provide such resources as he or she thinks appropriate for the Court to carry out its business²¹).

2. To what extent are those functions genuine powers, and to what extent are they nominal powers?

2.1 Post-2003 Lord Chancellors continue to exercise an extensive range of judiciary-related responsibilities. They are much less involved than their pre-CRA’05 predecessors in the nitty-gritty of everyday decision-making on matters relating to the courts and the judiciary, and have much less contact with the senior judiciary as a result. The LCJ and independent bodies (e.g. JAC) also now exercise a wide range of important functions. But the Lord Chancellor still retains significant systemic responsibilities.

2.2 It is commonplace to describe the Lord Chancellor’s role in judicial appointments as “nominal”. At one level, there is some truth in this. Prior to the changes introduced under the Crime and Courts Act 2013, the Lord Chancellor retained the final say over all appointments, yet successive office-holders accepted almost all of the recommendations made to them. Between 2006-2014, the JAC made almost 4,300 recommendations, with Lord Chancellors refusing only 5 of them; in other words, Lord Chancellors accepted the JAC’s recommendations—literally—99.9% of the time!

2.3 At another level, Lord Chancellors still exercise an important role in appointments, over and above their role in shaping the JAC’s strategic objectives. For example, before instructing the JAC to fill a vacancy, the Lord Chancellor can issue additional criteria that stipulate minimum eligibility requirements for appointment to the specific vacancy over and above any criteria set by statute. This is often influential in shaping—and, alas, often limiting—the diversity of the pool of potential applicants. For senior leadership positions (e.g. the LCJ), the Lord Chancellor not only has the final say whether or not to accept the recommendation made by the selection panel, but is also consulted as part of the selection process.

3. How in practice do Lord Chancellors uphold the rule of law and judicial independence?

3.1 There are three main levels at which Lord Chancellors contribute to the rule of law and judicial independence. The first is at the level of cabinet relations. One part of the customary (and now statutory) duty on Lord Chancellors to defend judicial independence requires the office-holder to encourage his or her colleagues to respect the convention that ministers do not criticize in public judicial decisions or the judges who deliver them, and to reprimand

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¹⁹ Constitutional Reform Act 2005, s137A.
²⁰ Constitutional Reform Act 2005, s3.
²¹ Constitutional Reform Act 2005, s50.
colleagues if they fail to respect this convention. The Lord Chancellor must also caution colleagues from pursuing policies that might undermine the rule of law and judicial independence.

3.2 The second is the level of *executive-judicial relations*. The Lord Chancellor must maintain good working relations with the senior judiciary, and the LCJ in particular, and through this nurture the confidence of the judiciary as a whole. Lord Chancellors must listen to judicial concerns and take these into account when framing policy.

3.3 The third level is that of the *system as a whole*, with the Lord Chancellor primarily responsible for funding, supervising and remediying problems in the court system, the discipline system and the appointments system.

3.4 It is difficult to know with any certainty how effectively or energetically this or that Lord Chancellor has defended the rule of law and judicial independence. This is true for both pre-2003 and post-2003 Lord Chancellors, since collective cabinet responsibility and the confidentiality of exchanges between Lord Chancellors and senior judges mean that outsiders seldom have a full picture of what has occurred behind closed doors. That said, there are examples of post-2003 Lord Chancellors endeavouring to uphold judicial independence at each of the levels identified above.\(^{22}\)

### 4. Are the offices of Lord Chancellor and Secretary of State for Justice best performed by the same person?

4.1 On the basis of the current division of ministerial roles, it is better that the two are twinned, rather than a separate Secretary of State for Justice with responsibility for criminal justice, prisons and probations and a rump office of Lord Chancellor with responsibility for the courts and the judiciary. The twinned roles give the officeholder more political clout, and arguably goes some (albeit not all the) way to compensating for the loss of the unique prestige and influence that attached to the unreformed office of Lord Chancellor.

### 5. Can judicial independence and the rule of law be defended in Cabinet by a minister responsible for wider departmental policies and budgets, which may point to different priorities? Is an independent voice required?

5.1 Yes. There are examples of post-2003 Lord Chancellors doing so, even though they head a large department with a wide policy remit and sizable budget.

5.2 When assessing whether the new-style Lord Chancellors can serve as effective guardians of judicial independence, five points should be kept in mind.

- **First**, it is unrealistic to expect Lord Chancellors to act as the preeminent guardian of the rule of law and judicial independence in the same way and with the same sort of success rate as their pre-2003 predecessors. The post-03 Lord Chancellors might be less effective and less reliable guardians than their predecessors (e.g. less assiduous

in reprimanding colleagues and, when they do so, their rebuke might carry less weight). But this does not mean that their role is without value.

- **Second**, pre-2003 Lord Chancellors were more proactive guardians: i.e. insofar as they had a better grasp of issues that encroach upon the rule of law and judicial independence, and because they met more regularly with senior judges, they were better able to articulate judicial concerns to their ministerial colleagues, and hence stave off ill-considered government policies. Post-2003 Lord Chancellors seem more reactive, at times responding to legitimate concerns only after senior judges speak out publicly or where there is sustained political opposition to a policy (e.g. from a select committee). One consequence of leading a department with a wide policy remit is that a Lord Chancellors inevitably spends much less of his or her time on judiciary-related issues, which presumably makes it much more difficult to grasp the full weight of and respond proactively to judicial concerns. To exaggerate the point somewhat: the post-2003 Lord Chancellors might do “the right thing” only after exhausting all other possibilities. Though messy and unedifying, this can still be effective.

- **Third**, on certain issues post-2003 Lord Chancellors might be better placed than their predecessors to disentangle legitimate concerns about judicial independence from more spurious claims driven by judicial self-interest (e.g. on pay/pensions). Indeed, statute now makes clear that Lord Chancellors must have regard to “the public interest” in matters relating to the judiciary.\(^{23}\)

- **Fourth**, other actors help to foster the rule of law and judicial independence inside government. From time to time the Attorney General has reminded ministerial and parliamentary colleagues not to criticize judges. The Treasury Solicitor and other government lawyers have also had occasion to remind ministers of the importance of constitutional principles.

- **Fifth**, there are other actors on the institutional landscape who promote the rule of law and judicial independence. Some have a clear responsibility to do so (e.g. the LCJ; the Constitution Committee, the JAC). Others do so indirectly through their day-to-day work (e.g. clerks in the Table Office). The Lord Chancellor is now only one part—albeit an important part—of the institutional arrangements designed to safeguard judicial independence.

5.3 It would be wrong to assume that pre-2003 Lord Chancellors would have been more successful in insulating judges from the effect of cuts in public spending. Similarly, the challenges confronting HMCTS would likely have been the same irrespective of whether aligned with today’s very large Ministry of Justice of 2014 or the smaller (albeit still large) Lord Chancellor’s Department of the late 1990s. The department would still have been required to secure cuts of around 20%. Indeed, although expected to cut its expenditure significantly in 2010–11 and 2013–14, HMCTS experienced less severe cuts than other parts of the Ministry.

\(^{23}\) Constitutional Reform Act 2005, s3(6)(c).
5.4 Some commentators question post-2003 Lord Chancellors’ understanding of as well as their willingness to attach due weight to constitutional issues. However, in confidential interviews, several senior judges in leadership roles who had interacted closely with the Ministry of Justice commended the recent Lord Chancellors, albeit while conceding that they had not always seen eye-to-eye with them on issues of importance to the judiciary. For example, one senior judge said that Jack Straw and Ken Clarke both understood the rule of law and judicial independence. A senior official in the Ministry also said that both had “taken very seriously” their duty to defend judicial independence. A second senior judge said that he had been “quite impressed” by Chris Grayling, a view echoed by a third judge who said that Grayling had “worked very hard” to inform himself on relevant issues.

5.5 The duty to “uphold” judicial independence in s3 of the Constitutional Reform Act applies to all ministers (with a special duty on the Lord Chancellor to have regard to the need to “defend” judicial independence). It seems that the Attorney General has from time to time sought to defend judicial independence. It might be worthwhile articulating expressly (in a report of the Constitution Committee; the Ministerial Code; the Cabinet Manual etc) the expectation that the Attorney General as well as the Lord Chancellor has a special duty to defend judicial independence inside government.

6. How effective have the criteria for appointment as Lord Chancellor in s2 of the Constitutional Reform Act been? What does it mean for an appointee to be qualified by “experience”?

6.1 The criteria are essentially meaningless. Section 2(2) provides that the PM may take into account ministerial and parliamentary experience, which in effect gives the PM a free hand in making the appointment. If this was in doubt, it is removed by s2(2)(e) which permits the PM to take into account “any other experience that [he or she] considers relevant”.

7. Should there be statutory criteria for the appointment?

7.1 No. The office of Lord Chancellor is a conventional ministerial office, albeit one to which important constitutional functions are attached. There is no need to have special criteria. The only meaningful function served by s2 is to signal the office’s constitutional importance, but even this is redundant in light of the duty on the Lord Chancellor [s3(6)] and the requirement to swear a special oath [s17].

8. What are the advantages/disadvantages of the office being held by a lawyer?

8.1 “Lawyer” covers a lot of possibilities: someone who read law at university, but never practiced; someone who was in practice, but only for a couple of years; a person who practiced for longer, but many years ago; someone who practiced, but without excelling etc.

8.2 Possible advantages include: an understanding of the meaning, content and limits of principles such as the rule of law and judicial independence; a broad familiarity with the challenges confronting the courts and the judiciary; and long-standing professional and personal relationships with senior judges.
8.3 Disadvantages might include: long-standing professional and personal relationships that make the officeholder too easily swayed by the arguments advanced on behalf of the judiciary; an outdated understanding of the challenges confronting the courts; potential to adopt an overly legalistic and expansive understanding of judicial independence; and a possible reluctance to initiate necessary change in the judicial system.

8.4 The most important question is what are the essential qualities required of the Lord Chancellor? To my mind, these include ability to run a large department and that she or he is sufficiently strong to defend judicial independence, where appropriate, including by standing up to ministerial colleagues who ride roughshod over constitutional niceties and also to senior judges if they make unreasonable demands. Broadly speaking, this requires the same skill-set as any other ministerial role (i.e. intelligence; industriousness; an ability to master a complex brief; an ability to delegate; the ability to command the confidence of ministerial and parliamentary colleagues and stakeholders).

9. Should the Lord Chancellor be someone who when appointed does not seek further ministerial advancement? Should he or she be a member of the House of Lords?

9.1 A Lord Chancellor in the Commons secures an important measure of democratic accountability, but is more likely to be swayed by short-term and partisan considerations. The opposite is true for someone who sits in the Lords. In reality, the twinning of the office of Secretary of State for Justice (with its responsibility for issues of considerable political salience and large budget) with the office of Lord Chancellor makes it likely that future occupants will tend to come from the House of Commons. True, there are recent examples of peers heading large departments with politically sensitive policy portfolios (e.g. Lord Adonis at Transport; Lord Mandelson at BIS). However, assuming the offices remain twinned, it seems more likely that any peers who serve as Lord Chancellor will do so only very exceptionally.

9.2 Lord Chancellors with realistic ambitions for future ministerial advancement might find it difficult to confront more senior cabinet colleagues, and to the Prime Minister in particular, on whose patronage they depend. The possibility that a political “lightweight” might be appointed is a very real weakness in the current arrangements. However, it is worth repeating that the Lord Chancellor is only part of the more elaborate way in which judicial independence is defended in the UK’s contemporary constitution. It is possible, for example, for the LCJ to request a meeting with the PM to articulate in person judicial concerns about a government policy. An example of this succeeding was in 2001, when the LCJ and a delegation of very senior judges met with Tony Blair and persuaded him to abandon a proposal to shift responsibility for the court system to the Home Office.

9.3 On balance, given the choice between candidates of comparable abilities, it would be preferable to appoint a political “heavyweight” at the end of their career who has the clout to stand up to the Home Secretary and the PM. But the most important thing is that a capable and thoughtful politician is appointed, who can show policy leadership in ways that

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24 Thought by many to be in his last ministerial role, Jack Straw was nevertheless the centre of leadership speculation during his time as Lord Chancellor. See J. Straw, Last Man Standing.
benefit the judiciary (e.g. on issues like judicial diversity and on securing more efficient use of public monies in the court system), whilst also having the courage to take on the Treasury, where appropriate.

10. Should there be a Lord Chancellor? If so, what should be his or her functions? If not, who should perform those functions?

10.1 Yes, there should continue to be an office of Lord Chancellor. Some argue that the office should be abolished since the functions currently attached to it can be exercised by the Secretary of State for Justice, and that judges need no longer shelter behind the Lord Chancellor’s robes when interacting with the government. In my view, this is mistaken for two main reasons.

10.2 First, there is value in identifying certain unique constitutional functions as attached to the office of Lord Chancellor as distinct from, even if occupied by the same person, as the Secretary of State for Justice. On appointment, this might be helpful to civil servants who have to brief the new minister to explain the special responsibility to defend judicial independence, especially if the minister is not legally qualified. It might also be helpful to the officeholder when reprimanding ministerial colleagues if he or she can point to their special duty as Lord Chancellor, and possibly even if standing up to the PM.

10.3 Second, it would be imprudent to inject additional uncertainty into the courts and judicial systems by scrapping the office. Obviously, the office changed considerably since 2003, as indeed was intended. The relationship between the office and the judiciary has also changed, as was also sought by those who initiated the changes. It has continued to change in the ten or so years since, and might also do so for some time yet as the full implications of more recent changes become clear (e.g. changes to HMCTS in 2011; and further changes to appointments in 2013). What is required is a period of relative stability to allow new practices to solidify, leadership roles to become more clearly defined and for the relationships between various actors to mature.

10.4 As I see it, to ask whether it should be retained is to ask the wrong question. Better questions include:

- How can we ensure that Lord Chancellors—and, as significantly, their official—have an appropriate appreciation of, and attach due weight to, the rule of law and judicial independence?

- How can we ensure that there remains scope for Lord Chancellors to exercise appropriate political leadership on judiciary-related matters (e.g. by helping the judiciary to make quicker and more visible progress on diversity)?

- How can we ensure that Lord Chancellors—and, indeed, the political class more generally—never forget that we all have a shared interest in well-resourced courts staffed with independent, well-respected and high calibre judges?
• How can we ensure the Ministry is attuned to judicial concerns, especially in light of significant staff turn-over (including the transfer of fairly large numbers of staff to the Judicial Office)?

• How can we secure sufficient accountability across the judicial system as whole, especially in light of the increasing power of senior judicial leaders, and the LCJ in particular?

• Given that the institutional landscape relating to the judiciary and the courts is increasingly fragmented, with important functions exercised by a wide range of different actors (e.g. Lord Chancellor, LCJ, HMCTS, JAC, JACO, JCIO), how can we ensure that there is sufficient coordination and shared strategic objectives between them?

10.5 These questions are not easily answered, and are also probably best not rushed. But it is important that they are answered in ways that preserve meaningful involvement of future Lord Chancellors in judiciary-related matters.

July 2014
Mr Graham Gee, lecturer, Birmingham Law School, University of Birmingham, Professor Andrew Le Sueur, Professor of Constitutional Justice, University of Essex, and Dr Patrick O’Brien, Research Associate, University College London — Oral Evidence (QQ 1-15)

Evidence Session No. 1        Heard in Public        Questions 1–15

WEDNESDAY 16 JULY 2014

Members present
Lord Cullen of Whitekirk (Acting Chairman)
Lord Brennan
Lord Crickhowell
Baroness Dean of Thornton-le-Fylde
Baroness Falkner of Margravine
Lord Lester of Herne Hill
Lord Lexden
Baroness Taylor of Bolton
Baroness Wheatcroft

Examination of Witnesses

Mr Graham Gee, lecturer, Birmingham Law School, University of Birmingham, Professor Andrew Le Sueur, Professor of Constitutional Justice, University of Essex, and Dr Patrick O’Brien, Research Associate, University College London

Q1 The Chairman: I welcome the three of you to give evidence to the committee. This is the first session in which the committee will hear evidence on the office of Lord Chancellor. I also thank Professor Le Sueur and Mr Gee for their written evidence, which was received earlier this week. Lord Lang of Monkton is normally the chairman of this committee, but he is unable to be here today, for which he gives his apologies. He has asked me to chair the committee in his absence.

I will begin by asking a general question. The Constitutional Reform Act 2005—the important Act for our purposes—and various changes since that time have had significant effects on
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the office of Lord Chancellor. That Act provided that the Lord Chancellor has certain responsibilities with regard to judicial independence and the rule of law. As matters stand, does the office of Lord Chancellor have the necessary power or authority to fulfil those responsibilities?

Professor Andrew Le Sueur: Looking very broadly at the picture, I would describe it as one in which the Lord Chancellor has two general and distinct areas of activity. First, he is the designated minister for many hundreds of specific statutory powers and duties related to the courts, the tribunals, the legal profession, the judiciary, legal aid and so on. These have accumulated over time and are still changing. By my calculation, over the past eight and a half years some 73 Acts of Parliament have added or modified these very particular functions.

The other general function that many people identify is that the Lord Chancellor is the constitutional conscience of government: a phrase that was frequently used 10 years ago during the passage of the Constitutional Reform Bill. I would describe that as a non-statutory function and one that is not particularly well defined. It is notable that it is not mentioned in any of the key guides to the operation of government: it is not mentioned in the Cabinet Manual, the Ministerial Code or the Guide to Making Legislation. None the less, I am sure it exists.

Those are the two broad areas where the Lord Chancellor has functions.

The Chairman: My question is whether as matters stand today the officeholder has the necessary power and authority, and whether he is effective for that purpose—particularly the purpose of being the constitutional guardian.

Professor Andrew Le Sueur: There is a very important distinction between the two functions that I have described. As far as being a constitutional guardian is concerned, I have doubts as to whether things are as they once were. We have a Lord Chancellor now who is not a lawyer, who is in the House of Commons and who is in the middle rather than at the pinnacle of a political career. The whole context has changed. The authority of the Lord Chancellor often came from him having a different background compared with other ministers. That is no longer the case.

Graham Gee: I agree with Professor Le Sueur that things have changed and that the Lord Chancellor is no longer the pre-eminent guardian of constitutional values that pre-2003 Lord Chancellors might have been. That said, I think the Lord Chancellor retains an important constitutional role, but it is a role that is more obviously political. Lord Chancellors will be more reactive guardians of judicial independence in particular and less proactive. That is to say that whereas pre-2003 Lord Chancellors, by virtue of having more extensive judiciary-related responsibilities and more day-to-day involvement in the nitty-gritty decision-making relating to the courts and the judiciary—and thereby meeting senior judiciary more often—were better able at a very early stage in the policy-making process to articulate judicial concerns around the Cabinet table.

That sort of proactive guardianship is less likely to occur with Lord Chancellors today, but they can be effective reactive guardians. That is to say, they can respond to judicial concerns and to political concerns, particularly with committees such as this, in their role as a guardian of judicial independence in particular.
Dr Patrick O'Brien: I would probably answer the question slightly differently and say that the answer is not necessarily in the text of the Constitutional Reform Act 2005. Whether the incumbent will have sufficient power will not be a legal question but a political one: it will depend on who is occupying the office—as Professor Le Sueur said, a mid-ranking politician will perhaps have less authority over other ministries than a senior politician at the end of his or her career.

That said, a large part of defending judicial independence is bread-and-butter things such as: ensuring that the court system is properly funded; ensuring that the appointments system is properly regulated and operated; judicial complaints; and judicial discipline. In that sense, the conjoined part of the Lord Chancellor’s role—the Justice Secretary role—is what gives the Lord Chancellor the power. The Ministry of Justice is now a big department and has a big budget and a lot of responsibility. A Justice Secretary who chooses to pursue objectives that we would regard as furthering judicial independence and the rule of law will not find it too difficult to do so, provided that he or she is at the right stage of their career and is willing and able to do so.

I do not think that the answer is necessarily found in the constitutional format; it is a political question, not a legal one.

The Chairman: While the holding of this office no doubt gives power in once sense, does the holder have robustness to stand up to his colleagues and to stand up for matters for which he is responsible personally?

Dr Patrick O’Brien: Is that the current incumbent or incumbents generally?

The Chairman: We are not being personal here.

Dr Patrick O’Brien: But that is my point: it is dependent on personality, and it will depend on who the incumbent is. I do not think that giving the office more or less power will answer that question definitively.

Q2 Lord Lexden: Can you give any practical examples of action that the holder of the combined office has taken since it came into being that demonstrates the individual’s determination to uphold constitutional balance?

Graham Gee: Let me begin by pointing out some difficulties in establishing concrete examples with any certainty. Cabinet collective responsibility and the confidentiality of interactions between the senior judiciary and the Lord Chancellor mean that as outsiders we are necessarily reading between the lines and having to read some of the tea leaves. That said, I think we can find examples of what I see as the three main levels where Lord Chancellors can help to contribute to judicial independence and the rule of law.

The first is Cabinet relations. As you will be aware, there is a constitutional convention that ministers should refrain from criticising judicial decisions that are unfavourable to government and criticising the judges who deliver them. Relying on public statements by senior judges, relying on confidential interviews that Dr O’Brien, Professor Robert Hazell, Professor Kate Malleson and I have conducted over the last three or four years with senior judges, and relying on public statements by Lord Chancellors and private interviews with senior politicians and senior officials in the ministry, I think it is possible to identify a number
of examples. There are indications that both Jack Straw and Ken Clarke articulated concerns to ministerial colleagues who had criticised judicial decisions.

Also on Cabinet relations, Lord Falconer of Thoroton in 2004 and 2005 articulated judicial concerns about proposed changes to judicial pensions. In his memoirs, Jonathan Powell records that there were unusually heated disagreements about exempting the judges from changes that were being introduced more generally to pensions. Lord Falconer articulated and defended the judicial interest and prevailed on that matter, albeit that the Treasury in the last couple of years has recaptured that exemption. These are some of the examples that suggest that post-2003 incumbents have successfully articulated and prevailed at the level of Cabinet relations.

There are other levels where Lord Chancellors further judicial independence, and they include executive and judicial relations more generally. Five or six years ago, there was a serious shortfall in funding of the UK Supreme Court after Her Majesty’s Courts and Tribunals Services had not followed through on a contribution that it was due to make to the court’s funding. When the seriousness of that shortfall was made clear to the Lord Chancellor and his officials, the Lord Chancellor stepped in and made up that shortfall.

Finally, at the third level, the Lord Chancellor has an important role furthering judicial independence by supervising the judicial system as a whole and by reforming things like the courts service in 2011 and the Crime and Courts Act 2013. Both are ways in which Lord Chancellors have taken their responsibilities seriously.

Q3 Lord Crickhowell: Dr O’Brien mentioned the size of the department, and I want to pursue that. When I was in the Cabinet, the Lord Chancellor sat in a very small department based in this House but spoke with enormous authority in Cabinet. The Prime Minister, who did not always listen to every member of the Cabinet, listened with obedience to the Lord Chancellor’s remarks when he intervened. Now the Lord Chancellor also in his role as the Secretary of State for Justice presides over a substantial department with a substantial budget. One consequence, particularly at a time of financial restraint, is that he has to cut the budget of his ministry substantially, which may affect decisions that affect the judicial system and may therefore temper the line that he is likely to take in defending judicial independence.

Against that background, I would be interested to hear what you think the impact of that change has been. Some thought at the outset that being a large department might be helpful. I doubt whether that has necessarily been the case, and I would be interested to hear your views.

Dr Patrick O’Brien: We looked at the MoJ budgets for the next few years in light of their retrenchment, and we found that budgets for courts and the judiciary had done well compared with the other parts of the department; they had certainly had not fared worse. You have to accept that in the current climate some reduction of court budgets is inevitable, but I do not think the figures suggest any problem in that respect. Nor do I believe that the senior judiciary feel that they have done worse as a result of having been coupled with prisons and so on, although they are concerned perhaps for other reasons.
To return to my earlier point, the extent to which this might be a problem will depend on the personality of the incumbent, whether they are interested in penal reform, whether they are a dove or a hawk, and what their personal interests are.

**Q4 Baroness Wheatcroft:** I declare that I am a consultant to the law firm DLA Piper. Is not the root of this the inherent conflict between the roles of the judiciary and the Ministry of Justice? The roles are very different, and there will be occasions when they are in conflict. I believe that the Joint Committee on Human Rights saw there to be an inherent conflict there. There was the decision this weekend to close the Liverpool court, for instance, at a time when the President of the Supreme Court is in favour, or so he told us, of experiments such as that, but they are expensive at a time when money needs to go into prisons. Are we trying to balance some inherently difficult conflicts?

**Professor Andrew Le Sueur:** I agree with that. There are two forces here. On the one hand you want public accountability for the expenditure of public money and public interest in the administration of justice, while on the other hand you want a system that acknowledges the importance of judicial independence and the autonomy of the judiciary. The Constitutional Reform Act 2005 made provision for an incredibly complicated set of institutions that try to resolve these tensions. It is not just the Lord Chancellor; it is the various arm’s-length bodies: the Judicial Appointments Commission, HM Courts & Tribunals Service and the Judicial Appointments and Conduct Ombudsman. So you have the Lord Chancellor and the arm’s-length bodies, and then you have the judiciary, which has developed an internal governing structure with various specific judicial leadership roles in the form of the Judicial Office and the Judicial Executive Board. The whole system is trying to reconcile these conflicts which I agree are inherent in the system.

**Q5 Baroness Falkner of Margravine:** I am interested in judicial independence and the examples that Mr Gee gave. You talked about judicial pensions and Lord Falconer of Thoroton’s intervention, which I remember well. That intervention was rather public, but an issue about the terms and conditions of employment really should not have gone to the heart of what judicial independence is about. To me it seemed to be a work-related matter and seemed to sully the argument a little in terms of the examples that you put forward. Can you see the other point of view? It was more that he was being a trade unionist for the judges.

**Graham Gee:** One of the important differences that new-style Lord Chancellors can make is to discriminate between the legitimate concerns that are articulated under the rubric of judicial independence and the perhaps more spurious claims that are made to advance judicial self-interest. There have been occasions over the past 20 or 30 years where arguments on the latter, judicial self-interest, have been cloaked in the language of judicial independence. Judicial remuneration has been one of them, with the regulation of the legal profession and rights of audience for solicitors being another in the 1990s. The new Lord Chancellors, who do not necessarily have the same legal pedigree as old Lord Chancellors, and who under the Constitutional Reform Act are required to have regard to the need for the public interest to be represented in decisions affecting the judiciary, might be better able to challenge the senior judiciary on the robustness of the arguments that may be made with regard to judicial independence—pensions being one of them. In so doing, they may be able
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to help members of the judiciary to recognise, as increasingly they do, the importance of value for money—lame and uncomfortable though that phrase often is—along with efficiency and effectiveness in the running of the courts.

I turn to one matter regarding the department that was touched on earlier. Dr O’Brien has already suggested, and rightly so, that the courts have done well compared with other parts of the ministry. To my mind that suggests that the real concern about the size of the department is less about the budget and more about the staff. What worries me more is that although it is now a very large department, the number of staff dealing with judiciary-related matters is quite small. Many staff have been hived off to things like the Judicial Office to support the Lord Chief Justice and the Judicial Appointments Commission. My concern is that, in hiving off those staff, you also hive off expertise and a real and instinctive understanding of constitutional principles such as judicial independence and the rule of law. That has already happened, and indeed the Lord Chief Justice and the Judicial Appointments Commission may need the resources and the staff, but it is critical that the Lord Chancellor and his key officials remain engaged in judiciary-related matters to ensure that there is a shared constitutional understanding between the department and the arm’s-length bodies that are at the coal face of the judicial system.

The Chairman: Perhaps we may move on to another topic: the criteria for appointment.

Q6 Baroness Taylor of Bolton: I noted with interest what you said about a great deal depending on individuals. Section 2 of the 2005 Act states that the Lord Chancellor should be qualified and experienced, including experience as a minister, a member of the Commons or the Lords, a legal practitioner or a teacher of law in a university, or other experience that the Prime Minister considers to be relevant. That seems to be the most relevant phrase; in other words, the Prime Minister can choose whoever he wishes. Do you think there should be criteria for who should hold such a position, and if so, what criteria? When you say that it all depends on the individual, while we have not had very long at this, are there indications in as to whether there are problems if it is simply the whim of the Prime Minister?

Graham Gee: There should be criteria for all ministerial appointments. Ministers should be intelligent and industrious, they should have the ability to master a brief, and they should have the ability to command the confidence of their ministerial and parliamentary colleagues and stakeholders in whatever systems and networks with which they have to engage. Ought there to be specific criteria for the Lord Chancellor? I do not think so. The criteria set out in section 2 of the Constitutional Reform Act are meaningless.

The Chairman: Why do you think the criteria are set out in the first place?

Professor Andrew Le Sueur: I think the answer to that lies in the pages of Hansard in 2005. It was a last-minute attempt to encourage members of this House to desist from insisting that the officeholder should be a Lord and a lawyer. The clause was described by Dominic Grieve as “absolutely vacuous”, which is an assessment that everyone agrees is still apt. The complication, of course, is that we have two ministerial posts. We have the Secretary of State for Justice and the Lord Chancellor. Under current conventions and practices, one person occupies both posts. In relation to the Secretary of State, the Prime Minister will want to focus, if you like, on the abilities of a person to ensure delivery and effective policy-making across controversial areas to do with prisons, probation and criminal justice.
Baroness Taylor of Bolton: Do you think it matters whether the person is or has been a lawyer: that is, whether they have legal experience? You mentioned that these days the incumbent is more political and less likely to be proactive about constitutional issues. Do you think that legal experience has any bearing on that?

Professor Andrew Le Sueur: My view is that it is largely futile to attempt to draw up a person specification if what you are trying to do is ensure that coming out of the executive machine, you have policies and proposals for law and executive action that comply with constitutional principles. I do not think there is a strong and demonstrable link between the characteristics of the particular person occupying the role and the output, if you like, of the system. To focus on specific criteria for the person is to focus on the wrong thing.

Lord Crickhowell: Is there not a practical problem too that we are in an age when there are far fewer top lawyers in the House of Commons? They are relatively rare in comparison with what used to be the case. If, therefore, you insist on a lawyer, you might not be getting the most able people. Rather, you might simply be selecting from among who is available among the lawyers, and they might not include the person who you want to have in this important job.

Professor Andrew Le Sueur: I agree. I think I am right in saying that there are approximately 86 people with legal qualifications in the House of Commons, and only a certain proportion of them will belong to the government parties. You are curtailing the Prime Minister’s scope for choosing a person with all the characteristics that are needed if you insist that that person also has to be a lawyer.

Q7 Lord Lexden: When the position of Lord Chancellor was a separate office, it was inconceivable that anyone could have been appointed to it who was not a member of the House of Lords and who was not a distinguished lawyer. Why should that not still be the case when combined with another post? We live in times when the House of Lords is not exactly overrepresented in the Cabinet.

Professor Andrew Le Sueur: I return to the point made earlier about the democratic imperative. A big-spending department is generally seen as one that ought to be represented by the principal minister in the House of Commons.

Baroness Falkner of Margravine: I want to come back to the point about how there should be criteria for all appointments. One thing that was mentioned was intelligence. I imagine it would be difficult to find a metric that would satisfy the public that their politicians were intelligent. Leaving that aside, I want to come to an argument put forward by David Allen Green when he said, “the notion that a Lord Chancellor should be a lawyer is misconceived, for three reasons”. He goes on to say that the current responsibilities of the Lord Chancellor do not require the holder of that office to be a lawyer, so would you have him use a map? The second argument is that even if the office of Lord Chancellor was still exclusive to lawyer politicians, as Lord Crickhowell said, the great age of lawyer politicians is over. The final point is that it is now rare for any first-rate lawyer also to be in the first rank of politics. Given those points—David Allen Green notes that Lord Mackay of Clashfern and Lord Irvine of Lairg were not politicians before becoming Lord Chancellors—would you hold that having a lawyer as Lord Chancellor, in the light of the contra-argument that I have just put to you, pertains?
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**Dr Patrick O’Brien:** We are dancing around what I think is an important issue, which is the fact that the Justice Secretary and the Lord Chancellor have to be the same person for political reasons. As Professor Le Sueur said, on the one hand you have the constitutional guardianship function. He or she has to be the angel sitting on other ministers’ shoulders some of the time. We also have the ordinary and conventional political minister who has to deal with a big department. To say that the Lord Chancellor has to be a lawyer is to say that the Justice Secretary has to be a lawyer, which would limit application to a major government department for quite a lot of entrants. It would also say something rather special about the Justice Secretary as well as the Lord Chancellor, which is that the primary role is that of being the constitutional guardian rather than that of being a policy-making minister. A Prime Minister who wants to appoint a policymaker might not want a legal guardian who, not in all cases but in some cases, might be assumed to be inherently sympathetic to judicial or legal arguments and might be more recalcitrant about reform that would upset his or her peers. I think the judgment about whether the Lord Chancellor should be a lawyer should remain political as opposed to legal, depending on what is going on at the moment: that is, what the constitutional or the political zeitgeist is.

**Professor Andrew Le Sueur:** There are two possible reasons why we thought that having a lawyer was an essential characteristic of the old-style Lord Chancellor. One is that the old-style Lord Chancellor had a representative function. He was a judge at the Cabinet table and he could speak with authority as someone who sat as a judge and was the head of the judiciary. It was therefore essential that that person was a lawyer. That has now gone and we have new constitutional architecture. The Lord Chief Justice is head of the judiciary and the Lord Chancellor does not sit as a judge. That is no longer relevant. The other reason for wanting a lawyer was that it was thought that lawyers might bring into government a different set of values. Lawyers might have more sensitivity to the rule of law and judicial independence, which are different from the normal cut and thrust of mainstream politics. That was regarded as valuable. I would say that the better way of ensuring that those qualities are still taken into account in decision-making is to get the statutory framework right. Broadly speaking, section 3 of the Constitutional Reform Act 2005 does that. It requires judicial independence to be at the forefront of the activities of the now non-lawyer Lord Chancellor.

**Q8 Baroness Dean of Thornton-le-Fylde:** We are where we are. There does not seem to be any appetite for major legislation to separate the two roles again. However, there is an inbuilt conflict, and I agree with what was said by Baroness Wheatcroft. One of your former colleagues, Professor Dawn Oliver, has written regularly and quite recently about the need for this role to be placed in the House of Lords: putting it back where it was before. She argues that that is necessary because of the element of independence. The role of Lord Chancellor has never been seen to be political, so the requirement to have a legal qualification would, I guess, start to take us down the road of asking whether the Secretary of State for Health has to be a doctor or the education brief requires a teacher. That is not part of our political system. What is your view of the role of Lord Chancellor being put back into the House of Lords? There is still a body of opinion that says that it is wrong to have it where it is because the Secretary of State for Justice is a very political role, while the functions of a Lord Chancellor are not as political. It is about the barrier between the political world and the judicial world.
Mr Graham Gee, lecturer, Birmingham Law School, University of Birmingham, Professor Andrew Le Sueur, Professor of Constitutional Justice, University of Essex, and Dr Patrick O’Brien, Research Associate, University College London — Oral Evidence (QQ 1-15)

**Graham Gee:** That is a very interesting question. Some of the senior judges who Patrick and I interviewed as part of a project we were working on were of that view. One had worked closely with the ministry and one had done so prior to 2003. They said that what is more important than the Lord Chancellor being legally qualified is that he or she should be in the Lords. That train of thought can also be found among the senior judiciary, and Professor Oliver has reflected it. Professor Le Sueur is right to point out that the Ministry of Justice is a very large and big spending department with a politically salient policy portfolio. That makes it likely that there will be political pressure for the officeholder to be in the Commons rather than the Lords in order to inject democratic accountability into the running of the judicial system. That said, there are recent examples of peers heading large, high-spending and important departments: BIS and the Department for Transport come to mind. However, more important is that it depends on the individual. My preference would be that it is better to have someone with political clout, whether from the Commons or the Lords and whether they are a relatively experienced minister or one who has political clout by virtue of their standing in a department even though they are more youthful. They must have the political clout to shepherd this large department successfully, to stand up to ministerial colleagues where appropriate, including, if necessary, the Prime Minister. Ultimately, it depends on the political clout of the individual.

**Baroness Wheatcroft:** Might it be that one reason for thinking that a lawyer should do this job is because of the overriding issue of safeguarding the constitution? As we know in this committee, the British constitution is a complicated institution that is difficult to define, but nevertheless it is crucial. An important part of this role is to be the guardian of the constitution. I do not believe that it is essential to be a lawyer to do that, but to be independent of government on occasion must be important, and potentially one might have thought that that is more easily done from this House.

**Dr Patrick O’Brien:** We have guardians who are independent of the Government; we call them judges. I am not sure that the old Lord Chancellor, who was a judge, can really be compared with the new Lord Chancellor in that respect. If what is being suggested here is that there should be a Lord Chancellor who is separate from the Secretary of State for Justice and who is purely a guardian, I am not sure that that person, whether resident in the Commons or the Lords, would have sufficient political power to perform that role. He or she would simply be the annoying fly buzzing in other ministers’ ears telling them things they do not want to hear and will end up doing anyway.

**Baroness Wheatcroft:** He or she could be quite an important fly.

**Dr Patrick O’Brien:** Certainly, but what if the advice of the Lord Chancellor is not forthcoming or if it is possible to ignore it? I am sure that it would be for a lot of the time by a headstrong or recalcitrant minister. Someone performing that role would have to be a heavy hitter, and I think that someone who was simply performing a guardianship role would have very little political power to draw on.

**Q9 Baroness Dean of Thornton-le-Fylde:** One of the issues that was never questioned when the role was seated in the House of Lords was that the person who carried out that function was not part of the day-to-day political ambitions of the heavy hitters you are talking about—those who are climbing the greasy pole. It was known and accepted that the role of
Mr Graham Gee, lecturer, Birmingham Law School, University of Birmingham, Professor Andrew Le Sueur, Professor of Constitutional Justice, University of Essex, and Dr Patrick O’Brien, Research Associate, University College London — Oral Evidence (QQ 1-15)

Lord Chancellor was the last function that person would undertake. They could not go back to the law. They were not looking out for their own ambition. Now that the role has been combined with that of the Secretary of State for Justice, some people have expressed the view that we are talking about a politician whose career is possibly one of their top priorities. Does that mean that the independence of the judiciary might be compromised because they are one of the normal people? That is a topical point at the moment because we are in the middle of a Cabinet reshuffle. There is a chance that they will be out. That would never have happened before.

Professor Andrew Le Sueur: I am not sure it never happened.

Baroness Dean of Thornton-le-Fylde: They were moved, I agree, but not to a role as a minister in another department. It was not part of their ambition or career plan.

Professor Andrew Le Sueur: No. The events of 2003 when Lord Irvine was removed from office provide a clear illustration of the power of the Prime Minister to remove someone from the Government whom the Prime Minister felt was not sympathetic to the direction of government policy.

Baroness Dean of Thornton-le-Fylde: I am not questioning that. My question is that if the individual holding the position is a politician in the sense that they have a career path that they want to follow, being a Secretary of State for Justice is a step on that career path. The role of Lord Chancellor was not seen as part of a career path. Can you tell us whether there is a contradiction in that?

Professor Andrew Le Sueur: I think there probably is, and it would be possible to turn the clock back. One of the models that was discussed during the passage of the Constitutional Reform Bill was that we might slim down the responsibilities of the Lord Chancellor and have a sort of minister for judicial affairs who would not be responsible for large areas of spending. You might remove legal aid from the ambit of that minister. He would become more of a constitutional link, probably in this House, between the judiciary and the Government. But in the grand scheme of ministerial posts, it would probably be recognised that that would not necessarily be one of the great offices of state any more. It would be a relatively junior ministerial role, and I am not sure that would work.

Dr Patrick O’Brien: To go back to your question, I do not think we should necessarily assume that because the Justice Secretary/Lord Chancellor is now more of a political person there is therefore a threat to judicial independence. That is making a leap. Plenty of other countries around the world function perfectly well without a Lord Chancellor and with justice secretaries who are capable of grasping—perhaps with good advice for much of the time—the limits of their functions and what they should and should not do. In a lot of other countries it is the Attorney General who performs this role: that is, as the adviser to the government. I do not think we should assume that the death of the role of the old Lord Chancellor is in and of itself a threat.

The Chairman: So you do not think that if a Secretary of State for Justice had hopes of future preferment, he might be reluctant to take a firm stand with his colleagues when he thought something was on the horizon that was not in accordance with the rule of law.

Graham Gee: I think that is a weakness of the current arrangements. One senior politician who we spoke to articulated that concern by saying that it is difficult to stand up to the
Prime Minister, on whose patronage you depend. We need to have realistic expectations of Lord Chancellors. I would argue that they can defend constitutional values and judicial independence in particular. I tried to give the committee some examples earlier. However, that does not mean that they are going to do that perfectly, that they will be proactive all the time, or that they will behave systematically. No guardian does. This committee is a very important constitutional guardian, but there are limits to its ability to uphold constitutional values. Fortunately, this committee is one of several actors in our institutional landscape who are charged with and take seriously their responsibility to contribute to the realisation of constitutional goods. So too is the Lord Chancellor, but we must limit our expectations of the occupant of that role, bearing in mind that there are other actors in the Government who can further the rule of law and judicial independence: the Attorney General, the Treasury Solicitor’s Department and government lawyers. Also today, which is a marked difference from before 2003, there are many arm’s-length bodies on the judicial landscape who can articulate concerns: the Lord Chief Justice, the Judicial Appointments Commission and HMCTS. These bodies can provide compensation for the admittedly reduced robustness of the Lord Chancellor’s role today.

Q10 Baroness Taylor of Bolton: Mention was made a moment ago of the Attorney General. In some respects, and certainly in the circumstances of conflict, he has a role of being the constitutional conscience by saying whether something can be activated. Is there any way in which you would see the Attorney General potentially playing a greater role as the constitutional conscience?

Graham Gee: We spoke to several people during our project who were familiar with the workings of recent Attorneys General. From time to time Attorneys General have, for example, reminded ministerial colleagues and parliamentary colleagues when they have gone too far in their comments about judges. That is an important way in which Attorneys General play that constitutional role. They also have trilateral meetings with the Home Secretary, the Lord Chancellor and the Secretary of State for Justice, which provide the opportunity for the Attorney General, who might be more closely attuned to concerns in the judiciary and the Bar, to articulate them to his ministerial colleagues. I do not have a clear sense of how co-ordinated that interaction is. Again, I think it is quite person-dependent. I would welcome a clearer articulation of the potential role of the Attorney General to serve as the constitutional guardian in things like the Ministerial Code and the Cabinet Manual. Perhaps this committee will articulate that role in its report if it felt so inclined.

Professor Andrew Le Sueur: The Cabinet Manual makes specific reference to the role of the Attorney General as having responsibility for the rule of law. The same document does not make any mention of the Lord Chancellor’s role in that regard.

Q11 Lord Brennan: I think we must bear in mind that there are different levels of constitutional literacy in the executive. The work that the Lord Chancellor would have to do, as we have discussed, is going to be dependent to a considerable extent on the civil servants at the time. So when we think about the future of the Lord Chancellor’s position, will section 2 of the Constitutional Reform Act provide an effective framework for the responsibility of looking after judicial dependence, as Professor Le Sueur says? Let us move on from that for a moment.
Section 1 talks of “an existing constitutional principle of the rule of law” and of “the Lord Chancellor’s existing constitutional role in relation to that principle”. It is almost an overarching general public duty in respect of the rule of law.

Section 3 is about justice in particular. Before I ask my question I want to emphasise that the duties under section 3 turn the Act to things that are positive and must take a long time. They include the administration of justice and the public interest, not just judicial independence. If, by statute, Parliament has declared these to be of such priority, surely if it is not the Lord Chancellor, somebody has to be ministerially responsible for these things. If it is not the Lord Chancellor, I am quite taken by your point about a minister for judicial affairs, and I disagree that it would become a junior ministerial post and that he would be given limited powers. But let us suppose such a minister, adopting the same oath and the same ministerial duties that we already have, and extend it if you need to. If we had such a minister, would it not be of considerable constitutional advantage for that minister to be required by statute to report annually to Parliament on the state of the constitution and his or her performance of their responsibilities, or would that be a barrier? That would inform Parliament, the country and the executive about the legal principle of the judges, complemented where necessary by the Attorney General.

Professor Andrew Le Sueur: I am very attracted by the idea of a requirement to make an annual report, and indeed under the Courts Act 2003 the Lord Chancellor has a requirement to lay before Parliament a report every year on the performance of functions in relation to the courts. The Constitutional Reform Act 2005 was intended to separate out powers. What I do not think it did sufficiently was build in channels of communication. The judges were taken out of this House and they no longer had the ability to speak on the floor of the House. We have developed a practice of judges appearing quite regularly in front of select committees, so we have re-established channels of communication that are different from the old ones. In that context annual reports could be an important contribution in making accountability systematic. They would give committees such as this one something to talk about when the Lord Chancellor or a relevant minister appears before them, and they would enable Parliament to track concerns over time. Many issues to do with the rule of law and judicial independence might not be to do with particular episodes but with how things develop over time. A series of annual reports and scrutiny of them could help to bring that to public knowledge.

Graham Gee: I agree. I would welcome a requirement for the Lord Chancellor to produce an annual report, but I think it is important that a similar obligation is place on the Lord Chief Justice, because while it is true that the Lord Chief Justice has produced a report from time to time over the last nine years, he has not done so annually. In light of the extensive obligations now exercised by the Lord Chief Justice, it is important that any statutory requirement placed on the Lord Chancellor should also be placed on the Lord Chief Justice to produce such a report. The absence of that requirement and the absence of annual reporting by the Lord Chief Justice is a real gap in the accountability system.

I am less attracted to the idea of a minister for judicial affairs, because we already have one. He is called the Lord Chancellor and the role is combined for the time being with the role of Secretary of State for Justice, so I see no real advantage from having a separate—and, I agree, a likely more junior—ministerial role.
Q12 The Chairman: Looking at the proposals in your written evidence, you are for the abolition of the office of Lord Chancellor and the transfer of the functions of that office to the Secretary of State for Justice. I am concerned about what has happened to section 1 of the 2005 Act. I appreciate that it still applies, as far as you are concerned, to judicial independence, but what has happened to it with regard to the rule of law?

Professor Andrew Le Sueur: I am rather sceptical as to whether the Lord Chancellor in reality performs this role as the constitutional conscience of government with a wide-ranging remit across all departments beyond the Ministry of Justice. What happens within government happens in a black box. Academic experts are, I think, more likely to be aware of failures, because they bubble to the surface and emerge later. But it seems to me that the Lord Chancellor is not particularly well equipped to act as this rule of law guardian, and there are a number of points where the system could fail. The system can work only if the issue is brought to the attention of the Lord Chancellor, either in Cabinet or by the Prime Minister. Often many rule-of-law issues are dealt with entirely within a department and do not come across the Lord Chancellor’s radar. The Lord Chancellor has to agree that there is a rule of law issue. One of the big rule of law issues of the past decade was the ouster clause in the Asylum and Immigration (Treatment of Claimants, etc.) Bill. Lord Falconer of Thoroton simply did not see that as a rule of law issue. So the idea of what the rule of law is can be contested. The Lord Chancellor’s fellow ministers have to agree with the Lord Chancellor, and I think that often for political reasons they will not. Ultimately, the guardian is a weak one because the Lord Chancellor can be removed from office by the Prime Minister.

Lord Brennan: So section 1 is not effective.

Professor Andrew Le Sueur: Section 1, so far as I recall the legislative history, was thrown in at rather the last minute, because there was a view that something had to be said about the rule of law. It is a little like the section 2 characteristics of eligibility for office. I am not sure that it means a lot.

Q13 Lord Lester of Herne Hill: My question is informed by my view that what matters more than structures is people. You can perfectly well have a Lord Chancellor like Roy Jenkins, who was not a lawyer but had great integrity and independence, and you can have someone who is a lawyer who is incapable of holding the office because he lacks the culture. Leaving that to one side, what is your view about the attempt, when Gordon Brown was Prime Minister, to make the Attorney General independent of government, as in Ireland, Cyprus and Israel, in order to tackle the problem that Lady Taylor was asking about: how to build in a really independent chair? As you know, some of us feel—my party probably does, and certainly I do—that there was a lot to be said for changing the role of the Attorney General so that he or she is no longer split between being the guardian of the public interest and a member of the Government. What is your view about that?

Professor Andrew Le Sueur: I agree entirely that the two issues—the future of the office of Lord Chancellor and the future of the office of Attorney General—need to be considered in tandem, because they have overlapping responsibilities for the rule of law.

As to whether we should cease having a politically appointed Attorney General, I can see merit in that view. That, of course, is a whole different inquiry: indeed, I think this
committee carried out an inquiry into the future of the office of Attorney General some years ago and was unable to reach a conclusion.

Q14 Lord Crickhowell: I was struck by your remark, Professor Le Sueur, that very often the rule of law is subservient and does not rise above the horizon, so to speak, as far as the Lord Chancellor is concerned. Does that not emphasise the importance of the proper functioning of Cabinet government? When Cabinet government is being properly operated, almost any important changes or proposals are circulated around departments. I recall that the Lord Chancellor in my day attended and was a member of the key Cabinet committees, and had many opportunities to intervene, and frequently did intervene, on rule of law issues during those discussions. Of course if Cabinet committees do not operate and you have sofa government, the system breaks down, but with full Cabinet government operating, that itself is important in the effective protection of the rule of law. Am I right or wrong?

Professor Andrew Le Sueur: I entirely agree. Many of the assumptions about the role of the Lord Chancellor as the constitutional conscience of government are exactly as you say: premised on the idea that matters are discussed fully at Cabinet meetings or in Cabinet committees where the Lord Chancellor is present. If the Lord Chancellor does not know about issues because he is not at the relevant meetings or if key issues are not put on to the relevant agendas, that constitutional conscience role cannot operate effectively.

Baroness Taylor of Bolton: As a slight tangent to that, we have talked about the rule of law, which is important—indeed, paramount—in this discussion. I am prompted partly by what Lord Crickhowell was saying from memory about Cabinet committees. My memory of Lord Irvine as Lord Chancellor was that he was very active in Cabinet committees and talked not just about the rule of law but about wider constitutional issues. We are at a time when quite a few constitutional issues are on the horizon; we already have the separation referendum in Scotland, matters about the European referendum, federalism or whatever. There is a dimension there that is not strictly the rule of law; it is the constitutional overview that somebody in government needs to take. In the past the Lord Chancellor has fulfilled that kind of role as well.

Lord Crickhowell: Lord Hailsham of St Marylebone pursued all those kinds of issues vigorously. He was a very active member of Cabinet committees.

Lord Lexden: As an addendum to that, may I point out that under this Government the responsibility for constitutional reform has been based specifically in the hands of the Deputy Prime Minister, as against the previous Ministry of Justice position that the Lord Chancellor had full responsibility for constitutional matters? Perhaps you could comment on that in your reply.

Graham Gee: I think that current and recent Lord Chancellors have not fulfilled the wide-ranging constitutional supervisory role that Baroness Taylor sketched out, and are perhaps unlikely to do so. My sense is that the game and the rules have changed and that in trying to make this new office as effective as possible we might be better served by trying to narrow its focus to the judiciary-related responsibilities and to imbue in that office a real and meaningful obligation to defend judicial independence inside government where appropriate. Narrowing rather than seeking out unrealistic, wide expectations might be better. I say that because the broad thrust of the research that Dr O’Brien, I and others have
been doing suggests that the real long-term threat to judicial independence vis-à-vis the Lord Chancellor does not come from excessive interference in day-to-day decision-making but derives from excessive neglect and a lack of engagement. So a narrow focus on judicial independence might be a better way to ensure that Lord Chancellors take their responsibilities seriously.

The Chairman: Does any member of the committee have any final question to put to the witnesses? Have any of the panel any further comments that they wish to make?

Dr Patrick O’Brien: I want to add that we have danced around another part of the problem, which is the role of judges. One reason why the old Lord Chancellor had a lot of authority was because he invariably had the authority of the judiciary. It is possible for the judiciary to be their own Lord Chancellor in this new environment, particularly by speaking to committees such as this. The Lord Chief Justice has power to make representations directly to Parliament if he perceives there to be a problem. That is another component.

Q15 Lord Lexden: Perhaps before we break we could have a comment on the passing of responsibility for constitutional reform to the Deputy Prime Minister.

Professor Andrew Le Sueur: For a few years we had a Department for Constitutional Affairs. I thought it was a rather good idea to have a department that had the constitution as its focus, alongside the judiciary-related matters.

Lord Lester of Herne Hill: Thank you very much. Could I suggest that you reflect on paragraph 60 of the judgment of Sir Alan Moses and two other judges yesterday in deciding that the residence test was unlawful; the comment on the current problem between the courts, the Lord Chancellor and Parliament is worthy of note?

The Chairman: Thank you all very much for your attendance; it gave us much to think about.
What are the current functions of the Lord Chancellor, as distinct from those of the Secretary of State for Justice?

1. The current policy remit of the Lord Chancellor includes responsibility for matters relating to the judiciary (including appointments, conduct, terms and conditions and pensions); courts and tribunals; coroners; civil, family and administrative law; legal aid; legal services and the legal professions; public records and the Crown Dependencies. The Secretary of State for Justice’s policy responsibilities include prisons and probation, criminal law, sentencing policy, human rights, data protection and freedom of information.

2. Some of these functions are conferred by statute: others result from machinery of government changes. They are underpinned by a range of legislative powers and duties.

3. The Lord Chancellor has a number of largely ceremonial functions deriving from his role as keeper of the Great Seal including presentation of the Queen’s speech at the State Opening of Parliament and the service marking the opening of the legal year. There are also a number of residual ecclesiastical functions attaching to the office. A fuller account of the history and functions of the role can be found in the Commons Library Standard Note on the Role of The Lord Chancellor of 7th July 2014.

To what extent are those functions genuine powers, and to what extent are they nominal powers?

4. Although some of the functions of the Lord Chancellor may be regarded by some as more important than others, and some are exercised jointly with other office-holders, there is no doubt that the functions are “genuine” and that some entail the exercise of significant statutory powers.

How in practice does the Lord Chancellor uphold the rule of law and judicial independence?

5. All ministers have a duty to comply with the law and to uphold the independence of the judiciary. In carrying out his functions as both Lord Chancellor and Secretary of State for Justice, the Lord Chancellor is always mindful of the need to act within the law.

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25 SN/PC/02105
26 Reflected in the Ministerial Code, the Civil Service Code and lawyers’ professional codes of conduct
27 Sections 3(1) and (5) of the Constitutional Reform Act 2005

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6. The Lord Chancellor has specific duties by virtue of his statutory duties and his oath of office under the Constitutional Reform Act (CRA) to respect the rule of law. The rule of law plays an integral part in policy formulation and operational management in the Ministry of Justice in practice.

7. The Lord Chancellor has a specific duty to have regard to the need to defend judicial independence and for the public interest, in regard to matters relating to the judiciary or the administration of justice, to be properly represented in decisions. Judicial independence is upheld through defence of the judiciary from unwarranted criticism. As the present Lord Chancellor said at the Annual Judges Dinner in July 2013:

“I see it as my job to defend the judiciary against unwarranted attack.”

8. The Lord Chancellor also upholds judicial independence by maintaining a clear, transparent and independent judicial appointments process and ensuring the proper administration of the courts and tribunals service, in partnership with the Lord Chief Justice and Senior President of Tribunals. The Lord Chancellor has regular meetings with the Lord Chief Justice, the President of the Supreme Court, the Senior President of Tribunals and other members of the senior judiciary.

9. The Lord Chancellor has a statutory duty to provide the support necessary for the judiciary to perform their functions and to ensure there is an efficient and effective system to support the business of the courts. This duty is discharged in conjunction with the senior judiciary as reflected in the HM Courts and Tribunals Service Framework Document 2014.

Are the offices of Lord Chancellor and Secretary of State for Justice best performed by the same person?

10. Whether the roles are best combined or separated is a matter for the Prime Minister. Since 2007, when the Ministry of Justice was formed, the roles of Lord Chancellor and Secretary of State for Justice have been held by the same person.

11. There have been no practical disadvantages to the Lord Chancellor and the Secretary of State being the same person. An advantage of a combined office is that the judiciary have a strong voice within government to communicate their concerns. The Lord Chancellor’s executive responsibilities for courts, tribunals and legal aid combine well with those of the Secretary of State for Justice. It was a logical step during a programme of constitutional reform to bring these functions under a single

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28 Sections 1, 3 and 17
29 Section 3(6)
31 Section 3(6)(b)
32 Section 1 Courts Act 2003
33HM Courts & Tribunals Service Framework Document July 2014 Presented to Parliament by the Lord Chancellor and Secretary of State for Justice by Command of Her Majesty July 2014 Cm 8882
umbrella for the provision of an effective and efficient justice system. There are advantages in having responsibility for the justice system as a whole in one department and this operates well in practice.

Can judicial independence and the rule of law be defended in Cabinet by a minister responsible for wider departmental policies and budgets, which may point to different priorities? Is an independent voice required?

12. All departments have to deal with competing spending priorities. At any period, a Lord Chancellor would have had to make difficult spending decisions. This is the case regardless of whether the officeholder had additional ministerial responsibilities or held office before or after the CRA. Prior to the reforms introduced in the CRA the responsibilities of the Lord Chancellor were significant, and included responsibility for an efficient and effective court system, and imperatives such as the need to determine goals, to modernise systems, balance efficiency and effectiveness, and provide budgetary accountability. The need to take difficult decisions does not arise from the conferral of wider justice responsibilities on one person. Any minister responsible for courts and legal aid would have had to make difficult spending decisions in respect of these functions and justify them to government colleagues.

13. Since the CRA, the duty to uphold judicial independence and the rule of law has been defended by Lord Chancellors who have been both a Cabinet Minister and Secretary of State for Justice. The Lord Chancellor has not been constrained in representing the views of the judiciary in Cabinet and defending judicial independence by virtue of having wider Departmental and budgetary responsibilities.

14. In his evidence to this inquiry Lord Judge stated his view that on balance “the judiciary is probably better served by a Lord Chancellor, who recognises his responsibility, who has the personality and strength of character to get across to his colleagues that he is at this moment exercising his function as Lord Chancellor and who is nevertheless in charge of a large Department”.

15. This matter was considered by Parliament in the debates on the CRA. Under that statute, the decision ultimately remains one for the Prime Minister recognising the importance of the office and the Prime Minister’s ability to choose any suitable person, from either House, who has the right qualities.

How effective have the criteria for appointment as Lord Chancellor in section 2 of the CRA been? What does it mean for an appointee to be “qualified by experience”?

15. This matter was considered by Parliament in the debates on the CRA. Under that statute, the decision ultimately remains one for the Prime Minister recognising the importance of the office and the Prime Minister’s ability to choose any suitable person, from either House, who has the right qualities.

16. The statutory criteria were considered in great detail during the parliamentary debates on the CRA. The conclusion of those discussions is reflected in the CRA.

What are the advantages and disadvantages of the office of the Lord Chancellor being held by a lawyer?
17. Parliament has made it clear in the CRA that either a lawyer or non-lawyer can fulfil this role.

18. It is unnecessary for the office of the Lord Chancellor to be held by a lawyer now that the post holder is no longer the head of the judiciary or entitled to sit as a judge. It has never been the responsibility of the Lord Chancellor to provide legal advice to other Cabinet colleagues; that is for the Law Officers.

19. As has always been the case, the office holder has access to specialist legal advice in respect of his own functions. No single person, lawyer or not, would have the breadth of knowledge, skills or training to cover the range of responsibilities without access to such advice.

20. As the Government response to the Constitutional Affairs Select Committee’s Report of 2005 stated: ‘The key qualities the office-holder should possess are political courage and sound judgement. Legal qualifications will not guarantee that the office-holder has these qualities, nor that they are appropriately deployed.’ 34 This assertion remains true today.

Should the Lord Chancellor be someone who when appointed does not seek further ministerial advancement? Should he or she be a member of the House of Lords?

21. This was debated in 2005 when the Constitutional Affairs Select Committee stated that ‘the ability to uphold the rule of law and independence of the judiciary will depend more on the abilities and standing of the person appointed than on whether the Secretary of State for Constitutional Affairs is a member of the House of Lords or the House of Commons’. It went on to say that it is a matter for the Prime Minister to choose the best person for the office, taking into consideration the different skills, different elements of the office will require. They also said that ‘it can equally be argued that a career politician may more forcefully defend the rule of law and independence of the judiciary to prove their ability’ 35.

Should there be a Lord Chancellor? If so, what should be his or her functions? If not, who should perform those functions?

22. This is a question for the Prime Minister, but it is apparent that the Lord Chancellor’s current policy responsibilities need to be entrusted to a member of the Cabinet. The Government is not aware of any compelling evidence that current arrangements and safeguards are not adequate.

23. Previous attempts to abolish the office of the Lord Chancellor in 2003 demonstrated the difficulty and legal complexity of doing so.

35 Published at: http://www.publications.parliament.uk/pa/cm200405/cmselect/cmconst/275/27502.htm
36 An academic summary of the difficulties faced by the government of the time can be found at: http://constitution-unit.com/2013/06/20/john-crook-the-abolition-of-the-lord-chancellor/
WEDNESDAY 15 OCTOBER 2014

Members present
Lord Lang of Monkton (Chairman)
Lord Crickhowell
Lord Cullen of Whitekirk
Baroness Dean of Thornton-le-Fylde
Baroness Falkner of Margravine
Lord Lexden
Baroness Taylor of Bolton
Baroness Wheatcroft

Examination of Witnesses

Rt Hon Chris Grayling MP, Lord Chancellor and Secretary of State for Justice, and Rosemary Davies, Legal Director, Ministry of Justice

Q43  The Chairman: Lord Chancellor, may I welcome you to this sitting of our Committee and the inquiry we are carrying out into the Lord Chancellor’s office? I stress to you—as I have to others and as the Committee has agreed among ourselves—that this is not an inquiry into the person of the Lord Chancellor. This is an inquiry into the office, and we intend to stick to that approach. I understand you do not feel the need to make an opening statement, so we will press on with the questions. First of all, how do you define the role of Lord Chancellor as distinct from the role of the Secretary of State for Justice?

Chris Grayling: I think the Lord Chancellor’s role has two distinct facets to it. There are administrative functions, which I will come back to but, in terms of the overall, what is the role? First, I would describe it as having a stewardship role over the judiciary and over the justice system. The Lord Chancellor is no longer the most senior judge; no longer has a management role over the judiciary; no longer carries out judicial appointments; no longer has detailed responsibility for judicial discipline. The Lord Chancellor’s role, in relation to the justice system, has the job of being the defender of the independence of the judiciary in
government, and hence I talk about the stewardship role—a stewardship role over disciplinary matters whereby I am one of the co-signatories of disciplinary decisions but ultimately I would not seek to interfere. There are occasions when I might send something back and say, “Are you really sure?” but very rarely. Over judicial appointments likewise there is the ability to say, “Are you really sure?” but it is a stewardship role to make sure that the ship is sailing smoothly rather than a management role.

The second part is the role that the Lord Chancellor continues to play in relation to the Crown where, again, it is a ceremonial role, a stewardship role, with responsibility for Crown appointments, responsibility for a number of Crown orders and responsibility for legislation in the Channel Islands, for example. Ceremonial positions are not things you would normally seek to interfere in. You would not send back a royal charter and say, “No, I do not agree with this”, but there is a ceremonial role as an officer of the Crown in performing a number of functions that continue to need to be performed. I think those are the things that are genuinely distinct in the role of Lord Chancellor.

Then the question obviously arises: how does that mesh in with the role of Secretary of State for Justice, and how do the functions that sit under the departmental umbrella divide between the two? If you look back at the legal position, the Lord Chancellor has titular responsibility in primary legislation for the courts, for the legal aid system, for a number of parts of what the Ministry of Justice does. Equally, there are a number of ways in which the department has delivered economies of scale by having an integration of the different functions—one Permanent Secretary, for example—where the responsibilities move both sides of the divide of the job. But I think if you are saying, “What are the really distinctive features of the Lord Chancellor’s role?” it is that stewardship role over the justice system and it is the ceremonial role performed on behalf of the Crown.

The Chairman: Could we not add to that a role as custodian of constitutional values?

Chris Grayling: Of course, to some extent the constitutional role of the department moved to the Cabinet Office, in fact I think in the last Parliament. The traditional role of the Lord Chancellor in, for example, shaping constitutional settlements or constitutional reforms in this country has now passed to the Deputy Prime Minister of the current Government. The proposed reforms to our constitutional arrangements, the debates about changing our voting system and the debates about the House of Lords sat within the Cabinet Office rather than within my department. The truth is today the constitutional role that the Lord Chancellor once performed, in a very practical sense, is not currently there.

In so far as there is an important element of our constitution, which is the relationship between Parliament, the Executive and the judiciary, yes, there is a role. That is where I talk about the stewardship role over the judiciary, the independence of the judiciary and the integrity of the justice system, which is a very important part of what I do. If you moved on to, say, the role of constitutional guardian, facilitator of change to our constitutional arrangements, that is really now with the Cabinet Office.

The Chairman: I was waiting in the hope of hearing you add to that list the upholding of the rule of law, your oath.

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37 The Lord Chancellor has pointed out that responsibility for a number of constitutional matters (including elections, party funding, relations with Parliament, devolution, House of Lords reform) was transferred by the current Prime Minister from the Secretary of State for Justice to the Deputy Prime Minister in June 2010.
Chris Grayling: When I talk about stewardship of the independence of the judiciary and independence and integrity of our justice system, that is what I mean. What I would say though, Lord Lang, is that I regard the task of upholding the rule of law as not being something that simply resides with the Lord Chancellor. It is something that resides with every government Minister and I hope every Member of both Houses of Parliament. Yes, of course, it is an important part of what I do, but it is an important part of what all of us do, in my view.

Q44 Lord Cullen of Whitekirk: I would like to ask you about the rule of law. The written evidence from your department, the Ministry of Justice, states: “The rule of law plays an integral part in policy formation and operational management in the Ministry of Justice in practice”. I would like to ask you by what means issues to do with the rule of law are identified and addressed within your department.

Chris Grayling: Well, really I think in the interaction between the policy teams, the ministerial team and the legal teams that we have working with us. We have long discussions about how best to shape what we do, but also discussions about how to ensure that we protect what I described earlier, the integrity of the justice system. For example, we have had long and difficult debates about judicial pensions in recent times. One of the important things that we had to ensure is that nothing in the changes that we had to make, because of financial pressure, could create a situation where the Executive or Parliament had the ability to exercise leverage upon the judiciary by saying, “If you do not do this, we will cut your pay or your pensions” or whatever. It is a difficult balance to find. One of the things you think through very carefully as you shape a reform, like the reforms we have put through to judicial pensions, is how we ensure that, in a time when there is less money to go around, we do not create the kind of levers that should never be there that enable a Minister to exercise pressure on a judge on an individual decision by using financial leverage.

Lord Cullen of Whitekirk: When it comes to formation of a particular policy, is there a routine search to see whether there is a rule of law issue, or does that surface only if somebody spots something that is, in fact, a rule of law issue?

Chris Grayling: It depends on your definition of a rule of law issue. We will make reference to all the different areas that we are obliged to follow. We do the various assessments required of us under equalities laws. We look at what is necessary under statute, custom and practice on consultations. We seek in the policies that we develop to ensure that we pursue a strategy that is consistent with the rule of law. Were we to bring forward a major change, we would clearly ask questions upfront about whether there was anything in what we were doing that was inconsistent with the rule of law.

Let me give you a practical example. We are embarking on what will be one of the biggest reforms to the court system in a very long time. The modernisation of the court system, with the generation of new technological systems to improve process, to improve access to the courts and to make it easier to launch and manage proceedings, will involve very substantial changes to the court estate, to court infrastructure, to court IT and to working practices. A central part of that will be to ensure that, nonetheless, what we shape protects the rule of law and protects access to justice in the way that you would want and hope.

Lord Cullen of Whitekirk: In practice in the past has there been any difficulty in identifying an issue that is an issue to do with the rule of law, or has it always been plain sailing?
Chris Grayling: If you take the example that I think was possibly on your list, we regularly have to take fine decisions about whether difficult decisions that we need to take are going to be judged by the courts to be lawful or not—and we sometimes lose judicial reviews—but we do so based on the best evidence that we have, the best legal advice that I have, and the best judgment of what is right and fair and what is not. Sometimes we are right and sometimes we are wrong. We are only human.

Q45 Lord Cullen of Whitekirk: One other question, if I may. Does your particular role enable you to convey to the Cabinet, or to Cabinet committees, any concerns that you have, as Lord Chancellor, in regard to matters to do with the rule of law?

Chris Grayling: Yes, it does. Let me give you an example of where that can and does apply. I think it is entirely fair for a government Minister involved in a case to say, “I disagree with what the court has ruled in that situation”—often prior to launching an appeal—and I think it is perfectly reasonable for the Attorney-General to say, “I am not happy that the sentence passed in a criminal court is adequate” and, therefore, to refer it back through the processes for unduly lenient sentences. But I do not regard it as acceptable for a government Minister to say, “That judge was bloody stupid. That was an idiotic decision”. In such a situation, I would always take the Minister concerned to one side and say, “That is not acceptable”. We have judges who—rightly—are independent. They have every right to reach the decisions that they reach, whether or not we disagree with those decisions. An integral part of the system that we have is that our judges are free and independent to take their decisions on the basis of the law in front of them. Sometimes the public and sometimes politicians will agree with them and sometimes we will not. That is all part of the way our system works, but, in my view, what we should never do is attack judges for reaching the decisions they have, in a way that denigrates the nature of the office they hold and the process they are part of. In a situation like that, I would have no compunction but to take a colleague to one side and say, “You should not do that”.

Q46 Baroness Dean of Thornton-le-Fylde: May I press that point a bit further with you, Secretary of State? You said you would take the Minister or the politician on one side and tell them. With your hat on as Lord Chancellor, would you not feel that that should be a public rebuttal? Then it would be clear that that was your position as Lord Chancellor, rather than taking them on one side and telling them privately, about which the world would never know.

Chris Grayling: I think it would depend on the situation. Fortunately, the situation has not arisen where I have had to take that kind of decision. Are there no circumstances in which the Lord Chancellor would have to publicly defend the independence of the judiciary? Of course there are circumstances in which that could happen and I would have no reticence in doing so. It is a matter of degree. Yes, of course, if the independence of the judiciary was seriously being questioned by a member of the Government, of which I am a part, I would have no compunction about saying publicly that that should not happen.

Baroness Dean of Thornton-le-Fylde: Secretary of State, since your appointment in September 2012, have you found it necessary to speak to any Ministers privately about public statements they have made?

Chris Grayling: I can think of one occasion when I did say something, but I do not think it would be appropriate for me in that situation to indicate when and how that was the case.
Q47  **The Chairman:** Before we go any further, I owe an apology to your colleague, Rosemary Davies, Legal Director at the Ministry of Justice. I should have welcomed you also. Would you like to add anything to what the Lord Chancellor has said so far?

**Rosemary Davies:** May I just add something in response to Lord Cullen’s question about how the rule of law issues are identified in practice? Looking at the wider rule of law issues, beyond the Lord Chancellor’s particular responsibilities about the independence of the judiciary, what we were getting at in that bit of our evidence is that the Ministry of Justice’s functions—almost everything we do—have a potential rule of law impact and an impact on access to justice in the broader sense. As a starting point for any conversation about new policy, questions will be asked about: what is the current law? Can we achieve our new policy objectives lawfully? If not, can we change the law and in what way? There is a presumption always that the law must be complied with and in that sense the rule of law is central. When we are considering contentious policies, like cuts to legal aid or changes to the judicial review system, access to justice concerns are obviously taken very seriously in the department.

**Chris Grayling:** It is worth just adding that that is not unique to my department at all.

**Rosemary Davies:** No.

**Chris Grayling:** It is really important to say that the rule of law is not something that is simply a matter for the Ministry of Justice. It is a matter for every government department, every Minister. Indeed, the ministerial code dictates that we should all be guided by upholding the rule of law. That does not mean we always have to agree with the law, because part of our role is to change it where we do not believe it is right for the job and it needs to be updated, modernised or changed. Upholding the rule of law, and upholding the independence of the judiciary, the courts and the integrity of our justice system, should be a function of every Minister regardless of which department they serve in.

**Rosemary Davies:** And every civil servant and government lawyer. It is in all our codes of conduct.

Q48  **Lord Lexden:** Lord Chancellor, in view of what you have just said, shall I take it that you think it could be advantageous to make it a specific duty on all Ministers to uphold the rule of law?

**Chris Grayling:** I think it is already. It is very clearly in the ministerial code so I think that is already there. I see that as an integral part. It is absolutely fundamental on any one of Her Majesty’s Ministers to uphold the rule of law.

Q49  **The Chairman:** Were you going to ask the next question, Lord Lexden?

**Lord Lexden:** We are moving to question 4?

**The Chairman:** I was thinking of question 3, the specific duty, but do you feel that is covered?

**Lord Lexden:** The Lord Chancellor said that there is a duty at the moment, so the only issue that remains is whether it should be made more specific than it is at the moment under the ministerial code. Do you think it should be?
Chris Grayling: Every one of us is bound to adhere to the ministerial code so I would argue that that is there already. I think it is just a fundamental part of being a Minister and, indeed, has always been so in this country. One of the things that makes our democracy strong is that, unlike in some other parts of the world, we have always had Ministers who did believe in upholding the rule of law.

Lord Cullen of Whitekirk: I may be wrong in my recollection, Lord Chancellor, but I seem to recall that the ministerial code deals with compliance with the law, whereas the rule of law is a much wider concept covering a lot of other matters. I may be wrong about that, but that is my recollection. Perhaps that could be noted by you.

Rosemary Davies: It is to comply with the law, including international law and treaty obligations, and to uphold the administration of justice.

Q50 The Chairman: I think I should indicate that some of our witnesses have taken a slightly different view. I know that your oath obliges you to respect the rule of law. I think there is a view that there is a more custodial role in some quarters. The Bar Council in their evidence to us, for example, referred to the Lord Chancellor as the constitutional conscience of the Government. I think that implies a specific philosophical overview required of you. Is that something that you feel is part of your remit?

Chris Grayling: Yes, it is, but I do not think it is unique to me. The point I would make is that every one of us should be a custodian of the rule of law. Whether or not the Lord Chancellor has a distinctive position, I like to think every Minister should treat this as being of paramount importance. It is absolutely fundamental to our society. If you said to me, “Does the Lord Chancellor have a duty to say, ‘Hang on, we are doing something here that is not consistent with the rule of law’?” yes, I would agree with that. But then I would say that the Prime Minister, the Deputy Prime Minister and all other Ministers have that same duty. Whether there is a constitutional extra, I would not disagree with that but I do not think that should downplay the importance of every Minister upholding the rule of law.

It is also the case that “rule of law” is a broad phrase. It can mean a number of different things. What do I mean by “the rule of law”? I think it is about an independent justice system, free from interference from outside, free from corruption, free from influence, that is respected and treated as independent by those in government and those in Parliament, and that ultimately—as I said earlier—we respect the ability of the courts and the responsibility of the courts to take decisions according to their best judgment about what the law of the land requires. To me, if you said to me, “What is the constitutional role of Lord Chancellor?” it is to make sure nothing impinges upon that.

Q51 Baroness Falkner of Margravine: Lord Chancellor, many years from now—when you are writing your memoirs and you look back on this anomalous period, where suddenly the Lib Dems are in government with you and the divvying up of jobs was rather more constrained than it might have been—when you reflect on this period in this role, with hindsight, do you think you will perhaps suggest to successors that they might want a lawyer in the job? Has there been a difficult and steep learning curve for you as a non-lawyer? Do you think there are perhaps advantages in having been from within the camp rather than from outside it?
Chris Grayling: My view is that it is a positive benefit for the Lord Chancellor not to be a lawyer. The reason I say that is, certainly at this moment in time, when we are having to take and would be taking difficult decisions regardless of the situation, if we had a distinguished member of the House of Lords occupying the traditional role of Lord Chancellor overseeing the courts today, there would still be the same financial pressures that my department and my team are currently facing. I think that not being a lawyer gives you the ability to take a dispassionate view: not from one side of the legal profession or the other, not from the perspective of the Bar, not from the perspective of the solicitors’ profession and not from the perspective of the legal executives. As long as you take very seriously the duty to uphold the principles I talked about earlier—uphold the independence of the judiciary, uphold the independence of our courts—I think there are benefits in not having a lawyer. It does not mean a lawyer cannot do the job, but it is really important to say I think there are benefits to having a non-lawyer in the job as well.

Baroness Falkner of Margravine: I can see your perspective in terms of vested interests. We have had a very interesting response from our interlocutors on this one. On the whole, people believe that the Lord Chancellor should have experience as a lawyer, “In order to have a deep understanding of the delicate balance on which our constitutional arrangements have been based, who can defend the values”—you have not said a word as yet about the values—“on which the Constitution is based, in particular the independence of the judiciary”. You have said quite a bit about that.

Chris Grayling: I have talked about the independence of the judiciary—

Baroness Falkner of Margravine: I am emphasising the values.

Chris Grayling: Which values have I not talked about?

Baroness Falkner of Margravine: The values on which our constitution is based.

Chris Grayling: But which ones have I not talked about?

Baroness Falkner of Margravine: I think it is a more amorphous sense that someone who has trained as a lawyer has come through with very clear, full frontal experience of the balance of ethics as well as responsibilities in upholding the law. That is the sort of thing that lawyers are very concerned about—and others by the way, academics who are not lawyers, so it is not just vested interests. It is not directed towards you, as our Lord Chairman has already said. It is directed to the idea that this very particular role in our constitution of the guarantor, the guardian of our constitution, should not have come from a background where the emphasis on the ethical part and the values part is quite significant.

Chris Grayling: You talk about ethics. That is just what I have talked about. I have talked about the ability to have a system that cannot be influenced, cannot be corrupted, where judicial independence is sacrosanct, where there is no attempt or no ability to wield undue pressure on the decisions taken by judges. Which ethics are you talking about that I have not been talking about?

Q52 Baroness Falkner of Margravine: I do not think we have the time to go into this. I will leave that on the side, but I hear from you very clearly that you think it is perfectly fine for the officeholder not to be a lawyer. One final other thing that I would like to come in on is the diversity of the senior judiciary. Are you comfortable with the current levels of diversity in the senior judiciary?
Chris Grayling: The answer to that is, no, I am not. I want to see a much more diverse senior judiciary. What I am encouraged by is the Judicial Appointments Commission. I give full credit to all of those who work on that commission for the work they have done, and indeed to many of the women who hold more senior judicial positions and do a lot of mentoring themselves of young potential recruits for the future. We are now in a position where around half of the new appointments made in recent selection processes have been women and that is good. I want to see more people come forward from minority backgrounds as well, and work is being done on that. Of course, it takes time to work through the system. If I look ahead now, the next round of senior appointments will be in three, four or five years’ time.

Baroness Falkner of Margravine: Three years, yes.

Chris Grayling: I think there are some good women now at the next level below. I hope some of those will emerge into the most senior positions. If you ask me if I am comfortable about having a senior judiciary dominated by men as it is now, no, and I want it to change.

Baroness Falkner of Margravine: White men.

Chris Grayling: Indeed, but I want it to change. I want it to change as soon as possible. At the same time, you cannot artificially promote people before they are ready for it. What I want is a properly managed succession planning system that has a whole diversity of candidates coming through who can fill those senior posts in the future. I would be very disappointed if we were sitting in this Committee in four or five years’ time and we still had the mix of people in the senior posts that we have today. I am cautiously optimistic that will not be the case.

Baroness Falkner of Margravine: But you would not go so far as to tell the JAC to go back and find someone else, “Try again”?

Chris Grayling: If I were to ever do that, it would be a matter of strict confidence between me and the JAC because to do so publicly would be for the Lord Chancellor to publicly undermine individual candidates, which I would not wish to do. I would not hesitate to do so, but I would never say so publicly if I was going to.

Baroness Falkner of Margravine: But the result of doing so would be evident in an appointment, so one would know whether—

Chris Grayling: It would not necessarily be because if a name was put to me and all I can do is refer back to think again, then nobody would know who had been put forward in the first place and nobody would know whether that was different from the person who was put forward in the second place.

Baroness Falkner of Margravine: No, but having seen the—

Chris Grayling: Forgive me, but I would have no compunction but to do that. In the final analysis, it will always be a matter for the Judicial Appointments Commission to say, “Do we really have this right?” but you would understand I could never make public if I had done that or if I were going to do that.

Baroness Falkner of Margravine: Yes, of course.

The Chairman: I think Lord Lexden wanted to come in behind Lady Falkner’s earlier question.
Q53 Lord Lexden: Mr Grayling, you have spoken of the benefits of the post of Lord Chancellor not being held by a lawyer. What of the disadvantages?

Chris Grayling: Given the fact that the Lord Chancellor’s role has changed significantly so there is no longer a judicial role in the way that there was, I do not think that the person holding my job suffers from not being a lawyer. I appreciate the constitutional difference, but we do not need a Health Secretary who is a doctor in order for them to understand how the health service should shape and deliver its services. I do not believe you need to be a practising lawyer and to understand the minutiae of individual parts of the law and have experience in court to understand the need to protect the values of our justice system. I do not think there are disadvantages. I am not saying it is not right for a lawyer to hold the job, but I think there are advantages in not being a lawyer, particularly in difficult times, which are not to my mind counterbalanced by the advantages of being a lawyer. I think it is fine to be a lawyer; you do not suffer a disadvantage. But in the job I do, particularly when I have a high-quality legal adviser sitting alongside me, I do not feel the lack of legal expertise makes my job more difficult.

Rosemary Davies: I certainly do not think lawyers could claim to have a monopoly on ethics.

The Chairman: Right, let us move along to the next question. You will find our questions tend to interlock quite a lot, so there may be an element of repetition. Lord Cullen, would you like to ask this?

Q54 Lord Cullen of Whitekirk: I think you just touched on that point a moment ago, that the written evidence from the ministry states that the holder of the office of Lord Chancellor always has access to specialist legal advice in respect of his or her functions. Some of the witnesses we have heard from have suggested there is a shortage of legal advice at a sufficiently senior level within the department so far as advising you as Lord Chancellor. There has been mention made of comparatively short lengths of tenure and possibly staff being taken off to other departments. Are you satisfied that you have adequate legal advice from the point of view of seniority and numbers?

Chris Grayling: I am. Basically I have an entire floor of lawyers. I have some very good lawyers. I get some pretty good advice from them. I also have access to the team of First Treasury counsel. I have access to legal advice from the government law officers. Indeed, I do have a lot of private conversations with senior people in the legal world and the justice system outside. I do not feel a lack of access to good advice. What I would say is that, of course, in relation to some of the structures that would perhaps once have been apparent when the Lord Chancellor’s office was here in the House of Lords, that expertise is still there. We have good teams of legal advisers in the Judicial Office, for example, as well as in my department. I am comfortable that I have access to good legal advice. As you know, if you put a certain number of lawyers in a room you will never come up with one single opinion, so whether that advice always gets it right is a different question. I do feel that I have a good team of lawyers and a good team of lawyers who will speak the truth. I do not feel that I am surrounded by people who are just saying, “Minister, that is fine, you can get away with it”. If a part of a package is not going to work, the lawyers will tell me that.
Rosemary Davies: It does slightly worry me that there is a perception that the Lord Chancellor is not getting the quality of legal advice that he used to get and perhaps there is an issue about visibility that we should think about. There are 60 lawyers in the in-house public law advisory team, two legal directors and seven other senior Civil Service lawyers. For example, the lawyer responsible for the team advising on the judiciary and courts is about to retire, but he has been in the department and its predecessors for I think 38 years. Likewise, the lawyer responsible for the judicial review reforms has been in the department for something like 27 years. I am not quite sure where this perception has come from that everybody has gone. Obviously, there are lots of new people and people do move around—and generally that is a good thing—but there is no shortage of continuity. We are now part of the Treasury Solicitor’s Department, so we have access to the Treasury Solicitor and to litigation, commercial and employment specialists.

Baroness Wheatcroft: No shortage of lawyers with experience in the department but, Lord Chancellor, you mentioned that you also have access to the law officers. I wonder if you could tell us a little bit about how often you consult with the law officers. Do they bring issues to your attention?

Chris Grayling: Very regularly. I have had very good relations with both Dominic Grieve previously and Jeremy Wright now all the way through. I talk to them regularly, seek advice regularly. If you take the example of the prisoner voting issue, I had very long conversations with the Attorney-General then trying to get thoughts together on how we should best respond. No, I have good relations with them and, indeed, with the Solicitor-General as well—who I think is very good—and, indeed, his predecessor. I have close relations with them. We talk and work together regularly.

Baroness Wheatcroft: Are they active in bringing issues to your attention in advance of them becoming big issues?

Chris Grayling: If there was something, yes, they would certainly do that.

The Chairman: Of course you sit in Cabinet, Lord Chancellor. The law officers do not. Therefore, you might become more quickly aware of issues where the rule of law was at stake than the law officers might. Is that something that you have experienced?

Chris Grayling: Not necessarily. The Attorney does sit in Cabinet. I have yet to go to a Cabinet meeting where the Attorney has not been there.

The Chairman: Really?

Chris Grayling: Although he may not be designated as a full member of the Cabinet, he none the less attends Cabinet all the time. Indeed, he is a member of the National Security Council—which I am not—so some of the more challenging international legal issues he would get. They would not come to me; they would come to him first and foremost. I do not think you should feel concerned that the Attorney is somehow outwith the key issues that arise. He is not.

Baroness Taylor of Bolton: Lord Chancellor, you will be aware that there is quite a significant amount of concern about the fact that you wear these two hats as Lord Chancellor and as Secretary of State for a very important department. Why do you think there is that much concern?
Chris Grayling: I think it is misplaced concern. There is perhaps a belief out there that, if we still had a separate Lord Chancellor’s Department looking after legal aid and the courts, the difficult financial decisions would not have had to be taken and that somehow decisions that are being taken are being taken in order to protect the prisons, for example. That is simply not the case. I think if you were to try to create a departmental split, what you would be doing is duplicating infrastructure that would add cost rather than reduce it and put additional pressures on front-line services. We have one directorate. We have shared services. If we had two separate departments, we would be splitting all that apart and taking on extra costs and, therefore, have less money to spend on legal aid and the courts.

If you look at the things I have done in my current role, by far the biggest project in financial terms is on the Lord Chancellor side of things in the courts. We have just embarked on an enormous programme of modernisation of the court system, which is designed to improve access to justice, to improve the process of justice and to get rid of some of the things that frustrate, whether it is the barristers who find that days in court are lost because of misplaced documentation, whether it is police officers having to sit in court all day waiting for their case to come up because the defendant has not turned up, or whether it is the complexity of dealing with the court, sending paperwork to the court, the bundles of paper you still see in every courtroom. These are things that all need to be consigned to the past and what we need to have is a high-quality, digitised, modern, victim-friendly court system that is fit for the 21st century. I have secured the funding from the Treasury to do that. We are spending more in capital on doing that than we are on other parts of the department, so I do not see an inconsistency.

What I do think is that by pooling the expertise in areas like estates, in areas like IT, we get more bang for the buck across the department than we would otherwise have. I do not believe this is a problem. Yes, it is the case that every part of the department has faced pressures. It is certainly the case that we have had to take difficult decisions, though the irony is that some of those who look at me and say, “He is not a lawyer. He does not understand”, can forget the fact that the biggest changes to legal aid and legal aid entitlement were carried out by my predecessor, a distinguished QC. I think it is a misjudgment to think that the current structure of the department somehow disadvantages the rule of law or disadvantages access to justice and that somehow we are kind of bunging all the money into the prisons. Seeing some of the pressures in the prisons over the last few months, with staff shortages, might give some reassurance that the pressures are not simply being felt in the courts and the legal aid system.

Q57 Baroness Taylor of Bolton: In your response to our questions about your wide responsibilities and budgeting, you give the impression that you regard the budget for both hats as one thing and that you regard cuts as across the border. You are now implying that you have given some priority to the Lord Chancellor’s role. Do you see yourself having two totally different sets of priorities that you have to balance or that the Treasury balance?

Chris Grayling: What is important is that, in taking a decision about a financial change, yes, I have a duty to make sure that I do not believe that it inappropriately compromises the justice system. Take the example of judicial pensions—something I inherited from my predecessor but where I pushed through the changes. I thought long and hard about that, because I understand the issue around pensions and, indeed, the legal protections for judicial remuneration. It should never be the case that the Government of the day seek to
use changes to pay as a way of putting pressure on the courts to behave differently. That would be an outrageous travesty of our constitution. At the same time, it was not realistic to say to the nation and to the public sector as a whole, “We are tightening up the public sector pension arrangements for everybody except the judges because they have a separate constitutional arrangement”. I think that would have undermined credibility in the judges. I had to think very carefully about the package of change. I had to make sure in my own mind that I did not think it would do lasting damage to the independence of the judiciary. Now, I have sought to make sure that we have done that. I do not think it will. I think the package there is still one that is better than is on offer elsewhere and will still be attractive to people joining the judiciary, but that is a factor that I take into account before taking a difficult public spending decision.

On the legal aid front, likewise, I have not sought to withdraw entitlement to legal aid, with three exceptions. We have put in a net earnings limit beyond which you have to fund your own defence, but that is set at a level of a six-figure salary. People in our prisons have limited access to legal aid for matters related to their sentence, as opposed to the prison they are in, because we have a prisons ombudsman system to deal with complaints about the nature of the prison system itself. We have sought—and we are currently appealing on a lost decision—to impose a restriction on access to legal aid, which says that you have to have arrived in the country and made a contribution here before you can start to access our civil legal aid system. I still defend that. I think it is a principle that is right and proper. Some people disagree with me. We have made a number of exceptions to protect the most vulnerable people who arrive in this country—for example, asylum seekers—but my personal view is that it is not undermining the rule of law to say that we should not be funding people who do not come from this country, and have only just arrived in it, to go to our courts at public expense to pursue cases unless the circumstances around their case are pretty exceptional. I do not think that undermines the rule of law. I think it is common sense about protecting confidence in our own system.

I have not talked about the other changes I have had to push through. I am afraid there have been difficult decisions about how much we pay the lawyers, and I am very sorry that we have had to do those. I have said to the legal profession that I am really sorry on more than one occasion. I would not have wished to come into this job to have to take that kind of decision. But the reality is, as you have seen, that the public sector continues to face some pretty big spending challenges.

Baroness Taylor of Bolton: I think that most Members of this Committee will have to restrain themselves from talking about policy issues at the moment because that is not our role. Therefore, can I change issues and talk about the Constitution?

The Chairman: Before we do that, Lady Taylor, I do not know if Lady Dean wants to come in on the earlier issue.

Q58 Baroness Dean of Thornton-le-Fylde: Yes, just very quickly about this duality of the role, Secretary of State. Do you think it is important that the public generally feel comfortable with the independence of the judicial system, the separation of the judicial system from the political system, that their perception of that is a positive one? Certainly, a lot of the evidence that we have had from some surprising quarters, in some cases, is that
that has been endangered by the change that has taken place. Do you think it is important that the public—

**Chris Grayling:** By which change?

**Baroness Dean of Thornton-le-Fylde:** The change in the role of the Lord Chancellor also being held by a senior member of the Cabinet.

**Chris Grayling:** I do not think it has had any impact on it at all. I think the issue about the judiciary is the same issue that we all face as Members of our two Houses of Parliament. The reality is that, as we know, both Houses of Parliament are homes to some very smart, thoughtful, intelligent debate about the issues that face this nation. Both Houses of Parliament are made up of committed public servants who do this because they believe in the future of the country and the well-being of our citizens. Most of the time that gets no attention whatever. It is only when things go wrong or become controversial that somehow we are sprayed all over the media.

The truth is, in relation to our judiciary, up and down this country, day in, day out, week in, week out, we have judges taking wise and sensible decisions in difficult cases where they try to balance the interests of the victim with the nature of the offender—for example, somebody who comes from the most difficult and challenging background who has an addiction—and try to find the right balance and, in my view, do a pretty good job of it. They sometimes pop up in the papers because a judge says or does something daft, but we are all human and that happens. I think it is important that when that happens you defend the individual and say that judges are free to take the decisions they do, whether they get it right or wrong, but also that the judges up and down this country are taking wise and sensible decisions in the interests of everyone in this country. We should cherish and support that. I do not believe anybody is out there saying, “I am not so sure about the judges these days because the role of the Lord Chancellor has changed”.

**Baroness Dean of Thornton-le-Fylde:** With due respect, that was not my question. My question was about the dual role of the Secretary of State for Justice alongside the Lord Chancellor role. The people holding those positions have traditionally been not only very different but also—with all due respect to you, a very able politician, possibly mid-career path, going on to bigger things—in the past a Lord Chancellor would have succeeded in their career and that is it. They are not seeking any ambition of promotion. As to the two roles being brought together within the Cabinet, in the past there has been a feeling of comfort, I would suggest, among a lot of people outside the Cabinet that, while those two roles were there, the Lord Chancellor was fighting the corner to ensure the independence of the judiciary, whereas the Secretary of State was having to carry through the political decisions. Do you see any conflict in those two roles being held by the one person, yourself in this case?

**Chris Grayling:** I do not. I think now, given the constitutional changes that took place a decade ago, the role of the Lord Chancellor would be massively devalued if the roles were separated. It is not something I had fully understood until I took the job. But now I have truly understood in carrying out the role myself, I think it would be just the opposite. The danger would be that you would end up with the Secretary of State for Justice holding the Cabinet position. The Lord Chancellor’s role is not what it used to be. It used to be Speaker of the House of Lords; it used to be the most senior judge, plus the other elements of the role. It
was a very weighty role. If you take away parts of the current job you then end up with the situation the courts are in now: a semi-independent agency run between the Lord Chancellor and the Lord Chief Justice. So the Lord Chancellor does not have executive responsibility for the courts in quite the same way that would have been the case in the past. Are you going to have two people around the Cabinet table? I am not convinced. You might find that splitting the roles relegated the Lord Chancellor to a junior ministerial post in the House of Lords, which I do not think would be good for the role. You want the Lord Chancellor, in a role that is not what it used to be, to be at the top table heading a substantial department with weight around the Cabinet table. I think it would be a big mistake to move away from that.

**Q59 Baroness Wheatcroft:** Lord Chancellor, you mentioned the case of people with multiple problems finding themselves in court, addictions and so on. One might have hoped that having the roles combined might enable Government to take a more holistic approach to dealing with people in those sorts of situations. However, it is my understanding that the Liverpool court, for instance, was recently closed because of cost, whereas if one had looked at it in the round and over the longer term, there is a very strong body of opinion that says that this was a means of long-term savings and rebuilding lives. Can you explain how it is that that should happen when you have been talking about trying to modernise the justice system?

**Chris Grayling:** There is an interesting question in this area. The Liverpool court was being underused and we had two buildings within a mile of each other. Yes, there have been some difficult decisions taken. It was one that was in the planning I inherited when I took over the job. There is an interesting debate to have about whether this country should pick up some of the examples from the United States, drug courts being a case in point. I have had quite a lot of representations about it. I am not closed to the idea. It does place our judiciary into a very different kind of role. In the States in the drug courts, they are almost case managers in some respects, “Come back in. I will find out next Monday how your rehab is going. If it is not going well, you can spend the night in jail”. It is a very interesting model. It would involve a very massive shake-up to the way we operate. I have not sought to pursue that kind of shake-up up until now because my main focus in reform terms has been within the rehabilitation system—the changes that we have been rolling out to support for those people who get none at the moment, the short-sentence prisoners, delivering a proper through-the-gates service at the end of prison. Those reforms are coming to fruition in the latter part of this year. I do not rule out us then taking a serious look at whether there are lessons to learn from elsewhere.

It is a separate question to the modernisation of the courts, though, where the truth is that we have too many old buildings. We have towns with a Crown Court, a Magistrates’ Court and a County Court, all with a security guard sitting on the front desk, often in an old-fashioned building with a lack of modern technology. What we are trying to do is to create something that is much more modern, much more fit-for-purpose, much more victim friendly, much more accessible, and improve access to justice that way. But I do not think you should assume that that reform automatically precludes the kind of things I have just been discussing.

**Baroness Wheatcroft:** That is reassuring, but in the short term one would have thought that bringing the responsibilities of Lord Chancellor under the Justice Department and making
that obviously on a par with other Cabinet roles might enable departments to work together more closely on this sort of thing. Is that happening?

Chris Grayling: I think so, yes. I certainly think we do operate as a team. We work across departments. We have one single criminal justice system. For example, one of the programmes we have in development at the moment is called the common platform. It is designed to digitise in a single system police, courts, probation, the defence, the prosecution and CPS. The nirvana is a situation where if you want information about an individual you have one place to go for it. The case files are all there, the witness statements are all there, and things do not get lost in the system. The system works efficiently and the records are there, so that probation can look back and understand slightly more carefully what they are dealing with. I think there are huge benefits to gain. I do not think that we benefit from operating in silos and if we simply fragmented the department again I think we would end up in a poorer place and a more expensive place.

Baroness Wheatcroft: Can social services and welfare and education—in that nirvana you talked about—all work together to deal with these victims?

Chris Grayling: Yes.

Q60 Baroness Taylor of Bolton: I want to go back to the traditional role of the Lord Chancellor as the heavyweight in Cabinet, the person who was custodian of our constitutional values. When you were answering questions at the beginning, I think you said that the custodial role, in terms of constitutional values, had passed to the Cabinet Office and to the Deputy Prime Minister.

Chris Grayling: The constitutional structure; the values are a different question.

Baroness Taylor of Bolton: That is exactly the point.

Chris Grayling: It then becomes an interesting mix. For example, on the discussions at the moment about devolution and English votes for English laws, although being led by the Leader of the House in his capacity as First Secretary of State, that work has been driven from the Cabinet Office. The part of the department that was once the Department for Constitutional Affairs, the constitutional affairs bit has moved to the Cabinet Office. Then your question is: when you are talking about constitutional values, what are you talking about?

Baroness Taylor of Bolton: Yes. Can we just make a distinction between policy and overall—

Chris Grayling: Indeed.

Baroness Taylor of Bolton: Yes, because the examples you gave were voting systems and House of Lords reform and things like that. They are policies.

Chris Grayling: But then what you get back to the constitutional values, the principles, being what I described earlier. The most fundamental constitutional values are around the relationship between legislature, Executive, and judiciary and courts—which are the three legs of our constitutional arrangements—and in particular the relationship that exists between our independent judiciary and the two legs of the democratically elected part of our system. As I said earlier, I think protecting the independence and integrity of that relationship is a very important part of what I do.
Baroness Taylor of Bolton: Within Cabinet, if a big issue is coming up about, for example, where we are now post referendum, if this had happened 10 or 12 years ago, the Lord Chancellor would have had a very significant role. He would probably have chaired Cabinet committees on that. He would certainly have been expected to talk within Cabinet about the wider implications and looking at the constitution as a whole rather than just one narrow area of policy.

Chris Grayling: That is correct. But with the 2004-05 reforms and the structure that followed, creating the Department for Constitutional Affairs and then the changes at the time in the Ministry of Justice, the last Government moved those responsibilities into the Cabinet Office.38

Baroness Taylor of Bolton: Yes, but we are talking about who should have a constitutional overview looking at the actual values and the wider implications rather than some of the simplistic policy areas that can come out in—

Chris Grayling: I do not think they are very simplistic if you are talking about the constitutional structure of the United Kingdom. I do not think that is simplistic at all.

Baroness Taylor of Bolton: Absolutely, and that is the whole point. If you are talking about individual policies, which can be simplistic, who is responsible within Cabinet for making sure that we are not creating more problems by those individual policies and threatening and undermining the overall stability of our constitution? Let me just give you an example. When it comes to any spending department, the Chancellor of the Exchequer is always making sure that everything holds together. Who makes sure that our constitution holds together?

Chris Grayling: I think if you look back at recent history, the only answer to that can be the Prime Minister. If you look at what has happened over the last 20 years, I would take the view that the changes to the constitution put in place by the last Government were ill thought out and left some big unanswered questions. The biggest of those quite clearly is: what is the role of English MPs in relation to Scottish MPs, Welsh MPs and Northern Irish MPs? We have a situation in this country today with a number of policies and let us take the most obvious example. In the last Parliament, the then Administration trebled tuition fees in a vote that was carried by Scottish MPs voting, although English MPs had voted against, even though that measure did not apply in Scotland. We have a flawed constitutional settlement. That flawed constitutional settlement dates back to a time when the previous Lord Chancellor structure existed in the late 1990s, where you had Lord Irvine as Lord Chancellor, but that change was driven by the Prime Minister. If you said to me, “Has the Lord Chancellor ever been the guardian of the constitutional framework?” I would say it is not obviously apparent to me that that was the case. Absolutely, the guardian of the relationship and the independence of the judiciary, the court system, the justice system and the relationship between that and the legislature and the Executive—yes, absolutely. But in terms of the broader constitutional picture it is not clear to me that that role really existed because those reforms were not driven by the Lord Chancellor’s Department at the time.

Baroness Taylor of Bolton: As someone who was in Cabinet at that time and attended those Cabinet meetings, I can assure you that the Lord Chancellor had a very significant role.

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38 The Lord Chancellor has pointed out that responsibility for a number of constitutional matters (including elections, party funding, relations with Parliament, devolution, House of Lords reform) was transferred by the current Prime Minister from the Secretary of State for Justice to the Deputy Prime Minister in June 2010.
Chris Grayling: Okay. The current Lord Chancellor would have a significant role in arguing this case, but the then Lord Chancellor did not have responsibility for the constitutional settlement. If he did, well, I am not sure he got it right.

Q61 Baroness Falkner of Margravine: International treaties, international obligations—do you see those in that list you have just told us about?

Chris Grayling: The answer to that is we have a duty to uphold international treaty obligations. It does not mean that we cannot argue for changes to them and there is an important distinction between the two. When I made the statement I did in the House of Commons about the prisoner voting issue, I accepted that my duty to uphold the rule of law would probably preclude me and I would—as and when the circumstances arose—have taken the proper advice of Rosemary on my left. We had discussions about this at the time. I do not believe that I would be able to serve as Lord Chancellor and to vote against giving votes to prisoners because that is a decision of the European Court.

Baroness Falkner of Margravine: I was thinking about the European Convention on Human Rights where your former colleague—another law officer—clearly takes a very different position from you.

Chris Grayling: He disagrees with me. But as to the policies that the party announced as opposed to the Government announced—it is important to make that distinction—nobody has seriously questioned the legality of them. What we have effectively sought to set out is a process of renegotiating a treaty and then, if not successful in doing so, exercising our right under that treaty to withdraw from it. To my mind, the policies that we have put forward as a party are completely consistent with the rule of law. The original convention expressly allows members to denounce that treaty, to give notice and withdraw from it. We have indicated that, if we were not able to reach accommodation with the other members of the Council of Europe on the kind of arrangements we have in place, we would exercise that right. There is nothing inconsistent with the rule of law in doing that.

The Chairman: I think we are getting into deep political water here and we are short of time, so perhaps we should move on to the last question, from Lord Lexden.

Q62 Lord Lexden: Lord Chancellor, could I ask you to summarise for us the extent and nature of your contacts with senior members of the judiciary, particularly in relation to the independence of the judges and the rule of law rather than the practical administration of justice?

Chris Grayling: I see them all the time—regular meetings with the Lord Chief Justice, regular meetings with other members of the senior judiciary. I hope and believe I have a good relationship with them. On occasion I have sought their advice. Clearly with the Lord Chief Justice I have a number of areas of common responsibility. I last met him yesterday to discuss many of those. I hope and believe that we have a good and constructive relationship, and I think that is important. I have that relationship with Lord Judge. I have that relationship with Lord Thomas, but also with other members of the senior judiciary.

Lord Lexden: The impression that we have from our evidence sessions, as far as senior judges are concerned, is that their interest lies primarily in their relations with Parliament perhaps to a greater extent than their relations with you. What is your view of the current arrangements by which a letter can be written? Under the arrangements of the last 10 years
Government: Rt Hon. Chris Grayling MP, Lord Chancellor and Secretary of State for Justice, and Rosemary Davies, Legal Director, Ministry of Justice — Oral Evidence (QQ 43-62)

there has been very limited contact between the senior judiciary and Parliament, the House of Lords in particular. Do you think there is a case for change?

Chris Grayling: I do not. I think it is important that we keep the judges out of the political process. It is in their interests that that should happen. I think the Lord Chancellor can and should be a conduit if there is real concern about their independence being questioned. One of the reasons why there is not a lot more to say about this is that, fortunately, that has not happened in my time. Nothing has happened to give me cause to believe that changes elsewhere in government are impinging on the independence of the judiciary. I would certainly act if I thought that was the case, but I do not think so. There is nothing in sight to that effect.

I think there is a real danger in having more discussions between Parliament and the judges because inevitably they get into debates that are before this House. The judicial review reforms are a case in point. My personal view is that judicial reforms are necessary; they are proportionate; they are dealing with an area that I think is not working appropriately and is damaging the relationships between Parliament, the legislature and the judiciary, in a way that is unnecessary. I believe they uphold the principle of judicial review while putting some sensible parameters in place. That is a political discussion. I suspect we will have a lively debate when these matters come before your House again next week. I really do not think it is sensible to get the judiciary individually involved in that kind of discussion because, inevitably, it draws them into political debate in a way that I do not think is right and proper. I do not think it helps them. I do not think it is good for them. I think it undermines the independence and the integrity of our judiciary, so I very strongly believe that it would be a mistake to start having teams of judges sitting in front of Committees like this engaged in discussions about topical matters, because I think it would undermine their role.

Q63 Lord Crickhowell: I have not come in previously because I thought I might have to leave the Committee before the end, but as I am still here, I will. The fact is that Lord Chief Justices have expressed the view that it might be desirable on occasions to put their views to Parliament in some way. There was a feeling of one of them that it might be a nuclear option, but that has been rather overturned more recently in evidence. After all, the President of the Supreme Court comes and talks to this Committee every year. So the suggestion has been made that it would be possible for the Lord Chief Justice of the day—if he felt there was something he wanted to say to Parliament—to write to this Committee to say he would like to appear before it and say what he would like to say. This Committee could very quickly arrange a meeting so that he could express the view and we could question him about it. Then a report would be given to Parliament. Would that not be quite a sensible way of giving the ability to express concerns to Parliament if they were so severe that the Lord Chief Justice wanted to do so without getting too much into the political jungle of which you were speaking?

Chris Grayling: I would not be hostile to a route of last resort. I think it would be a mistake, though, to end up in something more than that where it started to become common for parliamentary Committees to summon judges before them, calling in the President of the Family Division to come and address the Education Committee, for example. I think that would be a big mistake. I am not opposed to the nuclear option, if something is going badly wrong—the Government of the day are misbehaving, the Lord Chancellor is paying no
attention—to have the ability to say to Parliament, “Help”. I do not have a problem with that. I think my concern is doing something more than that.

The Chairman: If none of my colleagues has any further questions, let me thank you very much, Lord Chancellor. Is there anything else you would like to say, or Ms Davies, before you go that we have omitted from our questions?

Chris Grayling: No, I do not think so.

The Chairman: You have been very forthcoming and helpful to us and we are extremely grateful. Thank you very much.
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WEDNESDAY 29 OCTOBER 2014

Members present
Lord Lang of Monkton (Chairman)
Lord Brennan
Lord Crickhowell
Lord Cullen of Whitekirk
Baroness Falkner of Margravine
Lord Lester of Herne Hill
Lord Lexden
Lord Powell of Bayswater
Baroness Taylor of Bolton

Examination of Witnesses

Rt Hon Dominic Grieve QC MP, Attorney-General, 2010-14, and Baroness Scotland of Asthal QC, Attorney-General, 2007-10

Q86  The Chairman: Welcome, Dominic Grieve QC MP and Lady Scotland. We are most grateful to you for coming. As you know, we are looking into the office of Lord Chancellor. We are not looking into the person of the Lord Chancellor but we are looking into the job and how it has changed. We are most grateful to you for coming because, Lady Scotland, you I think were the first Attorney-General after the changes and, Mr Grieve, you were the second. I do not know if you would like to make an opening statement. If either of you would like to or you are confident that what you may have to say will come out in answer to questions, we can press on into questions.

Mr Grieve: I think I am probably confident that having seen a list of the questions you want to ask that the answers will come out in the questions. I do not know about Baroness Scotland.

Baroness Scotland of Asthal: I would agree.
Q87 The Chairman: Thank you very much. I will fire off with the first question, which is: how do law officers ensure that Ministers act lawfully and in accordance with the rule of law? Mr Grieve, would you like to start?

Mr Grieve: There is an important point here that we will come on to in a moment, but the law officers are there to make sure that the ministerial code is observed, which the Prime Minister has set out: the United Kingdom, its Ministers, its civil servants, must obey the law, the rule of law and act in accordance with our international legal obligations. Certainly we were there, I was there, to ensure that all the decisions that we took were in conformity with that.

As you will appreciate there are about 2,000 lawyers embedded in the Government Legal Service and the vast bulk of the advice that is provided to Government comes from them without any intervention from the law officers at all. But on issues that are reputational to Government, the Civil Service has a way of teasing those issues out, so that although it is never really written down as to what should come to the law officers, on the whole, I think, what needs to come to the law officers does come to the law officers, but it does it by a sort of process of emergence. Most of those issues, in my experience, are either constitutional law—particularly law relating to devolution—European law, human rights law, and international law, and in particular international humanitarian law, the law of war and armed conflict. Those are what I would describe as broadly the principal categories that the law officers had to grapple with during my period in office, although there might be other things.

We then provide the advice, but it is important to understand—and this arises in a question further down—that we are certainly not in a position to be overseers of the rule of law. I do not have spies in government departments telling me when ministerial colleagues might be on the point of going off the rails. The law officers’ department has 42 employees; it is down a little bit from the time when Baroness Scotland was in charge of it. There are 17 lawyers and the rest are support staff. There is a small press office and a tiny private office, only about four private secretaries to support two law officers. Ultimately, as any lawyers, we are a referral organisation. If somebody refers something to us we can advise and try to make sure that the right answer is come up with or the right solution is come up with, which is compatible with the rule of law.

Occasionally we might hear of something that was not coming to us and where we might say we think perhaps it might be advisable that it should come to us. That is one of the reasons why it is of great value that the Attorney-General attends Cabinet. There is a specific question about that, so I can come back to it in a moment. Certainly if the Solicitor-General or I picked something up that indicated that a course of action was being adopted that looked to us to be troublesome, we would flag it up and suggest somebody might wish to come and discuss it with us. What we are certainly not doing, and I would like to emphasise this, is we are not in a position to provide a scrutiny service of every aspect of the Government’s actions, any more than a lawyer who is retained by a client can be the person responsible for everything the client is trying to do.

Baroness Scotland of Asthal: Not surprisingly I agree with the exposition just given by my brother Attorney-General, but I just want to add a few other points, if I may, in relation to the nature of the rule of the law and the importance of it. As Dominic says, the Attorney-General sits at the apex of about 2,000 Government Legal Service lawyers, and those lawyers
are responsible for the day-to-day scrutiny of what the department does. The advice that they
give is quite often the real yardstick by which we can judge the efficacy of the legal
content of what gets delivered. The important thing I realised when I became Attorney-
General, which I frankly say I was not necessarily aware of prior to becoming Attorney-
General, was the depth and nature of what the Attorney does. I say that notwithstanding the
fact that I had two years in the Foreign Office where I would deal with some of the issues
that the Attorney-General dealt with—we had the International Criminal Court during that
time—then two years as deputy to the Lord Chancellor, then four years in the Home Office.
By the time I arrived as the Attorney-General, I really believed that I fully understood what
the office did but when I got the job I realised how wrong I was. It is very difficult to identify
when you are sitting outside. So, for example, every lawyer in every department owes two
duties. The first, of course, is to the department that he or she serves. The second, however,
is to the Attorney-General.

So I was told that sometimes the lawyers in these departments have challenging
conversations with the department Ministers. They may not fully understand the import of
some of the advice they are given and they may agree or disagree with it, and that is the
opportunity for the departmental lawyers to say, “Well, if you do not like the advice I am
giving you, if you do not trust the advice I am giving you, then you can always ask the
Attorney-General”, which I was told had a very sobering impact. Either it caused the Minister
to think again, as to whether he or she wished to do that, or the Minister was confident to
say, “That is exactly what I will do”, confident that the Attorney-General would look at it and
would give a definitive view.

The second issue that I came to understand was very important was to have a well qualified
law officer. Sometimes different departments will construe bits of legislation in a slightly
different way, all of which are within the ambit of reasonable disagreement, so that a lawyer
in department A may quite properly come to the view that the construction that can be put
on that piece of legislation points in direction A. Another department lawyer, acting entirely
properly, would say it points in the direction of B, because departmentally that construction
is much more comfortable for what the department would like to do, and then you would
have another department C who has another construct within the ambit of reasonable
disagreement. Therefore, when there are those perfectly proper but internal conflicts, that is
something that the Attorney-General has to define as to what the Government’s real
analysis on behalf of the Government should be, so that there is an opportunity to say either
A, B or C. Sometimes the most challenging is when the Attorney decrees that it is not A, it is
not B, it is not C but in fact it is D. I came to realise that that was a very powerful instrument.

Of course, there are a number of prosecutorial authorities both outside of government and
within departments, and getting some synergy between those is incredibly important, and
during my time I created a board on which all the directors sat to try to deliver a more
holistic approach to the way in which we discharged that duty.

The challenge has always been: how do you make sure that you are aware of what is
transpiring? That is why I think the domestic affairs committee is very important. As you will
know that for any piece of legislation it has to go through DA and at that stage different
departments will consider the impact that the new legislation is likely to have and the
Attorney acts together with the Parliamentary Counsel, the draftsman, looking at the detail
of some of those Bills trying to ensure that it complies with the Human Rights Act and is of good quality.

Those areas are extremely important, but the thing that I became very clearly aware of is that the Attorney-General is in government but is not of government. It has the ability to remain independent and give independent advice that Ministers need to have but may not always want to have. Our job is not to tell people what they want to hear; our job is to tell them what they need to know.

Q88 Lord Lester of Herne Hill: I wonder if I can explore a bit more this business about being in government but not of government, and the relationship with Parliament. As you both know very well, the Attorney-General in Ireland, Cyprus and Israel is a constitutional officer, not in government. It is entirely independent of government, with a different role. As you both know, that has been rejected for good or bad reason here. So the position is that, although you say you are in government but not of government, the reality is that you are in government and however much you try to distance yourself from government in that perfectly proper way there are internal conflicts. I am particularly interested in your role as Attorney-General in relation to Parliament. You have spoken so far entirely within government, but the reality of our situation I think is this: although occasionally an Attorney-General will advise Parliament, in general the only legal advice that Parliament receives on a routine basis comes from a committee such as the Joint Committee on Human Rights with its legal adviser that really is independent and able to make a report. Is that problem about accountability to Parliament not something we need to think about?

Baroness Scotland of Asthal: I understand the concern that is expressed, but there have been a number of occasions when Parliament has asked the Attorney-General for the Attorney’s opinion. It has had a degree of force certainly from those who I have spoken to, which has been very helpful to Parliament, because there is a real understanding of how Parliament works and an opportunity to develop an acuity and skill in that area that I think is very important.

The real strength of having an Attorney who is in government but not of government is that it is much easier to say to someone, “I understand the problems that you have. I also understand why you want to do this and the outcome you seek, so there is no dissonance between us in terms of that direction”. But there are occasions when Attorneys-General—and I am not speaking of any specific occasion—have had to say, “That is an extremely good idea save for one small thing. It is not lawful. Other than that, I absolutely understand it is a consummation devoutly to be wished but not obtainable”. So I do think that the Joint Committee on Human Rights plays a very powerful role. I believe that that is a role that should continue because it is strongly valued by the House, and both Houses, but I do not think that that necessarily expunges the need to have an Attorney represent the views of the law to Parliament in a way that Parliament will feel is covered appropriately. I do not think you have to choose either/or; I think you can have both, which is what, of course, we have now.

The Chairman: Thank you. Do you want to add anything to that?

Mr Grieve: I agree with all that. The Attorneys have a specific role in providing legal advice to the House of Commons, and indeed the House of Lords. I have a personal Writ of Summons to the House of Lords—different from Patricia’s, but as a Member of the House of
Commons—or had one, to come along and give counsel if required. I was told at the time
that I received it that it was completely archaic; they all said, “It hasn’t happened in the last
100 years”. In fact, I was asked for advice about three weeks later, which was about your
powers in respect of disciplining errant Members of the Lords. I think that is the specific
purpose; it is to advise the Commons and the Lords about their privileges.

More difficult is the question of providing advice—the advice that we are providing to
government. Of course from time to time with the consent of the Prime Minister and
colleagues in government I did front up debates in the House of Commons on issues where
the Government wanted to explain what it understood the legal position to be, sometimes
slightly controversially. Prisoner voting springs to mind as one where we had some debate
and where I think I was empowered to make quite clear what the legal framework was
under which the Commons had to operate. Of course there have been other examples of the
Attorney sitting on the Bench during a major debate and being able to intervene in the
debate to clarify legal concerns that might on occasion be raised and we have done that, and
my predecessors have done that, particularly when we are in the House of Commons.

I think it is quite clear that the client is the Government. The client is not Parliament. The
Government is answerable to Parliament and the Attorney may fulfil that role of
answerability to Parliament on the Government’s behalf where it is thought to be right, but
that is slightly different from providing specific legal advice to the Joint Committee on
Human Rights, for example, which would raise some quite difficult areas of a potential
conflict of interest.

The Chairman: Thank you. I think we will move on to question 2, with Lord Crickhowell and
Lady Taylor on that. It is on rule of law as well.

Q89 Baroness Taylor of Bolton: It is specifically on what you have just been saying about
the role of the Attorney both in specific terms and in general about being in government but
not of government. I just wonder whether you see something conceptual about the role of
the Lord Chancellor, about him also being in government but not quite of government.

Mr Grieve: The Lord Chancellor—and I know this is a specific interest of this Committee—
has a very different role. In his current form he is a departmental Minister with responsibility
for the prison system, penal policy, criminal justice policy, the administration of the courts
and ultimately the appointment of judges. Because his role changed so dramatically with the
Constitutional Reform Act there was great anxiety, particularly in your House, as to what was
going to happen in respect of his previous role as a judicial figure upholding the rule of law
within government, which is why his specific oath of office was prescribed. He clearly has,
under that oath of office, a duty to uphold the rule of law particularly in respect of the
 provision of court services and maintaining the independence of the judiciary, but it is a very
broad oath.

He is undoubtedly a member of the Government. The question is how he exercises his
functions within government in the light of the new duties that devolved on him post-2005.
Also I have to accept that I was not around before 2005 to see how the Lord Chancellor
operated in Cabinet. You can read about it—I think the Lord Chancellor also still has the title
of Keeper of the Queen’s Conscience—and I think that at its best the Lord Chancellor acted
as a voice that upheld the rule of law in circumstances in Cabinet where anybody might be
suggesting some other route should be followed, and had an understanding of the law and
of legal principles. So that is separate from the legal advice being provided by the law officers but nevertheless an important constitutional pillar in upholding the rule of law in our government structures. But he is of government and in that sense it is a slightly different position, and we can come on to look at it.

Q90 Lord Crickhowell: I read with very great interest your 2011 speech in which you set out the role of the Attorneys defending the rule of law. In the course of that speech you do not make a single reference to the Lord Chancellor. You referred, though, to the oath of office and the legislation set up and introduced by Lord Falconer to try to sort out the shambles that was involved in the attempt to abolish the office of Lord Chancellor. He spoke with extreme force at our last meeting about the importance of that oath and the duties of the Lord Chancellor in this respect. Yet you do not refer to the Lord Chancellor in your speech. That is the first point that I want to ask you.

You do make the point, and you have made it during the course of some of your remarks, of your presence on what in my day was called the L Committee—the committee that considers the legislative programme. In my day it was chaired by Willie Whitelaw. I do not expect you to answer because on the whole specifically the principle is that the advice given by Attorneys to the Government is not disclosed except in exceptional circumstances. I imagine you were sitting on that committee when the Criminal Justice and Courts Bill was brought forward, a Bill that was debated in this House on Monday. It seemed to the House, by a very considerable majority, to raise important rule of law issues—judges being told they must do things rather than they might consider things. It does therefore pose the question that if the Attorney is the principal defender, not just on referral matters but on a crucial committee that he has to advise the Government, is there a difficulty in preventing a Bill like this coming forward with rule of law issues clearly exposed? It is a bit unfair because I am asking you in a way to say what your advice to the committee was, and I shall perfectly understand if you refuse to do that, but it does raise the general point about your presence on the committee and how easy it is therefore in practice for you to defend the rule of law in that situation.

Mr Grieve: I will go first, because I think it is probably partly directed at me—

The Chairman: I am sorry to interrupt you, but we are going to be short of time towards the end, so perhaps you could manage to focus narrowly. Thank you.

Mr Grieve: I will try to keep my remarks short. The role of the law officers in terms of the introduction of legislation to Parliament is important. It is certainly one of the critical roles and I agree entirely with what Patricia said about that. When we are doing it, we will look at issues of whether there is compatibility so you can sign off a Section 19 statement of compatibility with the convention rights. That is obviously a critical part of it.

We look at the department’s memorandum claiming compatibility, so we scrutinise it rather than saying ourselves whether it is compatible or not. We do a critique of the reasoning in the departmental memorandum, but we also look at issues of propriety, unusual use of powers—all those things can be spelled out—and if we have concerns then we can raise them and ask for them to be readdressed. If we think something is manifestly unlawful, we can raise that and say that we are very concerned about it. Of course we can do all those things. At the end of the day, with the introduction of legislation, it will remain the Government’s collective view as to whether the legislation should be introduced or not. I
suppose it is also right to say that if you ever had an Attorney-General who thought the Government was about to do something that he really profoundly disagreed with it would be his duty to resign over it. That is how the system is bound to work, but we have an opportunity to provide our input. This particular piece of legislation is undoubtedly controversial. It is of course primary legislation and, as you will be aware, the Government’s view is that it is compatible with our convention obligations. That is not to say that it is not going to be the subject of heated debate both in our place and your place as to whether or not it should be enacted and whether it enhances or diminishes the rule of law, ultimately, and accessibility to justice, which is very much a key issue surrounding the Secretary of State for Justice’s responsibilities.

**Lord Crickhowell:** What about your failure to refer to the Lord Chancellor?

**Mr Grieve:** I think that you may be attributing too much to that. I did a number of talks in my time as Attorney-General and I do not think that by the failure to mention the Lord Chancellor there was some sort of message being sent out that the Lord Chancellor was irrelevant to the maintenance of the rule of law. His oath makes him really very important in his departmental responsibilities. Prior to the change that has come about since 2005 he had very limited departmental responsibilities but his presence in Cabinet, particularly with his strange mix of judicial office and being a member of the Government, gave the Lord Chancellor a unique position in terms of speaking out within government—a far more senior Minister than the Attorney—if he felt that the Government was about to do something that had impropriety about it, although there are examples of Lord Chancellors who did not speak out on a number of things that they might have done. I think the change is that whereas previously he might have been a second focus within Cabinet for general guidance, now it is much more specific to his own departmental responsibilities but it is going to vary from one Lord Chancellor to another according to their interests and according, probably, to their legal qualifications.

**The Chairman:** A quick question and answer and then we will move on.

**Q91 Lord Powell of Bayswater:** The present Lord Chancellor has told us that he does not have a particular responsibility for upholding the rule of law. Should you perhaps have resigned?

**Mr Grieve:** If he has told you that, he has to reconcile his duties with his oath. His oath is very specific. His oath is merely a reflection, in some ways, of the duty of all government Ministers, but nevertheless it is spelled out explicitly and he has to take an oath of office. It is certainly not my experience in my time as an Attorney-General that either of the two Lord Chancellors with whom I served ignored that issue and were not alive to the fact that it might have a bearing on what they could or could not do. It was probably right to say that it has become increasingly viewed in terms of their own departmental responsibilities.

**The Chairman:** Thank you. Lady Scotland, are you content for us to move on or do you wish to add anything?

**Baroness Scotland of Asthal:** I just want to make a few points if I may. First, for the first time I slightly disagree with Dominic when it comes to the fact that the Attorney only has one client. I think the Attorney-General has three, but they are in different areas. Of course we have not spoken about the Attorney’s advisory role to the Queen, to Parliament and to the Government, and those three duties are discharged in very different ways without there
being any inherent conflict. So if we look at the conversation we had a little earlier about the nature of the sort of advice and assistance that the Attorney gives to Parliament, it is very specific and different from that which he or she discharged in relation to the Government.

Secondly, it was absolutely clear when the legislation went through that the Lord Chancellor’s duty to uphold the rule of law would not be expunged, but that it would be reinforced and fundamental to the discharge of his duty. It was for that reason and that reason alone that the oath that the Lord Chancellor took made specific reference to that duty, particularly in terms of supporting the judiciary. It was in contemplation that there might at some stage, although many thought it was unlikely ever to happen, be a Lord Chancellor who was not a qualified lawyer, had never sat as a judge and therefore might not be fully conversant with what the day-to-day meaning of the application of the rule of law stood for.

For many it is shocking indeed to hear of a Lord High Chancellor of this country who appears not to understand the nature of that oath, so if—which is not admitted by me because I am afraid I have not had the opportunity, and I do apologise for that, of reading the evidence that is submitted in that regard—as I am gathering, that has been put in question then I think that is a very sad thing indeed. The Government, I believe any Government, needs a strong Lord Chancellor who understands the fundamental importance of the rule of law to our democracy. It is the cornerstone, the foundation stone, on which our democracy stands. If we do not understand the rule of law and if we have a Lord Chancellor who does not understand that then I think our democracy is in a little difficulty.

The Chairman: Thank you very much.

Mr Grieve: Can I just come back?

The Chairman: Do you mind if we move on?

Mr Grieve: I just want to make it clear that I do not disagree at all with Patricia over the three roles in relation to Parliament, which we explained, Government, and the Queen. All the public interest functions carried out by the Attorney-General are our responsibility to the Queen for the upholding of the rule of law and are totally independent of government. That was just the one point I wanted to make.

The Chairman: Thank you. I will bring in Lord Lester and then Lord Cullen and then I hope we can move on to some of the other issues. Thank you.

Q92 Lord Lester of Herne Hill: Because time is short I was going to ask you how you would define the rule of law, but as a shorthand what I have done is to extract from Tom Bingham’s book his eight principles. I do not know whether you have a one-page sheet of them in front of you. I asked that that should be done. If our report decides to explain to the public what the rule of law means, one way of doing it would be to endorse something like those eight principles. My question is short and simple: would we broadly be correct in treating those eight principles as a way of describing what we think the rule of law is?

Baroness Scotland of Asthal: Absolutely.

Mr Grieve: Yes.

Lord Lester of Herne Hill: So far as the particular role of the Lord Chancellor is concerned, I think you have already covered that. We will come later to other questions.
Mr Grieve: Yes. Just to make the other point about this, it is quite clear to me that the oath of office taken by the Lord Chancellor is very important. It was not put there for no reason and it should absolutely underpin the way any Lord Chancellor discharges his or her functions.

Q93 Lord Cullen of Whitekirk: This is a very short question. In the Cabinet manual I can see that the role of Attorney-General is mentioned in regard to the rule of law. So far I have not been able to find any reference to the rule of law in relation to the Lord Chancellor. Am I right in that understanding?

Mr Grieve: Within government rules?

Lord Cullen of Whitekirk: Within the Cabinet manual I am talking about.

Mr Grieve: That may well be the case, yes. The Cabinet manual makes clear the crucial role of the law officers and the Attorney-General in advising on legality and the need therefore to involve the law officers in the decision-making process. I have not looked at it recently but I would not be surprised if there is no reference to the Lord Chancellor. You could argue that that is something that should be corrected, but I come back to the point I made originally that the oath is central to what he does. His role has never been defined in Cabinet before, even before the Constitutional Reform Act.

Lord Cullen of Whitekirk: Perhaps it is the time for putting it in the Cabinet manual.

Mr Grieve: It may be.

Lord Cullen of Whitekirk: One other question, if I may. When he was asked about the duty to uphold the rule of law, the present Lord Chancellor referred to the ministerial code, but that simply talks about the overarching duty to comply with the law, including international law, and with treaties. Now, there is nothing therefore in the ministerial code obliging Ministers to act consistently with the rule of law. Do you have any comments on that?

Mr Grieve: If any Lord Chancellor were to ask me whether his oath of office is merely compliance with the ministerial code, I would tell him that I think it goes beyond that.

Lord Lester of Herne Hill: Would you include in that the common law—in other words, that the principles of the common law are themselves vital in being upheld?

Mr Grieve: Yes, the rule of law includes the common law and statutes, so it underpins it.

Baroness Scotland of Asthal: It is important for us to remember that the Human Rights Act is the embodiment of some of the fundamental principles of the common law. I remember when I very first read that document I wondered whether in fact a common law lawyer had simply picked up his or her pen, and written down the fundamental principles of our common law and stuck “Human Rights Act” at the top.

The Chairman: This is an extremely interesting session and clearly we have failed to allow enough time for it. The last thing I want to do is to rush matters and I wonder whether if we do not reach all the questions you would be content if we sent you a letter with unasked questions that we might like to pursue further through a written answer from you. Would that be acceptable?

Mr Grieve: I am perfectly happy to do that, and perfectly happy to come back if you want me to.
The Chairman: That is a kind thought, but difficult to arrange.

Baroness Scotland of Asthal: I just want to say that unfortunately I have been away quite a lot. I did 10 countries in eight weeks and I am just a bit timorous about saying that I will be able to answer further questions in writing within the timescale that you might like.

Q94 The Chairman: We are prepared to take that risk, and we will understand if a problem develops, Lady Scotland. I would like not to rush matters but to pursue them more carefully and I would like to bring in Lord Brennan now, with the next question.

Q95 Lord Brennan: Assuming the Attorney should attend all Cabinet meetings, why not give the Attorney the Lord Chancellor’s rule of law duties? If you do not think that is a wise step, if you were at a Cabinet meeting with a Lord Chancellor who is weak, incompetent or very diffident about challenging his colleagues on matters of propriety, especially if he is not a lawyer, is there then a positive duty on the Attorney to speak up in Cabinet and rectify the position?

Baroness Scotland of Asthal: First, I do not think there should be a diminution or a dilution of the duty that currently exists for both to discharge that duty in relation to the rule of law. The rule of law is particularly important for the departmental responsibilities that any Lord Chancellor will seek to discharge, because the Lord Chancellor of the day will be the officer or the departmental Secretary of State responsible for civil justice, for making a large contribution to development of criminal justice, the opportunity to influence the administration of justice through the courts, and indeed the way in which our liberty if we transgress is constrained. All those duties, I believe, cannot be discharged honourably without taking into account the rule of law. To have a Lord Chancellor around the Cabinet table who does not see it as an intimate part of the discharge of those functions that are all departmental functions puts us in a very difficult position. I would not like to support any suggestion that the Lord Chancellor of the day, whoever he or she may be, would be able to avoid that oath and avoid discharging that duty. There is a real issue as to whether it should not go into the Cabinet documents, but I think that the oath itself is so powerful that I would not wish to see it shared or simply discharged by the Attorney. I think it is important that the rule of law is there at the heart of what the justice system does and is not just something pushed to the sideline that could be construed as the preserve of simply the lawyers. It belongs to all of us.

Mr Grieve: The Lord Chancellor’s departmental responsibilities go to the heart of the maintenance of the rule of law because of his role in the appointment of the judiciary, protecting their independence and the operation of the court system. The Attorney-General cannot substitute himself or herself for that in government, and that is why I made the point that the Lord Chancellor in a sense has two roles. One is his major departmental responsibilities and the second is the extent to which he also wishes to push that envelope further in influencing the entirety of the way in which government is conducted, which I believe in the past is what often happened. Certainly the Attorney cannot be a substitute for that. You asked a question about the Attorney’s attendance at Cabinet. The Attorney is of course not a member of the Cabinet. Attendance is by invitation. I do not know how it was in Patricia’s day. It is right to say that when I was appointed in 2010 there was a short period where there seemed to be some uncertainty as to whether the Attorney should attend every
Cabinet meeting or not. But the habit that grew up reasonably quickly was that in reality I attended every Cabinet meeting.

**The Chairman:** Did you feel as free to speak out at Cabinet because you were in attendance as you would have felt had you been sitting at the Cabinet table as a Member?

**Mr Grieve:** Yes. I do not think it affected me by virtue of my role as Attorney. Of course, there is a bit of a self-denying ordinance as Attorney-General. I certainly think that precisely because one is there to provide legal advice one should not necessarily be steaming in to comment on every article of policy unless one thinks it is either particularly serious or important in policy terms or one thinks that there is a distinct legal angle to it, because otherwise one’s presence might start to become irksome to one’s colleagues. One has to be a little bit restrained because one has a very specific role to perform and one must not let anything start to detract from one’s ability to do one’s core task. But, no, I never felt that and, indeed, I also attended National Security Council, a very important body in terms of legality, and I never at any stage felt that my role in that was in any way marginal.

**The Chairman:** Thank you. I think we just have time to squeeze in question 6, because it is a very short one and you might manage an answer in one sentence each. I will bring in Lord Lester and then, if there is time, Lady Falkner.

**Q96 Lord Lester of Herne Hill:** It has been suggested that the Lord Chancellor needs to be someone old—all passion spent—and a lawyer. My personal experience of the Wilson Government serving Roy Jenkins was that Roy Jenkins, not a lawyer and not all passion spent, was a much more effective upholder of the rule of law than Elwyn Jones on issues like the Shrewsbury Two, Clay Cross and so on. Even though I am a lawyer I am sceptical about the idea of our being very prescriptive. Do you think that the Lord Chancellor must be a lawyer and must be someone with all passion spent? I am not sure Lord Mackay of Clashfern qualifies on that basis or not, because my own view is that what matters much more is the DNA of the individual than whether he or she is a lawyer or has no further ambition.

**Mr Grieve:** It helps to be a lawyer. I think there are advantages of having a Lord Chancellor who is a lawyer. One of his jobs is to act as a link between the judiciary and government, a very proper constitutional link that needs to be maintained while also ensuring the distance between the judiciary and government. I think it is probably easier to do that if one has a history of involvement in the legal profession. It seems to me that that is quite apparent but it is not essential. Somebody can overcome that if they choose to do so or want to do so. I certainly would not want to suggest that legal knowledge is essential. An understanding of legal principles is essential. An understanding of the oath of office is essential. As for whether it should be somebody who is ambitious and hoping for other things or somebody at the end of their career, again I think it is entirely a question of how people view the office. It is a slightly different office in government, even today, from that of other departmental Ministers. If somebody understands that, it does not matter whether they may have other ambitions because they will be able to successfully discharge their functions and their oath of office.

**Baroness Scotland of Asthal:** I think it is incredibly important for the Lord Chancellor’s role to remain one of the most senior in government because of the duties the Lord Chancellor discharges and the importance of the departmental issues the Lord Chancellor deals with. As I said earlier, I believe they are fundamental to our justice system. Therefore, I think the
Minister who holds that office should be a very senior Minister who has demonstrated their acuity and sagacity over a period of time, so you could be confident they have the ability to discharge the onerous burden placed on the Lord Chancellor. I think that is easier if the person has had the experience of being a senior lawyer and discharging that responsibility or has had responsibility of a quality in nature that demonstrates their fitness to discharge such a senior role. The person has to have demonstrated a real understanding of what the rule of law means. The Bingham principles of the rule of law can, I believe, be understood by anyone, but there should be a clear responsibility on any Government in choosing the person to discharge that onerous, senior duty to ensure that the Minister chosen holds the confidence of the other ministerial colleagues and the ability and strength to be listened to in government to uphold the rule of law. I would certainly invite the Bingham book to be given to every Minister who comes into government.

**Mr Grieve:** I would just add this. Much will also depend on the Prime Minister’s understanding of what the Lord Chancellor is supposed to deliver. The Prime Minister has to appreciate that the Lord Chancellor has a particular role within government and give it the respect it needs. This has traditionally happened. Certainly pre-2005, the Lord Chancellor had a very high status. He had the highest salary, quite apart from anything else, of any Minister in government and a very specific role within the constitution that, of course, still exists. But it is very much an issue for a Prime Minister to determine how they wish to enhance the role of the Lord Chancellor within their own Government.

**The Chairman:** Thank you very much. There we must draw stumps. We are most grateful to you. You have been extremely informative and helpful to us and I would like to follow up one or two of the questions that time did not allow us to ask you in the hope that you manage to reply to them. Lady Scotland, we understand you have a very busy travelling timetable. Thank you very much for coming today.
Rt Hon. the Lord Hamilton, former Lord Justice General of Scotland and Lord President of the Court of Session (2005-12) — Written evidence (OLC0016)

Rt Hon. the Lord Hamilton, former Lord Justice General of Scotland and Lord President of the Court of Session (2005-12) — Written evidence (OLC0016)

MY LORDS,

In December 2005 I was appointed to the offices of Lord President of the Court of Session and Lord Justice General of Scotland, broadly the Scottish equivalents respectively of the Master of the Rolls and the Lord Chief Justice in England and Wales. These Scottish offices have been held by the same individual successively since 1837. I succeeded Lord Cullen of Whitekirk, a member of your Lordships’ Committee. I retired from these offices in June 2012.

As your Lordships will be aware, Scotland at one time had its own Lord Chancellor; but this office was, on the union of the Parliaments, absorbed into that of the Lord High Chancellor of Great Britain. Despite the apparent geographical scope of that office, the functions of the British Lord Chancellor were, as regards Scotland, very limited. As I recall it, my dealings in office with him were, apart from social functions, restricted to matters of judicial pay and pensions, which, as regards the higher judiciary, are dealt with on a U.K. basis. I, with others, had meetings on these topics with Lord Falconer of Thoroton and with Mr Kenneth Clarke, M.P.

My dealings in office with Executive Government were largely with the Minister of Justice in the Scottish Government, with whom I had meetings on a regular basis, and occasionally with the First Minister. These, of course, were post-devolution. In the years prior to devolution there were, as I understand it, meetings between the Lord President of the day and the Secretary of State for Scotland—though, in some cases at least, these may have been largely formal in character. The Lord Chancellor might also, of course, chair judicial committees of the House of Lords when hearing Scottish civil appeals.

As will be appreciated, the Scottish judiciary had, except on the matters of pay and pensions, thus no personal ‘voice’ in the centre of Executive Government. Your Lordships’ Committee may be interested to know whether and, if so, to what extent that was perceived to be a disadvantage relative to the position in England and Wales.

I have watched with much interest a recording of a hearing before your Lordships’ Committee on 23 July 2014, when oral evidence was given to it by Lord Mackay of Clashfern and Lord Phillips of Worth Matravers. Two concepts of particular importance in relation to the role of the Lord Chancellor appear to have emerged from the discussion—the rule of law and the independence of the judiciary. I agree that both concepts are germane.

The recognition and application of the rule of law are, of course, as fundamental to Scotland as to the rest of the United Kingdom. The Scottish judiciary, particularly its higher judiciary, are as conscious of those requirements as their English colleagues. In one respect at least the Scottish judges have had to address a wider, and more politically sensitive, aspect, namely, whether legislative acts of a democratically elected Parliament should be struck down as inconsistent with some higher norm. I have in mind that, under the Scotland Act
Rt Hon. the Lord Hamilton, former Lord Justice General of Scotland and Lord President of the Court of Session (2005-12) — Written evidence (OLC0016)

1998, legislation of the Scottish Parliament is “not law” if it is incompatible with any of the rights under the European Convention on Human Rights and Fundamental Freedoms or with Community law. On several occasions judges of the Court of Session have had to address and determine such issues. They have not had difficulty in discharging this (effectively constitutional) role. On the other hand, there are areas of the rule of law which the Scottish judges have rarely, if at all, had to address. I have in mind issues relating to terrorism, and in particular international terrorism, and primary and secondary legislation in response to it. Because these responses have been devised by the U.K. Parliament and U.K Ministers with reference to powers granted by that Parliament (and for other practical reasons such as the residences of affected individuals) legal proceedings in this area have largely been confined to the English courts. There has in this area been a measure of controversy between the executive and judicial arms of government. It may be that the presence in the centre of executive government of a Lord Chancellor might provide a useful check against Ministers taking action, whether in proposing legislation or in exercising powers granted under legislation, which might infringe the rule of law—though the experience of U.K. ministers in recent years may suggest that such a check has not always been effective. I can see that, where a Lord Chancellor brings with him, or her, a background of great distinction in the legal world and enjoys among his or her Cabinet colleagues the respect in legal matters which that background ought to elicit, that presence might be truly effective—and useful—particularly if he Lord Chancellor were of strong personality. But, without that standing, a Lord Chancellor is unlikely, in my view, to have that effect. Cabinet then has to rely on the Law Officers for the relative advice—and that advice, even if weighty, is not always accepted by politicians.

The Scottish experience, in so far as it goes, does not suggest that the existence of a Lord Chancellorship, or of an equivalent office, is essential to the maintenance of the rule of law in a democratic society. Scotland, of course, has its own Law Officers, the Lord Advocate and the Solicitor General for Scotland. Prior to devolution these Officers, particularly the former, had significant influence in Scottish legal affairs, including influence with Executive Government. Since devolution there have been developments. Initially, the Lord Advocate regularly attended meetings of the Scottish Cabinet. He was thus close to the centre of the Scottish Government and, one would presume, in a position to influence it in political matters having a legal aspect. There may be there some parallels with the traditional role of the Lord Chancellor in U.K. matters. However, in 2007 the First Minister decided that such attendance was no longer appropriate. Part of the reasoning may have been to distance the Lord Advocate, who is the head of public prosecution (effectively of all criminal prosecution in Scotland) from executive government. However that may be, that particular opportunity to exercise influence, including influence towards the maintenance of the rule of law, was then removed, although the Lord Advocate remains the principal legal adviser to the Scottish Government and can be called in for advice. A further development, however, has been that the last two Lord Advocates have both been career prosecutors, without the width in civil practice experience of their predecessors in that office, who were all drawn from the senior ranks of the Faculty of Advocates. That development has, in my view, been unfortunate. It has meant that, in practical terms, the Scottish Cabinet has had to rely for legal advice in civil matters, including where the rule of law trenches on such matters, on legally qualified civil servants, whose influence may be less powerful. On the other hand, all Bills presented to the
Scottish Parliament are scrutinised by officials for compatibility with the European Convention and with Community law.

In the end accordingly, although there are some checks and balances, Scotland relies heavily on its higher courts for the due application of the rule of law. It has not, to date, found the absence of a Lord Chancellor to be a serious disadvantage to the recognition and enforcement of that principle.

As to the independence of the judiciary, this principle is also well recognised in Scotland. In that respect the Lord President of the day has a role to play. Since the enactment of the Judiciary and Courts (Scotland) Act 2008 that office holder has been formally recognised as the head of the Scottish judiciary, though prior to that he had been informally so recognised. The occasions on which the Lord President has had to take action in that regard have been relatively rare. One occasion does, however, come immediately to mind. In August 2007 an individual by the name of Angus Sinclair stood trial in the High Court in Edinburgh. He was charged with having, in 1977 along with another, raped and murdered two young women. The case was notorious, the crimes being colloquially known as the “World’s End Murders” after the name of the public house where, it was alleged, the accused had met the young women. Under modern Scottish criminal procedure an accused is entitled, at the end of the Crown case, to submit to the trial judge that, on the evidence led by it, he has no case to answer and should be acquitted. Such a submission was made on behalf of Sinclair. It was upheld by the trial judge; Sinclair was acquitted. As the law then stood (it has since been amended) he could not be tried again for the same offences. The Lord Advocate of the day (now Dame Elish Angiolini), who had not personally conducted the prosecution, chose as a person with right of audience in the Scottish Parliament to make certain remarks in that body about the trial and the acquittal. These remarks included what, in my judgment, was a serious criticism of the conduct of the trial judge, in particular of his decision to acquit Sinclair. Although that decision might have been brought under review before a higher court by a Lord Advocate’s Reference, no such proceedings were instituted by her. I found it necessary to write a public letter to the Lord Advocate remonstrating with the making of those remarks in that forum, which I considered to be an attack upon the independence of the judiciary. As I recall it, she did not in reply concede that her remarks in that forum had been inappropriate but she nonetheless recognised the importance of the principle.

The correctness of my approach has been questioned, in particular, I believe, by Lord McCluskey of Churchill, a former Solicitor General for Scotland and subsequently a Senator of the College of Justice. But I remain of the view that the open criticism by a Law Officer in Parliament of a judicial decision, particularly in a criminal case where further judicial resort was available, does threaten the independence of the judiciary and that my course of action was justified. Whether or not that be correct, the ability of the Lord President to take such action on an appropriate occasion remains an important safeguard. Whether the effective presence of a Lord Chancellor in Scotland would have made any difference is doubtful.

My overall judgment is that Scotland has not been seriously disadvantaged, at least in recent times, by not having had its own Lord Chancellor.
I make one further observation. It relates to the access of the judiciary to Parliament. As your Lordships are aware, section 5 of the Constitutional Reform Act 2005 empowers each of the heads of the judiciary in the various parts of the United Kingdom to make written representations to Parliament. Lord Phillips has described this as a “nuclear option”-a course of last resort. As Lord President, I did not regard it as such. Indeed, on one occasion I exercised that power when, in January 2012, I made written representations to each of the Houses of Parliament about a provision in the Scotland Bill then before it. It concerned the jurisdiction of the Supreme Court of the United Kingdom in Scottish criminal matters. I attach a copy of those representations. The matter in question was of real importance to the administration of justice in Scotland, and remains so. I believe that it is of value to the U.K. legislators should, in this non-devolved area, have direct access to the views of the head of the Scottish judiciary. While the exercise of the power should be confined to matters of major importance, it need not, in my view, be reserved for use only in situations of constitutional crisis.

I hope that these observations may be of some value to your Lordships’ deliberations.

20 August 2014
This is a very brief submission following the evidence session on 30 July 2014 with Lord Hope of Craighead, Lord Judge and Lord Woolf.

**Right of Lord Chief Justice to address Parliament**

At QQ 36–38 of the evidence session on 30 July, Lord Judge said that the statutory right of the Lord Chief Justice to make written representations to Parliament was a “nuclear weapon” which made it difficult to use. Instead he would prefer the Lord Chief Justice to have the right to address Parliament orally. This prompts two suggestions for the Committee to consider:

- It is unnecessary to confer on the Lord Chief Justice a statutory right to address Parliament. It would suffice for the Constitution Committee to state in its report that if the Lord Chief Justice ever wishes to express concerns, it will immediately grant him a hearing. The Committee can report to the House, and has shown that it can do so very swiftly when it needs to. Lord Judge seemed to accept that this might suffice when he said (responding to Q36): “If the House wants to know the views of the Lord Chief Justice ... then he should have the right to speak in the House. Whether it is to this committee or a differently constituted committee—I would have thought the Constitution Committee an ideal place—is also worth considering”.

- It is true that the LCJ’s statutory right to make written representations has given rise to difficulties, when the LCJ has sought to use this power to submit to Parliament his periodic reports. The House of Commons has raised procedural objections which are still not fully resolved. One solution would be to place a statutory duty on the LCJ to submit an annual report, similar to the statutory duties laid on the Senior President of Tribunals, or the Supreme Court. That would help to ensure that reports are submitted annually (which has not always been the case), and would avoid the unseemly procedural wrangling which has accompanied previous reports. I believe that the present Lord Chief Justice would be willing to submit annual reports, and it would be helpful to clarify the process for doing so.

**Multiple guardians of judicial independence and the rule of law**

In conclusion, I would like to emphasise a point already made in the submissions of my colleagues Graham Gee and Patrick O’Brien. The office of Lord Chancellor should not be viewed in isolation. He is not the only guardian of judicial independence and the rule of law.

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39 In 2008 the Constitution Committee encouraged the then LCJ, Lord Phillips of Worth Matravers, to submit annual reports to Parliament as a “key mechanism of accountability”. When Lord Phillips then sought to use his power to lay written representations under section 5 of the Constitutional Reform Act 2005 to lay his report before Parliament, the parliamentary clerks resisted. Lord Phillips had previously described the s. 5 power as a “nuclear option”, and the clerks felt that its use to submit a routine periodic report went against Parliament’s intention. They suggested that he deposit his report as a library paper instead. His successor, Lord Judge, also sought to use s. 5 to submit reports to Parliament—unsuccessfully in 2010 and 2012, following further resistance from clerks in the Commons, but successfully in 2013.

40 Section 43, Tribunals, Courts and Enforcement Act 2007.

41 Section 54(1) of Constitutional Reform Act 2005.
Within the executive there are multiple guardians of legal and constitutional values, including the Attorney General, Treasury Solicitor, and Parliamentary Counsel. There are specialist bodies defending certain aspects of judicial independence, in the Judicial Appointments Commission, Judicial Conduct Investigations Office, and Judicial Appointments and Conduct Ombudsman. Within Parliament there are now three specialist committees, in the Lords Constitution Committee, Commons Justice Committee and Joint Committee on Human Rights. The Lord Chancellor is no longer the sole defender of the rule of law. He is buttressed by all these other bodies, who can provide advice and support, and scrutiny. The institutional landscape may seem more complex and more fragmented; but reliance on multiple guardians rather than a single guardian is also more robust.

August 2014
INTRODUCTION

1. Not for some 339 years has the office of the Lord Chancellor been vested in a non-lawyer. The last holder of the office who held that distinction was Lord Shaftesbury, who was Lord Chancellor from 1672-1673\(^{42}\). This quite clearly shows that having non-lawyers in the post is not always a good idea. It is therefore right and proper for Your Lordships to examine the fundamental role, functions and office of the Lord Chancellor.

2. This short introduction will seek to set out a brief overview of the Lord Chancellor in the Constitution. Le Sueur et al. tell us “the Lord Chancellor has special responsibility for ensuring compliance with rule of law principles”\(^{43}\). In addition, Woodhouse tells us that prior to the reforms of the Constitutional Reform Act 2005, the Lord Chancellor was responsible for the following:

1) the Lord Chancellor’s Department (an Executive Ministry)

2) Judicial independence and judicial appointments. He was also head of the judiciary (a judicial role)\(^{44}\)

3. Ryan also tells us that the Lord Chancellor was an ex officio Speaker of the House of Lords, and was the Government’s principal representative in the same House\(^{45}\).

Part I – The Office of Lord Chancellor

Question 1 – what are the current functions of the Lord Chancellor, as distinct from those of the Secretary of State for Justice?

4. The Constitutional Reform Act 2005 makes it quite clear that the Lord Chancellor has a duty to uphold the rule of law\(^ {46}\). Thus, it appears that he is duty bound to advise the House and the Government when legislation is likely to violate the rule of law. However, in order to fully appreciate this function, it is necessary to diverge from this overarching topic to explore the meaning of “the rule of law”, since it is not defined. Slapper and Kelly identify it as a “symbolic ideal against which proponents of widely divergent political persuasions measure and criticise the shortcomings of contemporary State practice”\(^ {47}\). Joseph Raz, writing in the Law Quarterly laid down certain principles that should be followed\(^ {48}\). They are the following: all law should be prospective, open and clear; laws should be relatively stable; the making of particular


\(^{43}\) A Le Sueur; J E K Murkens; M Sunkin, Public Law: Texts, Cases and Materials (2nd, Oxford University Press, Oxford 2013)

\(^{44}\) D Woodhouse, The Office of the Lord Chancellor (1st, Hart Publishing Ltd, Oxford 2001)

\(^{45}\) M Ryan, Unlocking Constitutional and Administrative Law (2nd, Hodder Education, Abingdon 2010)

\(^{46}\) Constitutional Reform Act 2005 s1

\(^{47}\) G Slapper and D Kelly The English Legal System (11th, Routledge, Abingdon 2010)

\(^{48}\) [1977] 93 Law Quarterly Review 195
laws should be guided by rules; the independence of natural justice must be observed; there must be procedural fairness in official decision making; and the courts should be open and easily accessible, having powers of review and interpretation. It is therefore quite clear that the Lord Chancellor has to uphold all of these concepts in the execution of his functions.

5. However, this can run into conflicts with the concept of Parliamentary supremacy – a concept that has been lauded for being “democratic”\(^\text{49}\). In writing this, Professor Adam Tomkins seems to be suggesting that the judiciary are untrustworthy. Indeed, in a Written Question, Lord Lester asked HM Government whether they believed Parliament’s legislative powers to be unlimited. The Government responded in the affirmative\(^\text{50}\). This will be explored in more detail in questions 2, 4 and 5.

6. The Lord Chancellor also has the ceremonial duty of presenting Her Majesty with the Speech that she will deliver on State Opening of Parliament.

7. Finally, the Lord Chancellor has powers bestowed upon him by legislation\(^\text{51}\).

Question 2 – are the Lord Chancellor’s powers nominative, or genuine?

8. As I stated in response to Question 1, the requirement that the Lord Chancellor uphold the rule of law can be contradicted by Parliament, and thus this power can be seen as purely nominative. For example, the rule of law – theoretically – requires that Parliament respect judicial rulings and, where necessary, act thereon, since any failure would show that there is a failure in the coequal balance of powers, upon which our Constitution is based. Parliament has failed, however, to heed judicial decisions, or has attempted to subvert them by retroactively legislating (see, for instance \textit{Caitlin Reilly and another v Secretary of State for Work and Pensions}\(^\text{52}\), where the High Court struck down an attempt to retroactively validate a scheme that had previously been declared unlawful). The Lord Chancellor is meant to uphold the rule of law, yet, as the case above shows, he failed to do so in preventing the passage of the relevant legislation.

9. However, where the Lord Chancellor is specifically imbued with power deriving from Statute, this is a genuine power, normally resulting in his ability to make delegated legislation\(^\text{53}\).

Question 3 - How in practice does the Lord Chancellor uphold the rule of law and judicial independence?

\(^{49}\) A Tomkins \textit{Our Republican Constitution} (2005, Oxford: Hart)  
\(^{50}\) House of Lords Hansard 13 March 2004, col WA160  
\(^{51}\) For instance, see s 1(1) Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) (“The Lord Chancellor must secure that legal aid is made available in accordance with this Part”)  
\(^{52}\) [2014] EWHC 2182 (Admin)  
\(^{53}\) LASPO s 3(3) (“The Lord Chancellor may by regulations make provision about the payment of remuneration by the Lord Chancellor to persons who provide services under arrangements made for the purposes of this Part.”)
10. Whether the Lord Chancellor upholds the rule of law “in practice” is negligible, and consequently the answer to this part of the question can be shortly stated – he does not, in practice, uphold the rule of law. This is because of the current setup in relation to the relationship between the Lord Chancellor and the Secretary of State for Justice (explored later). This lack of practical protection is not helped by the fact that there is no concrete definition of the rule of law. Theoretically, of course, the Lord Chancellor can advise his fellow cabinet members and Parliament that the rule of law forbids whatever action they are contemplating. In practice, this does not happen, as there is no evidence of a Lord Chancellor doing so.

11. However, the Lord Chancellor has protected judicial independence in that it is now convention that he does not refuse recommendations for judicial appointment, with the bulk of the work in that regard being undertaken by the Judicial Appointments Commissions for England and Wales, Scotland and Northern Ireland. More generally, the Lord Chancellor’s role in relation to judicial independence is set out in the Constitutional Reform Act 2005. Specifically, the requirement that the Lord Chancellor must defend that independence can be evidenced from a description given by Lord Phillips of how the Lord Chancellor regularly negotiates with the Treasury for the budget of the judiciary.

Part II – the Combined Office of Lord Chancellor and Secretary of State for Justice
Question 4 – Are the offices of Lord Chancellor and Secretary of State for Justice best performed by the same person?

12. No, they are not. The Secretary of State for Justice is a politician who is responsible for heading a department with its own budget constraints, and departmental efficiency will thus be more important than any other concern. In order to maintain his job, he must ensure that he follows Governmental policy above all else. The Lord Chancellor, on the other hand is required to uphold the rule of law (as previously discussed), which may be contrary to government policy. Indeed, Dominic Grieve MP correctly stated that it would be better if the Lord Chancellor were someone who would not be subject to the “pressures of political patronage [...] [and] at the pinnacle or end of his career, with no further political ambitions”.

13. Another reason for the separation of the two offices is their distinct nature. Where an Act of Parliament confers power that is within the ambit of the Secretary of State for Justice/Lord Chancellor, it specifically refers to “The Lord Chancellor”, rather than “the Secretary of State for Justice”. Indeed, the majority of legislation that confers such power confers it on the Lord Chancellor than the Secretary of State. In addition, the Secretary of State is unable to exercise many of the powers that the Lord Chancellor may exercise. This is so because of the Constitutional Reform Act 2005. These provisions are ring-fenced – i.e. reserved to the Lord Chancellor.

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54 See s3 Constitutional Reform Act 2005
55 See s6
56 L Phillips The Challenges of the New Supreme Court Gresham College Special Lecture 8 June 2010
57 House of Commons Hansard, 1 March 2005, col 892
58 Section 7 and Schedule 20 Constitutional Reform Act 2005
14. Finally, section 2 sets out factors in selecting the Lord Chancellor that differ from the factors to be considered when considering who should be a Secretary of State. Indeed, section 2 relies heavily on “previous experience” in a number of roles\(^{59}\) – for instance, previous experience “as a Minister of the Crown”\(^{60}\), or as a Practitioner or teacher in law\(^{61}\).

15. In conclusion, therefore, the Office of Lord Chancellor was designed – at the outset – to be a completely separate office. Giving it to a Minister, whose primary function of Secretary of State conflicts with the requirements of that office, is therefore unworkable.

16. I take a moment to comment on Evidence submitted by others in relation to this question. Graham Gee, in his written evidence to the committee, states that the current setup gives the Lord Chancellor “more political clout”. This is not necessarily the case. The pre-2003 office of Lord Chancellor did not have as much responsibility as the current Lord Chancellors, yet he was a member of Cabinet and consequently had as much influence as his ministerial colleagues. Dawn Oliver, on the other hand, has succinctly stated my current thinking, and I would adopt her Evidence on this issue in addition to the evidence provided above.

**Question 5** – can the principles of the Rule of Law and judicial independence be protected by a minister with departmental budgets and priorities that would point in other directions?

17. I hinted at an answer to this question above (at para 12). The overriding principle for the Minister will be to maintain the Prime Minister’s patronage. Indeed, during the most recent Cabinet reshuffle, it was a widely held theory that the Prime Minister reshuffled his cabinet in order to remove known supporters of the European Union and the European Convention on Human Rights, thereby permitting him to pursue his ultimate aim of withdrawal from both. The previous form of Lord Chancellor had knowledge of the rule of law and the judiciary, having been a lawyer or other important legal personality. Because of how this convention has been watered down through the Constitutional Reform Act, knowledge of the rule of law and the judiciary is no longer required, so there is a threat from within the Government to those principles. For instance, whilst the Lord Chancellor might negotiate for a budget for the Courts, it is up to him as to how much money he requests and – eventually – provides to the judiciary. If he is constrained by a requirement to reduce overall departmental spending, then the spending on the judiciary will consequently decrease.

18. Perhaps an independent voice is required, in order to ensure that the principles of the rule of law and judicial independence are upheld. It might be worthwhile stripping the Secretary of State for Justice of his current powers as Lord Chancellor, and amending the Constitutional Reform Act to include the amendment suggested by

\(^{59}\) Constitutional Reform Act s2(1)

\(^{60}\) Ibid subparagraph (a)

\(^{61}\) Subparagraphs (c) and (d)
Dominic Grieve MP (see para 12 and footnote 16), thereby meaning that there is an independent voice, free of needing political patronage.

Part III- the criteria for appointment

Question 6 – How effective have the appointment criteria been? What is meant by “qualified by experience”?

19. The term “qualified by experience” is meaningless as far as section 2(a) and (b) are concerned – the essential point in those subsections is that the potential candidate has to have been in Parliament or in Government – irrespective of his length of service in either. The term does have meaning, however, when applied to section 2(c) and (d). This is because there are specific requirements in order to be a qualified practitioner, as defined by the Courts and Legal Services Act 1990 (indeed, there are specific requirements to be fulfilled in order to hold a “senior courts qualification”62, involving practicing in a Court of Law).

Question 7 – should the appointments criteria be set on a statutory footing?

20. There should be a definition of what is meant by “experience” in relation to ministers of the Crown or Members of either House. Indeed, a potential amendment to the Section would be as follows63:

“[…]
(2) The Prime Minister may take into account any of these:
(a) Experience as a Minister of the Crown, the said person having been such a Minister for a continuous period of a minimum of three years
(b) Experience as a Member of either House of Parliament, the said person being a member of either House for a continuous period of a minimum of ten years”.

Question 8 – What are the advantages and disadvantages of the Office being held by a lawyer?

21. An advantage of a lawyer holding the post is that he will know well the “terrain” – he will know the judiciary, having appeared in Courts of Law during the necessary period of practice, and he will know of the concepts of the rule of law, having learned of them whilst qualifying. He can therefore appreciate the requirements of both these concepts – independence of the judiciary and the rule of law. As Dawn Oliver rightly states in her evidence, the Lord Chancellor – as a lawyer – will have the confidence of the judiciary and will be able to maintain better relations between the judiciary and the Government.

22. Furthermore, Your Lordships’ House has considered this issue before. During the Committee Stage in Your Lordships’ House of what would become the Constitutional Reform Act, Sir Tom Legg stated, “there has […] been a fairly strong convention that

62 See s2(3)(a) Constitutional Reform Act and s71 Courts and Legal Services Act 1990
63 Proposed amendments are contained in red in the quoted text
the Lord Chancellor should either be a judge or a very senior lawyer. [...] It will probably be an advantage to be a lawyer [...]." \(^64\)

Question 9 – Should the Lord Chancellor be a person who is not seeking further advancement? Should he be a member of the House of Lords?

23. Yes to the first question (see above at paragraph 12 especially), and yes to the second question (to a degree). The House of Lords is more deliberative than the Commons; however, it is quite possible for the Government to influence the Lords as well as the Commons (because of the fact that some of its ministers are drawn from that House). If the Lord Chancellor is going to be a member of the House of Lords, he should ideally be a crossbencher, since they are independent of the main political parties.

Question 10 – should there be a Lord Chancellor? What would be his functions and who would perform them?

24. There should be a Lord Chancellor, with his functions being performed by an independent (i.e. crossbench) member of the House of Lords who is preferably a lawyer. Those functions would be stripped down to ensuring the judiciary had enough funding, and acting as a legal advisor to the Government in respect of the Rule of law. The Attorney-General consequently should be restricted to advising and acting for the Government in relation to litigation and its international obligations, with his other functions going to the Lord Chancellor. This does not apply to the Advocate-General for Scotland, where the constitutional establishment is different owing to a differing legal system and the results of devolution.

July 2014

\(^64\) Oral evidence to the House of Lords’ Select Committee on the Constitutional Reform Bill, Q 689
The Chairman: I start by welcoming our three distinguished witnesses and expressing our appreciation that on this, the last day of the term in the House of Lords, you have been able to be present. I also thank you for the submissions in the form of written evidence and excerpts from speeches, along with a background note in the case of Lord Hope of Craighead, which you sent to us. I hope that we can make reference to those in our report if we think it appropriate, possibly with the exception of the background note, which is of a distant status from written evidence.

Lord Hope of Craighead: Thank you, Lord Chairman. I simply wanted people to understand how limited my contact with the Lord Chancellor was.
The Chairman: That is perfect modesty, if I may say, but I daresay we shall soon discover otherwise. Would any of you like to make an opening statement?

Lord Judge: I am afraid I did not send the committee a written submission. Perhaps it would be sensible for me to say that as Lord Chief Justice I dealt with three Lord Chancellors, two Attorneys General, three Masters of the Rolls and two Presidents of the Supreme Court. It is an extraordinary situation. Of my three Lord Chancellors, two were lawyers by training and profession at the end of their careers, and one, the current Lord Chancellor, is a non-lawyer whose first office was held, I think, in 2010. So I have seen rather a different form of Lord Chancellor.

Q31 The Chairman: Thank you. We have an excerpt from a speech you made in December 2013 when you had quite a lot to say about contacts between the Lord Chief Justice and others, so we may come to that.

Q32 I start by asking about the Concordat which was drawn up ahead of the Constitutional Reform Act 2005, how durable it has been and whether the role and functions of the Lord Chancellor have changed in a way that may suggest that there is a need to update the 2005 Act. Perhaps I may turn to Lord Woolf first, given his involvement in that legislation.

Lord Woolf: The Concordat predates the 2005 Act. A lot of attention was given in Parliament to the precise drafting of the 2005 Act, and I think that it overtook the Concordat to some extent. But I still regard the Concordat as an important document, as I think Lord Falconer of Thoroton did at the time. That was because there was a multiplicity of contacts between the judiciary and the Lord Chancellor, and because of the Lord Chancellor’s involvement with the executive generally. Where I think the Concordat did and still does play an important role—no one disputes its status—is in the division of responsibilities for contacts between the judiciary, the Lord Chancellor and the executive into three categories. There were ones that were to be the responsibility of the judiciary, there was one that was going to be the responsibility of the Lord Chancellor, and ones that were to be the responsibility of both. In the case of each a guiding principle behind the Concordat is that there should be close consultation in respect of all these matters—what I would regard as interface issues—between both. So what I have said about my three categories does not mean that the other member was cut out. The fact that it was the Lord Chancellor’s sole responsibility did not mean that if there was some issue on which he thought the views of the Lord Chief Justice could have a bearing, he should not consult about that. The great thing about the Concordat is that it emphasised that there should be an informal partnership between the two offices where each was sensitive—I like the word “sensitive” in this context—to the concerns of the other.

The Chairman: Do you think that the changes made to the role and functions of the Lord Chancellor since then should lead us to contemplate changing the 2005 Act?

Lord Woolf: I would be very hesitant about changing the 2005 Act. I do not think we can put the clock back. In case there is any confusion, in my written evidence, which was prepared in a hurry, I was not seeking to suggest that the 2005 Act should be altered and that we could ignore what has happened and put the clock back so far as the Lord Chancellor is concerned. The question is: how effectively is the 2005 Act working? That is my view and I do not suppose that everyone will see it that way. If there are problems, could any changes be
made?—not by legislation but by creating a convention, to improve the position? I have read the evidence given by Lord Mackay of Clashfern and Lord Phillips of Worth Matravers and I note that one of the possible questions we were given notice of concerns whether reasons should be given by the Prime Minister for appointing a particular person as Lord Chancellor, having regard to the constraints imposed on him by the 2005 Act as to the experience the person who is to be appointed should have, speaking for myself, and I appreciate that others may take a wholly different view—indeed, the Prime Minister of the time could take a different view—I think it would be very helpful to have a convention in respect of this appointment. This is notwithstanding the tradition with regard to Cabinet appointments being exclusively a matter for the Prime Minister of the day. The convention would require the Prime Minister to indicate his reasons for regarding the person appointed as being qualified if there might be misunderstanding as to whether a particular person was qualified for appointment as Lord Chancellor, This applies to the most recent appointment—what are the things that the PM thought meant that the Lord Chancellor was qualified in the way that the 2005 Act requires? I was mystified as to what they were at the time. I am not making this a criticism of the holder of the office because, of course, he was appointed and he is perfectly entitled to assume that the Prime Minister of the day had confidence in him. But for a relationship that I regard as sensitive, it might have been helpful, to put it at its lowest, to see if what the 2005 Act had intended to be done was done.

**Lord Hope of Craighead:** On the Concordat, I remember its significance very well because I was following the Constitutional Reform Bill as it went through the House. It was a matter of great concern to us serving Lords of Appeal in Ordinary. It seemed to me that the strength of the Concordat lay in the partnership that Lord Woolf was able to establish with Lord Falconer of Thoroton. My concern was that once those individuals left their respective offices, the strength of the Concordat would diminish. That is the problem with agreements that are not written down. I think that with time it will lose its significance, and I am not sure whether to some extent it has not already done so.

As for the appointment, I think that some of us were rather dismayed to see a further provision added to the end of section 2(2), “(e) other experience that the Prime Minister considers relevant.” That opened the door to whatever he thought was appropriate. Of course it would be a good idea if he explained why, but he has such latitude there. It does not have to be legal experience. That provision was slipped in by a government amendment rather late in the passage of the bill, to the disappointment of quite a few.

**Lord Judge:** I do not think I have ever had recourse to the Concordat in any of my discussions with any of the three Lord Chancellors. We had a working relationship; I am sure that the present Lord Chief Justice has a working relationship with the Lord Chancellor, and we get on with it. If we have never had to have recourse to the Concordat and ask what it provided, maybe it is something that can be left until such time as the Lord Chief Justice of the day, and for that matter the Lord President of the Court of Session and so on, say, “This is not working. Our relationship is so undermined that we have to review the Concordat.” As to the Lord Chancellor’s qualifications for appointment, I would simply say that I disagree with Lord Woolf. I think that the Prime Minister giving reasons sounds effective, but what if they are daft reasons? What if they do not stand up to analysis? Is there going to be a judicial review of the Prime Minister’s reasons for appointing the Lord Chancellor? It is up to Her Majesty to decide whether to offer him the seals of office, and if she does, we cannot say to her, “Your

Majesty, please wait for 28 days to see whether someone wants to bring a judicial review.” I think that that would be dressing something up that is unsatisfactory.

The Chairman: Thank you. That is an interesting view.

Q33 Lord Goldsmith: I declare an interest as a practising lawyer. I am terrified of being in front of a form of court that seems to consist effectively of three Lord Chief Justices. There has been a focus in the helpful answers so far on the Concordat. I understand that the Concordat is primarily concerned with the working relationship: the running of the courts, responsibility for the judges and so forth. The Constitutional Reform Act 2005 sought to do something else, which was to establish responsibility in relation to the rule of law. That was explicitly included in the Act. I thought it was wrong to limit it to the Lord Chancellor at the time. It ought to have included the law officers as well.

Q34 I wonder whether our witnesses have a view on that aspect of the 2005 Act and whether there is scope for reform or improvement so as to focus more on the rule of law concerns.

Lord Woolf: I agree entirely with what Lord Goldsmith said about the Concordat. It dealt with the nitty-gritty. If I may say with respect to Lord Judge, the fact is that in his conversations with the Lord Chancellor he did not have to bring out the Concordat and say, “Ah, Lord Chancellor, you cannot do that because of the Concordat.” That does not really reflect what the Concordat was all about. It was designed to avoid arguments. It was concerned with the working arrangements between the two parties and it was not on the level of the rule of law. I think that at the time the 2005 Act was startling because, as far as I know, it makes the first reference that you can find in any legislation dealing with these matters that refers to the rule of law, and it does it only en passant in a negative way. It says that it does not change the hitherto position with regard to the rule of law. It is statutory recognition of the fact that the rule of law is an important part of our system, which is taken for granted. I think one would have to consider any amendments to the 2005 Act after seeing what form they might take. I would hesitate to do that because I would not like the 2005 Act to become a matter of political dispute.

Lord Judge: I am sorry, Lord Chairman. My point was this: we should leave the Concordat in place because it is working. I am sorry if I did not make that clear.

Lord Hope of Craighead: From the point of view of the Supreme Court, we had access to the Lord Chancellor because of section 50 of the Constitutional Reform Act 2005, which placed on the Lord Chancellor particular responsibilities for the resources of the court. That was a matter for continuing discussion. I am not sure whether that fits in with the idea of the Concordat, but there was a statutory basis for us to have recourse to the Lord Chancellor when we needed it. It meant that there was a fairly regular although occasional series of meetings between the President and the Deputy and the Lord Chancellor to ensure that the system was working.

Q35 Baroness Falkner of Margravine: Leaving aside the administration of justice, to what extent in your experience did the senior judiciary meet the Lord Chancellor and have discussions about the rule of law, the independence of the judiciary and particularly the anticipation of controversial measures that might be coming down the road? What was the
relationship like? Was there any attempt to address those issues early on? If there was, did that change anything? I wonder whether you could talk about how the relationship played out in practice. Lord Judge, I wonder whether you might cover one or two things you said in your opening remarks in terms of wanting representation in Parliament as well.

**Lord Judge:** I used to see the Lord Chancellor once a month. The meetings were constant and regular. I saw the Attorney General with about the same frequency. Usually, the Lord Chancellor of the day would let me know that something was coming that might affect the judiciary or the rule of law. Without breaking any confidences, it will come as no surprise to anyone here to know that among other things we discussed were the legal aid proposals. We considered pensions. I spent a lot of time with one Lord Chancellor being rather cross about the number of Henry VIII clauses that were being introduced in legislation, and I think they have been reduced. We had long and repeated discussions about televising court processes. I am not suggesting any particular reluctance, but in the end I was able to persuade the Lord Chancellor that the consent of the Lord Chief Justice of the day was required—consulting him was all well and good, but we all know what consulting means; it does not mean a lot—if the proposal was going to be extended. There were discussions about the way in which the new Sentencing Guidelines Council should operate, and the relationship between the new Sentencing Guidelines Council and the Court of Appeal Criminal Division so as to make sure that the powers of the Court of Appeal Criminal Division were not reduced.

Finance we discussed frequently. The current arrangement requires the Lord Chief Justice of the day to agree a budget, or not to agree it and to write to Parliament and say that he is not agreeing it. I agreed the budget on every occasion save one, when I thought that it was not sufficient for the needs of the court. I was wrong. I had not agreed it but fortunately I had not written to Parliament, so I had no egg on my face about it. That is the constant coming and going of what goes on at these meetings.

The role of the Lord Chief Justice is not to interfere in government policy, so it is sometimes quite a delicate line. Judicial review is currently being debated and I shall not make any contribution in the debate because I had confidential conversations of the kind that I have indicated. You can imagine that the Lord Chief Justice might have views about that subject, and I found that all three Lord Chancellors I dealt with listened. Sometimes they agreed, and I will say this for each of them: where they did not agree, they said so. None of them left me in a position where they implied that they had agreed but I found later that they had changed their minds—or, as one would say in ordinary civilian life, that they had ratted on me. We would either agree or disagree.

That is what goes on all the time with the Attorney General, if you want me to move to that subject, because I know that is one of the issues. As Lord Goldsmith will know, there is the overuse of cautions, why they are being used, deferred prosecution agreements and whether we distinguish between white-collar crime and blue-collar crime, legal aid, and the quality of the work being done by the Crown Prosecution Service. The Attorney General would have his responses.

**Q36 Baroness Falkner of Margravine:** One of our witnesses wrote this, and I wonder whether you could comment on whether it is accurate or not. She said, “What has been

created is an institutional relationship which envisages two separate but equal branches working together to manage the courts and judiciary.” Do you agree?

**Lord Judge:** At the moment there is an attempt to square that circle so that Her Majesty’s Courts and Tribunals Service functions differently. There is a difficulty; I do not see that society can do other than require the state to provide a system for the administration of justice. That simply cannot be provided privately. On the other hand, the administration of justice in relation to the cost of the court and so on needs to be examined. The old arrangement by which I had to agree or disagree the budget or to write to Parliament to say that I disagreed seemed to me absurd. We are not accountants. I would get my best prosecuting judges to go through the books and make sure the figures tallied and so on, but there has to be a different arrangement. If there is Her Majesty’s Courts and Tribunals Service, the Lord Chancellor, the Secretary of State and the Lord Chief Justice have an equal interest and the people who work in it have an equal responsibility to both. But I do not see it in quite the way your correspondent suggested that it worked.

**Lord Hope of Craighead:** Could I add a snapshot? The present Lord Chancellor has, I think, gone out of his way to make contact with the judges on the Supreme Court. On the day he was installed we were installing a new justice. He came to see us and to see the installation. He has had dinner with us at our annual dinner for the justices, and he came to lunch at which there was an open discussion, which he took part in, about legal aid and judicial review. He listened to what we said. We did not expect him to commit himself one way or the other but, more than his immediate predecessors, possibly because of his lack of legal experience, he seems to have gone out of his way to make those sorts of contacts and to understand what people are thinking.

**Lord Woolf:** I am happy to endorse what Lord Hope said about the personal efforts that were made by the new Lord Chancellor. In that context, I think that what your correspondent wrote is a reflection of the sort of relationship that we were trying to achieve by the Concordat. The actual relationship in practice is extremely important. It is sometimes said that of the three arms of government, the judiciary is the weakest arm. I think that is undoubtedly true.

There is more than one problem that one must have in mind in talking about the relationship. As Lord Chief Justice, although I was prepared to speak very bluntly—I know Lord Falconer would agree that at times I spoke very bluntly—I always had to be conscious that my relationship with the Lord Chancellor provided an opportunity to influence, when possible, the Lord Chancellor. This could be a highly important protection for the judiciary and I might not be doing a good turn to the institution of the judiciary—that arm of government—if I got to a situation where we were at logger heads. All that one was wanting to do, was find ways of making the relationship more likely to work. As a former member of this committee, whose importance I regard as considerable, it is sometimes just a question of drawing attention to the possibility of doing things in a better way than hitherto, and indicating problems that I think exist and need attention. I do not say that one should write a prescription, but I think that there is a need for attention to be given to it, because it is my general feeling that matters that can loosely be described as relevant to the rule of law are going down the agenda because of external pressures.
Q37 Lord Goldsmith: I want to ask about another topic that is connected: the support that the Lord Chancellor has. Lord Woolf, in your helpful written evidence you observed that, “It is also important that there should be an increased availability of civil servants who are lawyers in the Lord Chancellor’s department.” The permanent secretary was a lawyer for a long time. That has changed. Is it the case that other legal advice, advice as to the legal profession, which a Lord Chancellor might need, is perhaps not so present as once it was; and with a Lord Chancellor no longer legally qualified, is that more important?

Lord Hope of Craighead: When I was Lord President, I had fairly frequent contacts through the permanent secretary, who was easier to get access to as he did not have to sit in the chamber as the Lord Chancellor used to. From time to time things came up in Scotland where I felt I needed some help and of which perhaps he needed to be informed. We had some problems with judges, one of whom eventually had to resign. There was some question as to whether we would have to take action to have him removed. Another judge was exceedingly slow in producing his judgments. The question is what you do, because the system for removing a judge is a joint address to Parliament, and what other steps can you take to try to avoid that appalling step to try to move things on? There were discussions about the award of silk to solicitors, because the rights of audience were being extended to solicitors under the reforms of 1990. I introduced television in Scotland in, I think, 1992 with Lord Cullen of Whitekirk’s help. Sir Thomas Legg was very interested in what we were doing and there were discussions about it at my instance simply so that he was aware of what we were doing. There was an exchange of information, and the fact that there were people who really knew what was going on in this jurisdiction was helpful to me, and it was helpful to him that I kept him informed as to what was going on.

I very much regret the loss of the expertise there. Of course, it went down the line. I remember a very full room just beside the permanent secretary’s office and the Lord Chancellor’s office. There were lots of people working away extremely well, I think, and doing all sorts of useful things. It is a great shame that that has gone, and if it could be restored in some way I am sure that would be a help to the Lord Chancellor himself.

Lord Woolf: May I add that the old style office of Lord Chancellor, and the special character of what came to be called the Lord Chancellor’s Department and now the Ministry of Justice, has been diluted? I will not put it any stronger than that. Those who worked in the Lord Chancellor’s Department tended to stay there. They realised that this what the situation required. It was part of the separateness of the Lord Chancellor from the general political hurly-burly. It had a special character. Lord Goldsmith commented on the need for more interplay between those in the Lord Chancellor’s department and the profession. It is very common now for the people who are in the private sector to spend time in government service and vice versa that could help. As far as I know there is no movement of that sort. I might be wrong, and I hope that I am wrong, because I think it would be very useful for people working in the Lord Chancellor’s department to spend time in a solicitor’s office or a set of chambers as part of their career development, and vice versa. I have always had a very high regard for the Government Legal Service. For a young man from chambers or what used to be an articled clerk to spend a little while in the Treasury Solicitor’s Department would be hugely valuable.

Lord Goldsmith: I wonder if I might ask if any of you have spotted any instances of lack of expertise that one might entirely forgive a non-legal qualified Lord Chancellor coming into the job at the request of the Prime Minister. One could forgive him for that, but one is surprised to see it coming from the department itself. I remember one occasion when there was a discussion and the Lord Chancellor made a statement about what the obligations were in relation to following European Court of Human Rights cases, which both misunderstood what the judgment said and wrongly attributed it to someone called “Lord Justice Hoffmann”, when he was, at the time the speech was made, a member of the House of Lords. This might be a petty lawyer’s point, but it was slightly surprising to see that coming out of the Lord Chancellor’s department.

Lord Woolf: I can give an example. I was asked by a Lord Chancellor to see if I could help him look at the possibilities of improving guidance on what could be done to improve the planning process. Anybody working in that jurisdiction will know that there is an environmental court in Australia that some of us—including myself—have been campaigning for us to emulate. It is a very different way of dealing with planning matters. None of those advising the Lord Chancellor on the subject had heard of it. I thought that was unfortunate and I do not think it would have applied in the days when people saw their primary career as being in the government legal service.

Lord Judge: I think that the Lord Chancellor’s department is short of lawyers at the top. I am not going to give any specific examples, but sometimes proposals come down the road to the Lord Chief Justice about which you would say to yourself, “Didn’t anybody tell the Lord Chancellor that this problem, that problem or the other problem might arise?” It is a pity that the Lord Chancellor does not have more qualified lawyers. I make that point about both of the first two Lord Chancellors I was talking about and the present Lord Chancellor. That is because a few years in practice at the Bar in the 1970s tells you very little about the constitutional difficulties, arrangements, changes and so on that have overtaken your life when you come to be Lord Chancellor at the end of your political career. This is not directed at Mr Grayling; it is the same with any Lord Chancellor. He needs good legal advisers. I do not think that the Ministry of Justice is filled with lawyers who understand the constitutional subtleties.

Q38 Lord Cullen of Whitekirk: Is there a case for amplifying communication between the judiciary and Parliament? Three possibilities have been mentioned. The first is a more relaxed approach to section 5 of the 2005 Act, which is to do with written representations. The second, mentioned last week by Lord Phillips of Worth Matravers, is the possibility of a cross-party justice committee to which the Lord Chief Justice could have access to express his views, “in a rather less dramatic way”, to use his words. The third is that recently Lord Judge has spoken if I may say wistfully about restoring the ability of the Lord Chief Justice to address the House of Lords. Is there a case for that and, if so, for what purpose and in what kind of situation?

Lord Judge: My view has been strengthened since I arrived here. I always took the view that the written representation was neither fish nor fowl. You introduce dramatic changes to the constitution on the basis of the separation of powers, and how wonderful that is, without acknowledging that the executive fills the legislature. It has quite a few members in the upper House. So we do not have a separation of powers; we are paying lip service to it. But
the result ignored the situation that the head of the judiciary was no longer in the Cabinet, and the right of the Lord Chief Justice, which was never exercised by Lord Woolf, or by his predecessor for that matter, to address Parliament, went. This is all part of the lip service paid to the separation of powers. You are then left with the ability to write a letter. I am sorry to say this, but in a system where orality is fundamental, the idea of writing a letter saying, “Dear House of Lords. I am really rather worried about such and such. Please will you do something about it?”, strikes me as being on the side of the absurd. I think that the Lord Chief Justice should be able to address Parliament if he has the sort of concerns which he would expect to write a letter about. Moreover, I am more convinced now than I was that there are times when I have heard the minister—there is no criticism of him—speak about what the judges might think. If anyone should be speaking about what the judges might think, assuming it matters, it should be the Lord Chief Justice or his equivalent. Again, the idea of him writing a letter saying, “I don’t think the minister quite understood what I was saying, and anyway he is wrong about this and that”, simply makes it absurd. So whereas I always regarded the opportunity to write to the House of Lords as my nuclear option, to be exercised only in very exceptional circumstances, because you do not use your nuclear option more than once, there is something to be said for the following. If the House wants to know the views of the Lord Chief Justice—and if they matter—on issues of practicality, then he should have the right to speak in the House. Whether it is to this committee or a differently constituted committee—I would have thought that the Constitution Committee would be an ideal place where the Lord Chief Justice should be able to speak—is also worth considering.

There is a further subtext to bear in mind. The Lord Chief Justice cannot come to the committee or to the House to discuss issues of policy. I do not think that the Lord Chief Justice should, for example, talk about judicial review. There is a serious division of view about judicial review and there is a dispute between this House and the other place. It is not about arguing for and against policy, but it is to inform the House about what the Lord Chief Justice thinks.

**The Chairman:** Perhaps I may come back on what Lord Judge said. As you know, this committee takes oral evidence from the Lord Chief Justice every year, and we have heard from you here. Are you suggesting, although I think you are not, that the Lord Chief Justice should become involved at any stage in the preparation of legislation?

**Lord Judge:** No. I am saying that he should be able to say to you or another committee, “I would like to come and address you on these issues, which have been raised about pending legislation and whether the judges would be upset.” I was there for the debate about a long overdue reform to the sentencing provisions relating to those in prison for public protection. It is a matter of real concern for him not to be able to say, “Actually, the judges will not mind. We thought that the legislation was wrong in the first place. All that has happened is that we have been proved to be right about it. Please correct it.”

**Q39 Lord Cullen of Whitekirk:** I think you have answered the question, and the response in my mind to your words is, “If you see something coming, you want to have means of doing something about it.” I think you are suggesting that the Lord Chief Justice might contact the committee to see whether he could address it on a matter. Those views would be taken into account and then conveyed to the House. Is that what you mean?
**Lord Judge:** Yes, I do, but of course there has to be reticence. We cannot have the Lord Chief Justice being seen by one side or the other of the political divide as being on this side or the other side. That would be terrible. We would go down a long route of saying, “Judges cannot be appointed without hearing their political views”, and the like. However, I think you can rely on the individual who is the Lord Chief Justice to know the difference.

**Lord Woolf:** I agree with what Lord Judge said about the power of the oral word in our system. In fact, I spoke in the House on the question that Lord Cullen raised about the written representations, as I was entitled to when I was LCJ. It was nothing special in those days, because you were a member of the House and you could get just attend and get up to speak, but obviously you did not do so unless it was on something very important. Many members of this House thought that the Lord Chief Justice, notwithstanding the separation of powers, should still have the right to address the House. Speaking to the House is a very good way of satisfying the judiciary and allaying how they feel at times. They have felt that, in certain circumstances, their position has not been properly considered or has even been overlooked.

The need could be greater in future years. When we get past the present period when we still have former Law Lords and former Supreme Court judges who, when they retire, are already members of this House and therefore automatically have the right to participate. They may not always be listened to, but they can say on certain subjects that they think what is being done is wrong for the rule of law. That is not going to happen now unless provision is made for it. If they came here, they would come as Crossbenchers. I recall it being said that we have about three new Crossbenchers a year. You cannot fill all those appointments with former Supreme Court judges. We have had by chance a number of retirements of the senior judiciary from the Supreme Court and other positions, which means that the House is well staffed at the moment with former judges. But I can see that disappearing.

**Lord Hope of Craighead:** I want to make two points. I remember well the days when the Lord Chief Justice would come and address the House from the Crossbenches. I can recall Lord Woolf doing that, as did Lord Bingham of Cornhill. The House paid great attention because they were speaking as the Lord Chief Justice and therefore they had the ear of the House. May I put in a word for the other jurisdictions? It is not the case on appointment that the Lord Chief Justice of Northern Ireland is made a member of the House, nor the Lord President of the Court of Session. Under the present system, they have the right to write a letter. I moved an amendment the other day to extend that right to the President of the Supreme Court. To my knowledge, the Lord President of the Court of Session has exercised the right once on a matter that was of great interest to the judges in Scotland relating to legislation that was before the House. I am sure he found it helpful to be able to reassure his own colleagues that he was able to do this. His letter was sent in and was subsequently put in the Library; it was on the table for people to consider if they were interested. It was not a very strong way of getting his message across because it could not be debated. It was simply a letter, but at least it was something he felt he could do.

**Baroness Falkner of Margravine:** I want to pick up on Lord Judge describing the letter as the nuclear option. It would seem that, if a letter is the nuclear option, appearing in a debate in the House of Lords would be rather like multiplying the warheads, to continue the analogy. It
Lord Hope of Craighead, Second Senior Law Lord then Deputy President of the Supreme Court, 2009–13, Lord Judge, Lord Chief Justice of England and Wales, 2008–13, and Lord Woolf, Law Lord, Master of the Rolls, 1996–2000 and Lord Chief Justice of England and Wales, 2008–13, seems to me that Lord Hope does not see it as the nuclear option, but that it is a useful device to communicate views.

Lord Hope of Craighead: Yes. I do not think that the Lord President who wrote the letter thought that he was introducing a nuclear bomb. It was simply that he felt it was a point that was at risk of being overlooked. It was of great interest to his court and it was very proper that he should write. I think he did it only once, so it is not done very often. If you mean by “nuclear option” that one should exercise restraint in exercising the right, certainly that would be the proper way of going about it.

Lord Judge: Perhaps I did not put the point across very well. If this is the nuclear option, what is the point of firing it? It is not a very powerful weapon at all, but it is all that is left. I do not regard a letter as giving the Lord Chief Justice sufficient authority, in an age when the Lord Chancellor is no longer the head of the judiciary, to convey the views of the judiciary. It is a feeble nuclear option.

Q40 Lord Brennan: Lord Judge, you mentioned to Baroness Falkner of Margravine the connection between the senior judiciary and the law officers. It is not very well known, and it is not well understood. I wonder whether you could enlighten us about that a little. Secondly, what is your view about the constitutional role of the Attorney General, particularly in a government where neither the Lord Chancellor nor the permanent secretary in the Ministry of Justice are lawyers? What should the Attorney General then be thought to be responsible for?

Lord Judge: The meetings have been going on. Lord Goldsmith will remember plenty of meetings with me when I was senior presiding judge. They are for each other to be informed of what is going on. We obviously do not discuss cases. The Attorney General does not say, “Oh, I’m thinking of referring the case that you read about in the paper last week”, to which the Lord Chief Justice says, “Oh what a good idea”, or, “What a bad idea.” The Attorney General understands the rules and you can expect senior judges to understand the rules. The objective is to see whether the system could be made more efficient. By “the system” I do not mean merely what happens in the Crown Court when somebody says, “Stand up, Lord Judge. You are charged on this indictment with …” It is to try to make the entire criminal justice system work efficiently. That includes ideas such as deferred prosecution agreements, the use of cautions and so on, which I referred to. I am not sure I can expand on that any further.

As to the role of the Attorney General, that has assumed greater importance since the constitutional changes. It is a very significant office. The objective is to have an individual of impeccable moral courage. The function of the Attorney General is to tell the Prime Minister, the Cabinet, and for that matter the House of Commons, how he sees it, and that may be diametrically opposed to the views and wishes of those he is advising. So long as he retains that function, and is able to perform it, he is performing a crucial role in our constitution. He is, of course, advising the Government. He is, of course, the law officer. Lord Goldsmith will know this far better than I do, but looked at from my point of view as a former Lord Chief Justice, I want to be sure that the Attorney General is a man or a woman—I dealt with Baroness Scotland of Asthal frequently—who will tell it as it is and, of course, have access to the best advice that he or she may need, and the Treasury Solicitor obviously advises the
Attorney General from time to time. I shall put it another way round: I should be astonished if the Treasury Solicitor did not advise the Attorney General from time to time.

With this absence of lawyers and this absence of a system in which the Lord Chancellor is the head of the judiciary and able to represent the judiciary, I think that from time to time, although it is not for me to say, the Attorney General might have to tell the Cabinet that this is not acceptable to the judiciary or would not be acceptable to the judiciary. I see the role as crucial.

**Lord Hope of Craighead:** I did not deal with the Attorney General; I dealt with the Lord Advocate, who was not quite as closely involved with the Government as the Attorney General but was equally important and a crucial member of the Government, certainly north of the border, perhaps even more so because the Lord Chancellor’s writ did not extend very far north of the border. The Lord Advocate was pivotal to the way the rule of law operated in his day.

**Lord Woolf:** I add another footnote. The Attorney General appoints the Treasury Devil, although that title refers to the Treasury, rather than AG. He was in my day, though there have been changes, responsible for advising all government departments, with limited exceptions, on any matter on which they needed advice. Because of the more complex society that we now have, the Treasury Devil’s ability has been reduced. There used to be one Treasury Devil—I must take responsibility for changing this to some extent as there is now a team. Your status was special and your relationship with the Attorney General was critical. My role convinced me that the Attorney General should be a person of considerable experience and standing. It is of constitutional importance that that tradition should be maintained and the holders of the office of Attorney General, and Solicitor General, should be appropriate.

It is difficult today because it is much harder for someone to have a political career in the Commons and run a practice than it was when I was practising. You do not have a reservoir of experienced lawyers as you used to have in the Commons. I think Lord Goldsmith was an illustration of a way of dealing with that. If you do not have anyone who fits the bill in the Commons, somebody is made a peer with a view to them becoming Attorney General.

**Lord Goldsmith:** I was already a peer before being appointed Attorney General.

**Lord Woolf:** I am sorry.

**Lord Goldsmith:** So was Lord Williams of Mostyn, who was the first modern Attorney General in the Lords. In the 16th century, they would all have been from the Lords.

**Q41 Baroness Dean of Thornton-le-Fylde:** I would like to address the question of the roles of Secretary of State for Justice and the Lord Chancellor being held by one person. Lord Woolf, in his written evidence, referred to the judiciary as the weakest arm of government and talked about sympathetic consideration to protecting the rule of law, and goes on to say that he does not believe that this is happening. Can judicial independence and the rule of law be defended in the Cabinet by a minister with wider departmental responsibilities—the issue of prisons keeps coming up—budgets and perhaps their own political career? They might not be at the peak of their career, but they might want future promotion. Does that point to different priorities? In oral evidence we were told—not by a lawyer—that the role
of Secretary of State, linked with the role of Lord Chancellor, gives the Lord Chancellor power to fulfil his duties regarding the upholding of the rule of law and judicial independence, and the twin roles give the officeholder more political clout than the Cabinet would otherwise have had. In written evidence we learnt about the maintenance of the office of Lord Chancellor “with a radically changed character”, and the witness goes on to say, “the constitutional settlement has evolved and matured and there is now no need for the elaborate cojoined minister model to continue”. I would like to ask what your view is about that.

Lord Woolf: I am not sure it is practical to do anything to achieve a remedy. It might be one of those things that are inevitable. It is a problem, because whereas a Lord Chancellor could position himself outside the normal ministerial role in relation to political issues that are deeply contested, it is much more difficult for someone who is both Lord Chancellor and Minister of Justice.

There is one aspect that I think I have heard Lord Judge talk about. One of the things that happened when I was Lord Chief Justice and Lord Judge was Deputy Chief Justice was that we were getting judges to play a more active role in their relationship with government. Lord Judge felt, and I understand this entirely, that once you have Lord Chancellor who is also head of another department, that becomes more difficult. That is regrettable, because when I was Lord Chief Justice, and indeed when I was Master of the Rolls, I tried to find ways in which we could have a much closer relationship, which was appropriate, with the workings of government, so it was not only after the government had decided what they were going to do that we had any way of expressing our views. Lord Judge had regular meetings with the Lord Chancellor. I did not have those regular meetings. It may be that those regular meetings would achieve this, but my belief was that because Lord Chief Justice is a demanding job, it is difficult to do this. The fact that Lord Chancellor was seen by the judiciary as different from other ministers was important, because they thought they had somebody who was really concerned about them. I know the argument to the contrary—that he now has more clout—and I accept the importance of that argument, and the argument that if you took away from the Lord Chancellor the responsibilities of the Minister of Justice, his clout would be reduced, but it would still be better to have someone who is not quite as powerful who is looking after your interests than someone who is not. He cannot take a different view from that of his colleagues on the need to cut resources, for example, when the cut could undermine the rule of law.

I also think that the fact that he is in the Commons because he is the minister for prisons means that the danger is greater.

Lord Judge: I am not sure what the answer to your question is. I thought that the revolution in 2003 was constitutionally dangerous. I think that adding prisons to the Ministry of Justice so the Lord Chancellor became responsible for them was dangerous in the sense that it diminished the potential for defending the independence of the judiciary. The waters have run under the bridge. We have the system that we have. There is no possible way to go back to the former Lord Chancellor arrangements. For a start, there would not be much for him to do because most of the responsibilities have been passed on to the Lord Chief Justice. My concern was identified by Lord Woolf. My real concern is that if we imagine—and I can only imagine—the Cabinet table and we end up with a Lord Chancellor who is isolated from any
other department with a very limited function, I wonder how much attention will be paid to him or her when he or she says, “You know, this is all very well, but have you considered this, this and this and the possible dangers of that?” I would like to think that the Attorney General would do that anyway, although he is not a full member of the Cabinet. My view—but it is on balance, that is why I am not being definite—is that the judiciary is probably better served by a Lord Chancellor who takes his oath seriously, who recognises his responsibility, who has the personality and the strength of character to get across to his colleagues that he is at this moment exercising his function as Lord Chancellor and who is nevertheless in charge of a large department.

I suspect—I have no knowledge of this—that the bigger your department around the Cabinet table, the more clout you might have.

Q42 The Chairman: Lord Hope, before you add to that answer, could I ask you to bring in the question of whether the Scottish jurisdiction has any lessons that might be of value in considering the role of Lord Chancellor—looking at this from north of the border?

Lord Hope of Craighead: May I come back to that when I have responded to the question by Baroness Dean of Thornton-le-Fylde? It is difficult for those who have not sat at the Cabinet table to know how matters work, but my view is the same as that of Lord Judge. I think I am right in saying that the practice in the old days was for the Lord Chancellor to sit very close to the Prime Minister at the Cabinet table. I have an image of Lady Thatcher and Lord Mackay of Clashfern being very much together. You are then in a position to intervene and exercise authority. I fear that without prisons and the big department that he represents, the Lord Chancellor will be at the far end of the table where it is much more difficult to exercise the kind of authority that no doubt he has today. It is difficult to know, but I suspect that nowadays the volume of responsibility has a real part to play. I agree with Lord Judge that one cannot turn the clock back, so I would not change the present system. We need to have that kind of authority behind it.

As for the Scottish position, to be frank I find it difficult to draw any useful parallels. I have not studied how the committees work in the Scottish Parliament or exactly how the Lord Advocate interacts with other members of the Scottish Government. But from such observations as I have made, it does not look as though he carries a great deal of authority as compared with the Minister for Justice. It is a very interesting position. There are two responsibilities: the Minister for Justice has responsibility there for prisons, but I suppose that the rule of law is the responsibility of the Lord Advocate, who has nothing other than his prosecution function, which clearly is quite a big function. That is his position: to represent the rule of law. My impression is that he is relatively weak in comparison with the big-spending Ministry of Justice. Perhaps there is a lesson for us in that.

Q43 Lord Lexden: The issue of whether there should be statutory criteria for the appointment of the Lord Chancellor came up early in this morning’s proceedings and vigorous views were expressed by our distinguished witnesses. I wonder whether I could ask Lord Woolf to expand a little on his view that the Prime Minister should explain why a particular individual has been appointed. Secondly, since that proposition provoked vigorous disagreement, I wonder whether I could also ask Lord Woolf’s distinguished colleagues
whether they believe there is any point in retaining statutory criteria. If there is, how could the present criteria be developed?

Lord Woolf: My position is this: if you have criteria there must be some way of avoiding a situation where people, perhaps wrongly, think that there is no basis for regarding a particular appointment as falling within the criteria. I am not suggesting that there should be judicial review or anything of that sort, but perhaps there should be something more than a convention. At the least, it is important to the judiciary, under the system as it is, that the person who is Lord Chancellor is a person who is going to fulfil the functions of a Lord Chancellor. I am not saying anything on the basis of the appointment that was actually made—I leave that entirely outside, because it is not for me to comment about that except in a different capacity—but I am saying that the relationship between the different arms of government is very important. I have indicated that the Attorney General is in a similar position to the Lord Chancellor. For the good of the relationship, it should not be thought that insufficient attention in making the appointment has been given to the need to have someone who is appropriate to fulfil the difficult role of Attorney General, and equally the difficult role of Lord Chancellor. That is because it looks as though the same attention is no longer being paid to the significance of the rule of law. However, the rule of law needs protection.

Lord Judge: I agree entirely with Lord Woolf about the importance that the judiciary attaches to the individual who is appointed to be Lord Chancellor. There is no question about that. I had done cases against Ken Clarke and I knew that he was qualified. Jack Straw was already in office when I became Lord Chief Justice. I am quite prepared to tell you that when I heard that Mr Grayling was going to be the next Lord Chancellor, I rushed off to see whether he was qualified. I was reminded of how worried I was about the breadth of the statutory definition that would apply to anyone holding this office. I remain extremely concerned about it, but at least there is some limit. If you did not have some statutory limit, it could be anybody. I bear in mind that under the current arrangement the Prime Minister has to find someone who, from his point of view, is going to be appropriate and suitable to run the Ministry of Justice. I would be much happier if there was a statutory provision that required the Lord Chancellor and therefore the minister to have some legal qualification. It would not be a bad thing for someone to have a legal qualification if he is to be responsible for prisons. That is an area where there is quite a lot of law.

Lord Hope of Craighead: I would leave section 2 as it is. I think that the presence of the criteria is valuable. Presumably someone reads down the list, and you come to the let-out paragraph at the end—paragraph (e). I do not think politically that it is possible to change that now, but at least the list is there. I agree entirely that it is highly desirable that individuals should have some legal experience, but I would like to see the back-up from the civil service as well so that he has the advice that he needs from time to time. My recollection is of the permanent secretaries being very visible at conferences and so on because they needed to be informed. They were active, because that was their job, in their interaction with lawyers and seeing how the rule of law worked in practice. I think that one should not look at the position of the Lord Chancellor alone. The support arm is part of the package that should be considered.
The Chairman: Our last formal question is by way of a general round-up, with the intention of allowing you to bring forward any points that you think we have failed to raise but you would like to unburden yourselves of.

Q44 Lord Cullen of Whitekirk: This is a rather blunt question about whether there should be a Lord Chancellor. If so, what should his functions be? If not, by whom should those functions be performed? You have an open field.

Lord Judge: I am going to say something that might sound discourteous, but it is not intended to be. I spent most of my time with the Attorneys General and the Lord Chancellors saying, “Please stop legislating about the criminal justice system. Give us a few years just to let everything bed down”, but all my efforts failed. Perhaps I may suggest that we really do not want to have another reconstruction of the constitution. It is fragile enough. I wonder, if we had had a Lord Chancellor of the old style in the Cabinet, whether we might have had the debate we had on Monday evening. I suspect that somebody might have said something about the issue of where the Leader of the House should come from, and what his or her function and office, and indeed salary, should be. I think we should keep the Lord Chancellor, provided that we keep him with a heavy department, and provided that he continues to hold by the oath of office that he takes.

Lord Woolf: I am in the same position as Lord Judge. The Lord Chancellor who is also a Minister of Justice is better than nothing.

Lord Hope of Craighead: I am with Lord Judge as well. I have one small picture to add. The opening of the legal year takes place on 1 October and the Lord Chancellor has the function of turning up dressed in his full robes, knee breeches and so on. He has to process up and read the lesson. He is visible as the Lord Chancellor doing that in his capacity as head of the judiciary.

Lord Judge: No, he is not.

Lord Woolf: No. He is there as the Lord Chancellor.

Lord Hope of Craighead: I beg your pardon and I stand corrected. Nevertheless, he is there dressed up as he is to fulfil that function. It would be very odd if he turned up there as a Secretary of State wearing just a suit. It is just part of the way British life operates, and the name that is attached to the office is something that we would lose. We would lose something intangible with its departure.

Lord Woolf: I think that, if recent history is anything to judge by, the office causes the person who is employed to do it, whatever his qualifications, to make efforts, such as the present holder of that office has made to familiarise himself with his responsibilities and try to acquire the knowledge he may not have. The office serves a purpose.

Lord Judge: Perhaps I may add a footnote to what I said about leaving things alone. I say that, although I am constantly being reminded of how delicate our constitution is. I am not making a party-political point about the executive and I would not do so, but I think that the last 10 to 12 years or so rather demonstrates that there is no deep political understanding of the niceties of our constitution. I think that this particular body has a heavy responsibility to ensure that someone, at any rate, is made alert to that.

**The Chairman:** Thank you. That is a very good note to end on. I am conscious that we have overrun and I am sorry about that, but your answers have been so interesting and forthcoming that we are deeply in your debt. I thank all three of you for being so helpful.
1. This response focuses strictly on the nature of the role of the Lord Chancellor itself and the inherent conflict that we believe emanates from the current position whereby the office is held by the Secretary of State for Justice. This response draws on the experience of our legal team in attempting to assist young prisoners to access justice and ensure that the rule of law applies to them, as well as our extensive policy work concerning the penal system.

About the Howard League for Penal Reform

2. Founded in 1866, the Howard League for Penal Reform is the oldest penal reform charity in the world. The Howard League for Penal Reform has around 10,000 members, including prisoners and their families, lawyers, members of the judiciary, criminal justice professionals and academics.

3. The Howard League for Penal Reform has consultative status with both the United Nations and the Council of Europe. It is an independent charity and accepts no grant funding from the UK government.

4. The Howard League for Penal Reform works for its charitable objectives aimed less crime, safer communities and fewer people in prison. The Howard League for Penal Reform aims to achieve these objectives through conducting and commissioning research and investigations aimed at revealing underlying problems and discovering new solutions to issues of public concern.

5. The Howard League for Penal Reform legal team represents clients in the criminal justice system under the age of 21 in relation to prison law and public law matters. It is the only legal team in the country to provide this dedicated service.

What is the role of the Lord Chancellor?

6. The role of the Lord Chancellor was consolidated by statute in the Constitutional Reform Act 2005 (CRA). The CRA removed the historic role of the Lord Chancellor as head of the judiciary, in recognition of the constitutional impropriety of that role being filled by a politician. In making the Lord Chancellorship a part of the Secretary of State for Justice’s role and giving the leadership of the judiciary to the Lord Chief Justice, the CRA removed the judiciary from the Executive. However, at the same time, section 1 CRA enshrined the Lord Chancellor’s on-going obligation to respect and uphold the rule of law.

7. The Lord Chancellor’s oath of office states (section 17 CRA):

“I, [...], do swear that in the office of Lord High Chancellor of Great Britain I will respect the rule of law, defend the independence of the judiciary and discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for
which I am responsible. So help me God.”

8. We are not aware of any legislation or guidance that further clarifies what is meant in practice by the combination of the duties and promises in sections 1 and 17 CRA. In our view the provisions require that the Lord Chancellor should prioritise and champion the rule of law above all else.

9. The Committee will be aware that the Lord Chancellor has a number of important functions concerning the administration of the functioning of the justice system (including appointing lay magistrates, managing the court serving and setting court fees) and for managing various public records such as The Land Registry and the National Archives. Of particular importance for the Howard League for Penal Reform is that fact that responsibility for legal aid falls within the Lord Chancellor’s remit, not the remit of the Secretary of State for Justice. It seems to us that the Lord Chancellor’s powers in relation to legal aid, appointing lay magistrates and setting court fees at the very least are far from nominal. The Lord Chancellor’s guidance provides the framework for funding, and that post-holder is ultimately responsible for all decisions concerning legal aid. Decisions made in relation to court fees can be of critical importance in determining the business of the court, as the recent decrease in employment tribunal claims has demonstrated following the huge fee increase for claimants.

How is this role different from the Secretary of State for Justice?

10. The duties attendant on the Lord Chancellor are separate from the duties that fall to the Secretary of State for Justice. We do not set them out here but they include responsibility for managing and setting policy within the prison service and the probation service. The Secretary of State is also responsible for the overall budget for the Ministry of Justice and proposing new policies and legislation affecting the way in which the court’s function. The provisions in the Criminal Justice and Courts Bill 2014 concerning judicial review and the proposed new criteria for judges in civil claims suggested in the Heroism Bill 2014 are cases in point. Both could have a profound effect on the way justice is done in our courts.

Does the Lord Chancellor uphold the rule of law and judicial independence?

11. It is plain to us that decisions concerning policy and budget cuts which will affect access to justice, be it through the provision of legal aid or changes to court fees, will inevitably present a very real problem for any Secretary of State for Justice who also holds the office of Lord Chancellor.


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Review (2014), *The Implications for access to justice of the Government’s proposals to reform judicial review*, which notes that “the Lord Chancellor’s energetic pursuit of reforms which place direct limits on the ability of the courts to hold the executive to account is unavoidably problematic from the point of view of the rule of law.”

13. The Howard League for Penal Reform believes that at the very least responsibility for court fees and legal aid cannot be properly combined with politically motivated policy changes. This is particularly stark where fees or legal aid cuts will have a disproportionate effect on certain classes of people such as prisoners.

**Are there sufficient safeguards in place where the Lord Chancellor fails in those functions?**

14. We believe that, as a matter of law, where there is any conflict between the views of the Secretary of State for Justice as a politician and the duty of the Lord Chancellor to uphold the rule of law, the latter must prevail.

15. Yet, although we are aware of situations where it is believed that the Lord Chancellor has failed in his functions, we are not aware of any case to date where the duty to uphold the rule of law in section 1 of the CRA has been categorically enforced in the courts.

16. We note that at the House of Lords’ Third Reading of the (then) Constitutional Reform Bill, then Lord Chancellor Lord Falconer of Thoroton, stated in relation to what became section 1 of the CRA, that the role “goes further than simply respecting the rule of law in discharging his ministerial functions. It includes being obliged to speak up in Cabinet or as a Cabinet Minister against proposals that he believes offend the rule of law.” The Howard League for Penal Reform is not aware of any instance where this obligation has given rise to such a defence by a Lord Chancellor although we note that other Ministers, including the former Attorney General have had occasion to speak out66. It is also of concern that in that debate, Lord Falconer appeared to be of the view that ‘the role is not one that is enforceable in the courts.’ It is therefore of great concern that there are either insufficient safeguards available or they are sufficiently out of reach to ensure that the statutory obligations of the Lord Chancellor are adhered to. The absence of any requirement to demonstrate compliance with sections 1 and 17 of the CRA and the uncertainty about the enforceability of those provisions through the Courts suggests that the duty to protect and uphold the rule of law must be strengthened and made accountable.

**Reform**

17. The rule of law requires an independent champion and we see no reason to change the title. By convention the Lord Chancellor has historically been a lawyer, towards the end of his political career and we believe this has proved suitable for the role. We believe that such requirements would provide a measure of protection provided they

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did not result in discrimination. We also consider that the role should be entirely separate from the role of the Secretary of State for Justice.

29 August 2014

Transcript to be found under Lord Hope of Craighead
1. This is the response of the Judicial Appointments Commission (JAC) to the Constitution Committee’s call for evidence in their inquiry into the role of the Lord Chancellor.

2. The JAC considers that the ministerial functions which relate to the appointment of judges should continue to be exercised by the Lord Chancellor rather than the Secretary of State for Justice. In large part this is because the Lord Chancellor (unlike any other Minister of the Crown) is required by legislation to swear an oath of office in which he undertakes to respect the rule of law, defend the independence of the judiciary and ensure the provision of resources for the efficient and effective support of the courts. However, it is also relevant that the Constitutional Reform Act 2005 signals the constitutional importance of the role of Lord Chancellor by requiring that the holder of that office has:

- experience as a minister of the Crown;
- experience as a member of either House of Parliament;
- experience as a qualifying practitioner, i.e. a barrister, advocate, or solicitor with the appropriate rights of audience; or
- experience as a teacher of law in a university.

3. The main functions of the Lord Chancellor, as they relate to the JAC, are set out both in legislation and in a Framework Document agreed between the JAC and the Ministry of Justice. The current version of the Framework Document was agreed in October 2012; paragraph 3.3 sets out the responsibilities of the Lord Chancellor:

“The Lord Chancellor is accountable to Parliament for the activities and performance of the JAC. This excludes financial accountability, which is the responsibility of the MoJ Accounting Officer. The Lord Chancellor’s responsibilities include:

- approving the JAC’s strategic objectives and targets, and the policy and performance framework within which it shall operate;
- keeping Parliament informed about the JAC’s performance;
- carrying out responsibilities specified in the [Constitutional Reform] Act [2005 as amended by the Crime and Courts Act 2013], including approving the appointment and terms and conditions of Commission members, approving the appointment of the Chief Executive, sending to the Comptroller and Auditor General the statement of accounts prepared by the JAC for each financial year and laying the annual report before Parliament;
- the discretionary power to issue procedural guidance to the JAC under Section 65 of the Act;
- considering and making decisions on recommendations for judicial appointments received from the JAC; and
- paying the JAC such sums, through grant-in-aid, grant or other funds, as deemed appropriate for meeting the JAC’s expenditure and securing Parliamentary approval.”
4. Each of the above powers has been exercised to date, with the exception of the discretionary power to issue procedural guidance to the JAC under Section 65 of the Constitutional Reform Act 2005. For example, the power to reject or request reconsideration of a candidate recommended for appointment by the JAC has been used in four instances.

5. The JAC places great significance on ensuring its independence and a Commissioner has recently been given specific responsibility for monitoring any threats to its independence and reporting regularly to the wider Commission. The most recent assessment does not reveal any inappropriate influence on the Commission from the Executive. Moreover since the JAC began operations in 2006, the status of the Lord Chancellor as a House of Lords or Commons Minister, or a lawyer or non-lawyer, has not proved to be a significant factor in the relationship between the Lord Chancellor and the JAC, or in the Lord Chancellor’s performance of the functions outlined above.

6. In ensuring the continued independence of the JAC, it is also important that the appointment of JAC Commissioners themselves is subject to proper scrutiny. Under current arrangements, names are submitted to the Lord Chancellor for approval following a public appointments process that is in accordance with the provisions of the Constitutional Reform Act 2005 and subject to oversight by the Commissioner for Public Appointments. The Code of Practice maintained by the Commissioner is based on the principles of merit, fairness and openness. These arrangements appear to have operated appropriately.

7. The Lord Chancellor’s role has been changed by the Crime and Courts Act 2013, so that most JAC recommendations for judicial appointment to roles below the High Court are now made to the Lord Chief Justice or Senior President of Tribunals rather than the Lord Chancellor. At the same time, there is now closer contact between the JAC and the Lord Chancellor on senior appointments, partly due to the fact that under the amended legislation the Chairman of the JAC now chairs the panels to select the Lord Chief Justice and President of the Supreme Court (the latter in rotation with the Judicial Appointments Board Scotland and the Northern Ireland Judicial Appointments Commission).

August 2014
1. The Law Society welcomes the opportunity to provide evidence to the House of Lords Select Committee on the Role of the Lord Chancellor.

2. The role of Lord Chancellor prior to the Constitutional Reform Act 2005 (the Act) was, in constitutional terms, anomalous. He was the Head of the Judiciary and sat as a judge; he acted as Speaker of the House of Lords; and he was a member of the cabinet and in charge of an increasingly large spending department.

3. It has been argued that this combination of responsibilities carried particular advantages:
   - It gave the office holder a unique independence and insight;
   - It provided the judiciary with a voice in the heart of Government;
   - It brought a knowledge of legal principles and respect for the rule of law to the cabinet table;
   - Because the office holder tended to have a strong background in the law (most Lord Chancellors had had very distinguished legal practices) they provided wise, balanced counsel within cabinet.

4. Many of these influences were behind the scenes and so it is very difficult for external commentators to provide evidence in support of the proposals.

5. The Act provided for a specific role for the Lord Chancellor in respect of protecting the Rule of Law and the independence of the judiciary (Sections 1 and 3), together with an oath for the Lord Chancellor to take (Section 7). It also set out particular functions which were to be carried out by the Lord Chancellor (Schedule 4). Section 2 sets out the criteria that the Prime Minister should consider in recommending the appointment to the role. These include legal experience and knowledge, but these are not determinative.

6. Constitutional theory places significant importance on (a) the separation of powers of the three arms of the state and (b) checks and balances so that no one arm is able to dominate the others. The United Kingdom is unique amongst Western democracies in that it lacks a formal written constitution to regulate the balance between these arms. Indeed, some regarded the Lord Chancellor as being the figure who provided that balance.

7. In the Law Society’s view, however, it is probably more accurate to say that there is a cultural respect for the rule of law in the United Kingdom and that the conflicts in the previous tripartite role were managed because of the skill of successive Lord Chancellors in smoothing relationships between the executive and the judiciary. The fact that, by convention, Lord Chancellors tended to be individuals who, at least at the time of their appointment, did not have significant political ambitions and who did have a strong background in the law probably assisted this.
8. The growth in the responsibilities of what was the Lord Chancellor’s Department has led to it becoming a major spending Department with responsibility for prisons and the probation service as well as the court service and the legal aid budget. As well as the financial responsibilities, those areas, particularly prisons, are politically sensitive. This has two likely results. The first is that the responsibilities attributed to the Lord Chancellor in respect of the administration of justice are likely to take a lower priority than before. The second is that Prime Ministers are likely to wish to appoint heavy-weight, high calibre, career politicians to the role. While legal experience and knowledge will be desirable for the post holder, it is unlikely that a Prime Minister will see these as crucial requirements.

9. It needs also to be remembered that the changes to the Lord Chancellor’s role were accompanied by the establishment of the Judicial Appointments Commission, the aim of which was to provide an independent mechanism for appointing the judges, together with the transfer of significant powers in respect of judicial conduct, discipline and deployment to the Lord Chief Justice. These mean that functions which justified significant legal experience in the post are, at most, shared with others.

10. The Committee has asked a number of questions about the role and we now deal with these in turn.

**What are the current functions of the Lord Chancellor and how are they different from the Secretary of State for Justice?**

11. The functions attributed by statute to the Lord Chancellor, in addition to duties to uphold the Rule of Law and judicial independence are predominantly to do with the appointment, conduct and deployment of judges. Essentially, the role provides an element of executive involvement in those aspects of the judiciary. As has been suggested, these roles often require the post holder to work with the Lord Chief Justice or to take advice from the Judicial Appointments Commission.

12. By contrast, the Secretary of State for Justice has powers which Parliament has considered are more appropriate for the executive, often because of the sizeable expenditure involved. In addition to prisons and the probation service, this includes policy on legal aid, the legal profession and the operation and funding of the court service.

13. It should be noted that this line has been drawn where it is as a matter of practice and following a particular view of the balance between executive and judiciary. These are not incontrovertibly correct. Many jurisdictions place significantly greater power in these areas in the hands of the judiciary. It also needs to be noted that some of these aspects – legal aid, the court service and the legal profession - which have elements which are crucial to the rule of law. We have seen a substantial tension in recent years between the desire to save money on such matters with the requirements of a functional system achieving access to justice.

**To what extent does the Lord Chancellor still have genuine powers?**

14. While there are powers which belong to the Lord Chancellor, these are usually exercised on the recommendations of another body, such as the JAC or in conjunction
with the Lord Chief Justice. While we are aware of reports of discussions about individual appointments, we are not aware of occasions where the Lord Chancellor has formally invoked those powers.

15. The Law Society believes that this is the correct position. The fact that the Lord Chancellor holds powers does not mean that he has to exercise them and, if the other organisations work properly, it is undesirable that he should do so.

How in practice does the Lord Chancellor uphold the rule of law and judicial independence?

16. It is very difficult to identify how the Lord Chancellor exercises these functions, since one of the arguments for the post continuing was that they took place behind the scenes. On occasion, the Lord Chancellor has spoken out in support of particular judicial decisions.

17. It is notable that, recently, Governments have introduced or consulted upon a number of measures which, arguably, adversely affect the Rule of Law. In our view, the restrictions on judicial review and the HMRC’s proposed powers to take money directly from individuals’ accounts are so far inimical to the Rule of Law that it is surprising that a Lord Chancellor could have supported them. Similarly the Social Action, Responsibility and Heroism Bill is one that it is surprising to see a Lord Chancellor supporting.

18. It is obviously difficult to speculate about the processes which led to these proposals and we do not know what part the Lord Chancellor took in them. Previous Governments have also promoted legislation which arguably affected the Rule of Law where the Lord Chancellor had his full functions.

19. What is particularly important, however, at a time when Governments will frequently espouse controversial policies, is that the Lord Chancellor should recognise the vital role played by the judiciary in reviewing those policies. The Lord Chancellor should work to prevent overt criticism of judges or attempts to exert pressure.

Is the combination of the roles of Lord Chancellor and Secretary of State for Justice appropriate? Should the Lord Chancellor be a more independent voice?

20. There is a clear synergy between the roles of Lord Chancellor and Secretary of State for Justice, just as there is also a tension between those of a cabinet minister and an individual with the role of supporting the rule of law and judicial independence at times where that might be inconvenient for the Government.

21. On balance, the Society’s view is that it is preferable for the two posts to be combined for the following reasons:

- The responsibilities of the Secretary of State for Justice are likely to be held by a senior politician and it is beneficial for the duties to the rule of law to be held by someone of that seniority.
• Separating the posts is likely to mean that the Lord Chancellor’s role may be held by a less senior or influential figure and so the effectiveness of the role may be compromised.

• The responsibilities of the Secretary of State are closely linked to the judiciary and, again, the duties imposed on the Lord Chancellor should assist the administration of justice.

Should there be statutory criteria for appointment as Lord Chancellor?

22. The criteria set out in the Act appear to enable the Prime Minister to appoint any individual whose experience he or she deems suitable to the role. However, given the particular functions of the Lord Chancellor – which are unique among Government posts – it is appropriate for these to exist. They will need to be considered by the Prime Minister and it is, therefore, likely that the importance of these will be at least in his or her mind when making the appointment.

Should the Lord Chancellor be a lawyer? Should he or she be a member of the House of Lords?

23. The Law Society believes that there are strong benefits for the Rule of Law in the Lord Chancellor being a lawyer. The particular functions that he holds require a knowledge of the legal system and we believe that they are highly relevant for the role of Secretary of State for Justice. While we do not doubt that non-lawyers are able to understand and appreciate the importance of the rule of law, the concepts may come less familiarly to them.

24. The fact that the Lord Chancellor was a member of the House of Lords sat well with the more independent approach of that House and we can see the benefits of the role being held by a senior member of the government there. However, we have also indicated that we consider that it is appropriate for the role to be combined with that of the Secretary of State for Justice. Given the fact that the leadership of a major spending Department is generally held by a member of the House of Commons, it seems difficult to argue that the post should be in the Lords.

25. It is most important that the post should be held by a senior member of the Government who understands and is committed to the Rule of Law. Such people exist in the House of Commons.

28 August 2014
Sir Thomas Legg KCB, Permanent Secretary of the Lord Chancellor’s Department, 1989-98 and Sir Alex Allan KCB, Permanent Secretary, Department of Constitutional Affairs then Ministry of Justice, 2004-07 — Oral Evidence (QQ 63-75)

Transcript to be found under Sir Alex Allan KCB
The Chairman: Perhaps I may welcome our two distinguished witnesses this morning to our inquiry into the office of Lord Chancellor. Lord Phillips, you have particular experience as you were a senior judge when the Lord Chancellor’s position was abolished, and you subsequently became the first President of the Supreme Court. Lord Mackay, you were a distinguished Lord Chancellor, and since then you have been active in this House as an observer of developments, but very much from an inside vantage point. We are very pleased to have you both here today and we look forward to airing some thoughts with you. To start, could I ask you both what is meant by judicial independence in the context of the Lord Chancellor’s duty? There are mixed views on this.
Lord Phillips of Worth Matravers: I consider that judicial independence describes the position of a judge upon whom no outside influences are brought to bear, direct or indirect, in relation to the performance of his judicial duties.

Lord Mackay of Clashfern: Outside the confines of the court itself, of course, in most cases he or she expects to hear both sides of the argument. There are some other aspects that I would like to draw attention to. We are in a system where the state, in the shape of the executive, is a party to a number of actions. One of the important features of the court system is that a time has to be fixed for a case to start. That is the role of the listing officer. The listing officer is a servant of the state, but I hope in the judicial arm of the state. It is therefore extremely important that the judicial officer who is the listing officer for the case is not influenced by private—what should I call them?—approaches by, for example, the Government either to bring forward a case because they think they are going to win or to put it back because they fear that it might damage some current proposal. Therefore it is very important that the listing officers should be as independent as the judges. It is also important that the judge responsible, usually the resident judge, gives general directions to the listing officer as to the way in which cases are to be listed. If then a departure from that general rule is contemplated, the listing officer would bring it to the attention of the judge.

I agree with Lord Phillips about the central meaning of the word “independence”, but I think that respect for independence also implies respect for the authority of the judge exercising his responsibility as a judge in court. That respect has to be both in word and in action. It is undesirable for members of the executive, which is one of the arms of government, to be critical in a very definite way of the way judges perform their role. After all, the executive and the judicial, as well as the legislative, are the three arms of the state. If one arm is critical of another in the exercise of its functions without reason, it tends to damage the whole lot. If a house is divided against itself, it will not stand, and that is equally true of government in their three powers. Therefore the idea of respecting independence also carries with it the responsibility of carrying out the judgment, subject to appeal, of course.

That goes beyond simply the domestic law of our country. It also applies insofar as we have international obligations under treaties. The obligation to perform what the judges have decided is part of respect for judicial independence, subject to appeal.

The last point I want to make in this connection is that each individual judge is independent. No judge can tell another what to do except, of course, that a higher court can give directions to a lower court, but that is the judicial function of the higher court. However, no judge is entitled to tell another judge what to do. He can influence and argue with him, but he does not have authority to order him to take a particular course.

The Chairman: Thank you very much for that comprehensive answer. May I follow up the access to justice aspect of this? It has been suggested in the past that the duty extends to the maintenance of the legal process to the extent that judges have to be properly paid and lawyers have to be properly paid; in other words, government finance is brought into it. Do you think that is an important element of the issue we are addressing?

Lord Mackay of Clashfern: The oath which the Lord Chancellor has to take under section 6A of the Promissory Oaths Act 1868 makes particular reference to the support of the judiciary from that aspect. There must be some element of duty in relation to the judges themselves
and their support in financial and personnel terms, and possibly in other assistance that judges may need in order to perform their functions properly.

**Lord Phillips of Worth Matravers**: I endorse that. The administration of justice costs money and there is a limit to the economies that one can make without damaging the administration of justice. It is a tricky and delicate task, if you have to make economies, deciding where and how they should be made. It is a task that should be addressed as a matter of partnership between the Lord Chancellor/Secretary of State for Justice and the judges, and in particular for England and Wales, the Lord Chief Justice.

**Q17 Lord Lester of Herne Hill**: Many years ago, Lord Browne-Wilkinson gave a controversial lecture called “The independence of the judiciary”, in which he drew attention to what he saw as the threat to judicial independence essentially from the Treasury through officials interfering more and more administratively with judicial independence. It was a view that was contested strongly by Lord Butler of Brockwell at the time, as I recall. Is that problem which he raised a problem now, do you think? Is it the case that judges, not being fully in control of staff, who come from elsewhere, might find that they are not able to be as independent as they would like? As a rather unimportant example of the problem, in ancient times when I sat as a recorder, I remember when I began that I had court officials to stop me making an idiot of myself. By the time I stopped sitting, those officials had been removed because—

**Lord Mackay of Clashfern**: I believe it was that they were no longer considered to be necessary.

**Lord Lester of Herne Hill**: Indeed, it was deemed by the Treasury that they were no longer necessary. I wonder whether the Browne-Wilkinson problem is one that still exists.

**Lord Phillips of Worth Matravers**: The court administration and the civil servants who administer the courts come under the Ministry of Justice. One of the first issues that arose with the constitutional changes was the question of the loyalty of court staff. I and those acting on my behalf held protracted negotiations with Lord Falconer of Thoroton in relation to this. Initially, his attitude was, “I have to run the department. Their loyalty is to me. Of course I will listen to what you have to say, but I am their boss”, basically. It ended up with an agreement that there should be a dual loyalty to both the Lord Chief Justice and the Lord Chancellor.

I believe that you will be seeing Lord Judge next week, who will be able to give you much better up-to-date information as to whether there are any problems with the Court Service. My impression is that it works pretty well and that, on the ground, the local judges, the listing officers and the court staff work very well together.

**Q18 The Chairman**: Can you give us examples of how the Lord Chancellor has upheld the rule of law and judicial independence since the change?

**Lord Phillips of Worth Matravers**: It is difficult to do, and I would not like to do so specifically, but I am aware of one or two occasions when ministers—or perhaps a Prime Minister—have made comments which were not appropriate by way of criticism of judgments, where I have reason to believe that the Lord Chancellor at the time made it plain to the minister that that was not appropriate. The role of the Lord Chancellor in this respect...
does not happen in public; it happens in private and nobody knows specifically, unless he tells them, whether he has performed that particular function.

**The Chairman:** Is there something that could be done structurally to change that situation?

**Lord Phillips of Worth Matravers:** I do not believe that there is. One question we have been asked to consider is: should the Lord Chancellor make a report every year on certain aspects of his upholding the rule of law and judicial independence over the previous year, to which my inclination is to say no, because if he is doing his job properly, he is doing it privately and confidentially, and he could not be expected to report on that.

**Q19 Lord Lester of Herne Hill:** Public confidence is crucial, and to have a Lord Chancellor who commands public confidence about the rule of law is vital, but so for the law officers. I wonder what you both think about the role of the law officers, Scottish and English, in assisting the Lord Chancellor to uphold the rule of law.

**Lord Mackay of Clashfern:** I speak now of the ancient regime. I regarded the most important role of the Lord Chancellor in Cabinet as bringing to the attention of the Cabinet any matter which required the attention of the law officers, because sometimes, although the law officers saw papers, discussion tended to bring out something that needed the attention of the law officers. The Lord Chancellor was not—and, I do not think, ever should have been—and, I do not think, ever should have been—the adviser to the Government; the law officers had that function.

One difficulty is whether the Lord Chancellor should bring to the attention of the Prime Minister something that suggests that what the Prime Minister has said is inappropriate; if that became public, I think the reshuffle tendency would arise quite quickly. That happened not only to the Lord Chancellor but also to the law officers in some circumstances. One has to be careful about how this can be done.

When I was Lord Chancellor, I was at a meeting of justice ministers in Canada. The justice minister in Canada said to me that one of the strengths of the Lord Chancellor's office is that, on the whole, the Lord Chancellor will not be displaced unless he wants to go. That was clearly demonstrated to be false later, but at the time she said it, it was probably true. Therefore, there was a certain authority which it would be difficult to displace. On the other hand, in my time also, one had to be delicate about how one went about trying to improve matters.

**Lord Phillips of Worth Matravers:** Could I say a word on the rule of law? The rule of law is not readily defined or readily understood. You ingest it, if you are a lawyer, as part of your upbringing and your practice. Belief in the rule of law is almost like a religion: it is crucial; it governs the way you behave. If you are given office in government, where a rule of law issue arises, you will make it plain that that issue has arisen and make plain your view as to how the issue should be dealt with. If law officers have that background, one would expect them to perform that duty. The same goes for the Lord Chancellor. If they do not have that background, it is much more difficult. I was just imagining myself, having had no connection with the law, suddenly being appointed Lord Chancellor and Secretary of State for Justice. I would ask my officials for the relevant legislation, and the first thing that I would read in the Constitutional Reform Act 2005 is: “This Act does not adversely affect the ... existing constitutional principle of the rule of law or ... the Lord Chancellor's existing constitutional role in relation to that principle”. That would not mean very much to me; it really would not.
The Chairman: We may come on to the relationship between the Ministry of Justice and the Lord Chancellor’s role, but Lord Lester has a question about constitutional propriety.

Q20 Lord Lester of Herne Hill: In a sense, it has been covered, but do you think that, in our system of government, the Lord Chancellor should be seen as the ultimate guardian of constitutional propriety across government?

Lord Mackay of Clashfern: It was a role that the Lord Chancellor formerly had. I think it is more difficult when he may have no judicial authority to carry it out.

Lord Phillips of Worth Matravers: I would answer that question “Yes, in theory.” It is highly desirable that there should be an identified minister with responsibility. The Secretary of State for Justice, even if he were not also Lord Chancellor, would be the appropriate minister to have that responsibility. Problems may then arise of conflict of interest, but I think that it is a good thing that the statute identifies the minister who has that responsibility.

Lord Lester of Herne Hill: Is it not a matter of personal integrity and ethical sense rather than formal qualification? For example, my old boss, Roy Jenkins, was not a lawyer, but it seemed to me that he understood the rule of law better than many lawyers. I can think of some lawyers who still do not understand the rule of law. In the end, is it right that people matter more than formal qualifications in this area?

Lord Phillips of Worth Matravers: I would answer yes to that. I agree that you do not have to be a lawyer to understand the rule of law. What matters is that you should understand it, you should respect it and that you should have the clout in Cabinet to carry weight when you raise a rule of law issue.

Q21 Lord Lexden: I ask for your reaction to a statement in the written evidence that we have received. The statement is: “The Lord Chancellor’s authority on broad constitutional questions is probably better seen as, at very best, providing sporadic and peripheral direction to the Government’s agenda”. Do you agree?

Lord Phillips of Worth Matravers: If it is supposed to be a description of the reality, it is probably right. If it is supposed to be a statement as to what the position should be, I would not agree with it. I think it should be a fundamental part of a minister’s duty to look out for constitutional impropriety and draw attention to it.

Lord Mackay of Clashfern: You can see that if you have the general duty to be in that position all the time, it is only sporadically that you are required to operate it, because on the whole we hope that government will be carried out with complete constitutional propriety.

Q22 Baroness Dean of Thornton-le-Fylde: Whereas before we had the Lord Chancellor as a member of the Cabinet, we now have a Secretary of State for Justice holding the dual positions, probably a Secretary of State who is not legally qualified but also, if you like, climbing the greasy pole of career development—Lord Mackay mentioned Cabinet reshuffles. How do we ensure that the Lord Chancellor role, one person with two functions, has sufficient political clout with his colleagues around the Cabinet table on legal and constitutional matters when the individual holding the position may not be a qualified lawyer?
Lord Phillips of Worth Matravers: The answer is that you cannot. I am not sure that it matters whether he is a qualified lawyer if he is first and foremost a politician hoping for further political advancement. If you have a Prime Minister who believes in the importance of the rule of law, when he appoints someone to the position of Lord Chancellor, one would hope that he would appoint someone who already has standing and is likely to perform the role of guardian of the rule of law and judicial independence. One can point to a number of examples of such appointments before and after the constitutional changes. But ultimately, appointments are in the hands of the Prime Minister.

Lord Mackay of Clashfern: When I was appointed Lord Chancellor, which is quite a long time ago, I was extremely junior, having come to the Cabinet for the first time, but I was put in a position that was quite high for one of my tender years. As the people above me disappeared, I gradually went higher up, until when Lady Thatcher—Margaret Thatcher, as she was—retired, I happened to be No. 2, and therefore had the responsibility of reading the Cabinet tribute to her.

The Constitutional Reform Act 2005 immediately resulted in the Lord Chancellor going down the Cabinet hierarchy. The fact that the Secretary of State for Justice is that first, and then Lord Chancellor, does not suggest that the Lord Chancellor’s office is very important among secretaries of state as a whole. It may be that something can be done about that, but it depends to a great extent on what is wanted by those making the appointment.

Baroness Dean of Thornton-le-Fylde: I accept that you may have been junior in political terms, but in legal ability and experience you were senior, I suggest. When legal and constitutional matters were considered I should have thought that your voice carried much more weight than it would have done if you were a junior political appointment.

Lord Mackay of Clashfern: That is probably true, and I tried to exercise it with caution and discretion. It is just that the Lord Chancellor, whoever he was, was quite high in the Cabinet hierarchy right back as far as I can remember just by virtue of being the Lord Chancellor and because of the importance then attached to the responsibilities that he carried.

Q23 Lord Lester of Herne Hill: It seems to me as an observer over the last decades that whether a Lord Chancellor was influential was very much a matter of the politics at the time and the personality of the Lord Chancellor. For example, when I served the Wilson Government as Roy Jenkins’s adviser, Lord Elwyn-Jones was, in my judgment, much less influential than you were, Lord Mackay, when you became Lord Chancellor. You had the special advantage of being Scottish as well as having the confidence of the Prime Minister. The advantage of being Scottish was that you came from outside the English legal system and were able to take my profession by the throat and impose upon it much-needed reforms. But all that was happenstance and subsequent to your appointment. Some Lord Chancellors have been enormously influential, while they were there—for example, Lord Irvine of Lairg. Others have been influential because they were politically close to the Prime Minister, as with the current one. But it is impossible to lay down any conclusion or generalisation about this because it is like a kaleidoscope—it gets knocked politically and then how important the Lord Chancellor is or is not depends upon the pattern of the kaleidoscope.
Lord Mackay of Clashfern: That is true to some extent. On the other hand, Lord Elwyn-Jones was in a fairly high position in the Cabinet. I knew him pretty well but I still think that, by virtue of his appointment as Lord Chancellor, he held a position in the Government which would have been quite influential. It depends to some extent on whether a person exercises their influence, and how they exercise it. One thing which I remember well about John Major’s Government was that he said to me at one point, “I don’t want the Lord Chancellor to be involved in the nitty-gritty of party politics.” That suited me absolutely, as it still does. That was the way these things were looked at in those days. It was not just the first Prime Minister I served; it was also the second.

Q24 Lord Cullen of Whitekirk: In connection with the role of the Lord Chancellor and its relationship with the judiciary, I would like to ask about the arrangements for the senior judiciary to communicate with Parliament. I am thinking of section 5 of the 2005 Act. While some holders of the office of Lord Chief Justice have regarded the exercise of that power under section 5 as being a nuclear option, when he gave evidence to us earlier this year, the current Lord Chief Justice seemed to regard the nuclear option as indicating a declaration of war. He said, “I’d like to think I’d be free to make a direct representation without feeling that I was pushing the button that indicated war. It is sometimes better to have our unfiltered views rather than through a minister, or a minister reading them. This is an area we need to discuss because, on issues that are largely of a technical nature, our direct views are sometimes of great assistance, I hope.” Can I have your comments on that matter?

Lord Phillips of Worth Matravers: My initial reaction to this power, when I had it, was that it was a nuclear option. You would not want to exercise it unless there was a real crisis and you had tried every other means and you were really then trying to get the support of Parliament, probably in opposition to ministerial policy or conduct on a particular matter. But, as time went by, it seemed to me that it was desirable that the Lord Chief Justice should be able to communicate in some way or another to Parliament without exercising a nuclear option. An annual report is one way of doing that. But I have been thinking about it and I wonder whether an appropriate standing committee, perhaps a cross-party justice committee, to which the Lord Chief Justice could have access to express his views in a rather less dramatic way, might not be the best solution.

Lord Mackay of Clashfern: In the past, before these changes, the Lord Chief Justice and other judges, as well as the Lord Chancellor, were from time to time called before the Home Affairs Select Committee. On the whole, I think those exchanges were valuable. I think that it would also be desirable, if this system is to continue, that the President of the Supreme Court should also have a right similar to the one given to the Lord Chief Justice. I would like to see in due course, after September, the Supreme Court called the Supreme Court of the United Kingdom, and the supreme courts of England and Wales having the title that they formerly held before they became the senior courts. I do not know who the junior courts are exactly but, anyway, it would be advisable to do that. The other aspect of this which ought to be mentioned is that the judicial arm is separate from the legislative and executive arms. One has to be careful that the exercise of judicial power does not become a matter of detailed discussion with a particular committee of Parliament. I think there is a risk in that. I do not say that it should not happen but there is a risk in it of the political point of view being attempted to be put over to the judges on these occasions, so a measure of caution is

required. So far as I remember, when the Home Affairs Select Committee did it, there was never any difficulty of that kind. The judge’s role was recognised and respected.

**Q25 Lord Brennan:** Section 3 of the 2005 Act requires the Lord Chancellor to pay attention to the independence of the judiciary and the administration of justice. It is a positive obligation. I wonder what you think about the attitude of Lord Chancellors over the last 10 years. Has their attitude to this obligation been characterised by interest or neglect? If interest, how have they displayed it? If neglect, what can we do about it?

**Lord Phillips of Worth Matravers:** During my time, I would say their attitude was certainly not one of neglect. They showed interest and, indeed, enthusiasm and I think they took their office as Lord Chancellor very seriously. I thought it important that at the opening of the legal year the Lord Chancellor should parade in all his finery because that would help to bring home the uniqueness and importance of his role. I think that the initial reaction of Lord Falconer of Thoroton was that he would sneak in in a suit and sit down quietly. I said, “No, you should be properly arrayed in all your finery with the Mace and officials.” After that, I think the Lord Chancellor has always worn his robe on official occasions and all the ones I spoke to took their duties as Lord Chancellor seriously. They had all been lawyers in their time.

**Q26 Baroness Taylor of Bolton:** It was interesting that you talked a moment ago about the importance of the Lord Chancellor wearing robes to emphasise to the judiciary the importance of that role yet, when you answered about the role of the Lord Chancellor as Secretary of State for Justice within the Cabinet, you said that you thought the incumbents saw their role as Secretary of State for Justice as the main focus of their attention and saw the role of the Lord Chancellor as being added on to that within the Cabinet. Can you say whether you think it is appropriate for the same person to hold both offices? As regards the Lord Chancellor being the Secretary of State for Justice in the Cabinet, with all the other responsibilities and spending commitments that brings, what potential is there for conflict of interest and other pressures pulling in different directions?

**Lord Phillips of Worth Matravers:** One has to distinguish between functions and the obligation that is reflected in the Lord Chancellor’s oath to respect the rule of law and defend the independence of the judiciary. The day-to-day functions of the Secretary of State for Justice keep him extremely busy. He has an awful lot to do and he now has the prisons on his plate as well, so he is a very busy man. But, in performing those functions and in the Cabinet, he has the overriding obligation to act in a way which upholds the rule of law and the independence of the judiciary. I do not see that there is a conflict between them. There can be a conflict of interest, of course. He is running a department and he has a fixed budget and upholding the rule of law may require expenditure which he would rather not make, so there is that conflict. But if any minister is going to have the overriding obligation to uphold the rule of law and the independence of the judiciary, I think it should be the Secretary of State for Justice. If you divorced all his administrative functions so his only job was to uphold the rule of law, his word would not carry much weight.

**Lord Mackay of Clashfern:** In answer to Lady Taylor, I was thinking earlier, when I spoke, of the fact that he is the Justice Secretary and Lord Chancellor in that order. That is the way in which he is described. The Lord Chancellor has functions which one needs to draw attention

to in respect of the Crown Office. He is the Keeper of the Great Seal and the Crown Office is responsible for all arrangements in connection with a general election and by-elections; it is important that that be done in a way that commands confidence in its independence. At the State Opening of Parliament the Lord Chancellor still presents to the Queen the speech that she is going to make, and recovers it from her when she has finished, which used to be a more arduous escapade than it is now. These are important situations in which the Lord Chancellor is robed, and should be robed—I entirely agree with Lord Phillips about that. It tends to emphasise that the Lord Chancellor has more than one office if, in fact, he is going to be the Justice Secretary as well. I agree that the administration of the courts alone, which would be the typical Lord Chancellor’s function, would be such a small proportion of the total expenditure of the Government that his influence as Lord Chancellor in the Cabinet, unless he had influence for some other reason, would not be very high.

Baroness Taylor of Bolton: When we talked about the Lord Chancellor aspect of the person who is performing this role, the phrase “constitutional propriety and responsibility” was used. I cast my mind back to when Lord Irvine of Lairg was in this role and the Government of the day were introducing legislation on devolution. Lord Irvine chaired that particular Cabinet committee because it was such a significant constitutional change. It was not concerned with the rule of law or judicial independence but was a big constitutional change. Do you think that a Lord Chancellor should have an eye on the implications of constitutional change in that way?

Lord Mackay of Clashfern: Certainly. I think that Lord Irvine chaired that committee of the Cabinet and a number of others. When I was Lord Chancellor I did not feel very inclined to become the chairman of Cabinet committees because I felt that, in view of one’s position, the influential people on Cabinet committee should be the elected Members of Parliament, and one had to respect that. I did not feel very inclined to become involved in that aspect. But I entirely agree that that was very appropriate for Lord Irvine and as regards other committees that he has chaired as well.

Baroness Taylor of Bolton: Can we assume from what you have both said that section 2 of the 2005 Act, which talks about the criteria for a person to be Lord Chancellor, is pretty well meaningless? It sets out a range of phrases about experience but goes on to say “other experience that the Prime Minister considers relevant”, which reinforces the point that it is basically the Prime Minister who makes the appointment as he thinks fit.

Lord Mackay of Clashfern: It does not appear to be a very tight restriction on what he can do. One has to remember the change in the oath as well, which is in section 6A of the Promissory Oaths Act 1868, where specific reference is made to sustaining the judiciary. Section 17 of the Constitutional Reform Act 2005 provides for that.

Q27 Lord Lester of Herne Hill: This is an “emperor’s clothes” question. We do not have a written constitution, unlike the rest of Europe and most of the Commonwealth, and the law officers are members of the Government who give legal advice, unlike in countries such as Ireland, Cyprus or Israel. Suppose, hypothetically, that Parliament introduces an unconstitutional measure—no brown people coming into this country, as it were. Under our present system, all these formal safeguards that we have talked about amount to very little, do they not? If you look at the Cabinet papers, as I have done, about what happened in 1968
over precisely such a bill, the safeguards were a waste of time. Is it not time that we thought more deeply, beyond the forms and the clothing, about more effective safeguards—I am talking about constitutional safeguards.

**Lord Phillips of Worth Matravers:** If you are asking where that leads, it probably leads, first, to a written constitution and, secondly, to an overriding power of the judiciary, whether in the form of the Supreme Court or a constitutional court, to strike down legislation that is unconstitutional. At present we have an unwritten constitution, which has worked because the importance of our unwritten constitutional principles has been recognised by government. That is partly why the office of Lord Chancellor has had the standing that it has, because the Lord Chancellor was the person one would expect to give authoritative advice on the maintenance of our constitutional principles. If things change, so that the Government no longer think that constitutional principles are of that much importance and are irritated by advice from pedantic lawyers pointing out what the rule of law says, one is in trouble.

**Lord Mackay of Clashfern:** I would like to try to answer that a little bit more. The law officers have been in government distinct from the Cabinet, always described separately. My understanding of the office of law officer is that in matters connected with the law, prosecutions or anything of that kind, he has responsibility. He is not a member of the Cabinet—he has no responsibility of the collective type. He has to give his own point of view and stand by it. He is entitled to take the views of his Cabinet colleagues if he wishes to, and give them such effect as he thinks right. However, he has the ultimate decision, and that is the foundation of our prosecutorial system, for example. The idea of going to a written constitution attracts some lawyers. The difficulty about that in our country is that it is not at all likely, certainly in what is left of my lifetime—which is probably quite short—that this country will accept rule by lawyers. The rule of law and rule by lawyers are not necessarily the same thing. The idea that there should be a court that tells Parliament what to do is something that our people, so far, will not wish to indulge in.

**The Chairman:** Thank you. I was briefly drawn to thinking about Europe when you said that, but I had better not draw you into that.

**Q28 Lord Brennan:** Lord Mackay, in your last answer you described the constitutional position of the Attorney General and law officers. In practice, in government, what is the constitutional interaction between Lord Chancellor and Attorney General?

**Lord Mackay of Clashfern:** My understanding of it—it was not always the understanding—is that the Lord Chancellor is not the legal adviser of the Government; the senior adviser to the Government is the Attorney General. The Lord Chancellor’s function is to ensure that, if there is a legal and constitutional issue on which it is necessary to take the Attorney General’s advice, that is done. I have a number of examples in my head—I do not need to trouble you with them—where that happened and the Attorney General was then brought in. As you know, the Attorney General can take advice from anybody he likes, but he is ultimately responsible for the advice that he gives to the Government. Nowhere has that been more forcibly and clearly illustrated than in the case of Lord Goldsmith and the Iraq war.
Lord Lester of Herne Hill: Quite so, but in the case of the Suez affair, when I was in the army, we know that Anthony Eden’s Government deliberately did not take the advice of the law officers about the legality of what they were doing. That illustrates, does it not, the fallibility of any system if there are people who are unwilling to work it properly.

Lord Mackay of Clashfern: I think that you will find, if I am not mistaken, that in that case the advice came from a quarter different from the one I have seen.

Q29 The Chairman: I have one final question. You have covered the ground and I will ask a question simply by way of reprise. We have covered the topic very well, but the question is: should there be a Lord Chancellor? If so, what should be his or her functions and, if not, who should perform those functions? This gives you a chance to roam freely—and please feel free to do so.

Lord Phillips of Worth Matravers: Should there be a Lord Chancellor? Tony Blair said “No, we’ll abolish him”, but it was then discovered that quite a number of functions go with the office. However, if one puts those on one side and looks at the Secretary of State for Justice and Lord Chancellor, and whether it is necessary to add the words “and Lord Chancellor”, I would say that it is not necessary any more. But that does not mean that that particular minister should not have precisely the same responsibility and duty to take the particular oath to uphold the rule of law and the independence of the judiciary. The Lord Chancellor’s office is important at the moment because that is an oath that the Lord Chancellor takes in that capacity.

Lord Mackay of Clashfern: I would add that there is of course a provision that makes interchangeable the discharge of their duties by the secretaries of state. All secretaries of state are one—there is one office of secretary of state, as I understand the constitutional position—therefore the Secretary of State for Defence could be called upon to exercise the functions of the Secretary of State for Justice. However, the Lord Chancellorship is not subject to that rule and it is therefore extremely important that the title of Lord Chancellor be retained by somebody who has the responsibilities of the oath that is referred to in section 6A of the Promissory Oaths Act 1868.

The Chairman: Thank you very much. It has been a fascinating and extremely helpful session. I am sure that the committee is most grateful to you both for giving your time to be here. We shall read in the transcript what you have said with great interest. I have no doubt that it will contribute in large measure to our report.
Mr Colin Mardell — Written evidence (OLC0004)

I am not a lawyer but as a concerned citizen I hope you will accept my submission to your inquiry.

I understand that the main thrusts of your inquiry will be as to whether the post of Lord Chancellor should be held by a qualified lawyer; and whether or not the post should be held by the same person as the post of Secretary of State for Justice.

If, as I understand it, the Lord Chancellor is responsible for the efficient functioning and independence of the courts it seems to me to be self-evident that he/she needs to have a profound understanding of how they operate. It is difficult to know how that can be achieved except by somebody who has qualifications and experience in the law. As things stand, the current incumbent (a non-lawyer) has demonstrated a woeful lack of knowledge of the basic duties of his office by introducing ill-considered and rushed ‘reforms’ across both civil and criminal justice systems which have reduced both to chaos. For example:

I. By restricting access to Legal Aid the incidence of cases being fought by litigants in person has increased many fold and the consequent waste of court time is extremely costly to prosecution and the court itself.

II. Reducing payments to lawyers to such a degree that they cannot operate viably; which in some cases caused the collapse of high profile trials. Many lawyers both from the bar and solicitors are leaving the profession, and young gifted law students are being deterred from entering the profession. If this is allowed to continue there will be paucity of highly qualified and talented people to replenish the judiciary.

III. Privatising the court interpreter service and appointing a succession of incompetent contractors has incurred massive wastes of time and money. Non-attendance of interpreters, incorrect languages being represented, poorly qualified and on some occasions completely unqualified personnel turning up.

IV. Privatisation of the Probation Service, which barely before the process has even begun has dissolved into pandemonium.

V. The Crown Prosecution Service has been cut back so far that there are huge backlogs in their caseload; and are often not even able to conduct their statutory duty of timely disclosure of evidence to defence, sometimes as late the day of the trial, and indeed in some cases not at all. This continues to occur even after directions from the court.

VI. The Legal Aid Agency is now so incapable of conducting its business in a fair and efficient manner that tales of their behaviour emerge daily that would not be out of place in episodes of ‘Rogue Traders’ or ‘Watchdog’.

All of these things and no doubt many others have the potential for creating miscarriage of justice on an industrial scale. The consequences of in terms of cost to the taxpayer and to court users, the personal distress to the victims of crime and unjustly convicted, and to the reputation of our legal system are massive.

I don’t pretend to know enough about constitutional law to comment on whether or these two posts should be held by the same person, but on the performance of the current Lord
Chancellor it seems manifestly obvious that he has neither the aptitude nor knowledge that the post requires. Indeed on more than one occasion his lack of knowledge seems to have led to his giving misleading information to both the House of Commons and the press. Therefore it seems obvious to me that the post of Lord Chancellor should always be held by someone with suitable experience and qualifications to avoid such chaos happening in the future.

02 December 2014
The Lord Chancellor

The Lord Chancellor plays a critical role in the British public record keeping system ensuring that the custody of the records is impartial and subject to the “rule of law”. In other words it cannot be suborned by the executive, which itself can never be above the “rule of law”. Put another way the national archives holds the evidence which allows the executive to be called to account, if even only in the court of history. The assumption is that eventually, apart from the records covered by the Lord Chancellor’s security blanket, all records produced by government in the course of business will eventually become public, however embarrassing they may be and how much personal information they contain. To our minds this is a fundamental constitutional principle that we erode at our peril. The Information Commissioner has made it clear that the open data agenda is not the same as the regular opening of records under the terms of the now 20 year rule in the national archives across the United Kingdom.

The Lord Chancellor appoints the keeper of public records in the United Kingdom under the 1958 public records act, and appoints the members of the advisory council on records and archives which is chaired ex officio by the Master of the Rolls. The Master of the Rolls historically has had oversight of public record keeping, hence the title. The advisory council provides advice to The Lord Chancellor about record keeping policy, in practice to the Keeper, and also approves all closures of records, now almost entirely extracts and redactions, which are transferred to the National Archives and entered in the catalogue. The reasons or exemptions are outlined in the annexes to the Freedom of Information Act (FOIA), which are updated from time to time by the Cabinet Office. Under the British system all records have to be reviewed for sensitive information under the terms of the FOIA exemptions prior to transfer by the departments concerned. This process is currently being reviewed by Sir Alex Allan for the Prime Minister after the mistaken release of a piece relating to the involvement of the SAS in the storming of the Golden Temple at Amritsar by Indian forces.

This is not the place to discuss government record keeping, which have been the subject of recent investigation by both the Commons Home Affairs and Public Administration Committees. The important issue for the Constitution Committee is that the transfer of records into the public domain is subject to the “rule of law”, overseen by a juridical committee that has statutory powers to call the executive to account. As members of the advisory council until June, we can assure you that the council is resolute in ensuring that departments keep up to date with transfers and robustly challenges any requests for any delays or the withholding of records by departments. The council is scrupulous in applying the public interest test.

What is of concern, now that the role of Lord Chancellor has been combined with the Minister of Justice, is if the impartiality of the process has been undermined by the
Professor Michael Moss, Northumbria University, and Dr Clive Field, University of Birmingham — Written evidence (OLC0013)

The politicization of the office. It may be that it would have been more appropriate for these functions to be transferred to the President of the Supreme Court. This may raises issues of accountability, but as the recent select committee hearings have shown mechanisms are in place to inquire into problems as they arise and the Information Commissioner can challenge the decisions made by the advisory council and does so. This relationship between record keeping and the rule of law, which the late Lord Bingham felt very strongly about, extends far beyond the United Kingdom to many Commonwealth countries, where the protection it offers is an important bulwark against kleptocracy. The very brave national archivist of Zimbabwe uses this protection to challenge Mugabe’s administration.

There have been suggestions that the keeper and advisory council should have wider oversight of government record keeping. Historically the mandate for good record keeping in government has been the responsibility of the heads of the home and foreign services. All guidance went out under their signature. Since the abolition in the 1980s of the Treasury O&M department, which was not an O&M department at all but set up in 1919 by Lloyd George to supervise the registries in other words government record keeping, there has been ambiguity about this responsibility. The duty of the keeper is to oversee the timely transfer of records to the national archives. The keeper can provide advice, but direct supervision would jeopardise the keeper’s constitutional position as an impartial custodian of the evidence by which government is called to account. In any event the keeper lacks the authority and resources to discharge this function. More so than in the private sector where accountability differs fundamentally from the public sector, record keeping policy must be mandated by the heads of the home and foreign services with the support of their boards and audit and risk management committees. In the light of recent events the situation needs urgent clarification to improve the quality of the record, avoid conflicts of interests and affirm the independence of the national archives protected by the rule of law. If committee members doubt the paucity of modern record keeping, they need only to look at the evidence submitted to the Hutton Inquiry.

August 2014
Executive Summary

- The role of the Lord Chancellor was in a state of flux for much of the twentieth century, undermining the Constitutional Reform Act (CRA) 2005’s retention of its ‘existing’ (but not defined) rule of law functions. These functions should be repealed and increasing emphasis placed upon all ministers’ duty to act in a manner compatible with the rule of law.

- The combination of the roles of Secretary of State for Justice and Lord Chancellor cannot currently be regarded as comfortable. The Lord Chancellor’s distinct function under the CRA 2005 of upholding the rule of law is an ill-defined throwback towards historic conceptions of the office, taking no account of the Secretary of State for Justice’s role. The conflict between these roles can be seen with regard to legislative proposals regarding prisoner voting.

- Proposals to impose appointment criteria for the office of Lord Chancellor seek to restore the established mould for office holders set prior to the CRA reforms. Not only would such proposals likely be unacceptable to the government, this focus on appointment criteria fails to consider the changed nature of the office.

The office of Lord Chancellor

A) What are the current functions of the Lord Chancellor, as distinct from those of the Secretary of State for Justice?

[1] Prior to the CRA 2005 reforms the office of Lord Chancellor was frequently cast as standing ‘at a critical cusp in the separation of powers’, straddling the three branches of government in the UK. In the course of the 2005 reforms, the office of Lord Chancellor lost its functions as head of the judiciary in England and Wales and as Speaker in the House of Lords. The role of the office in the judicial appointments process was drastically reduced, and has since been further reduced. Subsequent to these reforms the office can no longer be regarded as central to maintaining the executive’s respect for judicial independence.

[2] Nonetheless, as a (perhaps best seen as transitional) safeguard, the ‘existing’ role of the Lord Chancellor to defend the rule of law was retained and expressed in a new oath of office. The idea was that the office would remain ‘the angel sitting on other ministers’ shoulders’. This hollowed-out office, was, however, twinned with the office of Minister for Justice, with broad responsibilities for the operation of the

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68 Constitutional Reform Act 2005, s.7.
69 Constitutional Reform Act 2005, ss.25-31 and ss.61-107.
70 Crime and Courts Act 2013, Sch.13, Pt.4.
71 Constitutional Reform Act 2005, s.1(b).
72 Constitutional Reform Act 2005, s.17.
justice and prison systems. The nature of these responsibilities means, however, that often Lord Chancellors have been expected to sit as the angel on their own shoulders when faced with adverse judgments.

[3] A further problem with the fusion of offices is that the legislative provisions retaining the Lord Chancellor’s existing role with regard to the rule of law did not define this role. Far from static existence, this role of the Lord Chancellor shifted throughout the twentieth century. At the turn of the century Lord Halsbury, and his Liberal successors in office, saw no conflict with the rule of law in filling judicial offices with party supporters. In the 1950s Lord Kilmuir saw his it as part of his role to provide legal advice to government, prompting the then Law Officers to contemplate resignation when his advice that invasion of Egypt during the Suez Crisis of 1956 would be legal was accepted by the Prime Minister. Even at the end of the century Lord Irvine continued to sit as a judge in the Appellate Committee of the House of Lords, provided that he considered that government interests were not at stake in the decision. These examples, and the controversy that surrounded them at the time, indicate the impact of changing conceptions of the requirements of the rule of law on the traditional office of Lord Chancellor.

B) To what extent are those functions genuine powers, and to what extent are they nominal powers?

[4] The office of Lord Chancellor carries with it many roles beyond those addressed in the CRA 2005. As was noted at the time of these reforms, specific mention of the office could be found in fully 347 Acts of Parliament, from the protections of criminal law afforded in the Statue of Treasons 1351 to the duties imposed under the Regency Act 1937. This tying of roles and protections to a specific office can be contrasted with the allocation of powers in modern statutes to “the secretary of state”, to enable ease of reorganisation of cabinet portfolios. In the course of the 2005 reforms it was considered to be too difficult to unpick all of these roles, long exercised by Lord Chancellor as a “great office” of state. These often ceremonial or esoteric functions, scattered across the statute books, made it prohibitively difficult to simply abolish the office of Lord Chancellor as first intended.

[5] The statutory functions of the Lord Chancellor with regard to the rule of law under the CRA 2005 (as distinct from the general duties imposed on other ministers), might appear at first sight to be important and distinct elements of the office. The legislation, however, does not define the rule of law, leaving its meaning in this context at the discretion of the office holder. If it means ensuring that actions

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75 See UK National Archives, PREM 11/1129: Lord Chancellor’s memorandum on the use of force and question of consultation with the Law Officers (1956).
79 See Constitutional Reform Act 2005, s.3 and s.4.
should be taken with due regard to legal advice, then the role adds little of value to
the function of the Law Officers. A Lord Chancellor’s feeding views into policy
making in the capacity of the “guardian” of the rule of law could even lead to
clashes with the Law Officers (similar to those over legal advice in the context of the
Suez Crisis in 1956). Such concerns saw Lord Chancellors in office prior to the 2005
reform eschew such a role.81

Retaining an ‘existing’82 function of the office can be seen as an effort to vest some
meaning in maintaining the title of Lord Chancellor. Its retention also responded to
the pressure from some senior judicial figures, led by Lord Bingham and Lord
Woolf,83 for the office be maintained as a channel of communication between
judges and the executive. These judges were sceptical of the effectiveness (and
insulation form the executive) of the proposed Judicial Appointments Commission,
concerns not borne out by the operation of the appointments system in the last
decade.84

[7] Treating the Lord Chancellor as the guardian of judicial independence under rule of
law is therefore a throwback to the functions associated with the office when it
historically straddled the executive and judiciary. This function is outmoded when
the CRA 2005 also recognises a general duty upon ministers to uphold judicial
independence. Moreover, senior judges now regularly give evidence before
Parliament and, through the Lord Chief Justice, the judiciary can respond to
perceived threats to judicial independence.85

C) How does the Lord Chancellor uphold the rule of law and judicial independence?

[8] The day-to-day operation of the Lord Chancellor’s duty to uphold the rule of law is
difficult to pin down, and in the absence of a statutory definition, will shift
depending upon the office holders’ understanding of the concept. Chris Grayling has
maintained that he takes the duties of the Lord Chancellor towards the rule of law
‘very seriously’.86 But any successes, in terms of preventing open criticism of the
judiciary by ministers will by definition go unpublicised, whereas breakdowns will be
all too public.87 Even before the CRA 2005, when the Lord Chancellor was seen as a
lynchpin securing judicial independence, Lord Bingham conceded that he had

Paper 125-I, para.71.
82 Constitutional Reform Act 2005, s.1(b).
83 That Lord Woolf’s position remains little changed can be seen in his oral evidence to the Committee; Select Committee on
the Constitution, Oral Evidence: The Office of Lord Chancellor, Q31 (30 Jul 2014). Available at:
84 See R. Stevens, ‘Reform in haste and repent at leisure: Iolanthe, the Lord High Executioner and Brave New World’ [2004]
24 Legal Studies 1, 29.
85 Constitutional Reform Act 2005, s.5.
86 Joint Committee on Human Rights, Oral Evidence: The implications for access to justice of the Government’s proposals to
87 For some flavour of one Lord Chancellor’s behind-the-scenes efforts to uphold judicial independence, see J. Straw, Last
regularly heard from former cabinet ministers that successive Lord Chancellors tended to be ‘very silent’ when judicial integrity or independence was threatened.88

[9] The uncertainty that can result from the Lord Chancellor’s current ill-defined statutory duty to uphold the rule of law was illustrated during consideration of the Draft Voting Eligibility (Prisoners) Bill. Chris Grayling, despite his publicly-expressed personal opposition to extending the franchise to prisoners, was unable to tell the Joint Committee tasked with evaluating the legislative proposals whether his oath of office would compel him not to vote in accordance with his conscience. He could only affirm that he would have to take further advice on the matter.89 The Lord Chancellor’s oath, however, did not prevent him from urging the Committee to put before Parliament an option which he knew to be incompatible with the European Convention on Human Rights.90 The Committee, by majority, ultimately considered that the Government (with Lord Chancellor as responsible minister) should not ‘be proposing to Parliament an option that it knows to be unlawful’.91 The episode, nonetheless, indicates a lack of clarity over the content of the obligation to uphold the rule of law and over the place of the UK’s international legal obligations within the rule of law. This lack of clarity renders the obligation upon the office ineffective.

The combination of the office with Secretary of State for Justice

A) Are the offices of Lord Chancellor and Secretary of State for Justice best performed by the same person?

[10] Following the CRA 2005 reforms, the role performed by the Lord Chancellor has been described as a ‘conventional ministerial office’.92 But whilst the office appears much more conventional than its predecessor, the fusion of the roles of Lord Chancellor and Secretary of State for Justice in the person of one office holder produces unique tensions around the special duty towards the rule of law included within the Lord Chancellor’s oath of office.

[11] The ill-defined nature of this duty has already run into conflict with the ministerial activities of Secretary of State for Justice. Differences in interpretation of the concept of the rule of law have seen opponents of various policies advanced by Chris Grayling level the charge against him that he is in breach of his duty regarding the rule of law. His refusal to regard legal aid reform as a rule of law issue, on the basis that ‘we have only had a legal aid system in this country for about 70 years; we have had 800 years of Magna Carta’,93 for example, indicates the narrowness of his conception of the rule of law. Public discourse over the approach to the rule of law which should prevail within the UK Constitution is not aided by the CRA 2005

89 Ibid., para.233.
90 Ibid., para.234.
dressing up one of the leading protagonists in this debate as the guardian of the principle. Even if the duty was better defined in the CRA 2005, the consequences of breaching the duty are not prescribed.

[12] In sum this makes a duty, which looks backward towards the historic role of the Lord Chancellor as a bridge between the executive and the judiciary, unworkable. The best solution to this problem would be to abolish the office of Lord Chancellor. If the twinned offices are to be retained, however, no special duties towards the rule of law should be vested in the office of Lord Chancellor beyond those imposed upon all ministers.

B) Can judicial independence and the rule of law be defended in Cabinet by a minister responsible for wider departmental policies and budgets, which may point to different priorities? Is an independent voice required?

[13] The refusal of recent post-holders to take the higher salary payable to Lord Chancellor, as opposed to the standard salary of a cabinet minister, points to a common desire not to mark out the position as being one of special constitutional significance. Sir Stephen Sedley certainly regards the combination of the roles as subordinating the distinct role of Lord Chancellor to the demands of a ministerial position with extensive budgetary commitments.94 The constitutional distinctness of the Lord Chancellor’s office prior to the CRA 2005 reforms, however, can be overestimated.

[14] The notion that prior to the CRA 2005 the Lord Chancellor provided an “independent voice” capable of defending the rule of law is something of a constitutional myth. With regard to the old-style office Lord Steyn recognised that, “[u]nder governments of all complexions, the Lord Chancellor is always a spokesman for the government in the furtherance of its party political agenda”.95 When Lord Irvine accounted to Parliament for his fundraising for the Labour Party amongst lawyers, he went to great lengths to maintain that ‘a Lord Chancellor is no different from any other Cabinet Minister’.96

[15] The holders of the post-CRA 2005 office of Lord Chancellor, shorn of much of the responsibility for judicial appointments, ‘simply have much less occasion than their predecessors to engage with the judiciary’.97 The Crime and Courts Act 2013 further restricted this role, removing the responsibility for appointments to judicial posts below High Court level and tribunals.98 In this context there is much less need for a specific duty than was perceived when the parameters of the new role were developed.

98 Crime and Courts Act 2013, Sch.13, Pt.4.
The general duty on all ministers to uphold judicial independence\textsuperscript{99} renders the special duty placed upon Lord Chancellor redundant, especially where their implications are unclear, as illustrated by Chris Grayling’s uncertainty before the Joint Committee. Moreover, the vesting of a specific duty for protecting the rule of law in a particular office could potentially be used by other ministers as an excuse for hollowing out the general duty. If the special duty is abolished, the general duty upon all ministers to uphold judicial independence should be expanded upon in the Ministerial Code (which at present refers only to the ‘overarching duty on Ministers to comply with the law including international law and treaty obligations and to uphold the administration of justice and to protect the integrity of public life’\textsuperscript{100}).

**Criteria for appointment as Lord Chancellor**

A) How effective have the criteria for appointment as Lord Chancellor in section 2 of the Constitutional Reform Act 2005 been? What does it mean for an appointee to be “qualified by experience”?

Ministerial appointments are traditionally considered to rest with the discretion of the Prime Minister of the day. Section 2 of the CRA 2005, on its face, purports to restrict the Prime Minister’s freedom of action in the appointment of the Lord Chancellor. In reality the requirement that the Lord Chancellor be ‘qualified by experience’\textsuperscript{101} rests entirely within the Prime Minister’s subjective judgement. The definition of experience contained within the Act providing no meaningful constraint. Suggestions that the requirements of office could be bolstered by a constitutional convention\textsuperscript{102} are unlikely to gain traction with the executive and would complicate appointment to the office without discernible benefit.

B) Should there be statutory criteria for the appointment?

Throughout this evidence I have maintained that the office of Lord Chancellor (if it is retained) should not be vested with constitutional significance beyond that of any other cabinet minister. I do not therefore consider that the conditions for service should be distinct from those conditions required to hold other ministerial positions.\textsuperscript{103}

C) What are the advantages and disadvantages of the office of Lord Chancellor being held by a lawyer?

If the Lord Chancellor is qualified as a lawyer this may make it easier for her to master the portfolio, but it is no more requisite than it is for a minister in the Department of Health to have practiced as a medical professional in the NHS.

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\textsuperscript{99} Constitutional Reform Act 2005, s.3(1) and s.4(1).


\textsuperscript{101} Constitutional Reform Act 2005, s.2(1).


minister does not have to be a lawyer to grasp the importance of judicial independence. Moreover, judges and senior members of the legal professions have long been accustomed to seeing highly respected lawyers take on the old-style Lord Chancellorship. The mere fact of the office holder having some legal qualifications is unlikely to instil the sort of respect once expected for the office.

D) Should the Lord Chancellor be someone who when appointed does not seek further ministerial advancement? Should he or she be a member of the House of Lords?

[20] A regular subject of commentary since the CRA 2005 was proposed has been whether the old or new style of Lord Chancellor is better placed to defend the legal system from budgetary constraints. The evidence fuelling this debate is, however, anecdotal. The approach of individual post holders would seem more important, in this regard, than their perceived seniority or whether they sit in the Commons or the Lords.

[21] If the residual elements of the role of Lord Chancellor continue to be seen as too difficult to unpick from the existing statutory fabric to see the office abolished, there are presentational advantages in the office holder not being perceived to be undertaking these functions with a view towards further political advancement. These advantages, however, are better realised by the prime minister of the day finding a suitable candidate for such a nuanced role, than by formal requirements.

[22] Formal appointment requirements which seek to place an office holder above ‘the hurly-burly of political life’ are likely to instead disguise the inherently political nature of the combined role of Lord Chancellor/Secretary of State for Justice. Any advantages expected to result from such requirements would be outweighed by the risks inherent in burnishing the office with a veneer of neutrality, and also by their potential to limit the pool of able candidates available to take on the role.

The future of the office

A) Should there be a Lord Chancellor? If so, what should be his or her functions? If not, who should perform those functions?

[23] A decade on, the CRA 2005’s efforts to carve out a specific modern role for the Lord Chancellor have not borne fruit, and have indeed produced more problems than they are worth. Whatever the office holder’s intention, the current twinning of the roles of Secretary of State for Justice and Lord Chancellor creates the perception that all of his actions are conditioned by the special concern for the rule of law required by the Lord Chancellor’s oath of office.

106 See Judges’ Council, Response to the Consultation Papers on Constitutional Reform (Nov 2003), para.27-36.
[24] The Secretary of State for Justice plays a vital role as the departmental minister responsible for the maintenance of the legal system of England and Wales. The policies advanced by the office holder, in areas from legal aid to human rights law to judicial review, should be open to challenge on their merits, and not presented as the product of a particular concern for the rule of law vested in the historic office of Lord Chancellor.

[25] If the title of Lord Chancellor is to be retained, Parliament should recognise that it continues to exist solely as a result of the administrative inconvenience of unpicking the office from historic statutes (or even to preserve the 'intangible'\(^\text{108}\) benefits of the continuation of an aspect of constitutional heritage). The Lord Chancellor’s special responsibility for upholding the rule of law should therefore be abolished. The responsibility for acting in accordance with the rule of law must be inculcated throughout government, and not regarded as the preserve of a particular office.

29 August 2014

Should there be a Lord Chancellor?

This submission is intended as a brief postscript to oral evidence I gave to the Select Committee on the Constitution on 16 July 2014. It is informed by research conducted with my colleagues Robert Hazell, Kate Malleson and Graham Gee since 2011 as part of an AHRC-funded project on *The Politics of Judicial Independence in the Britain’s Changing Constitution*. The opinions expressed are my own. Here I address question 10 of the call for evidence: should there be a Lord Chancellor? My answer is no. The traditional office of Lord Chancellor no longer exists and it would be difficult, if impossible, to restore it. Formally eliminating the office would have the not inconsiderable merit of presenting constitutional relationships as they really are.

The Lord Chancellor of old was a unique office that combined judicial, parliamentary and executive roles. The Constitutional Reform Act 2005 sought to preserve two key roles of the Lord Chancellor within the reformed constitutional arrangements: that of ‘minister for courts and the judiciary’ and that of special constitutional guardian of the principles of judicial independence and the rule of law within Cabinet. Calls to restore the office of Lord Chancellor to something like its pre-2003 form generally focus on this idea of the Lord Chancellor as a special guardian, operating to some extent outside of normal politics, and seek to strengthen this role. It is not clear that pre-2003 Lord Chancellors did in fact exercise their special guardianship role consistently, but leaving that debate aside it seems clear that post-2003 Lord Chancellors are not ‘special’ guardians in this sense. Since 2003 the office has gradually come to mean little more than the name that is given to the Secretary of State for Justice when he exercises his functions in relation to courts and the judiciary. The Justice Secretary/Lord Chancellor does not behave substantially differently to conventional Justice Ministers that exist in other countries. This is not to suggest that the new Lord Chancellor no longer exercises guardianship of any kind. Rather, the new Lord Chancellor is a guardian of the judiciary in the same way that the Health Secretary could be regarded as a guardian of the NHS. His or her guardianship is dependent on personality, policy outlook and on the surrounding political context. Judges are now treated more like a conventional departmental stakeholder group and not as a group with special status. In this sense, the ancient office of Lord Chancellor does not add much to the new office of Justice Secretary.

The role of the office of Lord Chancellor and the significance of its guardianship function cannot, moreover, be properly assessed in isolation from broader constitutional changes. Since 2003 the institutional environment has become more complex. New independent bodies like the Supreme Court, HM Courts and Tribunals Service and the Judicial Appointments Commission have stepped into the space left by the Lord Chancellor. The Lord Chief Justice has the power to make representations to Parliament. Parliamentary select committees (such as the this committee) play a much larger and more important role in engaging with the judiciary and in highlighting key issues in relation to judicial independence.

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and the rule of law. Attorneys General sometimes play the role of constitutional guardian within the Cabinet. It would be impossible to return to the situation that existed prior to 2003; nor would it necessarily be desirable to do so. The authority of the old Lord Chancellor rested in large part upon his status as a judge, and upon very old understandings that would be difficult to recreate and awkward to fit into the new constitutional environment. The special guardianship exercised by the old Lord Chancellor is gone, but others have taken up the role of guardian.

In this sense, the Lord Chancellor no longer exists. Complet**ing the process begun in 2003 by formally abolishing the office of Lord Chancellor would have the merit of presenting relations between Parliament, government and the courts as they really are. It is clear from interviews we conducted as part of the Judicial Independence Project that some judges still pine for the old Lord Chancellor and define their relations with government through this now out-dated paradigm. Abolition of the office might encourage judges to be their own ‘Lord Chancellors’ where necessary: to take a more robust approach in their public and private negotiations with government to their defence of the courts, the judiciary, judicial independence and the rule of law. Formal abolition of the Lord Chancellor would also allow the new constitutional bodies that have developed in the past decade the space to mature and to function as constitutional guardians in their own right.

It is also possible that the continuing existence of the Lord Chancellor distracts ministers from their own responsibility to respect judicial independence and the rule of law. If this responsibility is seen simply as a nicety that is the preserve of the Lord Chancellor ministers may fail to internalise these principles as they should. Making the duty to defend judicial independence and the rule of law common to all ministers, through amendments to the ministerial code or to section 3 of the Constitutional Reform Act 2005, would enhance general awareness amongst ministers of the importance of these principles.

July 2014

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The office of Lord Chancellor
1. What are the current functions of the Lord Chancellor, as distinct from those of the Secretary of State for Justice?
   A. Whatever they are, it does not appear e.g. from the website, that they are taken seriously or are central to the work of the Lord Chancellor’s staff. They are not mentioned on the website. And the criticisms by the JCHR of both the proposed reforms to judicial review and the spirit in which they were promoted by the Lord Chancellor indicate only a weak appreciation of the importance of the rule of law and access to justice.

The combination of the office with Secretary of State for Justice
2. Are the offices of Lord Chancellor and Secretary of State for Justice best performed by the same person?
   A. It depends what the roles of the Secretary of State for Justice include. Responsibility for prisons does not fit in at all well with the other functions in relation to Justice and the Office of Lord Chancellor.

3. Can judicial independence and the rule of law be defended in Cabinet by a minister responsible for wider departmental policies and budgets, which may point to different priorities? Is an independent voice required?
   A. It depends whether the Lord Chancellor has an informed understanding of the content and the importance of the rule of law, and of judicial independence. (The latter is not limited to protecting judges from being pressurised in particular cases.)

   Old style pre-2005 Lord Chancellors were able to balance wider departmental policies and budgets with their responsibilities for judicial independence and the rule of law, and therefore clashing priorities. However, the balancing of prisons against other Justice related issues is novel and particularly difficult.

Criteria for appointment as Lord Chancellor
4. How effective have the criteria for appointment as Lord Chancellor in section 2 of the Constitutional Reform Act 2005 been? What does it mean for an appointee to be “qualified by experience”?
   A. ‘Qualified by experience’ is in effect too vague and therefore meaningless.

5. Should there be statutory criteria for the appointment?
A. Yes. The person to hold the office of Lord Chancellor should be a lawyer with experience e.g. ten years in practice as a barrister or solicitor in one of the UK jurisdictions, and a member of the House of Lords. The appointee should before appointment give an undertaking not to retire from the House of Lords (see House of Lords Reform Act 2014) to avoid using the office as a stepping stone to a further political career, thus seeking to reduce the party political pressures on the holder of the office. It could be a requirement that in addition to the years in practice the appointee should have some political experience e.g. as a member of the House of Commons: such experience may enhance the status of the Lord Chancellor among Cabinet colleagues and give the appointee insights into political realities.

6. What are the advantages and disadvantages of the office of Lord Chancellor being held by a lawyer?

A. A Lord Chancellor who is a lawyer is more likely than a non-lawyer to act as an effective ‘link and buffer’ or ‘universal joint’ or ‘bridge’ between the judiciary and the government. This historical function was valuable to both the judiciary and governments before 2005.

The judiciary should be able to have confidence that the government will be informed by the Lord Chancellor of the importance of the rule of law and judicial independence and appreciate judicial concerns when these are raised by government proposals. And members of the Cabinet should be confident that the Lord Chancellor appreciates the realities of politics when participating in Cabinet discussions that affect the rule of law and judicial independence, though without acting in a partisan or party political way. As both a lawyer and a politician he will command respect in Cabinet.

7. Should the Lord Chancellor be someone who when appointed does not seek further ministerial advancement? Should he or she be a member of the House of Lords?

A. Yes to both questions. See above.

The future of the office

8. Do the functions of the Lord Chancellor need to be carried out by a minister or could the elements of the role that relate to the judiciary be carried out by someone else, such as a senior judge?

A. The functions associated with the link and buffer, bridge or universal joint roles can only be carried out by a minister. A question might be whether the Attorney General could perform them. It may be that the present Attorney General does so to a degree – perhaps he should be asked to give evidence on this. But in my view that AG role would carry too many different and possibly confliction responsibilities for the AG to do both jobs.
Elements of the role relating to the judiciary could not in my view be carried out except by a minister/MP to provide for some ministerial responsibility to Parliament.

9. Should there be a Lord Chancellor? If so, what should be his or her functions? If not, who should perform those functions?

A. The link and buffer roles, if they are to be performed at all, can only be carried out by a Lord Chancellor. The difference between the UK and other countries lacking a Lord Chancellor is that other countries have written constitutions and therefore stronger explicit legal/constitutional protections of the rule of law and judicial independence that the UK does.

However, if it were not possible for a Lord Chancellor to carry out the roles effectively, for whatever reason (e.g. lack of Cabinet support, rejection of the values the role is supposed to uphold) then the post should be abolished. It would be called into disrepute and along with it the principles of the rule of law and judicial independence if it were in the hands of a person who was not able to protect or uphold the values that underlie it.

July 2014

Transcript to be found under Lord Mackay of Clashfern, Lord Chancellor 1987–97
1. I was Permanent Secretary at the time the Government announced in 2003 that the office of Lord Chancellor was to be abolished, a Supreme Court was to be created and a Judicial Appointments Commission appointed. While we had done some substantial contingency work on what would be required to give effect to the creation of a Supreme Court and a Judicial Appointments Commission, as these ideas had been current for some years, little detailed work had been done on what would be the consequences for the observance of the rule of law and for a good focus in Government on constitutional issues in unravelling the office of Lord Chancellor. In 2003 and early 2004 my policy advice was concentrated on these issues and included, in support of the Lord Chancellor and the Lord Chief Justice, the negotiation of an acceptable division of responsibilities between their offices once the Lord Chancellor ceased to be the Head of the Judiciary (what became known as the ‘Concordat’).

2. Against that background I would like to offer the Committee some observations on the constitutional role which a Lord Chancellor can, and in my view, should play; and to take up the Chairman’s invitation to me to comment on the question asked by Lord Brennan at the oral hearing.

3. As the Committee is well aware there was considerable indignation, particularly among Members of the House of Lords, at the manner in which such a profound change in our constitutional arrangements had been announced. In my judgement, and to my best recollection, one of the principal reasons for this, and one of the principal reasons for the determination of a majority to oppose the abolition of the office in its entirety, was the view that the Lord Chancellor had played, and should continue to play, a special part in advising on constitutional issues. I would perhaps go further than my former colleagues, who gave oral evidence, in arguing that this reflected a view that the Lord Chancellor had a special responsibility in Government to encourage and underpin the rule of law, to uphold the independence of the judiciary and to be a focus for the resolution of constitutional issues more broadly. Following the Election in 2001 a deliberate decision was taken to transfer a range of ‘constitutional’ issues from the Home Office and the Cabinet Office to the Lord Chancellor’s Department, such as the oversight of the working of devolution, electoral matters, and human rights for example; and it was no accident that in 2003 the Lord Chancellor also became the Secretary of State for Constitutional Affairs. By then we had drawn all the constitutional functions together within a single department which I supervised personally. While it can be argued that one strand of the changes of 2001 reflected the role that Lord Irvine had personally played in many of these policy developments I believe it went further than that in reflecting a widely held view at the time that, given the history of the role of the office of Lord Chancellor, his department was the natural home for responsibility for such issues.
4. Of course matters and perspectives have changed since then but I would argue that the retention of the office – a ‘residual’ Lord Chancellor – was there to provide singular leadership in relation to the rule of law, the protection of judicial independence, and in taking responsibility for constitutional issues in the broadest sense. Personally I think it would be an error of judgement, strategically damaging in the long term, if this perspective were lost or set aside. And I also believe that the subsequent dispersal across Government of some of the critical mass of expertise the Department had developed is, in my view, to be regretted as not providing Government with an experienced and knowledgeable source of advice on constitutional matters.

5. Lord Brennan raised the issue about how one can be satisfied that the issues to which I have referred can be well protected by a framework in which, neither the Lord Chancellor, nor his Permanent Secretary is a lawyer; and in which the Department’s responsibilities have grown in directions which were not envisaged in 2003.

6. As the Committee is aware I was the first Permanent Secretary of the Lord Chancellor’s Department not to be a lawyer. It required primary legislation to enable this to happen. The objective of the change was both to be able to draw on a wider pool of potential appointees and to provide the Lord Chancellor of the day with support from a senior official who had had a wider experience of Government than had previously been the practice. I hope I can say with confidence, and with the support of two former Lord Chancellors and three former Lord Chief Justices, that you do not have to be a lawyer to understand the importance of the rule of law, of the independence of the judiciary, or of constitutional matters, or to have a strong motivation to seek to protect them. But the point of the change in the qualification to be Permanent Secretary was to create a new balance in which it was assumed that the Lord Chancellor would be a lawyer but his principal official adviser would not. It is, in my view, this balance of experience and expertise which mattered to all those involved, and particularly to the Judiciary. That balance has now gone. In my view that is potentially damaging.

7. Lord Brennan’s question therefore seems to me highly pertinent for the future. I assume that there is no powerful momentum to complete the logic of the 2003 announcement and finally abolish the office of Lord Chancellor, and then give responsibility for running the Courts to the Lord Chief Justice - a Non Ministerial Department with its own, non-legally qualified, Permanent Secretary. This is probably far too logical a step given the way the British constitution has evolved pragmatically over time; and it may well be that the Higher Judiciary would not welcome the degree of ‘political’ exposure this could give them. Such a change would not in any event embed in Government a focus of concern for the rule of law and constitutional issues. I also assume that there is no powerful momentum to legislate to require that any person holding the office of Lord Chancellor should be legally qualified then one has to consider some another way to try to recapture, to a degree, the balance of expertise that existed from 1998 to 2012.

8. I think there may be a way of providing, within the Ministry of Justice, a framework which could underpin, to a greater extent than now exists, confidence that the
Sir Hayden Phillips, Permanent Secretary of the Lord Chancellor’s Department then Department of Constitutional Affairs, 1998-2004 — Written evidence (OLC0029)

The constitutional purpose of the retention of the role of Lord Chancellor would be better safeguarded. I would suggest that the post of Legal Adviser in the Ministry should be held at Second Permanent Secretary level, thus giving much greater weight to his/her position in the Whitehall legal hierarchy and ensuring that at the very top of the Department there was a senior figure who also had responsibility for advising any Secretary of State for Justice on his/her responsibilities as Lord Chancellor and also take the lead, at official level, in relations between the Ministry and the Judiciary. I also see no persuasive reason why such a role should not be combined with the office of the Clerk of the Crown in Chancery; a senior Parliamentary Clerkship, which has existed for centuries longer than the Lord Chancellor’s Department, but which has traditionally, i.e. since the 19th century, been combined with the office of Permanent Secretary. It could lend therefore some historic constitutional importance to the new role I have suggested. Whether or not such a change would help would, of course, depend on a recognition by the Government of the importance of trying to recapture some of what has been lost, and real support for the objectives such a change implies.

November 2014
WEDNESDAY 29 OCTOBER 2014

Members present
Lord Lang of Monkton (Chairman)
Lord Brennan
Lord Crickhowell
Lord Cullen of Whitekirk
Baroness Falkner of Margravine
Lord Lester of Herne Hill
Lord Lexden
Lord Powell of Bayswater
Baroness Taylor of Bolton

Examination of Witness

Rt Hon. Jack Straw MP, Lord Chancellor and Secretary of State for Justice, 2007-10

Q95 The Chairman: Unfortunately the last two speakers could not see you sitting behind them, Mr Straw, although they realised that they were talking beyond their time limit. We understand that you have to leave by 11.45 am and we will keep to that. I urge my colleagues to keep their questions brief and to the point. We are very grateful to you for coming. You were the first modern Lord Chancellor in the House of Commons. You must have had some fascinating experiences and you must have observed the development of the role with possibly mixed feelings. We shall hear about that. It is the office of Lord Chancellor we are concerned about, not the individual, and I look forward to hearing your answers. Perhaps I may head off straightaway with the first question I wanted to ask you, which is: what makes a good Lord Chancellor?

Mr Straw: I think an understanding that your position of Lord Chancellor—leave aside some of the other Justice Secretary responsibilities, such as for the prisons and probation service and constitutional matters—on the interface between the executive branch of government and the judiciary is a different one from the relationships you have in almost any other
ministerial post. If you are going to do the job properly you have to have very clear sensibilities about the dividing lines between what is proper for the Executive to get involved in and what is proper for the judiciary, and crucially to do everything you can to protect the judiciary from both political interference but also political attack. They have a job to do and that necessarily involves them from time to time in making decisions that the Government does not like or making decisions on behalf of individuals who are unpleasant, unmeritorious individuals but whose rights none the less need to be respected.

The Chairman: The CRA sets certain criteria of the qualities that are needed in a Lord Chancellor. Do you think those adequately enhance the issue?

Mr Straw: It is for others to judge. Some may take the view that because I qualified it shows they are highly defective, but that is for you to judge. If you read the section it is pretty general and it provides guidance to a Prime Minister but I query whether they have that in front of them every time they make a decision.

The Chairman: Thank you. We will move on to the next question. Lord Cullen, I think you wanted to come in.

Q96 Lord Cullen of Whitekirk: Getting on to the role of the Lord Chancellor, do you think more needs to be done to promote an understanding of his role in relation to the rule of law?

Mr Straw: Yes, almost certainly, because this goes generally to this issue of the rule of law in a democracy. You can never do too much on that. I subscribe to Tom Bingham’s principles. The way I summarise the rule of law—and I was talking about this yesterday in a lecture when I, among other things, talked about countries in the Middle East—is that one of the fundamentals in a democracy is that you honour the rights of people who disagree with you. If a democracy is going to operate you have to concede all sorts of rights and privileges to people who have not voted for you. That is the first point.

Secondly, you have to ensure that serious criminals, people who have broken the law or are alleged to have broken the law in a terrible way, who have done very bad things, are accorded rights that they have not themselves accorded to other people. That then can lead to, as I just said a moment ago, the courts making decisions that are uncomfortable for Government, and it happened loads of times with me, or releasing prisoners or giving someone asylum who appears to be completely unmeritorious. It is important that we do not then get into a situation where the judiciary, as has happened under both parties, are under attack for making decisions that they may themselves feel uncomfortable about personally but are made on the basis of the law that rules at the time.

Lord Cullen of Whitekirk: My question was focused on communicating an understanding of the role of the Lord Chancellor in relation to the rule of law. There seems to be surprisingly little in, for example, the ministerial code or the Cabinet manual that fleshes out what he is there for.

Mr Straw: I accept that. I think that is because the Cabinet manual and the code have not caught up with the change from a Lord Chancellor who was at this end bound to be both legally qualified and legally experienced to the new situation where it is a commoner and the Lord Chancellor may or may not be a lawyer, either of great or limited experience or at all.
Lord Cullen of Whitekirk: As for the understanding of the rule of law, would you, like our previous witness, suggest that the Bingham book should be issued to all Ministers?

Mr Straw: Yes, because it is a good read.

Q97 The Chairman: You were proactive, allegedly, in pursuit of heading off criticism of judicial decisions that might have been adverse and harmful and by warning Ministers in advance of an upcoming decision. Is that something you think all Lord Chancellors should do, because I do not think others have done that?

Mr Straw: Yes, I do. I have to say that I was backed in that by Gordon Brown, the Prime Minister, who was also clear that collectively Ministers should not get into the position of taking shots at the judiciary for decisions they had made, even if those Ministers were being enticed or encouraged to do so by some of the newspapers. I think this runs into the issue of seniority. There is a sense that you should have people in the job who have no further ambition. I continue to have ambition but it was none the less my last job. I was one of the older members of the Cabinet but also I was senior, so I could pick up the phone and say or see somebody in the Lobby and say, “Just do not do this, please”. But that may not apply to somebody who is more junior in the Cabinet.

Q98 Lord Lester of Herne Hill: I should begin by declaring an interest as I was your independent adviser on some aspects of human rights and the constitution, but only some. You already endorsed the Bingham principles. I was one of those who supported the changes made in 2005. Do you think, on reflection, that the scheme that people like me approved at the time needs now to be reconsidered because it has not worked very well in all respects?

Mr Straw: It is hard for me to say without making some gratuitous ad hominem comments. I think it is a matter for you to conclude after you have run this inquiry. If you are going to have an elected politician being Lord Chancellor, whoever that is, the relationship between the Lord Chancellor and the senior judiciary and the judiciary as a whole is going to be different. It is in any event different because of the 2005 Act, but I suggest that if the Lord Chancellor, notwithstanding the 2005 Act, is at this end and is an experienced lawyer, that changes the dynamic. If they are down the other end, they are an elected politician; they have constituents at them and then the relationship is going to be different. I do not, for example, think it is improper for the current Lord Chancellor to come forward with a view about the role of a judicial review. I may or may not agree with him but it seems to me that that is an entirely proper thing for the Lord Chancellor to make an argument about. Because the Ministry of Justice budget is under huge pressure—not I ought to say because of any decisions by the current incumbent but ones that go back three or four years—there is going to be a tussle with all branches of the Ministry of Justice over budgets and therefore over a role. Those things are inevitable and I think they have become more difficult. Whether there is a case for strengthening Section 2 and saying that, for example, somebody can only do this job if they qualified as a lawyer and at some stage practised, I would want to see the evidence of it before I came to a conclusion.

Q99 Baroness Falkner of Margravine: Mr Straw, I want to take you back to what you were saying a minute ago before this intervention on the rule of law and the ability to challenge Cabinet colleagues. I wonder whether you might do a thought experiment and put yourself
into your role as Foreign Secretary when you were in Cabinet over very contentious legal decisions that were taken in 2002-03, where you were constantly arguing, I suspect, wearing a lawyer’s hat as a Foreign Secretary. Do you believe that the authority of the Lord Chancellor derives from the oath of office, which we have heard a lot about this morning, or the ability to be a senior member in any event, knowing their brief, being able to talk to their brief and challenge people on that? I ask you that because a previous witness said he thought the capacity to stand up to colleagues and the Prime Minister, and to stand against the collective view of Cabinet if necessary, was the key rather than the other stuff that we have been talking about.

Mr Straw: I do not think these are alternatives. The oath of office helps and it particularly helps where you have a Lord Chancellor who has not previously been involved in the legal system, because nobody else takes an oath of office as far as I know. The Attorney may, I am not sure, but anyway nobody else who is a member of the Cabinet apart from that takes an oath of office. It is a very formal occasion and you have to understand what you are saying. Especially to those who have not had particular experience in the legal system it is important, but it was important to me, too.

To go back to what I was saying earlier, the degree of authority—with a small “a”—and influence you are able to exercise with Cabinet colleagues critically depends on who you are and what your experience is. Although I only practised at the Bar for a very brief time I have always taken an interest in legal issues and, of course, as Home Secretary I was responsible for a vast range of constitutional legislation, including the Human Rights Act. It is a subject I have thought about a great deal as well as, as Home Secretary, being on the wrong end of endless legal actions and adverse judgments of the courts, and—fewer in number but even higher profile—as Foreign Secretary you have to think about these things.

Baroness Falkner of Margravine: In your many years of experience in all these different roles, do you recall that Lord Chancellors challenged you in your decisions in a different way because you were a lawyer from the way they would have challenged others?

Mr Straw: I do not remember. There were only two Lord Chancellors when I was doing these other jobs. I do not remember either Lord Irvine or Lord Falconer challenging me. Baroness Taylor may be able to remember, but I do not recall a challenge. We used to have discussions about things, but I do not recall a challenge.

Baroness Falkner of Margravine: I think there is a difference between challenging and perhaps the Lord Chancellor taking a step back and an overview. If you go back to the devolution days and those Cabinet committees where the Lord Chancellor was chairing it, his authority there to take an overview of constitutional change was absolutely important.

Mr Straw: Of course, yes. It was and later on in the Gordon Brown Government I chaired the relevant Cabinet committee on constitutional change as well as being directly responsible for a lot of it.

Q100 Lord Crickhowell: I have two questions. We have heard a great deal of the detailed responsibilities of the Attorney upholding the law, some by referral, some from membership of specific committees—the legislative committee, for example—but we have also heard of the still central importance of the role of the Lord Chancellor in the rule of law arising from the oath and all that. Do you therefore agree with the conclusion that seems to have been emerging this morning that there are two individuals who have special responsibilities that
Mr Straw: On the first, I think those two posts are different in character from other posts. I also just add parenthetically that the more acute responsibilities arise on the shoulders of the Attorney-General because the Attorney does in particular cases have to say to Ministers, “What you are doing is not lawful”, or, “You cannot do it”. To give the answer that is not sought can be uncomfortable, whereas my role was more general and after the event of an adverse judicial decision. On this issue of distribution of government business, personally I think it would be better if these issues were back within the Ministry of Justice, although having said that it is also the case that when I was Leader of the House I had responsibility for two areas of constitutional law: elections and the whole electoral system, and the House of Lords reform. That is going to be a matter for a Prime Minister to decide who they think within their Cabinet can take on these roles. But certainly I think the Lord Chancellor should have a continuum of responsibility.

Mr Straw: I do not think you can be prescriptive about this. I think it is better if it is held by a senior figure although I can certainly think of people who could do it as their first appointment to a Cabinet and do it perfectly well. On this issue of ambition, we are talking about age rather than ambition. Should the proverbial bus have hit the incumbent of Downing Street at the right time and had the stars been in the right place, I still had my Field Marshal’s baton in my Private’s knapsack. As I walked into the Ministry of Justice I did not abandon all ambition, but if you are at the top end of the age range of the Cabinet and you have been in the Cabinet as I was at the time—I had been appointed for 10 years already—you are less likely to be gagging for further high office than if you have only just arrived.

Mr Straw: I would agree, of course. There is not an exclusive sect of defenders of the rule of law who are only lawyers. I agree with you, yes.

Mr Straw: It is related to that in a way. It is about whether the Lord Chancellor needs to be a lawyer. Can I take you back to the time, and I am sure you remember as well as I do, when you were a special adviser and I was a special adviser in the Wilson Government? My experience in the Home Office was that Roy Jenkins, who was not a lawyer but had plenty of ambition within him, was a much better defender of the rule of law than Elwyn Jones, who was a lawyer. I am thinking about issues like the Shrewsbury Two, Clay Cross and all of that. My bias, my experience, is we should not be prescriptive in relation to being a lawyer. It is an advantage provided that the rule of law is in your DNA but the rule of law can be in your DNA otherwise. Would you agree or not?

Mr Straw: I would agree, of course. There is not an exclusive sect of defenders of the rule of law who are only lawyers. I agree with you, yes.

Mr Straw: Looking back on your own time and also looking at the current practice, what about the conflict of interest between being Secretary of State for
Rt Hon. Jack Straw MP, Lord Chancellor and Secretary of State for Justice, 2007-10 — Oral Evidence (QQ 95-105)

Justice and Lord Chancellor? I know in earlier evidence you said you were comfortable with exercising both roles but since then there seems to be more of a conflict, over accessibility to justice, legal aid and so on. Do you think this is a serious problem, the conflict of interest in holding both roles?

Mr Straw: Excuse me asking this, Lord Powell, but are you saying that the conflict arises not in respect of the Ministry of Justice’s other responsibilities like prisons and probation but in respect of the role of the Lord Chancellor to hold the purse strings of legal aid and things like that?

Lord Powell of Bayswater: Yes.

Mr Straw: If I had the choice I would not have split the Home Office in the way it was split. There are a lot of advantages in having the Home Office responsible both for the running of the criminal justice system in its widest sense, from policing through to sentence and disposal, and for constitutional affairs, because that gave a balance between liberty and order inside the department. The Home Office had become too much institutionally of a Ministry of the Interior in the old continental system. Anyway, that change happened. If you have a Lord Chancellor, he or she has to be responsible for, and was in the old system, relations with the judiciary and the things that go with access to the courts, which crucially is legal aid. Whether you call it a conflict or not, and there are plenty of conflicts anyway as you know very well within a particular portfolio, that is a key responsibility. I think it would be quite improper to give it to the Home Secretary. There is a major problem now because while, in my view, some cuts were inevitable, they have gone too far in legal aid and they have hit the wrong people. But that is principally a matter of a consequence of overall government policy.

Q104 Lord Powell of Bayswater: Can I just add one unrelated question? Do you see any prospect of going back to the system of an independent Lord Chancellor who did not share a portfolio?

Mr Straw: No, I do not. It is like so many other aspects of the British constitution, the old position of Lord Chancellor did not bear examination against any set of principles, Montesquieu’s separation of powers and anything subsequent to that, but it worked. But the moment you started to shine a spotlight on it and then to change it, you could not go back. What is the argument you are going to suddenly come up with for having a Lord Chancellor who is also a senior member of the Executive and chairing the House of Lords? It is a bit tricky.

Baroness Taylor of Bolton: Does it have to be part of the Ministry of Justice? Could it be combined with something else, such as a Department for Constitutional Affairs?

Mr Straw: It could be, in which case if it was my decision I would put prisons, probation, and sentencing back into the Home Office, because they fit much more sensibly. You could do, yes, there is no reason why not.

Baroness Falkner of Margravine: If the Deputy Prime Minister has responsibility for constitutional affairs the role could go to the DPM?

Mr Straw: It could, but the crucial thing about the Deputy Prime Minister is that their responsibilities are entirely ad hominem. Baroness Taylor and I saw this with the same person. Lord Prescott at one period of his incumbency as Deputy Prime Minister had wide
executive responsibilities running a government department and subsequently, as far as I know, he had no departmental responsibilities at all but he was still the same person.

Lord Powell of Bayswater: I wonder if the Lord Chancellor should not go back to being someone who had no departmental responsibilities but this general overseeing role of responsibility for the rule of law. I was not suggesting he would go back to the House of Lords and chair.

Mr Straw: Lord Powell, it is different with the Deputy Prime Minister, who by his or her nature is going to be either a leader of a minority coalition party or is going to very senior in the majority party of government. You talk about going back to the system, but it is worth bearing in mind that under the old system the Lord Chancellor did have responsibility for legal aid and the whole issue of access to justice as well as big issues, not often ones that get much publicity, of the administration of civil justice and family justice, which are important.

Q105 Lord Lexden: Could I ask the obvious last question? Is this a post that we need or is it a relic from the past on which the door could be closed?

Mr Straw: I personally think that the Lords came to the right decision in that argument about the future of the post in 2002-03 by insisting that the post should remain because it is about protecting the judiciary. You could argue this both ways but, if it is just another Secretary of State job, you could not then have these oaths and so on. I know people can be cynical about tradition and so on, but there is a reason why this post has survived for such a long time, albeit through various transformations, which is to have a bulwark within the Executive against interference in the judiciary. I think that is a very important feature of a democracy to defend.

The Chairman: That is a very good final note. Is there anything you have left unsaid that you would like to say before we finish?

Mr Straw: I do not think so, Lord Chairman.

Q106 The Chairman: We are most grateful to you. It has been extremely helpful in illuminating a lot of points for us and we thank you very much. We release you two minutes ahead of the deadline.

Mr Straw: I am very grateful. Thank you very much.
Executive summary

- The current institutional arrangements for a conjoined-minister (Lord Chancellor and Secretary of State) arose out of inadequately scrutinised party political compromises as the Constitutional Reform Bill ended its passage through Parliament in 2005. They are complicated and little understood beyond a small group of insiders and experts.

- The Lord Chancellor has two broad roles. First, he is the minister who exercises numerous specific statutory functions relating to courts, tribunals, the judiciary and the legal profession. Second, he is the minister who is said to be the ‘constitutional conscience’ of government (a vaguely defined non-statutory function).

- The maintenance of the office of Lord Chancellor (with a radically changed character) served a useful transitional purpose in 2005. The constitutional settlement has evolved and matured and there is now no need for the elaborate conjoined-minister model to continue.

- A Secretary of State could equally well carry out the numerous court and judiciary-related statutory functions currently conferred on ‘the Lord Chancellor’.

- There is little evidence to suggest that Lord Chancellors have been effective in their role as the constitutional conscience of government other than in a sporadic and peripheral way. Future Lord Chancellors who are likely to be mainstream, mid-career ministers (rather than legally trained and at the pinnacle of their career) are even less likely to be successful in this role. Attention should instead focus on the continued strengthening of the external accountability of government.

- A bill is proposed that would: (a) abolish the office of Lord Chancellor; (b) transfer statutory functions to the Secretary of State; (c) rationalise and strengthen the constitutional principles that the Secretary of State must have regard to in exercising statutory functions related to the courts, judiciary, etc; and (d) establish a statutory committee of Parliament with a remit over judiciary and court-related matters.

Background

1. I am Professor of Constitutional Justice at the University of Essex and make this submission in a personal capacity. In 2004, I was the specialist adviser to the House of Lords Select Committee on the Constitutional Reform Bill chaired by Lord Richard, which (in a little-used procedure) took evidence, deliberated and made amendments to the bill, before recommitting it to the whole House for further consideration. I also served as a specialist adviser to the House of Commons Constitutional Affairs Committee (later Justice Committee) in relation to the reforms. From 2006 to 2009 I was the legal adviser to the House of Lords Constitution Committee.

Some necessary recent history

3. The current arrangements for the office of Lord Chancellor cannot be well understood without reference to the events surrounding their origin. The following account demonstrates that:
   a. the institutional framework created between 2003 and 2005 is complicated;
   b. it was the product of party political deals and several important aspects were inadequately scrutinised during the passage of the Constitutional Reform Bill;
   c. although in 2005 the Conservatives were implacably opposed to the prospect of the modernised office of Lord Chancellor being occupied by a mainstream, non-lawyer, mid-career political figure (the spectre of David Blunkett MP, the then Home Secretary, becoming Lord Chancellor was sometimes mentioned), it was a Conservative Prime Minister who first appointed such a person to the office (Chris Grayling MP in 2012);
   d. there have been significant changes to the functions of the Lord Chancellor, and the context in which that ministerial office operates, since the enactment of the Constitutional Reform Act 2005 (CRA 2005).

4. Until June 2003, the principal minister responsible to Parliament for court and judiciary-related matters was the Lord Chancellor. In the Cabinet reshuffle that month, a new ministerial post of Secretary of State for Constitutional Affairs was created by the Prime Minister. As an interim measure, pending primary legislation, Lord Falconer of Thoroton simultaneously held the offices of Secretary of State and Lord Chancellor. The concordat negotiated between Lord Falconer and Lord Woolf (the Lord Chief Justice) was based on the Government’s proposal for a single principal minister in the form of a Secretary of State.\textsuperscript{111}

5. The Constitutional Reform Bill as introduced to the House of Lords in February 2004 sought to abolish the office of Lord Chancellor. At the time, there was a broad consensus that it was no longer appropriate for a person holding office as a minister to sit as a judge in the highest courts, even occasionally, or to be designated head of the judiciary.

6. During the passage of the bill, four different ministerial models were scrutinised (including by the House of Lords Select Committee on the Constitutional Reform Bill).\textsuperscript{112}
   a. The Government’s preferred model of a single Secretary of State, in which a mainstream minister would be responsible for judiciary and court-related functions of government as well as some other areas of policy related to the constitution.
   b. A change of name: some people advocated the retention of the ministerial title ‘Lord Chancellor’ for the mainstream minister proposed by the Government.

\textsuperscript{112} House of Lords Select Committee on the Constitutional Reform Bill, First Report: Constitutional Reform Bill (HL), vol 1, Session 2004-2005, HL Paper 125-1.
c. A ‘legal grandee’ model. This option would have retained the title of Lord Chancellor, preserving and enhancing several crucial features of the office, including that the minister be a senior lawyer in the House of Lords and be expected to hold office for a considerable period of time.

d. A ‘minister for judicial affairs’ model. Under this option, there would have been a redefinition of the office of Lord Chancellor to become more of a judicial figure than a political one and transferring responsibility for major areas of spending (including legal aid) to other ministers; the narrow focus of the ministerial post, which would be held by a person with a background in the law, would essentially be running the courts and tribunal system.

7. The Select Committee was divided on the central questions and therefore made no recommendations to the House on whether there should be a ministerial office of Lord Chancellor, whether the minister should hold legal qualification, and whether the minister should be in the House of Lords.

8. The Select Committee did not consider in any detail – because at that stage it was not high on the political agenda – a conjoined-ministers model in which there would be two ministerial posts (Lord Chancellor and Secretary of State) held by the same person, but with different statutory and broader constitutional functions. This model emerged as a political reality in late January 2005 during the bill’s committee stage in the House of Commons, with no adequate constitutional scrutiny, as a result of the Government’s concession to retain the title and formal office of Lord Chancellor. No detailed consideration was given to the role of a Secretary of State in other legislation or the relationship between the two distinct ministerial posts. There is no reference to the office of Secretary of State in the Constitutional Reform Act 2005.

9. The issues whether the new-style Lord Chancellor should be a Lord and/or a lawyer were not settled until the ‘ping pong’ phase of the bill (under pressure of time due to the impending prorogation of Parliament for the 2005 General Election).

10. The Government and the House of Commons refused to accept the Lords’ preference for the Lord Chancellor to be in the House of Lords. For the Government, it was said that that ‘it would be irrational to pickle for ever the Lord Chancellor in an unelected House when the ministerial post has changed. Although it has the title “Lord Chancellor”, it is a different post’.

11. On the question of whether the Lord Chancellor should be a lawyer, the Government put forward a compromise clause, listing the various factors that the Prime Minister should take into account in appointing future Lord Chancellors; this became section 2 of the CRA 2005. The Government’s rationale was that there was ‘nothing in the reforms that requires a Prime Minister to pick only a high judicial office holder or similar as one of his or her Ministers. Such a restriction could potentially narrow the field so greatly that perfectly eminent individuals—perhaps senior law academics—would be debarred by statute from appointment’. For the Opposition, Dominic Grieve MP was unpersuaded by the clause, labelling it ‘an absolutely vacuous amendment’: ‘I know that the Government specialise in meaningless words, but the hon. Gentleman must agree that if

he reads the amendment ..., it amounts to nothing whatsoever. It is not worth the paper it is written on because the Prime Minister can still do exactly as he pleases'.

12. One other characteristic of Lord Chancellors that was debated during the passage of the bill was that this should be an office held by somebody at the pinnacle of their career, who had no further professional and political ambitions. When the bill was in the committee stage of the House of Commons, Dominic Grieve MP for the Conservatives, with Liberal Democrat support, unsuccessfully pressed to the vote an amendment that sought to disqualify the Lord Chancellor from holding further ministerial office after he stepped down – ‘Once a person has held the post of Lord Chancellor he is disqualified from holding any other ministerial office’. He said ‘that will ensure that he is somebody who is at the end or peak of his career when he is appointed, who has no further desire for preferment’ and so immune from political pressures and patronage powers of the Prime Minister, adding (col 896):

I do not want to see in 10 years’ time—if the Government get their way on this Bill—someone who is effectively a junior ministerial appointment in the House suddenly realising that they are in fact at the mercy of the political pressures with which they will inevitably be surrounded. We should be sensible. One of the reasons why our political system has worked well to prevent impropriety is that it is robust. What the Minister is doing, with the changes that he is introducing, is making it much less robust in terms of the Lord Chancellor’s independence.

13. Since the enactment of the CRA 2005, there have been several developments affecting the character and scope of the ministerial offices of Lord Chancellor and the conjoined Secretary of State.

a. In May 2007, the scope of the Secretary of State’s statutory and policy responsibilities was significantly extended with the Prime Minister’s decision to transfer some functions from the Home Office, notably for criminal law and sentencing, prisons and probation, to the Secretary of State’s department (which changed its name from the Department of Constitutional Affairs to the Ministry for Justice). Under the conjoined-ministers model, the balance of work as between the Lord Chancellor and the Secretary of State shifted.

b. HM Courts and Tribunals Service, an executive agency of the Ministry of Justice, has developed to operate as a partnership between the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals. Judges are more involved than in the past in resource planning and management.

c. The Judicial Office, the civil service of the Lord Chief Justice, has expanded greatly in its size and work.

d. The Judicial Appointments Commission now reports on selections of judges below the level of the High Court Justices to the Lord Chief Justice rather than the Lord Chancellor.

e. The Lord Chancellor has moved from the House of Lords to the House of Commons. Lord Falconer was the last Lord Chancellor/Secretary of State for Justice to sit in the House of Lords. His successors – Jack Straw MP, Kenneth Clarke MP, and Chris Grayling MP – are members of the House of Commons. With

115 House of Commons Hansard, 16 March 2015, cols 364 and 360.
the enlargement of the Ministry of Justice portfolio it seems unlikely that a Lord Chancellor/Secretary of State for Justice will in future sit in the upper chamber.

f. A lawyer no longer holds the office of Lord Chancellor. Chris Grayling MP, appointed by the Prime Minister in September 2012, became the first Lord Chancellor of modern times not to have a legal training.

**The constitutional and legal status of ministerial offices**

14. Before proceeding further, it is necessary to consider the general constitutional and legal status of ministerial office. In law, all Secretaries of State hold a single office. Acts of Parliament confer powers and impose duties on ‘the Secretary of State’ without further elaboration as to which minister will in practice exercise those powers or carry out those duties. The Interpretation Act 1978 provides that a reference to ‘Secretary of State’ is a reference to ‘one of Her Majesty’s Principal Secretaries of State for the time being’. The previous practice of creating statutory ministerial posts responsible for particular areas of policy (for example, the Minister of Transport or the Minister of Agriculture, Fisheries and Food) has fallen into disuse.

15. The Prime Minister has considerable scope for making ‘machinery of government’ changes, creating new Secretaries of State and departments and transferring work between Secretaries of State and departments. These are normally done with little parliamentary scrutiny. Changes are given legal effect by secondary legislation made under the Ministers of the Crown Act 1975.

16. Legally, the distinctive nature of the office of Lord Chancellor – distinguishing it from that of Secretary of State – is therefore achieved by the following means.

   a. CRA 2005 and numerous other statutes confer powers and duties on the Lord Chancellor (rather than the Secretary of State).

   b. CRA 2005 section 20 prevents many powers of the Lord Chancellor (listed in Schedule 7 to the CRA 2005) being transferred to other ministers under the general machinery of government provisions of the Ministers of the Crown Act 1975. These Lord Chancellor powers are in effect ring-fenced and require primary legislation to allocate them elsewhere; but the Lord Chancellor also has statutory functions that are not ring-fenced in this way, for example those under the Legal Services Act 2007.

   c. The oath of office taken by the Lord Chancellor is different from that sworn by a Secretary of State (Constitutional Reform Act 2005 section 17)

   d. CRA 2005 section 2 sets out a series of factors that the Prime Minister ‘may take into account’ in selecting a colleague to be Lord Chancellor, which do not apply to selection of a Secretary of State. As noted above, these provide few if any political or legal constraints on the Prime Minister’s discretion.

**Two broad roles of the Lord Chancellor**

17. The complexity of the CRA 2005 and associated changes to the constitutional framework make it easy to lose sight of the wood for the trees. In 2004, the House of Lords Select Committee on the Constitutional Reform Bill described the office of Lord Chancellor in the following terms, which are still apt. The Lord Chancellor is the minister
The Lord Chancellor, a minister responsible for “judiciary-related matters” (a shorthand expression for the provision of systems to support the carrying on of the business of courts and tribunals, judicial appointments, and overseeing judicial discipline), and who has special responsibilities as the “constitutional conscience” of Government, defending judicial independence and the rule of law in Cabinet.117

Role 1: a minister responsible for courts and judiciary-related matters

18. The constitution needs to create an institutional framework for governance of the judiciary, courts and tribunals, and connected activities (such as legal aid and the regulation of the legal profession). Two competing demands have to be reconciled. On the one hand, democratic imperatives require that there is a minister answerable to Parliament for matters that are of general public interest, especially but not only financial resources. On the other hand, the imperative of judicial independence requires that the judiciary and courts should operate (and demonstrably be seen to operate) with a high degree of autonomy from the government of the day.

19. The current solution is an intricate network of institutions, of which the ministerial office Lord Chancellor is only one part.

   a. The Lord Chancellor has numerous specific statutory functions.

   b. There is an array of arm’s length bodies, including the Judicial Appointments Commission for England and Wales, the ad hoc appointments commissions formed for UK Supreme Court vacancies, the Judicial Appointments and Conduct Ombudsman, and HM Courts and Tribunals Service.

   c. The judiciary has self-governance institutions. The Lord Chief Justice of England and Wales is statutorily recognised as head of the judiciary; the CRA 2005 also creates other judicial leadership roles; the governance work is supported by bodies including the Judicial Office (which has a staff of 186), the Judicial Executive Board (essentially the Cabinet for the judiciary), the Judicial College, and the Judges’ Council.

20. Having a minister as a key part of this network is essential. One could perhaps imagine, for purposes of discussion, a constitutional framework in which there was an extreme separation of powers, with the judiciary solely responsible for running courts, appointing and disciplining themselves and having direct negotiating powers with HM Treasury for resources – but such a system would be completely alien to British traditions of parliamentary government and democratic imperatives.

21. Between January 2006 and June 2014, Parliament enacted 73 Acts of Parliament referring to the Lord Chancellor, many of which will contain multiple specific statutory powers and duties. A sample of the most recent provisions in primary legislation is set out in Appendix A, below. During the same period, more than 800 statutory instruments referring to the Lord Chancellor were made. Almost all of this primary and secondary legislation is to do with the operation of courts, tribunals, the judiciary, and legal services.

22. The Lord Chancellor is also the designated minister in relation to the Law Commission of England and Wales, approving programmes of law reform (Law Commission Act 1965);

has general responsibility for public records (Public Records Act 1958); and is one of the 33 Church Commissioners responsible for the resources of the Church of England (Church Commissioners Measure 1947). The Lord Chancellor also has functions relating to the custody or use of the Great Seal of the Realm, used to authenticate official documents on behalf of the Queen.

23. The Secretary of State element of the conjoined-ministers model, as described above, has grown considerably with the creation of the Ministry of Justice in 2007. That department’s areas of policy in respect of which the Secretary of State for Justice, rather than the Lord Chancellor, exercises functions include: prisons and probation services; youth justice; parole; criminal law and sentencing policy.

24. Occasionally, there seems to have been uncertainty in Government when designing legislation whether a particular new function should be conferred on the Lord Chancellor or Secretary of State. In 2006, the Legal Services Bill was introduced to the House of Lords, creating a new framework for regulating the legal professions. The bill referred to throughout the Secretary of State but the Government later accepted an amendment so that the Bill would refer to the Lord Chancellor. Members supporting the amendment regarded the Lord Chancellor, rather than the Secretary of State, as better placed to ensure the independence of the new regulatory system. Lord Hunt of Wirral explained ‘when we have a Lord Chancellor, who is responsible for the operation of the legal system and is required, under his oath of office, to respect the rule of law, we have confidence that the occupant of that post will follow the example of his learned predecessors and maintain the independence of the legal profession and all the other values that we have talked about in today’s debates’. Lord Kingsland referred to ‘the dangers of a Secretary of State, such as the Home Secretary or the Secretary of State for Trade and Industry, taking over responsibility for the Legal Services Board. It would be tempting in those circumstances for one or other of those Secretaries of State to rank other considerations higher than the rule of law. The Lord Chancellor, by contrast, would be obliged to place the rule of law at the head of his considerations in making decisions about the Legal Services Board.’ Lord Lyell of Markyate (a former Law Officer) said: ‘When the noble and learned Lords, Lord Irvine of Lairg and Lord Mackay of Clashfern, were Lord Chancellor—and, indeed, for the whole of my legal and parliamentary life—it was absolutely axiomatic that if the Government or a member of the Government sought to stray from the law, which sometimes happens, it would be made clear that, if the matter were not immediately corrected, the Lord Chancellor and the law officers would resign. There would be a constitutional crisis of massive proportions. I would like to think that that still applies.’

Role 2: the Lord Chancellor as the ‘constitutional conscience’ of Government

25. A role of the Lord Chancellor acknowledged throughout the debates on the Constitutional Reform Bill is that he is the ‘constitutional conscience’ of the Government. This is not a specific statutory function, though it was acknowledged laconically in relation to the rule of law in CRA 2005 section 1. It reaches beyond the specific statutory functions related to the judiciary and courts (role 1, above) and potentially extends across the whole of government.

118 House of Lords Hansard, 9 January 2007, col 164.

27. Nonetheless, based on explanations of previous Lord Chancellors, there can be little doubt that this function exists. Giving evidence to the House of Commons Constitutional Affairs Committee in 2004, Lord Falconer said explained:\(^119\)

‘Immediately I can think of a whole range of issues that are not [sic] issues at the moment which are not within my policy area where plainly the Lord Chancellor would intervene and make his views known on rule of law issues. Yes, you would definitely in relation to rule of law issues in other areas if it was appropriate. The only slight caveat, however, is quite a lot of issues are described as rule of law issues when they are not. The best example is the one about the rights of solicitors to appear in High Court.’

‘The office, whatever you call it, has to have sufficient clout both from, as it were, what surrounds it and the holder of it to be able to take a stand on issues that transcend politics’.\(^120\)

28. In his evidence to the House of Lords Select Committee on the Constitutional Reform Bill, Lord Mackay of Clashfern said the Lord Chancellor:

‘... is the only member of the Cabinet with that responsibility to see that the Cabinet is acting in accordance with the law of the country, and if any question arises that proper legal advice is taken—a very important role, and not one that requires to be expressed very often but it can occur and when it does occur usually attention is paid to it. If the Lord Chancellor opens his mouth in that area he is usually attended to.’\(^121\)

29. The Lord Chancellor is not the only defender of these values. The Attorney General, as the government’s chief legal adviser, may also be expected to recognise and advocate the importance of the rule of law, judicial independence and other constitutional principles when requested to provide legal advice (but the Attorney General is not a member of Cabinet). The professional ethos of lawyers employed by government may also operate as a brake: members of the Government Legal Service and Parliamentary Counsel may also be guardians of these constitutional values (but they are employees and cannot insist on their view).

30. Civil servants, too, advise on constitutional principles and conventions. Speaking in 2004, Lord Wilson of Dinton (Cabinet Secretary 1998-2002) explained in relation to constitutional conventions that ‘kept in a drawer, was of course the Precedent Book, seven loose-leaf folders covered in tatty red plastic, full of loose slips of paper which have to be kept carefully in place, which each Secretary of the Cabinet hands on to his successor. I consulted this collection frequently and almost always failed to find the answer to whatever point concerned me’.\(^122\) Giving evidence to the House of Lords Constitution Committee for its inquiry into the Cabinet Office and the centre of

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\(^119\) 8 June 2004, Q236 http://www.publications.parliament.uk/pa/cm200304/cmselect/cmconst/uc628-iii/uc62802.htm (uncorrected evidence).


\(^121\) 20 April 2004, Q248 http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcref/125/4042004.htm

\(^122\) ‘The robustness of conventions in a time of modernisation and change’ [2004] Public Law 407 (text of the Harry Street Lecture, delivered at the University of Manchester).
government, Lord Armstrong of Ilminster (Cabinet Secretary 1979-87) outlined the ideal scenario where a Prime Minister proposing a course of action with constitutional implications would ask for ‘a note about it and what are the pros and cons’, which ‘would have been produced in a very short time’.  

31. The stature of the person occupying the office of Lord Chancellor is regarded as important in carrying out the constitutional conscience role. The Lord Chancellor needs to command the respect of all Cabinet colleagues and occasionally intrude into matters outside the remit of his own department. In 2004, Sir Haydon Phillips (Permanent Secretary, Department of Constitutional Affairs) told the Constitutional Affairs Committee:

‘I take rather dangerous views on this subject in the sense that I think so much depends not so much on the nature of the office somebody holds but on their personality, attitude, experience and strength. You can look back over the last 30 years and you can see some profound defenders of the rule of law who were not Lord Chancellors and they might have been stronger defenders of the rule of law than some Lord Chancellors.’  

32. In its pre-2005 incarnation, the office of Lord Chancellor supplied to the Cabinet a senior statesman, with a legal and judicial background steeped in professional culture different from those of mainstream ministers. Giving evidence in 2004 to the House of Lords Select Committee on the Constitutional Reform Bill, Lord Mackay of Clashfern said the position of Lord Chancellor brought with it the long established convention of political seniority: ‘In my experience until then [12 June 2003] the Lord Chancellor, notwithstanding how junior he might be in the Cabinet in terms of service, was always regarded as a pretty senior member of the Cabinet’.

33. It is difficult to build up a systematic assessment of how effective the Lord Chancellor’s work as the government’s constitutional conscience has been in past decades. Most evidence is subject to Cabinet confidentiality or exchanges between the Lord Chancellor and other ministers may have been informal. It is however possible to point to examples on the public record where the constitutional conscience role of the Lord Chancellor appears to have been ineffective.

34. First, the constitutional convention that ministers are not openly hostile to judges who have ruled against their departments was broken for the first time in the early 1990s. According to an editorial in The Times during this period, ‘it is tempting to observe a pattern emerging, a potentially alarming hostility between an overmighty executive and an ambitious judiciary’. The conflict was especially apparent in relation to the Home Office (and the Home Secretary at the time was Michael Howard QC, a lawyer). Radio and television journalists described a situation of ‘mutual resentment and suspicion’ and ‘unprecedented conflict between a Conservative government and the judiciary’. This episode appeared to be a deliberate government strategy against the growing influence of judicial review on policy making. It is not known what if any steps the Lord Chancellor (Lord Mackay of Clashfern) took in relation to this antagonism but whatever it was seems not to have been particularly successful in pouring oil on troubled waters.

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35. A second example of failure surrounds Tony Blair’s decision to remove Lord Irvine of Lairg from the office of Lord Chancellor in 2003. Several years later, Lord Irvine explained to the Constitution Committee that he was not properly consulted ahead of the Prime Minister’s decision to announce the policy of abolishing the office of Lord Chancellor and was accordingly unable to warn of the profound constitutional consequences of this course of action.127

36. A third example also relates to Lord Irvine’s departure from government. During a ‘take note’ debate in the House of Lords on 12 February 2004 about the Government’s reform proposals, several Members speculated about the substantive reasons for the Prime Minister’s decision to remove Lord Irvine from office. Lord Ackner, a retired Law Lord, pointed to the genesis of ‘the unconstitutional and inexcusable behaviour of the Home Secretary [David Blunkett MP] in attacking’ a House of Lords judgment on human rights; he said ‘I have no doubt that then Lord Chancellor acted with enormous energy behind the scenes to try to sort this out. He was unsuccessful’.128 Baroness Kennedy of The Shaws described a situation in which ‘it became necessary for the Lord Chancellor to say to the Home Secretary, “Take your tanks off Middle Temple’s lawns. Take your tanks away from the front of the Royal Courts of Justice”. The Prime Minister had to decide where his loyalty lay – did it lie with authoritarianism or liberalism?’.

37. A fourth example is from 2004. A comprehensive ouster clause contained in the Asylum and Immigration (Treatment of Claimants, etc) Bill sought to prevent the High Court reviewing the legality of immigration and asylum decisions. This proposal was met with strong public opposition on constitutional grounds from the judiciary (Lord Woolf, the then Lord Chief Justice described the plans as a ‘blot on the reputation of the Government’), the legal profession, academics, and within Parliament. Lord Falconer, the Lord Chancellor at the time, did not regard the clause as constitutionally problematic.

38. These examples suggest that the Lord Chancellor’s broad role as the constitutional conscience of government may be of limited efficacy where
   
   a. a matter of potential constitutional significance is not brought to the attention of the Lord Chancellor (because it is not discussed in Cabinet or the Prime Minister does not inform the Lord Chancellor about it)
   
   b. the Lord Chancellor does not regard a government proposal as unconstitutional (even though many people outside government do)
   
   c. ministerial colleagues do not heed advice from the Lord Chancellor
   
   d. the Prime Minister dismisses the Lord Chancellor from office because of unpalatable advice.

39. Generally, I am sceptical about the idea that the Lord Chancellor is able to exert strong, systematic influence on questions of constitutional propriety across government. The Lord Chancellor’s authority on broad constitutional questions is probably better seen as, at very best, providing sporadic and peripheral direction to the government’s agenda. It

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is also inappropriate, in modern times, for a constitutional safeguard mechanism to depend ultimately on the patronage powers of the Prime Minister.

40. A more realistic view is to accept that governments will make the decisions they make (advised the Law Officers, government lawyers and civil servants) and that effective constitutional checks and balances are external ones in Parliament and the courts.

What Lord Chancellors have said about the conjoined-ministers model

41. Lord Chancellors have sought to defend the conjoined offices of Lord Chancellor and Secretary of State in different ways. Clearly, in assessing the future of the post of Lord Chancellor weight should be accorded to the views of those who have occupied the post, for they better than outsiders understand the subtleties of the role.

42. In November 2006, Lord Falconer told the Constitution Committee:130

‘The original proposal was that the Secretary of State for Constitutional Affairs would do both the jobs in the Lord Chancellor’s list and the jobs in the Secretary of State for Constitutional Affairs’ list. What then happened was that the role of Lord Chancellor was preserved and certain jobs were basically tied to the office of Lord Chancellor. I still have two titles and in my view rightly so. There is still a very, very big job to do. If, however, you separated out those things which I do under my heading of Secretary of State for Constitutional Affairs there is not very much in those.

43. As previously noted, however, in May 2007, the Ministry of Justice was created and the corresponding ministerial title changed from Secretary of State for Constitutional Affairs to Secretary of State for Justice. There was a substantial increase in the scope of responsibility of the Secretary of State, including for criminal law, prisons and probation services. These new areas of responsibility radically changed the position since Lord Falconer explained, in 2006, that his Secretary of State role did not ‘have very much in it’.

44. In February 2010, Jack Straw MP told the Constitution Committee:131

‘I am perfectly comfortable about exercising both roles. They are distinct. Many of your Lordships will remember the great debate that took place following the original proposals in the Constitutional Reform Bill, which led to the continuation of the position of Lord Chancellor. I happen to think that was the right decision, for all sorts of reasons. The distinction in practice—I believe in theory but actually in practice—is a very important one, because on the one hand you have the Justice Secretary functions, which in terms of their operation and how they are moderated by other colleagues in Government are no different from any other secretary of state functions. The functions may differ but how they are operated is no different. On the other hand, the functions of Lord Chancellor are principally related to the judiciary and the maintenance of the independence of the judiciary. On those, in turn, I act independently of other colleagues in Government.

45. In relation to the practice of a minister acting independently from other ministers, this is not a requirement unique to the Lord Chancellor’s role or to decision-making about the courts and judiciary. For instance, the Secretary of State for Communities and Local Government must exercise independence in relation to some important planning permission functions; similarly, the Home Secretary in relation to some individual immigration control decisions. Moreover, working with arm’s length bodies is part of the normal repertoire of a Secretary of State. Provided the right statutory framework is in place, I see no reason why a minister occupying a post of Secretary of State would be

130 http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/6112203.htm
worse placed than one occupying the post of Lord Chancellor in making decisions about courts and on judiciary-related matters.

Reform proposals

46. When developing proposals for the future of the office of Lord Chancellor, it is important to take a holistic approach. The Lord Chancellor’s numerous specific court and judiciary-related statutory functions operate as part of a network of institutions and process, many linked to work of arm’s length bodies or carried out in conjunction with the judiciary. Similarly, the Lord Chancellor’s role as the constitutional conscience of government is not the only internal scrutiny within government: the Law Officers, government lawyers, and the civil service may also offer advice to constrain proposed unconstitutional action. To focus on only one part of these systems (the Lord Chancellor) is artificial.

Reform of role 1: statutory functions relating to the courts and judiciary

47. For the reasons explained above, I take the view that a Secretary of State could equally well exercise the hundreds of specific statutory functions currently conferred on the Lord Chancellor. I would support such a transfer as it would simplify the institutional arrangements and help improve public understanding of the system.

48. The constitutional considerations that should inform the exercise of these statutory functions should be clarified and consolidated into a single piece of legislation. The CRA 2005 refers to only two constitutional principles that need to influence the Lord Chancellor’s decision-making – the rule of law (section 1) and judicial independence (section 3). Other principles are, however, also important – some of which have already received statutory recognition in other Acts of Parliament. These include the ‘regulatory objectives’ of the Legal Services Act 2007 and the ‘general duty in relation to the courts’ placed on the Lord Chancellor under the Courts Act 2003. A new Act of Parliament should strengthen and consolidate all the constitutional norms to which a minister should have regard in making decisions about the courts and judiciary (see Appendix B, below).

49. The formula used in the CRA 2005 and other legislation is that the minister must ‘have regard to’ specified factors of constitutional importance. In other contexts (notably the public sector equality duty created by the Equality Act 2010), the courts have laid down guidelines as to what is expected of a minister or other public body in fulfilling a duty ‘to have regard to’ a factor. It is not sufficient for a minister to show merely that the decision was made with ‘a general awareness of the duty’; rather ‘a substantial, rigorous and open-minded approach’ is required. The test is one of substance not of mere box ticking. The duty must be performed with ‘vigour and an open mind’, with a ‘conscious directing of the mind to the obligations’. The duty is ‘an essential preliminary’ to the policy decision, not a ‘rearguard action following a concluded decision’. The weight to be given to various factors is for the public authority (not a court) unless the weight given by the public authority is irrational.

50. The minister’s awareness of the relevant constitutional principles in relation to court and judiciary-related policy making and implementation could be made more concrete by a requirement that the minister make an annual report to Parliament, explaining how

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these factors have influenced his department’s work. Already, the Constitution Committee has through its annual meetings with the Lord Chancellor/Secretary of State, and members of the judiciary, with academic contributions, sought to develop understanding of the concept of ‘the rule of law’. An annual report could form the basis for a systematic official articulation of this and other principles.

Reform of role 2: the Lord Chancellor as the government’s constitutional conscience

51. I am unconvinced that the Lord Chancellor has in recent years – or can in the future – effectively exercised a function as the constitutional conscience of government. The role is ill defined. Accordingly, my draft bill makes no reference to this non-statutory role.

52. If I am wrong about this, the key official documents describing the operation of government (The Cabinet Manual, the Ministerial Code, and Guide to Making Legislation) should be revised to clarify and articulate this role.

A specialist, statutory committee in Parliament

53. In developing the future governance arrangements for judiciary-related matters and the courts, Parliament should have a role to play. The work of the House of Lords Constitution Committee and the House of Commons Justice Committee regularly consider issues relating to the Ministry of Justice, the judiciary, and the arm’s length bodies (sometimes duplicating efforts). There has been an exponential increase in the frequency with which judges appear before parliamentary committees. This said, there are gaps in accountability. Many annual reports of courts and arm’s length bodies go unscrutinised in Parliament and important draft bills have not been considered (for example, the draft Tribunals, Courts and Enforcement Bill). Parliament could better coordinate its work through a statutory joint committee on courts and the judiciary. This would provide a focus for calling to account the responsible minister (whether that be the Lord Chancellor or a Secretary of State) and the arm’s length bodies, and provide a channel of communication between the judiciary and parliamentarians. Providing the committee with a statutory basis would emphasise its importance as an organ of the constitution overseeing the relationships between the executive, the arm’s length bodies, and the judiciary.

54. A draft bill designed to give effect to these reforms is envisaged in Appendix B, below.

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133 See e.g. Relations between the executive, the judiciary and Parliament, 6th Report of 2006-07 (HL Paper 151), para 23.
Appendix A: Examples of recent statutory functions conferred on the Lord Chancellor

This list provides illustrations of recent legislation modifying or conferring new functions on the Lord Chancellor.

- Inheritance and Trustees’ Powers Act 2014: this amends provisions relating to intestate succession under the Administration of Estates Act 1925 following creation of civil partnerships, giving the Lord Chancellor power to make regulations about the ‘Bank of England rate’ of interest and power to make commencement orders. Protected from transfer to a Secretary of State by CRA 2005 Schedule 7.

- Intellectual Property Act 2014, amending the Registered Designs Act 1949: confers on the Lord Chancellor power to appoint (and remove) a person to hear appeals from the registrar. This function is protected from transfer to a Secretary of State by CRA 2005 Schedule 7.

- Social Services and Well-being (Wales) Act 2014: Lord Chancellor given power to make regulations extending functions of the Welsh family proceedings officers in respect of family proceedings (within the meaning of section 12 of the Criminal Justice and Court Services Act 2000) to other proceedings.

- Anti-social Behaviour, Crime and Policing Act 2014, section 180: the Lord Chancellor may with the consent of the Treasury prescribe court and tribunal fees of an amount which is intended to exceed the cost of anything in respect of which the fee is charged.

- Children and Families Act 2014, amending the Children Act 1989: Lord Chancellor given order making powers relating to timetable for dealing with application for care or supervision order; and carrying out reviews of resolution of disagreements in conjunction with the Secretary of State for Education.

- Northern Ireland (Miscellaneous Provisions) Act 2014: Rules committee of Northern Ireland High Court and Court of Appeal submits some rules to the Lord Chancellor for passage through UK Parliament; other rules are the responsibility of the NI Department of Justice.

- Financial Services (Banking Reform) Act 2013, amending Legal Services Act 2007: Lord Chancellor has rule making power on fees relating to the Office for Legal Complaints.

- Marriage (Same Sex Couples) Act 2013: Lord Chancellor given order-making power if the Governing Body of the Church in Wales decides to permit the marriage of same sex couples according to the rites of the Church of Wales.

- Crime and Courts Act 2013: office of Lord Chancellor referred to in context of transfer of functions in connection with selection and appointment of judges to the Lord Chief Justice or Senior President of Tribunals; rule-making powers in relation to court security; and other matters. Some functions are protected from transfer to a Secretary of State by CRA 2005 Schedule 7.
Appendix B: Draft bill

This draft bill is an attempt to envisage how the proposed reforms might be implemented.

Judiciary and Courts (Functions of the Secretary of State) Act

An Act to make provision for abolition of the office of Lord Chancellor, and to make provision relating to the transfer of functions of that office to the Secretary of State; to make provision for adherence to constitutional principles in relation to government functions relating to the judiciary and the courts; and to provide for oversight of the governance of the judiciary and the courts.

Be it enacted by the Queen’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. Abolition of the office of Lord Chancellor

(1) The office of Lord Chancellor is abolished.

(2) Functions that are within Schedule 1 to this Act are transferred from the Lord Chancellor to the Secretary of State.134

2. The general duty relating to courts and the judiciary

(1) In exercising functions listed in Schedule 1 to this Act, the Secretary of State must have regard to—

(a) the need to support the constitutional principle of the rule of law;135

(b) the need to uphold and defend judicial independence;136

(c) the need for the judiciary to have the support necessary to enable them to exercise their functions;137

(d) the need for the public interest in regard to matters relating to the judiciary or otherwise to the administration of justice to be properly represented in decisions affecting those matters;138

(e) the need for the system of justice to be accessible, fair and efficient;139

(f) the need to increase public understanding of citizen’s legal rights and duties.140

(2) In this Act references to the Secretary of State’s general duty in relation to the courts and judiciary are to his duty under this section.

(3) The Secretary of State must annually prepare and lay before both Houses of Parliament a report as the way he has discharged his general duty to the courts and the judiciary.141

134 Schedule 1, not included in this draft, would set out functions currently listed in Schedule 7 to the CRA 2005, plus other functions that would benefit from a principled constitutional approach.

135 See CRA 2005 section 1; Legal Services Act 2007 section 1.

136 See CRA 2005 section 3.

137 See CRA 2005 section 3; Courts Act 2003 section 1.

138 See CRA 2005 section 3; Legal Services Act 2007 section 1.

139 See Civil Procedure Act 1997 section 1(3), as amended.

140 See Legal Services Act 2007 section 1.

141 See Courts Act 2003 section 1, which already requires the Lord Chancellor to make an annual report to Parliament on the ‘general duty in relation to the courts’ under that Act.
3. The Courts and Judiciary Committee of Parliament
(1) There is to be a body known as the Courts and Judiciary Committee of Parliament (in this Act referred to as ‘the CJCP’).\(^{142}\)
(2) The CJCP is to consist of nine members who are to be drawn both from the members of the House of Commons and from the members of the House of Lords.
(3) Each member of the CJCP is to be appointed by the House of Parliament from which the member is to be drawn.
(4) A person is not eligible to become a member of the CJCP unless the person—
   (a) is nominated for membership by the Prime Minister after consultation with
      (i) the Lord Chief Justice of England and Wales
      (ii) the President of the UK Supreme Court,
      (iii) the Leader of the Opposition, and
   (b) is not a Minister of the Crown.
(5) A member of the CJCP is to be the Chair of the CJCP chosen by its members.

14 July 2014

\(^{142}\) Modeled on the Intelligence and Security Committee established by the Justice and Security Act 2013.
Professor Andrew Le Sueur, Professor of Constitutional Justice, University of Essex, Mr Graham Gee, lecturer, Birmingham Law School, University of Birmingham, and Dr Patrick O’Brien, Research Associate, University College London — Oral Evidence (QQ 1-15)

Transcript to be found under Mr Graham Gee, University of Birmingham
1. I congratulate the Committee on its decision to conduct a further inquiry into the office of Lord Chancellor. The Committee had previously considered the office when I was a member of the Committee in its Sixth Report of Session 2006/7 entitled “Relations between the Executive, the Judiciary and Parliament”. That Report was triggered in part by the constitutional changes made by the Prime Minister, Tony Blair, to abolish the office of the Lord Chancellor at a time when I was the Lord Chief Justice of England and Wales, in June 2003 in the midst of a Cabinet reshuffle.

2. As the present Committee is all too aware, there have been a number of developments since the earlier Report. These developments have, caused me increasing concern that the worries expressed in the previous Report, far from being resolved have proved to be more grave as time passes.

3. My concerns are not with the Constitutional Reform Act of 2005 or the Concordat I agreed on behalf of the judiciary with Lord Falconer of Thoroton, Lord Chancellor, on behalf of the Executive. The Act and the Concordat have made a positive contribution to bridging the gap left by the changes made to the office of Lord Chancellor.

4. The Acts’ provisions are reasonably clear: Section 1, provides for continuity between the traditional role of the Lord Chancellor and his role following his reincarnation. It states that the Act “does not adversely affect: (a) the existing constitutional principle of the rule of law; or (b) the Lord Chancellor’s existing role in relation to that principle.” So it makes clear that Lord Chancellor’s traditional responsibility for protecting the rule of law is to continue undiminished. Section 3 provides for the responsibility of the Lord Chancellor and other ministers to protect the independence of the Judiciary, which is an important part of the rule of law.

5. Section 2 of the Act presumably confines the Prime Minister to appointing as Lord Chancellor someone he considers is “qualified by experience” to fulfil his traditional constitutional roles, including those referred to in sections 1 and 3.

6. Section 3 needs to be considered in conjunction with the Concordat and Section 1 of the Courts Act 2003, which places a duty on the Lord Chancellor to provide the support required to carry on the business of the Courts in an efficient and effective manner.

7. The matters to which I have referred so far are directed at the responsibilities of the Executive in the person of the Lord Chancellor for protecting the rule of law, including the independence of the judiciary. However it must not be overlooked that the legislature has the same responsibilities. I would suggest that while both Houses have this responsibility, it is a special responsibility of the House of Lords as the revising chamber. When the Lord Chancellor is not a member of the Lords but of the Commons, I suppose the special responsibility to remind the house of the importance of protecting the rule of law, if I am correct as to the existence of this responsibility,
would fall on the Leader of the Lords. (Both Lord Hewart LCJ and Lord Hailsham LC, have been credited with the authorship of the phrase “elective dictatorship”. But whoever was the author, the phrase is a useful reminder that Parliamentarians should be mindful of this danger and should, like the Executive, be inclined, whenever possible, to exercise a self denying ordinance in dealings with the weakest arm of government, the judiciary).

8. In view of the period that has elapsed since the previous report it is now timely to look again at the relationship between the different arms of government and the 2005 Act and the Concordat and reassesses the extent to which they are achieving their purpose.

9. I turn to my areas of concern. In doing so I acknowledge that we are still going through a period when the government considers there is a need for austerity following the financial crisis and as a result all areas of public expenditure have to be subject to careful scrutiny and economies made where appropriate. However, just as priority is given to the needs of the Health Service so I suggest that sympathetic consideration should be given to protecting the rule of law because of its critical importance to the wellbeing of society, particularly in the long term. Unfortunately, I do not believe this has happened. Increasingly over recent years and in particular during the period that the present incumbent, Mr Grayling, has been in the office of the Lord Chancellor there has not been sufficient attention paid when deciding on economies, on the importance of protecting the rule of law, either in short or long term. Examples that spring to my mind are the cuts in legal aid, particularly in regard to access to justice - one of the most important facets of the rule of law and the current changes that are being proposed to judicial review in Part 4 of the Criminal Justice and Courts Bill. These and other measures show a lack of sensitivity and understanding of the needs of the rule of law.

10. I am not able to judge why the Prime Minister considered the present Lord Chancellor was qualified by experience to fill that office because I have not seen any statement of his reasons for coming to this conclusion; but the fact is, Mr Grayling must have had difficulty initially in fulfilling his responsibilities as to the rule of law because of his lack of legal experience. What is more, he was not supported by a Lord Chancellor’s Department, which was endowed with members who had legal experience and unlike the position in the past, his permanent secretary was also not a lawyer.

11. In addition, Mr Grayling is also the Minister for Justice, which includes responsibility for prisons. Prison policy is highly toxic politically. I recognise that combining the 2 offices has advantages, but it also has disadvantages for a holder of the office of Lord Chancellor. It means for practical reasons he has almost inevitably to be in the Commons. It is impossible for him to stand back from the political affray and it creates huge budgetary pressures which can inevitably be unhelpful to his responsibilities for the administration of justice. It also means he is in a position where it is difficult for him to deal with conflicts over prisoners’ rights.
12. In the past, a Lord Chancellor could insulate himself to a considerable extent from the political affray. This assisted him in his role in relation to the Judiciary, who distinguished him from the ordinary departmental minister. The judiciary could be more closely involved with him without offending the separation of powers. His special status at that time also made it easier for him to fulfil his responsibility for defending the Judiciary, of which he was the constitutional head.

13. I hope that in future the combination of circumstances which give rise to my concerns will not be repeated. In this connection, I would draw members of the Committee’s attention to the recent debate on the Motion on the legal system’s Rule of Law on 10 July 2014 (Hansard 755, No. 23, P.329).

14. What should be done to improve the situation? There are a variety of steps that may be taken - while not solutions they may alleviate the situation. Consideration could be given;

   i) no longer making the Lord Chancellor responsible for prisons.
   ii) This would enable him to be a member of the House of Lords, which is probably not practical while he is responsible for prisons. There would be plenty of responsibilities remaining to ensure that he was fully engaged.
   iii) However, bearing in mind the problems that have arisen in making the present Leader of the House a member of the Cabinet, it might be sensible for him usually to take on that responsibility as well as his other responsibilities which are not acutely political in nature.
   iv) It is also important that there should be an increased availability of civil servants who are lawyers in the Lord Chancellor’s Department. Unfortunately, the old links between a legal career and a political career are today rarely possible. However, the need for knowledge about the constitution has never been greater and this deficiency should be addressed.
   v) The Prime minister might in the future give his reasons for regarding the requirements in section 2 as fulfilled.

15. I have prepared this note in the short time available to me since I was asked to give evidence to the Committee. I apologise for its brevity in dealing with this important subject which I hope in the circumstances will be overlooked. I will be happy of course to expand on any matters on my appearance before the Committee to give evidence on 30 July 2014.

23 July 2014

Transcript to be found under Lord Hope of Craighead