



House of Commons
Constitutional Affairs
Committee

**The creation of the
Ministry of Justice**

Sixth Report of Session 2006-07

*Report, together with formal minutes, oral and
written evidence*

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The Constitutional Affairs Committee

The Constitutional Affairs Committee is appointed by the House of Commons to examine the expenditure, administration and policy of the Department for Constitutional Affairs (on 9 May the Department was renamed the Ministry of Justice) and associated public bodies.

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1 Introduction

Our inquiry

1. Following more than two months of intense press speculation, the then Prime Minister, Rt Hon Tony Blair MP, announced on 29 March 2007 a major Machinery of Government change, affecting the Home Office and the Department for Constitutional Affairs (DCA).¹ The Home Office's responsibilities would be concentrated on counter-terrorism, policing and asylum and immigration and a new Ministry of Justice (MoJ) would be created to take on the responsibilities of the DCA and the criminal justice functions of the Home Office and its agencies — mainly the National Offender Management Service (which includes HM Prison Service and the Probation Service). The new MoJ would now have responsibility not only for constitutional matters, civil and administrative justice, the courts and legal aid, but also become the lead department for criminal justice policy and as such would 'house' the Office for Criminal Justice Reform, reporting trilaterally to the Secretary of State for Justice, the Home Secretary and the Attorney General.² It would be led by the Lord Chancellor as Secretary of State for Justice. A detailed explanation of the Machinery of Government change was provided in a Cabinet Office paper accompanying the Prime Minister's announcement.³

2. The Prime Minister's announcement prompted the Lord Chief Justice, Rt Hon Lord Phillips of Worth Matravers, to make a public statement on the same day, declaring that the announcement raised "important issues of principle".⁴ The Lord Chief Justice stated that "structures are required which will prevent the additional responsibilities taken over by the new ministry [of Justice] interfering with or damaging the independent administration and proper funding of the court service".⁵ According to the Lord Chief Justice, "the continuing problems of prison overcrowding and the availability of resources to provide the sentences imposed by the courts necessitate public debate" as, on account of the strains on the prisons' budget, judges might feel under pressure to impose sentences they did not believe to be appropriate. His view was that "structural safeguards must be put in place to protect the due and independent administration of justice".⁶ Provided that these concerns were addressed, he concluded that "there would be no objection in principle to the creation of a new ministry with responsibility for both offender management and the court service."

3. Immediately following the Prime Minister's announcement and the Lord Chief Justice's statement, we decided to explore the matters raised by the senior judiciary with Lord Falconer of Thoroton QC, the then Lord Chancellor and, initially, by inviting the Lord Chief Justice to submit more detailed comments to the Committee. The Lord Chief Justice

1 HC Deb, 29 March 2007, cols 133-5WS

2 Ibid

3 Cabinet Office, *Machinery of Government: Security and Counter-Terrorism, and the Criminal Justice System*, 29 March 2007, www.cabinetoffice.gov.uk

4 Announcement of a Ministry of Justice – Statement by the Lord Chief Justice, 29 March 2007, www.judiciary.gov.uk

5 Ibid

6 Ibid

submitted the documents printed in the written evidence.⁷ On 17 April 2007, the Lord Chancellor gave oral evidence to us on the creation of the MoJ. On 9 May 2007, the new MoJ started its work, yet many of the issues raised by the Lord Chief Justice remained unresolved. On 22 May 2007, the Lord Chief Justice and the then Lord Chancellor appeared before us. The startling account both witnesses gave of the way they had learned of the plans to create the MoJ and the obvious lack of sensitivity for the judiciary's concerns relating to the Machinery of Government changes led us to issue this report. It addresses primarily matters of process and communication and is not intended to assess in substance the concerns raised by the senior judges.

Other inquiries and reports

4. The general issue of the process of Machinery of Government changes was the subject of a recent report by the Public Administration Select Committee, *Machinery of Government Changes*.⁸ This report not only provides a detailed analysis of the legal and procedural issues relating to Machinery of Government changes, but also comments on the process leading to the creation of the MoJ, with which we are in full agreement and which we commend.⁹

5. Throughout this session of Parliament, the House of Lords Select Committee on the Constitution, under the chairmanship of the Rt Hon Lord Holme of Cheltenham CBE, has conducted a wide-ranging inquiry into the relations between the executive, judiciary and legislature. Part of this inquiry has focused on matters germane to issues raised by the creation of the MoJ and the effective change in the political role of the Lord Chancellor; the Committee has taken substantial evidence on this issue.

7 Ev 24-27

8 Public Administration Select Committee, *Machinery of Government Changes*, Seventh Report of Session 2006-07, HC 672

9 E.g. in paras 1, 5, 25, 27, 33, 39 and 41.

2 Preparing the new Ministry of Justice

The Prime Minister's announcement and the *Sunday Telegraph*

6. The first authoritative report of proposals for splitting up the Home Office and creating a justice ministry appeared in the *Sunday Telegraph* on 21 January 2007. The then Home Secretary, Rt Hon John Reid MP, wrote in an article in that paper that “there must not be sacred cows when it comes to protecting security and administering justice—the two fundamental roles demanded of the Home Office and of the Home Secretary” and noted that “more radical changes” than short-term organisational measures within the existing Home Office might be unavoidable.¹⁰ While Dr Reid stopped short of directly proposing a radical shake up of his department, the paper reported on the same day that “sources close to the Home Secretary confirmed that one serious proposal was to split up the Home Office”.¹¹

7. In our evidence session with the Lord Chief Justice and Lord Falconer on 22 May 2007, Lord Phillips told us that “he [the then Lord Chancellor] and I learned together, first of all of the possibility that there would be a Ministry of Justice when we read the *Sunday Telegraph*” on 21 January 2007.¹² When we put this statement to Lord Falconer, he confirmed that he “did not hear about it much longer before” the *Sunday Telegraph* article of 21 January.¹³ With reference to the newspaper article, he insisted that “it had to start somewhere and it did not start much before...”.¹⁴ It was only after these press reports that the then Lord Chancellor and the Lord Chief Justice entered into discussions about the creation of the MoJ and the potential implications for the judiciary.¹⁵

8. The Prime Minister's announcement of the creation of the MoJ came on the day Parliament rose for Easter. The fact that neither House was given an opportunity properly to discuss the Government's plan prior to its taking effect led to considerable criticism by MPs and peers alike on the day of the announcement.¹⁶ Indeed, the Government did not publicly invite comments or consult on the creation of the MoJ, which had been a project Governments had considered on several occasions before 2007, as Lord Falconer confirmed in his oral evidence to us.¹⁷ The creation of the MoJ was a *fait accompli*. We note that not even the then Lord Chancellor appeared to have been informed of the previous Home Secretary's proposals for splitting the responsibilities of the Home Office.

10 'I can fix the problems, but I need three years' (Rt Hon John Reid MP), *Sunday Telegraph*, 21 January 2007, p 20

11 'Reid wants to split the Home Office in two' (Patrick Hennessy), *Sunday Telegraph*, 21 January 2007, p 1

12 Qq 62, 64

13 Q 160

14 Q 159

15 Q 62

16 HC Deb, 29 March 2007, col 1640; HL Deb, 29 March 2007, col 1798

17 Qq 121-123

A matter of constitutional importance

9. Outside Parliament, the announcement of the creation of the MoJ received a largely warm welcome. Paul Cavadino, Chief Executive of the crime reduction charity NACRO, greeted the news as “an important step towards achieving a more coherent criminal justice system. Most European countries have long recognised the benefits of bringing responsibility for courts, prosecution, probation and prisons together in a single justice ministry”.¹⁸ These comments were echoed by the Prison Reform Trust, stating that the establishment of the MoJ “could mark the start of a fairer, more balanced criminal justice system”.¹⁹

10. However, the law reform organization JUSTICE, in its written evidence, considered that the combination of responsibilities hitherto divided between the Home Office and the DCA might raise concerns for the real and perceived independence of the judiciary in relation to the executive and the Lord Chancellor’s role as guardian of the rule of law and judicial independence:

“The constitutional issue is whether there is any conflict possible between the duty to uphold the rule of law and the independence of the judiciary, on the one hand, and the taking of lead responsibility for criminal justice, on the other, by the new Secretary of State. There is a political element to this question: whether the enhanced criminal justice responsibilities will practically detract from the department’s ability to obtain funds and attention for issues relating to the administration of justice and including the judiciary, courts and legal aid.”²⁰

11. These comments reflect the concerns raised by the Lord Chief Justice in his statement of 27 March 2007 on the Machinery of Government changes as cited above. These centred on the exercise by the Lord Chancellor of his statutory duties to uphold judicial independence and ensure adequate resourcing of the courts under section 3(1) of the Constitutional Reform Act 2005 and section 1(1) of the Courts Act 2003. Prior to becoming Secretary of State for Justice on 9 May 2007, the Lord Chancellor’s primary departmental responsibility as Secretary of State for Constitutional Affairs was for the courts, the judiciary, the civil justice system and legal aid. However, the creation of the MoJ added to the Lord Chancellor’s responsibilities the more politically controversial and resource-intensive running of the Prison and Probation Services. This dramatic increase in the Lord Chancellor’s role and remit is borne out by the number of staff of the old DCA and the new MoJ: while the DCA, on 31 March 2007, had 36,910 staff, the new MoJ now has 88,483;²¹ the number of staff has thus more than doubled. We were warned by the Lord Chief Justice that this amalgamation of responsibilities and, of course, budgets in the new MoJ could lead to a “real conflict of demand on a single budget”.²² On 29 March 2007, Lord Phillips informed the Judges’ Council in a letter that “the cost of the ministry’s other

18 ‘Home Office to be split in two’, *Guardian Unlimited*, 29 March 2007, www.guardian.co.uk

19 *Ibid*

20 Ev 31

21 HC Deb, 20 June 2007, cols 1836-1837W

22 Q 75

responsibilities, and in particular, that of the prison service and offender management, must not be permitted to put at risk the proper funding of the court service.”²³

12. In its position paper of early April 2007, the Judiciary of England and Wales insisted that the creation of the MoJ “is not a simple Machinery of Government change, but one which impacts on the separation of powers by giving the Lord Chancellor, as Minister for Justice, decision-making powers which are incompatible with his statutory duties for the courts and the judiciary”.²⁴ In this context, both the Lord Chief Justice and Lord Justice Thomas, the former Senior Presiding Judge for England and Wales, went as far as describing as a “serious constitutional problem” the situation which the establishment of the MoJ and subsequent lack of an agreement on structural safeguards for the independence of the judiciary in terms of the resourcing and administration of the courts had created.²⁵ This was not seen by the judiciary as a merely theoretical problem. They indicated that there had already been disagreement between the judiciary and the DCA/MoJ about whether the terms of the *Concordat*²⁶ between Lord Falconer and the Lord Woolf of 2004 had been fully respected with regard to the involvement of the judiciary in Comprehensive Spending Review discussions involving the DCA/MoJ.²⁷

13. Despite having advertised the creation of the MoJ as “an important—indeed, a landmark—moment in the development of our public services and our justice system”,²⁸ Lord Falconer, the then Lord Chancellor, while not sharing the judges’ view that there was a constitutional problem, nevertheless acknowledged that this was a “serious matter”.²⁹ In the House of Lords, Lord Falconer insisted that the creation of the MoJ neither reduced the responsibilities of the office of Lord Chancellor in protecting judicial independence, nor reduced his ability to do so in practice.³⁰ The then Prime Minister, Tony Blair, confirmed his Lord Chancellor’s assessment that there was no constitutional problem in relation to the establishment of the MoJ in response to a question from our Chairman in oral evidence to the Liaison Committee on 18 June 2007. He said that this process was not “a constitutional change”.³¹ He added:

“I think the real concern for the judiciary, and I entirely understand this, [...] they want to know that there is someone in Government that they can go to and make their case to and, also, they want to know that they are not going to be at a disadvantage in relation to courts’ funding because the Ministry of Justice has got the prisons and probation in it too. I totally understand that, I do not actually think it is a constitutional point.”³²

23 Ev 24

24 Ev 25

25 Qq 47, 86

26 See para 17.

27 Q 92 [Lord Phillips of Worth Matravers]

28 HL Deb, 29 March 2007, col 1797

29 Q 182

30 HL Deb, 24 May 2007, col 807

31 Oral evidence taken before the Liaison Committee on 18 June 2007, HC (2006-07) 300-ii, Qq 167 & 169

32 *Ibid.*, Q 169

14. Professor Alan Page, of Dundee University, disagreed with this position. He told the Lords Constitution Committee on 9 May 2007 that the establishment of the MoJ:

“...is not just a machinery of justice change because it does have a very real constitutional significance...namely the consequences for the relationship between the funding of the judicial system and judicial independence. I think that is the key constitutional issue which is raised by this machinery of government change.”³³

Similarly, in its most recent report on Machinery of Government changes, the Public Administration Select Committee noted that it shared the judiciary’s view that the establishment of the MoJ had serious constitutional implications which required a proper, open examination in order to ensure both Parliament and the Judiciary as well as the Executive were content with the proposed arrangements.³⁴

15. We agree with this assessment. **Significant changes to the Lord Chancellor’s responsibilities as Secretary of State took place as a consequence of the creation of the MoJ. They are of constitutional importance as they may affect, in practice or public perception, the exercise of the Lord Chancellor’s core statutory function of guardian of judicial independence, both in organisational and budgetary terms. They can have the potential to upset the carefully balanced arrangements agreed between the judiciary and the Lord Chancellor in the *Concordat* of 2004 which was given statutory footing in the Constitutional Reform Act 2005. Such changes go far beyond a mere technical Machinery of Government change and as such should have been subject to proper consultation and informed debate both inside and outside Parliament.**

The lessons of 2003

16. The situation in Spring 2007 mirrored the unsatisfactory manner in which a previous Machinery of Government change involving the office and responsibilities of the Lord Chancellor was brought about in 2003: on 11 June 2003, the then Prime Minister announced a ministerial reshuffle and Machinery of Government changes. The post of Lord Chancellor was to be abolished in its entirety and the Lord Chancellor’s Department replaced by a new Department for Constitutional Affairs, headed by a Secretary of State for Constitutional Affairs. The radical announcement was almost completely unexpected.

17. A consultation paper issued in September 2003³⁵ gave more detail of the necessary legislative changes needed to abolish the office. On the basis of these consultation papers and negotiations between the then Lord Chancellor and the then Lord Chief Justice, Lord Woolf, both agreed what has since become known as the ‘*Concordat: Constitutional Reform: The Lord Chancellor’s judiciary-related functions: Proposals*’.³⁶ This document laid down detailed rules on the relationship between the Lord Chancellor as Secretary of State for Constitutional Affairs and the judiciary. The *Concordat* became the basis for the

33 Oral evidence taken before the House of Lords Select Committee on the Constitution on 9 May 2007, HL (2006-07) 151, Q 480

34 Public Administration Select Committee, *Machinery of Government Changes*, Seventh Report of Session 2006-07, HC 672, para 41

35 DCA, *Constitutional Reform: reforming the office of the Lord Chancellor*, CP 13/03, September 2003

36 <http://www.dca.gov.uk/consult/lcoffice/judiciary.htm>

Constitutional Reform Act 2005, which received Royal Assent on 24 March 2005, and which put the agreed relationship between the Secretary of State and the judiciary on a statutory footing. On 3 April 2006, the statutory changes to the judicial role of the Lord Chancellor took effect.

18. The way in which the changes to the ancient office of Lord High Chancellor of Great Britain were initially announced by prime ministerial press notice and subsequently partially withdrawn and significantly modified, attracted a great deal of criticism both inside and outside Parliament. When the then Prime Minister gave evidence to the Liaison Committee on 3 February 2004, he conceded that mistakes had been made in the way in which the changes to the office of the Lord Chancellor were initially dealt with:

“...it would have been better probably had we published a paper, had we taken a step back, separated the reshuffle very clearly from the departmental changes and then presented it at the very outset as it indeed then became, because what it then became was not in fact a decision that was rubber stamped and forced through, it actually became a consultation with papers being published and then a debate in the House of Lords. I think we could have in retrospect—this is entirely my responsibility—done it better.”³⁷

He told the Liaison Committee that pressure for constitutional change had been building up in his mind³⁸ and led to the announcement of 12 June 2003. He stressed again that, while the policy decision to change the role of the Lord Chancellor was right, “we could have done it better and done it differently and of course we should learn the lessons of that”.³⁹

19. The Constitutional Affairs Committee in the last Parliament, in its report *Judicial Appointments and a Supreme Court (court of final appeal)*,⁴⁰ commented that “it is a matter of regret that the proposals [to change the office of Lord Chancellor and to create a Supreme Court for the UK] were formulated and announced in a way that was hurried and evidently without the knowledge of many of those who would be expected to have been extensively consulted.” The Committee concluded that:

“The way in which these fundamental proposals were announced, as a part of a Cabinet reshuffle and without consultation or advice, has created anxieties amongst the most senior members of the judiciary and was felt by some supporters of the changes to have been unhelpful in presenting the case in favour of them.”⁴¹

20. When the Chairman of this Committee referred the then Prime Minister, at his appearance before the Liaison Committee on 18 June 2007, to the apologetic comments he had previously made in evidence to the Liaison Committee in February 2004,⁴² Tony Blair

37 Oral evidence taken before the Liaison Committee on 18 June 2007, HC (2006-07) 300-ii, Q 65

38 *Ibid.*, Q 64

39 *Ibid.*, Q 66

40 Constitutional Affairs Committee, *Judicial Appointments and a Supreme Court (court of final appeal)*, First Report of Session 2003-04, HC 48-I, para 14

41 *Ibid.*, para 14

42 See above para 18

defended the way the creation of the MoJ had been trailed and finally announced on 29 March 2007 as being “a different situation altogether”⁴³ from the changes to the office of Lord Chancellor announced in June 2003, as the present changes did not involve “a constitutional change”.⁴⁴ However, we disagree with this assessment and note the similarities between the way the changes in the office of Lord Chancellor in 2003 were announced and the way the creation of the MoJ was trailed in early 2007.

21. The process leading to the creation of the Ministry of Justice leaves the impression that the Government has failed to learn the crucial lessons from the way changes to the Lord Chancellor’s office were announced and subsequently effected between 2003 and 2005. As in 2003, the Government has manifestly underestimated the significance of the Machinery of Government changes announced on 29 March 2007.

22. Lack of sufficient consultation prior to the initial, Government-prompted, public proposal and then announcement of the creation of the Ministry of Justice has led to a highly undesirable public conflict between the senior judiciary and the previous Lord Chancellor. This conflict appeared to have been exacerbated by an underestimation of, and insensitivity for, the concerns of the judiciary which changes to the role and responsibilities of the Lord Chancellor may raise. Had the lessons of 2003 been learned, we believe such a situation could have been avoided.

43 Oral evidence taken before the Liaison Committee on 18 June 2007, HC (2006-07) 300-ii, Q 164

44 Ibid. Q 167

Conclusions and recommendations

1. Significant changes to the Lord Chancellor's responsibilities as Secretary of State took place as a consequence of the creation of the MoJ. They are of constitutional importance as they may affect, in practice or public perception, the exercise of the Lord Chancellor's core statutory function of guardian of judicial independence, both in organisational and budgetary terms. They can have the potential to upset the carefully balanced arrangements agreed between the judiciary and the Lord Chancellor in the Concordat of 2004 which was given statutory footing in the Constitutional Reform Act 2005. Such changes go far beyond a mere technical Machinery of Government change and as such should have been subject to proper consultation and informed debate both inside and outside Parliament. (Paragraph 15)
2. The process leading to the creation of the Ministry of Justice leaves the impression that the Government has failed to learn the crucial lessons from the way changes to the Lord Chancellor's office were announced and subsequently effected between 2003 and 2005. As in 2003, the Government has manifestly underestimated the significance of the Machinery of Government changes announced on 29 March 2007. (Paragraph 21)
3. Lack of sufficient consultation prior to the initial, Government-prompted, public proposal and then announcement of the creation of the Ministry of Justice has led to a highly undesirable public conflict between the senior judiciary and the previous Lord Chancellor. This conflict appeared to have been exacerbated by an underestimation of, and insensitivity for, the concerns of the judiciary which changes to the role and responsibilities of the Lord Chancellor may raise. Had the lessons of 2003 been learned, we believe such a situation could have been avoided. (Paragraph 22)

Formal minutes

Tuesday 17 July 2007

Members present:

Mr Alan Beith, in the Chair

Robert Neill
Mr Andrew Tyrie

Keith Vaz
Dr Alan Whitehead

Draft Report (The creation of the Ministry of Justice), proposed by the Chairman, brought up and read.

Ordered, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 22 read and agreed to.

Conclusions and recommendations read and agreed to.

Resolved, That the Report be the Sixth Report of the Committee to the House.

Ordered, That the Chairman do make the Report to the House.

Several papers were ordered to be reported to the House for printing with the Report

[Adjourned till Tuesday 24 July at 4.00pm]

Witnesses

Tuesday 17 April 2007

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

Ev 1

Tuesday 22 May 2007

Rt Hon Lord Phillips of Worth Matravers, a Member of the House of Lords, Lord Chief Justice of England and Wales, and **Rt Hon Lord Justice Thomas**

Ev 6

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

Ev 13

List of written evidence

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| 2 | JUSTICE | Ev 30 |
| 3 | Rt Hon Lord Falconer of Thoroton QC, Secretary of State for Constitutional Affairs and Lord Chancellor | Ev 31 |

Oral evidence

Taken before the Constitutional Affairs Committee

on Tuesday 17 April 2007

Members present:

Mr Alan Beith, in the Chair

David Howarth
Mrs Siân C James
Julie Morgan
Bob Neill

Mr Andrew Tyrie
Dr Alan Whitehead
Jeremy Wright

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

Q1 Chairman: Now we want to turn to the Government changes which were announced just recently. Having read the documents several times over, I am afraid I am still a little unclear as to where the boundary line in the responsibility for criminal law and criminal justice will fall. Can you enlighten us on this?

Lord Falconer of Thoroton: Criminal justice issues—meaning, generally, from the point of view of arrest—in so far as they involve what goes on in court, will be for the Justice Department. The activities of the police prior to arrest will be a matter for the Home Department. That will mean issues about, for example, evidence; for example, the creation of criminal offences; and, for example, sentencing will be matters for the Ministry of Justice. A particularly important area to refer to is the Police and Criminal Evidence Act, which, although it is an Act about evidence, in fact contains, as the Committee will know, substantial numbers of codes of practice determining police behaviour in relation to, for example stop and search; in relation to, for example, how you question suspects. Although that has an impact on what is admissible in court, that, we believe, essentially deals with police behaviour, as it were, on the street. In those circumstances PACE stays with the Home Office.

Q2 Chairman: Who will bring to Parliament legislation which changes, let us say, the law on homicide?

Lord Falconer of Thoroton: The Justice Department.

Q3 Chairman: And the law on matters which in other ways fall within the RESPECT agenda, such as low level offences in this field.

Lord Falconer of Thoroton: If, for example, you are changing the terms on which you can get an ASBO, that would be the Justice Department. If you are introducing new measures, like, for example, a curfew order—which has already been introduced—that would be something that would come from the Home Department.

Q4 David Howarth: I am not too sure how that distinction works. If the new order creates a criminal offence, surely that should come from Justice rather than Home.

Lord Falconer of Thoroton: The way that government operates is that where a new offence is created—and normally it is, for example, as part of a health and safety drive or you want to fight terrorism—the relevant department responsible for health and safety or fighting terrorism will produce the criminal offence. Formerly, they would have produced it to the Home Office for approval because they have responsibility for the criminal law. Now they will produce it to the Justice Department who have to agree it as well. But the lead will come from that department responsible for the particular policy. Where you are dealing with something like improving the criminal law on homicide, that is a matter of criminal law, where you are looking at the criminal law “as to criminal law”, and that will come from the Justice Department.

Q5 David Howarth: Perhaps I misheard you on antisocial behaviour orders. If a change was proposed to the definition of antisocial behaviour or to the penalty for breaching an order, did I hear you correctly that that would come from Justice rather than Home?

Lord Falconer of Thoroton: That would normally come from Justice. I say normally, because, suppose in relation to antisocial behaviour the Home Office thought you wanted a range of measures to improve bearing down on acts of antisocial behaviour, which included things like giving the police new powers and also increasing the penalty for antisocial behaviour, they could propose it but it would have to come through the Ministry of Justice.

Q6 David Howarth: The only reason I am confused about this is that I think the Home Secretary did say in the Commons when this was first discussed that responsibility for antisocial behaviour would stay with the Home Office.

Lord Falconer of Thoroton: There is a distinction here. What do you do on the street to reduce antisocial behaviour? If part of that involves changes to the criminal law, then you might have to propose those, if you are the Home Office, to the Ministry of Justice. But the Ministry of Justice has responsibility for criminal law. If you want to fight inefficient or dangerous practices at work, the DTI is basically responsible for that, but it might, as part of its policy for dealing with it, propose criminal offences and they would have to get the agreement of the Ministry of Justice for that.

Q7 Chairman: Could we explore a situation in which there is a constructive tension between the Home Office and the Ministry of Justice, in which the Ministry of Justice says, "You don't need new criminal offences here. Get on with doing your job properly?"

Lord Falconer of Thoroton: If that was the position, yes. You would want cooperation in relation to it and within any government there will be agreements and disagreements about what particular steps should be taken but there will be discussions of it obviously between the two departments.

Q8 Jeremy Wright: Further on that, you have very helpfully sent us a paper by letter of 1 April which gave further details on the responsibilities of the new Ministry in its relationship with the Home Office. There is one paragraph of that which I wonder if you could elucidate for us.

Lord Falconer of Thoroton: A letter to Mr Alan Beith, dated 1 April, I am writing following the Prime Minister's announcement last Thursday . . . "

Q9 Jeremy Wright: Yes. I am looking at page 13, the third paragraph on that page: "Criminal law and sentencing policy will move to the new Ministry of Justice." That is clear. "In order to maintain the Government's clear focus on crime reduction, the Home Secretary will continue to have a core role in decision making in this area, reflecting his responsibilities for policing, crime reduction, and public protection. Where the Home Secretary makes a proposal reflecting these responsibilities, the expectation will be that the Ministry of Justice will work with the Home Office to deliver such changes as are necessary, taking account of the wider resource implications for the CJS and the need for sentencing policy to tackle re-offending. Government policy in this area will in future be decided by a new Cabinet Committee on Crime and the Criminal Justice System, chaired by the Prime Minister." Am I right in thinking, as a result of reading that paragraph, that there are circumstances in which, within the field of criminal law and sentencing policy, the Home Secretary will still be in a position to say, "This is what I want to happen" and in those circumstances the new Ministry for Justice would be expected to carry out those proposals?

Lord Falconer of Thoroton: It does not mean that. It means precisely what I said in answer to Mr Howarth's question: if, for example, as part of a

suite of measures to deal with a particular problem of, say, antisocial behaviour or some other social problem, the Home Secretary proposed the creation of a new criminal offence or an increase in sentencing for an existing criminal offence or for breach of an ASBO, then he would make those proposals to the Ministry of Justice. This is saying, inevitably, if one of the things the Home Secretary is responsible for is crime reduction—which he is—that is something he would from time to time propose, and the Prime Minister is saying that he would expect the Justice Department and the Home Department to work closely together. One of the things we have learned very strongly since 1997 is that all of the bits of the Criminal Justice System—the police, the prosecutors, the courts and the prison and probation—have to work as closely together as possible.

Q10 Jeremy Wright: Where there is a dispute it will be resolved within this new Cabinet Committee.

Lord Falconer of Thoroton: Where there is a dispute, if it cannot be resolved between the two and it cannot be resolved within the Cabinet Committee, as our system of government requires it will ultimately be resolved by the Cabinet.

Q11 Bob Neill: Therefore, if one were to find oneself a suspect in a criminal case, for example, the definition of the law under which you might be arrested or charged is going to be the responsibility of the Department of Justice as the lead department. The procedures by which the police charge and investigate you, et cetera, remains the lead of the Home Office.

Lord Falconer of Thoroton: Yes.

Q12 Bob Neill: And then the court system, which decides guilt or innocence and sentence and subsequent matters, is back to the Ministry of Justice.

Lord Falconer of Thoroton: Yes, broadly that is right. I think you are including in what you are saying and then the action after sentence, assuming conviction, is a matter for the Department of Justice as well.

Q13 Bob Neill: That is right.

Lord Falconer of Thoroton: Because they will be responsible for the Youth Justice Board, the Probation Service, the National Offender Management Service and the Prison Service.

Q14 Bob Neill: Is the bit at which the Home Office responsibility for the investigative procedure ends at the moment of charge or at the moment of first court appearance?

Lord Falconer of Thoroton: At the moment of charge.

Q15 Bob Neill: Given what you have told us about how there has to be that feed by other departments into the Ministry of Justice in securing agreement, what is the point of keeping the Office of Criminal Justice Reform in its current tripartite arrangement?

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Lord Falconer of Thoroton: In simple terms, the Office of Criminal Justice Reform has connected police, prosecutors, courts, prison and probation. Prosecutors and police remain in two separate departments: prosecutors because, as a result of the 1984 Act setting up the Crown Prosecution Service the Attorney General superintends the prosecutors, who have to be separate. The police remain in the Home Office because of crime reduction. It is right they should. The rest is in the Department of Justice. You need an organisation, the Office of Criminal Justice Reform, that brings the three together.

Mr Allan: It is also responsible for the network of local Criminal Justice Boards, where there is one in each of the 42 police authority areas, which brings together again, as the Lord Chancellor said, the various agencies on the ground and looks at whether the particular objectives for the Criminal Justice System are being delivered in the particular area. So it has a very extensive network right around the country through those local Criminal Justice Boards.

Q16 Bob Neill: And they tend to link in to things like the Crime and Disorder Reduction Partnerships. Will any of that be affected by these changes? Is it simply that the Home Office continues to have a lead in that or not?

Lord Falconer of Thoroton: The local Criminal Justice Boards are intended to have on them the leading members of each of the criminal justice agencies. The Crime and Disorder Partnerships will involve the local authority but also, hopefully, some of those agencies as well. That will continue completely unaffected.

Q17 Bob Neill: That is helpful. You have clarified to some degree now the position of the new department and the Home Office. You referred to the Attorney General's role as, in effect, superintending the prosecutors. Is that the limit of the Attorney General's role in this now?

Lord Falconer of Thoroton: He remains not just responsible for superintending but he also has ministerial responsibility for the prosecutors; by which I mean it is not just a question of making, as it were, non political judgments, if I may say so, but also he is responsible for making sure the Crown Prosecution Service and indeed a number of other prosecuting agencies operate in accordance with—

Q18 Bob Neill: Pay and rations of CPS and that sort of thing.

Lord Falconer of Thoroton: There is a policy element as well.

Q19 Mr Tyrrie: The pay and rations element will stay with the Attorney General with respect to the administration of the criminal law.

Lord Falconer of Thoroton: No. I was saying to Mr Neill that the responsibility for the Crown Prosecution Service and, indeed, other prosecuting agencies—not quite all but almost all of the prosecuting agencies—remains with the Attorney General. That is a policy responsibility (for example,

if we create antisocial behaviour or domestic violence prosecutors, that is a matter for the Attorney General) but also issues about whether a prosecution should start or stop are matters for the superintendence of the Attorney General, which are matters of, as it were, non policy, non political type decisions.

Q20 Mr Tyrrie: In what respect, if any, is the role of the Attorney General changing?

Lord Falconer of Thoroton: It is not affected at all.

Q21 Chairman: Is that realistic or does not so fundamental a change begin to call into question, leaving to one side this superintendence of the Crown Prosecution Service and those other functions for which the Attorney General is an accountable minister, as opposed to those for which he has a responsibility for advising government, the responsibility for stopping or starting prosecutions, which is not a politically accountable role.

Lord Falconer of Thoroton: There is nothing in the machinery of government changes which come into effect on 9 May which affect the responsibilities of the Attorney General in the sense of either removing any responsibilities from the Attorney General or giving him any extra responsibilities. The practical effect will remain to be seen.

Q22 Jeremy Wright: Could we move on to the judiciary. You will appreciate that the judiciary have some concerns—and I will not put it any higher than that—about the way in which this new department may operate with regard to the judiciary. You have always been perfectly clear with us at previous hearings that one of the roles you consider yourself to have is the protection of the independence of the judiciary. In relation to the creation of the Ministry of Justice, one of the issues which has been raised in communications with us from the judiciary is a concern that, if one department is to have superintendence of the judiciary but also control of prisons policy, there is the danger that one day there may come a conflict between the interests of the department in keeping the prisons budget as low as possible and the independence of the judiciary who may wish to pass custodial sentences when they think it is appropriate. In order to reassure the judiciary on that and ensure there is no danger that that could ever happen, what do you think could or should be done to ensure those conflicts never arise?

Lord Falconer of Thoroton: I would not regard myself as having “superintendence of the judiciary”. They are independent. They make their own decisions.

Q23 Jeremy Wright: You protect their independence.

Lord Falconer of Thoroton: I protect their independence and I have a relationship with them on behalf of the Government but certainly not superintendence. They have said they do not object in principle to the Ministry of Justice. They have two concerns: one, the Minister of Justice might start to say: “Send less people to prison” to save money.

Separately, they are worried that a situation could arise where the minister takes money from the courts to fund the prisons. I am obliged by statute to ensure there is a reasonably resourced Court Service. That is a statutory obligation on me. Separately from that, I would regard protecting the independence of the judiciary as requiring me to ensure that happens. There need to be processes in which the judiciary have confidence, which means no Minister of Justice will either put the sort of pressure to which I have referred or denude their funds in practice. That means they have to have confidence about what happens, in particular in relation to the money. There is a working group in existence, chaired by Alex Allan. Perhaps he could tell you a little about that, where it has got to and how it is going.

Mr Allan: Certainly. We have had a number of meetings involving senior DCA officials, including the Chief Executive of the Court Service, plus a number of the senior judiciary. Would have been working through what arrangements will be in place for how the budget for the Court Service is set, the negotiations which will inevitably take place between the Court Service and the Ministry of Justice over budgetary matters, what arrangements will be in place for determining the final budget, what arrangements will be in place for he monitoring, spending during a year what arrangements will be in place for altering their budget if it is proposed that it should be, making sure appropriate involvement of the judiciary is provided for at each of these stages. We have been going through quite extensive discussions and then looking at the accountabilities of the Court Service of the Ministry of the Lord Chancellor and trying to make sure we produce within the existing framework of the Court Service, as a “next steps” type agency of the Ministry of Justice, that we produce a way of working that will satisfy the judiciary that they will have full involvement and that the transparency is there so that they can be satisfied with the way in which the Court Service budget is set.

Q24 Chairman: Only 13 days ago the Lord Chief Justice sent us a position paper, which you will have seen, in which these words appear: “We have attempted to engage with the DCA in a constructive manner in order to ensure that proper safeguards are in place upon the creation of a Ministry of Justice. Our concerns have not yet been met.” The position paper went on to say: “We have not been provided with an adequate structure for dealing with disagreement in relation to the setting and revision of the budget, or for financial accommodation of new policies.” We have had the Easter weekend since then. Is that still the position?

Lord Falconer of Thoroton: The purpose of setting up the review group is to try to meet precisely those concerns. Alex can tell you where we have got to.

Mr Allan: I believe the paper from which you are quoting was written at the time of the announcement, so it is rather further ago, and since then we have had three or four meetings of the group itself. There have been a couple of sub groups. I had a meeting yesterday and I have another meeting

tomorrow. We are making good progress in trying to meet the points that the Lord Chief Justice has raised.

Lord Falconer of Thoroton: These are points we take very seriously and we need to reach an accommodation so that both sides feel comfortable about it.

Q25 Dr Whitehead: It is the experience of the Scottish Justice Department that they have had responsibility for police, prisons and the courts since 1999. Have you looked at that in terms of what their experience has been, and particularly, their responsibility for policing the prisons and the administration and funding of the courts?

Lord Falconer of Thoroton: There is a whole variety of models across Europe and within the United Kingdom, Scotland being one of them. We debated what the right model was. There are arguments for and against a whole variety of models. We think, for us, this is the best one. The one in Scotland has worked perfectly well but we think this is the right one for England and Wales.

Q26 Dr Whitehead: Are you aware whether there have been discussions between the Lord President of the Court of Session as the Head of the Scottish Judiciary and then the Scottish Ministry of Justice on the other hand on those sort of potential conflicts of interest and their solutions that we have been discussing today. If there have been discussions, are you aware of any results that have been forthcoming from those discussions?

Lord Falconer of Thoroton: The Scottish Executive in February 2007 produced a consultation paper about—and this is the wrong phrase—reforming the courts in Scotland and they have made a proposal about how the financing of the courts should be done. I think, in effect, that involves handing over a budget to the court which is then administered by a non executive board, chaired by the Lord President (effectively the Lord Chief Justice in Scotland), the non executive board being responsible to the Minister for Justice for the expenditure of the money. That is one possible model. We think the current model we have is fine. That involves a statutory duty properly to fund the courts, HMCS being responsible to the Secretary of State for Justice, but there being in place mechanisms whereby the views of the judges are properly given taken into account. The work Alex and his team are doing is trying to work out the detail of how that would work.

Mr Allan: Quite a few of the proposals in the consultation paper to which the Lord Chancellor referred implement some of the sorts of changes that were already implemented under the Constitutional Reform Act in England and Wales. The systems are at different stages in the two countries.

Q27 Dr Whitehead: The theory is backwashing on devolution, is it not?

Lord Falconer of Thoroton: Do you mean they are now looking to us?

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Q28 Dr Whitehead: Yes.

Lord Falconer of Thoroton: I am not sure the Scottish court system is a product of devolution. The Scottish court system has been there since before 1707.

Q29 Dr Whitehead: Yes. It is different.

Mr Allan: For example, one of the changes proposed in the paper is the setting up on a statutory basis of a Judicial Appointments Commission in Scotland which of course we have had on a statutory basis—

Q30 Chairman: On the other hand, they had one before we did.

Mr Allan: They had one but it was not statutory.

Q31 Dr Whitehead: Turning to other institutions which have been here for a very long time, is it your view that the Secretary of State for Justice on May 9 should be a Member of the House of Lords or a Member of the House of Commons as a matter of principle?

Lord Falconer of Thoroton: Since I anticipate that I shall be the Secretary of State for Justice on May 9 and I am in the House of Lords, that seems on May 9 a perfectly okay arrangement. It may well be that in the long term this is a ministry or a secretary of state that has to be in the Commons but that is for others to judge, it seems to me. From where we are at the moment, it seems to me entirely appropriate. When we are going through the phase that we are going through of creating a new Ministry of Justice, it is not at all inappropriate that I should do that—or somebody in the Lords should do it.

Q32 Dr Whitehead: Of course, I note the position on May 9, but there is a distinction, is there not, between the phrase “in the long term” and the phrase “transitional”?

Lord Falconer of Thoroton: Yes.

Q33 Dr Whitehead: Which one would you go for, do you think?

Lord Falconer of Thoroton: “In the long term.”

Q34 Dr Whitehead: Why would you do that?

Lord Falconer of Thoroton: I think you need some period of time to settle it down. How long that period is, I do not know.

Q35 Dr Whitehead: In terms of things settling, do you think there is a number of what Peter Riddell of the *Times* described as “loose ends” in the department? For example, the situation of electoral reform and electoral matters within a Ministry of Justice looks at first sight a little oddly placed. Is it your view that there is further work to be undertaken, as it were, to ensure those “loose ends” are properly within the right area of administration?

Lord Falconer of Thoroton: The Department for Constitutional Affairs has human rights, freedom of information, electoral matters and constitutional affairs. I think it is much better that those issues are

in a ministry such as the Ministry for Justice, where there is not a complete fit but there is a comfortable enough fit. It is hard to see any other place for them to go which is not a ministry of loose ends.

Q36 Dr Whitehead: They came from a different ministry.

Lord Falconer of Thoroton: They came from a ministry called the Home Department, by and large. The Home Department may have started as a ministry in which a whole range of things had been put together; the effect of what has happened now is that the Home Department is pretty focused. So are we. Where should these other matters go? I think they are much closer in their fit to Justice than they are to security, policing and immigration.

Q37 Chairman: There is a major political issue around, let us say, electoral reform on which the department is still supposed to be doing a significant amount of work—out of which we await. That is quite a difficult one, is it not, for a Ministry of Justice to pronounce upon, whether we should have a fundamental change in our electoral system?

Lord Falconer of Thoroton: We have done justice, rights and democracy as being the unifying feature of the DCA. Justice is now much more at the centre of it, but rights and democracy go very closely with justice.

Q38 Chairman: You have not recognised that in the name of the department.

Lord Falconer of Thoroton: No.

Q39 Chairman: You have lost “Constitutional Affairs” from your name and replaced it entirely with “Justice”.

Lord Falconer of Thoroton: I have. It seemed, in a sense, to be a much clearer, more straightforward title.

Q40 Chairman: It is shorter but I am not sure it is straightforward or clear in relation to the responsibilities which you have described as fitting appropriately together.

Lord Falconer of Thoroton: The fit is there. You always make an argument for it being somewhere else. It is the best fit. I do not think you will ever find a perfect fit.

Q41 Chairman: Do you think this is a secure position or that this too is transitional and that you might see the department losing responsibilities relatively soon?

Lord Falconer of Thoroton: It is not for me to speculate about what may happen sometime in the future. It is a perfectly defensible position, it seems to me.

Chairman: Lord Chancellor, thank you very much indeed for giving evidence. We look forward to quizzing you in the future on what you have done to sort out the prisons and offender management and things like that. In the meantime, thank you very much.

Tuesday 22 May 2007

Members present:

Mr Alan Beith, in the Chair

Mrs Siân C James
Julie Morgan
Bob Neill

Mr Andrew Tyrie
Keith Vaz
Jeremy Wright

Witnesses: **Rt Hon Lord Phillips of Worth Matravers**, a Member of the House of Lords, Lord Chief Justice of England and Wales, and **Rt Hon Lord Justice Thomas**, gave evidence

Chairman: Lord Chief Justice, Lord Justice Thomas, welcome. We may have interests to declare around the table before we begin.

Bob Neill: I am a member of the Bar but I am not currently in practice.

Jeremy Wright: The same for me.

Keith Vaz: The same for me.

Q42 Chairman: We are glad to have you this afternoon. You have kindly provided us with a detailed statement. I am not sure how far you feel you need to refer to every point in the statement, but clearly the first thing we would like to know, and it is what the statement is about, is what is the current state of negotiations between the judiciary and the Ministry of Justice about the constitutional safeguards which you think are necessary, and we would also, obviously, like to know how you got to where you are?

Lord Phillips of Worth Matravers: Yes. The current state of discussions is that they have not resulted in agreement. At the very outset, the Lord Chancellor made it plain that he was only prepared to enter into discussions on certain understood parameters. They were that there would be no change to legislation, that there would be no change to the Concordat, that there would be no change to the executive agency status of Her Majesty's Courts Service (HMCS), that there would be no ring-fencing of HMCS's budget and that it would be for the Lord Chancellor to decide, subject to his statutory obligations, on budgetary issues. I agreed that we would negotiate on those parameters to see if we could reach a satisfactory agreement, and we have tried very hard to do that but it became apparent to my negotiating team—and Lord Justice Thomas was heading that team—that it was not going to be possible to reach an agreement that we thought satisfactory within those parameters, and we have now reached the firm view that there is a need to have a fundamental review of the position in the light of the creation of the Ministry of Justice. We had been trying very hard to reach an interim agreement in order to tide over the period that will elapse, and it will obviously be a considerable period, before a review and any implementation of it can take effect. We were really very close to agreement on that, but where we did not agree was that there was a fundamental need for the review. Our stand is we must have this review; the Lord Chancellor does not believe it is necessary.

Q43 Chairman: So, you believe that the parameters which were set really inhibited any sensible resolution of the problems?

Lord Phillips of Worth Matravers: Yes. What we found ourselves trying to do, more or less, was to achieve some of the things that we were not allowed to achieve directly by a rather complicated agreement, but, at the end of the day, if one looks, for instance, at the Concordat, the Concordat would never have been agreed in its current form if the original proposal had been: "We will abolish the Lord Chancellor and have a Ministry of Justice." As far as the status of the Courts Service is concerned, this has become a fundamental difference between us. To whom should the Courts Service owe its primary duty? As an executive agency it owes a duty to its minister, but we have urged that the duty it owes to its minister is to discharge the duty that the minister owes to us; that is to provide the judiciary with the resources that they need to provide the public with an efficient and effective system of justice; and therefore, although, of course, the Courts Service, while it is an executive agency, owes a duty to its minister, its primary loyalty really ought to be to us because its job is to provide us with the resources we need.

Q44 Chairman: Is this a theoretical argument or is it a real threat?

Lord Phillips of Worth Matravers: It is a very practical argument and, of course, it applied even before the Ministry of Justice was introduced. The Ministry of Justice has exacerbated the position, because whereas before, so far as the Lord Chancellor was concerned, the running of the courts was really probably his primary concern, now he has taken on board an enormous portfolio, and it seems to us, looking at it realistically, that his primary concern is bound to be prisons and offender management.

Q45 Mr Tyrie: If I may summarise, you said that you have failed to reach agreement so far, you have failed to reach even an interim agreement and you have failed to agree that you need a fundamental review?

Lord Phillips of Worth Matravers: Yes.

Q46 Mr Tyrie: Lord Justice Thomas, before these negotiations began, I think I am right in saying that you said there would be a serious constitutional

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problem if, by the time the MoJ became operative there was not an agreement. It became operative on 9 May. Do you stand by your remarks?

Lord Justice Thomas: We accept that an inquiry is bound to take some time. If we are to do it properly, it is bound to take even until the early part of next year and we would need legislation. We have to have an interim agreement. We believe that, although we cannot, without legislation, sort out the basic problems, because everywhere we have tried we have always come back to the constitutional problem of the way the duty is structured and the executive agency status of HMCS (and it has impacted not merely on the duty, as the Lord Chief has explained—but on the powers of intervention, the composition of the HMCS Board, and issues of accountability—there are a whole host of very complicated problems and every time we try and resolve them we run into this legislative problem, but we accept that actually we must find a short-term way forward, and we think that can be done and we are nearly there.

Q47 Mr Tyrrie: Can you give me some feel for what you consider to be the scale of the constitutional problem: what is the serious constitutional problem?

Lord Justice Thomas: The serious constitutional problem is this. If we could not agree on anything, we would have a real problem on our hands. If we can agree something in the interim, then there should not be a problem because we can work for a short time under working arrangements.

Q48 Mr Tyrrie: You have just said that has failed; you have not got an interim agreement.

Lord Justice Thomas: We were very, very close to the bones of an interim agreement and, as the Lord Chief Justice has explained, there is probably one problem with it.

Q49 Mr Tyrrie: It is like cricket, is it not? You are either out or you are not, you are not nearly out?

Lord Justice Thomas: Yes.

Q50 Mr Tyrrie: So, you have not nearly got an interim agreement; you have not got an interim agreement; so we have got a constitutional problem?

Lord Justice Thomas: We have got a problem, as it stands at the moment. We believe it can be resolved pretty simply.

Q51 Chairman: The situation today is that, in the view of the senior judiciary, the relationship between the judiciary and the newly created Ministry of Justice is not a sustainable or satisfactory one?

Lord Justice Thomas: It is not. We have, as you will see from the Lord Chief's statement, got very, very close to an interim working arrangement—there is very, very little between us—but there is the question that really we say we can reach something on an interim basis but the experience of the negotiations has taken us back on so many occasions to the difficult issue of trying to resolve the executive agency status, and everything that flows from that, of HMCS, which is outside our terms of reference.

We can find a way forward and we would ask that an inquiry, to see what is the best method of actually dealing with this problem for the long-term in our new world, takes place and we have something that governs in the interim. That is what we want. We actually want to make the system work. We want an inquiry, which I would not have thought was an awful lot to ask.

Q52 Chairman: You said a moment ago it would take time to get legislation, but does not that just reveal that it takes time properly to create the Ministry of Justice?

Lord Justice Thomas: Of course.

Q53 Chairman: If we look back at the Concordat: how did the Concordat happen? It happened because the changes to the Lord Chancellor's status could not be achieved without legislation and, therefore, there was time to have a Concordat, which your predecessor negotiated?

Lord Phillips of Worth Matravers: Absolutely, and that was in the context of pending legislation.

Lord Justice Thomas: The difficulty with this is that you can create a Ministry of Justice, but the fact you can do it without legislation does not diminish its importance.

Q54 Bob Neill: It seems pretty clear that we have reached a stage where further negotiations are unlikely to produce anything, unless there is a significant move by the Lord Chancellor in terms of accepting an inquiry, which has been outside the parameters so far?

Lord Phillips of Worth Matravers: I think that is right. I hope that common sense will prevail and that it will become quite apparent that we do need this inquiry.

Q55 Bob Neill: Is there any timeframe as to when the Lord Chancellor is likely to respond to you, if at all, as to whether he is prepared to consider such an inquiry?

Lord Phillips of Worth Matravers: We have been negotiating, or discussing, I think, is the more appropriate term, very vigorously up to this moment and we were hopeful, up to an hour ago or so, that I should be coming and saying we have got an interim solution, a *modus vivendi*, for the time being. There is agreement that we need to have this looked at in depth but, for the time being, we will put the interim agreement in place.

Q56 Bob Neill: But that we have not got?

Lord Phillips of Worth Matravers: We have not got that.

Lord Justice Thomas: The difficulty we face is that it has been difficult to get to a stage where we think we can work something out that will last for the interim. What is a very different position is something that lasts for the long-term. So, after trying lots of different ideas of how we might be able to get there, it became quite apparent that there was this really difficult problem which can only be solved by looking at the different models that were available.

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We were quite happy for this to be done, and really what we are saying is it is not difficult to agree something for the short-term but actually agreeing something for the long-term within the constraints that were imposed upon us we simply cannot do.

Q57 Bob Neill: I understand that, and I take on board very much the comments I think of either Lord Phillips or yourself that there is a fundamental difference between you. I have noted, Lord Phillips, in your helpful remarks that you have provided to us, you make this comment, “We are now in the position that there is no agreement on the proper constitutional position”?

Lord Phillips of Worth Matravers: That is so.

Q58 Bob Neill: Given that very clear and serious statement, have we not perhaps reached a stage where, if there is no agreement on the proper constitutional position and a fundamental difference, it is appropriate for you to consider using your powers under section 5(1) of the Constitutional Reform Act on the basis that you can make a statement to Parliament if there are matters of importance relating to the judiciary or the administration of justice, a fundamental difference and lack of clarity on the proper constitutional position?

Lord Phillips of Worth Matravers: We may very well be getting near that point. At the moment I am here to answer your questions.

Q59 Bob Neill: I understand.

Lord Phillips of Worth Matravers: Which, I would hope, in normal circumstances would be really as far as I needed to go in making plain my position.

Q60 Bob Neill: I appreciate that. I think you made clear that it would be a rare circumstance for you to do that, Lord Phillips, but “getting close” is your considered view?

Lord Phillips of Worth Matravers: Yes.

Q61 Chairman: It would be quite extraordinary at such an early stage in the Concordat, in the arrangements, to have reached it so quickly.

Lord Phillips of Worth Matravers: Well, the Concordat was concluded in very different circumstances.

Q62 Keith Vaz: Lord Chief Justice, you must have expected that this was going to happen. The creation of the Ministry of Justice has been widely touted over a period of weeks and months. Did you not approach the Lord Chancellor, before the announcement was made, in order to try and work out a compromise with him, because obviously you have had so far very good working relationships with the DCA?

Lord Phillips of Worth Matravers: Yes, and I have, up to this moment, had very good working relationships with the Lord Chancellor, for whom I have a very high regard. Of course, he and I learned together, first of all, of the possibility that there would be a Ministry of Justice when we read the

Sunday Telegraph, and the minute we read the *Sunday Telegraph* we entered into discussions as to what the implications of a Ministry of Justice might be.

Q63 Keith Vaz: You are telling me you had discussions with the Lord Chancellor and the first he knew about the possibility of the Ministry of Justice was when he read about it in the *Sunday Telegraph*. Presumably you were meeting that Sunday, were you?

Lord Phillips of Worth Matravers: We were not meeting that Sunday, no, but we both read the Sunday papers.

Q64 Keith Vaz: Do we know roughly when this was?

Lord Phillips of Worth Matravers: It is a matter of record.

Lord Justice Thomas: It was on 22 January.

Q65 Keith Vaz: So almost five months ago?

Lord Phillips of Worth Matravers: Yes.

Q66 Keith Vaz: But then it was not, of course, the policy of the Government, was it?

Lord Phillips of Worth Matravers: Four months ago.

Q67 Keith Vaz: It was not official policy?

Lord Phillips of Worth Matravers: No, this was just an announcement, and at that point the Lord Chancellor had no inside information that there was going to be a Ministry of Justice.

Q68 Keith Vaz: How do you know that?

Lord Phillips of Worth Matravers: I am sure he would have told me.

Q69 Keith Vaz: So, as far as you are aware, he had no knowledge of it?

Lord Phillips of Worth Matravers: As far as I am aware, he did not and, had he known before then, I would have expected him to share it with me.

Q70 Keith Vaz: Do you think perhaps when the Concordat was concluded the judges should have been much stronger in anticipating what may have been likely to happen: because, of course, the Ministry of Justice was touted at the last major reshuffle in 2003 when it was almost created but it was not because of the resistance of the then Home Secretary?

Lord Phillips of Worth Matravers: The Concordat took an enormous amount of energy to agree. I think, in practical terms, it would have been impossible to have agreed the Concordat on the footing: we have got to accommodate the possibility that there is going to be a Ministry of Justice.

Q71 Keith Vaz: So nobody thought that this might possibly happen?

Lord Phillips of Worth Matravers: I suspect people thought it might possibly happen, but certainly the basis upon which the Concordat was negotiated was that the Lord Chancellor was going to part with his judicial functions, he was going to cease to play an

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active role in the appointment of judges, there was going to be a new disciplinary system, but not that he was going to take into his ministry a vast new area of responsibility.

Q72 Keith Vaz: In a sense, this is exactly what the judges predicted at the time when we were discussing the creation of the Concordat and the abolition of the Lord Chancellor's office. Senior judges came to this Committee and warned this Committee, and others, that the independence of the judiciary was something that may well have been put at risk. Do you feel to some extent this is a vindication of the points that were made at that stage?

Lord Phillips of Worth Matravers: I would have to have a look at them, but what has happened now has undoubtedly added to the problems that were raised at the time of the Concordat and throws a very different light on them, because the Minister for Justice now is going to have, I would have thought, inevitably, as his primary concern, the very real problems that exist with the prisons and offender management.

Q73 Keith Vaz: You have demanded constitutional safeguards to prevent risks to judicial independence, whether real or perceived. What concrete mechanisms, apart from the amendment to the Concordat, do you think are necessary to make sure that those particular safeguards are written in stone?

Lord Phillips of Worth Matravers: There is more than one way of achieving this, but at the heart of our immediate concerns has been the position of the Courts Service and, as from the Concordat, there should have been a fundamental change in the attitude of the Courts Service because up to the time of the Constitutional Reform Act their duty was unquestionably to the Lord Chancellor. He was the head of the judiciary and he was also their minister. I then became the Head of the Judiciary, and there should have been a fundamental change with the way they went about things with me or my senior judges being intricately involved in the decision-taking. Well, we were not, and things were going wrong, and we are much more concerned now.

Q74 Keith Vaz: But you think that mechanisms can be put in place, if the Government accepts it, which would preserve the independence of the judiciary. So, if you were going to have changes to the Concordat, this is possible with the Government showing a bit of goodwill, because Lord Justice Thomas says you are nearly there?

Lord Phillips of Worth Matravers: Yes.

Lord Justice Thomas: There are two separate things. We are nearly there on an interim agreement, how we could sort things out, but we are poles apart on actually what we need. It is interesting. This is a problem which has arisen in a lot of countries and if one can take Scotland, as this Committee knows, there is discussion there about this issue as well and there is nothing wrong with a Ministry of Justice, there is nothing in principle wrong with one,

provided you do it properly. One of the keys to it, we believe, is to have an autonomous court of administration.

Q75 Keith Vaz: This is an unprecedented situation. We have heard of government ministers criticising judges, but judges being prepared to come up and criticise ministers in this way is unprecedented. I do not think I have ever experienced such anger before. Would you describe your mood as disappointed, let down or angry?

Lord Phillips of Worth Matravers: I am certainly not angry. I am disappointed that we are not here with an agreement, but my fundamental attitude is one of concern, not for the judges, but concern for the administration of justice in this country. One talks of conflicts of interest, it is not like conflicts of interest, but there is certainly going to be a real conflict of demand on a single budget.

Q76 Keith Vaz: Finally, Lord Goldsmith has suggested perhaps we should have a written constitution. Is this now the time, with all these concerns being expressed by yourselves, the fact that the Concordat has not been adhered to, for a written constitution?

Lord Phillips of Worth Matravers: I think if we started to write a constitution from A to Z, the delay in getting in place the kind of long-term safeguards we need would be too long. The Constitutional Reform Act itself was, in a way, the first step in producing a written constitution. It is now part of our constitution in writing. It may well be that the current situation would lead to further written foundations of our constitution, but to try to write the entire constitution, I think, would take quite a while.

Q77 Keith Vaz: Lord Justice Thomas's negotiations, he is heading your team, is that with Lord Falconer or his officials?

Lord Justice Thomas: No, we have negotiated with the officials.

Q78 Keith Vaz: So you have not had a face-to-face negotiation session with the Lord Chancellor?

Lord Justice Thomas: We had some early on meetings with the Lord Chancellor which led to the formation of the working party. As to the timescale, the Ministry of Justice was announced on 22 January, the working party was created on 19 March. It took some time to persuade people there was an issue. We did send papers which set out what we believed needed to be done, and at the forefront of that, which has always been our position—

Q79 Keith Vaz: Do you not think you should have been negotiating with him rather than officials?

Lord Justice Thomas: It was agreed that it was best that it began with officials, and I have been negotiating with the Permanent Secretary and we have explored the problems and we have actually found out what the difficulties are.

Q80 Chairman: You used the expression “long-term”, but we are now in the interim and we have not got a proper basis for running the interim period. Has not the long-term become relatively urgent?

Lord Justice Thomas: I think if we look at the experience of the different ways you can find a long-term solution; it would need someone to look at it, for Parliament to have a view on it, the Government to have a view and for us to have a view on it. It is something that ought to be capable of being done, but, I am sorry to sound slightly pessimistic, these things always take longer than you first think. There would be no reason why, if we had a proper inquiry, it could not be got underway very quickly and we could not report by the end of the year. Looking at the models, there is plenty of research out there. There is a very good report, for example, on the position in Canada where exactly all of these issues have been canvassed, so you can see what the range of options are.

Q81 Mr Tyrrie: I want to come back on the point you made, Lord Justice Thomas, when you said it took some time to persuade the department that there was an issue that needed discussing. I would like you to speculate on that in relation to the fact that you both discovered about this, I gather, from the *Sunday Telegraph* and whether you think this is a good way in which decisions should be taken, whether you think that adequate steps have been taken to think this through?

Lord Justice Thomas: I have always been told never to speculate, but I will draw an analogy with what happened in 1919, which is, I think, about the first time a Ministry of Justice was thought of. A proper inquiry was set up and a White Paper produced with people such as Viscount Haldane and then he recommended something. It never happened. As Mr Vaz has said, the Ministry of Justice has been on the cards. It has been on the cards a very, very long time, and, I may be wrong, it may be before 1919, but I have read the 1919 report. I am not going to comment further.

Q82 Mr Tyrrie: Do you have anything to add, Lord Chief Justice?

Lord Phillips of Worth Matravers: When we first learnt that a Ministry of Justice was being mooted, we did make it quite plain that we thought the right way to go about it was to have in-depth discussions first and to form the Ministry of Justice afterwards.

Q83 Mr Tyrrie: Would you have expected a Lord Chancellor to have had an opportunity to think it through and make points on behalf of the judiciary?

Lord Phillips of Worth Matravers: You mean an old-fashioned Lord Chancellor?

Q84 Mr Tyrrie: An old-fashioned Lord Chancellor?

Lord Phillips of Worth Matravers: An old-fashioned Lord Chancellor would have been, from the outset, at the very heart of what was being proposed.

Q85 Mr Tyrrie: So, the crisis that we have is a consequence partly perhaps of that early reform. I think you are describing a constitutional crisis, are you not?

Lord Phillips of Worth Matravers: I do not think we are quite at the stage where I am saying—

Q86 Mr Tyrrie: A serious constitutional problem.

Lord Phillips of Worth Matravers: Serious constitutional problem.

Q87 Mr Tyrrie: We will stick with that.

Lord Phillips of Worth Matravers: One might say it might not have come about in the same way if one had not first had the Constitutional Reform Act.

Q88 Mr Tyrrie: Because I think it is universally agreed that that decision was rushed?

Lord Phillips of Worth Matravers: It was a fairly speedy announcement, that one, yes.

Q89 Chairman: Even the Lord Chancellor has acknowledged that!

Lord Phillips of Worth Matravers: Indeed.

Q90 Mr Tyrrie: So, what we have is a rushed decision having inadvertent consequences creating further poor decisions?

Lord Phillips of Worth Matravers: Yes, that is right. As far as one can see from what one has read, the impetus for this decision was an anxiety on the part of the Home Secretary to clear the decks so that he could really make a concerted attack on terrorism. It was not a decision that was taken because it would be an extremely good idea to have a Ministry of Justice.

Q91 Julie Morgan: To turn to the budget, could you describe the way the courts’ budget is currently set and how much informal judicial involvement is there in this process at the moment?

Lord Phillips of Worth Matravers: John, would you like to have a go at that? I suspect you will be better at it.

Lord Justice Thomas: Yes, subject to correction from officials who are sitting behind me, and I may get it wrong. What has happened is that the Courts Service used to have proper budget models some time ago. Those have not been updated, as I understand it, though they currently are undergoing updating. You must remember that in 2003 the decision was made to bring the magistrates’ courts in, which had an entirely different budgetary set-up, and, as I understand it, the cost models for the way in which we run the magistrates’ court system are extraordinarily rudimentary. So, the way the budget is set at present, though big efforts are being made to try and put this right, is to take what you think it cost last year, add a little bit for improvement and then try and take a bit off for efficiency and then you look at head count. It is not, in our view, a very satisfactory way of funding the court system. That budget is then put to the central department—the last budget was put to the Department for Constitutional Affairs—they then look at it and then

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negotiate with the Treasury. That is how it worked. The Treasury would make their decision, back would come a global amount and then the Minister, looking at his priorities, would send the money back according to his settlement, and if you have a generous settlement, you might get it in full, if you do not have such a generous settlement, you get a cut. I hope that is accurate, but I am sure there are people who know a great deal more about it behind me who will correct me if I have got it wrong.

Q92 Julie Morgan: Is there any judicial involvement in it?

Lord Justice Thomas: The judicial involvement in it has been to say what has been going on, to discuss what the broad figures are, but detailed judicial involvement has proved very difficult. It was more extensive, in my experience, in the spending round that took place in 2004, where with the then Finance Director of the DCA and staff we had very detailed discussions and we looked at policies in a great deal of detail. This time round we were involved vastly less.

Lord Phillips of Worth Matravers: The Concordat dealt with this. It said: "In Spending Review years the Director General, Finance and the Permanent Secretary will meet the Lord Chief Justice or his representative when the Departmental bid and the Public Service Agreement is being worked up, and then again before final departmental allocations are made after the settlement." The latter stage was overlooked, and that was, I think, symptomatic of an attitude on the part of the DCA that life goes on more or less as before: we are in charge, we take the decisions, we, of course, must have regard to the views of the judges, but the views of the judges were not considered so central to what was going to happen that they automatically said: "Before we make any decisions on allocation we must discuss this with the Lord Chief Justice or his senior judges."

Q93 Julie Morgan: How do you think the judges should be more involved?

Lord Phillips of Worth Matravers: We ought to be involved in discussions in relation to, first of all, what resources are going to be needed, discussions with the Courts Service and the department, and, secondly, involved in discussions as to how resources are going to be allocated before decisions are taken, not informed after they have been taken in principle in case we have any comments to make.

Q94 Julie Morgan: Obviously the parliamentary accountability for the setting of the courts' budget must be through the Ministry of Justice, otherwise there will not be any accountability. Would you agree with that?

Lord Justice Thomas: If I can answer that. Obviously, ultimately, it is Parliament who makes the allocations and approves what the Treasury does, and this problem is one that occurs in many countries. What we would be concerned to see is that there is a proper means of setting the budget. The Chief Executive Officer of HMCS is, I believe, an accounting officer, so he can account to Parliament,

and in any of the various models that have been looked at in other countries there are proper arrangements for accountability to Parliament. So, yes, at present the Ministry has to be accountable, but if you had a different form of Courts Service agency, there are lots of different models of accountability that could make sure that public money is probably accounted for to Parliament. I do not believe this is a problem.

Q95 Chairman: Is there not an alternative danger that you have very strong parliamentary pressure on a spokesman for the judiciary, whether it is yourself or the Lord Chief Justice, for, let us say, overspending in the court system or inefficient use of resources, and that that political pressure would fall upon you if the Ministry of Justice was not accounting to Parliament for your expenditure?

Lord Phillips of Worth Matravers: I think there is some validity in that point. Accountability for my part is something that I am considering at the moment with the senior judges, because it seems to me that if I say that I have primary responsibility for the administration of justice in this country, there has got to be some form of accountability.

Lord Justice Thomas: The issue of accountability is one of these issues that there are different ways of addressing it. The dangers that you have spoken of have been considered in other countries and solutions found. It is one of those issues that we would love to look at but we cannot because that is something that an inquiry is needed to do.

Q96 Jeremy Wright: Staying with the budget and dealing with another of your concerns that the Lord Chancellor does not want to talk about, the issue of ring-fencing the Courts Service budget: as we understand it, Lord Justice Thomas, you have talked about the possibility, notwithstanding the Lord Chancellor will not consider an entire ring-fencing of the Courts Service budget, there may be scope for a partial ring-fencing of that budget. Can you explain a little more about what you have in mind?

Lord Justice Thomas: The really crucial matter, I think, is setting the budget. Because we operate still in this country on annual budgets, you do need to get the budget set correctly and then you need to make certain that the budget is not, unless there is a catastrophe, affected so you can have proper planning through the year. I think we have always said that there may be occasions where actually, if there is a crisis, money has to come back. It would be foolish and impractical not to take that view. But if that is to happen, there needs to be a process which makes it clear what is happening, and if the judiciary are unhappy with it because they think it will seriously adversely affect the administration of justice for the public, then there ought to be a proper mechanism for disputing it and, if the worst came to the worst, the Lord Chief Justice coming to Parliament and explaining why. So, the question of the mechanism is something that I think can be achieved.

Q97 Jeremy Wright: Is not the problem that in relation to the extra elements of the Ministry of Justice's new portfolio, particularly the prison system, there is a crisis every other week, or so it seems?

Lord Justice Thomas: Yes.

Q98 Jeremy Wright: And the danger of, therefore, the need for the transfer of funds away from the Courts Service budget and towards the prison system is a very real one, is it not?

Lord Justice Thomas: Yes.

Q99 Jeremy Wright: Is the answer to that, in your view, that whereas it may be possible and desirable to have the flexibility to transfer funds from the Courts Service to the Legal Aid budget and back again, for example, it would not be desirable to permit that free flow of funds to and from the Prison Service budget?

Lord Justice Thomas: I think it is undesirable to permit the free flow anyway, because it stops proper business planning. The courts are run as an operation that has a large number of fixed costs and, if you are to run it properly, to get good and experienced staff you need proper planning and not a budget that is subject to that freeflow. I would not accept that it goes into the Legal Aid. The problem with the Legal Aid and Prison Service is the same. They are both demand-led budgets without a free flow into them. The problem with Legal Aid is well understood, but it is exactly the same problem with the prisons, that it is demand-led but the amount of funds made available appears to be capped.

Q100 Jeremy Wright: Is it not apparent from the fact that the Lord Chancellor has made it clear that he does not want to permit any consideration of ring-fencing, that he, at least, anticipates that this will be a regular problem and that there will be the need to transfer money away from the Courts Service budget when something goes wrong elsewhere in his portfolio?

Lord Justice Thomas: As I understand his view, it is his view that he would consider that he must decide into which of the various operations within his control the money should go. It is our position that as a body of people whose duty it is to administer justice for the benefit of the public and who quite often may have to take decisions that really are between the citizen and the state, our budget should not be subject to that kind of political pressure.

Q101 Bob Neill: Does it not follow from that, Lord Justice Thomas, that we have to question now whether it is appropriate for the Courts Service to be a departmental executive agency?

Lord Justice Thomas: That is our point. We think that that is what is at the root of the problem. As you see, that is one of the express things that the Lord Chancellor said he could not look at. We believe it is going to be looked at, or it is being looked at in Scotland, the likelihood is that it is going to be looked at in Northern Ireland, it has been looked at

in other countries of the world and we believe that one of the many options is far better than the executive agency status.

Q102 Bob Neill: I appreciate you are saying: look at it rather than come to a settled view. Do you have a view as to the role of the judiciary within that executive agency?

Lord Justice Thomas: We would see, as has happened successfully—and the best example I can give is either the Republic of Ireland, Denmark or the Netherlands, but other countries serve equally well—that actually administration is best done by administrators but you have a good working relationship, a strategic steer from the judiciary who is interested, and to have an administration that is independent and supports them. The last thing any of us want to do is spend our time doing administration, but we would like to be able to say those who administer the system have their primary loyalty to us.

Bob Neill: That is the point I wanted to get out.

Q103 Chairman: How significant is it that the Lord Chief Justice and the judges can be expected to sit in judgment over the decisions of the Lord Chancellor or his ministers more often than previously because of the subjects that now fall within the department and the extent to which they give rise to cases and appeals?

Lord Phillips of Worth Matravers: This creates a practical problem. I am in weekly, if not daily, communication with the Lord Chancellor. I have, up until recently, also been in regular communication with the Home Secretary. It happened on one occasion that I was actually sitting myself on an appeal to which he was party, and while that was going on I said, "Look, I am sorry, it would not be appropriate for me to meet you", although we would have been discussing something quite different. This is going to happen more often now that the Lord Chancellor is responsible for prisons and offender management, because in that position he is going to be subject to more judicial reviews. I do not think this is an insuperable problem, it is a problem we have to work out how to deal with, but it would probably mean that, if I was sitting on an appeal to which he was party, then I could not myself meet with him or enter into discussions with him while that appeal was pending; one of my other judges would have to do that.

Q104 Jeremy Wright: Would it be a problem if the person holding the office of Secretary of State for Justice, or Lord Chancellor, or both, was either a member of Parliament or somebody who was not a lawyer and, if so, how big a problem?

Lord Phillips of Worth Matravers: You mean a member of the Commons.

Q105 Jeremy Wright: Yes, a member of the House of Commons?

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Lord Phillips of Worth Matravers: I do not think that of itself would create a problem. I have never thought that it was essential that the minister holding that office should be a lawyer; the calibre of the individual, I think, is much more important. Obviously, there are advantages if you have somebody with a legal background who comes to the office already understanding how courts work and imbued with the respect for the rule of law, which is so important.

Q106 Chairman: Just to provide some context and some background, can you say anything to us about what the Designated Civil Judge for the London group of county courts, Judge Paul Collins, said when he said that London county courts were on the verge of collapse? Is that an illustration that there is

already an under-funding problem which is going to generate the sorts of pressures we were talking about?

Lord Phillips of Worth Matravers: His court has a hideous problem. It is partly because it is in the middle of London where the competition for trained staff is intense. There are people who are able to pay very much more than staff earn in the Courts Service. So what happens is you get a young recruit; you train him or her up. As soon as he or she has got the skills, an offer is made by a firm of city solicitors, or what have you, 30% more than the person is being paid and off they go. So, there is a continuous turnover. It is almost impossible to get a really good body of experienced staff.

Chairman: Thank you very much indeed. We have the Lord Chancellor and the Permanent Secretary coming to see us shortly. We are very grateful to you for your frank and forthright evidence.

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

Q107 Chairman: Lord Chancellor, Mr Allan, we are glad to have you immediately following the session with the Lord Chief Justice. I do not know whether you had an opportunity to follow that.

Lord Falconer of Thoroton: I did. I have got a copy of the Lord Chief Justice's statement and I have seen a bit of that was being broadcast.

Q108 Chairman: I have been in Parliament for 34 years and I do not think I have ever seen such clear anger and concern on the part of the senior judiciary, even in the last round of constitutional changes.

Lord Falconer of Thoroton: I did watch the bit, Chairman, when you asked the Lord Chief Justice was he angry and he said "No."

Q109 Chairman: I will interpret it, as I think many other will, as a situation in which the senior judiciary are very concerned indeed that you and your department have not been able to meet their concerns either for an interim arrangement following the creation of the Ministry of Justice or for the resolution of these problems in the longer term. Have you got a constitutional crisis?

Lord Falconer of Thoroton: No, we have not. Can I explain it from my perspective? Discussions have been going on since 19 March. Alex has been leading on behalf of my department and Lord Justice Thomas, who you heard evidence from, leading on behalf of the judiciary. The point that has been reached is the parties are extremely close to an agreement.

Q110 Chairman: On the interim measures.

Lord Falconer of Thoroton: Yesterday the judges said, "We will only reach the agreement that has been discussed since 19 March on the basis that there is an 'inquiry' starting straight away in relation to the constitutional position." The constitutional position issue is as follows. Her Majesty's Courts Service is an executive agency set up by statute. The

arrangements that we have agreed involve the judiciary very substantially in the management both of the budget and of what happens in relation to the administration of the courts but, as the Lord Chief Justice said, leave the last word in relation to significant issues to the Lord Chancellor. Before there is any disagreement, there is a process by which disagreement can seek to be resolved. If it is not resolved they have got to be reported to Parliament, which we think is a sensible way of dealing with it. We were very close to agreement on that. What the judges are saying—I perfectly respect their position—is that you need an inquiry into the issue of whether or not Her Majesty's Courts Service should cease to be an executive agency and should, in effect, become an agency broadly responsible to the judges and not to a minister and thereby accountable to Parliament. My position has been: I do not think we need that; I think we need the new arrangements that we have got through; let us see how they work. The discussions, as I understand it, still continue. So, what they are saying is an interim agreement subject to the inquiry being agreed on the constitutional position. I am perfectly happy to talk about that.

Q111 Chairman: Have not the Government really just done it again? The last round of constitutional changes, a set of reforms which many people thought desirable, were introduced in such haste that only the process of legislation made it possible for sensible agreements to be reached, the Concordat to be reached and modifications to be made? The Ministry of Justice has been created overnight and we learn today that none of the kind of discussion that could and should have preceded that with the judiciary has actually taken place.

Lord Falconer of Thoroton: Again, I do not think that is fair and I do not think that is what the Lord Chief Justice is saying either. There were discussions that started in February between myself and the

Lord Chief Justice and a working party was set up on 19 March to discuss the detailed issues. When the Ministry of Justice came into existence, the Lord Chief Justice said there was no objection in principle to the Ministry of Justice subject to safeguards being negotiated. That is what is going on at the moment.

Q112 Chairman: But we have a Ministry of Justice with no safeguards?

Lord Falconer of Thoroton: We have a Ministry of Justice where the parties are extraordinarily close to a *modus vivendi* and the issue is: do we need a discussion on the wider constitutional issues?

Q113 Bob Neill: “Extraordinarily close”, you say. The written evidence of the Lord Chief Justice says, “We are now in a position where there is no agreement on the proper constitutional position”, and his oral evidence is, “There is a fundamental difference between us.” That is not extraordinarily close, Lord Chancellor, at all?

Lord Falconer of Thoroton: As far as the position between the Lord Chief Justice and myself is concerned, the detail of the interim position is pretty well agreed, and he would not dispute that. The difference between us is not the detail of the interim position, it is whether or not the interim position can only be agreed if I agree to an inquiry now in relation to the constitutional position. That is the disagreement between us, not the terms. There may be bits and pieces, but I do not think the Lord Chief Justice would suggest there is not pretty well agreement on the detail of the interim position.

Q114 Bob Neill: But that in the future is fundamental to the issues.

Lord Falconer of Thoroton: Alex is drawing my attention to the second last paragraph the Lord Chief Justice’s statement, where he says, “The working party has come close to settling an interim working arrangement.” So, the problem is not the detail of a working arrangement, the issue is should it be interim pending a wider inquiry?

Q115 Bob Neill: That is the only the result if you give way on that, Lord Chancellor?

Lord Falconer of Thoroton: That is right. I think both the judges, my department and myself can agree on the basis of how we work in the interim. I do not think there is much difficulty in relation to that. The issue is: should we have, as was suggested yesterday, an “inquiry” or shall we put these things into place and see how they work and perhaps review them after a year or two?

Q116 Chairman: Going back to my earlier point about the way in which the reform was brought forward, why on earth are we discussing an interim arrangement between the judiciary and the Executive? That is one of the most fundamental parts of the constitution of any country, and we are having to scabble around to try and find an interim arrangement because the long-term relationship has not even been thought through before the Ministry of Justice was created.

Lord Falconer of Thoroton: We made it clear what our position was before 9 May. We said there should be a working party to discuss the detail of, it. We said what the parameters were in relation to it, it was agreed that that was the basis of the working party and that is the basis on which the discussions have gone ahead; and, what is more, in the course of that working party we have been broadly able to reach agreement on the interim arrangements. The critical issue is the question: should Her Majesty’s Courts Service be an agency responsible to the judges or should it have some Parliamentary accountability?

Q117 Chairman: The critical question is: should the Government create a ministry of justice without having thought through the basis on which it is to relate to the judiciary?

Lord Falconer of Thoroton: I think we did.

Chairman: Manifestly, surely, you did not?

Q118 Jeremy Wright: Can I be clear about what has happened here based on the evidence we have received from the Lord Chief Justice and Lord Justice Thomas. You say the parameters of the discussion were agreed. The judiciary did not have much choice. You told them what you would and would not discuss. Most of their major concerns you, the Government, are not prepared to discuss with them in the course of these discussions. What they then told us is that, regardless of the difficulties there may or may not be in reaching an interim agreement—what Lord Justice Thomas said is that is the easy bit, that the long-term position is much, much harder and on that his words were that you and the judiciary are poles apart. How on earth is the Government going to resolve this dispute and, if it cannot, how are we to get along if the judiciary and the Government cannot reach agreement?

Lord Falconer of Thoroton: I do not think that there is a real dispute about how we get along in the interim. The first time that there was suggestion that we needed a long-term--

Q119 Jeremy Wright: But there is no agreement?

Lord Falconer of Thoroton: The detail is broadly agreed. I do not claim that it is an agreement, because it is subject to the inquiry in the longer term, but I do not think there is much difficulty about us having a *modus vivendi* going forward. The broader issues we are still discussing.

Q120 Keith Vaz: Lord Chancellor, the Lord Chief Justice told us that the first time you and he discovered the proposal to create a Ministry of justice was when you read the *Sunday Telegraph* on 19 January. Is that really correct?

Lord Falconer of Thoroton: If the Lord Chief Justice says it was 19 January, it was 19 January. I may have known the day before that something was going to be suggested. It was not Government policy at the point that it appeared in the *Sunday Telegraph*, but having seen it in the *Sunday Telegraph*, the right thing to do was to discuss the possibility with the

Lord Chief Justice. The discussions then became more detailed as it became more and more of a reality.

Q121 Keith Vaz: The idea of a Ministry of Justice has been mooted for some time, has it not?

Lord Falconer of Thoroton: A long time, yes.

Q122 Keith Vaz: Is it not correct that in the major reshuffle in 2003 it was almost on the cards except that the then Home Secretary, David Blunkett, vetoed the proposal? It is not something new, is it?

Lord Falconer of Thoroton: I read that in Mr Blunkett's diaries as well, but I was not privy to the discussions that went on before 12 June.

Q123 Keith Vaz: So he just thinks he vetoed it?

Lord Falconer of Thoroton: No, I am not disputing that he did veto it, I am just saying I was not privy to any discussion that led to that.

Q124 Keith Vaz: Why is it, and it is true, these judges are pretty upset with? Do you understand that, or do you think they are making it up?

Lord Falconer of Thoroton: Of course they are not making it up. What we need to do is to sit down and reach an agreement, and that is what we are in the process of doing.

Q125 Keith Vaz: Their problem with your negotiating stance is, first of all, the fact that you have not bothered to sit down at the negotiating meeting and you have not had negotiations with them, it has all been done with your civil servants?

Lord Falconer of Thoroton: I did not realise there was a matter of complaint about that. I would be more than happy sit down with them, but both the Lord Chief Justice and I thought the best way for the negotiations to be conducted was with teams led by Alex Allan and John Thomas respectively.

Q126 Keith Vaz: In the end the decision rests with you.

Lord Falconer of Thoroton: It does.

Q127 Keith Vaz: These are the proposals of the Government and every judge that has appeared before this Committee, certainly since it has been created, although they have been critical of aspects of government policy, have always lavished praise on you.

Lord Falconer of Thoroton: We are in the middle of these negotiations. We have got to a point where we are very near to a position, there are these longer-term issues, we need to reach a solution and very quickly.

Q128 Keith Vaz: Why do not you take personal charge of these negotiations? It is an unprecedented situation here, where the Lord Chief Justice and a senior Court of Appeal judge comes before the Committee of members and has the kind of complaints that they have. Surely it is time, despite the great effectiveness of Mr Allan and his team, that you should take charge of this, because in the end

you are the Government minister responsible. They have faith in you and they feel that you can deal with this issue. Why do you not take charge?

Lord Falconer of Thoroton: I am responsible for all that has gone in relation to these negotiations. I think the right course is for the negotiations to continue and, watching the Lord Chief Justice and speaking to the Lord Chief Justice, I do not understand the negotiations to have come to an end.

Q129 Keith Vaz: But, Lord Chancellor, you have excluded from the discussions most of what they would like to see on the agenda. You have excluded any discussions by the working group of structural changes requiring primary legislation. You have made it very clear that you do not wish to be discussing the amendments to the Concordat. After all the Concordat was the great Magna Carta of this Government as far as the judiciary and the Government was concerned. You will not even consider changing that, despite the fact that the Ministry of Justice really does change the whole atmosphere as far as these matters are concerned?

Lord Falconer of Thoroton: The issue about it, the anxiety of the judiciary, which I am very alive to, is the sense that when you cease to be responsible not only for courts and legal aid but also become responsible for prisons, probation, criminal sentencing, criminal policy, your willingness to protect the independence of the judiciary and the independent running of the courts might get diminished. That is the essential concern. What we have done in the arrangements that we have been discussing is build in safeguards that try to provide assurance that will not happen whilst at the same time ensuring proper parliamentary responsibility.

Q130 Keith Vaz: Do you not think there ought to be an amendment to the Concordat? The Concordat was arrived at between you and Lord Woolf in different circumstances. There is no criticism here of what is being proposed, except that you will not look at the reality of the situation as it is now. Why can you not amend the Concordat?

Mr Allan: First of all, parts of the Concordat subsequently were enshrined in the Constitutional Reform Act, so there are parts of the Concordat which were effectively overtaken by primary legislation and to change them would, of course, require primary legislation in turn. There are other bits of the Concordat that will need to be amended. Some of the actual arrangements have changed.

Q131 Keith Vaz: You are appropriate to do that. The position we had was that the Government was not prepared to move on the Concordat.

Mr Allan: If you look at what the Lord Chief Justice's statement says, the changes to the Concordat, there are some that are absolutely inevitably, but the changes to the Concordat that were being discussed are the ones that are subsequently enshrined in the Constitutional Reform Act and would require primary legislation.

Q132 Keith Vaz: Are you prepared to amend the Concordat in view of the new changes that have occurred?

Mr Allan: As I said, I think that the changes which are under discussion are the ones that require primary legislation to change; they are not simply an agreement.

Q133 Keith Vaz: You are not prepared to change that?

Mr Allan: That is a matter of having new primary legislation, which is a different issue.

Q134 Keith Vaz: Do you feel the judges have been slightly ungrateful. You have spent the last three and a half years giving them all this power, giving up your power of appointment and here they come back complaining again?

Lord Falconer of Thoroton: No, I do not think they are being remotely ungrateful. I think they are rightly standing up to ensure that there is a proper relationship between the Executive and the judiciary, and that does involve, it seems to me, quite detailed negotiations.

Q135 Keith Vaz: But they did warn us about this, did they not? They did say that, as soon as you propose to abolish the role of the Lord Chancellor, as soon as you became an ordinary member of the cabinet as opposed to the protector of the judges, this is exactly what would happen; there would be no big beast who would be in the Government prepared to protect them. This is exactly what they said would happen.

Lord Falconer of Thoroton: Then you recall what happened after that, there was the Concordat reached and the Constitutional Reform Act and the view that is widely expressed is that entrenched judicial independence much more, and, what is more, that was done on the basis that the Lord Chancellor would no longer be the head of the judiciary. That is the basis on which we have gone into the Ministry of Justice.

Q136 Keith Vaz: Lord Goldsmith has suggested maybe this is the time for us to have a written constitution. With all these changes that have occurred with the creation of a Ministry of Justice, now is the time to enshrine all this in a written constitution. Do you agree with him?

Lord Falconer of Thoroton: I think the right thing to do is to resolve these issues by reaching an agreement with the judiciary. The critical thing is to reach an agreement with the judiciary, but what is happening is you are coming into the discussions, quite legitimately, this Committee, at a point when the discussions are still going on. We have got to resolve, the Executive with the judiciary, and we should be given a chance to do that, in my view.

Q137 Keith Vaz: You are confident that it can be resolved?

Lord Falconer of Thoroton: I am confident it can be resolved.

Q138 Keith Vaz: Are you prepared to take over the lead of these negotiations?

Lord Falconer of Thoroton: I think the right thing to do is to not break down the format of the negotiations. I think the right thing to do is to let the negotiations continue until a point is reached where there is agreement.

Q139 Chairman: When you read your Sunday newspaper or received your telephone call on the Saturday—you referred to the day before—did it occur to you to get in touch with your senior colleague, the Prime Minister, and say, “Look, I think it would be better if we did this in a way which enabled the judges to present their concerns before we actually create the Ministry of Justice, set it in stone”?

Lord Falconer of Thoroton: Not on that weekend, but subsequently I had discussions with the Prime Minister in relation to this issue, and not only did I have discussions with the Prime Minister about it but also with the judges in relation to it. There needs to be a proper negotiation, we all agreed, in relation to it. I say “we all”—myself and the Prime Minister, myself and the judges—and that is what is going on now and the right thing to do, in the interests of the constitution, is wait until we get to the end of those.

Q140 Chairman: Would it not have been the right thing to wait for the setting up of the Ministry of Justice?

Lord Falconer of Thoroton: No, because these negotiations would only ever have taken place in the context, as indeed the judiciary said, of there being about to be a Ministry of Justice and then there being a Ministry of Justice.

Q141 Chairman: You are not saying that the judiciary would only have discussed these things if you had placed the threat over them, if you do not mind my saying that?

Lord Falconer of Thoroton: That is most certainly not what I am saying, no. I am saying that the right thing to do, because of the benefits that can be obtained, is to set up the Ministry of Justice and, in advance of discussing it with the judiciary, agree with them a process by which their legitimate concerns can be discussed. We can agree an interim arrangement, and there are details to be sorted out, but we can agree those interim details and we can discuss the longer-term issues. I am very, very keen to make it clear that constitutionally this can be resolved and I believe, having regard to the quality of the people in the working group and having regard to the quality of the Lord Chief Justice, there will be no insuperable bar to this being done, and I am very keen that what we do not have is, as it were, a snapshot of the negotiations at a particular time and that the right time to make the judgments in relation to this is at a point when the negotiations have come to a stop.

Q142 Mr Tyrie: It strikes me that, if the Lord Chief Justice thought the negotiations were going reasonably well, he would not have gone public to

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the degree that he has about them which of course has created the snapshot you just described. Lord Justice Thomas says that all this can be sorted out if you will agree to an inquiry. What is it about an inquiry that you fear or that you feel is so unreasonable?

Lord Falconer of Thoroton: I do not think an inquiry is necessarily unreasonable, nor do I fear it. I think the right course is for it to be made public what the detailed agreement is once it is agreed, and I cannot make it public at the moment because it is not agreed, that we should put those arrangements into place, and I think the people who are broadly satisfied with them saw them, and that we should then agree to review them after a period of time. That would seem to me to be the best course, particularly when we know, because Lord Justice Thomas said it and I agree with it, it is a year or two at the very earliest before there could be any fundamental change. That seems to me to be the right thing, particularly because we need some degree of stability for the court staff, the judges and the politicians, going forward.

Q143 Mr Tyrie: So you are prepared to have a review—

Lord Falconer of Thoroton: Yes.

Q144 Mr Tyrie:—but you are not prepared to have an immediate review?

Lord Falconer of Thoroton: I do not think it is sensible.

Q145 Mr Tyrie: So, just to clarify, the only issue separating you in order to sign up to this interim arrangement, rather than agreement, is that the judges want the review to start tomorrow and you want it to start when, perhaps you will tell us now?

Lord Falconer of Thoroton: I am happy for it to happen in a year or two. That is the only issue between us at the moment and that is why I am slightly surprised and that is why I am saying we are almost agreed on this.

Q146 Mr Tyrie: What were you slightly surprised about?

Lord Falconer of Thoroton: Well, I am slightly surprised that that issue, which I first heard about yesterday evening, is one that has led to this slight—

Q147 Chairman: Is it not obvious why that is so, which is that there are very serious long-term considerations?

Lord Falconer of Thoroton: Yes.

Q148 Chairman: The least the judges can hope to drag out of you is that during an interim period there will be certainty that an inquiry into these long-term considerations is going to take place.

Lord Falconer of Thoroton: I would have thought the right thing to do is to let us see if we can reach agreement on the interim arrangements and let us continue to discuss what is the right way to have an inquiry or a review.

Mr Tyrie: It strikes me that the only responsible thing for you to do is to take direct charge of these negotiations immediately and start having these discussions ideally with the Lord Chief Justice.

Keith Vaz: Will you do that? You will sort it out in no time!

Q149 Mr Tyrie: Are you going to do that?

Lord Falconer of Thoroton: There is not a great crisis here. There is a—

Q150 Chairman: You may not think so!

Lord Falconer of Thoroton: We are broadly agreed on the detail on an interim basis and there is an issue about review, so let us get down to talking about that.

Q151 Mr Tyrie: When the judges come to us and say that there is a serious constitutional problem, then I think you would agree that there is something—

Lord Falconer of Thoroton: Of course.

Q152 Mr Tyrie:—very weighty that needs examination.

Lord Falconer of Thoroton: Indeed and we need to examine it.

Q153 Mr Tyrie: So are you prepared to involve yourself to engage directly now in these negotiations?

Mr Allan: Could I just say in defence of the negotiations—

Q154 Mr Tyrie: Before you come in, Mr Allan, could I possibly have an answer to this question?

Lord Falconer of Thoroton: Of course I will, subject to the view that the Lord Chief Justice takes of what is the most convenient way for these negotiations to continue. If he thinks it would be useful for us to talk about it face to face more often, I would be more than willing to do it.

Q155 Mr Tyrie: Mr Allan?

Mr Allan: I was just going to say, in defence of the negotiations that Lord Justice Thomas and I and our teams have been carrying on, Lord Justice Thomas himself said that, although there have been quite extensive negotiations to get to an agreement, I think his words were, “there is very little between us” and we are in a position where we could reach agreement on an interim basis.

Q156 Mr Tyrie: An interim arrangement. He did not talk about an interim agreement, he talked about an interim arrangement. Can I go back to this *Sunday Telegraph* article? When you read the *Sunday Telegraph* article in January, did you think it was speculation?

Lord Falconer of Thoroton: No, I did not.

Q157 Mr Tyrie: Did you think that most decisions had been made and that the machinery of government was at an advanced state in pushing these reforms through?

Lord Falconer of Thoroton: No, I did not.

Q158 Mr Tyrrie: When did you find out that things were at an advanced stage?

Lord Falconer of Thoroton: The reason I did not think it was speculation is because the *Sunday Telegraph* article came from an authoritative source, namely the Home Secretary. That is where it came from and he encompassed that straightaway, so this was not speculation, but it was the Home Secretary saying this is what he thought should happen. There then followed over a period of weeks discussion within government and it became apparent during the course of those internal discussions that we were moving towards the real possibility of a Ministry of Justice, which I strongly supported, and I completely associate myself both with the decisions in relation to it and also the method by which it has been done.

Q159 Mr Tyrrie: And you were not surprised that the Home Secretary did not engage you in detailed negotiations or discussions prior to that *Sunday Telegraph* article?

Lord Falconer of Thoroton: Well, it had to start somewhere and it did not start much longer before—

Q160 Mr Tyrrie: Yes, but this started in the press. This is trying to rearrange a large chunk of the machinery of government and it appears to have started in the columns of the *Sunday Telegraph*.

Lord Falconer of Thoroton: The first time it becomes public is in that article. I do not hear about it much longer before that.

Q161 Mr Tyrrie: And it did not cross your mind to say to the Home Secretary, “It would have been helpful if I had had an opportunity to talk to the judges, you know, Home Secretary”? It might have been helpful to let them know.

Lord Falconer of Thoroton: I then spoke to the judges very quickly thereafter.

Q162 Mr Tyrrie: The question I am asking you is: do you not think it would have been helpful to have a word with them beforehand?

Lord Falconer of Thoroton: I think I spoke to them as quickly as I could.

Q163 Chairman: Well, you do not say that you think this was the right way to make the decision.

Lord Falconer of Thoroton: Yes, I do because I am very, very committed to what is a successful Ministry of Justice and you are absolutely right to say that part of the success of that will depend upon the relationship with the judges, and I am not remotely surprised that it is taking some time to get to a conclusion, but I have got absolutely no doubt that we will reach a conclusion with the judges and it is a necessary concomitant of a successful Ministry of Justice. Should one wait until one got to a point where the judges had agreed? The position was that they said, “Subject to proper safeguards being negotiated, and we can negotiate it—

Q164 Chairman: They had not got much choice by that stage, had they? It was publicly announced.

Lord Falconer of Thoroton: That was their position at the point it was announced on 29 March, that, “Subject to there being proper safeguards being negotiated, we don’t object to a Ministry of Justice”.

Q165 Chairman: I press you again on that point though. Actually to say that we have a judiciary which is only happy with the Ministry of Justice if safeguards are negotiated is no way to carry out constitutional reform, is it?

Lord Falconer of Thoroton: Well, I think the critical thing is the creation of a Ministry of Justice, keeping the judiciary well informed and setting up a process by which the detail can be negotiated.

Q166 Mr Tyrrie: You would not describe this as another illustration though of joined-up government, would you?

Lord Falconer of Thoroton: I am trying to think which bits were not joined up. You are referring to the judiciary and myself not being that joined up or are you referring to me and the Home Secretary not being joined up?

Chairman: I am thinking of you and the Home Secretary.

Q167 Mr Tyrrie: I am looking for the bits that are joined up.

Lord Falconer of Thoroton: Well, the matter was discussed during the period January to March when it was announced and then March to May, between the date of the announcement and the date of it coming into force.

Q168 Bob Neill: I just want to clarify this because, wearing your old hat as an old-fashioned Lord Chancellor as opposed to a modernised Lord Chancellor, if I can put it that way, there you are, you are the member of the Cabinet who has responsibility, if anyone does, for the oversight of justice and you have a particular responsibility for the interests of the judiciary who are bound to be affected by this. You find out shortly before it happens that the Home Secretary is going to write a newspaper article which is going to lead to the splitting up of his Department, and that seems to be the driver of all of this, and on the back of that there is going to be a new Ministry of Justice created. After that you think, “Okay, well, I’ll talk to the judges”, but surely it is your role, as Lord Chancellor, to be saying to the Home Secretary, “Hang on, don’t do any of this until we’ve had a chance to see what the implications are for the administration of justice”, and to take a deep breath?

Lord Falconer of Thoroton: I completely accept my role in relation to defending the independence of the judiciary. I do not believe, and have never believed, that the setting up of a Ministry of Justice in the current form is remotely inconsistent with the independence of the judiciary. I discussed it with the judiciary and, if they had said to me that they thought that it was, then I would have opposed it, but they never said that and that was never their

position. The position was that, subject to proper safeguards being put in place which required detailed negotiations with them, that was the right course, and it was entirely consistent with my own view in relation to the interests of the judges.

Q169 Bob Neill: What they now say of course is that in order to try and make this work, and I agree with them, they do not have an objection to a Ministry of Justice, they have a bigger objection, it seemed to me from their evidence, as to the way it has been done, but, to make it worse, central to their concerns is getting an inquiry into the relationship of the courts to the rest of your Department.

Lord Falconer of Thoroton: We come back, and Lord Justice Thomas and Lord Phillips kept coming back to the point in the course of the negotiations, that the issue is the independent court system. Should you have a court system that is independent in effect of the Minister? That is the question.

Q170 Bob Neill: Indeed.

Lord Falconer of Thoroton: That would mean, for example, in relation to court closure issues, should those be decided by a court system reporting to judges? Now, I have always made it clear that the judges have an intimate role to play in the budgeting and the management of the courts and I have also made it clear that the Lord Chancellor or the relevant Minister should only interfere very exceptionally, but ultimately there needs to be accountability to Parliament. Therefore, what the agreement, which we have been negotiating since 19 March, does is involve the judges in the management and the budgeting. It leaves the last word to the Lord Chancellor, but, if there is ever a disagreement, it will be reported to Parliament, and Parliament, the judges and the Executive do it together.

Q171 Bob Neill: But that envisages it still as a departmental executive agency.

Lord Falconer of Thoroton: Exactly, that is right.

Q172 Bob Neill: And you are not prepared to give on it?

Lord Falconer of Thoroton: That is my clear position and it has always been my position. Right from the time that I discussed it first with the judges and right from the time that the working party was set up, the judges knew that that was my position.

Q173 Bob Neill: Well, if you are going to have an inquiry, why rule out the most fundamental point of the inquiry at all? It is actually meaningless, is it not, effectively?

Lord Falconer of Thoroton: Let me be clear, Mr Neill, about what I was saying. When we set up the working party on 19 March, I made my position clear, just as I have made it to you. The working party was then set up with Alex and John Thomas leading on the respective sides, knowing that that was my position. The position still was that the judges were saying, "We don't object to a Ministry of Justice, subject to proper safeguards", and that is what the discussion has been about. Now, I am very

keen to reach an agreement on the question of how it is to be reviewed, let us discuss that, let us put the interim arrangements in place because they obviously can be agreed, and let us settle down and find a way forward.

Q174 Bob Neill: Does that involve conceding that you are open, as a way forward, to giving the judiciary a greater role in the day-to-day organisation and the budgeting?

Lord Falconer of Thoroton: My goodness me, I have done that and, if I could show you, I have conceded huge amounts of a role to them. That is not in dispute. None of that is in dispute. It is wrong for me to show you the detail of the agreement that is almost there, but we have, quite rightly in my view, agreed, if you take this, for example, a significant number of judicial directors on the board of HMCS, we have agreed that the judges should be involved in the budgeting process, we have agreed that the judges should be involved in all policy and operational matters, quite rightly in my view, and now they are saying that the issue is: is that enough or should you go one stage further and say, "Actually we run the courts"?

Q175 Mr Tyrrie: Well, an inquiry will tell you. Why not hold one?

Lord Falconer of Thoroton: Why do we not do what I think is the right course which is, and this is the basis we were negotiating, why do we not see if the interim arrangements work, because no inquiry can produce the results of two or three years, and then decide what the best way forward is?

Q176 Chairman: Are you implying that the interim arrangements can be semi-permanent?

Lord Falconer of Thoroton: Well, they were only first described as 'interim' yesterday, but I accept that is what the judges are saying.

Q177 Chairman: So the idea that these are interim is a new idea?

Lord Falconer of Thoroton: It was a new idea that came yesterday for the first time from the judges, yesterday.

Q178 Chairman: So you are prepared to contemplate an arrangement in which the fundamental questions have not been resolved, and indefinitely?

Lord Falconer of Thoroton: As far as the judges were concerned, we were almost at a point where we had reached agreement.

Q179 Jeremy Wright: We got to the stage then, Lord Chancellor, where there had been virtually no discussion before the Ministry was created and you are happy to say, "Well, let's rub along and see if that works", and this is seeing if what was put on the back of a fag packet works thereafter.

Lord Falconer of Thoroton: No, I do not think that is a very clear characterisation of the discussion. There has been detailed discussion since 19 March and the detail has been worked out—

Q180 Mr Tyrie: But, on the basis of a misunderstanding, you thought—

Lord Falconer of Thoroton: So it would appear.

Q181 Mr Tyrie:—you were discussing a permanent deal and now you have discovered you were debating an interim arrangement.

Lord Falconer of Thoroton: It would appear that the issue at the moment between us is: should the review start straightaway or should it wait for a year or two?

Q182 Mr Tyrie: Is it common for people in your position and the Lord Chief Justice to spend seven months negotiating at cross purposes?

Lord Falconer of Thoroton: This is a serious matter.

Q183 Mr Tyrie: You were doing the laughing and I was asking a serious question.

Lord Falconer of Thoroton: Indeed you were and it is a very serious matter. I believe that, as I say, the right thing to do at this particular point is to continue to discuss how we deal with the review/inquiry issues. Can I just make clear in answer to Mr Tyrie's questions that I am not remotely complaining about the issue of interimness being raised yesterday. All I am saying is that this is what has been happening in the course of the negotiation and that is why we need to reach the end of the negotiation.

Mr Allan: If I could perhaps come in on some of the process, as the Lord Chancellor is saying, one of the particular issues of concern to the judiciary was the budget-setting process to ensure that there was visibility, that there was appropriate judicial input as we went through the various stages, not just on the annual budget, but the capital budget over a number of years, the Comprehensive Spending Review years, and we have been working through quite detailed processes to ensure that there is judicial involvement in all stages so that some of their concerns about the Lord Chancellor arbitrarily raiding the court budget to fund some other portion of the Ministry of Justice's budget would be alleviated. We have been through a complicated process negotiating that which, as the Lord Chancellor says, is very close to completion and that has been addressing one of the issues they raised which was in terms of, as they referred to it, ring-fencing. I believe we have produced a solution through this process which meets the particular concerns to ensure transparency of the budget-setting process and full involvement of the judiciary.

Q184 Bob Neill: But is that a solution which is a matter of agreement with the judiciary or is this one of the things where you are so apart?

Mr Allan: It is one of the things where, as the Lord Chief Justice's statement says, the working group have come close to setting and we are very close, but we are not there yet.

Q185 Bob Neill: Is that partial ring-fencing then?

Lord Falconer of Thoroton: No, that is unfair. That is totally unfair. The discussions have gone on and there broadly is agreement in relation to this. The issue is not whether there is disagreement in relation

to this, and you have characterised that and I am not blaming you for that because you have not been party to the negotiations, but there is of course agreement in relation to that and the issue is not the detail of that because how the budget is to be set is now agreed in detail through the working party. The question is: is this interim or is it permanent? That is now the issue.

Q186 Bob Neill: Is there any element of ring-fencing, all or partial?

Lord Falconer of Thoroton: There is no element of ring-fencing.

Q187 Jeremy Wright: Can I just put something to you which I am sure you will agree with. Senior members of the judiciary are not given to indiscretion and they are not given to overstatement.

Lord Falconer of Thoroton: No.

Q188 Jeremy Wright: Now, given the tone of the evidence, which two very senior members of the judiciary have given to us today, and you will have a chance obviously to review it, I appreciate you have not seen it in its entirety—

Lord Falconer of Thoroton: But I have got the document.

Q189 Jeremy Wright:—I think you will find, when you look at what has happened when they gave evidence to us, that the tone of it is quite striking. Now, if what you have described to us is right, that, in terms at least of an interim agreement between the Government and the judiciary on these arrangements, there are some matters yet to be worked out, but there is a very substantial measure of agreement, why do you think those members of the judiciary thought it appropriate to come and give us the evidence they gave in the tone they gave it?

Lord Falconer of Thoroton: Well, there is a disagreement about the longer-term position. The point that we have reached is that we can go forward on an interim basis, that they are concerned about the longer-term position and we need to discuss it further with them.

Q190 Jeremy Wright: Do you think, or would you concede perhaps, that some damage has been done to the relationship between the Government and the judiciary over the way in which these issues have been handled?

Lord Falconer of Thoroton: I hope not, I do not think it has and indeed there were similar things said after 12 June 2003 when the proposals about the Lord Chancellor were made on the last occasion, and I hope it became clear from what Lord Woolf has said in evidence which he has always given and what Lord Phillips said today that there has not been a difficult relationship between the judiciary and the Executive over the last year since 2003; indeed it has been good.

Q191 Chairman: Between what happened in 2003 and what is happening now, which is that in 2003 most of what had been decided could not be

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implemented until the legislation had been completed, and during that process a concordat was reached, changes were made to the substance of the proposals and there were lengthy debates in both Houses of Parliament before most of it came into effect, but that is not happening this time.

Lord Falconer of Thoroton: What happened in relation to that was that the announcement was made in June 2003. In practice, quite a lot of them were put into effect straightaway. I indicated I would not sit as a judge and I indicated that I did not want anymore to be the head of the judiciary, which in effect, although legally I had not divested the role, it meant that I was hugely compromised in that particular role. There were then discussions that lasted between July and December, which is four months with a gap in the middle, about the same length of time these discussions had started, and they reached a conclusion, as I believe these will. The difficulty always is, if there is any thought of running commentary, you have the difficult discussion that we are having now.

Q192 Keith Vaz: Can I just be clear, following the article on 19 January, whenever it was, when you first read about these proposals, if the judiciary had said to you, “We oppose the creation of the Ministry of Justice because we believe that this compromises our independence”, you also would have opposed the creation of the Ministry of Justice?

Lord Falconer of Thoroton: Most certainly.

Q193 Keith Vaz: And they have never said this to you?

Lord Falconer of Thoroton: They have never said that to me and I most certainly would have opposed it because, if the senior judiciary said to me, “This compromises our independence”, then my duty, both constitutionally and as a result of the Constitutional Reform Act 2005, is to defend their independence. I would inevitably be guided by what the Lord Chief Justice and the senior judges said to me, but they never said that. What they have said is, “We don’t object, subject to safeguards”. What we have got to balance in central government is making sure that they get the safeguards against the wider benefits that come from having a Ministry of Justice and that is what I am striving to do.

Q194 Keith Vaz: Just to follow on from what Mr Tyrie has said, there has clearly been a misunderstanding to some extent as to what you have been negotiating, in all seriousness. Would it not be a good idea, following this session where we have heard from the judges and we have heard from you and you have heard from the judges only yesterday, for you and the Lord Chief Justice to actually get together and see whether a deal can be done? Can we act as a kind of dating agency?

Lord Falconer of Thoroton: The Lord Chief Justice and I need to discuss what is the best way to go forward in relation to this. If we agree that it is best that we discuss it together, then we will do that. If we agree that it is best for further discussions to go on

in the working group, then we will do that, but this is a very, very important matter that we need to resolve.

Q195 Chairman: Mr Vaz asked you whether, if the judges had said to you that they were opposed in principle to a Ministry of Justice, you would have opposed it if they believed it compromised their independence, and that was not their position, but it was their position that bringing it into existence without safeguards could compromise their independence. You are the Ministry of Justice, you preside over a Ministry of Justice which has been created in the absence, at least for the time being, of those safeguards. That cannot be right, can it?

Lord Falconer of Thoroton: I am sure that balancing the need to make sure that the judges are properly protected against the benefits that come from the Ministry of Justice in the way that we have done it is perfectly satisfactory. They were saying, “We don’t oppose, subject to safeguards”, and by the time the announcement was made on 29 March a working party was up and running, discussing those safeguards.

Q196 Chairman: What is the urgency about putting a Ministry of Justice in place that meant that you could not pursue the safeguards? Was it the imminent retirement of the Home Secretary?

Lord Falconer of Thoroton: The best way of running the Home Office was a driver in terms of timing in part because what the Home Secretary was saying and proposing was, “You are far better, in terms of the current security threat, to have a Home Office that focuses on a few things”. That affected the timing. It seemed to me that, once the judges were saying, “We don’t oppose, subject to safeguards” and there was the pressure from the Home Office, saying, “Let’s split the Home Office”, the right thing to do was to go ahead, and in fact the security stuff went ahead earlier, but the split occurred on 9 May. That is a sensible balance to strike. Although one has got to very much recognise the importance of resolving the concerns of the judges, there are other interests that need to be balanced as well in terms of timing, so I do not accept the implication of your questions which is, “You could have waited”. Lord Justice Thomas is saying, in my view quite correctly, that the inquiry might take a year, then you might have legislation which will take a year and then that might take six months to implement, and it would have been illegitimate and wrong, having regard to the other issues, to wait, say, two and a half years before you did the Ministry of Justice.

Q197 Chairman: You have to wait several years to create the Supreme Court until you finish the building.

Lord Falconer of Thoroton: I do not think the Supreme Court has quite the same measures.

Q198 Jeremy Wright: I think though, to be fair, Lord Chancellor, the Chairman is making a slightly different point because, in order to get agreement on an interim arrangement, what you would have to do

is agree with the judiciary that an inquiry could be started, not that it would have to be completed, and I think what we are really suggesting to you is that it would have been sensible to get that degree of agreement before any further progress was made, and that clearly did not happen.

Lord Falconer of Thoroton: And that is my fault. I thought the working party was sufficient and now what is being suggested is an inquiry, so let us see whether one needs to discuss how one deals with that, and I take complete responsibility for making the mistake that I thought the working party would be sufficient.

Q199 Mr Tyrie: Could you just explain in a little more detail what you mean by the phrase “the driver for these changes in terms of timing”?

Lord Falconer of Thoroton: Over the course of the period from May to July and December, the Home Secretary had been presiding, as is well known, over an ad hoc group in relation to looking at terrorism and he had made a variety of proposals emerging from that in December/January, which is about the time that the suggestion of the split comes up, in which he is basically saying that it would be a better organisation to have a more focused Home Office, able to focus more on terrorism, and there are bits of the counter-terrorist activity that are not in the Home Office or were not in the Home Office at the time, but were elsewhere in government, so he said to bring them into the Home Office and reconfigure as between the Home Office and the DCA.

Q200 Mr Tyrie: And this is because the terrorist threat had generated concerns to the point where it was felt essential to respond to it by splitting the Home Office and the delay of a few months to enable you to consult on the judicial aspects of these changes would have been inappropriate?

Lord Falconer of Thoroton: Again, and I take the responsibility for this, nobody else, the working party looked sufficient. The need for an inquiry was not recognised at that particular point. Again, I am still doubtful about whether you need an inquiry, whether or not it is a review after a period of time, but you are asking about the driver of the changes and that is, as it were, the foundations of the changes. I was very supportive because, quite separately from the counter-terrorism material, I was very keen that there should be a Ministry of Justice, but, as I have answered to Mr Vaz and Mr Beith’s questions, only if the judges did not feel that it compromised their independence.

Q201 Chairman: Might we have another of these changes any day now? Is the present or future Prime Minister discussing with you whether the Attorney General’s role might be dramatically changed?

Lord Falconer of Thoroton: Not that I am aware of, Mr Beith.

Q202 Chairman: So will you read it in one of the Sunday papers and will we then find that the implications have not been thought through?

Lord Falconer of Thoroton: Again, I think you are slightly unfair in saying that the implications have not been thought through. I think the process will produce a perfectly sensible answer in relation to this.

Q203 Mr Tyrie: Well, we are certainly not in a happy situation now, are we? You would not describe it as a happy situation, would you?

Lord Falconer of Thoroton: I am in the middle of discussions or the working group is in the middle of discussions.

Q204 Mr Tyrie: In public where the Lord Chief Justice has felt the need to come to this Committee and go just one step short of pressing the nuclear option and making a statement to Parliament.

Lord Falconer of Thoroton: Well, I wish that had not happened, but I think the right thing to do is to reach an agreement.

Q205 Jeremy Wright: But the point, Lord Chancellor, surely is that you do not just have to wish that it had not happened, but you could have stopped it happening because you could have reached agreement with the judiciary before the Ministry of Justice was set up and not afterwards, which you are telling us will happen, but has not yet happened. Surely, it would have been more sensible, and this has been asked of you before, to set up the Ministry of Justice only when you gained unconditional agreement, not conditional agreement, from the judiciary that it would not compromise their independence, and we are not in that position.

Lord Falconer of Thoroton: No, and I am, with respect, Mr Wright, disagreeing with that proposition. I am saying that, once the judiciary were saying, “We don’t disagree in principle, but there need to be safeguards”, there were other drivers that made it good to do it as quickly as possible and there was a process by which those safeguards could be agreed, and that seemed to me to be balancing all the interests and an appropriate way to go forward. It would not have been right, it seems to me, to delay until the concerns of the judges had been sorted out because there were other factors in play as well which I have gone into.

Q206 Chairman: Let us just clarify one point that we discussed with the Lord Chief Justice, and that is the situation that arises when the Lord Chief Justice is hearing cases to which the Ministry is a party and increasingly yourself or your successor. What is your view of that situation and how it should be handled?

Lord Falconer of Thoroton: I have been judicially reviewed or my Department has been judicially reviewed and the Legal Services Commission has been judicially reviewed 31 times, I am told, during the course of the last year. It has never occurred to either myself or the Lord Chief Justice until this moment that that caused any difficulty between us. I do not know whether or not the Lord Chief Justice or the other members of the senior judiciary I have been speaking to were hearing any of these, but it

22 May 2007 Rt Hon Lord Falconer of Thoroton QC and Mr Alex Allan

never occurred to us that that was a particular problem. If it seems inappropriate for the individual judge, a member of the Court of Appeal or the plenum which is hearing it to speak to the Lord Chancellor, I would not have much difficulty about that; I do not think that will provide a particular difficulty in resolving problems between us.

Q207 Chairman: In fairness, I do not think it was raised in that spirit. It was simply that an arrangement has to be made which may result in your not being able to have the sort of day-to-day contact with the Lord Chief Justice at certain times that you might otherwise have had.

Lord Falconer of Thoroton: Well, the area of problem is that there are significantly more judicial reviews against the Prison Service in one shape or form than practically any other bit of the State. I do not know how many judicial reviews the Lord Chief Justice has heard, I think very, very few, so, although I can see it is a sensible safeguard, I cannot see it as being much of a problem on a day-to-day basis.

Q208 Chairman: Well, Lord Chancellor, there are one or two other things we could have gone into today, but I think we have had enough of a mind-boggling exposition of the way in which these things are determined in government to be sufficient for the afternoon. Thank you very much.

Lord Falconer of Thoroton: Thank you very much indeed for having me.

Written evidence

Evidence submitted by Rt Hon Lord Phillips of Worth Matravers, Lord Chief Justice of England and Wales

I would like to thank the Constitutional Affairs Select Committee for inviting me to submit material relevant to the Committee's enquiry into the creation of a Ministry of Justice.

I enclose the following documents to assist the Committee and to stand as the initial evidence of the judiciary:

- (i) Letter to the Judges' Council and Judicial Position Paper sent to members of the judiciary for the purpose of consultation. The contents of this paper have now been considered and endorsed by members of the Judicial Executive Board and the Judges' Council;
- (ii) Addendum A to the Position Paper (and Annexes *[not printed]*), which sets out a brief comparative analysis.

Further, I have now had a little time to consider the Cabinet Office Paper which accompanied the Prime Minister's Written Ministerial Statement of 29 March 2007 ("Machinery of Government: Security and Counter-Terrorism, and the Criminal Justice System"), and I wish to make a few comments upon it.

The Cabinet Office paper contains a number of general statements which tend to give the impression that the progress of an offender through the courts can properly fall within the "seamless management" of the Ministry of Justice. The progress of an offender through the courts depends, in part, upon matters that are the exclusive responsibility of the judiciary, such as judicial deployment and judicial management of the business of the court. The judiciary will continue to seek to ensure that they play their part in the due administration of justice but emphasise that it would be quite wrong to treat them as part of the system that is subject to the management of the Ministry. The judiciary cannot be treated as a seamless part of the justice process in this manner because they are, and must remain, a distinct and separate branch of Government, whose duty it is to ensure a fair and independent determination of issues and to uphold the Rule of Law as laid down by Parliament.

A number of statements are also made in the paper as to the effect that the new arrangements will have on sentencing. The passing of a sentence is, as the paper makes plain, a matter for judicial determination. Guidance to the judges in relation to sentencing is provided by decisions of the Court of Appeal and the Sentencing Guidelines Council. The role of the latter is set out in the Criminal Justice Act 2003. Further, there are existing liaison structures in place governing the links between the judiciary and NOMS, which were the subject of detailed discussion with the Home Office and which have worked well in practice. It is therefore not easy to envisage what further appropriate links might be made "between those who sentence and those who manage the correctional and other facilities".

4 April 2007

Appendix

LETTER FROM THE RT HON THE LORD PHILLIPS OF WORTH MATRAVERS, LORD CHIEF JUSTICE OF ENGLAND AND WALES TO ALL MEMBERS OF THE JUDGES' COUNCIL

You will be aware by now of the announcement to transfer responsibility for offender management and criminal justice policy from the Home Office to the DCA, and to create a new Ministry of Justice.

The senior judges have been conducting discussions with the Lord Chancellor about this proposal since it was first mooted in the press, despite the absence of a definite and detailed proposal from Government upon which I could have consulted the wider judiciary. We have not objected in principle to the creation of a Ministry of Justice with responsibility for both offender management and the court service. However, we have demanded that structural safeguards are put in place if the new ministry is not to threaten the due and independent administration of justice.

We are of the view that the cost of the ministry's other responsibilities, and in particular, that of the prison service and offender management, must not be permitted to put at risk the proper funding of the court service. Further, a solution must be found to the issue of how to match sentences to available resources. Such a solution requires public debate, followed by appropriate legislation. Without it, the risk arises that the ministry will be faced with a situation of recurrent crisis, or judges will be placed under pressure to impose sentences that they do not believe are appropriate.

From the outset, I have made these concerns clear to the Lord Chancellor, and we have embarked on discussions that I hope will address them. Now that the proposed transfer of responsibilities has been announced and the structure of the new ministry is known, I propose to pursue these discussions as a matter of urgency while, at the same time, consulting with all levels of the judiciary as to the implications of the changes.

To this end, I attach a position paper which sets out what we see as being the main implications of a new ministry. I intend to place this letter and the position paper on the judicial intranet, so that all members of the judiciary can view in full the position taken to date. At the same time, members of the judiciary will be asked to contact their representative on the Judges' Council with any queries or representations. This process of consultation will begin at the next meeting of the Judges' Council.

29 March 2007

Attachment

MINISTRY OF JUSTICE: JUDICIAL POSITION PAPER

INTRODUCTION

The views expressed in this paper to be those of "the judiciary" are the views of those whom it has been possible to consult in the time available, in the absence of a proposal which is sufficiently detailed to provide a basis for consultation of the judiciary as a whole.

CONSTITUTIONAL ISSUES

The creation of a Ministry of Justice (MoJ) with responsibility for both offender management and the courts service is not of itself contrary to the constitutional principle of the separation of powers. Indeed, that principle is respected in many systems which do have a MOJ. However, examination of those systems reveals a series of structural safeguards, in place to protect the independence of judicial decision-making and the administration of justice. At a more practical level, such safeguards also provide a mechanism for resolving conflicts between the two branches of Government in the event of "demarcation stresses" (so described by Lord Browne-Wilkinson in his 1987 Francis Mann Lecture [1988] PL 44). The best example of a successful relationship between a court service and its ministry in a jurisdiction and administration close to our own is that of Ireland, although comparative analysis provides a variety of models from across Northern Europe and the common law world.

The judiciary has, since the possibility of a MOJ was first mooted in the press, called upon Government to engage in a rigorous analysis so that the best model can be achieved, prior to the changes being made. The judiciary believes that such analysis, including detailed comparative work, is fundamental to ensuring that our constitutional arrangements, only recently put in place, are not unsettled by a reform, the consequences of which have not been fully worked through. A logical pre-requisite of such an examination is the acceptance that the creation of a MOJ is not a simple machinery of government change, but one which impacts on the separation of powers by giving the Lord Chancellor, as Minister of Justice, decision-making powers which are potentially incompatible with his statutory duties for the courts and the judiciary.

By way of example, a Minister of Justice would almost certainly be the subject of regular judicial review, in respect particularly of prisons. At present, the Home Secretary quite properly does not meet with senior members of the judiciary when such matters concerning him are sub judice. The relationship between the Lord Chancellor and the Lord Chief Justice, on the other hand, governed by the Constitutional Reform Act 2005 and the Concordat, depends on continuous dialogue, concurrence and consultation between the two in the fields of judicial appointments, discipline and the administration of justice. Serious thought needs to be given as to how this essential relationship, which relies on mutual co-operation, could survive unscathed in a new environment.

To continue the example, it is virtually certain that members of the judiciary will find themselves making judicial decisions which directly and adversely affect the expenditure of the Ministry of Justice. If the budget of HMCS is not sufficiently independent of, or safeguarded from, that same departmental budget, the consequence is that members of the judiciary will find themselves in the invidious position of making decisions which directly impact on the Lord Chancellor's ability to fulfil his duty under section 1 of the Courts Act 2003. What must be avoided, both in perception and reality, is a position whereby judicial decision-making is influenced or constrained by such financial considerations.

POLICY ISSUES

A further key issue is the exact division of ministerial responsibility for criminal justice policy. The current position is a tri-partite division between the Home Secretary, the Lord Chancellor and the Attorney General. The precise role to be played by each is uncertain. The setting of policy is clearly a matter for the Executive. However, the judiciary has a clear constitutional role in so far as the administration of justice is affected, as a result of which judicial views should be sought where appropriate. A complex and cross-departmental approach is envisaged for the development of the government response to different types of crime; this has the potential to alter the nature of that input. There are circumstances where it is perfectly proper, and indeed essential, to seek judicial views, and this is must be done in such a way as to maintain

the independence of, and public confidence in, the judicial decisions subsequently made in respect of enacted policy. This means that the circumstances in which such input is sought and the mechanisms for doing so must be clearly defined, and the proper boundaries respected by Government.

This is of course not a new conundrum, but it is one which demands a more urgent answer in the context of a MOJ. There are a number of current examples which illustrate the issue (the Fraud Review, pre-court diversion), but nowhere is it more acute than in relation to sentencing. Responsibility for offender management will now transfer to the MOJ. This transfer, and the resulting departmental structure, cannot of themselves solve the crisis of prison over-crowding or provide a solution for matching sentences to available resources. Such a solution requires public debate, followed by appropriate legislation. Without it, the risk arises that the ministry will be faced with a situation of recurrent crisis, or judges will be placed under pressure to impose sentences that they do not believe are appropriate.

It is imperative that the judiciary is not drawn inappropriately into policy decisions in its area by virtue of its relationship with a MOJ. What must be recognised in the structure of the new ministry, with its vastly enlarged remit, and in the framework of its relationship with the judiciary, is the need to establish open and clear lines of communication so that it is always evident with which branch of government responsibility and accountability lie.

There is a need for a detailed examination and a consequent long-term solution. We have attempted to engage with the DCA in a constructive manner in order to ensure that proper safeguards are in place upon the creation of a Ministry of Justice. Our concerns have not yet been met. What has not been addressed is the mechanisms by which it is proposed to make certain that the Lord Chancellor's statutory duties are met once the remit of the Department and the Minister is significantly changed. In particular, we have been offered no satisfactory guarantees for the independence of the administration of justice through HMCS. We have not been provided with an adequate structure for dealing with disagreement in relation to the setting and revision of the budget, or for the financial accommodation of new policies. While it is true that the Lord Chief Justice ultimately has available to him the "nuclear option" of alleging to Parliament that the Lord Chancellor is failing to meet his statutory duties, it would be most unfortunate if a stage were ever to be reached where he was forced to deploy this.

The Lord Chancellor has made it plain that he and his officials will continue to engage with the judiciary, and we hope that these discussions will produce a satisfactory outcome.

ADDENDUM A:

COMPARATIVE SURVEY OF THE POSITION IN OTHER EUROPEAN AND COMMON LAW COUNTRIES

Lord Justice Thomas has, on behalf of the senior judiciary and in his capacity as judge with responsibility for European matters, conducted an initial comparative survey of the position in other European and common law countries.

This document outlines the key points to be drawn from this analysis. and introduces useful material dealing with the issues.

The following introductory points may be made:

- A Ministry of Justice, with responsibility for "corrective services" (prisons and probation), as well as the courts exists in a number of States, and need not be incompatible with the separation of powers;
- Where a Ministry of Justice undertakes a wide variety of functions, including responsibility for criminal justice policy and, in some cases, prisons, arrangements have very often been made to place the funding arrangements and operational control of the courts at arm's length from the Ministry;
- There is a trend in both European and common law jurisdictions toward greater autonomy in courts' governance, so as to draw a clear line between the executive functions of the Ministry and the judicial business of the courts, whether through creation of Judges' Councils which have responsibility for the running of the courts, or through legislation which enshrines a courts administration independent of the Executive; and
- The kinds of tensions with which the judiciary is now concerned in England and Wales are not unique; other jurisdictions have conducted detailed analyses of the problem of how to ensure that the courts run both independently and efficiently, even though they are funded by the Executive through Ministers who have a broad policy remit and are often subject to competing political pressures. For example, in Ireland, which since 1999 has had a settled and successful system of courts governance, a working group consisting of Judges and officials produced six reports over a three year period, covering all aspects of the Irish system from the bottom upwards (reference is made to each of the working group reports at Annex C below but particular attention is drawn to Chapter 1 of the 6th Report of the Working Group, which summarises the depth and breath of analysis undertaken in Ireland).

The common features to emerge from a survey of countries to have moved toward greater autonomy in courts' governance are:

- Judges' Councils (or autonomous courts administrations) are established by primary legislation, which will outline the composition of the Council or Board, its accounting and other duties, (such as that to prepare an annual report or have regard to government policy in making decisions (eg Ireland, Courts Service Act 1998, section 13));
- Significant judicial representation on the Management Board responsible for the administration of the courts. Chairmanship may be judicial or may be by the Chief Executive (or equivalent), but around half of the Board members will be judges of various rank (eg in Ireland, 9 of the 17 members are judges, in Denmark 5 of the 12 members are judges, in Sweden 4 of 9). The remaining members will be a variety of managers, lawyers, community representatives, trade union representatives etc. Judges will very often also sit on lower-level Committees, although the models vary as to whether this is at a strategic and policy level, or whether the judicial role extends to operational detail. On the Irish model, for example, the Judges are jointly responsible with senior officials for strategy, but responsibility for delivery rests with officials;
- Duty to prepare annual reports, which the Minister of Justice or equivalent is then under a statutory duty to lay before Parliament; and
- Budgetary autonomy. In respect of funding arrangements the position appears generally to be for the Board to make its annual bid for resources to the Ministry of Justice. The Board then determines how the funds are allocated. However, there can be additional protection built into the system, so for example in Denmark, the Council has the competence to address Parliament directly if it considers its allocation insufficient. Further, on a model in which the Chief Executive or Board prepare the annual report, rather than the Minister, there is scope for publicly addressing any lack of resources in that report, which Parliament can then scrutinise.

4 April 2007

ADDITIONAL SOURCES [not printed]

Annex A: “*Councils for the Judiciary in Focus*”, by Wim Voermans of Tilburg University (2000), which sets out the various models used in Europe and the link between judicial independence and courts' administration.

Annex B: Alternative Models of Court Administration (2006) (<http://www.cjc-ccm.gc.ca/cmslib/general/models-e.pdf>) for an up-to-date summary of the position in America, Canada and other common law jurisdictions.

Annex C: Courts Service Act 1998 (Ireland). Working group reports which led to the creation of the Irish Courts service can be found at: <http://www.courts.ie/courts.ie/Library3.nsf/foe0a24268coa3da80256da500428fb8/7e684fd4e568423b80256da6003877e6?OpenDocument>.

Annex D: “Which Council for Justice? The current situation in the Council of Europe Member States”, paper given by Sir Richard Aikens to the Third European Conference of Judges (March 2007).

Further evidence submitted by Rt Hon Lord Phillips of Worth Matravers, Lord Chief Justice of England and Wales

The judiciary is an independent arm of the state and is fundamental to the Rule of Law. It is not a privilege for the judiciary but is an essential requirement for every citizen to ensure the fair and impartial resolution of disputes. The administrative system that supports the judiciary underpins that independence. Judicial independence cannot exist on its own—judges must have the loyal staff, buildings and equipment to support the exercise of the independent judicial function.¹

When the Lord Chancellor was head of the judiciary he had primary responsibility for the administration of justice in England and Wales. When he ceased to be a judge and I, as Chief Justice, became head of the judiciary, I inherited primary responsibility for the administration of justice in England and Wales. The

¹ In 1980, Lord Browne-Wilkinson put it in this way in his lecture entitled “The independence of the judiciary in the 1980s”:

“I do see . . . a threat to the independence of the legal system, as opposed to the judges who operate it. The threat arises by reason of the executive's control of finance and administration. At first sight many would not regard the control of finance and administration as providing any threat to judicial independence. But if the matter is given more consideration, it is to my mind apparent that the control of the finance and administration of the legal system is capable of preventing the performance of those very functions which the independence of the judiciary is intended to preserve, that is to say, the right of the individual to a speedy and fair trial of his claim by an independent judge . . .

The number and quality of staff in court offices have a direct impact on the conduct of the case when it comes into court . . . Court administrators are answerable to their superiors in the civil service, not the judges”.

Lord Chancellor came under a duty to provide me and my judges with the resources that we need for the efficient and effective administration of justice. In view of this he and I became partners in the administration of justice, but as a matter of constitutional principle the Lord Chief Justice is now the senior partner.

The provision and administration of the resources needed for the administration of justice was entrusted by the Lord Chancellor to Her Majesty's Court Service (HMCS), an executive agency, before the Constitutional Reform Act. At that time the duties owed by HMCS were owed to the Lord Chancellor, both because he was the head of the judiciary and because he was the Minister responsible for the agency.

When the Lord Chief Justice became head of the judiciary in place of the Lord Chancellor this altered the duties owed by HMCS.² It continued to owe a duty to report to the Lord Chancellor, as the responsible Minister. But it also owed a duty to the Lord Chief Justice, as head of the judiciary responsible for the administration of justice, to provide the infrastructure necessary to discharge that responsibility. Close communication and co-operation with the Lord Chief Justice and the senior judges when decisions are taken is essential in order to ensure that what is needed for the administration of justice is provided.

The Concordat recognised this to a degree. Provision was made for the Lord Chief Justice to be consulted in relation to both the fixing of the HMCS budget and the allocation of that budget. There should have been a sea-change in the attitude of both HMCS and the Department for Constitutional Affairs (DCA), under the Lord Chancellor, to the role of the Lord Chief Justice in relation to the provision and administration of court resources. In the event there has been no real change in attitude at all. The Lord Chancellor and his staff in the DCA continued to act as if he retained primary responsibility for the administration of justice and had sole responsibility for deciding what resources should be allocated to this and how they should be deployed.

In giving evidence to this Committee on 17 April 2007 Lord Falconer said:³

“We think the current model we have is fine. That involves a statutory duty properly to fund the courts, HMCS being responsible to the Secretary of State for Justice, but there being in place mechanisms whereby the views of the judges are properly taken into account”.

After the Constitutional Reform Act 2005 came into force, the views of the judges should always have been taken into account by the Lord Chancellor. They were not. We were side-lined. Decisions were taken without our participation and we were then told what was proposed. Examples are plans for court closures and development of the court estate and a lack of judicial consultation and transparent decision-making in relation to disposal of a £34 million surplus earned on civil justice court fees in 2005–06.⁴

This lack of real involvement of the judges in decision making was already a matter of concern before the Ministry of Justice came into being. We were trying to redress the situation. That it existed is perhaps not surprising. Lord Falconer was and is an outstanding Lord Chancellor in the traditional and historic role of that office. He has stood up for the Rule of Law and the independence of the judiciary when the need arose, and it has arisen. I have the highest regard for him and a very good personal working relationship with him. It is perhaps not surprising that he and his department continued as before in relation to the allocation of resources. The Ministry, the DCA as it was, also keeps a very tight control over the activities of HMCS—closer than is consistent with best administration, even on an executive agency model.

All of this may have been tolerable so long as the Lord Chancellor was in the traditional and historic role of that office and so long as providing an administrative system for the courts remained one of his two most important budgetary concerns; the other being legal aid. The transfer to him of responsibility for prisons and offender management and criminal justice policy has changed all that; his concerns will be those of Home Secretaries past. In the fullness of time, the Minister of Justice will be increasingly distanced from the traditional and historic role of Lord Chancellor. There may well be a Minister who may have no personal knowledge of how the courts work nor the same understanding of and passion for the rule of law.

² In 2003, the Courts Act was passed, setting up HMCS, and placed, in section 1, the Lord Chancellor under a duty to ensure that there is an efficient and effective system to support the carrying on of the business of the courts. This duty was currently delegated to HMCS, an executive agency, headed by the Chief Executive. In 2004, the Concordat made the Lord Chief Justice Head of the judiciary, and the Lord Chancellor became a Minister with responsibilities primarily for the courts and legal aid. The Constitutional Reform Act 2005 set this out and created new systems for judicial appointments and discipline. The nature of the protection of judicial independence changed, from one person holding a dual role as Head of the Judiciary and Minister with responsibility for the courts, to a Minister with statutory duties owed to the Judiciary.

The Courts Act 2003 was passed at a time when the Lord Chancellor was head of the judiciary. Although this was inconsistent with the separation of powers it did, as Lord Browne-Wilkinson put it, provide a flexible and effective means to transmit the needs of the legal system to the executive and to Parliament. If, prior to the Constitutional Reform Act 2005, disputes arose between judges and administrators, the Lord Chancellor, because he occupied both roles, would be the arbiter. His dual position operated as a built-in constitutional protection that the section 1 duty would be performed with due regard for the (then) non-statutory duty to protect judicial independence. Following the separation of the Lord Chancellor's role and the imposition of a statutory duty to uphold judicial independence, it becomes necessary to put in place mechanisms to check (prior to ultimate recourse to Parliament) that the section 1 duty is performed consistently with the section 3 duty owed to a branch of the state of which the Lord Chancellor is no longer the head.

³ <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmconst/uc466-i/uc46602.htm>

⁴ <http://www.dca.gov.uk/consult/civilcourt-fees/cp0507.pdf>. The figures are at Annex A, page 35. The civil only surplus was approximately £34 million in 2005–06.

The Ministry of Justice has additional responsibilities for prisons, probation and criminal justice policy which may create a conflict between the Ministry and the judiciary.⁵ This is why the creation of the Ministry of Justice has constitutional implications. Machinery must be put in place to ensure that the efficient and impartial administration of justice by the judges for the benefit of each citizen and the resources needed for this are not put at risk.

These problems are not unique to this jurisdiction. They have been recognised in other countries where there is a Ministry of Justice with responsibility for the court infrastructure, and there is a movement to giving the judges greater control over the running of their own court systems. There is, for example, a very helpful recent report in relation to Canada. The judiciary are drawing on the experience of other countries with Ministries of Justice, and in particular Ireland, the Netherlands and Denmark, where autonomous court administration with a greater degree of judicial participation has been very successful. It has underpinned the independence of the judiciary, improved the relationship between the judiciary and the court administration and improved the delivery of justice for the public.

The issue is currently being addressed in Scotland⁶—Chapter 12 of the consultation paper, *Proposals for a Judiciary Scotland Bill*, (14 February 2007) raises the issue of the practical way of giving the judiciary more authority over the Court Service in Scotland.⁷ The Lord Chief Justice of Northern Ireland has raised a similar issue in Northern Ireland as a matter for resolution in relation to the new scheme of devolution.

The problem is exacerbated in this jurisdiction because prison capacity is inadequate to cope with the effect of the present legislative framework and the demands for funding prisons and offender management are likely to be particularly heavy. This could lead to a perception of pressure being brought to bear on the judges to go easy on prison sentences in order to prevent damaging demands being placed on their own resources. Such a perception would be damaging to the Rule of Law and would dent public confidence in the independent administration of justice.

THE PRESENT POSITION

Shortly before the Ministry of Justice was created questions raised by the judges led to discussions, which resulted in the Lord Chancellor taking the position that a working party could consider the creation of constitutional safeguards but only under the following parameters:

- no change to legislation;
- no change to the Concordat;
- no change to the executive agency status of HMCS;
- no ring-fencing of HMCS budgets; and
- that it is for the Lord Chancellor to decide, subject to his statutory obligations, on budgetary issues.

Whilst I agreed that the working party could proceed on this basis as these parameters were stated to be non-negotiable, I made it clear that that they would have to be revisited if a solution could not be found.

As the working party has, over many weeks, studied the issues it has become clear that there is a difference in relation to constitutional principles⁸ which the working party has agreed they cannot resolve within their terms of reference.

We are now in the position that there is no agreement on the proper constitutional position. This necessitates the enquiry that we have always sought, which needs to commence as soon as possible, although it will take a little time to report.⁹ The judiciary made this clear within the working group and to the Lord Chancellor.

⁵ This conflict is not purely financial, but also affects the relationship between the judiciary and the Ministry of Justice. For example, it is inappropriate for a judge who is involved in proceedings to which the Ministry is a party to meet with the Minister of Justice until judgment in that case has been given.

⁶ Professor Page's answer to Question 499.

⁷ Paragraph 12.2 of the Scottish Executive's Consultation Paper states that: "There were some strong views in the consultation on the link between the unification of the judiciary and the governance of the Court Service. Put simply, the view was that the Lord President should not take an overall responsibility for the efficient disposal of business in all courts without having authority over the administrative support for those courts. We understand the force of that argument, and have therefore entered into more detailed discussion about how more judicial authority over the Court Service would work in practice, taking into account the continuing strategic role of Scottish Ministers, accountability to Parliament and the need for strong working relationships with other bodies in the justice system".

⁸ In particular the status of HMCS as an Executive Agency, the recognition of a direct obligation owed by HMCS staff to the Lord Chief Justice and judiciary to support them in their function to deliver justice independently and the nature and type of the intervention of the Lord Chancellor in the operation of HMCS and the relationship of these to the existing constitutional framework.

⁹ As well as the long-term position of HMCS, it is my view that the enquiry will also need to examine the operation of certain functions under the Concordat, such the appointment to leadership posts, in the light of the creation of the Ministry of Justice (see also the evidence of Professor Hazell to the Constitution Committee of the House of Lords, on 9 May 2007).

Pending the report of the enquiry I and the judicial members of the working group have been keen to put in place an interim working arrangement to allow the judiciary to continue to work with HMCS to enable justice to be administered.

The working group have come close to settling an interim working arrangement. The group produced a short document which set out the role and function of the HMCS Board, including that of the judicial representatives upon it, a clear process for the setting of all types of HMCS plans and budgets, and adjustments to them, and, where agreement on these matters at HMCS Board level proved impossible, an escalation process for the HMCS Board and for me to resolve those matters with the Lord Chancellor, with reference to my ultimate recourse to Parliament, as set out in the Constitutional Reform Act 2005. The document formed no more than the basis for a temporary working arrangement which I hoped would have provided the protection that we need against the two immediate risks—the pressure on the HMCS budget and the conflicts of interest that have arisen from the creation of the Ministry of Justice.

The terms of this document were almost agreed. However, I and the judicial members of the working group are quite clear that this document was premised on the need for an enquiry without delay. If only the need for this were accepted, then we would have a basis for moving forward.

22 May 2007

Evidence submitted by JUSTICE

MINISTRY OF JUSTICE: BRIEFING NOTE

1. In general terms, JUSTICE welcomes the government's creation of a Ministry of Justice formed out of the Department for Constitutional Affairs (DCA) with additional responsibilities from the Home Office. However, much of the public discussion of this proposal has focused on the desirability of breaking up the Home Office. JUSTICE is concerned that the government deals appropriately with the issues for the DCA and, in particular, recommends that:

- (a) The government publish a memorandum of the "rule of law" obligations on the Secretary of State for the proposed department which are implied in s1 Constitutional Reform Act 2005 (CRA) and in the revised oath of office which the CRA introduced for the Secretary of State for Constitutional Affairs;
- (b) Parliament consider the implications of any proposed merger from the point of view of the Government's obligations for the rule of law;
- (c) Ministers in the new department are mindful of their responsibilities for maintaining the rule of law; and
- (d) Consideration be given to more separate funding arrangements for the judiciary and the Court Service.

2. This note concerns one issue alone: the consequences of the "rule of law" obligations on the DCA that would remain at the core of a newly created Ministry of Justice.

3. From the point of view of the rule of law, the advantages of enlarging the DCA into a wider Ministry of Justice are:

- (a) There would be a ministry with greater degree of comprehensive oversight of the Criminal Justice System, albeit that the residual Home Office and the Attorney General's Department will also retain criminal justice responsibilities; and
- (b) Ministers in the new department will command greater resources and should, thereby, have greater weight within Government.

It is on the basis of these that we welcome the proposal.

4. However, there are matters of concern. These are highlighted by the statutory responsibilities assumed by the DCA when it was formed to take over from the Lord Chancellor's Department. The CRA passed through Parliament only after a protracted and contentious two-year period of debate. It contains two provisions relating to the role of the Lord Chancellor/Secretary of State for Constitutional Affairs. Section 1 provides that:

This Act does not adversely affect:

- (a) the existing constitutional principle of the Rule of Law; and
- (b) the Lord Chancellor's existing constitutional role in relation to that principle.

This is somewhat unclear since the Rule of Law is left undefined. Section 17 makes further use of the term and amends the Lord Chancellor's oath of office to:

Respect the Rule of Law, defend the independence of the judiciary, and discharge my duty to ensure the provision of resources for the efficient and effective support of the courts.

5. The constitutional issue is whether there is any conflict possible between the duty to uphold the Rule of Law and the independence of the judiciary, on the one hand, and the taking of lead responsibility for criminal justice, on the other, by the new Secretary of State. There is a political element to this question: whether the enhanced criminal justice responsibilities will practically detract from the department's ability to obtain funds and attention for issues relating to the administration of justice and including the judiciary, courts and legal aid.

6. The role of the DCA has been the subject of some controversy and the issue of possible conflict has arisen previously—in the context of a proposal to transfer the Court Service to the Home Office. Lord Woolf, then Lord Chief Justice, has reported that “there is a lack of appreciation of the significance of the judiciary in the corridors of Government”. He has also recounted his successful resistance, on the part of the judiciary, to the proposed transfer of the Court Service to the Home Office: “It was not appreciated within government that it was inappropriate for the department that most frequently had to defend judicial review in the courts and that had lead responsibility for criminal justice policy to be in charge of what should be seen as an impartial Court Service”.¹⁰

7. Lord Woolf was pointing to the fact that the majority of judicial review applications are taken against the Home Secretary. This has, however, been largely because of the dominance of applications relating to immigration and asylum (3,149 out of a total of 5,381 applications in 2005).¹¹ His concern was presumably that a minister responsible for the administration of the court would face conflict if also a party to actions within it that might conceivably surface in terms of budgetary priorities or administrative reform.

8. The present proposal would not encounter quite the same objection because asylum and immigration would be retained within another department, the residual Home Office. However, the new Secretary of State would face the same potential conflicts in relation to criminal matters, both within the criminal courts and in civil cases. 251 applications for permission for judicial review related to criminal matters. Nevertheless, in our view these are manageable, primarily because the independence of the judiciary will not be affected by which ministry is responsible for court and judicial administration.

9. However, the likely practical consequence of any further responsibilities for the DCA will be that the Secretary of State must be a member of the House of Commons and not necessarily a lawyer of any kind. The CRA imposes statutory requirements on the Secretary of State for Constitutional Affairs, who must “appear to the Prime Minister to be qualified by experience”¹² for which qualification as a practising or academic lawyer may be indication. But so may previous ministerial or Parliamentary experience as well as such “other experience as the Prime Minister considers relevant”.¹³

10. The position is, thus, soon likely to be very different to that under which the relationship between Government and the judiciary was managed through the post of the Lord Chancellor. That is, in JUSTICE's view, desirable and it supported the CRA during its passage through Parliament. However, some element of further protection may be required to safeguard the responsibilities that, until recently, were seen as central to a major office of state. In particular, the government should spell out its understanding of the obscurely worded obligation in s1 CRA and the statutory oath in relation to the Rule of Law. This should be considered by the relevant Parliamentary committees and would provide a written statement of obligations to remind ministers of its content. In the longer term, consideration should be given to greater separation of the responsibility for administration of the courts from that of criminal justice and it may be that the Court Service should become responsible to the judiciary through the Office of the Lord President of the Courts of England and Wales and the Supreme Court.

1 March 2007

**Evidence submitted by Rt Hon Lord Falconer of Thoroton QC,
Secretary of State for Constitutional Affairs and Lord Chancellor**

MINISTRY OF JUSTICE

I am writing following the Prime Minister's announcement last Thursday of the creation of a Ministry of Justice.

The Ministry of Justice will be a completely new department. It will bring together the current responsibilities of the Department for Constitutional Affairs, including Her Majesty's Courts Service and the Tribunals Service, with the National Offender Management Service—including criminal law and sentencing policy—and will provide clear leadership in driving forward the outcomes of the justice system. This reform represents a significant step in the Government's commitment to the delivery of justice and a

¹⁰ Lord Woolf, “The Rule of Law and a Change in the Constitution”, 23 March 2004.

¹¹ The Stationery Office Judicial Statistics 2005 (revised) Cm 6903.

¹² section 2(1) Constitutional Reform Act 2005.

¹³ section 2(2) Constitutional Reform Act 2005.

further logical step in its programme of constitutional reform. It reflects the Government's desire and drive to give the country the justice system it deserves and to achieve its objectives of protecting the public and reducing crime and re-offending.

The focus of the new Ministry will be on public protection and reducing reoffending, the delivery of justice and upholding rights and democracy. In bringing these functions together it will be able to improve the ability of the justice system as a whole to serve members of the public in whichever capacity they encounter it: as victims, witnesses, or offenders; in using family or civil courts, tribunals or alternative dispute resolution procedures; or as an individual needing to feel secure in daily life. In the unification of sentencing, criminal law and penal policy, the new Ministry provides for a single department to be responsible for delivering an end-to-end criminal justice system from first appearance in court right through to rehabilitation or release.

The Ministry of Justice will also have complete departmental oversight of civil and family justice as well as key elements of constitutional and rights based policy such as data protection and the Human Rights Act 1998. It will continue also DCA's role as departmental sponsor to the Judicial Appointments Commission and to provide support to the judiciary through the Judicial Office for England and Wales and the Judicial Communications Office. Further details on the responsibilities of the new Ministry and its relationship with the Home Office and the Attorney General's Office are provided in the attached paper. [*not printed*]: Available at www.cabinetoffice.gov.uk/publication/reports/government_changes/doc/machinery_govt.doc

The new Ministry will Operate from 9 May 2007. This commencement date allows for a number of financial, legal and operational issues to be finalised. Transitional arrangements will be put in the interim period. Until this date, the Home Secretary retains Ministerial accountability for the functions to be transferred.

The Home Office will maintain responsibility for the police and the security agencies as well as oversight of crime reduction, drugs, serious and organised crime and counter-terrorism policies. The Attorney General's Office will maintain responsibility for the Crown Prosecution Service and other prosecuting agencies. The Ministry of Justice will work closely with both to ensure that the Government maintains and builds upon the reduction in levels of crime and the increase in the numbers of offences brought to justice achieved in the last ten years. The Office for Criminal Justice Reform will be based in the Ministry and will work bilaterally between the Ministry of Justice, the Home Office and the Attorney General's Department.

The delivery of these reforms represents a challenge, but I am confident that the professionalism and commitment of the prison and probation officers, court staff and all those working in the new Ministry and across the justice system will ensure that we make the most of this opportunity

I look forward to continuing the productive relationship with your Committee as we progress with these important reforms.

1 April 2007
