



HOUSE OF LORDS

Unrevised transcript of evidence taken before
The Select Committee on the Constitution
Inquiry on
THE OFFICE OF LORD CHANCELLOR

Evidence Session No. 1

Heard in Public

Questions 1– 15

WEDNESDAY 16 JULY 2014

10.30 am

Witnesses: Graham Gee, Professor Andrew Le Sueur and Dr Patrick O'Brien

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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 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 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 one 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 determinedly.

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 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 the delivery of 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 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?

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.

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 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 independence, 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 particular things that 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 placed 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.