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Constitutional Affairs Committee

Department for Constitutional Affairs: key policies and priorities

Oral and written evidence

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Oral evidence

Taken before the Constitutional Affairs Committee

on Tuesday 18 October 2005

Members present:

Mr Alan Beith, in the Chair

James Brokenshire
David Howarth
Barbara Keeley
Jessica Morden
Julie Morgan
Mr Andrew Tyrie
Keith Vaz
Jeremy Wright
Dr Alan Whitehead

Witnesses: **Rt Hon Lord Falconer of Thoroton QC,** a Member of the House of Lords, Secretary of State for Constitutional Affairs and Lord Chancellor, and **Alex Allan,** Permanent Secretary, Department for Constitutional Affairs, examined.

Chairman: Welcome back, Lord Chancellor and Mr Allan, to a substantially different Committee. We look forward to hearing from you. I think we have to declare relevant interests before we start.
Jeremy Wright: I am a non-practising criminal barrister.
James Brokenshire: I am a non-practising solicitor and member of the Law Society.
David Howarth: I am a legal academic specialising in tort law.
Keith Vaz: I am a non-practising barrister. My wife holds a part-time judicial appointment.
Chairman: Any more? No. Mr Vaz.

Q1 Keith Vaz: Lord Chancellor, you have set out a clear vision as to how you wish to see the judiciary develop in the future. You talked about new types of people entering the judicial service and indeed since your appointment as Lord Chancellor you have appointed the first woman to sit in the House of Lords and the first black woman High Court judge. How do you see this vision developing? How do you think the new Judicial Appointments Commission will take on board the points that you have raised?
Lord Falconer of Thoroton: The vision as far as the judiciary is concerned is of a judiciary much more representative of the society it serves, so reflecting much more gender and racial balance in the way that it is made up and also other minorities such as disability or sexual orientation. I think the critical thing in order to achieve that is to increase the pool as much as possible from which judges are selected. I have always made it clear that selection must be on merit. I do not believe the problem that there is a lack of merit amongst women, for example amongst the BME community. To achieve the vision it is necessary to increase the pool of people who are willing to consider themselves as judges and make applications. There are a number of ways that that can be achieved. First of all, it can be done by increasing the eligibility of people who can become judges and I have done that in certain areas. For example, people who are a member of the Institute of Legal Executives can now apply, making it easier to work as a judge. I would be keen to see more part-time judges. I would be keen to see judges appointed at a younger age if that is appropriate for their particular lifestyle and making it clear that there is a will on the part of the appointers to appoint from a much, much wider group of people. I would very much hope the Judicial Appointments Commission carries that forward.

Q2 Keith Vaz: You can only just set up the vision; you cannot make the new Commission do what you want them to do.
Lord Falconer of Thoroton: That is correct. They are an independent body. It is for them to decide who they select for appointment. I can give guidance in relation to it. I can also work actively with bodies like the Law Society or the Bar Council to encourage them to take steps to promote people thinking about being a judge. I think one of the great difficulties—and I have made this point before to this Committee—is if you look at the figures of people going into the profession, for example in terms of gender, for the last 20-odd years or more the number of women starting at the Bar is the same as the number of men, the number of women qualifying as solicitors is the same as the number of men, but the numbers then go down as time goes on. What is the method by which you can retain people in the profession who are women or who are from black minority ethic groups so that when the time comes they become judges? One of the things I am quite sure of is by asking them, if they are thinking of leaving the profession, whether it might be suitable for them to become a part-time judge in some way or even job sharing as a judge. That does not mean two people try the same case, it means the workload of one judge can be dealt with by two people. We need to be looking at things like that to encourage people to do it.

Q3 Keith Vaz: Is there not a danger that the Department and you are running ahead of yourselves? For example, in terms of ILEX

members, you are currently consulting on rights of audience at the same time as you are telling them that they can become judges.

Lord Falconer of Thoroton: There is a considerable overlap between the qualities that make it appropriate to have rights of audience and the qualities that make it appropriate to be a judge. I do not believe that the only people who are qualified to be judges are those who are advocates because what we are talking about in relation to ILEX having rights of audience is whether they should be advocates in court. Whilst I completely accept that if you have not been an advocate you need some experience sitting, so that would mean fee paid work as a judge, I do not believe that you need to be somebody whose main job is advocating before you can become a judge. One of the things that we have failed to pioneer adequately is making sure that more solicitors who are not engaged in litigation or appearing in court think about becoming fee paid judges first of all and then permanent judges, either part-time or full-time.

Q4 Keith Vaz: When do you think you will be making your last judicial appointment? What is the timetable?

Lord Falconer of Thoroton: I do not know. We have appointed the chair of the Judicial Appointments Commission, Baroness Prashar. We need to discuss with her the time at which she starts to make selections. The Commission will start to make appointments probably in or around April of next year. I am not sure whether they can do every appointment at that stage. There needs to be a gradual handover period.

Q5 Keith Vaz: In the meantime you still make those decisions. I want to ask you about one of the decisions that you made recently which was the subject of press comment and it is the Chancery appointment in Wales of Wyn Williams. Are you confident that you have appointed a person on the basis of merit and merit alone?

Lord Falconer of Thoroton: I am completely confident in relation to that. I deeply, deeply regret that his name and the job to which he was appointed have become public because the consequence is he has been the subject of unfair press comment. The issue that I was facing at the time I made that appointment was what would make that court, which is a specialist court in a jurisdiction outside London, succeed and I have got absolutely no doubt whatsoever that the appointment I made was the right one balancing all the factors. The thing that gave rise to the controversy was the fact that I appointed somebody to a particular court who was not a specialist advocate in that particular court. The fact that he was not a specialist advocate in that area did not debar him in my view from becoming a judge in that particular area and as events have unfolded I think I have been proved absolutely right in that respect, and I am happy to say that both myself and the Lord Chief Justice take the view that he has been very successful in that job.

Q6 Keith Vaz: Have you not had any representations from the Lord Chief Justice post your appointment of Mr Williams that this was the wrong choice?

Lord Falconer of Thoroton: The Lord Chief Justice has made it clear to me that he thinks it has been a success.

Q7 Keith Vaz: The reason why you know this particular applicant is that he attended a party in your house and you were called to the Bar at the same time as him in 1974, is it not?

Lord Falconer of Thoroton: We were certainly called to the Bar in the same year. I do not remember him being there, but I accept that he might have been there. Apparently he did come to my house 20 years ago for a party to celebrate the engagement of somebody that we both knew. It is also true that I have met him from time to time, maybe three or four times over 20 years. I should tell you that I meet very large numbers of members of the Bar and I could not tell you who quite a lot of them were. Meeting him four times over 20 years is not that often.

Q8 Keith Vaz: Presumably when the new system operates members of the Judicial Appointments Commission would be meeting people who they subsequently appoint.

Lord Falconer of Thoroton: Of course. It has been agreed by Parliament that there would be five judges who sit on the Judicial Appointments Commission. They are bound to know a number of solicitors and a number of barristers. There will also be a solicitor and a barrister separate from the judges. They are bound to know certain people and we think that is a good thing, but it has got to be done on the basis of objective merit.

Q9 Keith Vaz: As far as the transition period is concerned, obviously to avoid anymore controversies, even though I accept that the controversy is not of your making or Mr Williams, are there any lessons that can be learned about the transition period or are you just going to carry on in the same way in which you have?

Lord Falconer of Thoroton: I think there are a lot of lessons that can be learned. In relation to the appointment we have been talking about, for example, we could have had a much clearer advert in relation to it and clearer criteria. I think there is a great deal that we can learn about appointments. Over the two or three years that I have been doing it I am particularly conscious of the fact that at every stage that you do anything in relation to appointments you have got to be clear to potential applicants and you have also got to be clear internally about why you have done something and you have got to report it properly. If you have got a clear and simple process where everybody knows where they stand and you explain what you have done then you will tend to find you have done the right thing.

Q10 Keith Vaz: And you have done that in this case, have you?

Lord Falconer of Thoroton: I believe so.

Q11 Chairman: You said that the press comment was unfair. Was it unfair of the Commission for Judicial Appointments to say, "We found that the Lord Chancellor had acted inappropriately in relation to the appointment criteria and procedures in deciding to appoint a candidate found by the panel not to meet one of the criteria"?
Lord Falconer of Thoroton: I find that completely unfair because what the Commission for Judicial Appointments did was they said one of the criteria was knowledge of the particular speciality and another of the criteria was making the court work. The person I appointed was not a specialist but plainly he could find out about the particular area of law, so he was weak on that but very strong on another of the criteria. For the Commission for Judicial Appointments to say it was inappropriate was completely wrong in my view. I do not think they got it right in relation to that and I do not think that they analysed properly the material at all. I think they got the whole thing completely out of perspective and produced both an inaccurate and unfairly damaging report.

Q12 Keith Vaz: Mr Allan, when you last came before this Committee I asked you about feedback meetings and you will recall that at that stage you had not been to any, but subsequently you wrote to me to tell me that you had been. Have you looked at your DCA website recently?
Alex Allan: Yes, but I am not sure I have looked at all of it.

Q13 Keith Vaz: I went on to it this morning to look at judicial appointments. There are about 11 questions that are frequently asked. Bearing in mind that there are more posts, surely one of the most frequently asked questions is "Why was I not appointed".
Alex Allan: I am sure if there is demand for that we will put it up. Our frequently asked questions are based on the questions we are asked.

Q14 Keith Vaz: So as far as you are aware, as the Permanent Secretary, there are not many people who ring up and say "Why didn't I get this job"?
Alex Allan: I am not sure about the answer to that, but certainly there has not been enough to warrant putting a question there. Following the questions you asked at the last hearing before this Committee we have in fact changed the procedures slightly in that we now provide written rather than telephone feedback and we provide it to all the people who were not selected either at the sift stage or at the subsequent stages. We do that for those who ask for it because we have done some work and discovered that not everybody wants feedback, so we do not force it on people, but if they want feedback, we provide written feedback at all stages.

Q15 Keith Vaz: The Lord Chancellor sets out this vision of having new people in the profession, having new types of judges, but the Department does not seem to have caught up with him because somebody applying to become a judge or taking a part-time appointment for the first time will probably be turned down because they will not have passed the assessment. They would then ring up and ask for guidance. I telephoned your Department this morning on the number that has been advertised and I got a very helpful person who referred me to another person who was on an answering machine and I did not leave a message, but maybe you can chase up the process later. Do you not think that, with the vision that has been set up by the Lord Chancellor, there should be more nurturing of potential judges, a longer training system than just attending an assessment centre and writing to people and telling them why they are not good enough?
Alex Allan: I very much agree with that. Part of the Lord Chancellor's vision is starting much earlier in the process to encourage people who might not have considered a judicial career to consider a judicial career. I think the nurturing comes right at the beginning of the process. Yes, we do need to provide good feedback as to why people may not have been successful.

Q16 Keith Vaz: Why have you changed from oral feedback where people can have a decent conversation with one of your officials and be told, "This is the wrong appointment for you. This is more suitable to what you are going to do. We know you want to be a judge. We know you want an appointment of some kind. Why don't you try something else"? The Lord Chancellor makes thousands of appointments every year. Most of them pass your desk. Surely there is someone who can be giving oral feedback as opposed to writing a letter because this might put people off.
Alex Allan: We did some research and based on that we decided that written feedback would be more helpful in most cases simply because it can provide more detail and people can look at it. If they want to contact the Department to ask for further advice then we can certainly do that. The key point was actually getting out information in a way that people can look at and consider.

Q17 Keith Vaz: Could you write to the Committee with your new proposals, if there are any, on how to improve the feedback process?
Alex Allan: I did write to you and explain some of it, but we can certainly write to the Committee again.

Q18 Keith Vaz: That was last year. Has it changed since last year?
Alex Allan: We have changed it. I will write again and explain exactly what the process is.

Q19 Julie Morgan: Going back to the diversity of the judiciary, I think it is right to say that practices at the Bar are not very sympathetic toward women, they are not family friendly and you have suggested some paths that might be taken to improve the situation. Are you considering a realistic career break scheme?

Lord Falconer of Thoroton: Yes we are. I think what you say about career breaks is very important because if people think that they can take a break from a career, whether they are already a judge full-time or part-time or whether they are a barrister or a solicitor, that really makes people feel that they can come in and come out, which is a critical aspect of making sure people feel they are not quite on the treadmill but still within the pool of people who will be considered. We are considering career breaks and we are considering it in the context of judges being allowed career breaks.

Q20 Mr Tyrie: Are applicants told at the time of their application that they can obtain feedback if they want it?
Alex Allan: Yes.

Q21 Mr Tyrie: So when you said those who do not want it will not be bothered by it, it is quite reasonable to assume that those who do not come back to you demanding feedback do not want any feedback. It is made perfectly clear that they can get it, is it?
Alex Allan: Yes.

Q22 Chairman: One of the other major changes which has taken place and is still working through has been the move over to the Lord Chief Justice of the function of representing the judiciary collectively. How well do you think that is working so far? I am not asking for comments on either the past or the recently begun Lord Chief Justice, but have you got the arrangements in place?
Lord Falconer of Thoroton: We have got the arrangements in place in the sense that the Lord Chief Justice is now well supported in relation to officials to help him with performing that representative role, with a press office to help him and the other judges in relation to particular press enquiries or press pressures that they may have. I think it is wrong to look at it as a fundamental change that occurred in practice. I recognise it is a very important constitutional change that occurred in the Constitutional Reform Act, but when Lord Mackay was Lord Chancellor he said, rightly in my view, that the Kilmuir Rules no longer apply, which meant that judges were no longer restricted from making, as they would see it, appropriate comments to the press. Subsequent to that there were a number of occasions when the judges and the Government, on issues that were legitimate for the Government to raise, ended up having disputes. I do not know if you remember Lord Lane making representations about who had rights of audience in court and Lord Taylor who made various points about the content of criminal justice Bills. A long time before the Constitutional Reform Act changes the Lord Chief Justice was already a figure, in my view rightly, who was expressing the views of the judges. I do not see it as a 'big bang' change; I see it as a change that has been coming over a long period of time. Although inevitably there will be times when the judges differ from what the Executive is saying, I do not see any difficulties at the moment in the way that the process is actually operating. For example, the new Lord Chief Justice, Lord Phillips, gave a press conference at the beginning of last week. It was an event that was not regarded, in my view again correctly, as a great constitutional innovation. It was a very sensible opportunity for the press and thereby the public to meet the new Lord Chief Justice.

Q23 Chairman: One thing Parliament was insistent should not change was that you and your successors do have a responsibility for representing within Government the position of the judiciary and asserting its proper independence.
Lord Falconer of Thoroton: Correct.

Q24 Chairman: There has continued to be a fair amount of noise and smoke emanating from parts of the Government about the merits or otherwise of the court process and the judiciary, not least from the Prime Minister who talks about "half of them end up getting off at the end of it" in relation to criminal trials.
Lord Falconer of Thoroton: That quote is not half of them in every criminal case, that is half of them in 18-month long complex cases. I am happy to say that both the Prime Minister and the judges are all as keen as each other to ensure that those long cases get dealt with. I say that by reference to the criminal procedure rules that Lord Woolf, as the Chair of the Criminal Procedure Committee, produced in March of this year when he said he wanted to say goodbye to the long case. I think he said three months should be regarded as top whack and it should be an extremely exceptional case that lasted six months.

Q25 Chairman: I thought the quote was as much about how many got off as it was about how long the trials took. I think the Prime Minister's other phase which he now likes is, "summary justice—it's tough, it's hard, but it's the only way to deal with it". Have you talked that through with the Lord Chief Justice?
Lord Falconer of Thoroton: I think one should be careful not to create differences where there are in fact no differences. For example, the idea of summary justice could mean, and does mean in many cases, fixed penalty notices for relatively minor examples of anti-social behaviour and I do not think there is anybody here who thinks that is a bad idea, or it could mean conditional cautioning, which means saying we believe that you have committed this offence, you have admitted this offence, but instead of going through the whole criminal justice process, if you agree to accept a caution conditional on you being of good behaviour for a period of time that will be the end of it. That is the sort of summary justice which leads to sensible results and does not engage the whole criminal justice process. The idea that there is a row between the judges and the Executive about that is wrong. There may be a bigger question which you are putting to me which is that governments are always making noises about how unsatisfactory the results in particular court cases are. I would certainly regard my role as making sure that at no stage does the Executive, by what it says publicly, put undue pressure on the judges to

reach or procure results in particular cases because that would plainly be undermining the independence of the judiciary. You have got to be careful to ensure that anything which says the process should change equals undermining the independence of the judiciary because I do not believe that is right and I believe very strongly that the judges in some areas are just as keen as the Executive to see changes in the way the process operates because they do not want 18-month trials, nor do they want long delays between a charge and the disposal of the case.

Q26 Barbara Keeley: Lord Chancellor, in the DCA document *Making a difference* you talked about further steps to reform the House of Lords and how that there are matters there such as reform and the composition and role and powers of the House and that is of great interest not just to this Committee. Could you tell us what plans you have for pushing forward on that reform and also what timetable you have in mind both for consultation and action?
Lord Falconer of Thoroton: In terms of reform of the House of Lords, it is plain that reform of the House of Lords depends upon building some degree of consensus on a constitutional change of that importance. The broad proposals that we make in relation to the process by which we seek consensus is that there should be a joint committee set up of both Houses of Parliament to look at the conventions as between the Commons and the Lords and by that I mean what are the circumstances—this is the main convention although not the only one—in which it is appropriate for the Lords to knock back legislation or bits of legislation that have come from the Commons. I think there is some uncertainty about what that is, particularly in relation to the Salisbury Convention, ie the idea that the House of Lords should not defeat manifesto legislation. Both the Leader of the Conservatives in the Lords and the Leader of the Liberal Democrats in the Lords, Lord McNally, have said they do not think the Salisbury Convention applies anymore. We need to have a joint committee to see what all the conventions are and to make any representations in relation to that. The usual channels are discussing the setting up of such a joint committee. I am not allowed to say how far they have got because that is one of the most secret bits of the State. That will take a few months to report, but it will provide the basis for a debate about the relationship between the Commons and the Lords. Separately from that there needs to be a debate about composition. It is well known that there were a series of votes which produced no majority for any particular compositional change. We will come back to the issue of composition and allow both the Lords and the Commons to vote in such a way that the Commons and the Lords are answering the questions they want to answer in relation to it. In the light of whatever comes out of that we will then move to legislation. It is plain that we will not be able to legislate during the first session, namely the session that ends some time in the course of the summer or the autumn of next year. In terms of powers, in the manifesto we said that there should be a time limit for the time that a Bill spends in the Upper House as opposed to the Lower House. The reason we did that was not to curtail debate. The proposed time limit we suggested, which was 60 days, was way beyond the time that even the longest Bill takes.[1] We did it to deal with a situation where from time to time when there have been very controversial issues, eg hunting or constitutional reform, spokesmen for the Opposition in the Lords have said things like, "If you continue with your Hunting Bill or your Constitutional Reform Bill you will find the rest of your legislative programme disrupted." The victim of great issues on hunting could potentially be the Pensions Bill or the Health Bill or the Education Bill. That is why we propose a time limit, so that the one thing that cannot happen is that Bills get bogged down procedurally in the Lords. In a sense we have got no problem with Bills being debated on their merits and proposals being made for change, which means in essence disagreeing with the Government and making the Government think again, but what would be difficult and unacceptable would be a situation where the Bill did not even get considered for procedural reasons. That is the process; that is what we aim to try to get to. I cannot say what compositional change would come.
Chairman: I do not think we are asking you to. At the moment we are trying to explore what the process is.

Q27 Barbara Keeley: Could you say something about the timetable for looking at the powers? You were saying earlier about how we are unlikely to come to a vote in the first session.
Lord Falconer of Thoroton: I think we would want to be discussing and debating the powers in the context of what the joint committee said and that means during the course of this session. I cannot tell you precisely when the joint committee will be set up, but it will be sooner rather than later. I cannot tell you when it will report, but again that will be sooner rather than later, short of the spring or summer of next year. If one wants to proceed with a real Bill then my own view is you need to do it earlier rather than later in a Parliament, which means not this session but maybe next.

Q28 Mr Tyrie: When are you confident that we are going to get an opportunity to vote on the composition of the House of Lords?
Lord Falconer of Thoroton: I think it will be some time during the course of this session and before the second session. I cannot tell you when exactly.

Q29 Mr Tyrie: You will be aware, of course, that it is now eight and a half years since Labour came to power committing to provide a democratically elected House of Lords and we still are not very far down the road, are we?
Lord Falconer of Thoroton: You will also be aware that it is 100 years since the 1911 Act was passed with a preamble which said "This is stage one of Lords reform".

[1] *Note by witness:* I was not referring to Bills which are carried over into a different session. Historically only a few Bills per session would have been caught by a 60 day rule.

Q30 Mr Tyrie: You are making my point.
Lord Falconer of Thoroton: I am. Is not the reality about Lords reform, which we are keen to see, that it is an area where it is difficult to build a consensus? If you fail to build a consensus you end up as a Government spending a lot of parliamentary time on a constitutional issue about which there is considerable disagreement and it may not be at the forefront in terms of what are the critical priorities of a Government.

Q31 Mr Tyrie: Is it not at the forefront of the Government's priorities?
Lord Falconer of Thoroton: We are keen to reform it, but we are not keen to spend two or three parliamentary sessions dominated by the issue of Lords reform. We genuinely want to make progress on it. I am sure you were not in Parliament at the time, I certainly was not, but in 1968 the Labour Government spent a lot of time trying to propose significant Lords reform which ended up by being opposed by both the Right and the Left. Mr Michael Foot and Mr Enoch Powell came together and in effect made it fail in the Lords. If you do not build a proper consensus then you end up spending a lot of time doing something that may not necessarily achieve that measure.

Q32 Mr Tyrie: We have asked you about the timetable and, quite frankly, all we have heard so far is the sound of foot dragging. We have just heard references to 1968 and how you do not want to go down that road and take the risk of it. You have referred to the fact this all began 100 years ago, even though you have had a very firm commitment in manifestos solidly for over a decade and in policy documents. What we need to know is whether there is a firmness of commitment to putting together a sensible measure. Everybody knows there is consensus in the House of Commons for a measure of election and everybody knows that out in the country there is overwhelming opposition to the retention of the hereditary element making laws. The Government has been mandated to do something about this by the electorate and it is being pressed to do something about it by elected MPs. If the Government really wants to do something about it then they can introduce a measure in the next session for a largely elected Lords and if they give it a fair wind you and I both know it will almost certainly get through. Whether it gets through the Lords or not is another matter, but it will get through the Commons. Will you make that effort? Is that drive there in the Government to push that through?
Lord Falconer of Thoroton: If you are right in your analysis, Mr Tyrie, the point will be reached this session rather than next session when the consensus that you enthusiastically describe in the Commons will be revealed and if there is such a consensus then there will be the basis upon which we can proceed. Whatever the position in relation to composition, there are those two areas where we have committed ourselves, the hereditary peers, which you have indicated has the widespread support of the country, and the procedural changes. The critical issue is whether or not, and I think it is over to you, the Commons demonstrate there is that consensus. If they do then the difficulties that I have identified would not exist.
David Howarth: Thank you for mentioning the preamble to the 1911 Act which is very dear to the hearts of the successors of those who passed that Act.
Keith Vaz: The Liberals!

Q33 David Howarth: We are still waiting for that promise to be fulfilled.
Lord Falconer of Thoroton: I hope that the heirs to Lloyd George took the opportunity of reading the Act that had been passed and the way it was construed in the Court of Appeal.

Q34 David Howarth: Can I just clarify the relationship as you see it between function and composition because at the start I understood you to say that function and composition had to be considered separately and come together later. Does not the 60-day question take a functional matter before the compositional matter?
Lord Falconer of Thoroton: I have indicated why we think the 60-day matter should be dealt with. We are seeking to deal with one particular thing which is threatening the possibility of procedural stagnation if the Commons persists in a particular Bill like hunting, for example, which the Lords find completely objectionable. That is why we want to do that particular provision and I think there is a perfectly good justification for it. I think in principle, apart from that point, we are right to have a debate about function because only once you reach a consensus about what the Lords should be doing can you decide, for example, what size the independent element should be in the Lords. If, as I believe the position to be, the Lords should be a revising chamber but not one that decides major points of principle then that could well have a significant impact on whether you think it should be 60% elected, 40% independent or whether, as some people think, it should be all appointed.

Q35 David Howarth: The 60-day Bill seems to take a position on the functional matter.
Lord Falconer of Thoroton: Does anybody think the Lords should be able to bog down Bills in procedural maelstroms?

Q36 David Howarth: For most legislatures throughout the world that is a possibility. You are still taking a position on it before you are deciding the composition.
Lord Falconer of Thoroton: Does anybody think that should be possible?

Q37 David Howarth: It is possible in the United States and in Italy. You do not need to make a case as part of the functional view that you are taking the House of Lords forward.

Lord Falconer of Thoroton: It is not a very popular view that if you disagree with hunting, for example, you should be allowed to bog the Pensions Bill down in procedural stratagem.
Chairman: I think we have made the point.

Q38 Barbara Keeley: You have talked about the importance of building a consensus. I am not very clear on what the process will be to drive that and test that.
Lord Falconer of Thoroton: We have said a free vote in both Houses of Parliament. A free vote implies, in my view correctly, that the Government will not be whipping, either directly or indirectly, a particular position. Members of the Government will have particular positions and they will express those positions and seek to persuade people of those particular positions, but ultimately we have committed ourselves in our manifesto to a free vote on the basis we believe this is something that has got to be a cross-party consensus about some way forward. If Mr Tyrie is right then that has been done already.

Q39 Jessica Morden: What advice is the DCA giving government departments for dealing with Freedom of Information requests?
Lord Falconer of Thoroton: We are keen that there should be a change of culture. We are providing them with assistance in the working out of the Act. We believe that the Freedom of Information Act provides a change of culture but it also contains exemptions because there are certain things that everybody believes should be withheld in order to promote good government. It does mean that you have got to look at quite a lot of individual requests on a case-by-case basis. It gives rise to quite difficult questions. The advice we are giving the rest of government is helping them on dealing with those cases on a case-by-case basis.

Q40 Jessica Morden: Is it true that government departments have been told that they may choose 'to neither confirm nor deny' whether they even hold information that has been requested, which I think relates to some press reports in memos that have been given by the clearing-house to civil servants? One quote says that whether information is or is not held in itself is information and that confirmation of this fact alone may be damaging. Do you concur that whether information is held or not is in fact information?
Lord Falconer of Thoroton: Whether information is held or not is information.

Q41 Chairman: Oh, Sir Humphrey!
Lord Falconer of Thoroton: The Act itself recognises that there may be occasions when it is inappropriate either to confirm or deny. The best example I can give is where the police are surveying a particular building which they do not want to identify. If you are asked to provide all the information you have got about surveillance of a building it would be a perfectly appropriate answer to say, "We neither confirm nor deny that we have got any information relating to that particular building."

Q42 Chairman: It is covered by different exemptions so you would not need to.
Lord Falconer of Thoroton: If you look at the way the Bill operates, the first thing you have got to say is whether or not you hold that information. The reason why the Act is structured in that way is so that normally you can provide a basis for determining whether you will appeal against the refusal of that information. Where, however, saying whether you have got that information could give rise to revealing, for example, the police are surveying a particular house, in those exceptional circumstance the Act, passed by both Houses of Parliament, said you did not have to say whether you held that information. That seems to me to be necessary and perfectly sensible. The way it is done also reflects the fact that normally you should say whether you have got such information. I am sorry to give such a Sir Humphrey-esque answer!

Q43 Jessica Morden: Is there enough feedback from your Department and the Information Commissioner's Office to inform best practice?
Lord Falconer of Thoroton: Yes. We started in January. I have to tell you that some people in public authorities and government departments were not that keen. Some officials were not keen, some politicians were not keen, but we all accept there is an Act of Parliament that determines how it works and we have got to work within it. Best practice is very, very important and providing genuine help is very important and we are getting there. There have been difficulties along the way, but I think we are getting to a point where the culture is changing. You can see that from the fact that one very frequently opens one's newspapers now and sees lots of material that is coming out as a result of the Freedom of Information Act that would not have come out before.

Q44 Jessica Morden: There are 1,299 complaints relating to Freedom of Information currently with the Information Commissioner's Office and only 55 cases have been dealt with. Are you satisfied about the speed of dealing with these complaints?
Lord Falconer of Thoroton: He has dealt with a lot more than 55 cases since he was set up. He may have dealt with 500 cases. There are quite a number of cases waiting with the Information Commissioner. I am extremely keen that there be no delays in the operation of the Act as a result of a pinch point with the Information Commissioner. I have made it clear repeatedly to the Information Commissioner that if he has got any difficulties with resources he should come and speak to me and we will discuss what, if any, further resources should be made available. I think the position is that the Information Commissioner thinks it is an inevitable consequence that when an Act starts to operate you get flooded at the beginning and that gradually over time the numbers go down. If you look at the numbers, in the

first quarter there were a very large number of requests, in the second quarter it had gone down by something like 38 to 40% and it is on a downward and now plateauing level.

Q45 Jessica Morden: Is he happy that he has enough resources?
Lord Falconer of Thoroton: I see him every month and I say, "Have you got any problems about resources? If you haven't, please talk to me," and he has not talked to me about it. I read a thing in *The Times* where there was an issue about resources. It has not been raised with me.

Q46 Jessica Morden: Given that it was a new thing, you must have anticipated that there would be a large number of cases.
Lord Falconer of Thoroton: We did. We prepared ourselves with the clearing-house. The Information Commissioner took very sensible steps in relation to it. I think we all expected there to be a surge at the beginning and then a plateauing and that is what has happened.

Q47 Jessica Morden: And you are confident that things will speed up?
Lord Falconer of Thoroton: Yes, I am.

Q48 Jessica Morden: In the recently updated statistics on Freedom of Information requests it is only central government departments which are logged. What is the progress in dealing with requests that have been made by bodies outside central government?
Lord Falconer of Thoroton: There are something like 100,000 bodies covered by the Act. There is no overall system for every individual public authority having to make public returns and indeed for many bodies that would not be a sensible use of their time. We have set up in DCA something called sector panels on health, education and crime in which we bring together representatives of a particular sector, for example health bodies, and use those sector panels to spread best practice, to get feedback on how the Act is working and to try to monitor progress in relation to each of those individual sectors. Alex knows more about it than I do.
Alex Allan: We have got a whole series of mechanisms. Through the clearing-house we operate with the individual departments like the health department, they clearly have a responsibility for all health related bodies and this is partly following a recommendation the Committee made in a previous report in terms of, as the Lord Chancellor said, spreading best practice and getting information. The panels meet regularly and we are getting feedback. We do not aim to collect statistics and that level of detail because of the bureaucracy that would be involved and especially since technically any request for information is a Freedom of Information request and so I think it would be very burdensome to try and collect that level of detailed statistics.

Q49 Jessica Morden: So it is never going to be available at that level?
Lord Falconer of Thoroton: I do not think we are ever going to be able to say across the 100,000 bodies the total number of Freedom of Information requests. They will certainly get some overall impressions about the numbers of requests and whether they are going up or down.

Q50 James Brokenshire: Obviously we have the issue of electoral administration and the new Bill coming through. Part of the issue associated with that is about sharing information and how electoral registration officers will impart that information to other people. How much data sharing do you foresee in terms of the changes that are taking place and what issues do you think that will throw up?
Lord Falconer of Thoroton: I think there should be more data sharing than there is at the moment in the context of preparing the electoral register. Currently the electoral registration officers are entitled to use information in the hands of the relevant local authority, for example council tax lists and I think it would be sensible for them to use that more. Some already do, but I think those that do not should use it more because the more you have got information about who might be living in the particular local authority area or the constituency the better because when you send letters for the annual canvass you can give the names of everyone you think is in the dwellings house to assist returns being made. So more data sharing is needed in that respect. In addition to that, you will know that the Electoral Administration Bill contains permission for something called the CORE national electoral register which will be accessible by electoral registration officers to see, for example, where there is duplication throughout the country, so you get a more accurate list. As a matter of good practice I would like to see more data sharing, though there is not a specific provision in relation to the Bill for that more generally. I think the national electoral register will also help EROs in getting more accurate registers.

Q51 James Brokenshire: Do you foresee there being any privacy issues or further protections that would be needed to protect individuals in this case at a time when identity theft is becoming an increasing problem? What sort of protections would you be looking at to try and address those sorts of issues?
Lord Falconer of Thoroton: In relation to data sharing within material held by the local authority the Data Protection Act would apply, so the Data Protection Act would ensure that electoral officers can only use the material for a purpose which is legitimate, namely creating an accurate electoral register. In the context of elections I think the protections currently are satisfactory. We need to think in relation to data sharing generally about how one clarifies what the law is because I think the difficulty in all data sharing activity is the fact that everybody agrees you should only have the information you have given used for a legitimate purpose by the State. Neither the people who share data nor the public quite know what the law is and I think we need to take steps to try to clarify that. I

do not think the problem is with the substance of the law, it is the fact that nobody knows how it works, those who have to operate it and those who are supposed to be protected by it.

Q52 James Brokenshire: How would you go about doing that?
Lord Falconer of Thoroton: I think the first thing we need to do is to identify across Government where there are problems in relation to that and then I think we need to set out clearly and simply what the principles are.

Q53 James Brokenshire: Obviously in terms of the actual Bill itself, which will come for Second Reading next week, there are a number of issues in terms of the challenge between encouraging people to vote as against the issue of having integrity within the system itself. Obviously there is a balance that has to be struck between the two. Your Department says you intend to trial a number of projects in the use of personal identifiers at registration. Can you talk about that a little bit more?
Lord Falconer of Thoroton: Yes. This Committee along with the ODPM Select Committee produced a pretty influential paper about the problems of fraud but also the problems about a lack of legislation. Members of the Committee were very interested in both those problems as we are. We do want to increase security and we do want to address the particular problem of postal voting. The Electoral Commission have said if it is no longer possible to return the form with just the head of the household filling in the names of everybody and that instead everybody should have to sign and put their date of birth, which is what the Electoral Commission say, that would provide greater security in postal votes because you would have a signature against which to compare when the application for a postal vote came in. The danger of that is that you may get to a situation where that reduces the number of those registered. The statistics produced by this Committee were accepted as quite out-of-date, but the more up-to-date statistics produced by the Electoral Commission show that there is quite a worrying decline in registration. What is the right course to take in order to balance it? We think the right course to take is to pilot what the effect would be of requiring an individual signature and an individual date of birth to see whether or not there is a significant decline in registration because you have got to strike a balance there.

Q54 James Brokenshire: Obviously one suggestion is the helpful use of national insurance numbers as a further means of combating fraud. Is that something that you would consider further?
Lord Falconer of Thoroton: I think that is a very bad idea and I do not think even the Electoral Commission think that is a good idea anymore. Mr Brokenshire, I imagine you have got your national insurance number at your beck and call, but if you have, for example, in your household two or three people who are just reaching the age where they can vote, one or other of them may be away at university or a further education establishment and in order to get them onto the electoral register you have got to find out what their national insurance number is. Do you think that would have an effect on reducing registration? My own view is that it probably would without commensurate benefits in relation to security. I think we need to look carefully at how we increase security. We need to see where the balance lies. I am not in favour of national insurance numbers.

Q55 James Brokenshire: I think there is this issue in terms of whether it is household registration or individual electoral registration. Do you foresee things moving more towards the individual side? Is that something you would promote?
Lord Falconer of Thoroton: The security issue is the critical thing. Postal voting is where the big issue is. If you want a postal vote, you have got to make an application for a postal vote, then you will get your postal vote back and then you send your postal vote filled in. So there are two signatures anyway in relation to a postal vote. Is that enough for security reasons? I do not know whether it is enough, but I am very sure that you can never invent a system that is completely secure against fraud. So the question is what additional steps you put in.

Q56 James Brokenshire: I think you have said that the main issue is with postal votes, but clearly there is an issue in terms of the integrity of the register itself and hence the reason for the debate and argument about individual registration and how to get on the register in the first place. You said that effectively you see postal voting as the main issue.
Lord Falconer of Thoroton: When you say there is a problem about the integrity of the register, do you mean the register might be too full? There is an issue about that, I agree. I think the bigger issue about registration and the one that causes the most difficulty in practice is under-registration. I think you are right, some people who have moved still remain on the register, but the work of the Electoral Commission, the work of my Department and the work of this Committee sitting with the ODPM Committee concluded that particularly in areas of social exclusion but also in particular racial groups there was significant under-registration and I believe in registration terms that is the particular issue that needs to be looked at. The other issue of under-registration which is quite worrying is those between eighteen and twenty-four years old. If you end up with people of eighteen to twenty-four not registering then obviously they cannot vote. There is research which suggests that if you do not vote on the first or second occasion when you can vote legally then you do not tend to vote later on. I think those problems of registration give rise to great difficulties about the way democracy develops over a period of time because nobody involved in democratic politics wants a situation where there is a correlation between your racial group, your age, your socio-economic grouping and whether you are registered and, therefore, whether or not you vote.

Q57 Chairman: So do we conclude that for all these reasons the Government is holding back from individual registration not just at this stage but in its picture of where we are going to?
Lord Falconer of Thoroton: What we are not committing ourselves to at the moment is compulsory individual registration, because I think there is one view that says it might take you time to get there for administrative reasons, but that you should commit yourself now to the proposition that in order to be on the electoral register each individual has got to provide a signature and a date of birth. We are investigating that position by saying, in the Electoral Administration Bill that Mr Brokenshire referred to, that we are going to pilot that.

Q58 James Brokenshire: Do you agree with the Leader of the House of Commons, in comments that are attributed to him, that we should be moving towards a system of compulsory voting?
Lord Falconer of Thoroton: For me it is very painful to have to disagree with the House of Commons. I do not favour moving towards compulsory voting. I do not think the problems of democratic engagement can be solved by making it compulsory for people to vote. We have got to make it easier to vote, we have got to make it easier to register subject to all the fraud issues, but above all we have got to make politics attractive to people. I think the way you do that is not by making it a criminal offence not to vote, I think it is by the substance of what politicians say. I think there would be resentment about people saying they were being compelled to vote.

Q59 James Brokenshire: I think that neatly moves us on to the European Court of Human Rights and the recent decision about prisoner voting and whether prisoners should be entitled to vote. In the light of this decision the Government said that it will look at it. What is the Government minded to do?
Lord Falconer of Thoroton: What the European Court of Human Rights have said is, "You have a blanket ban on convicted prisoners being able to vote. You have never considered a proper justification for that, so consider a proper justification for that." We need to review the law. The principle that has underlined it in the past has been that if you are convicted of a criminal offence so serious that you are sent to prison it is not wrong in principle that you should also lose your civic right to vote. That sounds a perfectly sensible principle to me. We reflect that as being the principle by excluding from the ban on voting people who are remanded in custody but who are not convicted because you do not know whether they are guilty or not at that stage. We have also excluded from the ban on voting people who are in prison because they have not paid their council tax or something similar because they are not convicted prisoners. The judgment says you should consider whether or not things like seriousness should be relevant before you prevent people voting, but if the position is you only go to prison in this country if you have committed a serious offence or you are a very, very persistent offender, might that not be sufficient a basis to say once you are a convicted prisoner in prison you should not have the right to vote? We need to consider all these things because the European Court of Human Rights has said that we must. They are making it clear we have got quite a wide margin of appreciation.

Q60 James Brokenshire: I had understood that the initial feedback from the Government immediately after that decision was that they would be looking to relax it, whereas the view that you have just put forward is that there may not be any relaxation at all and that the existing law might be stuck where it is.
Lord Falconer of Thoroton: I think I was the person who gave the immediate reaction of the Government and I am happy to be able to tell you that what I have said to you is identical to what I said during the course of the day that the decision came out. We need to see what the consequence of the decision is. I have indicated what I think the principle is underlying not being allowed to vote once you are a convicted prisoner. If seriousness is a necessary hurdle to get over before you go to prison it may well be that we do not need to make a change. What I have said is we will review the law and consider it.

Q61 Mr Tyrie: In your document you say, "We will work with others to review the conduct of elections overall," and you have said you are much more concerned about under-registration than over-registration. I agree with you. Were you aware that a large proportion of the Armed Services were effectively disenfranchised at the last election?
Lord Falconer of Thoroton: I am very conscious of the fact that it was difficult in certain circumstances for the armed forces to get a postal vote and we need to look at the processes in relation to that. I am in discussions at the moment with the Ministry of Defence as to what is the best way to achieve much greater ease of voting for Armed Services who are away from home.

Q62 Mr Tyrie: The Government was made aware of the effects of effectively abolishing the Armed Services registration scheme over a year ago, well before the general election. Were you aware of it at that time?
Lord Falconer of Thoroton: I was aware that there was a particular issue in relation to that, yes.

Q63 Mr Tyrie: What action did you take?
Lord Falconer of Thoroton: My Department entered into discussions with the Ministry of Defence and we did not come up with a solution before the general election.

Q64 Mr Tyrie: Do you know how many servicemen in the end were not on the electoral register at the time of the general election?
Lord Falconer of Thoroton: No, I do not know what the number of that was.

Q65 Mr Tyrie: Do you think it might be something your Department should find out?
Lord Falconer of Thoroton: Yes.

Q66 Mr Tyrie: Do you think that perhaps you ought to undertake a wider investigation into what I think is pretty much of a scandal where we had large numbers of servicemen trying to bring democracy in Iraq who had just been disenfranchised from voting in their own country?
Lord Falconer of Thoroton: You make it sound as though it was impossible for them.
Mr Tyrie: I did not say impossible.

Q67 Chairman: This was not just about postal votes, it was about under-registration.
Lord Falconer of Thoroton: Those who were not on the register were in the same position as members of the electorate, namely if you were not on the register at the time the general election started then you could not get on it in time to vote and that is wrong because everybody who is engaged in democratic politics knows that the process of a general election reveals significant numbers of people who are not registered. One of the things that we have done in the Bill is to make it possible to get on to the electoral register 11 days before a general election actually takes place. That would apply equally to members of the armed forces, though I recognise they are not going to be having people coming round regularly and asking them what they are going to do about voting. We need to make sure that the process of getting on to the register is made as easy as possible for soldiers abroad or soldiers away from home in other parts of the country.
Mr Tyrie: It was easy before. It was the Government who removed the ease of it by effectively abolishing the Armed Services registration scheme.

Q68 Chairman: Can you come back to us about this?
Lord Falconer of Thoroton: Yes.

Q69 Mr Tyrie: It would be very helpful if we could get agreement that your Department make investigations which will cut across government departments, produce and publish a thorough report that shows the scale of the problem that existed, the action that was taken when the Government was made aware of it and what action it thinks it should now take.
Lord Falconer of Thoroton: I think what we should agree to do and undertake to make public is an identification of the scale of the problem and what our detailed proposed solution for it is.

Q70 Mr Tyrie: Will that also include an analysis of what went wrong prior to the election?
Lord Falconer of Thoroton: We should analyse what the problem is and we should come forward with detailed proposals as to what the solution is.
Mr Tyrie: If your report does not include that we will be back for more, Lord Falconer.

Q71 Julie Morgan: Widespread concern has been expressed about the proposal that terrorist suspects should be detained for 90 days without charge. It has been reported that the Attorney General and senior members of the Judiciary have expressed qualms. What are your views, Lord Falconer?
Lord Falconer of Thoroton: It is a Government proposal that there should be 90 days. It is a proposal that the Government, collectively, has put forward and we support it. As I made clear, the day before yesterday one of the aspects of it is that a 90 day detention period would have to be one with judicial authority. I think we need to look to see whether or not the detail of what judicial consensus required needs to be looked at. It is a Government proposal, we are all collectively responsible for putting it forward and we support it.

Q72 Julie Morgan: Do you feel satisfied that the jump from 40 to 90 days, which is a considerable jump, is justified?
Lord Falconer of Thoroton: The police have put out a detailed case in relation to it. Plainly, no Government should accept without giving detailed consideration itself to proposals put forward by any group, but that obviously includes the police. Lord Carlile of Berriew who is the independent analyst or reporter appointed by the Government to look at the way that terrorist legislation has operated has said in a report he produced last Wednesday, "there will be a small number of exceptional cases involving terrorist suspects when 90 days or more is justified". We are not suggesting more, but he is saying in those few cases the 90 days is justified. Somebody looking at it independently has concluded that the police are correct in putting that 90 day period forward. That is the view that the Government has reached as well. Lord Carlile says, "you need to make sure you have got the safeguards right". I agree with him in relation to that. That is how we need to look at the judicial oversight of those measures.

Q73 Julie Morgan: So your view, as well as the Government's view, is that 40 to 90 is justified by what the police have said.
Lord Falconer of Thoroton: I believe that looking at all of the evidence in relation to this the Government's conclusion, and it is a Government conclusion, that 90 days is justified, is correct.

Q74 Chairman: Do ministers still claim the security service is given advice to this effect?
Lord Falconer of Thoroton: I have seen the detail put forward by the police. I have seen what Lord Carlile has said. I personally have not discussed it with the security services.

Q75 Julie Morgan: What about the review? What sort of review do you think should be carried out.
Lord Falconer of Thoroton: You mean the judicial oversight? I think that there needs to be a senior judge involved. There needs to be very regular references back to the individual judge. If the judge

believes there is not a basis for continuing the detention, he should be able to require the immediate release of the suspect.

Q76 Julie Morgan: You believe there will be some changes in the Bill?
Lord Falconer of Thoroton: The Bill currently says "with judicial authority", the detention continues and I think the issue is what that means. You may need to flesh out what the words "judicial authority" mean, but the Bill itself is silent about the detail. We need to set out what that detail is. If you accept, as we do, that there are these exceptional cases and that separately is the view of Lord Carlile, then I think the critical area to focus on is what are the safeguards to ensure the position is not abused.

Q77 Julie Morgan: How many do you think "a small number" is that Lord Carlile refers to?
Lord Falconer of Thoroton: A handful, I am sure he means well under ten. A very, very small number.

Q78 Jeremy Wright: If I may, just one quick question coming back to the 90 days period. The reasons which are given for the requirement to have 90 days instead of 40, or any other period include, do they not, the need to accumulate further evidence in particular. Is your Department satisfied that there is nothing else that can be done to accelerate those types of procedures to preclude the need for a 90 day period of detention. What I really mean is, I understand that police would like 90 days, are you confident they absolutely need 90 days?
Lord Falconer of Thoroton: In any case, where those procedures can be accelerated, they should be and they should be as much as possible. The question is even assuming acceleration in as many cases as possible will there be the occasional case where you do need the full 90 days. The police, Lord Carlile and the Government all consider that there will be even assuming, as you rightly suggested, you have got to try and do it as quickly as possible. We do not think there is a process by which you can ensure that no case requires 90 days. Broadly, what is being said is when you are dealing with terrorism under current arrangements, you very, very frequently—for obvious reasons—need to arrest earlier than you otherwise would, either with terrorism from a previous era or from other sorts of criminals. In many cases where you are aware that somebody is a suspect you might be prepared to wait until they almost commit the crime, because the consequences of stopping at the time the crime is being committed would not be disastrous. You cannot do that in the current climate. You therefore may well need to arrest much earlier in the process. You are then faced with the decryption of computer material, finding out what is on hard drives, looking at a whole range of forensic stuff, following up a whole range of stuff that comes from abroad. That is the thing that takes the time. They are saying it does take 90 days in some exceptional cases. That is how we have got to the conclusion we have reached.

Q79 Chairman: Have you explored whether other procedural changes might allow questioning to continue on matters not covered by the initial charge?
Lord Falconer of Thoroton: Lord Carlile is pretty persuasive on this. He says the critical thing is the building of a case by the material that has been sought elsewhere from the defendant. He points out, in his report, that quite legitimately the legal advice given to the suspect is very, very frequently to keep silent right from the beginning of the process and it is not the questioning that is the critical thing, it is the building up of the evidence from elsewhere.

Q80 Chairman: Can I turn to special advocates which we reported on. We expressed a number of concerns about both the process and the nature of the role of the special advocate. What progress have you made on establishing a pool of advocates and what steps have you taken with the Attorney General to ensure they have got sufficient support?
Lord Falconer of Thoroton: You raised in your report the fact that there were not enough of them and they were not sufficiently supported. In November 2003 there were 29 of them, there are now, I think, 50 of them. The number has gone up significantly. We are also in the process of appointing yet more because the more there is, the easier it becomes. In relation to support, we consulted with the special advocates themselves and said what help did they want. We have set up something called the Special Advocates Support Office which provides substantial support to the special advocates appointed. We have put together a comprehensive written training pack which comprises substantial material addressing how it works, helping them in the work they do. Also, we have, as a result of the discussions in this Committee, set up a database which helps them get access to decisions and practice which cannot be publicly available but can be available to them. We hope that we have gone a very long way to meeting many of the concerns this Committee expressed.

Q81 Chairman: Are you continuing to explore ways in which the special advocate might be able to seek information, which is relevant to the defence, when authorised by the judge without actually disclosing the evidence on which it is based to the defendant? There are some procedures for doing that now, very severely circumscribed, quite little used. They do mean, of course, frequently the special advocate cannot find out whether the defendant has a cast iron alibi against the evidence which is being brought into play.
Lord Falconer of Thoroton: That was the most difficult one of the proposals that were put last time. I have not got a proposal to put in relation to it. I am not aware of what further discussions are going on. Can I look at that? The strong feeling I got on the last occasion was the anxiety about giving material that was classified was such that it would be unlikely that either me or the Attorney General or the officials would be able to come up with an answer

that would satisfy the Committee because of the risks of the material going to the wrong place. I will come back in detail on that.

Q82 Jeremy Wright: Lord Chancellor, can I take you back to the criminal justice system, specifically, what is happening with regard to the Criminal Bar at the moment. The Criminal Bar are described as being on strike, it is not a strike in the traditional sense of the word, of course, but there is no doubt that this is having a significant impact on the practice of criminal justice. It has also never happened before. Can you give us your thoughts as to why it is happening now?

Lord Falconer of Thoroton: I think it is happening now because there needs to be a fundamental rethink in the way that lawyers are paid by the State in the context of defending defendants. The amount of money paid to advocates in the higher courts, the Crown Court, has gone up by something like 79% since 2000. The indications are that that has largely gone to a small number of long and very, very expensive cases. To make the system work better we need to reduce the amount of money that is going to these cases, in part by making them shorter, but in part by paying less for those cases and redistributing the money to some parts of the criminal justice system, the defence side of it, solicitor and barrister, where there is under payment for the work that is being done and also, I believe, redistribute some of it to civil Legal Aid as well because over the time that we have been in Government, criminal Legal Aid has gone up by 37% and civil Legal Aid excluding asylum has gone down by something like 24%. What you cannot do, in order to solve the problem, is constantly increase the amounts where there are problems and do nothing about the bits where there is significant over payment. The review that we have started, under Lord Carter of Coles, which is going to report by 31 January next year is addressing the question, how do you make the system work across the board properly rather than deal with it on a piecemeal basis. I think the reason why there is a problem now is because there is a review but, in a sense, I have called a halt to the piecemeal changes, which I was doing myself when I was Lord Chancellor in years one and two and said we need an overall look at the whole thing. It is made worse as well by the fact there has been an over-expenditure of £130 million on Legal Aid for this year.

Q83 Jeremy Wright: A number of things come out of that, can I try and ask you them in turn. First of all, I suspect much of the Criminal Bar would accept your analysis that there has been an overspend in relation to high cost cases and of course there is a separate system of fees in place for very high cost criminal cases in any event. So far as the graduated fee system is concerned, which affects the rest and primarily relates to those cases you describe, which are lower cost cases where members, particularly of the Junior Bar practice, there have been cuts, have there not, of a very substantial nature made effective at the beginning of this month which precede the Carter Review, why is that?

Lord Falconer of Thoroton: There were two separate sets of cuts made, one were the things called "Cracks and Guilties". Cracks and Guilties involved a situation where there was not a graduated fee, which means a fixed fee for the amount you were paid when your client who had started off saying they were going to plead not guilty, then moved to a guilty plea. Although, there was no agreement reached with the Bar on figures the Bar, in principle, agreed that we move from *ex post facto* consideration of what the fee was to what was, in principle, a graduated fee for that. Although the figures are not agreed, the Bar and the Department agree that we should move from *ex post facto* to graduated fees for the Cracks and Guilties. That has reduced the amount of payments that have been made there, just as it did when we introduced graduated fees for the not guilty pleas. That is one. The other is that there has been a reduction, which I announced on July 5 and then consulted about which comes into effect the same day as the Cracks and Guilties which is because of the £130 million overspend. Those are why the two had to be done. One was done as a result of an agreed process started the year before, the other was because of the £130 million overspend. I do not know any other organisation, Mr Wright, that can go on overspending without doing something to curb it.

Q84 Jeremy Wright: That is certainly true. I simply asked because your analysis, which, as I have said I think the Bar would share, is the overspend is primarily occurring in high cost cases. Are you content that cuts in other cases, which primarily affect the Junior Bar is the appropriate way to deal with the overspending?

Lord Falconer of Thoroton: In relation to those cuts, I specifically sought to target them at the highest spending cases. I have said to both the Bar and the solicitors' profession, please advise me if I am wrong on these proposals as to how I target them at the upper end, and they did not come back with any alternative proposal. I was very, very keen that in curbing my expenditure I should do it in accordance with the analysis that I have given and that is why both because it is statutorily required and because it gives an opportunity for the lawyers to say where it should be done, that was the nature of the discussion I was having from July until September.

Q85 Jeremy Wright: Also, I want to talk a bit about the impact of the strike a bit more widely. Has your Department made any analysis of two particular problems which arise from it: the first being the additional costs to the courts' service caused by trials which are delayed or even cancelled at short notice and secondly, and much more importantly, the consequences for those held in custody of their trials being delayed?

Lord Falconer of Thoroton: There has not been any impact in relation to the first. The information I am getting is that it is very sporadic and in a very few places and there have been no delays of any sort in relation to what the courts hear. If there is a particular case that cannot be heard because they

have not got a prosecution or a defence barrister then the list for that particular court simply pulls in other cases. There is absolutely no suggestion at all that we are losing any time in relation to that. There is no identifiable extra cost for the criminal justice system. In relation to those in custody, I am not aware of any case at the moment where somebody has spent longer in custody as a result of the problem; you may be but I am not. All the impression I am getting from reports about it is that it is pretty sporadic and it is pretty limited in its effect.

Q86 James Brokenshire: Obviously, there is quite a lot of anger and some comments that have been attributed in terms of how this arose. Can you understand some of the frustration of the Bar when, as I understand it, a review was promised in May of this year which did not happen?
Lord Falconer of Thoroton: No, a review was promised for May of this year and it started in July. I deeply regret that it was two months late and the consequence of the review starting in July, rather than May, is that it cannot report until January. There are some months delay in relation to it. The substance of the review is being delivered. It is a much broader review than simply looking at the graduated fee scheme and the VHCC scheme but it is looking at those two things. I am very interested in what Mr Wright said, he said that the Bar, by and large, would agree with my analysis of what needs to be done. It seemed to me impossible to simply review the graduated fee scheme and the VHCC scheme without looking at the bigger issues as well. I think everybody now accepts that the funding mechanism has gone wrong and needs to be changed and therefore the one thing you should not be doing is applying sticking plasters to bits of it.

Q87 James Brokenshire: Do you concede that this a problem that has been brewing for quite some time? As I understand it, the graduated fee scheme was obviously introduced in 1997. There has been no increase in the rates that are payable under that since its introduction, even though inflation has gone up by quite a considerable amount in that time. The amount has effectively been scaling down over that time.
Lord Falconer of Thoroton: That does not reflect the earnings of the individual member of the Bar. There are two aspects to that. First of all, over the last few years, although the basic rates have not gone up, means have been found to improve the payments made to members of the Bar, for example, by page numbers, by complexity, witnesses, and if you look at the average earnings of individual members of the Bar from the Legal Aid fund, they have gone up from an average of £40,000—this is just from Legal Aid alone—to £62,000. If and insofar as you are trying to create a picture of members of the Bar's earnings have been static over that period, even putting aside the very, very high earners that is not, in fact, an accurate picture. Some have been, but quite a lot have gone up quite significantly and quite a lot have gone up quite significantly at the very bottom.

Q88 James Brokenshire: Obviously, there is a concern at the junior level that people might be discouraged from entering the profession as a consequence of the historical situation we have just touched upon. I was just interested in one further point, in terms of your announcement on 5 July, in terms of the changes that were taking place in terms of the various funding, what consultation or notice was given in relation to that?
Lord Falconer of Thoroton: There was none. 5 July was not a decision made, it was a decision for consultation. On 5 July we embarked on a process of consultation which ended towards the end of September and we extended, I think on two separate occasions, the period of consultation so that both the Bar and the solicitors could make further representations to us. Can I pick up on your earlier point. I am extremely keen that there should be a strong independent Bar and a strong independent Bar which operates the criminal justice system. I would be very anxious if the numbers at the Bar were dropping. In fact, the Bar has increased in size by around 40% since 1995. Some of that is in the civil area but quite significant numbers are in the criminal area as well. There is no evidence that I have seen that people are not coming to the Bar, there is no evidence that I have seen that people are not coming to the Criminal Bar, indeed the evidence at the moment appears to be the reverse.

Q89 Keith Vaz: Lord Chancellor, what is the Department's main concern about the current length of complex fraud trials. Is it the cost of the Legal Aid budgets in these trials or the complexity of the case?
Lord Falconer of Thoroton: A trial that lasts over six months seems to me to be a trial that it is almost impossible to think is as fair as a much shorter trial. If you are asking yourself if you are a member of the jury, or if you are a judge, can you remember what was said 18 months ago by a particular witness, the answer is probably no. The complexity and the length is not good for justice. Therefore, you have a situation where long trials that are not the best way of resolving these issues are also costing lots and lots of money.

Q90 Keith Vaz: Would you save that money and spend it on another area of the Legal Aid budget?
Lord Falconer of Thoroton: I would hope to, yes. Mr Brokenshire and Mr Wright have raised issues of the Junior Bar. It would be possible to deal with those bits of the fee system, it is not just the Bar it is solicitors as well, to pay more to them. Also, just as important, change the direction of travel in relation to the civil Legal Aid budget.

Q91 Keith Vaz: When you last came before us you made a powerful case for the abolition of one of the tiers of the immigration appeal system. It is gone, but there is still a huge backlog, why is there still a backlog in dealing with immigration cases?

Lord Falconer of Thoroton: There was always a backlog in relation to immigration cases. I do not think the abolition of one tier alone was ever going to deal—this is immigration as opposed to asylum cases—with that. They need to work their way through it.

Q92 Keith Vaz: Your junior Minister, at a recent meeting, stated that one of the reasons why the Government was considering abolishing the right of oral appeal for visitors' visas was because of the backlog. Is that a justification for taking away another right of appeal?
Lord Falconer of Thoroton: I think in relation to visitors' visas, we need to be focusing there on much higher quality decision making in the first place.

Q93 Keith Vaz: So, it is the Home Office's fault?
Lord Falconer of Thoroton: No, I am not saying that for one moment. We all have difficulties and this is a very difficult area. The number of appeals allowed suggests that getting better decision making is a good idea which, may I say, the Home Office and I are as one on in relation to that.

Q94 Chairman: More appeals are successful when they are oral.
Lord Falconer of Thoroton: Is the answer not instead of saying having a two stage process, make it easy to apply again.

Q95 Keith Vaz: You are appointing all of these diverse judges, surely they will need something to do?.
Lord Falconer of Thoroton: I have more than enough for them to do, Mr Vaz.

Q96 Keith Vaz: What conclusions have been reached about the experience of broadcasting in courts? Obviously, they are broadcasting outside when the barristers are on strike, I am talking about inside.
Lord Falconer of Thoroton: Everybody agreed in the consultation that it was wrong to broadcast any sort of court process where you were showing a witness or a victim. That was probably the same in civil as in criminal because the effect of broadcasting makes it less likely that people will co-operate with the process, particularly the criminal justice process. It seems to me the only outstanding issues that are left are, do you allow broadcasting in relation to the Court of Appeal, whether it be the Appellate Courts, whether it be the experiment that took place in the Royal Courts of Justice at the end of last year and the other area was would it be appropriate to allow broadcasting of, for example, the judge passing sentence, and we are considering the responses in relation to that.

Q97 David Howarth: Can I take you to the part of the Department's document that is entitled *Tackling the Compensation*. The first thing I want to ask you is in light of the Cabinet Office's Better regulation Task Force document on the compensation culture which seems to suggest that there is not a problem, it is just a myth, what is your view about the current situation? Is there a problem with the so-called compensation culture?
Lord Falconer of Thoroton: Yes, I think there is a problem with the compensation culture. You are right to say that Mr Arculus's report indicated broadly that the numbers of personal injury claims were going down. The problem in relation to the compensation culture seems to me to be first, legitimate desirable activity does not take place because particularly public sector and voluntarily sector people are unduly anxious that if they do a particular thing they will be sued. It is not a myth that it is harder to find people to be, for example, the people who will take children on school trips. It is not a myth that there are certain places in the country where you cannot find councillors because they are terrified of being sued. It is not a myth that some local authorities do not open bits of beautiful parkland or beach because they fear that people might suffer injuries. That is the danger that one needs to address. One needs to send out as clear a message as one possible can that we do not want to stop legitimate behaviour because of a fear of a possible claim and that, it seems to me, is the danger of the compensation culture at stage one. There is a separate more identifiable problem of claims farmers who create high expectations which are then dashed. There is a series of cases, which I am personally acquainted with, where groups of various industrial workers have been persuaded to take out loans which are expensive and have high rates of interest in order to fund the one-off insurance premium against losing and having to pay the other side's costs, where there is no consideration being made for a legitimate claim, they end up with no claim and they end up with a forever increasing debt. The two things I think we need to do therefore, on the compensation culture, is send out the clearest possible message that if it is a legitimate activity as long as you are careful you are okay and we need to properly regulate those claims farmers who have been exploiting people in the way that I have described. Those are the two things I think we need to do.

Q98 David Howarth: Taking the first of those, you said people are unduly worried. You would accept that the substance of the law is that where there is no fault there is no claim and that the House of Lords has been particularly clear on this in recent years, for example, the *Tomlinson* case.
Lord Falconer of Thoroton: You are absolutely right: what do local authorities think if it takes to get to the House of Lords to say you are not liable if somebody dived into a water and got injured when there was a sign saying "do not dive". The lawyers take great comfort from the fact the law is clear, which it is. Those people on the front line in local authorities or those people running things like the scouts are, in my view, understandably just as worried about a claim being made as they are about what the courts may decide at the end of the day. How much does it cost the local authorities to get to the House of Lords to determine that, as you would say as an expert on tort.

Q99 David Howarth: They are covered by insurance hopefully. The question is what the remedy is, which you are proposing in the Bill. One of the remedies in the Bill seems to be to say that the law is as the law already is. Is that not simply a symbolic gesture when the problem must lie elsewhere, perhaps in the cost regime or in some other aspects of the system?
Lord Falconer of Thoroton: I think that if the Bill, as a clear clause, says in considering whether somebody has been guilty of negligence bear in mind that you do not want to discourage legitimate desirable activity, I think, that is a sensible message to send through and Act of Parliament. It indicates clearly to society at large, where you want to strike the balance.

Q100 David Howarth: Does it have the danger that since the judges have already said that it will give a signal to the judiciary that that is as far as we need to go, and they are obviously developing this area more in the direction you want already. It is a risk that will stop the development of the law in precisely the way you want it to go.
Lord Falconer of Thoroton: I think quite the reverse. If you put that into a statute and make it clear you want to ensure that legitimate activity is not discouraged it would have precisely the opposite effect.

Q101 David Howarth: We will see on that. Can I take you to public bodies. You say in the document that you have a particular concern, you have already raised this particular concern, with public bodies. Of course, again the doctrine is very favourable to public bodies, there are barriers put in the way of suing public bodies that do not exist for private bodies. Again, it seems to me the problem is a practical one rather than a doctrinal one. What proposals are coming out of your discussions about this matter with other public authorities?
Lord Falconer of Thoroton: Again, there are lots and lots of things that one needs to do like, for example, provide more favourable insurance regimes, so we are in discussions with the ABI and the insurance industry generally. One needs to look very carefully at things like rehabilitation of people who are injured to ensure that if there is a problem, rather than looking through a claim, it is perhaps getting better that one is looking at. There needs to be greater information in relation to public bodies. All of those steps need to be taken and I do not want it to be thought that we are only thinking that legislation is the answer, but just as much in relation to private or voluntary sector bodies there needs to be a single legislation, so there needs to be for the public body as well it seems to me; the same point applies there.

Q102 Julie Morgan: The Government says that it will regulate claims farmers. I think there is evidence, particularly in the field of housing disrepair, that tenants have a very poor service from claims farmers, often are not getting as much damages as they would have if they had gone to court and often not even being indicated that they might be entitled to Legal Aid. I am wondering what the Department can do about that and would it be possible to require a claim farmer by law to carry out a Legal Aid eligibility test and if a person is eligible for Legal Aid to refer them to a solicitor who has got a standard mark?
Lord Falconer of Thoroton: I would have regarded it as being an indication that you were not doing the best for your client if you did not consider can you get Legal Aid because it seems to me you are, in a sense, advising a client not necessarily to get what is the best advice. I would certainly regard that as indication of them not being suitable, that would certainly be something that I think the regulators of claims farmers should have in mind.

Q103 Julie Morgan: Yes, I think this is happening, quite widely.
Lord Falconer of Thoroton: I am quite sure it is, I have absolutely no doubt that it is happening and in some areas it is a deliberate policy to keep the client away from a lawyer. Some people might think that is quite a good thing to do, but in quite a large number of cases that is most certainly not the right thing to do.

Q104 Julie Morgan: You would regard this as something the regulator has got to do?
Lord Falconer of Thoroton: Certainly, I would regard that as something that the regulator has got to deal with.

Q105 Chairman: If I can move to the Department as a Department, perhaps I will call you Secretary of State for a moment, in order to ask you whether you are still having quarterly meetings with the Chief Secretary of the Treasury which were brought in when the Department was put under special measures?
Lord Falconer of Thoroton: I do seem to see the Chief Secretary quite a lot. I cannot guarantee it is quarterly but it feels at least that regular.

Q106 Chairman: Are you under closer financial scrutiny than other Government Departments? You seemed to suggest last time when you reported on the subject so desirable were special measures, that like ASBOs everybody should have one because you get such splendid mentoring and monitoring, or ought we to conclude that the Department is still requiring some special attention?
Lord Falconer of Thoroton: I think you have to ask the Treasury that. I have regular friendly meetings with the Chief Secretary to the Treasury. I do not know what he does with other Departments. It seems sensible, in relation to all Departments, the Treasury should keep closely linked with each individual Department. That is not a way of getting out of the question.
Mr Tyrie: It is!

Q107 Chairman: It sounds like that.
Lord Falconer of Thoroton: Mr Tyrie is saying it is, it is not.

Q108 Chairman: Mr Allan, perhaps you could help with the definition. Is the Department under special measures distinctive from those in other Departments?
Alex Allan: I do not believe formally. I am not too sure about whether even that procedure exists in that way. It is not obviously just the Lord Chancellor meeting the Chief Secretary, there are enormous amounts of contact between officials as to what the prospects for spending are.
Lord Falconer of Thoroton: I have got a much better answer now. I think you will find this very refreshingly frank. DCA was placed on special measures following a reserve claim in 2002–03. The increased reporting measures, which were agreed between the Treasury and the DCA, were very successful throughout 2003–04 and 2004–05 and have now been adopted as standard practice across the Government. We were on special measures but they now apply to everybody.

Q109 Chairman: I wish you had told us that before.
Lord Falconer of Thoroton: I wish I had known that before.

Q110 Chairman: Do you see that you have had to face some rather difficult challenge with integrating into the Department a number of completely wholly different functions. You have taken effectively the Scottish Office and the Welsh Office in some respects. The Department has assumed many responsibilities it did not have before. What can you tell us?
Alex Allan: Most of the functions that have been taken on are not wholly novel to the Department. The great bulk of increase in staff has come from taking the magistrates' courts into the Department creating a unified HMCS, which we have given evidence about before. Clearly, we had experience of dealing with that. Equally, looking ahead, we are setting up a single tribunal service and we will be taking on more and more tribunals from other Government Departments into the Department. These are not wholly novel areas. The Scotland Office and the Wales Office operate reasonably autonomously. Clearly, the Department, as a whole, has a very big interest in the devolution settlement in the aggregate level but the Scotland Office and the Wales Office advise their respective secretaries of state on the day to day matters there.

Q111 Chairman: Can I raise one rather specific issue before changing to another question which I am going to ask Mr Wright to put in a moment. You have said quite a bit about the reform of the Coroner Service recently. Have you seriously contemplated putting into the departmental budget a system of full-time coroners across the United Kingdom. The geographical spread which the coroner service currently provides is with quite a significant use of part time coroners. Is that factored into your future budget considerations?
Lord Falconer of Thoroton: You are right to identify, and I know this Committee is aware of the wide ranging proposals made for coroners' reform by Mr Luce and Dame Janet Smith. Put aside the question of death certifications—which has got nothing to do, in a sense, with the coroners—what would be desirable would be as national a series of standards and as national an organisation as possible. You are completely right, to introduce, as it were, that the most extreme proposals on that spectrum would be quite impossible in financial terms in our current budget. What we need to do is identify what is desirable on the spectrum and what is possible in financial terms as well and we need to strike a balance in relation to that. We do need to act in relation to coroners. We have got to act in a way that is do-able within our budget and we cannot do a complete national system, completely transformed but we can take certain steps I believe.
Chairman: Perhaps we will come back to that on another occasion.

Q112 Jeremy Wright: Just before we leave the question of the departmental budget, can I ask you one question which you may not have the answer to now but I am sure the Committee would be interested to hear it in due course and that is about the exhibit system of automated court information. I do not know whether you can tell us, but how much has or how much will that system cost?
Alex Allan: I am not sure I have the total cost. It is funded partly out of the criminal justice IT programme which is shared among all the departments. I do not believe I have got a figure to hand for the individual cost of XHIBIT, we can certainly send you that. It is proving very successful as it is being rolled out and it provides a huge amount of additional information and it is not just the display screens in court buildings which let people know what is happening in individual courts, which is clearly a benefit. It is also very much wider benefits when, for example, individual witnesses, for example police officers can be informed by email or by text message when they are going to be needed and as a result they do not have to spend so much time waiting in court rooms. It has got much better facilities for getting information about results in court straight out to the relevant prison service or probation service. I think it is a technology that will have huge applications in the future and will very much improve the operation of the criminal justice system.

Q113 Jeremy Wright: I think it would be interesting to know how much it costs and how much, if at all, that exceeds the original estimates for it. The other questions that I wanted to ask, which we may deal with reasonably briefly, are in connection with court fees and the increase there has been in court fees which may not be entirely unrelated to the departmental budget issues, I do not know. Has the Department made an assessment of what the impact of that increase in fees has been, whether in particular there has been any detrimental impact with regard to access to justice?
Lord Falconer of Thoroton: We are consulting on the increase in fees. You are right to identify that there is a principle in relation to civil and family justice that subject to those people that cannot afford it, it

should recover its own costs. That is what we have got to seek to do. If we do not do it, if we do not increase fees, the consequence is that savings have got to be made in other areas, for example in relation to Legal Aid. It is not something that one would want to do, but one has got to do it. What effect does it have on claims? There is a study that has been done by solicitors that says one in three solicitors says that they know of a claim they have not made as a result of the fees at the moment. If you look at the increase in fees it is quite difficult to see what sorts of claims are actually being blocked by either the current fees to which the study is related or would be in the future. The ones, I think, we need to really keep an eye on are the family ones where I think, particularly in relation to contact applications, where the fee is going up from something like £20 or £30 to £120 or £130, we need to listen very closely to what is being said and in particular ask the question is there Legal Aid on the exemption provisions which would mean you would not have to pay sufficient to ensure that access to justice is not being unduly affected, but we need to listen to that very carefully.

Q114 Jeremy Wright: The final point is this, in relation to the efficiency measures, which the Department is looking to put through so far as the court services are concerned, what impact do you think that is likely to have on court fees over the next two or three years?

Alex Allan: It certainly should not. Increasing fees would not be an efficiency saving. We have plans and we will be developing more plans for improving the efficiency of the court service, and in particular, realising the benefits from bringing together the magistrates' courts, the crown courts and the county courts into a single unified court service. Certainly, increasing fees is not in itself an efficiency measure.

Chairman: Lord Chancellor, Mr Allan, thank you very much indeed. We look forward to seeing you again.

Tuesday 28 February 2006

Members present:

Mr Alan Beith, in the Chair

James Brokenshire
Mr Piara S Khabra
Julie Morgan
Mr Andrew Tyrie
Keith Vaz
Jeremy Wright

Witnesses: **Rt Hon Lord Falconer of Thoroton QC,** a Member of the House of Lords, Lord Chancellor and Secretary of State for Constitutional Affairs, and **Alex Allan,** Permanent Secretary, Department for Constitutional Affairs, gave evidence.

Chairman: May we welcome you both and do our usual formula of declaring interests.
Jeremy Wright: I am a non-practising barrister in the field of criminal law.
Chairman: I am not sure that I have to declare this but my wife is a Member of the House of Lords.
Keith Vaz: I am a non-practising barrister. My wife holds a part-time judicial appointment.
James Brokenshire: I am a non-practising solicitor.
Julie Morgan: My daughter works for Shelter Cymru and one of my employees also works for the Special Support Services of the Legal Services Commission.

Q115 James Brokenshire: Let us start with legal services. If the market for legal services is widened to allow banks and supermarkets and other sorts of providers to provide legal services to the public what impact do you think that will have on legal aid provision?
Lord Falconer of Thoroton: I think it will not have a detrimental impact on legal aid provision. I do not think the fact that, for example, some practices do legal aid and some practices do private work and the private work, it might be said, supports the legal aid stuff, will be a factor in many practices. There are two things going on that may have a big impact on the supplier market for legal services. One is the changes in legal aid that Carter is working on and the other is in effect reducing the regulation in the market. I think the effect of that is going to be for there to be provision of legal services for consumers in some cases more accessibly, like in banks and supermarkets. As far as legal aid provision is concerned, I think in some places it will be provided through bigger firms than currently exist, thereby getting some economies of scale. I think the supplier market will change but I do not think it will have an impact on the provision of legal aid. Indeed, I think there will be more money available for front-line legal aid rather than supporting things like travel and overheads.

Q116 James Brokenshire: Let us pick up on a couple of those things. Do you expect these new providers, like the supermarkets, to bid for legal aid contracts? Is that the expectation at the moment?
Lord Falconer of Thoroton: I would not have thought so, no. I would have thought the effect of the reduction in regulation of the market would be for suppliers like that to provide services for people that they do not get at all at the moment—legal advice, for example, in relation to employment matters where they do not qualify for legal aid—or provide advice and services that are currently provided in solicitors' firms but that could be provided more accessibly in other places.

Q117 James Brokenshire: You have touched upon this issue of the cross-subsidy and the fact that we could see some cherry-picking of certain "profitable" services and the fact that there is in operation in some firms some cross-subsidy of services by those firms in terms of being able to fund the legal aid services. Do I understand you correctly, that effectively you are saying that the impact of this change is likely to be that smaller firms may disappear and this will force a change towards larger firms?
Lord Falconer of Thoroton: Yes, I think there might be a reduction in the number of smaller firms. Indeed, I am pretty sure that there will be. I think the difficulty about the sort of firm that you describe, one that has private work and public work, is that, because public work, ie, work that has been funded by legal aid, is being done in lots and lots of small firms, the price that is being paid has quite a significant element of things like overheads, so it is more expensive than it otherwise would be. There will be a drive to bigger suppliers as a result particularly of the Carter changes. I do not think that is going to reduce the supply of legal aid. Far from it: I think it will increase it because the amount of money that is being spent on the front line will go up and the amount of money being provided on the overheads will go down.

Q118 James Brokenshire: Would you accept though that there is a risk that the public may find it more difficult to access those services, because obviously the smaller providers that you talked about tend to be on the high street, tend to be more accessible to the public? How do you see that changing?
Lord Falconer of Thoroton: I do not think it will have that effect because most people, particularly when we are talking about criminal legal aid, though this is obviously not the only area of legal aid, will be referred to their solicitor by some other source, for example, the police or an acquaintance, and I do not think for one moment that drop-in selection of solicitors is the way that people choose them. I do not think therefore that it will make it less accessible

than it is at the present. Indeed, the reduction in regulation—the supermarket, the bank—will for many services make them much more accessible. The other aspect one needs to look at is the question of price. You know that the conveyancing monopoly was removed from solicitors. The consequence of that was that solicitors tended to reduce their prices. The quality of conveyancing and the accessibility of conveyance providers did not go down.

Q119 James Brokenshire: Just on the issue of professionalism and the general ethos, obviously, it is a question of whether we see that same ethos being maintained amongst all of the new entrants. Do you see that there is any problem if the Legal Services Commission moves to a market-based competitive tendering model of legal aid provision? Do you see that having any impact on that professionalism or ethos?

Lord Falconer of Thoroton: Carter has made clear, and I fully agree with this, that we have to make sure that quality does not drop. What Lord Carter is proposing is that the professions themselves, the Law Society and the Bar Council particularly, should undertake more of a burden and an obligation in ensuring that professional standards are kept up. Both the Law Society and the Bar Council think that that is a good idea. I think the question of ethos is very important. If the professional societies, the professional regulators, the front-line regulators, think they should increase their role in that, that will probably have an effect of at least maintaining and possibly increasing professionalism.

Q120 James Brokenshire: Just to come back to you on the issue of price, and I heard what you said, do you accept in any way that a move from an hourly based rate to a fixed fee will have any qualitative impact since lawyers will be, one might argue, less prepared to go the extra mile because they know that their fee is being capped in some way?

Lord Falconer of Thoroton: I think lawyers are by and large professional. They want to do a good job. I think the effect of it being done on a fixed fee rather than an hourly rate is that there is some incentive there to ensure that cases are dealt with within a reasonable time, because we have seen cases go on for much too long. It is not only lawyers; it is a whole range of issues that cause that, but if you have a system of payment that provides an incentive for cases to be dealt with within a reasonable time then I think that is what will happen.

Q121 James Brokenshire: I take it therefore that that is why you stress this emphasis on ethos and professionalism, because if you are on a fixed fee type of arrangement (that is not to say that this would happen) some people might be prepared to cut corners if things have gone on longer or become more complicated than they were expecting, and that might have a qualitative impact on the service thereafter once you discover that.

Lord Falconer of Thoroton: We have got to be astute to ensure that quality is maintained. Whichever system you choose, fixed fee or hourly rate, we can all see round the room that there is a pressure in each of those arrangements for something that might not be the best result in terms of what is the best way to deal with a case. Whichever system you have, you have to be sure you have measures to ensure that quality and professionalism are maintained.

Q122 James Brokenshire: Now that Lord Carter has completed the first phase of his report do you expect to reach an agreement with the Bar to preclude any recurrence of the "strike" that took place in the autumn of last year?

Lord Falconer of Thoroton: The next stage in the process is for Lord Carter, having produced his interim report, which as it were sets out the principles that he wants to adopt in criminal legal aid, to have detailed discussions with the Law Society, with the Bar and with other legal service providers and try to reach an agreement in detail about what happens for fee schemes for this year, next year and the year after. What I am hoping to see is an agreement with the professions, in effect brokered by Lord Carter, for a detailed way forward.

Q123 James Brokenshire: But from where you sit at the moment do you think that the outcome is looking more positive?

Lord Falconer of Thoroton: Very much so, yes. What is very significant about what has happened is that Lord Carter produced his interim report, which is a very significant document, because it talks in practice about restructuring the supplier market, and there were some voices that said this was a bad thing but both the Law Society and the Bar Council gave it guarded support.

Q124 James Brokenshire: What effect do you expect the proposals set out in the White Paper *The Future of Legal Services: Putting Consumers First* to have on the independence of the legal profession?

Lord Falconer of Thoroton: I do not think it will have any detrimental effect on the independence of the legal profession. David Clementi's report, which was the foundation of the White Paper, says that one of the things that regulation has got to achieve is to ensure the independence of the legal profession because an independent legal profession is a necessary concomitant of a state that lives by the rule of law. The proposals that are made in the White Paper and which will be translated into a Bill before Parliament ensure the independence of the legal profession and I think both the Law Society and the Bar Council accept that view.

Q125 James Brokenshire: It has been suggested that this does present a serious threat to the independence of the legal profession. Can you see where that argument might come from?

Lord Falconer of Thoroton: I can, and the argument is based upon the proposition that if the Government appoints the Legal Services Board and the Legal Services Board in effect supervises the Law

Society and the Bar Council, which are the front-line regulators, the Government, the argument goes, has the ability to control those who control the lawyers. The answer to that is that the Bill has to contain provisions which make people completely comfortable but that the people who appoint the Legal Services Board are independent of the Government and have no connection with, as it were, the political state before the appointment is made, very much in the way that the Judicial Appointments Commission will appoint judges from April in a way that I think people have confidence is entirely separate from the political Government.

Q126 James Brokenshire: And therefore, if there are questions about the robustness of those proposals, that is something that you will consider very carefully to ensure that that model works?
Lord Falconer of Thoroton: Yes indeed. I think that is a very important point. I think people have to have confidence that the independence of the legal profession is preserved and I believe that our proposals do that, but that is plainly something that, as the Bill goes through Parliament, people will want to be sure we have effectively delivered.

Q127 Jeremy Wright: If I can take you back to Carter, you said, and I think you were right to say, that the Bar has given the first stage of Carter a cautious welcome, but, of course, the second stage will tell them how much money they are going to get, which is where they will really become interested.
Lord Falconer of Thoroton: But they are quite interested in this bit.

Q128 Jeremy Wright: Well, vaguely interested, I am sure. When the money bit comes into the forefront of our consideration will it be at the forefront of the Government's mind to look again at the balance between fees for senior counsel in the longer cases and fees for junior counsel in the shorter cases which, as you will know, is the concern primarily of the junior Bar? That is going to be another live issue, is it not, when Carter reports on the figures?
Lord Falconer of Thoroton: These are the issues that Lord Carter has to deal with in broking with the Bar and the Law Society how the cake is divided, and the cake has a finite size which all the participants in the discussions know. You will recall that one of the foundation beginnings of the process was that in a sense very big cases are overpaid but there are some parts of the process where both solicitors and the Bar are underpaid and there needs to be a redistribution throughout the system in order for it to be a fairer system of payment. However, it is also important to remember that there is a sense—and this is borne out by the figures—that civil legal aid has gone down as well and there needs to be some money from the criminal legal aid payments taken and given to civil legal aid. You are absolutely right to say it is a difficult second bit that needs to be done and money does tend to focus people's minds but, having set out the principles, there is now a basis of agreement in principle which I think will make the second process easier.
Alex Allan: One of the points in Lord Carter's first report is that for the revised graduated fee scheme for advocacy services the base fee should incorporate the majority of the ancillary payments that are currently made and a single advocate should take responsibility for all payment of the advocacy elements of the case, so in that sense looking towards giving options for rebalancing to the advocate who is accepting the single payment.

Q129 Chairman: You will probably be aware that we had an evidence session with the Legal Services Commission about Specialist Support Services.
Lord Falconer of Thoroton: Yes.

Q130 Chairman: We are going to publish a report about that probably in ten days' to a fortnight's time, but you may have been made aware of the evidence session which did raise some quite interesting questions.
Lord Falconer of Thoroton: I have read the evidence of Mr Harvey.

Q131 Julie Morgan: Lord Chancellor, I am particularly concerned about the quality of legal advice that people receive in the future, especially those on legal aid, and the proposed withdrawal of the Specialist Support Services I think casts a real shadow over what quality of legal aid will be available. We received evidence last week, as the Chairman has said, from the Legal Services Commission and we were left feeling that this was definitely a step in the wrong direction. I wondered if you had had any consultation with the Legal Services Commission and whether there was any way this decision by the Legal Services Commission could be looked at again.
Lord Falconer of Thoroton: First of all, as far as consultation is concerned, it was a decision made by the Legal Services Commission. The facts on the process plainly need to be looked at. Looking at the facts, it appears to be that the position was that from 2000 to 2004 there was a pilot scheme. In 2004 it was decided that the scheme would be rolled out across the country. Three-year contracts were then entered into which would have ended in, I think, the spring of 2007 or the middle of 2007. It appears that within eight or nine months of those contracts being entered into some sort of process then began which led to six months' notice being given under these contracts. Looking at those basic facts, I have a concern that, having piloted this, having then entered into three-year contracts, it is odd that a decision was then made or contemplated quite so quickly to stop the three-year contracts before the three years were up. It gives me cause for concern, that such a strange change occurred. Having said that, the position of the Legal Services Commission is that they want to try to focus as much civil legal aid as possible on the front line. They have a point when they say that if you go to a lawyer and then that lawyer goes to another lawyer you might be

duplicating the cost of what the Legal Services Commission is paying for. If, for example, CLS Direct, which is the telephone service, can put you directly in touch with the specialist provider, that may ultimately be cheaper than going to one of their recognised lawyers who then rings up one of the specialist providers that you have been referring to. I do not think it is open and shut that this is the best way to provide the service but, as I say, I am very concerned about how the conclusion was reached that that was the right thing to do.

Q132 Julie Morgan: I am sure you aware that there was an evaluation done of the service which said that it was very good, and it was decided that there should be mainstreaming of the Specialist Support Services.

Lord Falconer of Thoroton: Yes, and that is what happened, as I understand it, and then the six months' notice was given, and I also noticed that Mr Harvey in his evidence said words to the effect that everybody who had been asked about the services said they were good and beneficial. I do not think, on the basis of the material that I have seen, that anybody could reach any other conclusion than that the specialist services were doing a good job and providing a useful service. That seems to me to be beyond argument. The only issue seems to me to be, is there some area of overlap? As I understand it, the issue is, could you get access to the specialist services without the need for another possibly cost-bearing legal provider intervening between the two?

Q133 Julie Morgan: Certainly all the evidence given us by the front-line advisers, including many of the voluntary organisations, was that access to the Specialist Support Services saved an enormous amount of time and provided very good quality expert advice very quickly, which in fact has increased their ability to serve people.

Lord Falconer of Thoroton: That seems to me to be completely beyond argument, that they obviously providing a very good service to the voluntary sector bodies. If you look at the list of who they are, even after you have confessed that your daughter works for one of them, they are high quality service providers, and I do not think anybody can dispute that. I did not understand Mr Harvey to be disputing that the quality of what they were doing was high and that they provided good quality advice to people who needed it. As I say, it appeared to me to be a value for money issue and, as I say, I am very concerned about the way it was done.

Q134 Chairman: You have obviously had concerns about the process. The evidence that we have received clearly was equally concerned about the process but was even more sharply focused on the gap that might be left. When we publish our report, which will be as soon as we can get it turned round, may we take it that you will look both at the report itself and at the issues about the availability of specialist services?

Lord Falconer of Thoroton: Your hearing has led to this being focused on as an issue. I do not know when you are going to publish your report but, irrespective of your report, it seems to me that (a) because of the process and (b) because the substance of the issue seems to me to be whether you can provide equivalent quality of service by some other means which might be cheaper, that needs to be considered, but I need to consider both those issues. I should say, without in any way seeking to discharge my own responsibility for this, and I have some responsibility for this because Ministers were aware it was going to happen before it happened, that it is an LSC decision, so it would need to involve consultation on my part with the LSC. It is not something where I can simply reverse the decision. Discussions will need to be had, but I undertake to the committee, irrespective of what might be said in your report, that I will look at it now both on process and on substance.

Chairman: And the report we hope will be with you within about ten days to a fortnight.

Q135 Keith Vaz: Lord Chancellor, the working relationship between the judiciary and the Government has changed dramatically since you have been in office. You have given away a huge number of powers to the Lord Chief Justice. There were grumbles from some parts of the judiciary about the way in which matters were being dealt with. Has that all settled down? Are you getting on with the judges now?

Lord Falconer of Thoroton: Yes. I think there were grumbles. If you remember 12 June 2003 when the judges discovered that the Lord Chancellor was going to be abolished—

Q136 Keith Vaz: Lord Hope was at Edinburgh Airport.

Lord Falconer of Thoroton: Some of them were apparently in transit at the time it happened. It was an unfortunate way to do it, I regret that it was done that way and it made for real difficulties. From where we are now I think there is a much, much better relationship with the judiciary. I think the judiciary have been constructive and extremely positive in the way that they contributed to the making of the new arrangements. I think as well, since the new arrangements have been constructed, senior members of the judiciary are involved in quite a number of executive processes. There is a judge on the executive board of the DCA, he sits as a non-executive, but he is a member of the board. There is a judge, again who sits as a non-executive, on Her Majesty's Court Service. I think the relationship between the judiciary and the state is now good and positive. I think it is, in large measure, a tribute to the judges but I also think the executive has now got a much steadier relationship with the judges than they might have had a year or two ago.

Q137 Keith Vaz: One of the most significant changes that you have made has been the establishment of the Judicial Appointments Commission, although

you continue to appoint judges until the commission has started its work. What is the current timetable for when they will take over this decision?
Lord Falconer of Thoroton: The Judicial Appointments Commission will start to be involved in the appointments process from 3 April 2006. There is a Chief Executive of the Judicial Appointments Commission, there is a Chairman of the Judicial Appointments Commission and there are 14 other commissioners who have also been appointed. The system set up by the Constitutional Reform Act basically involves the Judicial Appointments Commission making a recommendation to the Lord Chancellor who has then got very, very limited powers to say no. The Judicial Appointments Commission from 3 April will basically appoint all judges where a new competition is involved. The Chairman of the Judicial Appointments Commission, the Lord Chief Justice and myself have agreed transitional provisions where I will continue to appoint judges where the competition was started some time ago and that will continue until at the latest the spring of next year. Every new competition that comes on-stream will then be the responsibility of the Judicial Appointments Commission.

Q138 Keith Vaz: It is a fact, is it not, because we heard from your junior minister in the House today, that there will be at least 80 members of staff from the DCA being seconded to the new commission?
Lord Falconer of Thoroton: That is correct.

Q139 Keith Vaz: How independent can it be seen to be when so many of your own staff are going to be working for them?
Lord Falconer of Thoroton: There is a lot of hard work that goes into the appointment of judges. We need a new way of doing it, there will be new leadership in the way that it is done from the commission. There also, inevitably, needs to be continuity. The actual processes, which are complicated and have built up over time, need to continue reliably. It is for the commission, as time goes on, to determine how they want to change that. I have absolutely no doubt whatsoever they will be totally independent.

Q140 Keith Vaz: One of the things that you have done is increase the number of women and ethnic minority people on the bench between April 2004 and September last year. Of the appointments that you made 37% were women and 12% were from ethnic minorities, but when the commission takes over they are under no obligation to follow any of the statements or comments you made about diversity; they can basically do their own thing.
Lord Falconer of Thoroton: They have got a statutory duty to widen the pool for those who apply to be judges. I have got absolutely no doubt that Baroness Prashar and her commission will be just as active and just as committed to increasing diversity as I and my predecessors have been. I referred to this committee before in relation to this. One of the points that makes a real difference in relation to increasing diversity is that there is a will on the appointer to do it, and I am quite sure the commission have that will, but it is more than just having will, you also need to do things, both to widen the pool and to convince people who would not otherwise apply that they have got a prospect of getting an appointment if they do apply.

Q141 Keith Vaz: You were on the radio a few days ago concerning the right of the Prince of Wales to speak out on controversial issues from the political agenda. Does he have the right to do this?
Lord Falconer of Thoroton: What I said on the radio was that the Prince of Wales is plainly entitled to have views on things and to express those views. Examples I gave were rural affairs, the environment, the Armed Forces and architecture. The monarch and I think the Prince of Wales cannot get involved in party politics. The fact that the views that they express might coincide with a view expressed by a political party does not make those views political views. Examples of that are the things the Prince's Trust have done where they have made a number of innovative proposals which have been adopted by them, for example, getting unemployed into work, helping with youth unemployment. They have been adopted in some cases by both political parties; that does not make them political.

Q142 Keith Vaz: In answer to James Naughtie you mentioned environmental issues and basically cows and buildings, non-controversial issues.
Lord Falconer of Thoroton: I am not sure about that.

Q143 Keith Vaz: If the Prince of Wales made a comment about the A&E at Windsor General Hospital, that would be "crossing the line", in your words. He is not supposed to cross the line but you finished that by saying, "I do not think he does".
Lord Falconer of Thoroton: I do not think he does and I do not think the fact that you talked about health or education—because he has also talked about education—would necessarily mean that you were crossing the line. I think if he said something about a specifically party political issue, as it were, espousing one party political side against another, that would be inappropriate, but, as I say, I do not think he has done that.

Q144 Keith Vaz: Alex Allan, you have obviously got the best team that you can possibly have in your department. You choose them on the basis of merit, is that right?
Alex Allan: Yes.

Q145 Keith Vaz: Why do you need to spend £9 million on outside consultants?
Alex Allan: They are employed on a number of specific projects. One of them, for example, was when we launched the consumer strategy, when we decided that we needed to have much more information about consumers in the courts, what sort of service we were providing and what sort of service consumers wanted, we employed consultants on that, for example. Another one was looking at

how we could improve our enforcement programme. We employed consultants to advise us on how we could achieve our objective of stepping up the level particularly of fine enforcement.

Q146 Keith Vaz: What are your civil servants doing? In 1997 your department only spent £700,000. From £700,000 you now spend £9 million and you pay one consultant £2,100 per day. Who is this? Is this Karl Rove?
Alex Allan: As I say, these consultants, where we have employed them, are aimed at specific business areas. They are aimed at improving the way we do it, in many cases improving our value for money.

Q147 Keith Vaz: Who could be worth £2,100 a day?
Alex Allan: I cannot reveal the individual but the project on which he is engaged is one looking at how we manage all the finances in the DCA, including something like £6 billion we have under management, whether it is in the Court Funds Office or held in trust for various vulnerable people.

Q148 Keith Vaz: That is more than we pay the Lord Chancellor and he appoints all the judges, he has a huge budget.
Alex Allan: We paid what we believed was the market rate for the skills we needed.

Q149 Keith Vaz: Is this gentleman or lady still being paid £2,100 per day and can anyone apply for this job?
Alex Allan: The appointment was made through the competitive process.[1]

Q150 Keith Vaz: One final question about the Supreme Court building. It is rather sad to see the Supreme Court Justices wandering around the Strangers' Dining Room together having their lunch without a building of their own. When are we going to give them their building?
Lord Falconer of Thoroton: We have identified the building: it is Middlesex Guildhall. Detailed work is going on at the moment to make sure it is a building fit for a Supreme Court and that detailed work will produce a precise series of dates when it is going to happen and I am absolutely sure there will be a first class dining room as well.

Q151 Chairman: That is nothing new since the last time you came to see us because that is what you told us then.
Lord Falconer of Thoroton: Quite a lot has happened since then but could I be excused from saying precisely what the dates and the times are and where we have got to with various other matters as well in relation to that until a later date?
Keith Vaz: Maybe you should appoint a consultant to look into this.
Chairman: Heaven forbid. Let us turn to a not unrelated matter, Mr Tyrie?

[1] *Note by witness* The person concerned was appointed on a fee-paid contract on the basis of his professional expertise. The rate negotiated against OGC benchmarks for the market rates for the skills required

Q152 Mr Tyrie: On the House of Lords reform, the Government plans to take forward reform by way of a joint committee. When will that be appointed? When will the nominations be made? Do you have in mind a timetable for consultation?
Lord Falconer of Thoroton: There are two bits to this. First of all, we said in our manifesto a variety of things, one of which was that there would be a joint committee to look at the conventions governing the relationship between the House of Lords and the House of Commons. We have put detailed proposals through the usual channels and the usual channels are discussing it at the moment, and I hope that they will come to a conclusion as quickly as possible in relation to that. Secondly, we have said there should be a free vote on composition after the Joint Committee on the Conventions has reported and that will be some time during the course of this year. We have also made it clear—indeed, I made it clear over the weekend—that it would be very worthwhile, particularly in the light of the things that have been said from the Conservative Party, to see whether or not we could build a consensus on Lords reform. I do not think anybody wants Lords reform to take up two whole sessions of Parliament. If it were possible for there to be a consensus across the political parties about what the reform should consist of that would be a very good thing to achieve and I think it would increase confidence in our parliamentary institutions. In addition to the Joint Committee on the Conventions, we are also trying to look for a consensus across the political parties.

Q153 Chairman: Has the Prime Minister left you enough room to manoeuvre to achieve such a consensus?
Lord Falconer of Thoroton: As I think I also indicated over the weekend, there needs to be room to manoeuvre in relation to it. I think one would find there was more agreement than disagreement on quite a lot of the important issues. The answer is yes.

Q154 Mr Tyrie: I will come back to that in just a moment. I want to clarify, first of all, this timetable. You said that you hoped to complete these discussions behind the scenes as quickly as possible.
Lord Falconer of Thoroton: I did not manage to do that but I want them to start. I have written today and I hope that we can get them going and make progress as quickly as possible.

Q155 Mr Tyrie: What is "as quickly as possible"? In other words, when do you have in mind that we are going to get some progress on the joint committee?
Lord Falconer of Thoroton: You keep putting the joint committee and the consensus discussions together. The joint committee is looking at the conventions governing the relationship between the Commons and the Lords. The consensus discussions that I talked about are much more to see can you reach agreement cross-party on the way the Lords should be reformed, which is a much wider issue than simply what are the conventions currently that govern the relationship between the Lords and the Commons.

Q156 Mr Tyrie: I accept that point but I am trying to get a feel for the timetable of this joint committee and I have not heard anything that is giving me a clear understanding of that.
Lord Falconer of Thoroton: This has been discussed between the usual channels and the usual channels are trying to reach agreement across the three parties on the Joint Committee on the Conventions governing the relationship between the Lords and the Commons. I should say we are pressing it as hard as we possibly can in relation to it. We have been slightly held up by various things that have happened in the other parties, for example, changes in leadership, but I hope it can happen as quickly as possible.

Q157 Mr Tyrie: There is, of course, the risk that it could happen in your party before long as well and then we will be held up again.
Lord Falconer of Thoroton: Andrew, although you responded in a rather sharp way, I was not in any way trying to make a political point about it; I was simply trying to retell the facts in relation to it.

Q158 Mr Tyrie: I was responding to what I was hearing. Can I get back to this consensus point? What do you think a consensus is likely to be? I ask you that not in order to look into the crystal ball but by reading the book and bearing in mind the votes in the last parliament that we have had in the House of Commons. If I may ask you a leading question, would you say it is more likely than not that the consensus will lie for a second chamber that is part elected and part appointed, given that the proposal that was most vigorously rejected was a wholly appointed House when it was last put to the Commons?
Lord Falconer of Thoroton: Just looking at the votes in 2003, it seems to me inconceivable that the consensus could be anything other than some sort of hybrid House.

Q159 Mr Tyrie: Do you not find that is going to sit rather incongruously with what the Prime Minister himself said about the hybrid House when he said, "I personally think that a hybrid between election and appointment is wrong and will not work"?
Lord Falconer of Thoroton: What the position is, is that if we could get a consensus, if there was broad agreement that a hybrid House was the right way forward—and I do not know whether we could, or whether we will or we will not—then the position is that the Government will go along with that.

Q160 Mr Tyrie: You must have discussed this with the Prime Minister and you clearly will not disclose exactly what those discussions were but it does seem pretty extraordinary that the Prime Minister himself has ruled out an option on the grounds that it is unworkable and you are now suggesting—and indeed you have more or less made it clear in the exchange that we have just had—that that is exactly what any consensus is likely to throw up.
Lord Falconer of Thoroton: What I am saying is the right way forward on Lords reform is that if there is a consensus let us harvest the consensus and make the reform. I am saying as well, and it is from the Chairman's first question, is that a consensus that senior members of the Government could sign up to? Answer, yes it is, there is a consensus there but I do not know what will happen in these discussions.

Q161 Mr Tyrie: There do seem to be quite a number of views coming out of the Government on all of this. Baroness Amos, who is Leader in the Lords, has expressed a very clear view on this only recently. I do not know whether you know this.
Lord Falconer of Thoroton: Is this the *Glasgow Herald* interview?

Q162 Mr Tyrie: Yes, in which she said that she favours halving the size of the House of Lords and the introduction of 80% elected and 20% appointed. Is it now open season within the Government's expression of views? We have a Prime Minister whose views are going to be set aside by you, although you are not going to describe it as that, in seeking this consensus. You have got your Leader of the Lords expressing a very clear view about the direction of reform before the joint committee has reported. I will come on to what Lord Carter said this morning in a seminar, if I need to, in just a moment.
Lord Falconer of Thoroton: It is an area, is it not, where for a very long time, certainly since the manifesto and the general election, it has been a free vote issue? Therefore, you would expect members of political parties within the same political party to have different views. That is why the consensus building process is something that is worthwhile to do because you might well discover that although there were disagreements on the margins, on the question of what the main elements of reform should be, should it be hybrid, for example, should the primacy of the Commons be preserved, there would be broad agreement.

Q163 Mr Tyrie: The good news that I took from your interview was—
Lord Falconer of Thoroton: Was there bad news as well?

Q164 Mr Tyrie: I think the bad news is that the Government is at sixes and sevens on this. It is kind of you to ask me some questions. The good news is that you appear to be saying that you want to bring composition and powers back together again if you can find a consensus for them whereas the previous approach, and the one that was articulated this morning by Lord Carter, is that your manifesto commitment enables you to go ahead with one of those without the other, indeed the government's commitment to democracy has effectively been dropped. Those were his remarks this morning. Could you clarify where you stand on that point?
Lord Falconer of Thoroton: In terms of the consensus building, the consensus would have to be on both powers and composition because I think the two go

together, though you need to look at both to reach a conclusion. You are not going to have a consensus if there is disagreement on one or other of those two issues. The consensus I seek to build is one that covers both of those issues, as I think it has to.

Q165 Chairman: On constitutional issues, a couple of further points: have you any initial response to the report being produced by the group chaired by Baroness Kennedy on the broad constitutional and parliamentary issues?
Lord Falconer of Thoroton: I think it was a very important and very timely report. I think we do need to consider very, very carefully the recommendations that she is making. Obviously, we do not agree with every single one of them. For example, we had indicated that whilst we would come back to the issue of votes at 16 that might not be something for immediate implementation. The points he is making about the need for there to be more democratic engagement seem to me to be broadly right. The question is how, and she has got 30 recommendations and I think we need to consider them very carefully.

Q166 Chairman: Are you going to make some kind of structured response at some stage?
Lord Falconer of Thoroton: We will definitely make a structured response—and this is not a matter for me but it is obviously subject to the usual channels—and it is plainly something which, certainly speaking for the House of Lords, we should, subject to the usual channels agreeing, think about having a proper debate about as early as possible because I think a lot of people who engage in democratic politics would agree very strongly with the identification of the problem. The question is how we gather round a number of solutions.

Q167 Mr Tyrie: That was a very helpful and constructive reply and my heart is warmed by it.
Lord Falconer of Thoroton: I am very glad you are keeping us fully informed as to your feelings throughout. If there are any more medical bulletins—

Q168 Mr Tyrie: I am glad that the Government is picking up the report and it has many views on this subject. You did say just a moment ago, which I thought was very interesting, that you are definitely going to go ahead with a free vote on composition before the end of the year.
Lord Falconer of Thoroton: Yes.
Mr Tyrie: Are you going to make any effort to guide how that vote should be conducted in terms of options, because what went wrong last time was that we just had this plethora of options which ended up—

Q169 Chairman: I hear a preferential system.
Lord Falconer of Thoroton: There are two things to say on that. Yes, obviously, there needs to be some way to work out, and I think it is much more for the Commons to work this out than anybody else, what it is that people actually genuinely want to vote on and how you can ensure that you structure the vote in such a way not that you get a particular answer but that you get the questions that people in the House of Commons actually want answered. It has to be sufficiently clear what people are voting on and I suspect there have to be maybe fewer questions than there were previously.

Q170 Mr Tyrie: Can I suggest four votes: wholly appointed, wholly elected, largely elected, largely appointed, and leave it for a committee to define exactly what they mean subsequently? You can have a huge influence on this if you want to.
Lord Falconer of Thoroton: I note what you say in relation to all that. The other point I was going to make was that it is a free vote, as we have said, but if a consensus emerged then no doubt we would give an indication of what we thought at that point.

Q171 Chairman: While we are talking about voting systems, your department has been beavering away on voting systems for ages. In July 2005 Harriet Harman said, "We were reviewing those systems and officials in my department are doing desk research". When is this PhD going to be published?
Lord Falconer of Thoroton: I cannot give you a precise date as to where we are but the work continues. This is the review on how the various electoral systems throughout the country work or are operated and the work is going on in my department.

Q172 Chairman: Is this a process that has a next stage? At one stage it was said that there was going to be some public consultation at the end of this.
Lord Falconer of Thoroton: It is work being done internally within the department by officials looking at how the various systems work.

Q173 Chairman: But there are books and theses written on all this.
Lord Falconer of Thoroton: So many books and theses are there that it has taken a very long time to go through all these books.

Q174 Chairman: No consultants are involved?
Lord Falconer of Thoroton: No consultants, no. It has been done by my excellent officials.
Chairman: We await a report without much eager anticipation at the moment, but let us turn to another problem.

Q175 Jeremy Wright: Lord Chancellor, can I bring you to the question of extraordinary rendition and first of all ask you this? Are you satisfied now as to the facts of whether extraordinary rendition has happened in this country and, if it has, how often?
Lord Falconer of Thoroton: I have the facts as stated by the Foreign and Commonwealth Office, various statements made by Jack Straw about it, which I accept.

Q176 Jeremy Wright: What do you think the duty of the Government is so far as extraordinary rendition is concerned? What I mean by that is how active a duty do you think the Government has to investigate whether or not this has happened?
Lord Falconer of Thoroton: We are a signatory to the Torture Convention. Article 12, I think it is, of the Torture Convention requires a signatory of it to investigate through the competent authority where they believe that torture or something associated with it—those are not the exact words—might be taking place. The competent authority would plainly be the police in these circumstances. That is our obligation. If there were a reason for us to believe that rendition through this country was taking place, and by extraordinary rendition I mean people being rendered to another country for the purposes of torturing them, we would have an obligation to investigate it and stop it in so far as it was happening in this country. Jack has set out what the position is in some detail. He has thoroughly looked into what the position is and I accept what he says in relation to it.

Q177 Jeremy Wright: But you are, of course, a Minister with direct responsibility in this area, are you not, in relation to human rights and to inhuman and degrading treatment, it therefore follows, so you would want to be satisfied yourself, would you not, that every potential incident of extraordinary rendition had been properly investigated? That must follow.
Lord Falconer of Thoroton: Indeed.

Q178 Jeremy Wright: And it is right, is it not, that you have seen, as we have all seen in the press, specific allegations particularly of American flights coming into this country? Again, just to be clear, are you satisfied on a personal level that each of those alleged incidents has been fully investigated by the police or by other agencies?
Lord Falconer of Thoroton: I cannot say for sure that I have looked at every single allegation that has been made because I do not know the range of allegations that have been made. I am responsible for human rights policy in the Government. That is a different role from being a police officer in relation to extraordinary rendition. If a government department, for example, is responsible for sex or race discrimination within the Government, that does to mean that that particular government minister becomes a police officer responsible for going round every single department and investigating every single incident, and indeed it would be both wrong and an ineffective way of preventing the sorts of things to which you are referring to make the relevant minister a police officer. I regard myself as having a responsibility in this respect. Equally, I am part of a Government where there is mutual trust and confidence between myself and the Foreign Secretary and between my department and the FCO.

Q179 Chairman: There is a Lords division now and I will not adjourn the committee in the Lord Chancellor's absence because I would like to ask Alex Allan a question, which is that we are in discussion with you about your spring supplementary estimates.
Alex Allan: Indeed, yes.

Q180 Chairman: You have kindly written to us and have responded in detail on some points, indicating that the present state of your financial systems does not enable you to tell us about the link between estimate allocation and PSA delivery. Why?
Alex Allan: There are two points on that. First of all, in the process of changing our financial systems we will make sure that the relevant coding is introduced so that we can answer that question. The second is that it is actually quite a difficult conceptual issue because, for example, we have a PSA target dealing with increasing the number of offences brought to justice. We have another PSA target dealing with reducing the number of ineffective trials, trials that are aborted for one reason or another. We have another PSA target dealing with confidence in the criminal justice system. It is conceptually quite difficult when, for example, there is an increase in the funding going towards the Court Service, to say that a specific bit of funding to the Court Service is designed, for instance, if we are funding what is happening at the particular crown court, which of those three different PSAs it should be ascribed to.[2] Clearly, there are some specific projects, and we do some very targeted work on reducing ineffective trials and that can clearly be ascribed to a particular PSA, but in many other cases it is conceptually quite difficult. There are also, of course, other areas which are not at the moment covered by any PSA targets. Not all bits of all departments' work are. We do not at the moment have a PSA target in relation to our work on electoral reform, and by that I mean electoral administration. That is something we are looking at for the next spending round so that we can introduce one that sensibly measures our performance.

Q181 Chairman: It sounds like a significant slip there. What you were being asked in that area suggested that you are not working to a PSA target on your desk work on electoral reform.
Alex Allan: There is not a PSA target on that.

Q182 Chairman: No, I know there is not. You imply in your letter that the systems are going to be changed in such a way that you will be able to be a lot more illuminating to us in the future.
Alex Allan: I hope so. When I was preparing for coming to this committee I was asking my officials how we would do that. I think in some cases it may be that we can only give an illustration of the areas or that particular spending will support a number of different PSAs. I do not think it will be able to say absolutely tidily, "This much money goes to that

[2] *Note by witness:* Increasing offences brought to justice and reducing ineffective trials are both part of PSA target 1, rather than being separate targets

PSA", "This much money goes to that PSA". I think it will be slightly more blurred than that, but we certainly will endeavour to produce the information in as much detail as we can and in a way that is most helpful to you.

Q183 Keith Vaz: The last time you came before the committee, Alex Allan, you said that you would be attending a feedback session for those who had not been successful in getting a judicial appointment. Have you done that?
Alex Allan: I do not believe I said that. I have since the last committee session continued to make further inquiries about our systems of feedback. As I said last time and as I think we followed up in the letter we sent, as a matter of course we do not nowadays give oral feedback to all candidates. We offer written feedback to all candidates and I have looked at samples of written feedback so that I can understand what is being done. We also provide opportunities for people where at certain events it is possible for them to come in, produce their written feedback, discuss with one of the assessors the sorts of points that have arisen and how they might improve their performance and might succeed in a subsequent competition.

Q184 Keith Vaz: When did you change the policy of giving oral feedback, because certainly when I last looked at the form concerning people who apply for judicial appointments, if you go on to your own DCA website you have in the past given people the opportunity of an oral feedback. When did that change?
Alex Allan: It changed certainly before my last appearance before the committee, if not before the one before, because I certainly explained then that we did not any more offer oral feedback as a matter of course, and this was largely because we found that providing written feedback was normally more effective. It enabled us to be more comprehensive and clearer and that is the procedure we have now followed for at least a year.

Q185 Keith Vaz: So have you drawn any lessons from the process that you have looked at which would be helpful to the new Judicial Appointments Commission, bearing in mind that 80 members of your staff will be going to work for them?
Alex Allan: This is certainly one of the things we will be discussing with Baroness Prashar and the other commissioners, and, of course, as you imply, it will be for them to discuss what feedback they provide for the competitions that they initiate. As the Lord Chancellor explained, there is still a number of competitions in train which are shortly to finish.

Q186 Keith Vaz: How many competitions are in train at the moment?
Alex Allan: I can give you that information. There was a list published in a written ministerial statement that the Lord Chancellor gave. There is a fee-paid immigration judge of the Asylum and Immigration Tribunal, a deputy district judge Magistrates' Court competition, a recorder competition for the South East Circuit, a specialist Chancery judge for the Midlands Circuit, a specialist mercantile judge for the Midlands Circuit, and lay members for the Mental Health Review Tribunal.

Q187 Keith Vaz: So that will be completed by the Lord Chancellor? That will not be handed over because the competition has begun?
Alex Allan: Those are the ones that have begun. We will clearly involve Baroness Prashar to make sure we take her through the processes but those are the ones which I think are expected to be completed before July 2006.

Q188 Chairman: Just before we leave the judicial appointments could I ask if you could throw any light on the situation when you appoint magistrates? You have just mentioned the appointment of what we used to call a stipendiary magistrate but it does appear that there is some major hiatus in the system for appointing magistrates which is not at present due to be handed over to the Judicial Appointments Commission and that in some areas the advisory committees, which have traditionally had a key role in this, are themselves now reduced to two or three members because appointments to the advisory committees have not been made pending some other decisions. What is actually happening?
Alex Allan: I was not aware of the point about appointments to the advisory committees and certainly we do still, and will for a little time, rely upon advisory committees to make the appointments. I will investigate that. I did not know that point.

Q189 Chairman: Has the Government got any timetable in view for the eventual accommodation of magistracy appointments within the Judicial Appointments Commission?
Alex Allan: I do not believe a specific timetable has been set, but if there has been more information I will let you know.

Q190 Jeremy Wright: I was going to ask you about Gershon targets and if you could tell us a little bit about the department's progress towards the targets you have been set under Gershon. I appreciate, of course, that there is no such thing as an interim target for Gershon officially, but did the department set internally interim targets and, if so, are they being met?
Alex Allan: With regard to the Gershon targets for the DCA, it may help if I split them into two different areas.
The Committee suspended between 5.10 pm and 5.25 pm for a division in the House

Q191 Chairman: What I think we will do is resume, but because the person who was asking the questions a moment ago has not yet returned from the division we will move to another area, which is freedom of information. A number of things have been said by you, Lord Chancellor, about fees. Are you reviewing

the fee regulations? Are you planning a review, or is this something that was a way of dealing with issues that have been raised with you?
Lord Falconer of Thoroton: We always said that we would look at the fees because we have introduced a regime that basically does not charge for providing information under the Freedom of Information Act. What it does is set a limit by reference to time, which is £600 in central government and £450 outside central government. There are issues about the extent to which some things that are not currently included in that £600 should be included. For example, people have adopted the technique of getting a list of files under the Freedom of Information Act, then asking for all of the contents of the file. That, before it can be released, plainly requires somebody to read the file, which does not seem to me to be legitimate. The time it takes for a civil servant to read the file is not included in the time it takes you to get to the £600 limit. Various government departments are now having to employ people specially to read files to see whether or not any provisions of the Freedom of Information Act would affect whether it should be disclosed or not. The sort of question we need to look at is, for example, should the reading of the file be included in the fee.

Q192 Chairman: Is this just an accounting question so that, for example, journalists who pursue inquiries of a very detailed kind, their newspapers might well be prepared to pay that amount of money and the department's budget would be that little bit less in difficulty, or is it a deterrent to an ordinary member of the public who is pursuing a genuine case on a purely personal basis with no financial backing?
Lord Falconer of Thoroton: We do not want it to be a deterrent to members of the public who want to exercise their rights under freedom of information. We set a limit of £600 because there has to be a balance between providing freedom of information as freely as possible and the time it takes the state to find that information. Has the balance been put in the right place? I do not think £600 is the wrong figure, but is what is included right or not? It is not a question of trying to deter the public. We are not seeking to do that; we are simply seeking to get the balance right. If lots of time was required to do reading, for example, for work that a newspaper, a magazine or a film company was doing, this does not exclude the right for them to pay for it if it is over £600, and that is the accounting aspect you referred to, but that will not cover every case.

Q193 Chairman: Is the danger not that you will produce a rule which would not deter, perhaps should not deter, legitimate inquiries by well-funded newspapers, but would actually deter the person with a genuine case for whom it does require effort to go through the files and find out why he or his father or whoever was badly done to many years before?
Lord Falconer of Thoroton: Yes, and indeed it is that sort of issue that one needs to look at in considering the question, "Should you include the cost of reading the file?". There are two sorts of case, the one you rightly described, and the other is, "Oh, let us just get them to go through all of the files, give a separate request each time; something interesting may turn up".

Q194 Chairman: Is there a review?
Lord Falconer of Thoroton: We are looking at what we should do about fees at the moment and we will reach a conclusion, I think, fairly soon in relation to that.
Chairman: I think we could now return to Mr Wright's question to the Lord Chancellor.

Q195 Jeremy Wright: We were talking about extraordinary rendition and particularly how active a duty it is for the Government to investigate alleged cases. You made the perfectly fair point that if you compare it with other examples in other fields where it would be unrealistic for the Government itself to investigate every single alleged incident it would be impractical for you to do so in this case also. Is the substantive difference not that there are, in fact, relatively few specific allegations of extraordinary rendition and that therefore it is easier to investigate each of them? In particular, to give you an example, there was a case of which we are aware reported in *The Independent* where there were allegations of American planes bringing people through this country and using four specific airports, two of which are in Scotland. We understand from the Committee on Human Rights that their investigations revealed that the Scottish police have been making no investigations about flights travelling into and out of Scottish airports of this nature. Presumably you would be very concerned to ensure that those sorts of incidents, where they are raised in the press, where there are specific allegations made and they are certainly capable of investigation, are properly investigated?
Lord Falconer of Thoroton: Yes, but it is for the police to decide whether or not that threshold has been reached. I would not think it appropriate to say that every time an allegation is made in the press of a particular wrongdoing or of extraordinary rendition the police are then obliged to investigate it. Plainly it is a matter for them as to whether or not they investigate it. I understand that in relation to one case the Manchester police were approached and what they said was, "If you produce material that suggests some wrongdoing is going on, we would then investigate it". It seems to me that is the right approach. What you cannot have, it seems to me, because it will not lead to the right results, is a politician becoming a police officer. It is for the police to perform that role and it is for them to decide whether or not the threshold has been crossed.

Q196 Jeremy Wright: Finally, can I ask you this: are you satisfied that this is not happening any more?
Lord Falconer of Thoroton: What Jack has said in his statement is that four requests were made; two of them were granted, this was in the mid to late 1990s. I do not think it necessarily follows from the fact that

those facts occurred that there was rendition for the purpose of torture. I do not know what the answer to that is. On the basis that the United States Government always asked in the past, on the basis they had given assurances, I accept that it is not happening.

Q197 Mr Tyrie: When those assurances were given did you or the Government ask the US Administration what the basis was for their definition of torture and their definition of the likelihood of torture?
Lord Falconer of Thoroton: The assurances that were given were given in the context of people transiting through this country and assurances were given in the context of there only having been the cases to which the Foreign Secretary gave a response, so the question that you ask does not arise.

Q198 Mr Tyrie: Let me put it in a more general way. I think I will have to look back at the transcript to see if I understood your reply.
Lord Falconer of Thoroton: What I am trying to say is: are people being rendered through this country? Answer: we were asked on four occasions, those are the only cases. I think that is the effect of what Jack has said. Your question was: does torture mean something different to the Americans than what it means to us?

Q199 Mr Tyrie: Are you aware of that difference?
Lord Falconer of Thoroton: Yes, I have seen statements made on behalf of various parts of the United States of America that describe various practices which we would plainly regard as being a breach of Article 3.

Q200 Mr Tyrie: What about the definition of the likelihood of torture, that is, whether or not someone may be tortured? The UK Government talks about a substantial risk of torture or a real risk of torture, whereas the American Administration, when asked about this, provides a different definition. Are you aware of that distinction?
Lord Falconer of Thoroton: You have got to give some context to that question.

Q201 Mr Tyrie: When asked, the chief legal adviser or a chief legal counsel, for example, to the US State Department said that their definition of whether or not there is a real risk someone is going to be tortured is that "it is more likely than not" that they are going to be tortured, therefore more than a 50% chance that they would be tortured. If it is less than a 50% chance, they feel that they are not in breach if they render someone.
Lord Falconer of Thoroton: That is the Americans rendering somebody out of the United States of America to another country.

Q202 Mr Tyrie: If I may say so, I am a little bit worried that you are not fully aware of this debate and the argument that is going on at the moment, which is of considerable concern to international lawyers and indeed to all of those who may be caught up in rendition. You are not aware of that debate?
Lord Falconer of Thoroton: You are asking me questions about what is the burden of proof for the risk of torture. What you are not saying is in what context is one looking at whether or not the threshold has been passed.

Q203 Mr Tyrie: What do you mean by "in what context"?
Lord Falconer of Thoroton: The threshold that we normally look at is in the context of Article 3 of the European Convention when we are considering whether or not we are going to deport somebody from this country to another country, and we accept the burden of proof laid down in the *Chahal* case. What I am unclear about from your questions, Mr Tyrie, is in what context you are asking me about the burden of proof or the risk of there being torture; in what context is the American Government applying the test that you are referring me to.

Q204 Mr Tyrie: When we allow a US rendition through this country, and there have been several by the United States—
Lord Falconer of Thoroton: To where?

Q205 Mr Tyrie: To a country which they have announced to us is a country where historically there has been a risk of torture.
Lord Falconer of Thoroton: The allegations of extraordinary rendition, as I understand them, are about people being delivered to countries where there are American installations. That is the allegation, is it not?
Chairman: It is broader than that.

Q206 Mr Tyrie: I am extremely perturbed by your reply. On the contrary, the majority of renditions are cases where people are transported from US bases to places where they may be tortured.
Lord Falconer of Thoroton: As I understand the allegations—
Mr Tyrie: Among those are Egypt and Syria and a number of other countries in the Middle East and former Soviet Asia. The question that I am asking you—
Chairman: One voice at a time. Perhaps if you let Mr Tyrie complete his question, then I will have silence so that it can be answered.

Q207 Mr Tyrie: Perhaps we can just arrive at the key point because I am very concerned that you do not seem to be completely on top of the legal position. The greatest single concern is that the UK definition of the likelihood of torture, to which I have just been referring, that would be applied to our own deportations and the definition of the real risk of torture, is not the definition that is being applied to US renditions through this country. The question I have for you is whether or not you are confident that when those renditions have taken place and when

any future renditions may take place the US Government is fully aware that it must obey and abide by the UK definition of Article 3.
Lord Falconer of Thoroton: Of course, when it comes through our country it has got to be our law, but that was not the question you were previously asking.

Q208 Mr Tyrie: I am asking it now.
Lord Falconer of Thoroton: Of course it has got to be UK law.
Chairman: That seems to be a straight answer.

Q209 Mr Tyrie: And the US Government has been made aware?
Lord Falconer of Thoroton: Of course they know that, yes.

Q210 Mr Tyrie: What action are we going to take if we discover that they are in breach?
Lord Falconer of Thoroton: We will not allow it. We have made that clear.

Q211 Mr Khabra: I have in my constituency casework on English asylum cases, and in my personal experience I believe that the Home Office immigration system is failing to tackle the problem. As you know, recently Mr Justice Hodge gave evidence to the Home Affairs committee for its inquiry into immigration control and referred to the longstanding problem of backlogs in asylum and the immigration system. He said there are about 47,000 cases awaiting hearing and also he estimated that it would take up to spring 2007 to clear the backlog. Can I also remind you that when you gave evidence to the committee in October 2005 you accepted that there were problems with a backlog of immigration appeals. To quote you: "There was always a backlog in relation to immigration cases. I do not think the abolition of one tier alone was ever going to deal—this is immigration as opposed to asylum cases—with that. They need to work their way through it." Could I ask you what progress has been made in relation to the acknowledged backlog of immigration appeals since your last appearance before the committee?
Lord Falconer of Thoroton: As you rightly quote me in saying, removing one tier is not going to get rid of the backlog by itself, and indeed setting up a new asylum and immigration tribunal has had the effect of bringing out of the previous system a number of cases that had got lost in the woodwork, and therefore there are quite a lot of extra cases that got flushed out in the change. We need to do things about the backlog. The things that we are doing are that we are appointing 100 extra judges or adjudicators to seek to deal with the backlog, we are working closely with UK Visas and the Home Office to streamline the entry clearance process because entry clearance appeals are one of the big areas where there is a problem. We are also seeking to introduce a new points-based system by the new Bill that is going through Parliament at the moment, but that will not come on stream for some time, so it is basically extra judges and a streamlined entry clearance process.

Q212 Mr Khabra: What is your estimation with the introduction of the new Bill? Will it take a year, two years or two and a half years to clear the backlog?
Lord Falconer of Thoroton: It is difficult to say. I think there are something like 88,000 cases at the moment waiting to be dealt with. I think they are dealing with more cases now than are coming on stream. I cannot give an estimate of how long it would take to deal with the backlog, but gradually the backlog is going down.

Q213 Mr Khabra: You will accept that the new migration into the country is a big problem; it is another problem. I do not know whether or not the new Bill, whatever the new Bill will be, will be able to control migration into the country which is still happening—illegal, legal, overstayers. This is a big issue.
Lord Falconer of Thoroton: The new Bill will help to some extent, I think, in that respect, but obviously it is not a complete solution to all the problems of both illegal and legal immigration.

Q214 Mr Khabra: Do you accept that this backlog of immigration appeals is caused by the drive to hear asylum appeals quickly because, as you know, there are two problems: one is ordinary immigration appeals, the other one is asylum appeals. Through my experience more and more people are still coming to seek asylum in the country. How do you consider taking action to balance two different problems?
Lord Falconer of Thoroton: Part of that problem is that the number of asylum appeals is going down because the number of people seeking asylum is going down, so to some extent that problem rights itself. You are absolutely right: asylum appeals have been given priority over a period of time and that has had the impact of pushing certain sorts of immigration appeals lower down the process, but as the asylum appeals go down hopefully that position will equalise.

Q215 Mr Khabra: There is another problem. As you know, the legal aid changes have taken place and they are going to cause problems for individual applicants, those who are in the country who wish to make representation, legal representation, whatever is possible for them under the given system. The statistics suggest that the number of appeals and reconsiderations is not going to go down, but legal aid changes have meant that the applicants simply go ahead unrepresented, they are not being represented by anybody, the money is not available, they cannot afford it. What assessment have you made of the number of applicants who are appealing unrepresented?
Lord Falconer of Thoroton: I do not know what the number of applicants who are appealing who are unrepresented is, but the effect—

Q216 Chairman: There is another division in the Lords.

Lord Falconer of Thoroton: Excuse me.
Chairman: We will take the opportunity to allow Mr Wright to finish questioning Alex Allan. We are nothing if not versatile!

Q217 Jeremy Wright: I think I had finished asking the question, and I think you were in the process of answering it.
Alex Allan: You were asking about efficiency and progress on the Gershon targets and I think I had started to say that in some ways, if you look at the Department for Constitutional Affairs as a whole, there are two key areas in our efficiency targets. One is on legal aid and the other is on the administrative work in particular in the Court Service. On legal aid, I have to say that we are behind where we had hoped to be earlier. Understanding the processes and trying to work out how to get greater efficiency and procurement of legal services has been difficult. One of the ways that we have now done it is to set up Lord Carter's review and I am now confident that we have got the way forward that will produce the efficiency savings that Gershon was looking for. If you looked at a trajectory, are we halfway up the ladder, no, but I do believe that the interim report of the Carter review and the final report will show a convincing way in which we are going to deliver the efficiency savings. On the Court Service, I am confident that we will deliver efficiency savings. We have got a significant programme of work going on looking at how we can do that. We have just had published, about ten days ago, and I think it was sent to the committee, the business strategy for Her Majesty's Court Service which details a number of ways in which the processes will be made more efficient and how we can improve services to the public at the same time as reducing costs, and so I am very confident on that side of the account that we will deliver the efficiencies that we promised.

Q218 Jeremy Wright: Just in terms of the process of analysing your progress towards the targets, are there interim targets which you impose internally? Is that something that the Civil Service does generally or is it something that you do specifically in this department?
Alex Allan: I do not know the answer about other departments. Certainly we do monitor where we are on a trajectory towards the targets that Gershon set for the future. That is clearly important because it would not be prudent management simply to ignore it till the last year and say, "Oops! We have suddenly got to deliver whatever it is in efficiency savings this year", so certainly we look at how we are doing towards the efficiency targets. In some ways it is still early days for Her Majesty's Court Service and they have been in operation less than a year, but I am confident that the business plan and the work we are now doing to take forward those sorts of reforms will produce the efficiency savings.

Q219 Chairman: I wonder if Alex Allan could help us with a question which arises also out of the freedom of information list, which is on the issue of the census. You will know that 130 Members of Parliament have signed a motion about the 1911 census, which, of course, in a few years' time will become available, but under the Freedom of Information Act, of course, it can be applied for and the department would be free to release that information under the Act but has so far very firmly insisted that it should not do so. What are the policy considerations which lead to this decision and how compelling are they?
Alex Allan: The 1911 census in some ways is something of an anomaly in the process in that there is a clear process for ensuring closure for a hundred years for censuses after that, so that the 1921 census and thereafter are all statutorily protected for a hundred years. The 1911 census in that sense is an orphan. It is a very clear policy that a hundred years is the appropriate period for encouraging people to believe that the information they give out, very personal information in some cases, will be protected throughout their lifetime, and so that is something that as a matter of policy we wish to maintain. It is an anomaly, as I say, in that the other census records are held with the Office of National Statistics. The 1911 census, because it occurred before the Census Act of 1920, is actually in the custody of the National Archives. We are planning to publish it. It is a huge exercise to get the whole census in a way that can be released and nowadays would be released on line after the 100-year point, so that from then on we have got a guarantee that anybody can access any of the information they want very readily. As you may recall, when we released the last census in 2001 the volume of demand was such that it caused considerable problems, so we do recognise the interest. We are not in a position where we could bring forward the planning for releasing the entire census before then, and to go and pick out individual records for people who applied under the Freedom of Information Act would, I think, set the process of releasing the whole census back. There clearly are complicated issues and obviously legal issues under the Freedom of Information Act as well which we are considering.

Q220 Chairman: It may well be the subject of an appeal, I presume, but what you are really telling us is that because subsequent censuses are firmly protected by statute in order to give people the reassurance that you mentioned, the 1911 one is an anomaly and the reason you are not prepared to take a more relaxed view, even at this stage so close to the release of the information, is an administrative one.
Alex Allan: There are points of principle. Most previous census have followed a 100-year rule and we have opened them up after a hundred years[3], and the 1921 census and thereafter will all be subject to a 100-year rule. It is a stated principle. When the 1911 census was issued and then it has been completed there were explicit assurances made that the information was provided strictly in confidence, I think were the words used, and as a result we continue to believe that it is appropriate, given, as I

[3] *Note by witness*: The previous [X] censuses were released after 100 years, though before that some censuses were released after a shorter interval

say, that all other censuses either have been or will be protected for a hundred years, that we should maintain a 100-year protection for the census as a matter of principle. There are also, as I say, the administrative concerns. We do intend to publish the information. It is not as if we believe that we should hide the information, lock it away. We do have a specific plan, a programme, to publish it all. What we are resisting is publishing it either piecemeal or trying to bring it forward in a way that might well mean we were not successful in publishing it all at once and getting the computer systems in place.

Q221 Chairman: As you look ahead, with time to prepare for the next census, there are two things about that. First of all, I presume the 100-year guarantee is expected to be a feature of the next census.
Alex Allan: I think it is a feature of the 1920 Census Act, so I think it is a statutory provision now.[4]

Q222 Chairman: Secondly, have you given any thought to the thirst the departments have for information and their tendency to want to add things to the census when the census is not a voluntary social survey; it is an exercise in which there are penalties for failing to provide the information, and as the department with this overall responsibility for human rights do you recognise that you have a sort of policing role in saying, "Is it legitimate on pain of penalty to insist that people provide this or that piece of information which the department would find very useful?".
Alex Allan: I think in some ways I may fall back on the Lord Chancellor's answer to Mr Wright about policing human rights activities. This is clearly a matter where the Office for National Statistics, who have the responsibility for compiling censuses and also for accepting what questions go into the census, are the people who would decide that balance. Clearly, we would help and provide advice as asked. I imagine if we felt that they were behaving in an outrageous manner and neglecting all human rights considerations we would express that pretty forcefully, but I have no reason to believe that that will be the case.

Q223 Chairman: But there have been big issues in previous years, arguments about racial origin questions, about religious questions, different views about whether you should or should not be required to answer such a question on pain of a penalty. Surely the department has some role in dealing with the request, because you did not used to be but you are now the department which co-ordinates all of this information.
Alex Allan: As I say, we are responsible for overall policy on human rights. We are not responsible for the census. That is the business of the Office for National Statistics which, like all government departments, have obligations under the human rights Act. We have an overall commitment to spread good practice to make sure they do understand their obligations and we do that. The details of exactly where the balance would fall on one particular issue, if we are satisfied that they have actually thought about the human rights aspects, would be for the Office for National Statistics, and indeed the department responsible for them, which is the Treasury.
Chairman: Now that you have returned, Lord Chancellor, as you were in the process of answering Mr Khabra he might like to restate his question.

Q224 Mr Khabra: Lord Chancellor, if legal aid is not available to the applicants there are implications to the department and the Court Service. What would be the extra cost?
Lord Falconer of Thoroton: The way we did it was, five hours legal advice, and if it revealed that there was not a proper basis for an appeal then legal aid would not be extended, so what we were in effect doing was applying the merits test there. Where there is a shortage of legal aid, which there is, you have to prioritise where you spend your legal aid and always one of the filters has been to spend it on cases which have merit. As to the question, does that make some cases last longer, I am sure that it does. I do not have a calculation for that, but equally I suspect in some cases where you have a lawyer that might last longer because various points are taken which in fact fail at the end of the day, so I suspect it is swings and roundabouts but I have no calculation on which I could base that conclusion.

Q225 Mr Khabra: What sort of quality of service will be available?
Lord Falconer of Thoroton: Legal advice is available but not representation if, after ascertaining what the factual basis of the application is, it is perceived to be a case that does not have merit. The only service available is advice but not representation unless there is merit in the case.

Q226 Keith Vaz: Lord Chancellor, you cannot be comfortable with coming back to the committee each time and telling us that there is still a backlog.
Lord Falconer of Thoroton: No, I am not, and that is why hopefully the points system will make some difference to that, and the 100 extra judges I hope will make a difference to that. We need more resources.

Q227 Keith Vaz: These 100 extra judges that you talk about: the advert for the extra judges went out at the end of last year. There should have been a sift by now. At a meeting that your junior minister had with Members of Parliament she told those members that the process had been stopped by you.

[4] *Note by witness:* Since 1981, text included in the census form has provided the basis for the one hundred year guarantee. The 1920 Census Act provides the Office for National Statistics with the authority to hold census data and contains a statutory bar which (via s.44 of the FOI Act) exempts the data from disclosure

Lord Falconer of Thoroton: Yes.

Q228 Keith Vaz: Why did you stop that process?
Lord Falconer of Thoroton: Because the way the process had gone I could not be satisfied that a fair selection was being done, by which I mean I was advised that there were inconsistencies in the way that people were being assessed, a number of people had put in referees, as is required, and the referee reports had got separated from the applications that had been made. In those circumstances, in order to have a proper process, I thought the right thing to do was to stop the process that had got some of the way down the road but was, for all the reasons I took, I thought was flawed, and we had to start again.[5]

Q229 Keith Vaz: But this sounds chaotic. You have come to the committee and you have said, "We are going to get 100 extra judges"; you want to bring down the backlog. You appointed Henry Hodge to deal with this issue. The Government abolished the whole tier of the appeal system. There is chaos over the appointments system. What is going to happen now? Are you going to have to re-advertise?
Lord Falconer of Thoroton: I think we will have to re-advertise.

Q230 Keith Vaz: So what is the timetable?
Lord Falconer of Thoroton: I do not think the new judges will be there before September or October at the earliest.

Q231 Keith Vaz: And will this be done by your department?
Lord Falconer of Thoroton: It will be done by my department, yes. It is deeply regrettable and you are right to describe it as being unacceptable, but I am faced with a situation where, if the process is plainly not identifying who the right choice is, then I think we have got to stop and start again.

Q232 Keith Vaz: I know you inherited this problem.
Lord Falconer of Thoroton: In terms of the actual problem—

Q233 Keith Vaz: The backlog?
Lord Falconer of Thoroton: Yes, the backlog, not the—

Q234 Keith Vaz: Not the chaos of the recent sift. Henry Hodge told the Home Affairs Committee, as Mr Khabra has said, that he hopes that this is going to be cleared by early spring 2007. You have not even put out the advert for your 100 extra judges. You have to sift, you have to interview, you have to assess, you are going to appoint them by September of this year. The backlog is not going to be cleared by spring 2007, is it?
Lord Falconer of Thoroton: Mr Justice Hodge is aware of what arrangements are in place. As I say, it is a downward trend at the moment, not an upward trend. The 100 new judges will obviously make a significant difference to what happens. He is there on the front line. Spring of next year presumably means round about March. That is six months of 100 extra judges. It does not seem to me to be impossible that it could be done then. However, he is in a better position to judge than I am because he is, as it were, the leader at the front line of those appeals.

Q235 Keith Vaz: We are having him before us very shortly on that point. I have one final point about rights of appeal. If you look at the statistics on rights of appeal, of those who went for an oral hearing in 2005 for visitors' appeals 52% were successful. When it comes to written hearings it is 31%; these are Home Office figures. What are your views now about the proposals of the Home Office to abolish the oral right of appeal?
Lord Falconer of Thoroton: It is in the context as far as the Home Office is concerned of improving decision-making at the first stage. Are oral hearings coming to the right conclusions? Probably they are. If it is only a written hearing, again, are they coming to the right conclusions? Again, it is very difficult to judge. There is obviously a risk in abolishing the oral hearings but is the risk justified by the number of appeals that are wrongly going to be refused?

Q236 Keith Vaz: The success rate has doubled. Your judges are doing their job as far as the applicants are concerned.
Lord Falconer of Thoroton: The judges are hearing the argument and are, I am sure, coming to the right conclusion.

Q237 Chairman: They are assessing the credibility also of the family circumstances which are otherwise described in the written papers. When we did a report on this some time ago it seemed apparent to us that the oral hearings were picking up things in the entry clearance assessment because the judge is in a position to assess the credibility of at least the relatives of the applicant.
Lord Falconer of Thoroton: I cannot gainsay the proposition that if you have an oral hearing you are much more likely to penetrate, as it were, beneath the surface of the facts in a way that a written document will not and therefore it has got to be seen of the context of improving the original decision-making.

Q238 Keith Vaz: Alex Allan, I am just pondering what the Lord Chancellor has said about this sift process. You, obviously, as the senior civil servant, have to take responsibility for this process. What assurances can you give this committee that when

[5] *Note by witness:* The cancelled competition was to fill ten vacancies for salaried Immigration Judges at AIT hearing centres in Bradford and Stoke. Due to problems arising with the competition process the Lord Chancellor could not be confident all candidates had been treated equally. A fresh competition is currently being advertised with appointments expected to be made by the end of September 2006. There is a separate competition to recruit 210 fee-paid Immigration Judges to the Tribunal which is expected to conclude in mid June for the London area, and mid September for the regions. It is estimated that approximately half of the appointments will be filled by Immigration Judges who currently have fixed term contracts, with the remainder, (approximately 100) being completely fresh appointments.

people apply in good faith for a job in the DCA as a judge their applications will be treated with respect, that the references will not be separated from the application forms and that this whole process will not have to be run again? This must be deeply disturbing for you.
Alex Allan: It is disturbing and I regret it. As the Lord Chancellor said, the most important thing was that once it had become clear that the process was not operating in a satisfactory way the Lord Chancellor stopped it and started it again, and I think that was the right decision in the circumstances. Of course, I regret the circumstances that led to it.

Q239 Keith Vaz: But officials must have been in charge of this process. Why did the officials not stop it?
Alex Allan: They reported the information to the Lord Chancellor.

Q240 Keith Vaz: And when did this happen?
Alex Allan: I am not sure I have got the exact date.

Q241 Keith Vaz: And have you written to those people who have applied in good faith for the post to tell them that this chaos is reigning as far as this sift is concerned? Have you written to them? Have you told them?
Alex Allan: I will check the exact information that has been given to them.

Q242 Keith Vaz: Do you know whether you have written to them?
Alex Allan: I do not know.

Q243 Keith Vaz: Does this happen on a regular basis?
Alex Allan: No.

Q244 Keith Vaz: So why do you not know whether they have been written to?
Alex Allan: I do not know.

Q245 Chairman: Were you able to identify why it happened?
Alex Allan: I will let you have some more information about this. I do not know the full details of that.

Q246 Mr Khabra: Would you be prepared to consider granting the right of an oral hearing to the family visit appeals?[6]
Lord Falconer of Thoroton: We do not have that at the moment. I think not. That is not currently planned, I do not think.

Q247 Chairman: Re-reading the committee's earlier report, we, of course, went to look at entry clearance and saw a process which had such inherent flaws—
Lord Falconer of Thoroton: At the point of embarkation?

Q248 Chairman: Yes, and it needed a sound appeal system and the disparity between oral and written appeals seemed to demonstrate to us that once you actually got judges involved in assessing credibility these flaws became apparent. It would seem to us, those of us who took part in the original inquiry, that to predicate a change in the appeals system on an assumption that the entry clearance operation can be perfected is a pretty shaky thing to do.
Lord Falconer of Thoroton: That is the context. I am not disputing the efficacy of an oral hearing but I am asserting that it is our policy to try and improve the process at the first stage.
Chairman: Thank you very much. We are very grateful to you.

[6] Appellants bringing an appeal against a decision to refuse entry clearance to visit a family member, currently have the option of requesting either a paper or oral hearing before an Immigration Judge of the Asylum and Immigration Tribunal

Tuesday 4 July 2006

Members present:

Mr Alan Beith, in the Chair

James Brokenshire
David Howarth
Mr Piara S Khabra
Julie Morgan
Mr Andrew Tyrie
Keith Vaz
Dr Alan Whitehead
Jeremy Wright

Witnesses: **Rt Hon Lord Falconer of Thoroton QC,** a Member of the House of Lords, Secretary of State for Constitutional Affairs and Lord Chancellor, and **Alex Allan,** Permanent Secretary, Department for Constitutional Affairs, gave evidence.

Chairman: Lord Chancellor and Alex Allan, welcome to the Committee. I ask for declarations of interests that are relevant to the first part of our evidence session.
Jeremy Wright: In relation to the first part, I am a non-practising criminal barrister.
Keith Vaz: In relation to the first part, I am a non-practising barrister, and my wife holds a part-time judicial appointment.
James Brokenshire: I am a non-practising solicitor.

Q249 Chairman: Lord Chancellor, you appear before us in plain clothes on a day after which your life will never be the same again, following touching tributes from all parts of the House of Lords. When you first came to see us you were, at least theoretically, a judge, head of the judiciary and you sat on the Woolsack as Speaker of the House of Lords. All those jobs have now fallen away from your responsibility and so has the policy lead on Lords reform and party funding, and you have been given the job of regulator of claims handlers. It seems a pretty poor substitute for all that. Are you feeling a bit sidelined?
Lord Falconer of Thoroton: As to the first bit, you rightly identify that I first came and saw you in June and July of 2003 and I said then that the aim was that the Lord Chancellor should no longer be a judge, Speaker of the House of Lords and head of the judiciary. Three years and two weeks later—you were there today—the last bit of that happened. Although it is very sad personally that this change has taken place, it was what we embarked upon at the beginning. I feel some degree of pride that we have managed to achieve what I believe are very substantial reforms. You are right that I am not now responsible for Lords reform and party funding, but I am still involved in both issues. Do I have enough to do? Yes, I certainly do. What goes on in the Department for Constitutional Affairs, the courts, legal aid, human rights, devolution and freedom of information is enough to keep me going. Do I feel marginalised? No, I do not.

Q250 Jeremy Wright: Although you are no longer head of the judiciary, we know that you still have an interest in the judiciary and are responsible for what happens there. We also know that what has happened in the press recently has been a very public and apparent argument between politicians and members of the judiciary. Does it concern you that as a result of that very public spat the public may take a different view of judges and lose a degree of confidence in them?
Lord Falconer of Thoroton: I think you are wrong to say that the problem was necessarily a spat between the Government and judges. What has been happening over a period of time is that a lot of people have been saying that part of the problem in relation to sentencing is the judges. A variety of parts of the media has been explicitly critical in blaming the judges for a number of things that have happened in sentencing. I believe that that has had an impact in undermining confidence in the judiciary. Separately from that, there have been reports of rows between the judges and the executive. I should make it clear that neither the judges nor the executive wants such rows, nor do they believe that there is any such row going on between them. They are both as concerned as they could be to ensure that public confidence in the judiciary is maintained. But it goes deeper than that. If people think there are rows going on between different bits of the state that undermines their confidence in the ability of the state as a whole to deal with the problems that it has to face, for example terrorism and crime.

Q251 Jeremy Wright: Do you accept that clearly the judges are worried about this? Several senior judges have expressed concerns about politicians—I do not refer specifically to the Government but politicians generally—interfering in judicial matters and making comments upon decisions in individual cases. Do you not believe that that is causing a potential problem of public confidence?
Lord Falconer of Thoroton: Judges have been careful not to criticise politicians at any stage. I have made comments to the effect that the judges should not be made the whipping boys for various problems. For example, the other day there was a rather graphic piece in either the *Daily Telegraph* or *The Times* in which a judge said that it might be time for him to resign and go off into the Thames or something like that. Earlier in the same article it was said that an unnamed part-time judge was thinking of resigning. I know of no such judge. I know of no judges who are thinking of resigning because of that. Everybody involved, judges and executive alike, is concerned to ensure that confidence is not lost but equally is aware

that these events occur from time to time and the important thing is to cool the temperature, identify the policy issues and get on with solving them.

Q252 Julie Morgan: I think the public find it quite hard to understand some of the arguments going back and forth. You are absolutely right to say that arguments at the top undermine confidence. But do you not believe that some of the language that is used is a little off-putting and difficult for the public to understand in these sorts of debates? For example, we talk about the sentencing guidelines. The public understands them to mean guidelines rather than instructions. I am continually asked questions about these issues. Would you comment on that?
Lord Falconer of Thoroton: I think there is a real problem. People think about sentencing guidelines, honesty in sentencing and the minimum period someone has to serve by way of parole. You take a figure and then halve it. Those sorts of things—it is the language of sentencing which has built up over 30 years—which in very many cases are prescribed in statute, are complicated. Very often people who attend court, and who have families that might have been affected by what a defendant has done, are utterly bewildered by what is happening. All of us together—executive, judges and legislature—must try to improve that, because its ability to leave people feeling tremendously outside how the criminal justice system works is very strong.

Q253 Julie Morgan: I have been asked what an indeterminate sentence means. There is real confusion. Therefore, do you believe that progress should be made towards simplifying this process or making it more understandable to the public? Do you have any suggestions as to what we could do?
Lord Falconer of Thoroton: Perhaps I may identify two areas. I make it clear that I am not referring to any specific cases. The automatic discount of one third for a guilty plea at "the earliest possible opportunity" gives rise to two problems. First, what happens when you are caught absolutely red-handed and there is no prospect of pleading anything other than guilty? Second and separately, what do you do in a case where the guilty plea, whilst of some significance, is to any reasonable person a very minor matter in comparison with the horror of the crime? Has the law got itself into a situation where it is much too rigid in how to deal with that?

Q254 Chairman: This is the consequence of the 2003 Act, is it not?
Lord Falconer of Thoroton: I believe that it is the consequence of years and years in court of people saying that the more certainty there is of a discount for a guilty plea the more guilty pleas you will get. The whole trend of the system over decades is to get more and more rigid about guilty pleas in order to be able to say to defendants that if they plead guilty that will definitely happen. Eventually, that rigidity culminated in a situation being reached where individual judges could not do anything but give a one third discount, even in very serious cases and where the defendant had been caught red-handed. It was the inevitable consequence of the way that the law had been developing over a long period of time, but it has caught the courts and judges in a straitjacket. The other matter is that with an indeterminate sentence the court is saying that a defendant will spend life in prison as long as he or she remains a danger. This is not a mandatory life sentence for murder but an indeterminate sentence because somebody is dangerous. But the judge is forced to specify when that defendant can first be considered for parole. It is done by notionally identifying what the determinate sentence would be and then halving it because the individual spends only half of it in prison. Chopping off a bit for the period you do not spend in prison has been on the statute book for over 15 years. A whole range of things has come together. The implication of Julie Morgan's question is that this leaves people feeling very dissatisfied with the way the criminal justice system operates. I completely share that view.

Q255 Chairman: Are you reviewing the 2003 Act?
Lord Falconer of Thoroton: We are looking at a whole range of matters: some of them are guidelines, some are principles, some emerge from the 2003 Act and some arise from earlier issues. We need to look at all these matters, and we have made it clear that we are reviewing them.

Q256 Mr Tyrie: Do you want to give judges more discretion?
Lord Falconer of Thoroton: In relation to a guilty plea at the earliest possible opportunity, it is the rigidity that leads to the problem. It must follow from that example that judges should have greater ability to recognise where a defendant is caught red-handed or the horror of the crime is such that the guilty plea should be regarded only as a minor matter. It seems to me that inevitably that depends on the judges having more discretion to deal with it rather than that their hands should be tied, which is the current position.

Q257 Jeremy Wright: Following on from that, were these points not put to you before the 2003 Act was passed?
Lord Falconer of Thoroton: The three big things that the 2003 Act did were: first, the introduction of an indeterminate sentence where there was otherwise a limit on the sentence; second, it dealt with what a judge should do in the case of murder, because that was taken away from the Home Secretary; and, third, it dramatically increased the range of community penalties. The guilty plea at the earliest possible opportunity may be reflected somewhere, but it is carried over from an earlier Act. The 50% discount comes from the 1991 Act. They were matters which had been carried forward from earlier pieces of legislation. I am not trying to take the blame off this Government's shoulders because it has contributed to these sorts of decisions over a long period, but inevitably when particular events

and cases occur they illuminate in a much clearer way than before particular problems that one needs to deal with.

Q258 Jeremy Wright: Mr Tyrie suggested to you that the tone of your comments indicated you would like to give the judiciary more discretion over sentencing. Is there unanimity of thought on that across the Government? Do your department and the Home Office think the same about that, or is there a difference of opinion?
Lord Falconer of Thoroton: In terms of what we do next, it is a proper review, which means consulting people about particular changes in relation to sentencing. The Government as a whole does not, in my view rightly, have a settled view about precisely what changes need to be made. I believe that the Government as a whole would be agreed in relation to the example I gave in answer to Mr Tyrie's question. Is there a need for more discretion? Plainly, yes, in relation to pleas of guilty. That seems to me to be emblematic of the fact that there are likely to be other areas as well where greater rather than less discretion is the answer. But there is no question of disagreement within government. What we seek is a proper, open discussion about how we deal with these problems. It would be wrong simply to impose a solution; we need to consult.

Q259 Chairman: In an exchange of letters that you had with your junior Minister, Vera Baird, after she had spoken in *Any Questions*, she wrote: "As we discussed, we clearly need to address these important cross-government issues as a matter of urgency." I find that a rather odd sentence in a letter which was meant to say, "I got it wrong and I am very sorry." What did she mean by that?
Lord Falconer of Thoroton: Perhaps I may refer to the letter.

Q260 Chairman: I will read it again: "As we discussed"—presumably, she and you—"we clearly need to address these important cross-government issues as a matter of urgency." This letter was concerned exclusively with comments she had made about a judge getting a matter wrong. We will not go into the matter.
Lord Falconer of Thoroton: In the previous sentence she says: "Accordingly, I withdraw them and fully support the government's position both on this case and on the broader issues of sentencing and the sentencing framework, which you set out last week before I spoke." These important cross-government issues are the broader issues of sentencing and sentencing framework that I have just been discussing with Jeremy Wright, Mr Tyrie and Julie Morgan.

Q261 Chairman: So, you had given her permission to say, as it were, that this was a matter under discussion?
Lord Falconer of Thoroton: I had said it myself the week before, so there was no revelation there.

Q262 Keith Vaz: If Vera Baird had not sent you that letter would you have dismissed her?
Lord Falconer of Thoroton: Vera accepted that she should not have made the comment she did on *Any Questions*. She withdrew them and as far as I was concerned that was the end of the matter. I have absolutely no intention of speculating, because it was very readily, quickly and amicably resolved between us.

Q263 Keith Vaz: So, she was wrong to have said what she said on *Any Questions*?
Lord Falconer of Thoroton: She was wrong to have said what she said, and she accepts that.

Q264 Keith Vaz: Was the Home Secretary wrong to have said what he did in his criticisms of judges?
Lord Falconer of Thoroton: He did not make criticisms of judges; he expressed the view that the sentence in a particular case was unduly lenient and asked the Attorney General to consider referring it. The Attorney General then said that it was for him to decide whether or not to refer it.

Q265 Keith Vaz: The problem to which Jeremy Wright alluded in his questions is that we are not on a level playing field here. The Home Secretary with his vast array of press officers can make statements about judges and judges really do not have the opportunity to respond. Was not the deal that you as the person in cabinet would be speaking up for the judges?
Lord Falconer of Thoroton: That is absolutely right. You say "the deal", but the history of the office of Lord Chancellor is that politicians should not criticise the judges in relation to individual cases or generally, although they are perfectly entitled to talk about policy issues, because the judges should not and do not talk politics and comment on what the executive does. There is always a temptation for politicians to speak about how wrong judges are in particular areas. If it looks as if that is happening then the role of the Lord Chancellor privately or, if necessary, publicly is to seek to stop that happening.

Q266 Keith Vaz: At the time the role changed this Committee said, as did the judges who gave evidence to us, more in sorrow than in anger, that you would not be able to play that part in cabinet. Have you discussed these issues with John Reid? Have you told him that his criticisms are causing concern among the judiciary?
Lord Falconer of Thoroton: In the end the judiciary did not say that; it took the view that in the light of the concordat there would be adequate protection.

Q267 Chairman: The Lords insisted, and it is in the statute?
Lord Falconer of Thoroton: We were very willing to see it in statute, but it was also reflected in the concordat. What has happened since? Last week seems to me to be an extremely good demonstration of the ability of the Lord Chancellor explicitly to defend the judges, and if and insofar as there are people who think that members of the executive

were attacking the judges—which I do not believe was the case—my position was made absolutely clear during the course of last week. I defended the judges against such criticism. If one looks at the statement of Lord Phillips his concern was much more about the media criticism, not criticism from politicians. Our position was made absolutely clear.

Q268 Keith Vaz: Have you spoken to the Home Secretary and told him either in cabinet or outside that his statements are causing concern because the judges cannot respond and get involved in the minutiae of party politics? High politics are going on here. They cannot respond to him. Have you told him that?
Lord Falconer of Thoroton: They cannot respond to it.

Q269 Keith Vaz: Have you told him this?
Lord Falconer of Thoroton: I will not speak about what I have said privately to any member of the Government in relation to this, but you can rest assured that both privately and publicly I have taken steps to defend the independence of the judiciary.

Q270 David Howarth: I turn to another area of possible difficulty or conflict between ministers and judges. I refer to the Human Rights Act and its interpretation. What is your opinion of the different views being expressed about that Act? Is it inevitable and healthy, inevitable and unhealthy or not inevitable at all? What are the limits?
Lord Falconer of Thoroton: We are completely committed to the principles of the European Convention on Human Rights. A distinguished and soon-to-be Conservative Lord Chancellor spent a large amount of time writing it in the late 1940s. We were one of the early signatories. It was a thoroughly good thing that we did in 1998 in incorporating that convention, or large parts of it, into our law by the Human Rights Act 1998. We have absolutely no intention of stepping back from it. The impact of incorporating the convention into our law is that in some areas there have been difficulties. A tragic example of that is the description given by the Chief Inspector of Probation about how Rice was released and then murdered Naomi Bryant. He referred to the possibility that human rights arguments might have misled or distracted officials from the decisions they made in relation to whether or not to release him and, if so, on what terms. We need to address those particular issues because they are very important. We also need to make it absolutely clear that the European convention which we have incorporated does not allow the rights of a convicted defendant like that to come before public safety. There are particular issues like that, but I think it is a good thing that we incorporated it into law and it would be wrong now either to contemplate repealing it or to repeal it and replace it with some home-grown version of those rights.

Q271 David Howarth: But the relationship between the executive and judiciary under this kind of legislation, whatever form it takes, is inevitably subject to conflict, is it not? Is not part of the problem that that has not been properly explained to the public who expect the whole of the Government, including the judiciary, to have one view?
Lord Falconer of Thoroton: Certainly, attacks have been made, not by the Government, on the judiciary for particular findings it has reached in relation to human rights law. I say in parenthesis that many of the findings that it has allegedly made have never been made. For the 93rd time to kill two canards, the judiciary did not authorise hardcore porn to go into prison to satisfy "a prisoner's human rights". An application was made and was dismissed before it even got to the leave stage. It did not require, nor does the Human Rights Act require, that food be given to somebody who is unlawfully on a roof holding the police at bay. There are hundreds and hundreds of such examples. But everybody round this table probably knows that the European Court of Human Rights laws determine that if there is a significant risk of inhuman or degrading treatment or torture taking place if somebody is returned to a particular country that individual cannot be deported to that country. That led to the Immigration Appeals Tribunal coming to a particular conclusion in relation to the Afghan hijackers' case because of the view it formed as to what would happen to those individuals if they went to Afghanistan. That was really a conclusion as far as the law was concerned which came from the cases decided under the human rights convention. The judges had no option in relation to that. There are legitimate questions as to whether or not that is the right conclusion, but the judges had no option but to come to that conclusion in the light of the factual findings that they made. In the build-up to the *Chahal* case, as you know, the English courts had said that it was a balanced, not an unqualified, right, but the European Court of Human Rights took a different view, so subsequent to that they were bound to follow it. But that debate is perfectly legitimate. You should not blame the judges for then giving effect to the law.

Q272 David Howarth: We could spend all afternoon on myths to do with the Human Rights Act, including the myth that it is something to do with the European Union which we see repeated quite often. What is your overall assessment of the Act since it came into force six years ago? Do you think it has been a success or failure? What are your criteria for judging the results?
Lord Falconer of Thoroton: I think it has been a success. Its effect on criminal justice process has been hugely exaggerated. There has been very little change in relation to criminal justice process because we had a pretty well developed system before the human rights convention came into place. In areas a million miles from crime one can see that it is doing thoroughly good work in ensuring that an individual is not, as it were, the victim of bureaucracy which does not think enough about the citizen. The best example is perhaps the elderly husband and wife who ask a local authority not to separate them from each other when they are put into care homes

because they cannot otherwise be looked after and the local authority ignores that request. They take a case which alleges that, surely, their family life should allow them to stay together, and they are allowed to stay together. Another example is where relatives complain about the level of treatment that their relatives, not necessarily elderly, receive in care homes provided by the state. They get no response at all and bring proceedings and are able, for the first time, to get minimum standards provided for those who are being looked after. These are basic examples of fairness which in a sense protect the citizen from the state that will not focus on the needs of an individual. It is nothing to do with crime or terrorism; it is just treating people properly. That is the way the courts have decided it. In relation to any piece of legislation that now passes into law government must certify that it complies with the Human Rights Act. There is generally no difficulty in relation to criminal justice statutes. One is concerned with health and education statutes where one is thinking of people who before the convention was incorporated could not stand up to the state and get what they were entitled to. This helps them and I believe it is a good thing.

Q273 David Howarth: The point I had in mind was precisely what happened in government. One of the arguments for the Human Rights Act was that it would help change the culture of government. Where previously the law might have been treated as just a method of getting the Government's way, a human rights Act or bill of rights would make government officials and ministers think about the law as something more fundamental than that and that people had fundamental rights that needed to be protected. Has there been that cultural change, or does government still think of the law as a convenience rather than as a set of rights?
Lord Falconer of Thoroton: There has been a very significant change. When I started in government in 1997 I was Solicitor-General and the European Convention on Human Rights was a matter dealt with by the Foreign and Commonwealth Office because it was a treaty. If there was a human rights issue one would ask the Foreign and Commonwealth Office what it thought. It would then get cases. It would be regarded as a slightly eccentric thing to do and it was off to the side. Now it informs the way that the Government addresses the issue. I make it clear that it is not having a significant effect in relation to crime or terrorism, because we had a well developed system before, but it is having an effect in other areas which are concerned more with social delivery, and it is a good thing.

Q274 Dr Whitehead: To return to the *Chahal* case which you mentioned a moment ago, that might be seen as a particular rubbing point in the philosophy that you have just set out. Certainly, as I think you have indicated, it is impossible for a signatory to the European Convention on Human Rights to deport a foreign national in circumstances where he or she may face inhuman or degrading treatment?
Lord Falconer of Thoroton: Or torture.

Q275 Dr Whitehead: Irrespective of that individual's conduct?
Lord Falconer of Thoroton: Yes.

Q276 Dr Whitehead: Do you consider that on human rights grounds that should continue to be the case? What exactly is your view of where the rubbing point is?
Lord Falconer of Thoroton: One can see a point where one says that if the risk of suffering degrading and inhuman treatment or torture is quite low and the risk of the individual doing something damaging to the people here is quite high the balance may favour deportation. I make it clear that I do not say there should be deportation where torture is certain but deportation where there is a genuine view that the chances of torture are sufficiently small to justify it. Indeed, that is broadly the argument that the British Government is running in the case of *Ramzy* before the European Court of Human Rights. It is in effect trying to get back to the pre-*Chahal* position in 1996 before the European Court of Human Rights. It is a difficult balance to strike, but it seems to us that it does not in any way conflict with our absolute prohibition on torture, which we as a nation take, but recognises that some sort of balance needs to be struck.

Q277 Dr Whitehead: You have slightly anticipated my question about *Ramzy*. It has been said by the Joint Committee on Human Rights that to argue for the deportations of terrorist suspects where there is a real risk of torture on their return may send a signal that the absolute prohibition on torture may in some circumstances be overruled by national security considerations. The Committee has referred to precisely that juxtaposition and talked about national security considerations. How do you respond to that criticism?
Lord Falconer of Thoroton: It seems to me to be sensible and fair and not against the absolute prohibition on torture to say that in quite a lot of countries the state will not engage in torture but we recognise that the ability of the state to protect that individual from other agencies, for example, is very much less than it is here. Therefore, if he goes back there is some risk but it is not very high. If an individual is actively threatening the lives of people in this country and there is no ability to prosecute that individual, is it legitimate to say that there is a level of risk—which does not look as if it will be realised—but it exists which that individual should be prepared to take in going back, because of the much more real and large threat that that person poses for the people of this country? That does not seem to me either to promote torture, because we make absolutely clear that we abhor it, or to constitute an unbalanced approach to the issue. I make clear we are not saying that in some circumstances torture is justified, but if a person threatens the lives of people in this country it may well be that that person has to endure a higher risk of it than might otherwise be the case. But if it is clear

that the person would suffer degrading or human treatment or torture of course he could not be sent back.

Q278 Dr Whitehead: That appears to be a rather circumlocutory way of saying that there is a trade-off between torture and national security, and indeed the *Ramzy* case suggests that that trade-off is effectively being sanctioned by the British Government?
Lord Falconer of Thoroton: If there is any identifiable risk you cannot do it. Are there risks that probably will not mature in relation to that person which, if he threatens the lives of people in this country, he should be asked to take? That seems to me to be a realistic way of looking at it.

Q279 David Howarth: But is not the weighing in the balance of the link between the risk that the person will be tortured and the threat to lives in this country the heart of the problem? Could not one argue instead that if there was an insubstantial risk of torture the person should be allowed to be deported anyway regardless of the other side of the balance? Would that not be more clear as a way to avoid giving the impression that one is balancing torture against security?
Lord Falconer of Thoroton: If the level of acceptable risk in a sense goes down I cannot query that because it makes no difference in terms of what the result will be in relation to individual cases. But I can see an argument—it is one that we are advancing in the *Ramzy* case and with the Netherlands and other countries—that if an individual is allowed into this country and threatens seriously the lives of people in this country it may well be that there needs to be a clearer risk than at present that he will suffer torture before he can avoid being deported. That does not seem to me to be unreasonable, but I understand what you say. If you are saying that perhaps the answer is to increase the threshold of risk that is another way of reaching the same point.

Q280 Mr Khabra: *Chahal* is a famous case. He was in detention for a number of years.
Lord Falconer of Thoroton: In England.
Mr Khabra: Eventually, the *Chahal* case went to the European Court of Human Rights and he won the case. There is a test case to get the judgment in *Chahal* overruled. If that is unsuccessful does the Government intend to do something about it, or does it intend that *Ramzy* legislation should be passed to amend the Human Rights Act, as the Prime Minister said in May?

Q281 Chairman: If we lose the case that we have been discussing, what do we do?
Lord Falconer of Thoroton: If we lose we have made it clear at all stages that we will accept whatever the Convention says. If at the end of the day there is no further place to go, in the sense that the European Court of Human Rights says, "This is what Article 3 means", we have to accept it. The question of amending the Human Rights Act can arise only in the context of the period prior to any final ruling by the European Court of Human Rights, but if after everything has been gone through, every case has been considered and the conclusion reached is that Article 3 is as *Chahal* described it, we have to accept it. The Prime Minister and everybody else in the Government have made it absolutely clear that we are not leaving the Convention. If we are not leaving the Convention it means we have to accept its terms. I raise one other point. There is a further track in relation to this: a memorandum of understanding. That is an agreement with the government of the country to which deportation is sought whereby assurances are given by that country that the deportee will be treated in such a way that does not constitute degrading or inhuman treatment or torture. It seems to me that these are worthwhile things to get. It is for the courts to determine whether they sufficiently reduce the risk but they are worth having because they have the potential to affect the way that these countries treat not just the deportees about whom we are speaking but others as well. I think that they are a worthwhile track both in terms of dealing with the individual problem for us and in the wider impact that they may have.

Q282 Mr Khabra: In the case of a person being removed, with all the guarantees that you mention, if the receiving country later on does not abide by the agreement, what are the implications of it?
Lord Falconer of Thoroton: There is little that the court can do in relation to the individual country, but the judgment that the court must make in relation to the memorandum of understanding is whether that agreement is likely to be complied with. If a sovereign state says that it will comply with a particular agreement then, absent any evidence to the contrary, there should not be any reason why that is not accepted, not least for the reason that the country would, having given its word, want to keep it. But you are right that there are no means of enforcement and so a judgment has to be made.

Q283 James Brokenshire: In a recent speech in which the deportation of suspected terrorists was being considered the Prime Minister indicated that the time had come "to rebalance the decision in favour of the decent, law-abiding majority who play by the rules and think others should too." I note that in his comments to the Liaison Committee this morning the concept of rebalancing the legal system for failing to take account of the way the world had changed was also mentioned. What do you think he meant by that in the context of the convention and the obligations and responsibilities placed on countries under it?
Lord Falconer of Thoroton: Is that quote by reference to the Convention issues or the broader issues about the criminal justice system?

Q284 James Brokenshire: He was probably talking about the broader issues, but the quote I gave you was in the context of the deportation of suspected terrorists.

Lord Falconer of Thoroton: The rebalancing is the case being argued for in *Ramzy*. There should be the ability to arrive at a balance, as I indicated in answer to questions put by Dr Whitehead and David Howarth.

Q285 James Brokenshire: How do you fit that within the context of your very clear view that convention rights have to be maintained and there are no changes in them?
Lord Falconer of Thoroton: Where opportunities arise in individual cases one argues that *Chahal*, which involves no balance at all, should be developed in the way that we have argued in *Ramzy*.

Q286 James Brokenshire: Do I take it that when the Prime Minister also said today that it was possible under the current law to take a different view of the balance between the protection of the public and the human rights of the accused you are following the same line of argument; namely, in essence there is some flexibility there which perhaps you have not seen before?
Lord Falconer of Thoroton: Perhaps you would give me the quote.

Q287 James Brokenshire: The Prime Minister, talking about human rights, said it was possible to take a different view of the balance between protecting the public and the human rights of the accused.
Lord Falconer of Thoroton: I have not seen the whole context in which the Prime Minister made that remark, so to ask me to interpret what he says by reference to the quote is a bit tricky. But the rebalancing generally—he is talking there about the accused—covers things like indeterminate sentences where people pose a danger; being able to access people's bank accounts to see whether they are money-laundering; and the ability to impose interim ASBOs. That is an example of where the accused can be the victim of an anti-social behaviour order without the protection of a full trial because the balance of public protection requires it. It is that sort of range of things to which he refers.

Q288 James Brokenshire: What do you do when you come across obstacles, for example where there is a conflict between that approach and perhaps rights that may exist under the Human Rights Act? How do you address the desire to achieve the ends that you have talked about but you find you are fettered in some of the ways we have seen?
Lord Falconer of Thoroton: Ultimately, there will be limits beyond which we cannot go, but in the three examples I have given—indeterminate life sentences, the ability to look at people's bank accounts and interim ASBOs—although significant numbers of people have said that we should not have done it, when we look into it there are no legal fetters, because the balance between the rights of the individual, for example to keep his bank account secret and not to have an interim ASBO made against him, give way to the rights of the public, whether it be stopping drug-trafficking or anti-social behaviour. These matters are not absolutes and need to be looked at on a case-by-case basis. What the Prime Minister and Government are saying is that we need to see how we give people the confidence that we are looking after and rebalancing the system in favour of the law-abiding public. It does not mean infringing people's human rights but reaching a sensible balance so the law-abiding public can feel that the legal system is on its side.

Q289 Mr Tyrie: I want to take you back to memoranda of understanding. These have been round a goodly while now. Does the Government keep a check on whether it turns out that it was prudent to take at face value memoranda or understanding?
Lord Falconer of Thoroton: At the moment, I am not aware of any cases where memoranda of understanding have been definitive in winning a case in relation to deportation.

Q290 Mr Tyrie: That was not my question. The question was whether after the event the memoranda of understanding were reviewed to see whether not they were decisive in the deportation of the individual?
Lord Falconer of Thoroton: I am not aware whether or not such a review is made. Plainly, a review should be made.

Q291 Mr Tyrie: You would be disappointed if there is not a review somewhere?
Lord Falconer of Thoroton: I do not know the extent to which memoranda of understanding have played as critical a part as they may do in future.

Q292 Mr Tyrie: Is this discussed with the United States? Memoranda of understanding are used extensively by the United States?
Lord Falconer of Thoroton: Between them and other countries?

Q293 Mr Tyrie: Yes.
Lord Falconer of Thoroton: It is not discussed with the United States as far as I am aware. Whether or not I would be made aware of all those discussions I am not sure.

Q294 Mr Tyrie: Do you think it would be helpful if the Government published a review of the effectiveness of memoranda of understanding?
Lord Falconer of Thoroton: Yes, I think it would be.

Q295 Mr Tyrie: Would you be prepared to do so?
Lord Falconer of Thoroton: Yes, but I am not sure which ones we would be reviewing at the moment. We have entered into memoranda of understanding that will be and have been referred to in proceedings recently, for example in relation to Jordan. I believe it is very important that we publish it. Once a memorandum of understanding is reached and something is done on the basis of it people should know what the consequence is. The closest example from the past that I can think of is the commitments made by the United States of America over a long

period not to execute people who have been extradited to that country. I am pretty sure that every individual state has always complied with the undertaking.

Q296 Mr Tyrie: Perhaps I may for a few more moments refer to you as "Lord Chancellor".
Lord Falconer of Thoroton: I am still Lord Chancellor and you can call me that for a few more years.

Q297 Mr Tyrie: I look forward to doing that.
Lord Falconer of Thoroton: I would welcome it if you did—as long as I remain Lord Chancellor!

Q298 Mr Tyrie: I shall take that request to heart, Lord Chancellor. You kindly agreed that you would publish a review or at least consider whether you could publish it.
Lord Falconer of Thoroton: I want to see what we have in relation to that. I do not know what the situation in the past has been, but in the future when it matters in the way we have described it seems sensible to do so.

Q299 Mr Tyrie: As you can imagine, many people may feel that this is just a coat of paint in order to dress up something.
Lord Falconer of Thoroton: You may well be wrong about that. If a nation enters into a memorandum of understanding and commits itself to do particular things there is a whole series of reasons which are public as to why it should comply with that agreement.

Q300 Mr Tyrie: There must be a number of countries where you would not accept at face value a memorandum of understanding. For example, you would not take at face value a memorandum of understanding from Zimbabwe at the moment, would you?
Lord Falconer of Thoroton: I do not want to comment on our foreign relations with every single country. Ultimately, it is for the court to decide, not for me, whether the memorandum of understanding is sufficient to give that assurance that the deportee will be properly treated when deported.

Q301 Mr Tyrie: Whilst we are considering human rights, I should like to ask you briefly about Guantanamo Bay. I take it you agree with Lord Goldsmith's view.
Lord Falconer of Thoroton: I do not think it should have been opened; it should be closed.

Q302 Mr Tyrie: When did you come to that view?
Lord Falconer of Thoroton: For me, the problem about Guantanamo Bay has always been that we are a country that lives by the rule of law. Ultimately, to try to put people beyond the reach of the rule of law is contrary to the way that all of our states are organised. It now appears that Guantanamo Bay is not beyond the reach of the rule of law because the Supreme Court of the United States of America has said that various provisions should apply to it. But the essential objection to Guantanamo Bay has always been that law cannot reach it, and that was the intention. From my point of view, it has always been objectionable on that basis.

Q303 Mr Tyrie: Why did you not come forward earlier?
Lord Falconer of Thoroton: Plainly, from the point of view of the British Government judgments have to be made about precisely how one deals with these issues. Jack Straw is here. He spent a goodly period of time effectively procuring the release of a number of people from Guantanamo Bay, and judgments have to be made, entirely correctly in my view, about what is the best way to achieve those sorts of ends. I am perfectly happy as a member of the Government to be guided by the Government's approach to these issues.

Q304 Mr Tyrie: What you appear to be saying is that if you had come forward publicly with your condemnation of Guantanamo Bay at an earlier stage it might have adversely influenced the efforts to secure the release of British detainees there. Is that correct?
Lord Falconer of Thoroton: We are a government and we form collective views about things and how those are to be expressed.

Q305 Mr Tyrie: Did you get it right or wrong?
Lord Falconer of Thoroton: Perhaps you would put the question again.

Q306 Mr Tyrie: The question is: were you influenced in restraining yourself in not condemning Guantanamo Bay by the consideration put to you that it might adversely affect your efforts to secure the release of British detainees at that base?
Lord Falconer of Thoroton: I was influenced by the fact that I was a member of a government that sought to achieve particular aims in relation to Guantanamo Bay.

Q307 Keith Vaz: Did you see Vera Baird's article in *The Times* this morning? Was it drafted by Alex Allan or written by Vera Baird?
Lord Falconer of Thoroton: I am quite clear that every single word was drafted by Vera Baird.
Alex Allan: After all, it has her name on it.

Q308 Keith Vaz: In her article she says: "The Lord Chancellor and I and others in government have all been working in lockstep with Lord Carter." What does "lockstep" mean?
Lord Falconer of Thoroton: It means that he has kept us fully informed in relation to what he is doing and as to the state of his negotiations and thinking in relation to the process of reforming legal aid. The reason we have worked in lockstep is that this matter has been going on for a considerable time. We as a government want to be able to respond as quickly as we can to what Lord Carter says.

Q309 Keith Vaz: Why has it been so delayed? We expected it in January and were told it would be published in late spring.
Lord Falconer of Thoroton: Yes.

Q310 Keith Vaz: Do we have a date for publication yet?
Lord Falconer of Thoroton: We expect it to be published before the recess, which means before 25 July, so very soon. The reason it has been delayed is that Lord Carter, in co-operation with the legal profession, has been talking in great detail about the principles of a new purchasing system of publicly-funded legal services. We are as keen as we possibly can be to find a way forward by which the legal professions agree this in the interests of the consumer. It is better to have a whole new system in which there is co-operation rather than not. Lord Carter, the Bar Council and the Law Society have been working extremely hard to try to get to that point. We think it is worthwhile giving them that time, but there is now a deadline; it must be done before the recess so we can move on.

Q311 Keith Vaz: According to Vera Baird's article in *The Times* today, as part of the next steps she will be visiting various parts of the country: "I will visit as many towns, regions and cities that I can to discuss the proposals." So, there will be a further period of consultation?
Lord Falconer of Thoroton: There must be consultation on the detail, but I very much hope that Lord Carter will produce his proposals and we will as quickly as possible—I hope almost immediately—be able to say that we either accept them or not. What Vera is talking about is some period of consultation. There must be three months' consultation—given changes in the arrangements for the payment of solicitors or barristers—in which these detailed proposals are discussed with the professions.

Q312 Keith Vaz: You already know that there is concern about the moves to larger suppliers and the disproportionate effect that it will have on ethnic minority firms and firms in rural communities?
Lord Falconer of Thoroton: Yes.

Q313 Keith Vaz: Have you telephoned Lord Carter or sent him a memorandum and said, "Look, these are concerns that the Government will take seriously because they are part of its core values"?
Lord Falconer of Thoroton: Yes.

Q314 Keith Vaz: "Please look at them again"?
Lord Falconer of Thoroton: Not look at them again. Take BME community solicitors or rural solicitors. To take an example entirely at random, if one is in an obscure part of Cumbria the more rural it is perhaps the more expensive it is to provide legal services. His proposals need to address this. One size will not necessarily fit all.

Q315 Keith Vaz: You seem to know what is in the report?
Lord Falconer of Thoroton: I do not know what is in the report.

Q316 Chairman: You are in lockstep. It is like having one's ankles tied together in a five-legged race.
Lord Falconer of Thoroton: I must ask Vera precisely what she meant by that, but I think it means "closely linked".

Q317 Keith Vaz: We will look forward to Vera Baird's next letter to you explaining what she meant.
Lord Falconer of Thoroton: It will say that important issues need to be addressed.

Q318 Keith Vaz: I have one quick question to Alex Allan. How many civil servants have been transferred to the new Judicial Appointments Commission?
Alex Allan: None has been transferred.

Q319 Keith Vaz: Seconded?
Alex Allan: A number have been seconded.

Q320 Keith Vaz: How many?
Alex Allan: I do not know the exact number. I can certainly let you know.

Q321 Keith Vaz: Perhaps you would send us a note and tell us how many civil servants have gone missing from your department.
Alex Allan: They have not gone missing; they have been seconded to the Judicial Appointments Commission.

Q322 Keith Vaz: Do you know how many days have been lost in your department due to sickness?
Alex Allan: I do not have the figures with me, but we know them and they are published.

Q323 Keith Vaz: Will you write to the Committee and give that information?
Alex Allan: Certainly.
Chairman: We thank both of you very much. We expect to see you again. Despite the loss of certain of your roles, we have plenty to talk to you about in future.

Written evidence

Responses to written questions from the Committee relating to the DCA Departmental Report 2004–05

General Reporting

1. *Why has the Department reported by strategic priorities rather than objectives?*

Because the DCA's work is structured around our recent fiver Strategy (Delivering justice, rights and democracy—DCA Strategy 2004–09 (December 2004))—and, within the constraints of HM Treasury guidance on the format of reports, it is sensible for our internal and external communications to be consistent with this.

HM Treasury guidance requires that Departmental Reports should be both forward and backward looking, setting out plans and information for performance. The Report presents a clear picture of the DCA's aims, activities, performance and plans.

The Report includes progress against all Spending Review (SR) 2002 objectives and their targets, showing how these map onto SR2004, as well as against all of those objectives with targets that remained live or otherwise outstanding from SR2000. The nine core Financial Tables required by HM Treasury this year, compared to the six in 2003–04, are also included.

This was the second Departmental Report since the creation of the DCA and is designed not only to be a major corporate publication made available to Parliament but also to be easily accessible to the public.

Therefore the Report was structured around the Secretary of State and Lord Chancellor's key priorities, outlined in the 5 Year Strategy. In drafting the text of the Report, we aligned the style and content with the tone and direction set out in the 5 Year Strategy.

We also thought it important to continue drawing attention to the established themes of justice, rights and democracy which the DCA exists to deliver. Last year's Report was structured around these themes, rather than objectives, and was received well. The Executive Summary of this year's Report was again designed around these themes, and the content of the entire Report resonates with the Secretary of State and Lord Chancellor's key aim to deliver them in a manner which makes a real difference to real people's lives.

2. *PES (2004) 19 states "departments should describe the quality of the data system [with regard to figures reported on PSA performance]". The same guidance also states "Departments should seek to agree any references to NAO work, including their PSA data systems work." Has NAO reviewed the Department PSA data systems? If so, will the Department make available to the Committee any recommendations or conclusions from the review?*

The National Audit Office is currently auditing our Public Service Agreement data systems. The review has not yet been completed, but once the report has been concluded copies will be made available to the Committee.

Financial Management

3. *PES (2004) 19 states "It is very important that these tables [expenditure tables] are structured to explain clearly what the department is spending its money on". The same paper also suggests "As a matter of good practice reporting should seek to inform the reader about how resources have been divided between the departments differing objectives and bring out the links between financial performance, spending allocation and service outcomes". Please provide a breakdown of expenditure in tables 1 and 2, (for Request for Resource One), by objectives basing the breakdown on the most recently available outturn for 2004–05*

The information contained in tables 1 and 2 is drawn directly from HM Treasury's database and reflects the structure which is consistent with the DCA Parliamentary Supply Estimates. The tables reflect the way DCA allocates budgets and so do not specifically reflect by objective.

Schedule 5 of the annual Resource Accounts does, however, provide a breakdown of the Net Operating Costs by objective. The percentages per objective are shown in the table below, together with the unaudited 2004–05 Net Resource Outturn.

SCHEDULE 5 RESOURCE ACCOUNTS 2004–05

Objective	*Net Resource Outturn (£'000)*	*Percentage of Total*
1. To ensure the effective delivery of justice.	2,179,007	62.97%
2. To ensure a fair and effective system of civil and administrative law.	540,146	15.61%
3. To reduce social exclusion, protect the vulnerable and children, including maintaining contact between children and the non-resident parent after a family breakdown, where appropriate.	669,038	19.34%
4. To modernise the constitution and ensure proper access to information by citizens.	36,021	1.04%
5. To increase consumer choice in legal services by improving information and promoting competition.	9,668	0.28%
6. To deliver justice in partnership with the independent judiciary.	26,328	0.76%
Total	3,460,208	100%

These percentages can be applied to the figures in Departmental Report Tables 1 and 2 for illustrative purposes. However, the following caveats should be applied:

— The 2004–05 Resource Accounts are in draft form only and therefore may be subject to change.

— Tables 1 and 2 in the Departmental Report are Resource and Capital budgets and will therefore include the full resource consumption of Non Departmental Public Bodies (NDPBs). The resource accounts include grants to NDPBs only, so there is no direct comparison.

— The Legal Service Commission, an NDPB, spends around two-thirds of DCA's Departmental Expenditure Limit so there is significant variance between the Departmental Report tables and the Resource Accounts.

— The department does not budget based on objective and is therefore not able to provide further breakdown within each objective.

TOTAL PUBLIC SPENDING 2004–05

£'000

Objective	*Resource Budget*	*Capital Budget*	*Total Public Spending*[1]
1. To ensure the effective delivery of justice.	2,057,863	116,573	2,134,930
2. To ensure a fair and effective system of civil and administrative law.	510,136	28,898	529,240
3. To reduce social exclusion, protect the vulnerable and children, including maintaining contact between children and the non-resident parent after a family breakdown, where appropriate.	632,032	35,803	655,702
4. To modernise the constitution and ensure proper access to information by citizens.	33,987	1,925	35,260
5. To increase consumer choice in legal services by improving information and promoting competition.	9,150	518	9,493
6. To deliver justice in partnership with the independent judiciary.	24,837	1,407	25,767
Total	3,268,005	185,125	3,390,392

4. *To provide for more effective scrutiny of resources please provide a breakdown of the DCA total staff figures in table 6 to show DCA HQ, Court Service/HMCS, PGO and other associated bodies?*

[1] Total public spending is calculated as the total of the resource budget plus the capital budget, less depreciation.

The table below provides a breakdown of the DCA total CS FTEs figures by key business areas. This is consistent with the way the Department presents figures in its Main Estimate and the workforce statistics provided to Cabinet Office/Office of National Statistics.

DCA Staff Numbers	*1999–2000 Actual*	*2000–01 Actual*[2]	*2001–02 Actual*	*2002–03 Actual*[3]	*2003–04 Actual*	*2004–05 Estimated*	*2005–06 Plans*	*2006–07 Plans*	*2007–08 Plans*
DCA Headquarters[5]	875	1,123	1,112	2,066	2,282[4]	2,454	2,190	2,006	2,006
PGO	494	357	301	315	281	343[6]	280	280	280
Wales Office[7]	n/a	n/a	n/a	n/a	n/a	52	50	50	50
HMCS (Court Service)	8,781	10,075	10,259	10,443	10,286	9,048[8]	19,767[9]	19,551	19,351
Tribunal Service	n/a	n/a	n/a	n/a	n/a	1,137	1,123	2,923[10]	2,923
Departmental Total	10,150	11,555	11,672	12,823	12,850	13,034	23,410	24,810	24,610

Note:

These figures do not include staff numbers for the Scotland Office, which can be found in the Scotland Office annual report. This has recently changed and in future the staff numbers for the Scotland Office will be included in the DCA's staff reports to Cabinet Office/ONS and subsequently added to table 6 above.

The figures for the years 1999–2000 to 2003–04 are presented on a pro-rata basis from the DCA manpower data published on the Civil Service website. The figures for 2004–05 to 2007–08 are presented in accordance with figures provided to ONS/Cabinet Office and HM Treasury.

5. *The Committee understands a review of financial management is underway in Departments by the Treasury and the National Audit Office. Is DCA still on special measures? Will the Department make available to the Committee any recommendations or conclusions from this review?*

DCA was placed on "Special Measures" following a Reserve claim in 2002–03. The increased reporting measures, which were agreed between HM Treasury and DCA were very successful throughout 2003–04 and 2004–05 and have now been adopted as standard practice across Government.

The Treasury's financial management review of DCA has not begun yet and as such has not delivered any findings. However, as soon as any findings or recommendations are made available we will provide the Select Committee with this information.

Public Service Agreements

6. *Please explain how the PSAs agreed for the SR2004 periods met with the wider Spending Review requirement for them to become more outcome rather than output focused, particularly on the new PSA 4?*

SR2004 PSA targets 1, 2, 3, 4 and 5

Our targets for SR2004 were developed in conjunction with the Department's Five Year Strategy which was framed around our key themes of "Justice, Rights, Democracy" and Delivery. As a Department we are aware of the expectations and needs of the public that we serve. We have therefore tried to put in place PSA targets that meet those needs.

We agreed with our delivery partners (Home Office and Crown Prosecution Service) that we should continue with the targets to bring more offences to justice (PSA1) and improve the public's confidence in the criminal justice system (PSA2). Improved levels of confidence will have the outcome of increasing people's sense of security and reducing their fear of crime. Both these targets fit closely with the other Home Office targets on crime.

[2] Reflects the creation of the Public Guardianship Office and the move of the Court Funds Office into the Court Service and the office of the Official Solicitor & Public Trustee into DCA Headquarters. Additionally the Court Service increase is as a result of the working time directive and "fee paid" ushers becoming permanent members of staff.

[3] Increased resources as a result of Constitutional Reform giving the Department a central role in the Governments work on rights especially in relation to Human Rights and Freedom of Information and the transfer of major new work to the Department from the Home Office and Cabinet Office. These changes saw departmental responsibility for the Information Commissioners Office, Legal Secretariat to the Advocate General for Scotland and the Office of the Solicitor to the Advocate General for Scotland transfer to the DCA. Additionally there was a major increase in workforce to deal with additional Immigration & Asylum work in DCA Headquarters and Court Service.

[4] Increase in DCA Headquarters as a result of the Departmental Change Programme and the transfer of support functions from operational areas to the Centre.

[5] Including Associated Offices.

[6] Increase in PGO is as a result of the conversion of agency/contract workers to permanent civil servants.

[7] Historic year figures (1999–2000 to 2003–04) can be found in the Wales Office Annual Report.

[8] Reflects the transfer of Tribunals Group from Court Service in preparation of the creation of the Tribunals Service with effect from April 2006.

[9] Reflects transfer of magistrates' courts staff into DCA and the creation of HMCS.

[10] Reflects planned machinery of Government changes as a result of the creation of the Tribunal Service.

SR2002's Asylum PSA was broadened in SR2004 (PSA 3) to focus on migration as a whole, looking at the whole end-to-end process from entry into the UK to removals where this is necessary.

It was also agreed that the Department should have a PSA target focused on Protecting the Vulnerable, to highlight the importance of improving outcomes for the public. It was agreed that the supporting target from SR02 PSA 4 on protecting vulnerable children should be taken forward into SR04 (PSA 4). Through this PSA target we are looking to improve performance in securing suitable outcomes for vulnerable children by working with all stakeholders in the delivery chain to ensure that the case management process is efficient and effective.

The target on Proportionate Dispute Resolution (PSA 5) takes forward the key elements of the SR2002 civil justice PSA targets 3, 4 and 6, with the long term aim of creating a more coherent and effective cross-DCA civil justice strategy that can more readily respond to its users' needs.

The outcome it seeks is to achieve earlier and more proportionate resolution of legal problems and disputes by:

— increasing advice and assistance to help people resolve their disputes earlier and more effectively;

— increasing the opportunities for people involved in court cases to settle their disputes out of court; and

— reducing delays in resolving those disputes that need to be decided by the courts.

PSA target 4—further information

During the 2004 Spending Review we agreed that the supporting target from SR02 PSA 4 on protecting vulnerable children (Public Law Children Act Cases) should be taken forward into SR04.

This is a key area of the Department's work. Continued uncertainty impacts on the long-term prospects of the child eg lack of educational achievement, youth offending. The longer it takes to resolve whether or not a child should be taken into care, the longer a child has to wait for permanence in his or her life which may involve a series of temporary placements, which in turn can impact on schooling continuity. (70% of children in care leave school with no qualifications.) The Children Act Report 2003[11] acknowledged "delays in the court processes, which had a knock-on effect on the number of changes of placement the children experienced and their opportunities for making stable attachments. A number of children were still displaying evidence of insecurity several years after they had been placed permanently."

The outcome we are looking to achieve through this PSA target is to improve the lives of vulnerable children. We will continue to work with all stakeholders, including Department for Education and Skills, CAFCASS (Children and Family Court Advisory and Support Service) and Department of Health, to ensure that the case management process for dealing with these types of cases is efficient and effective.

7. *Why could PSAs not be set for all of the Department's Objectives?*

Treasury guidance states that although objectives should cover all of a department's work, PSA targets should cover only key aspects, not be a comprehensive description of everything that it does. Spending Review 2004 PSA therefore has four objectives covering the work of the whole Department (justice systems to command public respect and confidence/excellent services to enable the public to exercise their rights and understand their responsibilities/democratic systems which command public confidence/a modern public service delivery department) and five PSA targets focussed on: crime (two targets); asylum; care cases; and the earlier and more proportionate resolution of legal problems and disputes.

8. *Given the "Not Met" or "Not Known" final assessment provided on a number of PSA targets from SR2000 in the Autumn Performance Report 2004, please provide details of any internal plans the Department has to continue monitoring these measures internally?*

The table states our response to the question beneath each relevant Supporting Indicator / Final Assessment from both the Autumn Performance Report 2004 and the Departmental Report 2004–05.

PSA Target 1 : Secure a minimum five percentage point improvement in the level of satisfaction of users

Supporting Indicator	**Final assessment**
Maintaining at 95% the proportion of jurors who are satisfied or very satisfied with their treatment in the Criminal Justice System, while increasing the number who are very satisfied by 5% by March 2002 and 10% by March 2004.	UNKNOWN

Response: Up to and including 2003–04, there were two different methodologies used to gauge juror satisfaction—the specifically-targeted juror satisfaction survey and the broader-based national customer satisfaction survey, which encompassed all areas of the Court Service. From 2004–05, we've used the

[11] See Ward H, Munro E, Dearden C and Nicholson d (2003) *Outcomes for Looked After Children: Life pathways and decision-making for very young children in care or accommodation*. Centre for Child and Family Research, Loughborough University.

customer satisfaction survey as the sole measure of juror satisfaction. Juror overall satisfaction in 2004–05 stood at 90%. Issues highlighted by the survey and other concerns that have come to light are being addressed in the *Improving the Juror Experience* project.

We are currently planning to introduce a new survey strategy during 2006–07. While the new methodology has yet to be finalised, we plan to continue to monitor juror satisfaction.

Supporting Indicator	**Final assessment**
Reducing the average waiting time in the magistrates' courts to one hour or less by March 2002.	NOT MET

Response: The result of the November 2004 Survey showed an average wait of 1 hour 28 minutes. Effective case progression is key. There is a lot of work ongoing to implement the new Criminal Case Management Framework and the resulting changes to listing practices. We plan to continue to closely monitor this area. We also continue to monitor the level of ineffective trials, where considerable improvements have been made, and the reducing level of unnecessary attendances by witnesses. Generally, the average time a witness has to wait has remained stable and it is felt in the first instance, to be more important that a witness does not have to return because the trial was ineffective, or that they gave their evidence but had to wait longer, rather than prioritise the time that the witness has to wait.

Supporting Indicator	**Final assessment**
Reducing the unnecessary attendance of witnesses in the magistrates' courts by 10% over the Spending Review 2000 period.	NOT MET

Response: Witnesses are a key part of the criminal justice process. In order to keep them engaged throughout the process, we need to try to keep levels of unnecessary attendance at court to a minimum. Although we did not meet the SR2000 target to reduce levels by 10% from a baseline of 53%, latest data indicates this is now down to 46% (November 2004 survey—we continue to run the survey bi-annually).

HMCS with its other partners in the CJS continue to focus on reducing the number of ineffective trials, which are one of the prime reasons for witnesses attending court unnecessarily.

Sub-target

Improve the standard by which the Criminal Justice System meets the rights of defendants, by achieving by 2004 100% of targets in the below basket of measures:

Supporting Indicator	**Final assessment**
90% of people in police stations requesting the service of a duty solicitor receive the service within 45 minutes.	NOT MET

Response: Problems were caused by the nature of the selected sample. This was not a stand-alone exercise but one integrated into the Legal Services Commission's (LSC) standard supplier management process. This is a risk-based process using performance indicators identified across a range of measures—including unusual work profiles and value/quality of suppliers' contract work. Because of the skewed nature of the population monitored, the performance measured in the 2002 exercises was seen not to have been indicative of the performance of the entire population of contracted solicitors. Continued measurement was, therefore, considered to have little value.

The LSC is no longer monitoring this specific target at a macro level due to the sampling issues. However, the LSC continues to manage their supplier management activities on an individual supplier basis. The LSC continues to assess, and search for ways to improve, performance.

Supporting Indicator	**Final assessment**
80% of magistrates' courts to have full access to a comprehensive courts-based bail information scheme by March 2003.	NOT MET

Response: As reported in the Autumn Performance Report, performance against this target is reliant on the National Probation Service. Owing to the National Probation Service reducing the priority of this area of work it is no longer practicable for the DCA to have a specific target.

PSA Target 2: Reduce by 2004 the time from arrest to sentence or other disposal by:

Reducing the time from charge to disposal for all defendants, with a target to be specified by March 2001.	**Final assessment** UNKNOWN
Dealing with 80% of youth court cases within their time targets.	**Final assessment** UNKNOWN
Supporting indicator	**Final assessment**
Set a target by March 2001 for reducing the time taken from first listing in the magistrates' courts to sentence or other disposal for all defendants by March 2004.	UNKNOWN

Response: Timeliness continues to be an area of business that is closely monitored by Local Criminal Justice Boards. In 2003–04 LCJBs were required to establish their own individual targets. From 2004–05, LCJBs monitored timeliness more in conjunction with their ineffective and cracked trial performances, and national benchmarks were established. DCA worked with LCJBs and criminal justice partners on this.

PSA Target 3: Improve the level of public confidence in the Criminal Justice System by 2004, including improving that of ethnic minority communities.	**Final assessment** UNKNOWN

Response: Improving public confidence in the Criminal Justice System continues to be a high priority for DCA and its partner Departments. PSA targets on confidence were developed for SR2002 and SR2004. We adopted one of the measures used for SR2000 as the principal means of measuring public confidence: the British Crime Survey question about public confidence in the effectiveness of the CJS in bringing offenders to justice. The SR2002 and SR2004 PSA targets also include measures of the confidence of BME people and of victim and witness satisfaction. The other measures of public confidence used for SR2000 continue to be monitored and published with the results of the British Crime Survey, though they are not used for targets.

After a period of decline, which ended in 2002/03 with public confidence in the Criminal Justice System at a low of 39%, there has been a steady improvement in confidence levels. Latest data from the British Crime Survey indicates that public confidence in the CJS is currently 43% (March 2005).

PSA Target 5: Reduce the proportion of disputes which are resolved by resort to the courts.

Supporting indicator	**Final assessment**
To extend the coverage of integrated local Community Legal Service Partnerships to 100% of the population in England and Wales by March 2004.	NOT MET

Response: As reported in the Autumn Performance Report full coverage in England and Wales was achieved shortly after March 2004. The Legal Services Commission continues to monitor to ensure 100% coverage is maintained.

PSA Target 6: Increase the number of people who:

Receive suitable assistance in priority areas of law, involving fundamental rights or social exclusion, by 5% by 2004;	**Final assessment** NOT MET

Response: A final assessment of performance against this target was reported in the 2004–05 Departmental Report. The target was re-worded for the 2002 Spending Review but the survey of National Legal Needs continues to be used to measure progress.

Secure year-on-year increases of at least 5% in the number of international legal disputes resolved in the United Kingdom.	**Final assessment** NOT KNOWN

Response: As reported in the Autumn Performance Report the Department decided on cost/benefit grounds to no longer continue with the target.

PSA Target 9: Secure year on year improvements in value for money in the delivery of the Community Legal Service and the Criminal Defence Service.

Supporting indicator for 2nd Proxy measure	**Final assessment**
The average cost per case of legal help in immigration and all other work.	NOT MET

Response: The Legal Services Commission continues to monitor the change in average costs for non-immigration Legal Help cases and report regularly in their Annual Report. For immigration cases, unique identifiers are now in place and analysis and reporting is currently in development.

Strategic Priority 1: reducing crime and anti-social behaviour

Performance measurement

9. *On PSA 1 (sub measure 2), what is DCA doing to support the six Criminal Justice areas which are underperforming to ensure the target is achieved in the required timescales? What are the six areas and how far was their performance below baseline in 2004–05?*

DCA is working with partners across the Criminal Justice agencies, through the Office for Criminal Justice Reform (OCJR) principally, to manage performance, and will work with areas which are underperforming.

At the time of the Annual Report's publication, the six areas below baseline were Durham, Dyfed Powys, Gloucestershire, Gwent, Northumbria and West Midlands. That was based on published data for the twelve months ending December 2004. Dyfed Powys performance has since improved above baseline but Northamptonshire's has declined to below baseline. (Unlike the other areas, Northamptonshire's 2005–06 Offences Brought to Justice (OBTJ) target is above its 2001–02 baseline level.)

We have therefore included information on Northamptonshire in the table below which states the latest figures.

CJS Area	*Baseline year, 2001–02*	*Year ending March 2005*	*% change comparing 2004–05 with 2001–02*	*OBTJ targets, 2005–06*
Durham	13,592	12,684	−6.7%	10,715
Dyfed Powys	11,068	11,155	0.8%	10,092
Gloucestershire	13,031	12,191	−6.4%	11,458
Gwent	17,253	14,429	−16.4%	15,438
Northamptonshire	13,021	12,790	−1.8%	14,840
Northumbria	40,525	37,913	−6.4%	37,151
West Midlands	77,332	66,985	−13.4%	69,670

Local targets were agreed with the National Criminal Justice Board who set a methodology taking into account a range of factors. The methodology requires all areas to improve the following key elements of existing performance:

— sanction detections (defined as recorded offences where an offender has been: cautioned—including reprimands and final warnings—given a formal warning for the possession of cannabis, issued with a penalty notice for disorder, charged, reported for summons or asked for an offence to be taken into consideration); and

— converting sanction detentions into offences brought to justice.

In the table above a number of the targets for 2005–06 are set below the baseline year. Principally there are two reasons behind this. In some large Metropolitan areas eg the West Midlands, success in reducing crime has impacted on their ability to bring more offences to justice in terms of absolute numbers. Also, in some areas existing sanction detection rates were already among the highest in the country, and smaller increases in sanction detection rates were therefore required by the methodology. This was reflected in the local area targets that were set.

Since the year ending September 2001, there has been an almost continuous improvement in the number of offences brought to justice and the overall performance is above the planned trajectory. 1.151 million offences were brought to justice in the year ending March 2005, 14.9% above the baseline level.

The steps taken to improve the areas are as follows:

— Local area performance is reviewed regularly and, where appropriate, direct support is given to areas through a network of OCJR Performance Advisers.

— The advisers work closely with the Local Criminal Justice Boards (LCJBs), monitoring performance, spreading good practice and identifying blockages and ways through them.

— Specific examples include analysis of OBTJ trends and data issues, support to LCJB performance groups, assistance in the development of action plans and the implementation of new performance management frameworks, and checkpoint reviews to assess delivery against targets.

10. *On PSA 1 (sub measure 4), why has this measure been assessed as "on course" when in fact it has been achieved or is ahead of requirement? What internal measures have the Department set to ensure continuing improvement is achieved?*

The PSA 1 (sub measure 4—a reduction in the proportion of ineffective trials) has been assessed as on course as current performance in both the Crown Court and the magistrates' courts is currently the best to date but there is always the chance of a decline before year end. However, it is anticipated that by then we will have achieved or exceeded the target. A number of cross-CJS initiatives have been developed which have had a positive effect upon the ineffective trial rate in both the magistrates' courts and the Crown Court. Examples of the cross-CJS initiatives include: Criminal Case Management; Effective Trial Management Programme; No Witness No Justice; and Xhibit. Internal performance managers look at a range of performance to ensure balanced achievements are sought across the board.

11. *On PSA 2 (sub measures 1 and 2), two measures have been assessed as ahead; what internal measures have the Department set to ensure continued improvements?*

DCA is involved in the Criminal Justice System (CJS) wide structure for ensuring (as far as possible) the delivery of this cross CJS PSA target. In addition the Department has established its own delivery structure which includes performance monitoring and regular reports to the Departmental Management Board.

In particular, the Department will:

— continue to build on our achievements with victims and witnesses. We are improving witness facilities in criminal courts. There will be separate waiting areas for witnesses in all Crown Courts and 90% of magistrates' courts by 2008. During 2004–05 we successfully completed a programme to provide additional videolinks for vulnerable and intimidated witnesses The department therefore met, one year ahead of schedule, its target of providing 75% of magistrates' courts with videolinks, by 2006. We will take forward the recently launched victim's advocate consultation with its proposals for victims of murder and manslaughter to have a voice in court;

— improve confidence in community based justice through the Supporting Magistrates to Provide Justice Programme. We will publish a white paper shortly. In addition the North Liverpool Community Justice Centre started hearing cases last December and a second Community Justice Initiative is being developed and will be based in Salford Magistrates' Court from the end of 2005;

— continue with the work to ensure compliance with and respect for court orders through the new National Enforcement Service (NES). The NES will focus on the hardcore of offenders and will be a distinct body with high community visibility and a standard collaborative approach to enforcement;

— carry through major changes contained in the Courts Act 2003 for tackling people who do not pay their fines. We will provide incentives for defaulters to stay in touch, and make it easier for the court to trace and deal with refusals to pay. The new enforcement framework has harsher penalties for those who have the means and will not pay. These include clamping of vehicles and credit blacklisting;

— take forward wider information sharing measures. All magistrates' courts enforcement teams have recently gained access to the Department for Work and Pensions' Customer Information System database and also the Police National Computer to help them make risk assessments and trace missing defaulters;

— establish pilots of dedicated drugs courts at 2 magistrates' courts in Leeds and West London by December 2005;

— continue to work to increase the diversity of the judiciary through the Magistrates National Recruitment Strategy and implementing the proposals in the paper published last year *Increasing the Diversity in the Judiciary*;

— implement our Customer Service Strategy to ensure we support our courts in delivering customer service excellence including on Charter Mark accreditation in 2008–09 and establishing a new HMCS courts charter; and

— play a key role at a local level with the 42 Local Criminal Justice Boards where the courts are involved in engaging with a wide range of communities, particularly Black and Minority Groups.

Strategic priority 2: speeding up Asylum and Immigration Appeals

Performance measurement

12. *The DAR refers to the revision of PSA 5 (measure 1). Has the revised target been agreed? If not, will this be done?*

Measure 1: Fast turnaround of manifestly unfounded cases

The revised target has been agreed and published in the revised Technical Notes on 27 July 2005. The revised target is for 75% of detained Non-Suspensive Appeal cases to be removed within 28 days.

This element of the target was agreed when the policy was in its infancy. While the process has been successful, the target proved to be unrealistic. The need to review this target was recognised in the Technical Notes and accordingly, the Home Office announced in their Autumn Performance Report 2004 that they were reviewing it. The Technical Notes underpin the Public Service Agreement (PSA) and give more information on how the high level targets will be met.

Please note that the correct assessment for this measure is "under review". As this element of the target is a Home Office measure, we consulted our colleagues in the Home Office in responding to this question.

13. *The DCA has assessed PSA 5 (measure 2) as "on course", while the Home Office (which shares this PSA) reports it as "achieved". Performance against this target has declined over the last year. Why has this happened; and what plans does the Department have to support the performance improvements in 2005–06?*

Measure 2: Number of substantive asylum applications decided within two months

Assessment

The correct assessment for this measure is "achieved". This element of the target is a Home Office measure.

Officials in the two Departments had been working together throughout the drafting of their Annual Reports but unfortunately, late changes in the assessment of some of the Home Office measures had not been picked up.

Officials in both Departments are seeking to review the mechanism currently in place, to avoid such errors from happening again. DCA and Home Office have always worked very closely in managing this joint PSA target.

Performance

As this element of the target is a Home Office measure, we consulted our colleagues in the Home Office in responding to this question.

The Home Office and the DCA set out in their Annual Reports performance against this target as: 75% for 2002–03, 82% for 2003–04 and 77% for October to December 2004. The PSA target was to hit 75% by 2003–04 and this has therefore been achieved.

Figures published[12] on 23 August report performance of 80% for 2004–05. The publication also includes a slightly amended figure of 81% for 2003–04.

We regard the figures for 2003–04 (81%) and for 2004–05 (80%) to be similar rather than representing a decline in performance.

14. *PSA 5 (measure 3) shows reduced performance over the last year. What evidence is there to demonstrate that the DCA has reallocated resources to address workload issues which have impacted on performance?*

Measure 3: Number of substantive asylum applications, including final appeal, decided in six months

2004–05: Target 65%

Provisional data shows year to date performance for this measure has improved significantly since the publication of the Departmental Report in June 2005.

DCA has chosen not to reallocate resources to address workload issues, as major structural and process changes, with the introduction of the new Asylum and Immigration Tribunal (AIT) on the 4 April 2005, have provided the levers for improved performance.

The AIT replaced the previous two-tiered appeals system, reducing the potential for delay and abuse in the system.

The Procedure Rules for the AIT set out the timescales for the hearing and determination of asylum appeals, and allow for the personal service of all such decisions by the Home Office. These are significantly shorter timescales than seen previously—underpinning improved PSA performance—and in the longer term this faster appeals system will assist as a deterrent to unfounded applications.

Given the nature of the six month target, and the elapsed time necessary to report on performance, full year figures will not be available until October 2005. Provisional year-to-date figures indicate delivery is now on course.

15. *Performance on PSA 5 (measure 4) is reported as "on course". The Home Office DAR 2005*[13] *however reports performance as "slippage expected". Why is the performance rating different between the two Departments?*

Measure 4: Enforcing the immigration laws more effectively by removing a greater proportion of failed asylum seekers

The correct assessment for this measure is "slippage". This element of the target is a Home Office measure.

As with question 13—PSA 5 (Measure 2)—officials in the two Departments were liaising but, unfortunately, late changes had not been picked up. We are working to avoid a repeat of such errors.

Strategic Priority 3: Protecting the Vulnerable

Performance measurement

16. *PSA 6 & PSA 4 (supporting measures 7 and 8) are both assessed as showing slippage. For PSA 4 work volumes are given as a reason for failing performance. Can DCA demonstrate they have reallocated resources to support increased workloads? What other support has DCA provided to help improve performance? On PSA 6, please provide details of the measures implemented or planned for 2005–06 to ensure the target is achieved?*

SR02 PSA target 4

Performance outturn for 2004–05 for supporting indicators 7 (Public Law cases dealt with in 40 weeks) and 8 (adoption cases dealt with in 20 weeks) was below target at 41% and 64% respectively. However, this was a significant improvement on 2003–04 performance outturn. Both Public Law and Adoptions have complex delivery chains—the performance achieved reflects the success of all the agencies involved in tackling unnecessary delay.

[12] Asylum Statistics 2004 published on 23 August 2005 http://uk.sitestat.com/homeoffice/homeoffice/s?rds.hosb1305pdf&ns_type=pdf&ns_url=%5Bhttp://www.homeoffice.gov.uk/rds/pdfs05/hosb1305.pdf%5D

[13] Home Office Department Report 2005 (CM6528) p 13.

The work on supporting indicator 7 underpins the work on SR04 PSA4. In order to continue the drive to reduce unnecessary delay in Public Law Care cases, an inter-agency plan is being implemented. Delivery is overseen by the SR04 PSA 4 Programme Board, which includes representatives from the judiciary and all key family justice organisations. A number of activities are being taken forward to tackle delay in these cases. These include the piloting of case progression officers, extending the jurisdictions of District Judges, providing specialist legal advisers and reviewing the use of expert witnesses. Taken together, it is expected that these and other measures will see an improvement in the number of cases being heard within 40 weeks.

The detailed utilisation of judicial sitting days is the responsibility of the Regional and Area Directors who retain an element of autonomy, However, the Secretary of State and Lord Chancellor has already announced plans to broaden the types of judiciary who are authorised to hear care cases. This, along with ongoing work to achieve greater flexibility in listing and court arrangements, will provide further opportunity for optimising the efficient disposal of family work.

The establishment of the Family Justice Council in July last year and the ongoing work to establish Local Family Justice Councils in the 42 HMCS areas, will be pivotal in promoting inter-disciplinary working and securing yet further improvement in the Family Justice System. Reducing delay is one of their key priorities in their first year.

For supporting SR02 PSA4 target 8 (Adoptions) reported performance reflects the aggregate of both placement adoptions and significant levels of private (step-parent) adoptions. HMCS Performance Directorate is leading on co-ordinating activity with Family Operations and Performance Managers to deliver this during 2005–06. The final element of the Adoption and Children Act will be implemented in December 2005, which should further facilitate performance improvement.

PSA target 6

The PSA6 target was agreed under SR02 and followed on from an earlier SR2000 target. It specified that a 10% increase in the numbers of people recorded in a sample as having received advice should be obtained, so as to give a reasonable statistical certainty that nationwide an increase in this number had actually occurred. It is now virtually impossible that this increase will be attained, since surveys in 2004 suggested a fall in the sample numbers. The reason for this fall is that there has been a much larger fall in the numbers of people recorded as encountering problems. The proportion of problems encountered that are resolved through advice has increased significantly.

About half the advice received is through work directly funded by the Legal Services Commission; the rest is delivered by the voluntary and private sectors. The fall observed affected both LSC funded and other advice. LSC are making determined efforts to restore the volume of advice received (as measured by "new matter starts") to the level pertaining at the start of the SR02 period during 2005/06 and are funded to do so; initial monitoring suggests this is broadly on course. If this continues and is matched by the other providers, then by 2006 the number of people measured as receiving advice could be broadly maintained compared to the start of the SR02 period. In the context of a falling number of problems encountered, a further increase in the proportion of such problems resolved through advice could be seen. But a 10% increase in the recorded numbers of people receiving advice is an improbable outcome.

We are not revising this target as we regard it as overtaken by Target (1) of SR04 PSA5.

Mental Capacity—Mental Capacity Act (April 2005)

17. *A recent National Audit Office report*[14] *on Public Guardian Office states,*

> *The PGO has a number of new challenges, such as the implementation of the Mental Capacity Act 2005 . . . The Department for Constitutional Affairs needs to continue to support the PGO to prepare itself—to ensure that it has the right skills, the right resources and the necessary infrastructure.*

(a) Why was PGOs estimates expenditure in 2004–05 so low?

The effect of centralising DCA Corporate Services (HR, Facilities, IT) removed funding from PGO to the central shared services. The appropriate cost of the shared services is notionally recharged back to PGO and fully recognised in the annual accounts for 2004–05.

(b) Can DCA explain how it is supporting PGO with the implementation of the Mental Capacity Act?

The Mental Capacity Act received Royal Assent on 7 April 2005. Since then the Department has constituted the Mental Capacity Implementation Programme (MCIP) to oversee implementation of the Act in partnership with the Department of Health. The role of the programme is to establish, design and implement the organisation, processes, procedures and structures that will enable the delivery of the new framework for those that lack capacity that the Act sets out.

[14] *Public Guardianship Office (Protecting and Promoting the Financial Affairs of People Who Lose Mental Capacity*, (HC27), June 2005.

A major project within the MCIP is the transformation of the Public Guardianship Office into the Office of the Public Guardian project (OPG). The OPG will have wider responsibilities than the PGO for example on welfare issues. DCA and the PGO are working together to manage the transition of the PGO to the new OPG, ensuring it is developed consistently with changes to the Court of Protection, the necessary development of policy and legislation, and incorporating the Department of Health led changes.

Specific support includes providing project management, planning, policy input and legal advice. DCA is also responsible for the recruitment and appointment of the new Public Guardian and has set aside specific funding for implementation costs.

The PGO is represented on the Programme Board that oversees the MCIP.

Strategic Priority 4: Faster and More Effective Dispute Resolution

Performance management

18. *PSA 3 (sub measure 1 and 4) has been assessed as "slippage" due to increased workloads. Given that the purpose of targets is to measure a Department's performance improvements, including how issues such as increased workloads are managed, please explain how DCA supported performance on this target?*

Sub measure 1

Sub-measure 1 is a proxy target based on decreasing the level of claims issued through the court system. The target covers the totality of claims issued, of which 90% relate to unpaid debt. These claims generally do not need a court hearing, as they are undefended.

We set the measure based on the assumption that a significant proportion of debt claims being issued through the courts might more appropriately be dealt with by other means. We planned to introduce a package of reforms to ensure that only appropriate debt claims were issued through the court system.

However, consultation on these reforms allowed us to significantly increase our understanding about the sort of cases coming to court. We realised that most credit sector organisations had already put in place filtering systems to ensure that, as far as possible, only those debtors able to pay were being taken to court. The programme was, therefore, re-scoped with a focus on improving the effectiveness of the credit sector filtering mechanisms. Likely implementation dates of the reforms are now beyond the SR2002 period. A paper setting out the latest position on the Department's Debt Programme was published in March 2005 and can be made available to the Select Committee if required.

There has also been a change in the type of organisations using the civil courts. DVLA now use the courts to recover fixed penalties for non-payment of road tax. These claims amount to over 200,000 actions a year. Other Government Departments and Agencies are also increasingly using the court process, as it is an effective method of recovering debts from people that have the ability to pay, but are refusing to do so. Likewise, the Water Industry have started to use the court system again as their attempts to resolve problem debts by alternative methods were ineffective.

In the light of our better understanding of our customers, and changes in the type of organisation that want to use the courts, we do not consider that is now possible to achieve this sub-measure. We have not, therefore, carried this measure forward as a target in SR2004.

Sub measure 4

Performance against sub-measure 4 (the family element of this target) has been supported by two major initiatives: a leafleting pilot in the courts to promote family mediation; and a substantial extension of the in-court conciliation schemes operated by CAFCASS officers in some courts. The latter has had the clearer and more sustained positive impact on the target for agreed orders in child contact cases.

A bigger than anticipated increase in child contact applications has produced the unusual statistical outcome that we are meeting the separate targets for consent orders in ancillary relief and agreed child contact orders but failing to meet the combined target by a narrow margin. A data quality issue was identified with court staff incorrectly inputting data. This has had the effect of understating the true performance level. The data issue has now been corrected, and performance has improved over the last few months. We are currently analysing the data to establish how far these improvements can be credited to policy initiatives rather than the change our data collection methods. Once we have this analysis we will plan what we need to do to support performance on this target.

19. *PSA 4 has a measure with regard to customer satisfaction on resolution of complaints. In 2004–05 performance is below target and has declined since 2003–04. What is the Department doing actively to increase the return rates for their customer satisfaction survey? How is the Department engaging with customers in this area to help formulate appropriate actions to improve performance?*

The survey is a postal survey of randomly selected court users. In 2003–04 15% of those that received a questionnaire completed and returned it. In 2004–05 this increased to a 20% response rate. The advice from ORC International (the independent company that manages the customer survey on our behalf) is that the response rate is now fully in line with what should be expected for a survey of this nature.

4% of those that did complete and return a questionnaire told us they had made a complaint and answered questions relating to their perception of how the complaint was handled. This should be seen as a positive indicator on the overall service we offer to users of the courts. However, it does make it difficult to draw statistically meaningful conclusions from such a small sample. We are currently developing a new survey that will run from April 2006, which is outside of the SR2002 PSA period. This work will include looking at ways to capture more robust feedback from this specific user group.

We do take any complaint seriously and since 2003 a range of initiatives have been implemented to improve the complaints handling process. These include:

- the introduction of new compulsory customer service training courses, emphasising complaints handling;
- national roll-out of new complaints handling guidance;
- performance in this area forming part of field managers' performance reviews; and
- the introduction of a new national complaints analysis system.

Additional research carried out during 2004-05 by ORC International established that case outcomes and judicial issues heavily influence the responses in the survey and respondents allow this to affect their perception of satisfaction with the administrative process. For example, some customers explained that their "complaint" was that the judge in their case found against them.

In 2005–06 we will be introducing additional guidance for customers to try and help them focus on their customer experience(s) with the court administration. However, overcoming these perception issues and successfully translating improvements in the complaints handling process into improved customer satisfaction in order to deliver the staged target measure will continue to be a significant challenge.

Strategic Priority 5: Strengthening Democracy, Rights and Responsibilities

Performance measurement

20. *The DCA document Delivering Justice, Rights and Democracy—DCA Strategy 2004–09* (p 63) states that for the strategic priority strengthening democracy and rights a "shadow target for the SR2004 period is to be developed". Has the target been agreed? What is it? What does the Department mean by a "shadow" target? Why could this target not be set at the same time as the other SR2004 targets?

The Department for Constitutional Affairs was created in 2003. Although the new Department inherited established responsibilities for the administration of justice and publicly funded legal services from the Lord Chancellor's Department, its responsibilities for delivering the public's civil and political rights were largely new. It was not possible for the Department to articulate reliable PSA targets to measure performance in relation to its new constitutional responsibilities in time for the SR04 exercise. We therefore decided to focus on internal targets only.

In preparation for the next Public Spending Review, the Department is developing internal/shadow PSA targets. These will be targets which can be set and monitored as if they were part of the Department's Public Service Agreement, but they will only be monitored internally, rather than by the Treasury. By evaluating performance against the shadow targets, the Department will be able to reach a considered view on the practicality of setting measurable targets in this area. The three targets under examination cover respect for human rights; the way people can effectively exercise their information access rights; and strengthening engagement with the democratic process.

Supreme Court location

21. *Please describe the formal appraisal process used to determine that Middlesex Guildhall was the preferred site for the Supreme Court? What alternative options were considered, and why were they discounted in favour of Middlesex Guildhall?*

In autumn 2003, professional agents were commissioned to conduct an extensive search for properties. This search was made, on the basis of a schedule of requirements agreed with Lord Bingham, the Senior Law Lord.

Their search involved:

— undertaking a review of the DCA estate in London;
— evaluating suitable properties on the Greater London Magistrates' Court Authority (GLMCA) estate;
— engaging with the Office of Government Commerce (OGC);
— working with colleagues across Government to identify suitable buildings; and
— reviewing current commercially available property (within 1 mile of Charing Cross).

This initial search generated a long-list of 48 properties, only a few of which, after closer scrutiny against a number of criteria (size, operational efficiency, adaptability, suitability), merited further consideration. A further exercise was therefore commissioned, this time extending the net wider across London and asking the agents to explore the potential for new build sites. The agents could not locate any private sector sites for development, reflecting the state of the central London office market at the time.

The short listed properties were subject to a qualitative analysis of their relative merits and disadvantages and assessed against the following criteria: suitability; deliverability; prestige and location; and cost. Each of these criteria attracted 25% of the overall markings. A full HM Treasury style Green Book appraisal was produced in which value for money and affordability of each option was produced in order to assist the evaluation. The evaluation process included a presentation to the Law Lords on each of the options under consideration.

The result of the evaluation process was that the shortlist was further reduced to three refurbishment options. These were a commercially owned property that could be refurbished to meet the requirements, Middlesex Guildhall (DCA owned) and the New Wing, Somerset House. Following further consultation with key stakeholders (including the Law Lords, English Heritage and Westminster City Council), the options were reduced to two, with the commercial property being removed as the least desirable of the three options as against the selection criteria.

Why was Middlesex Guildhall selected?

In December 2004, the Secretary of State announced that Middlesex Guildhall was the preferred location for the Supreme Court and gave three key reasons for his decision:

— the Guildhall is able to provide all the key design requirements of a modern Supreme Court and therefore represents a significant improvement on the Law Lords' current accommodation;
— it would deliver this much-improved accommodation at a reasonable cost, demonstrating good value for money; and
— the location of the Guildhall on Parliament Square will mean that the judiciary, the legislature, the executive and the Church are each represented on the four sides of the Square enhancing its position at the heart of our capital.

Middlesex Guildhall will allow for larger hearing rooms; improved infrastructure, including better IT and an education suite; and accommodation for research assistants and secretarial support. The Guildhall will also allow for the provision of a high quality law library. The court will also enable improved public accessibility.

Diverse judiciary

22. *DAR 2005 (p 158) states that 17 investigations were finalised in 2004-05 and: "In seven of these cases the Commissioner identified concerns that prompted them to suggest at least that the DCA apologise to the complainant."*

Given that targets are set across the public sector to monitor gender and ethnicity, why are no targets set for Judicial appointments?

Targets are not set for appointment to the professional judiciary as appointments must be based solely on professional merit regardless of ethnicity or gender. Setting a target might lead to a suggestion that individuals from under-represented groups had been appointed in order to meet a target, rather than on merit alone, which would undermine public confidence and the professional position of those individuals.

The Constitutional Reform Act 2005 establishes the Judicial Appointments Commission, which will be responsible for selecting individuals for recommendation for appointment to the judiciary from April 2006. It will have a statutory obligation to encourage diversity in the range of persons available for selection for appointment within the context of selection being solely on merit. It will be for the JAC to determine how best to encourage applications from a more diverse range of applicants.

Judicial appointments differ from other types of public appointment because the pool from which applicants are drawn is not the population at large, but barristers and solicitors in practice more than seven years and in reality for significantly longer. The proportion of women and those from BME communities

in this pool does not reflect that in the general population. As part of the DCA's Judicial Diversity Programme, some work is in train to examine the nature of the eligible pool and its diversity, but is at an early stage. This work is not designed to allow targets to be set, but to inform the Department's work on encouraging individuals from under-represented groups to apply.

Our objectives take account of the fact that over time as the number of women and minority ethnic people entering the legal profession increase, more of them, on merit, should enter the judiciary if they are applying in proportion to their presence in the eligible pool.

23. *The table on page 98 of the DAR 2005 is most useful in setting out the gender and ethnic diversity of judicial officers. If the same data is available for March 2004 could you provide it to the Committee?*

A table showing the data for March 2004

Position	*Total*	*Gender*		*Ethnicity*						
		M	*F*	*White*	*Mixed*	*Asian*	*Black*	*Chinese*	*Other*	*Unknown*
Lord of Appeal in Ordinary	12	11	1	9	0	0	0	0	0	3
Heads of Division (excluding the Lord Chancellor)4	4	3	1	4	0	0	0	0	0	0
Lord Justice of Appeal	37	35	2	35	0	0	0	0	0	2
High Court Judge	106	98	8	97	0	0	0	0	0	9
Circuit Judge	611	551	60	563	0	3	1	0	5	39
Recorder	1,419	1,232	187	1,317	8	20	18	0	19	37
District Judges (including Family Division)	434	352	82	384	3	8	0	0	6	33
Deputy District Judges (including Family Division)	801	619	182	738	6	6	5	0	6	40
District Judge (Magistrates' Court)	106	85	21	103	1	1	0	0	1	0
Deputy District Judge (Magistrates' Court)	174	135	39	158	0	7	4	1	3	1
Total	3,704	3,121	583	3,408	18	45	28	1	40	164
% of Total	100	84.3	15.7	92.0	0.5	1.2	0.8	0.02	1.1	4.4

Delivering for the Public

Full Cost Recovery

24. *Would DCA indicate the following for the Court Service (civil business) and the Public Guardianship Office:*

(a) The projected income in 2005–06:

HMCS/Court Service

Projected Fee income (based upon current fee levels) for 2005–06 is as follows:

Court	*Net of Remissions and Exemptions £ m*
Supreme	24.1
County	289.9
Family	44.5
Probate	17.3
Insolvency	11.1
Magistrates'[15]	4.6
Total	391.5

Public Guardianship Office

Gross fee income for 2005–06 is predicted to be £16.1 million.

[15] It is possible that not all Magistrates' Courts Income will be Appropriated in Aid.

(b) Income and full costs for 2004–05. (Based on the latest outturn figures); and

HMCS/Court Service

Income *v* full cost by Court 2004–05:

2004–05	*Total Fee Income (net of Fees Exemption and Remission and family subsidy)—£m*	*Full Cost £m*	*Shortfall £m*
Supreme Court	17.2	59.7	42.5
County Courts	263.1	228.2	−34.9
Combined Civil Courts	280.3	287.9	7.6
Family	39.6	136.5	96.9
Insolvency	8.7	14.5	5.8
Probate	19.7	13.0	−6.7
Total	433.5	534.4	100.9

Public Guardianship Office

The figures contained in the table below are based on the latest outturn figures.

	£000
Operating Income	14,738
Fees Remitted	1,401
Total Income	16,139
Net Expenditure	19,924
Operational Deficit	3,785
Cost Recovery	81%
Reported Deficit	
Operational Deficit	3,785
Fees Remitted	1,401
Mental Capacity Costs	169
Receivership of Last Resort Subsidy	132
Annual Accounts Deficit	5,487

(c) Workload statistics for income generating activity for 2003-04, 2004-05 and projected levels for 2005–06.

HMCS/Court Service

The volumes for the 10 biggest revenue-generating activities (which account for approximately 85% of total fee income) are as follows:

	Fee Type	*2003–04*	*2004–05*	*2005–06 Projected*
Civil County Court	Commencement of Proceedings (money and non-money)	1,313,298	1,441,635	1,567,000
	General and other Applications	852,382	843,907	842,000
	Allocation to Track	180,494	172,367	172,000
	Warrants of Execution	336,706	307,947	342,000
	Warrants of Delivery and Possession	124,112	120,991	129,000
Civil Supreme Court	Commencement of Proceedings (money and non-money)	25,038	24,994	19,000
Family	Divorce Petitions	173,721	160,735	154,000
	Children Act Applications	103,085	99,255	97,000
Insolvency (County)	Bankruptcy Petitions	26,291	35,511	44,000
Probate	Application for Grant of Probate	280,581	294,712	282,000

Please note that 2005–06 projections are based on extrapolated year to date 2005–06 actual volumes.

Public Guardianship Office

The figures for caseload trends in previous financial years contained in the table below are taken directly from the PGO's annual reports. The figures for 2005–06 are predictions based on trends year to date.

Workload Units	*2003–04*	*2004–05*	*2005–6*
Appointing and Supervising Receivers	28,309	30,061	31,000
Enduring Powers of Attorney	14,624	16,285	20,850
Receivership of Last Resort	521	225	150
Total	43,454	46,571	52,000

COSTS OF TECHNOLOGY IMPROVEMENTS

25. *Although Departments are no longer required to publish an Investment Strategy has DCA updated the Department Investment Strategy since April 2003? Is so, could the Committee have a copy?*

DCA produced an internal draft DIS in 2004. However, its scope was very limited because there were ongoing discussions with the NAO regarding the accounting treatment of planned PFI deals. These discussions continue. The treatment has a direct bearing on the affordability of capital projects based upon the Settlement received by the DCA in Spending Review 2004.

The creation of HMCS, the forthcoming establishment of the new Tribunals Service and developments within the DCA HQ estate has meant the recent establishment of a National Property Board to ensure that the investment strategy is comprehensive and joined up.

Currently, HMCS is developing a model to plan the future for their estate, building upon the existing HMCS Estates' Strategy. The modelling tool, when completed, will enable a comprehensive Estates' Strategy, which will mesh with the HMCS Business Strategy.

The overall Investment Strategy for DCA has yet to be finalised. The work of the NPB over coming months will inform the overall IS which will then be taken forward as necessary.

Once finalised we will send a copy of the DIS to the Committee.

26. *For each of the new IT systems developed under the Court Modernisation Programme, would DCA provide: (a) A breakdown of the resource and capital expenditure from 2004–05 to 2007–08; and (b) The anticipated savings*

Expenditure on the Court and Tribunals Modernisation Programme (CTMP) in 2004–05 and 2004–06 equates to:

— 2004–05: £55.2 million capital and £55.5 million resource; and

— 2005–06: £21.5 million capital and £74.3 million resource.

It is not possible to break down this expenditure between particular systems.

The main focus of investment in the CTMP to date, has been the deployment of a modern IT infrastructure, incorporating secure networked desktop computers. In itself, that infrastructure provides a range of services including the capacity for court to transact with court users and partner justice organisations. Having deployed that infrastructure, the focus going forward is now to implement applications that can run over it and so deliver beneficial business reforms, for example, the XHIBIT initiative, the Money Claim OnLine service and video links to prisons and for Vulnerable and Intimidated Witnesses.

By way of context, the largest part of the capital investment relates not to IT equipment but to the enabling works needed before IT equipment can be implemented, including power, lighting, ducting and so on. These costs are proportionately high because of the nature of the court estate, much of which pre dates IT and is specialist in nature. The resource expenditure figures include capital charges (cost of capital and depreciation) arising from the capital investment.

CTMP comes to an end in March 2006. After that point, investment going forward, and so benefits delivered, is subject to a number of factors:

— the Development, Innovation and Support Contracts (DISC) Programme. This programme is recompeting and rationalising IT contracts on a DCA wide basis, so incorporating all of the IT services currently provided through the current contracts, including those delivered through CTMP (http://www.dca.gov.uk/procurement/contracts/it.htm). The Official Journal of the European Union (OJEU) notice has been issued and the commercial process has begun with suppliers. Contracts are due to be awarded in spring next year. Existing IT service provision, including those services provided currently as part of CTMP, will cut over to the new DISC contracts as existing contracts reach their end date. As the DCA's Efficiency technical note states

(http://www.dca.gov.uk/dept/technote.pdf), we are expecting reductions in the cost of ongoing IT services through this re-competition process. However, we cannot yet know the actual level of ongoing IT service charges until the Best and Final Offer stage of the procurement;

— a significant part of the CTMP programme relates to the Crown Court and so forms part of the wider Criminal Justice System (CJS) IT Programme, which has CJS wide governance structures. This is in recognition of the point that investment in one part of the CJS (eg the courts) often generates greatest benefits in other parts of the system, for example in the provision of electronic court results to the police. This investment programme is underpinned by a cross-departmental CJS IT Joint Budget. The programme as a whole, including decisions as to what should be invested in which Criminal Justice Organisation and when, is governed by the cross CJS structures. This decision making is a continual process and results in evolution as to what will be delivered when and so what benefits will accrue and when;

— the other parts of CTMP relates to non-criminal jurisdictions. Here there are decision making structures within the DCA to prioritise what will be delivered and when, incorporating not only IT investment but all investment across the DCA. Again, this prioritisation is on a rolling basis and so the work programme will evolve over time; and

— related to the above decision making are commercial negotiations with existing suppliers, where the agreed investment priorities mean the DCA needs to negotiate changes or additions to original contracts. Such changes will, in the majority of cases, affect future payment profiles to IT suppliers and so overall spend.

27. *What element of the £50 million savings shown in Annex B of the DCA Efficiency Technical Note is dependent on these new systems?*

Currently £3 million of the £50 million savings shown in Annex B (Cross CJS efficiency gains) of the DCA Efficiency Technical Note is dependent on these new systems. The £3 million will be delivered following implementation of the Xhibit system.

Efficiency

Performance management

28. *PSA 7 is assessed as "on course". Please provide details of the activity which has delivered the £96 million savings in the Criminal Justice System and £136 million savings in DCA? In providing this detail please clearly distinguish between new efficiency activity in 2004–05 and activity implemented in earlier financial years.*

The figures "£96 million savings in the Criminal Justice System (CJS) and £136 million savings in DCA" in the question are taken from the DCA Departmental Report 2004–05 and were correct at the time of going to print. However savings in 2004–05 were actually £133 million against the CJS target and £223 million against the DCA target.

The target over the full three year SR02 period 2003–04—2006–07 is £171 million for CJS and £210 million for the DCA. The CJS target includes savings from the Complex Crime Unit (CCU), Other Criminal Justice Savings and savings from Fines, whereas the DCA target also includes savings from Asylum and Other Civil Savings and excludes Fines.

There are no year on year targets but the 2004–05 savings exceed our second year planned projections for both targets. The only relevant measure of success however is the amount of savings generated over the full period.

Savings against the DCA target resulted mainly from reforms to the asylum and immigration legal aid process which were expected to be significant but, coupled with a high fall off in numbers of asylum seekers generally, have greatly exceeded original expectations.

The main area for savings against the CJS target Very High Cost Cases (VHCC being handled by the CCU) did not progress as expected. Savings from Fines, the other area of this target were not thought to be sufficient to make up for the shortfall and further criminal legal aid savings were undertaken mid term to guard against possible shortfall.

The two targets are not mutually exclusive. The DCA contributes to trilateral joint working arrangements with the Home Office and CPS on the Criminal Justice System and asylum issues. For example, Criminal Justice efficiency savings will score for both. Asylum savings will qualify for the DCA target only.

Details of the areas of savings for the two targets which go to make up PSA7 are in the tables below.

CJS PSA 7 Target

Area of savings	*2003–04 (Actual) £m*	*2004–05 (Actual) £m*	*2005–06 (Projected) £m*
Complex Crime Unit—handling Very High Cost Cases	27	74	114
Other Criminal Justice Legal Aid Savings	1	26	51
Fines	11	33	49
CJS PSA 7 Total Savings	39	133	214
CJS PSA 7 Target	57	114	171

DCA PSA 7 Target

Area of savings	*2003–04 (Actual) £m*	*2004–05 (Actual) £m*	*2005–06 (Projected) £m*
Complex Crime Unit—handling Very High Cost Cases	27	74	114
Asylum	0	123	275
Other Criminal Justice Legal Aid Savings	1	26	51
Other Civil Legal Aid Savings	0	0	8
DCA PSA 7 Total Savings	28	223	448
DCA PSA 7 Target	70	140	210

Estate management

29. *Why have only 17 out of 30 estate integration opportunities been identified under PSA 4? What plans does the Department have to ensure the measure is achieved by April 2006?*

The SR02 PSA 4 target requires at least 30 opportunities for county courts to share accommodation used by magistrates' courts to be realised by April 2006. Our PSA delivery plan, which was agreed with HM Treasury, planned to realise 10 opportunities during 2003–04, seven during 2004–05, with the remaining 13 being achieved between April 2005 and the end of April 2006. The creation of the new Agency on 1st April 2005 unified management of the joint court estate. We therefore expect the last year of SR02 to be one in which we can actually increase the opportunities we will be able to realise. The SR02 PSA 4 Programme Board, on which HM Treasury are represented, is monitoring progress and we remain on course to deliver this supporting indicator.

30. *Are any elements of the savings shown for HMCS and Procurement efficiencies, as detailed in the DCA Efficiency Technical Note for SR2004, dependent on the 30 estate integrations under the current PSA 4 being achieved? If not, how many additional integration opportunities are being considered?*

Yes, some of the running cost savings relate to the 17 integration opportunities that have been delivered to date under PSA 4 (see answer to question 29) and the 13 further opportunities to be realised by April 2006. Thereafter, HMCS Estates will continue to consider a further 30+ opportunities to integrate courts and produce further savings.

Legal Services Commission

31. *In April 2004 DCA published "The Independent Review of the Community Legal Service (CLS)". One of the recommendations was for:*

DCA to undertake more robust legislative impact analysis and seek an undertaking from either the Treasury or other government departments that the DCA budget will increase by the amount necessary to meet increased demand due to new legislation.

Has the DCA implemented this recommendation? What improvements have been made to the legislative impact analysis process?

The DCA is ensuring that a more robust impact analysis of proposed policy changes is undertaken by all Government Departments by arranging to have a legal aid impact test added to the Regulatory Impact Assessment (RIA) process.

The legal aid impact test will help facilitate discussion and negotiation between DCA and policy makers in other Government Departments at an early stage. This will give DCA an opportunity to suggest alternatives to regulation or, where appropriate, suitable commitments from other Departments to meet any new, additional cost to the legal aid fund. The inclusion of a legal aid impact assessment in the RIA process will help make other Departments aware of the importance of fully understanding and budgeting for the full impact and cost of their new policies.

DCA is asking the Cabinet Office to update its RIA website guidance to reflect the inclusion of the legal aid impact test in the RIA process. This will be electronically linked to further guidance on the DCA website, which will help policy officials in other Government Departments to establish whether there may be an impact on legal aid arising from their policy proposal. This guidance, which includes the contact details of relevant policy officials in DCA is located at http://www.dca.gov.uk/legalpolicy/legalaid/public funding general.

The effectiveness of these arrangements will be reviewed in 12 months time.

HM Courts Service

31. *Table 2 of the DAR 2005 suggests a resource budget for HMCS in 2005–06 of £979 million compared to the Court Service and Magistrates' Courts Grants in 2004–05 of £408.787 million and £233.050 million respectively. Where is the additional £337.163 million coming from; and how do the costs of the two organisations prior to the merger compare to the total planned expenditure of the merged organisation for the SR2004 period?*

The figures detailed in table 2 of the Departmental Report for the years 2004–05 and 2005–06 do not reflect the latest position for Court Service/Magistrates; Courts and HMCS. The total DCA resource budget figure represents the estimated position at the time of the Report's publication (June), however, the breakdown between individual entities is not correct due to being unable to make the relevant updates to the HMT database in time.

A comparison of costs of the two organisations (Court Service/ Magistrates Courts and HMCS) pre and post merger, using August figures is as follows:

Organisation	*2004–05 Outturn (£m)*	*2005–06 Resource Budget (£m)*[16]
Court Service	403.83	403.44
Magistrates	303.78	505.51
Head Office Divisions	29.66	53.57
Total	737.27	962.52

The unification changes funded in 2005–06 mainly related to harmonising the Magistrates Courts into the central government accounting framework. The key changes to the Magistrates' costs were:

Reason	*Increase on 2004–05 (£m)*
Additional VAT[17]	15
Capital Charges[18]	73
PFI Credits[19]	20
Transfer of 20% funding from ODPM[20]	87
Reclassification of Capital Funding to Revenue[21]	22

The Head Office Divisions increase of £24 million represents the relocation of a number of DCA departments into HMCS, and therefore is not new funding.

[16] These are net allocations both of income and efficiency savings. The allocations for 2006–07 and 2007–08 have yet to be finalised.
[17] To reflect the different VAT rules that applied to Magistrates Courts before unification.
[18] Magistrates Courts did not pay these costs before unification.
[19] Transfer of 20% previously funded by Local Authorities for PFI schemes.
[20] Transfer of 20% revenue funded by Local Authorities.
[21] To reflect the different classifications of capital between local and central government.

33. *Given the potential for economies of scale from the merged organisation, why was a more taxing efficiency target above 3% not set for SR2004? Is there a higher internal target to be achieved; and, if so, what is it?*

HMCS will allow a transformation in the way courts operate. By the end of December 2005, HMCS must agree more stretching efficiency targets based on the new business model and estates strategy. These targets will be made available to the Committee.

34. *The DCA Efficiency Technical Note states a proposal for HMCS to reduce staff levels by 800 during the SR2004 period. Have these posts been identified? What per cent of the total workforce does this reflect? Have any of these staff savings been achieved already?*

The planned reduction represents 4% of the total workforce. Early indications are that staff savings of 110 full time equivalents have been achieved in the two months to May 2005. A further update will be provided in the Autumn when the position will be clearer and a profile of planned reductions available. This update will be made available to the Committee.

35. *Please provide a breakdown of the pay bill costs in table 5 to show the costs of DCA HQ, Court Service, HMCS and PGO?*

The table below shows a breakdown of DCA's pay bill within administration costs. The 2005–06 figures detailed here represent the latest budget delegations and will therefore not match the indicative figures in the Departmental Report. Allocations for 2006–07 and 2007–08 have not been made yet, therefore, the figures represented in these years are purely illustrative.

Admin Paybill (Table 5)—'000s

	2000–01	*2001–02*	*2002–03*	*2003–04*	*2004–05*	*2005–06*	*2006–07*	*2007–08*
HQ	34,182	39,146	51,481	85,224	126,395	131,639	135,747	135,747
Court Service	12,346	13,073	14,883	13,423	16,250	0	0	0
Public Trust Office (old)	14,887	0	0	0	0	0	0	0
PGO	0	9,512	9,094	8,467	9,014	9,551	11,264	11,098
HMCS	0	0	0	0	0	0	0	0
Total	61,415	61,731	75,458	107,114	151,659	141,190	147,011	146,845

The main reasons for the historic movements in administrative paybill costs are that in 2001–02, PGO split into the PTO and Courts Funds Office. In 2003–04, as part of the Departmental Change programme shared services such as HR, IT and finance were moved from Court Service to HQ. In 2004–05, Tribunals group moved from Court Service to HQ. As part of SR2004, in conjunction with the creation of HMCS, HM Treasury reclassified front line delivery staff from administrative to programme expenditure. Programme paybill and total paybill can be seen in the tables below. Figures for 2006–07 and 2007–08 reflect what is currently held on the HMT database and not detailed plans. These figures will be amended when future allocations are finalised.

Programme Paybill—'000s

	2000–01	*2001–02*	*2002–03*	*2003–04*	*2004–05*	*2005–06*	*2006–07*	*2007–08*
HQ	5,643	5,910	7,071	7,646	6,652	9,835	0	0
Court Service	174,718	185,014	210,613	204,272	181,071	0	0	0
Public Trust Office (old)	106							
PGO		0	128	155	0	0	0	0
HMCS	0	0	0	0	0	472,135	667,314	686,290
Total	180,467	190,924	217,812	212,073	187,723	481,970	667,314	686,290

Total Paybill

	2000–01	*2001–02*	*2002–03*	*2003–04*	*2004–05*	*2005–06*	*2006–07*	*2007–08*
HQ	39,825	45,056	58,552	92,870	133,047	141,474	135,747	135,747
Court Service	187,064	198,087	225,496	217,695	197,321	0	0	0
Public Trust Office (old)	14,993	0	0	0	0	0	0	0
PGO	0	9,512	9,222	8,622	9,014	9,551	11,264	11,098
HMCS	0	0	0	0	0	472,135	667,314	686,290
Total	241,882	252,655	293,270	319,187	339,382	623,160	814,325	833,135

36. *Given the relatively low target set for DCA under the Lyons Review, was any consideration given to locating HMCS Headquarters outside London? Why was it necessary for the headquarters to remain in London?*

During the design stage of HMCS, consideration was given to locating its Headquarters outside of London. The conclusion was that the agency would be highly devolved with much of the central management devolved to regional level. Regional Directors and their teams are located within regions. As a result a large proportion of the HQ function is outside London. The design work further concluded that the Chief Executive needed to be based in London, as much of his role requires stakeholder management with the senior judiciary, Home Office (Police), Criminal Justice policy, Probation, Prison and Criminal Prosecution Service, as well as with senior DCA officials and Ministers. Criminal Justice policy and delivery continues to be a top priority for Ministers and as such it was concluded necessary for the CEO to have a central team developing and implementing criminal as well as civil and family justice policy changes. These teams needed to be located with the CEO in London to have access to Ministers and Criminal Justice partner Departments, driving the changes.

DCA Headquarters

37. *Table 2 and 3 shows DCA HQ and associated offices estimated outturn in 2004–05 for resource and capital as significantly higher than in 2003–04. Please would the Department provide the resource and capital outturn figures for just DCA HQ for financial years 2003–04 to 2007–08? Please also provide a brief explanation for the key reasons behind the increased total outturn figures in 2004–05? If more recent figures are now available for 2004–05 please use these in responding to this question?*

DCA does not formally monitor expenditure under the title of "DCA HQ"; the subhead title "Headquarters and associated offices" referred to in the Departmental Report represents everything else not captured under the other headings. As such this will include amongst others HR, Finance, Communications, Private Office, Crown Office and Legal and Judicial group.

The 2004–05 outturn information shown in Tables 2 and 3 was taken from the HMT database as at May 2005 and therefore does not represent the latest outturn figures. The latest unaudited Resource DEL outturn for Headquarters and associated offices was £480.87 million and the capital DEL outturn was £124.75 million.

The major factors causing the £215m Resource DEL increase between 2003–04 and 2004–05 are:

Reason	*Increase on 2003–04 (£m)*
Tribunals moving from Court Service to HQ and associated offices	103
Increased funding for rollout of Courts and Tribunals Modernisation Programme	33
Provision for Jubilee Line case	25
Increased funding for Unified Courts Administration and Magistrates Courts Administration programmes ahead of HMCS creation in 2005–06.	13
Criminal Justice Delivery Unit moving from HMCS to HQ and associated offices	9

The major factors causing the £64 million Capital DEL increase between 2003–04 and 2004–05 are:

Reason	*Increase on 2003–04 (£m)*
Impact of NAO decision to classify PFI courts as on Balance Sheet	54
Investment in LINK infrastructure across Crown, County and Royal Courts of Justice.	13
One off expenditure in 2003–04 related to tenant fit out costs for Steel House and Clive House (Headquarters Buildings)	-4

The SR2004 settlement provided total DEL figures for 2005–06, 2006–07 and 2007–08—these figures were below what DCA had requested. Within the settlement, with the exception of ringfenced areas, such as Legal

Aid, DCA is free to allocate resources as it wishes. DCA delegates its budget on a yearly basis and does not delegate budgets to its entities 3 years in advance. The figures shown for DCAHQ and associated offices in the Departmental Report for 2006-07 and 2007-08 are therefore indicative and reflect the remainder of the budget once ringfenced allocations for legal aid and a flat average annual real terms growth rate across SR2004 for HMCS have been factored in.

Department for Constitutional Affairs

September/October 2005

Memorandum submitted by Department for Constitutional Affairs

Thank you for your letter of 26 October concerning the issue of Armed Services Registration. You referred to the remarks I made in evidence at the CASC hearing and those made by Harriet Harman MP in the debate on the Second Reading of the Electoral Administration Bill. I am pleased to provide you with the information you request.

Prior to 2001, service personnel could only register by a service declaration, which meant that they were registered on joining the armed forces at the place they joined up and remained on the electoral register there indefinitely. However, the Howarth Working Group (an all-party working group set up after the 1997 election, chaired by a minister and also including electoral administrators and others) examined this system and proposed reform. They concluded that the old system was characterised by low take-up and left to service voters becoming disassociated with the areas in which they were registered and therefore less inclined to vote. The Working Group also pointed out that Electoral Registration Officers (EROs) faced problems in identifying and communicating with service personnel, both throughout their careers and after they left the services. This led to many service declarations not being amended or revoked when the recipient moved on or left the armed forces. The consequent inaccuracies in the Electoral Register (so-called dead wood) increased the likelihood of electoral fraud and unjustifiably inflated the electoral registers in those areas.

The recommendations of the Howarth Working group led to a reform of the registration arrangements for members of the Armed Forces in the Representation of the People Act 2000, which was introduced with all-party support. Since then service personnel have been given the choice of registering as ordinary voters at their home address (or at another qualifying address such as a barracks), or continuing to register via a service declaration, as before. Under the new arrangements service personnel were asked to confirm their declaration on an annual basis, and EROs were required to remind each service voter in writing when this annual confirmation was needed. EROs therefore now write to each service voter every year enclosing a simple form for them to sign to confirm that they wish their service declaration to continue. Service personnel were therefore put as far as possible on the same footing as other electors. These reforms were intended to provide more flexibility for service personnel—giving them a choice about how they would prefer to register and vote—and thus increase levels of electoral registration and participation amongst the services.

I accept, however, that there is anecdotal evidence that take-up these registrations and voting options amongst service personnel may still not be as high as we would wish. There are no reliable data to indicate how many service personnel are not currently included on electoral registers. This is because, since they can (and do) register as ordinary electors, it is impossible to distinguish them from the rest of the electorate. I understand that Ministry of Defence colleagues intend to conduct surveys to measure levels of registration among service personnel in the near future.

Responsibility for communicating with servicemen and women and their families lies with the Ministry of Defence and responsibility for publicising voting and the arrangements for registering to vote lies with the independent Electoral Commission. They have therefore taken the lead so far in developing strategies to ensure that service personnel are registered and enabled to vote. A number of initiatives have emerged from their discussions. They have jointly produced a leaflet to inform service personnel of how to register and vote. This leaflet clearly outlines the different options available to service personnel, including a service declaration form as well as postal of the armed forces. I believe these will make the registration process as straightforward as possible for service personnel, particularly for those who are posted overseas. I am forwarding you a copy of this leaflet.

In addition to the leaflet, to ensure that service personnel are aware of the registration and voting procedure, press releases have been offered to all MoD in-house publications and full use has being made of MoD and Services internal websites to draw attention to the need to re-register to vote during the annual canvass period. Also, in light of concern that families of service personnel were not always aware of the registration procedure, they will also be targeted with information during the campaign.

Furthermore, there is now an obligation for every service unit to appoint an officer to be responsible for voting issues for both service personnel and their families, and to ensure that they are in receipt of the previously mentioned leaflet. The officer will act as a central contact point both to provide information to those who seek it, and to press those who do not to make sure that they complete the relevant forms and ensure that can exercise their right to vote.

As the department responsible for electoral law, we have also been involved in various discussions with the Ministry of Defence and the Electoral Commission on this issue and will continue with those. We are, of course, open to any suggestions about reforms to electoral law which could have a positive effect on registration levels among service personnel and I would be happy to hear what you and the Committee might propose. I will of course keep you informed of any developments in relation to this issue.

Rt Hon Lord Falconer of Thoroton
Secretary of State and Lord Chancellor

30 October 2005

First supplementary memorandum submitted by Department for Constitutional Affairs

RESPONSES TO QUESTIONS PUT TO DCA ON 18 OCTOBER

I undertook to return to you on some questions when we met on 18 October. These were: feedback on judicial appointments; Special Advocate exploration of non-disclosable information relevant to defence; reform of the coroner service; costs of XHIBIT; and servicemen not on the electoral register.

Judicial Appointments—Feedback

Keith Vaz raised several points about feedback to unsuccessful candidates for judicial appointment. When we write to unsuccessful candidates we offer them the opportunity to seek written feedback on their performance. If they take up this opportunity they receive a letter which sets out why the evidence that provided in their application was insufficient to allow them to pass to the next stage of the competition (if they are rejected after sift) or they are provided with full details of how they performed at interview or assessment centre. As all candidates are offered this opportunity we have not though it necessary to repeat this invitation through the website as Keith has noted. However, there is not a problem in doing so and my officials are arranging for a relevant question and answer to be added to the Frequently Asked Questions sections, reminding applicants that written feedback is available to all unsuccessful candidates.

We moved to written feedback as this method ensures that candidates have a clear record of the detailed comments on their performance, which they can use to assist them to make a stronger application in the next competition. However, we have also introduced a series of Judicial Appointments events where anyone interested in a future judicial appointment can come along and hear about the process, what positions are available, and how to make the best of their application. They can also book an appointment for a one to one interview with a senior official to discuss their personal situation.

Keith also mentioned that he had called the number publicised on our website. I was pleased that he found the official who answered polite and helpful and am sorry that, having been referred then to a named official, he was connected to voicemail. We do aim to respond to messages left on voicemail as soon as possible.

Special Advocates

You asked if ways were still being explored in which the Special Advocate might be able to seek information, relevant to the defence and authorised by the judge, without disclosing the evidence on which it is based to the defendant.

As has been previously noted in the Government Response to the Constitutional Affairs Select Committees Report into the Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates on 17 June 2005, the risks to national security from any relaxation of the current restrictions on communication are far too high to justify any changes being made.

There are procedures in place which allow the Special Advocate, with the permission of the SIAC Chairman, to explore information relevant to the defence but without disclosing the national security material.

The Special Advocate is unable to communicate to the appellant and his legal advisers once the closed material has been served on him. The material is not served on the Special Advocate until he confirms that he is ready to receive it.

The Special Advocate can communicate with the appellant and his legal advisers following the service of the closed material provided he obtains the permission of the Commission, the High Court, and the Secretary of State to do so. This has happened previously within the SIAC process with the Special Advocate obtaining permission in a number of cases to communicate legal points and factual matters that have emerged from cross-examination in a closed hearing, but which can be disclosed without compromising the national security material.

This is a process which could be relied on more widely if the Special Advocate wished to seek specific instructions relative to the defence, so long as the questions were framed in such a way that it did not compromise national security.

Of course not all of the difficulties the Special Advocates experience in being able to argue the appellants case are to do with limited access to national security information. Some of the difficulties faced emerge from the appellants declining to discuss the case with their Special Advocate and refusing to engage with the open appeal process. This has resulted in Special Advocates being completely in the dark about the nature of the appellants defence, a feature previously noted by SIAC. Appellants are made fully aware of the role of the Special Advocate in representing them, but it is for the appellant to decide if they want to engage with the Special Advocate.

Coroners

I know the Committee is interested in the coroner service and is aware of the Governments commitment (n the Queens speech programme) to issue a draft coroner reform Bill in this session of Parliament.

The aim of reform is to create a modernised, effective and accountable coroner system, which will have the needs of bereaved people as an important focus.

Two independent reviews commissioned by the Government (including the Shipman Inquiry) have recommended that the current system needs to change. There is broad consensus for reform from those who work within the system and those who interact with it.

Responsibility for coroners policy transferred to DCA from the Home Office following the 2005 election. We are currently finalising reform plans, taking account of the available budget, and expect to announce how we intend to proceed early in 2006, paving the way for a draft Bill in the late spring.

DCA officials met your Clerks on 16 November to discuss pre-legislative scrutiny of this draft Bill

XHIBIT

Jeremy Wright was interested in XHIBIT costs.

The Department has a fixed price £20 million contract with Electronic Data Systems for the development and national rollout of XHIBIT to all Crown Court sites in England and Wales. The contract includes the cost of training. Rollout of the system to all 101 Crown Court sites is due to be completed by March 2006. This is a fixed price contract for delivery of the system and so there is no change from the original price estimate.

The ongoing support costs for XHIBIT in future years will be covered by new contracts which the Department has opened to competition as part of the Development, Innovation and Support Contracts (DISC) Programme.

Changes may be required to the system over time, for example due to legislation. These would be handled via the Change Control processes (the governance processes that set out how any changes to contracts will be handled between the Department and the relevant supplier) in the relevant contracts.

I have already written to you about Armed Services Registration. I will of course keep you informed of any further developments in relation to this subject.

Rt Hon Lord Falconer of Thoroton
Secretary of State and Lord Chancellor

22 November 2005

Second supplementary memorandum submitted by Department for Constitutional Affairs

When Lord Falconer and I appeared in front of the committee on 4 July, I undertook to provide information about staff seconded to the Judicial Appointments Commission and about DCA staff sick leave.

81 DCA staff have been seconded to the Judicial Appointments Commission. Seconding our staff ensured the JAC had the support of experienced and knowledgeable staff during the transition and start up period, while not compromising the JACs longer term flexibility to appoint their own staff.

In 2005–06 DCA recorded a sickness absence rate of 9.6 days per head, a total of 175,000 across the department. Over the last decade the absence rates at DCA have been steadily declining, from over 14 days in 1997 to the current 9.6 days. DCA has committed to reducing days lost to absence to 7.5 days per head by March 2008 in order to meet its efficiency savings targets.

Alex Allan
Permanent Secretary

19 July 2006

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