

HOUSE OF LORDS

Select Committee on the Constitutional Reform
Bill [HL]

Constitutional Reform Bill [HL]

Volume 1: Report

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Select Committee on the Constitutional Reform Bill [HL]

The Committee was appointed to consider and report on the Constitutional Reform Bill [HL].

Membership

The Members of the Committee were:

Viscount Bledisloe	Lord Goodhart
Lord Carlisle of Bucklow	Lord Holme of Cheltenham
Lord Carter	Lord Howe of Aberavon
Lord Craig of Radley	Lord Kingsland
Lord Crickhowell	Lord Lloyd of Berwick
Lord Elder	Lord Maclennan of Rogart
Lord Falconer of Thoroton	Lord Richard (Chairman)
Baroness Gibson of Market Rasen	Lord Windlesham

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NOTE:

The Report of the Committee is published in Volume I, HL Paper No 125-I. The Evidence of the Committee is published in Volume II, HL Paper No 125-II.

References in the text of the Report are as follows:

(Q) refers to a question in oral evidence (Volume II, HL Paper No 125-II)
(p) refers to a page of evidence (Volume II, HL Paper No 125-II)

Constitutional Reform Bill [HL]

CHAPTER 1: INTRODUCTION

Background to the Committee

1. The Constitutional Reform Bill [HL] makes provision for replacing the office of Lord Chancellor and to abolish that office; to establish a Supreme Court for the United Kingdom and to abolish the appellate jurisdiction of the House of Lords; to establish for England and Wales a Judicial Appointments Commission to recommend appointment of all judges (other than those of the Supreme Court); and for introducing new arrangements for judicial discipline.
2. Although some aspects of the policy of the bill had been under consideration by the Government for some time—particularly, but not exclusively, the question of judicial appointments—the immediate catalyst for change was the specific announcement by the Government on 12 June 2003 of its intention to abolish the office of Lord Chancellor and establish a Supreme Court. There followed a period of public consultation on the three principal elements of reform (Lord Chancellor, Supreme Court, and judicial appointments), and the Government published summaries of the responses on 26 January 2004.¹ Meanwhile the Supreme Court and judicial appointments issues were also considered by the Constitutional Affairs Committee of the House of Commons, which reported on 3 February 2004.² One of its recommendations (at para.188) was that the Constitutional Reform Bill would be “a clear candidate for examination in draft” and a number of speakers in a keenly argued debate in the House of Lords on 12 February 2004 made the same point (HL Deb col.1211-1344).
3. The Government took a different view and the bill was introduced into the House of Lords on 24 February 2004 (HL Bill 30). During the Second Reading debate on 8 March a number of speakers advanced the case for referring the bill to a Select Committee (there having been no opportunity for pre-legislative scrutiny) and following a vote on a motion in the name of Lord Lloyd of Berwick the bill was committed to a Select Committee, rather than to a Committee of the Whole House which would have been the usual course.

Select Committees on Public Bills

4. The practice of committing a bill to a Select Committee has been very rarely used in respect of Government bills in recent times (though not unusual in respect of contentious private members’ bills).³ Indeed the most recent precedents for so doing by agreement lie in the period during and just after the First World War.

¹ Department for Constitutional Affairs, Summary of Responses to Consultation CP (R) 13/03,11/03,10/03.

² Judicial Appointments and a Supreme Court (court of final appeal), Session 2003-04, HC 48-I and II.

³ The Hare Coursing bill, a Government bill, was referred by the Lords to a Select Committee against the then government’s wishes in 1975. The Select Committee reported that the bill should not proceed.

5. The orders of reference of a Select Committee on a public bill are the bill itself. It has power to receive evidence on the policy of the bill and to determine whether or not the bill should proceed. The Committee also has power to amend the bill, so the bill may be reported to the House with or without amendments. Any amendments are made in the context of the Committee's private deliberations and printed in the minutes of proceedings appended to the report. The bill is reprinted as amended and re-committed to a Committee of the Whole House.
6. The order of the House establishing our Committee required us to report by 24 June. We embarked upon a programme of twice weekly meetings between 24 March and 22 June, nine of which were assigned to hearing evidence and eleven of which were deliberative. The Committee appointed Professor Andrew Le Sueur, Barber Professor of Jurisprudence at the University of Birmingham, as its specialist adviser. The Committee is grateful to him for his invaluable assistance. We also commissioned an e-consultation exercise the conclusions of which are summarised at Appendix 7. The Justice 2 Committee of the Scottish Parliament conducted an inquiry into the bill between March and May 2004 and we were able to take account of their report (4th Report, 2004 (Session 2), SP Paper 163).
7. In exercising our powers, we took the view early on that it was not appropriate in this case to prevent the bill from proceeding to its next stage of Committee of the Whole House (on recommitment). Having heard a wide range of evidence we identified those Clauses of the bill which raised issues on which we should comment. To the extent that is practicable our report is based on those issues in the sequence in which they are raised by the bill. Where we have been unable to reach agreement we decided to register that disagreement in the terms of our report, rather than by voting. Consistent with that approach all the amendments we have made to the bill—there are over 400 of them—have been made by agreement and on the basis that they improve and clarify the bill while leaving the main structure of the bill in its present form. These changes have, however, been made without prejudice to the fact that on at least two central features of the bill—the abolition of the office of Lord Chancellor and the establishment of a Supreme Court—the Committee's views have been more or less evenly divided. We thus wish to make it clear that, in those areas of disagreement, the fact that we have stood the Clauses and Schedules part of the bill does not imply that we all acquiesce in them, nor will it inhibit some of us from registering such disagreements at the later stages of the bill.
8. In our consideration of the issues, we have made every effort to set out the full range of arguments which emerged in the evidence we have received, both orally and in writing. In some cases, where we have agreed on a policy matter, it is clear that we have accorded more weight to some views than to others. But in those policy areas where we have been unable to agree, we express no view upon, nor do we attempt to ascribe weight to, the evidence set out. We see no advantage in attempting to "count heads" in support of a particular line of argument. Moreover, although we sometimes disagree, that should not be taken to imply that we have not discussed those issues of disagreement exhaustively amongst ourselves. But ultimately it will be for the House itself to take a view on these matters and we hope that our report will be a helpful aid in that respect.

9. The amendments we have made fall into a number of categories. They include amendments which the Lord Chancellor⁴ announced at Second Reading and amendments brought forward by the Lord Chancellor as a result of the Committee's deliberations. These are all substantive amendments and are for the most part referred to in the body of our report. A further group of amendments were deemed necessary by the Government to fulfil more completely the Concordat with the Lord Chief Justice. (The Concordat is printed at Appendix 6.) Finally, the opportunity has been taken to incorporate into the bill a large number of minor and technical amendments. All the amendments agreed to by the Committee are published in the Minutes of Proceedings at Appendix 3. Unless otherwise indicated references to Clauses are to the bill as introduced. The bill is reprinted As Amended in Select Committee as HL Bill 91.

⁴ Throughout this report, we refer to the present holder of the office of Lord Chancellor and Secretary of State for Constitutional Affairs in the two shorthand words by which he has been known throughout our proceedings, "Lord Chancellor".

CHAPTER 2: ARRANGEMENTS TO REPLACE THE OFFICE OF LORD CHANCELLOR (PART 1 OF THE BILL)

Issues relating to the office of Lord Chancellor

10. The Committee have identified the following issues arising in evidence which relate to the proposed replacement of the office of Lord Chancellor.
- Is the policy of the bill to abolish the office of Lord Chancellor the correct one? If not, how should the office of Lord Chancellor be redefined and retained? (Clause 12)
 - Should the Minister hold a legal qualification? If so, should the Minister in addition swear a judicial oath upon appointment?
 - Should the Minister responsible for judiciary-related matters be a member of the House of Lords rather than the House of Commons?
 - Should Part 1 be amended to place a statutory duty upon ministers generally, or the Minister in particular, to uphold the rule of law?
 - Should Clause 1 (Guarantee of continued judicial independence) be amended to:
 - prevent its implied repeal by later Acts of Parliament?
 - require the Minister to have more than merely “regard to” the factors set out in subclauses (4)(a)-(c)?
 - In relation to the Concordat,
 - should the principles set out in that agreement be put on a statutory footing even if the office of Lord Chancellor is retained?
 - should its continuing importance be recognised by making specific reference to it in the bill, in the Explanatory Notes, or in some other way?
 - should Clause 2 of the bill be amended to refer to the Lord Chief Justice’s responsibility for ensuring that appropriate structures are in place for the deployment of individual members of the judiciary (Concordat, para.4(c))?
 - should the bill be amended to require the concurrence of the Lord Chief Justice before the appointment of Judges to public inquiries, etc by the Minister?
 - Should Clause 1 (Guarantee of continued judicial independence) be extended to Scotland?
 - Speakership of the House of Lords. (Clause 11)

We consider these issues below.

Is the policy of the bill to abolish the office of Lord Chancellor the correct one? If not, how should the office of Lord Chancellor be redefined and retained? (Clause 12)

11. One of the main concerns of the Committee has been to examine whether it is right to abolish the office of Lord Chancellor, as proposed by Clause 12 of the bill. The question is not whether to return to the position on 11 June 2003,⁵ but rather whether, as part of the reform process now underway,
 - the office of Lord Chancellor should be abolished, or
 - the office should instead be redefined and retained.
12. One aspect of this question concerns simply the title of the office in dispute. Should it be designated (as in the first announcement of the Government’s decision to make the change) as “Secretary of State for Constitutional Affairs”? Or should we retain the ancient title “Lord Chancellor”, which has for centuries been part of the fabric of the United Kingdom’s constitutional framework. This—or something like it—is a choice which will have to be made, when Parliament has determined the final shape of the bill. (Until then—and throughout this report—we propose to follow the example set in Clause 97 of the bill by using the neutral description “the Minister”. For convenience, we refer to Lord Falconer of Thoroton—whose full ministerial title is “Secretary of State for Constitutional Affairs and Lord Chancellor for the transitional period”—simply as the Lord Chancellor.)
13. The substantive criticism of Clause 12 is more far-reaching, concerning much more than the choice of name, and relates to the formal qualifications and personal characteristics of the person who is the Government minister
 - responsible for “judiciary-related matters” (a shorthand expression for the provision of systems to support the carrying on of the business of courts and tribunals, judicial appointments, and overseeing judicial discipline), and
 - who has special responsibilities as the “constitutional conscience” of Government, defending judicial independence and the rule of law in Cabinet.
14. The bill proposes that this minister be a Secretary of State. The Prime Minister would be free to select a person without a background in the law and who might be a member of the House of Commons rather than the House of Lords. According to many critics of Clause 12, it is essential that this minister should continue to be a senior lawyer, a member of the House of Lords and accordingly a person of stature and status, without the pressures of party political career aspirations.

The case for abolition of the office of Lord Chancellor

15. The Government’s case for abolition of the office of Lord Chancellor is set out in the Lord Chancellor’s written and oral evidence to the Committee

⁵ On 12 June 2003 the Government announced its plans to abolish the office of Lord Chancellor, to establish a Judicial Appointments Commission for England and Wales, and to create a Supreme Court of the United Kingdom in place of the Appellate Committee of the House of Lords.

(p 1, QQ 1-149), as well as in the Department for Constitutional Affairs' consultation papers issued in July 2003⁶ and in speeches in Parliament.⁷

16. In bare outline, the positive case presented to the Committee for abolition of the Lord Chancellor is that each of the functions currently performed by the Lord Chancellor—being a Cabinet minister responsible for judiciary-related matters, head of the judiciary of England and Wales, a judge, and Speaker of the House of Lords—“would be better performed if they were not fused in the office of Lord Chancellor” (Q 29). The bill therefore proposes that
- the ministerial functions of the Lord Chancellor will be transferred to the Secretary of State for Constitutional Affairs,
 - the Lord Chief Justice of England and Wales will assume the role as head of the judiciary in that jurisdiction, with express statutory responsibilities for representing the views of the judiciary to Parliament and the Government,
 - the Lord Chancellor's role as a judge, in particular his entitlement to participate in the work of the United Kingdom's top-level courts, will end with the abolition of the office, and
 - the House of Lords will decide for itself its own arrangements for the Speakership.
17. In relation to the ministerial functions, the Government's view is that the Prime Minister should have an unfettered choice in selecting a minister with the skills and attributes best able to deliver important public policy goals relating to the courts and constitutional matters generally. The departmental duties of the Lord Chancellor have grown dramatically since the mid-1970s, and today the Department for Constitutional Affairs and its executive agencies have tens of thousands of employees and a budget in excess of £3 billion. The Lord Chancellor told the Committee: “In performing his ministerial role, the qualities which will make him or her a success are the same as his other ministerial colleagues. Yet the current system involves the office holder being drawn from a restricted pool—those with senior legal and political standing” (p 3).
18. In relation to the head of the judiciary, the Government's view is that it is now appropriate to recognise that the Lord Chief Justice of England and Wales should exercise this role. Clause 2 of the bill makes provision for this. The Lord Chancellor told the Committee: “Once you take away the fact that he [the Lord Chancellor] is a judge—because everybody agrees he should not sit as a judge—once you take away the driving role in appointing judges, which again, everybody agrees that you should; once you take away his deployment and disciplining role in relation to judges, you cannot ultimately say with any degree of conviction he is this powerful judicial figure that historically he had been”. (Q 9)

⁶ Constitutional Reform: reforming the office of the Lord Chancellor (CP 13/03); Constitutional Reform: a new way of appointing judges (CP 10/03); Constitutional Reform: a Supreme Court for the United Kingdom (CP 11/03).

⁷ See, especially: 26 January 2004, cols 12-30 (judiciary-related functions of the Lord Chancellor); 9 Feb 2004, cols 926-941 (Supreme Court); 12 February 2004, cols 1211-1324 (Supreme Court Judicial Reforms); 8 March 2004, cols 979ff (Second Reading of the Constitutional Reform Bill [HL]).

19. The Government also rests its case for abolition of the office of Lord Chancellor on two areas of difficulty, said to be inherent in the office. First, it is said that the workload of the office, in relation to the Lord Chancellor's role as a minister, has increased significantly. Lord Bingham of Cornhill told us: "The old days when the Lord Chancellor spent the first half of his day sitting judicially and the second half sitting as Speaker for better or worse have clearly gone forever" (Q 415).
20. Secondly, there are said to be a variety of tensions between the functions placed upon the Lord Chancellor. The Committee was told that it was increasingly difficult to reconcile being a member of the Cabinet, subject to collective responsibility, while at the same time having "a representative function on behalf of the judiciary" within Government. The Lord Chancellor told the Committee that the judges' "views on policy may well, quite understandably, be different from the views on policy that you as a Government Minister and your colleagues might take, the differences being perfectly legitimate" (Q 2). He gave as examples of such differences: views on criminal procedure as contained in the Criminal Justice Bill 2003; how particular tribunals operate; and reforms of trial by jury (Q 6). Although these are sometimes presented as rule of law issues, in reality they are "policy disagreements". The tensions have become greater in recent years as the judges have, since the abrogation of the Kilmuir Rules, been much more willing to express their views publicly about issues where they disagree with the Government (Q 17).
21. The proposal for abolition of the office of Lord Chancellor broadly on the grounds advanced by the Government was supported by a number of witnesses and in written evidence received by the Committee (for example, Professor Diana Woodhouse p 106, Clifford Chance LLP p 336). Professor Vernon Bogdanor, in his written evidence, argued that the office of Lord Chancellor was defended because it "worked"—"the system 'worked' since, although in theory, the Lord Chancellor could regularly sit as a judge, he has rarely done so in recent years; and although he could, in theory, act as a partisan Cabinet minister by making political appointments to the judiciary, this too did not happen in modern times" (p 325). He pointed to three objections to the argument that the old system "worked". First, it has worked in a broadly satisfactory manner only in recent years. Second, "there have been cases when the supposed conventions were not observed, even in recent years". Thirdly and most importantly, Professor Bogdanor argues, "even if the conventions worked perfectly, it would still not be satisfactory to retain a system based so largely upon them. What may have been acceptable a hundred years ago is hardly likely to be acceptable to day in a world in which deference has largely disappeared and political and judicial arrangements are expected to be capable of rational and public justification. Indeed, one central theme of the process of constitutional reforms since 1997 is the need to refashion our political system so that it no longer depends on tacit understandings, but is based upon clear public principles for organizing and controlling power".

Criticisms of the abolition of the office of Lord Chancellor

22. The Committee heard objections to the proposal to abolish the office. First, it may deprive the Cabinet of a senior lawyer able to influence Government thinking on important constitutional issues. One of the functions of the office of Lord Chancellor has been to protect important constitutional values at the

heart of Government. The Law Lords, in their collective response to the Department's consultation paper, said that they were "very greatly concerned that the important constitutional values which the office of Lord Chancellor protected should continue to be effectively protected" (p 116). Lord Bingham of Cornhill, the Senior Law Lord, told us that while he doubted whether a minister responsible for judiciary-related matters could be regarded as head of the judiciary if he did not sit as a judge, he continued to have "a very strong belief in the role of the Lord Chancellor as a guardian of constitutional propriety" (Q 416). One aspect of this line of argument is the contention that the presence of the Lord Chancellor, as head of the judiciary, and as a member of the executive Government, has the advantage of providing "a link between two sets of institutions" (Lord Alexander of Weedon Working Party, p 465).

23. A second and related concern is that the Secretary of State for Constitutional Affairs may in time become "over influenced by party political considerations", prompting the suggestion that the Secretary of State should by convention be a member of the House of Lords rather than the House of Commons (Law Society p 162). Lady Justice Arden stressed to us the importance of the judicial appointments process remaining apolitical—"something of which this country can be extremely proud". "It is, I would have thought, better to have, in the position of the Minister receiving the selections from his Appointments Commission, a person who is not in the throes of a political career" (Q 797).
24. Thirdly, some fear that the Secretary of State for Constitutional Affairs may lack sufficient seniority. In the Full List of Her Majesty's Government published on 2 April 2004, the office of "Secretary of State for Constitutional Affairs and Lord Chancellor for a transitional period" was ranked 20th out of the 21 members of the Cabinet. The General Council of the Bar stated: "While we are neutral on whether it is appropriate to retain the title [of Lord Chancellor] or not, we feel very strongly that the minister who is responsible for the judicial system should be of sufficient seniority to protect the integrity of the system in Cabinet and publicly, to bid properly for resources to support the system and to ensure that the judges' concerns are heard in Cabinet. A convention needs to grow up that the Secretary of State for Constitutional Affairs has this level of seniority" (p 162).
25. As Lord Mackay of Clashfern said, the position of Lord Chancellor brought with it the long established convention of political seniority. "In my experience until then [12 June 2003] the Lord Chancellor, notwithstanding how junior he might be in the Cabinet in terms of service, was always regarded as a pretty senior member of the Cabinet" (Q 238). Lord Bingham of Cornhill said: "I would have no difficulty in agreeing that the protection would be the more effective the more clout the person had" (Q 456), a proposition with which Lord Woolf agreed (Q 523).
26. Fourthly, some doubt was expressed as to whether the transfer of functions from the Lord Chancellor to the Secretary of State for Constitutional Affairs will do much to reduce some of the tensions associated with the former office. Under the bill, the Secretary of State for Constitutional Affairs will be under a statutory duty to defend the independence of the judiciary and, if amended to this effect, also to uphold the rule of law. Professor Robert Hazell told the Committee that there is a "tension which is universal between the values of justice on the one hand and the values of law and order on the

other. Post 11 September 2001, the conflict between those two values has become really acute and very difficult... this tension is universal, all governments have to address it and generally in most governments there is one figure, call him the Minister of the Interior or whatever, who upholds the values of order and there is another figure, often called the Minister of Justice, who upholds the values of justice. They will always clash” (Q 182). (See also Lord Alexander of Weedon Working Party pp 467-9.)

27. A fifth concern is that the transfer of functions after the abolition of the Lord Chancellor will place unduly heavy burdens upon the office of Lord Chief Justice, who will assume the role as head of the judiciary in England and Wales. Administrative workload might, it was suggested, prevent the Lord Chief Justice sitting regularly as a judge; it might in future deter distinguished judges from taking up the office. Lord Bingham of Cornhill told us that “I have expressed worries to Lord Woolf and others that he is going to have so many responsibilities for appointing judges, disciplining judges, this, that and the other, as to whether he will still have enough time to give a serious and very important Judicial Office the judicial time it needs. This is a very real worry I have and although, of course, you can delegate and have assistant this and assistant that, there is always a good deal of most difficult decision making that ends up on the desk of the top man” (Q 427). Lord Mackay of Clashfern expressed similar concerns: “I wonder whether we will be appointing Lord Chief Justices in the future for their judgements or for their administration” (Q 251).
28. For the Government, it was said that the Lord Chief Justice in practice already performs quite a lot of the functions (Lord Chancellor Q 39). The Senior Presiding Judge of England and Wales disagreed with the proposition that the Lord Chief Justice would be overloaded: “I am fairly sure, seeing this from the inside, that the Lord Chief Justice will be able to discharge all the functions and able to carry out what is his paramount duty which is to sit in court and judge” (Lord Justice Thomas Q 714).

The common ground

29. Before setting out the case for redefining and retaining the office and title of Lord Chancellor, it is helpful to identify the common ground between the proponents and opponents of abolition.
30. The first area of broad agreement is that it has long been impracticable for the Lord Chancellor to sit as a judge. Lord Bingham of Cornhill told the Committee that “the days when the highest court of the land should be presided over by somebody who, whatever his other qualities, has almost certainly not been selected for his qualities as a judge have gone and gone for ever” (Q 415). The Committee heard differing views on whether the practice of the Lord Chancellor sitting in the Appellate Committee of the House of Lords ran the risk of a successful challenge being made under Article 6 of the European Convention on Human Rights, which requires a court hearing a case to be “independent and impartial”. Whatever the merits of the rival analyses, the practical constraints on the Lord Chancellor have long been clear. Lord Bingham of Cornhill said: “In the three years until Lord Irvine retired when I was here he sat on two cases. It was agreed between us that he could not do anything to do with crime because that affected his colleague, the Home Secretary, he could not deal with human rights because he piloted the bill through the House, he could not deal with judicial review because it

was of governmental interest and he could not deal with commercial cases because they always went on for much longer than he could possibly sit. That left him in that period of three years with two cases, one about whether premises could be a dwelling for purposes of the Rent Act if they did not have a kitchen and one about the construction of a mortgage deed. This was the result of both of us trying to find cases on which he could sit. I came to form the view that really no useful purpose was served” (Q 415).

31. A second point of broad agreement is that, whatever the future of the office of Lord Chancellor, the principles of “the Concordat” should be put into legislation in accordance with the strong views expressed by the Lord Chief Justice of England and Wales and the Judges’ Council (the non-statutory body of 20 judges from all levels of courts in England and Wales which has the task of making collective decisions on behalf of the judiciary). In response to the Government’s announcement of its proposals in June 2003, the Lord Chancellor and the Lord Chief Justice agreed a set of principles to determine the allocation of the Lord Chancellor’s functions between the Secretary of State for Constitutional Affairs and the Lord Chief Justice, when the office of Lord Chancellor was abolished. The text has been published by the Department for Constitutional Affairs under the title *Constitutional Reform: the Lord Chancellor’s judiciary-related functions – proposals*, and has come to be widely known as “the Concordat”. It is re-published with this report at Appendix 6.
32. In his oral evidence to the Committee, Lord Woolf said that the judges unanimously want to see the principles of the Concordat put into legislation “irrespective of whatever else happens as a result of this bill” (Q 493). It would, he said, “be a terrible shame if, as a result of other aspects of the reform, this, what I regard as a huge step forward which will really provide protection for the judiciary in the future should be lost” (Q 493). In a supplementary note, Lord Woolf told us: “By far the most important outcome that the judiciary are seeking from the current parliamentary process is the implementation of the Concordat which has been reached between the judiciary and the Government. The Concordat seeks to define the relationship that should exist, in future, between the Lord Chief Justice, as Head of the Judiciary, and the Government Minister who will exercise the responsibilities which fall properly to the Executive in respect of the judiciary and the courts” (p 463). Lady Justice Arden, the chairman of the Judges’ Council working group on the bill, confirmed that the judiciary’s view was that the Concordat “should be given effect to as soon as it is reasonably practicable” (Q 724). Among the principles set out in the Concordat, to which the bill seeks to give effect, are:
 - the key respective responsibilities of the minister responsible for judiciary-related matters and the Lord Chief Justice should be set out in statute, so as to provide clarity and transparency in this relationship;
 - the minister will not be a judge and shall not sit in a judicial capacity;
 - it is important to ensure that the roles and responsibilities of the most senior judiciary are clear in the new arrangements;
 - it will not be appropriate for judges to be sworn in by the minister; those who do so now should instead take their oaths in the presence of the Lord Chief Justice.

33. The Concordat, and the oral statement to the House of Lords by the Lord Chancellor on 26 January 2004, made clear that the proposals set out in the Concordat “are, of course, conditional on parliamentary approval”. Subject to that, it is apparent that the Concordat places constraints on both the Government’s policy for reform and those who argue for the retention of the office of Lord Chancellor. Lord Woolf sought to make clear to us “that the judiciary as a whole has not taken a position on the question of whether the office of Lord Chancellor should be abolished” (p 463).
34. A third area of consensus is that there should be an independent judicial appointments commission for England and Wales. Although the Committee heard a range of views on the powers of such a commission, and the extent of the discretion (if any) left to the Government to reject appointees identified by the commission, almost no one doubted that a commission was a desirable development. A judicial appointments commission will significantly change the role of the government minister responsible for judicial appointments—whether he or she is a Secretary of State for Constitutional Affairs or a Lord Chancellor.

The case for redefinition and retention of the office of Lord Chancellor

35. Several witnesses told us that, contrary to the policy of the bill, the office of Lord Chancellor should be retained in some way, including Lord Bingham of Cornhill (Q 415), Lord Mackay of Clashfern (Q 238; p 79), Lord Ackner (Q 313), Professor Robert Hazell (Q 156), Professor Robert Stevens (QQ 165-166), Professor the Lord Norton of Louth (Q 475), Lord Morris of Aberavon (p 478), and Lord Alexander of Weedon’s Working Party (p 469). On the basis of this and other evidence, during our deliberations we were able to identify three principal options for the future of the office of Lord Chancellor.
- To retain the title of Lord Chancellor and preserve and enhance several crucial features of the office, including that the minister be a senior lawyer and a member of the House of Lords, while recognising that the office should change following the Concordat.
 - To redefine the office of Lord Chancellor so that the office-holder is more of a judicial figure than a political one and transferring responsibility for major areas of spending (including legal aid) to other ministers.
 - To use the title “Lord Chancellor” for the ministerial post set out and called Secretary of State for Constitutional Affairs in the bill.

A common feature of all the proposals is that the Lord Chancellor no longer should sit as a judge.

36. The first model seeks to retain not only the title, but also to preserve and enhance several crucial features of the character of the office of Lord Chancellor. Unlike the Secretary of State for Constitutional Affairs, the office of Lord Chancellor would be required to be held by a senior member of the legal profession who is a member of the House of Lords (rather than the House of Commons). Accordingly, the Lord Chancellor would continue to be a person who has reached the pinnacle as well as the culmination of his political and legal careers, without any need or expectation of further promotion. Not only would this ensure that the Lord Chancellor was a senior figure, it is likely to have the consequence that Lord Chancellors will

continue to hold office for significantly longer periods than is typically the case for other ministers. A Lord Chancellor would, accordingly, be in a better position to exercise the duties set down by the bill relating to defending the independence of the judiciary and the rule of law than would an ordinary Secretary of State. In this model, the Lord Chancellor would continue to be the minister responsible for the whole range of court and judiciary-related policy areas, including legal aid (Lord Alexander of Weedon Working Party pp 471-2). There may, however, be merit in reversing some of the recent accretions of responsibility for areas of policy to the Lord Chancellor's Department/ Department for Constitutional Affairs—which are set out in the table below—to allow the Lord Chancellor to focus on judiciary-related matters. It is this first model that some members of the Committee, opposed to abolishing the office of Lord Chancellor, found most compelling. Further aspects of this option, including retaining the requirement that the minister responsible for judiciary-related matters be a lawyer and a member of the House of Lords, are examined further below.

TABLE 1

Acquisition of Responsibilities: Lord Chancellor's Department/Department for Constitutional Affairs

Subject matter	Date acquired by LCD/ DCA	From where
Human rights, open government, freedom of information, data protection and identity, church and hereditary issues, Lords Lieutenants, the Channel Islands and the Isle of Man	2001	Home Office
House of Lords reform policy	2001	Cabinet Office
Electoral Commission, policy on electoral law, referendums and political party funding	2002	Department of the Environment, Transport and the Regions
Devolution policy and administrative responsibility for the Scotland Office and the Wales Office	2003	

37. A second model for the future also envisages that the Lord Chancellor would continue to be a senior lawyer who is a member of the House of Lords—but the areas of policy falling within the remit of the Lord Chancellor would be very significantly narrower than those envisaged in the first model described above. Lord Mackay of Clashfern told the Committee that the Lord Chancellor's job should effectively be about “running the courts” (Q 238, Q 254). He supported the idea that responsibility for legal aid—which has risen to £2 billion in the past year—should be removed from the Lord Chancellor; and he envisaged that a minister, who might be in the House of Commons and who need not be a lawyer, could be responsible for legal aid and some other matters currently within the ambit of the Department for Constitutional Affairs (Mackay of Clashfern Q 256). He argued that Lord Chancellor should be “be a judicial rather than a political figure” (Q 246), and he might also have the formal title of President of the Supreme Court of

England and Wales (the Government proposes to rename this The Senior Courts of England and Wales), though he would not sit as a judge (Q 243). In his written evidence, Lord Morris of Aberavon also suggested that the role of the Lord Chancellor should be reduced; he “should no longer have any responsibility as a Minister of the Crown for any significant spending accountability, many of which have accrued since the advent of legal aid and the Beeching reforms, coupled with a recent transfer of many duties, including responsibility for magistracy” (p 478). Given the “non-political and non-spending nature” of the functions, Lord Morris of Aberavon envisages the Lord Chancellor carrying out—including appointing judges on the recommendation of the Judicial Appointments Commission—there is, he argues, “no reason why it should be carried out by a minister of the Crown at all”, prompting him to suggest that the office of Lord Chancellor should be held by the judge who is the senior Law Lord, or President of the Supreme Court of the United Kingdom (p 478).

38. A third model is to use the title “Lord Chancellor” for the ministerial post referred to in the bill as the Secretary of State for Constitutional Affairs. Thus, it would not be necessary for the Lord Chancellor to be a lawyer. Nor would the title “Lord Chancellor” require the office-holder to be a peer. (A parallel may be drawn here with the office of Lord Privy Seal). Professor Robert Hazell, who proposed this model to the Committee, agreed that the difference between this model and the arrangements set out in the bill related only to the title of the minister (Q 160, Q 214). The rationale for this model is that the continued use of the title Lord Chancellor would help preserve the confidence and respect which has been attached to the office of Lord Chancellor in modern times. It may be added that the role of the Lord Chancellor has altered significantly since the 1970s without it being thought necessary (until now) to change the title of the office.

Criticisms of the proposals to redefine and retain the office of Lord Chancellor

39. One objection to the continued use of the title “Lord Chancellor”, anticipated by the Department for Constitutional Affairs’ consultation paper in September 2003, is that this would lead to confusion. “Some suggest that the title of Lord Chancellor (but not its current wide range of responsibilities) should be retained for use in relation to another public office to maintain the link with the past. However, until the office is abolished, clearly the title cannot be used in relation to any other office. Part of the purpose of reforming the office of Lord Chancellor is to address the confusion of roles his office has produced. To create a new office (or rename an existing one) will in all probability add to that confusion, rather than reduce it” (*Constitutional reform: reforming the office of Lord Chancellor*, CP13/03, para.8-9). In a supplementary note to the Committee, Lord Woolf warned that “because of an accumulation of events, including the fact that the role of the Government Minister envisaged in the Concordat is very different from the historic role of the Lord Chancellor, I have real reservations as to whether it is possible to retain the title” (p 464).
40. Secondly, some witnesses expressed the view that it was now too late to revive the office of Lord Chancellor. The reality of the situation is that, whether the minister is called a Secretary of State or Lord Chancellor, he “is not going to have the power and authority in Cabinet that the old office of Lord Chancellor had” (Dr Kate Malleson Q 183). Even Robert Hazell, who proposed the idea, conceded that “the damage may well have been done ...

The Government having decided to abolish the office in a way may have broken the vase and it may be too late to put the pieces together again” (Q 178).

41. A third concern was a danger that the continued existence of the office of Lord Chancellor, occupied by a senior lawyer who is a member of the House of Lords, might now risk undermining the status and authority of the Lord Chief Justice of England and Wales, who by the bill is made head of the judiciary. Lord Woolf told us that this risk has to an extent already materialised in recent years: “What has happened up till now, and I hope that as a result of the legislation this would no longer be the situation, is that because of the Lord Chancellor’s position as it had been, that he was the constitutional head of the judiciary, the role of the Chief Justice was undermined to that extent. A constitutional monarch does not get in the way of a Prime Minister. There are various views both within this jurisdiction and without, but to have somebody who is clearly the head of the judiciary who is a judge—as I see it now—is important” (Q 519). Lord Woolf in his supplementary note to the Committee rejected the idea that it might be appropriate to have two Heads of the Judiciary—the Lord Chief Justice as the “professional” Head and the Lord Chancellor as the “constitutional” Head: “Such an approach would create a serious risk of confusion and the potential for future conflict between the two office holders. It would be quite possible for them to have very different ideas as to the proper boundaries of their respective roles. It is precisely this lack of clarity, and the consequent risk of encroachment on the independence of the judiciary, that the Concordat is intended to avoid” (p 464).
42. Fourthly, doubt was expressed about whether a Lord Chancellor, as envisaged by Lord Mackay of Clashfern in the second model described above, would be a “plausible political figure” (Lord Chancellor Q 22). This model envisages a Lord Chancellor with reduced departmental responsibilities. He would, in effect, be “a non-executive judicial chairman of a ministry of justice” (Q 13) or a “judge in the Cabinet” (Q 21), the Lord Chancellor told us.

Opinion of the Committee

43. The Committee agrees that in view of the Concordat the future duties of the Lord Chancellor/ Secretary of State office-holder should be responsibility for “judiciary-related” matters (that is, the provision of systems to support the carrying on of the business of courts and tribunals, judicial appointments, and overseeing judicial discipline); and responsibilities as the “constitutional conscience” of Government, defending judicial independence and the rule of law in Cabinet.
44. There was a clear division of opinion within the Committee between those members who considered that the office-holder should be called Lord Chancellor, be a senior lawyer, and sit in the House of Lords on the one hand; and those members who considered that the name of Lord Chancellor should not be continued (since its retention would be confusing), and that there was no necessity for the office-holder to hold a legal qualification or sit in the House of Lords on the other hand (that is, the policy of the bill). Accordingly we make no recommendation to the House.
45. We are not attracted to the proposal to retain the traditional office of Lord Chancellor radically reduced in scope.

46. Some of us wish to record that we are attracted to the idea that the minister responsible for judiciary-related matters should be called the Secretary of State, or Minister, for Justice. This title would carry more status and be more easily understood than that of Secretary of State for Constitutional Affairs. Those of us for whom the traditions of the Lord Chancellor's role remain of real practical importance believe that it would be possible to get the best of both worlds by retaining the title of Lord Chancellor, as head of the Ministry of Justice.

Should the Minister hold a legal qualification? If so, should the Minister in addition swear a judicial oath upon appointment?

47. In modern times, as a matter of constitutional convention rather than law, Lord Chancellors have been lawyers of some seniority. Almost all have been members of the Bar of England and Wales, although Lord Mackay of Clashfern, Lord Chancellor 1987-97, held a qualification as an Advocate in Scotland. The office has never been held by a solicitor. The bill contains no requirement that the Minister be a lawyer.
48. In the past, there was a statutory requirement that the Permanent Secretary to the Lord Chancellor's Department (now the Department for Constitutional Affairs) be a barrister or solicitor of at least 10 years' standing. This was modified in 1990 to enable the Permanent Secretary to be a barrister or solicitor of 10 years' standing, or a civil servant with 5 years' service in the Lord Chancellor's Department. These restrictions on appointment were removed by the Supreme Court (Offices) Act 1997.
49. The bill opens up the prospect that, at some point in the future, neither the minister nor the department's most senior official will have any background in the law.

Should the Minister be a lawyer?

50. The reason for suggesting that the Minister should be required to be a lawyer is the special nature of the duties placed upon this office by Clause 1 of the bill. In addition to the general duty on all ministers to uphold judicial independence:
- the Minister will have a specific duty to defend that independence (Clause 1(4)(a));
 - if the bill is amended, the Minister may have placed upon him express duties in relation to upholding the rule of law;
 - the Minister will be required to make judgements about whether to reject nominations by the Judicial Appointments Commission for England and Wales, and the appointments commission that will make recommendations to fill vacancies on the Supreme Court;
 - he will also be involved in matters relating to judicial discipline and rule-making for the courts.
51. For all these reasons, it may be thought that the Minister will be more than merely "another mainstream minister" and that the Prime Minister should be required to select as the office-holder only someone who has a legal qualification and perhaps experience as a practitioner. The Prime Minister's discretion is, of course, constrained in a similar way in relation to the Law

Officers (Attorney General, Solicitor General) of Her Majesty's Government. Indeed, it was tentatively suggested to the Committee that the office of Secretary of State for Constitutional Affairs could be "perhaps defined as the senior law officer which would be classed in the list as separate from other members of the Cabinet and that would also provide the implication that the holder should be a lawyer, and the benefits which flow from that" (Norton Q 464).

52. For the Government, it is said that to amend the bill to include such a requirement, or for there to be a constitutional convention that this ministerial post be held only by a lawyer, would cut across the rationale for change: "In performing his ministerial role, the qualities which will make him or her a success are the same as his other ministerial colleagues. Yet the current system involves the office holder being drawn from a restricted pool—those with senior legal and political standing" (p 3). The Lord Chancellor and some other witnesses argued that it was unnecessary to be a lawyer to defend judicial independence and understand the imperative of upholding the rule of law: "The rule of law in the questions that we are talking about is not has the Government complied with the law ... we are talking about big constitutional issues which are identifiable to all members of the Cabinet. The question boils down very often to is it only a lawyer who can identify these sorts of rule of law issues? I do not believe that it is, I believe that all constitutional politicians can spot them. How they respond in a particular case is a different question" (Q 50).
53. Several witnesses agreed with the Government's view that it is not essential for the Minister to be a lawyer in order to carry out his functions under the bill (see for example Roger Smith of JUSTICE Q 291). Within the Scottish Executive, there is no requirement that the Minister for Justice be a lawyer and the Committee was told by Roy Martin QC, vice-dean of the Faculty of Advocates, that his assessment of the experience in Scotland—where, of the two Ministers for Justice since devolution, one was a lawyer and one was not—is that it does not make a particular difference (Q 837).
54. A different view was expressed by Lady Justice Arden, who told the Committee that she sees a great advantage in the Minister being a senior lawyer. She expressed concern for maintaining an apolitical appointments process, "something of which this country can be extremely proud". She believes that it is better for the Minister receiving recommendations from the judicial appointments commissions, to be senior lawyer at the pinnacle of his career, "a person who is not in the throes of a political career" (Q 797).

If the Minister is required to be a lawyer, should he or she swear a judicial oath upon appointment?

55. While members of the public are familiar with the process whereby a telephone call from Number 10 starts a ministerial career, little tends to be known of the formal process by which ministers assume office. This normally happens at a meeting of the Queen in Council (i.e. a meeting of the Privy Council in the presence of Her Majesty). The oaths are tendered by the Clerk of the Council.
56. The Promissory Oaths Act 1868 Act requires a Secretary of State to take both the oath of allegiance

“I, ... , do swear that I will be faithful and bear true allegiance to Her Majesty Queen [Elizabeth II], her heirs and successors, according to law”

and the official oath

“I, ... , do swear that I will well and truly serve Her Majesty Queen [Elizabeth II] in the office of ... So help me God”

57. The 1868 Act requires judges in England and Wales to take the following oath:

“I, ... , do swear that I will well and truly serve our Sovereign Lady Queen [Elizabeth II] in the office of ... , and I will do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will. So help me God.”

58. It is often said that the Lord Chancellor is marked out as different from his fellow ministers not only by the fact that (until June 2003) he sat occasionally as a judge (although the last time a Lord Chancellor sat judicially was in 2001), but also by the fact that he has taken a judicial oath. Indeed, it was probably the fact of this oath, as much as his occasional presiding over the Appellate Committee of the House of Lords, that by convention led the Lord Chancellor to be accepted as head of the judiciary in England and Wales.
59. We considered whether it would be appropriate for the Minister, because of his continued judiciary-related functions, to swear a judicial oath (QQ 797-801). Lord Woolf told us that, as any future Lord Chancellor will not sit as a judge, it would not be appropriate for him to take the judicial oath (p 464). Lady Justice Arden pointed out that, as an alternative, it would be possible to create a new form of oath (Q 800).

Opinion of the Committee

60. There was a clear division of opinion between those members who thought that the Minister had to be a senior lawyer and those who considered that there was no need for the office-holder to hold a legal qualification. Accordingly, we make no recommendation.
61. The Committee agrees that the future duties of the Lord Chancellor/Secretary of State office-holder are such as not to require the taking of a judicial oath.
62. The Committee is divided on the question of whether some alternative form of oath should be taken by the Minister and leave this for the House to determine.

Should the Minister responsible for judiciary-related matters be a member of the House of Lords rather than the House of Commons?

63. As noted above, one of the major differences between the office of Lord Chancellor and that of the Secretary of State for Constitutional Affairs is that while Lord Chancellors have been members of the House of Lords, the Prime Minister will be free in future to choose as the Minister someone who is a member of the House of Commons or of the House of Lords. The main justification for the Commons is that the Department for Constitutional Affairs has become a major spending department and it is therefore constitutionally appropriate for its ministerial head to be accountable to the House of Commons. Lord Morris of Aberavon told us that “Since the last

half of the 17th century, it became established that the granting of supply and its appropriation was a matter for the Commons. It follows that the head of a significant spending department should be directly accountable to the grantor of supply—the House of Commons” (p 478). The increasing budget of the Lord Chancellor’s Department prompted the House of Commons to establish a select committee with oversight of its work in January 2003, now called the Constitutional Affairs Committee.

64. In his evidence to us, Sir Hayden Phillips, the permanent secretary of the Department for Constitutional Affairs, described for us the changes that have and are taking place in the size and role of the DCA: “First, there has been a great growth in the nature and the size of the Department. ... We are moving a staff now of 13,500, which is already very large, to 23,500 by April next year. It will grow beyond that when the unified tribunal service is created to a budget of between £3 billion and £4 billion and staff over the next two years getting nearer to 30,000, which is a major department of state. Second, the Department has come increasingly central to the delivery of Government policy, especially in relation to criminal justice and on asylum and immigration, indeed Lord Falconer is the Chairman of the National Criminal Justice Board along with the Home Secretary.... The third, between 2001 and 2003 we were given a range of responsibilities from across other parts of Government for a number of sensitive and complex constitutional issues—I will not go into the detail—and that added a whole new dimension to our work and to the Lord Chancellor’s political importance” (Q 679). In relation to the budget of the Department, the increase is mainly attributable to its “core” judiciary-related functions—notably legal aid. Similarly, the increase in staff stems from court related matters, in particular the creation of Her Majesty’s Court Service which, from April 2005, will bring the administration of magistrates’ courts into a unified court service for the whole of England and Wales.
65. Evidence we received suggested that there were several advantages to retaining the Minister responsible for judiciary-related matters as a member of the House of Lords. While making it clear that he did not have a strong view as to the whether the minister should be in the House of Lords or the House of Commons, Professor Hazell told us that the House of Lords “has a particularly important role to play as a guardian of the constitution. That was recognised in the report of the Royal Commission chaired by Lord Wakeham and I think has been endorsed in subsequent White Papers and comment and debate about the role of this House, however composed. If, as I have suggested, one important function of the Lord Chancellor or Secretary of State is to be a guardian of the constitution, then, in that respect, it is entirely appropriate for that minister to be a Member of this House” (Q 180). Secondly, a requirement that the minister be in the House of Lords may also help reinforce another desirable characteristic of the office of Lord Chancellor—that the minister be someone approaching the end of his political career rather than someone seeking further advancement. Thirdly, having the Lord Chancellor in the House of Lords also makes the House more effective in influencing Government. Lord Elton told us that “The House of Lords has, by convention, a direct line into the Cabinet in the person of the Leader of the House and the Lord Chancellor. Without some other, compensating step, the abolition of the office of Lord Chancellor would leave it with only a single voice in Cabinet secured to it by convention. ... The influence of the House would thus be significantly diminished in a

forum where it is of value” (p 353). Finally, as we have already noted (para.23 above) a number of witnesses saw advantage in keeping the Secretary of State in the Lords, out of the more politically charged atmosphere of the Commons (Law Society p 162, Arden Q 797).

Opinion of the Committee

66. There was a division of opinion on the question whether there should be a presumption that the Minister responsible for judiciary-related matters should be a member of the House of Lords or, at the discretion of the Prime Minister, of either the Commons or the Lords.

Should Part 1 be amended to place a statutory duty upon ministers generally, or the Minister in particular, to uphold the rule of law?

67. Part 1 of the bill, we were told, fails to make arrangements for the continued performance of one of the Lord Chancellor’s principal functions—to act as a guardian of the rule of law within Cabinet and the Government more broadly. Lord Mackay of Clashfern spelt out his view of the ambit of the Lord Chancellor’s function in relation to the rule of law, telling us that “... in the Cabinet his job is to ensure that the Cabinet decides and takes executive action in accordance with the law, but he is not the legal adviser. I think there have been mistakes in the past when the Lord Chancellor has assumed the task of advising the Government about the law. That is not the Lord Chancellor’s function; the Lord Chancellor is a judge and it would be improper for him, in fact, to act as legal adviser in that sense. The legal adviser is the Attorney General, but the Lord Chancellor’s job is to see that if an issue arises which requires legal advice is taken, because often non-lawyers do not appreciate—naturally enough, because they are not lawyers—there is a legal question involved” (QQ 277, 278, 285).

Reasons for advocating a rule of law duty

68. Lord Ackner told the Committee “that Clause 1 must in terms say that there is an obligation upon ministers to maintain and support the rule of law” (Q 313, and also p 100). Lord Ackner’s view is that had such a statutory duty been in place, the current Lord Chancellor’s support for the ouster Clause in the Asylum and Immigration (Treatment of Claimants etc) Bill “would have been automatically ruled out”. Similar views were expressed by Lord Donaldson of Lynton (p 344). Lord Woolf supported the idea of a statutory duty, saying “It seems to me that it is very desirable that there should be a clear statement which reflects the need for the protection of the rule of law and I can well see that there is a very important role for the individual, whether he be called the Lord Chancellor or whether he be Secretary of State...” (Q 501).
69. More generally, it may be thought that if one obligation that is currently placed on the Lord Chancellor as a matter of constitutional convention (that is, to defend judicial independence) is put on a statutory footing, then a duty to uphold the rule of law—undoubtedly another duty that currently exists as a matter of convention—should similarly be translated into legislative form.

Reasons for caution in creating a rule of law duty

70. The evidence presented to the Committee suggests a number of reasons for caution in amending Clause 1 to include reference to the rule of law. First, the concept of the rule of law was said by some witnesses to be ill-defined or contested. Sir Thomas Legg QC, a former permanent secretary to the Lord Chancellor's Department, argued that the rule of law "is a very tricky, slippery concept a lot of the time, at least in general terms. My own feeling is there would not be very much to be gained from the protection of the public by putting a requirement into statute that ministers, and so on, should uphold the rule of law because in any given case people can have disagreement about what that means" (Q 689). The Lord Chancellor told the Committee that policy differences between the Government and the judiciary—on issues such as trial by jury and criminal procedure—were sometimes, wrongly, presented as rule of law issues (Q 6).
71. Secondly, we were told that it was unnecessary to impose a rule of law duty specifically on the Minister. Professor Diana Woodhouse said that the Attorney General could fulfil the role as guardian of the rule of law. The fact that the Attorney General was not a member of the Cabinet was not significant; most government decisions affecting the rule of law were not made at Cabinet level (Q 378). (The Attorney General's current role is to give legal advice.)
72. Thirdly, several witnesses warned us of the patchy history of Lord Chancellors in upholding the rule of law. Lord Ackner, who proposed amending Clause 1 to include a duty relating to the rule of law nevertheless said: "... we have history going back over 40 years when there were a number of very unsatisfactory Lord Chancellors and I think the strength of the executive is such that you could have that situation in the future" (Q 340). Lord Alexander of Weedon's Working Party accepted that "it is not clear how often the Lord Chancellor in fact used his position to influence policy—he is likely, inevitably, to have felt it right to defer to the views of elected colleagues." (p 468) Lord Bingham of Cornhill echoed this in his evidence. He had "very strong belief in the role of the Lord Chancellor as a guardian of constitutional propriety". He also noted that "anecdotally those people who have served in cabinets have tended to tell me that Lord X or Lord Y has been very silent and never opened his mouth. I simply do not know whether that is true or not" (Q 415). The Lord Chancellor made a similar point (Q 50). Fourthly, there were some concerns expressed that to impose a statutory rule of law duty could provide new grounds for litigation, which many felt would not be the appropriate method by which such issues should be resolved. Related to this there are concerns that such a provision could undermine Parliamentary Sovereignty and, possibly, the role of the courts.

Opinion of the Committee

73. During our deliberations we were able to agree, without difficulty, that it is desirable for the bill to make reference to the rule of law. We also agreed, first, that the reference to the rule of law should replicate, as far as possible, the responsibilities in regard to the rule of law currently discharged by the Lord Chancellor. Secondly, we agreed that while other Ministers have responsibilities in regard to the rule of law (for example, they abide by decisions of the courts), the Lord Chancellor/Secretary of State for

Constitutional Affairs has and should continue to have a special role in relation to the rule of law within the Cabinet.

74. Most of us also agreed that the responsibility of the Lord Chancellor for the rule of law is not and should not be directly enforced through the courts, but stems from his position in Cabinet and is exercised by way of his influence in discussions with colleagues.
75. We were unable to agree a new Clause tabled by the Lord Chancellor on the rule of law and accordingly leave this matter for the House to determine. (The new Clause amendment and other amendments on this issue which were moved and withdrawn may be found in the Minutes of Proceedings at Appendix 3.)

Should Clause 1 (Guarantee of continued judicial independence) be amended to:

- prevent its implied repeal by later Acts of Parliament?**
- require the Minister to have more than merely “regard to” the factors set out in subclauses (4)(a)-(c)?**

76. The Committee received evidence expressing concern that the duties placed upon ministers by Clause 1, relating to the guarantee of continued judicial independence, were insufficiently robust. Evidence from a number of witnesses established that Clause 1 as drafted is a declaratory provision which is unlikely to be enforceable in the courts. Lord Woolf compared it to declaratory provisions that had been included in education and National Health Service legislation, and told the Committee that it was not intended that such declaratory provisions should be enforceable in the courts, and that a minister failing to fulfil the responsibilities set out in the Clause “would be answerable to Parliament and the public for the failure to do so” (QQ 501, 527-528). Other witnesses believed that the duties set out in Clause 1 might, in some situations, be enforced by a claim for judicial review; and Lady Justice Arden argued that, if it was required, it should be possible to draft a clause that was enforceable. Other witnesses expressed doubts as to enforceability (Lord Alexander of Weedon Working Party p 473).

Protection against inadvertent implied repeal

77. Lady Justice Arden, on behalf of a working group of the Judges’ Council, argued that Clause 1 of the bill “... should be given some enhanced status to prevent inadvertent implied repeal. It is not a question of entrenching it because it would be open to Parliament to depart from judicial independence if it wished to do so, although it would have to use clear language. The enhanced status would be achieved by imposing an interpretative obligation along the lines of section 3 of the Human Rights Act 1998. That provides that, so far as it is possible to do so, primary and subordinate legislation must be read in effect in a way which is compatible with convention rights. We suggest that that could be adapted to Clause 1 of the Constitutional Reform Bill and what goes for the independence of the judiciary goes for the rule of law as well if Parliament thought it right to include that in Clause 1 or a similar Clause. We suggest that there is plenty of precedent for this approach. It may be found either in the Human Rights Act or in the Interpretation Act 1978 where other certain meanings apply in later

legislation unless the contrary intention appears. It is also a principle by which the courts construe legislation implementing legislation of the European Union. How the principle should be expressed is of course a matter for parliamentary counsel, but, in essence, the effect would be that Clause 1 would apply unless Parliament expressly stated to the contrary or clearly stated to the contrary in future legislation” (Q 713). The Lord Chancellor raised two concerns in relation to amending the bill along the lines of section 3 of the Human Rights Act 1998 to prevent inadvertent implied repeal. He first observed that the Convention rights are a well-established body of law, refined and elaborated over many years by the case law of the European Court of Human Rights. An interpretative obligation linked in with this body of law therefore carries with it a significant degree of legal certainty, while the rule of law was untested as a stand-alone directly-applicable legal doctrine. He drew attention to the fact that both academic and judicial opinions on the rule of law differ substantially as to its meaning. Secondly, he was concerned lest such a provision might be thought to impinge upon the Sovereignty of Parliament, unless it was heavily qualified.

The Minister’s obligation to “have regard to...” (Clause 1(4)).

78. Lord Ackner told us: “I have also taken the phrase in Clause 1(4) ‘must have regard to’, as being pretty meaningless. You have regard to it if you consider it but, having considered it, you are perfectly within your entitlement to reject it. I have said that I think there is substance in the point made by JUSTICE in its memorandum to expand the phrase quite considerably in order the better to express what is needed. I think it should be borne in mind that the phrase ‘independence of the judiciary’ can be in any event open to doubt as to what it means” (Q 313; p 100). JUSTICE said, in its written evidence, that “The Lord Chancellor’s role as guarantor of the independence of the judiciary within government has been removed. Clause 1(4) of the bill merely gives the Secretary of State the duty to ‘have regard to ... the need to defend [judicial] independence’” (p 93). Mr Roger Smith the Director of JUSTICE said: “The bill would be improved by some more ringing declaration of the independence of the judiciary rather than measly words requiring a Secretary of State to have regard to judicial independence” (Q 289). The Lord Chancellor informed the Committee that the purpose of the Minister’s obligation to “have regard to” in Clause 1(4) was to create additional and special duties on the Minister, in line with the Concordat. In order to do this consistently with existing constitutional conventions, the considered it necessary to employ the distinctive language in the bill. The drafting of Clause 1(4) had been considered very carefully in consultation with the senior judiciary. The Lord Chancellor also argued that there was a risk that a change to the drafting could cut across the doctrine of Cabinet collective responsibility.

Opinion of the Committee

79. The Committee is divided on the question of whether any further strengthening of the judicial independence provision in Clause 1 is required. Accordingly, we make no recommendation.

In relation to the Concordat,

- should the principles set out in that agreement be put on a statutory footing even if the office of Lord Chancellor is retained?
- should its continuing importance be recognised by making specific reference to it in the bill, in the Explanatory Notes, or in some other way?
- should Clause 2 of the bill be amended to refer to the Lord Chief Justice’s responsibility for ensuring that appropriate structures are in place for the deployment of individual members of the judiciary (Concordat, para.4(c))?
- should the bill be amended to require the concurrence of the Lord Chief Justice before the appointment of Judges to public inquiries, etc by the Minister?

Recognising the importance of the Concordat in the bill

80. Many of the powers and duties created by Part 1 and Part 3 of the bill are intended to give effect to the Concordat. The Concordat has no formal status and is not referred to in the bill. Lady Justice Arden, giving evidence on behalf of the Judges’ Council, said “there is a role for the Concordat even after the bill has been enacted. If it is the intention of Parliament that the Concordat should pass into law, the intention of Parliament in that regard should be made clear either in the Act or in the Explanatory Notes. This point is very important to the smooth running of the Act in the years to come” (Q 713). She added “... not every iota of the Concordat can be reflected in statutory language. There are some matters which have to, as it were, survive within the Concordat and one way in which the Concordat may be relevant in future is when the court is construing what will then be the Constitutional Reform Act, it may be necessary for it to look at the Concordat. Now, it may not be possible for the court to do that unless there is a clear indication that it was Parliament’s intention to implement the Concordat” (Q 726). The Lord Chief Justice also told us of his and the Judges’ Council’s desire to retain the provisions of the Concordat, “irrespective of whatever else happens as a result of this bill” (Q 493).

Deployment of individual members of the judiciary

81. In their written evidence to the Committee (p 213), the working party of the Judges’ Council led by Lady Justice Arden draw attention to a number of respects in which the bill does not conform with the Concordat. Lord Woolf in a written note to the committee said that while Clause 2(2)(c) of the bill clearly stated that the maintenance of appropriate arrangements for the deployment of the judiciary of England and Wales, and the allocation of work within courts, is the responsibility of the Lord Chief Justice, Clause 2 needed to be amended to more accurately reflect the Concordat. It should state that the arrangements for deployment include appointments of judges to committees, boards and similar bodies and the Lord Chief Justice should have to agree to such appointments where a serving judge is invited to sit on such bodies as a representative of the judiciary and/or where such an

appointment could interfere with the performance of his judicial duties (p 464).

Appointment of judges to public inquiries

82. A further issue relating to the deployment of judges is the appointment of judges to chair public inquiries. Lord Woolf told us in a written note that this topic was overlooked in the negotiations leading up to the Concordat, but he and the Judges' Council had reached the firm view that the Lord Chief Justice should have to concur with any appointments to a public inquiry (p 464). Lord Woolf offered two justifications for this. First, the Lord Chief Justice must have the right to say whether a particular judge can be released to conduct an inquiry, as placing a serving judge on an inquiry prevents him from being deployed in his normal judicial duties. Secondly, "Whilst some inquiries are appropriate for a judge to sit on, other inquiries are of a highly politically sensitive nature and it is not appropriate for a judge to be involved. The Lord Chief Justice should be entitled to say not only who, but whether, a judge should conduct an inquiry at all" (p 465).
83. The Lord Chancellor told us on the other hand: "My own view would be that consultation is enough on the basis that a judgment has ultimately got to be made and there is a balance to be struck and, therefore, as long as there is appropriate consultation, that would be sufficient. ... This is not about judicial deployment, although it involved judges, and a balance has got to be struck against the urgent demands of the judiciary to do, as it were, ordinary judicial business against the public interests. For example, there have been grievous losses sustained by the judiciary and the current Master of the Rolls spent a very long and productive time looking into BSE, I think it was, which resulted in a grievous loss to the judiciary while he was away, but obviously the public interest required that he do it" (QQ 732-733).

Opinion of the Committee

84. The Committee agrees that the terms of the Concordat should be fulfilled and that, to the extent that statutory provision is required, this bill should be the vehicle for effecting those changes. Accordingly, we have made many of the amendments referred to by the Lord Chancellor in his paper "Government Amendments to the Bill" (pp 420-5) and a large number of minor and drafting changes.
85. We do not consider it possible, beyond the provisions made by the bill, to accord the Concordat a quasi-statutory status. However, we have decided that greater publicity might be given to the document (hitherto published by the Department of Constitutional Affairs as "*The Lord Chancellor's judiciary-related functions: Proposals*") were we to publish it as an Appendix to this report. Accordingly, it may be found at Appendix 6.
86. We agree that the Minister should consult the Lord Chief Justice over the appointment of judges to boards, committees and public inquiries, rather than seek his concurrence. We consider that convention will suffice and accordingly make no change to the bill in this connection.

Should Clause 1 (Guarantee of continued judicial independence) be extended to Scotland?

87. Several witnesses expressed concern that Clause 1 of the bill, guaranteeing continued judicial independence, extended only to England and Wales. Section 1 of the Justice (Northern Ireland) Act 2002 creates similar duties in relation to Northern Ireland.
88. The Law Society of Scotland said that “on the basis of symmetry applying throughout all the constituent jurisdictions in the United Kingdom”, Clause 1 should extend to Scotland. “If it is not extended to Scotland then we could be in an anomalous situation. Ministers of the Crown are defined *inter alia* in the Scotland Act 1998, section 117, as those ministers who include Scottish ministers, so therefore Scottish ministers would be in the position of having an obligation to uphold the independence of the judiciary in England and Wales but would not, apparently, be under a similar duty quoad Scotland. That could be an anomalous situation. It would also create the situation that two Cabinet ministers, the Secretary of State for Scotland and the Advocate General for Scotland, who have a role more appropriately in the UK and would be definitely caught by this provision, would be responsible for upholding the independence of the judiciary in England and Wales. We think that all in all, on the basis of symmetry and to make sure that there are no difficulties about interpretation, this provision should have application in Scotland” (Q 594).
89. Support for the extension of Clause 1 to Scotland also come from the Royal Society of Edinburgh (p 399); Professor Hector MacQueen (p 375); and the Lord President of the Court of Session and the other Senators of the College of Justice (p 249).
90. On the other hand, the Lord Chancellor questioned whether the UK Parliament or the Scottish Parliament should deal with the application of this provision in Scotland. The Law Society of Scotland replied that “we might wait for some time for the Scottish Parliament to be able to enact a similar protection. For the purposes of symmetry and until such time as the Scottish Parliament has the opportunity to legislate on this issue this would be a useful mechanism to use.” (Q 597)
91. Part 1 of the bill relates to the arrangement to replace the office of Lord Chancellor. Historically, the Lord Chancellor has had little or no role in Scotland. It might therefore be thought incongruous for Clause 1 to extend to Scotland. There is a case for saying that it would be preferable for the Scottish Parliament to enact legislation to protect the independence of the Scottish judiciary. The Law Society of Scotland takes a pragmatic view: that the bill “provides a convenient vehicle” (Q 595) for creating such a duty and, moreover, Part 2 of the bill creating the Supreme Court of the United Kingdom, would apply to Scotland.
92. The Lord Advocate, however, took a robust line. The Scottish Executive did not consider such an extension necessary. The provision as they see it arises out of the abolition of the office of Lord Chancellor and functions performed in respect of England and Wales, so “at the moment we are not inclined to say to Westminster that they should impose a similar duty on Scottish ministers...” (Q 1096). The Scottish Executive plan to introduce legislation to put the Scottish Judicial Appointments Board on a statutory footing and will consider at that time whether or not there should be a duty on ministers

similar to that in Clause 1 (Q 1100). In their report on the bill, the Justice 2 Committee of the Scottish Parliament expressed the view that “if such a duty is required, the vehicle should be a Scottish Parliament bill and in those circumstances the Scottish Executive should seek an early opportunity to legislate” (SP Paper 163, para.30).

Opinion of the Committee

93. We agree with the advice of the Lord Advocate and the opinion of the Justice 2 Committee of the Scottish Parliament that the provisions of Clause 1 should not be extended to Scotland.

Speakership of the House of Lords (Clause 11)

94. Clause 11 and Schedule 6 provide for certain statutory functions in relation to the House of Lords currently performed by the “Lord Chancellor” to be performed from commencement by the “Speaker of the House of Lords”. Lord Norton of Louth was alone in suggesting to us that the title Lord Chancellor be used for the person who performs the functions of Speaker of the House of Lords. He argued that the office of Lord Chancellor should be put “at the disposal of the House” (p 139) and “retaining the position of the Lord Chancellor for parliamentary purposes would provide for some element of continuity, not just formally but in practice” (p 140).

Opinion of the Committee

95. The Committee takes the view that the question of the future of the Speakership of the House of Lords is not a statutory matter and so we make no comment on the policy whereby the Lord Chancellor would cease to sit as Speaker. Alternative arrangements are for the House as a whole, and not this Committee, to determine.

CHAPTER 3: THE SUPREME COURT (PART 2 OF THE BILL)

Issues relating to the Supreme Court

96. The Committee have identified the following issues arising in evidence which relate to the proposed establishment of a Supreme Court.
- Is the policy of the bill to replace the Appellate Committee of the House of Lords with a Supreme Court of the United Kingdom correct? (Clause 17(1))
 - If Part 2 of the bill is enacted, should it come into force before permanent premises are available for the Supreme Court? (Clause 103 is the commencement provision.)
 - Are the names “Supreme Court of the United Kingdom” (Clause 17(1)) and “Justice of the Supreme Court” (Clause 17 (7)) appropriate?
 - Is the policy of the bill to specify that “the maximum number of judges is 12” correct? (Clause 17(3))
 - Should the qualifications for appointment for a judge of the Supreme Court be amended? (Clause 19)
 - Should the composition of the Supreme Court Appointments Commission be amended? (Clause 20)
 - Should the Supreme Court appointments commission prepare a list of 2 to 5 names for the Minister, or provide a single name? (Clause 21(3))
 - Are the arrangements for consultation by the Minister satisfactory? (Clause 21 (4))
 - Should the Prime Minister, as well as the Minister, have a role in the appointments process? (Clause 21(5) and 22(1))
 - Are the arrangements for “acting judges” (Clause 29) and the “supplementary panel” (Clause 30) satisfactory?
 - Is it acceptable that Clause 31(1), by which the Supreme Court is designated “a superior court of record”, extends to Scotland? (Clause 31 (1))
 - Does the bill satisfactorily define the jurisdiction of the Supreme Court over appeals from Scotland?
 - Is the policy of the bill to transfer devolution jurisdiction from the Judicial Committee of the Privy Council to the Supreme Court correct? (Clause 31(4) and Schedule 8)
 - Should Scottish appeals to the Supreme Court lie only with the permission of the Court of Session or the Supreme Court?
 - Is the provision for the making of rules for the Supreme Court satisfactory? (Clauses 35 and 36)

- Are the duties placed upon the Secretary of State for Constitutional Affairs in relation to supporting the Supreme Court satisfactory? (Clauses 38 to 41)
- Are the arrangements for setting fees payable to the Supreme Court satisfactory? (Clause 44)
- Should Part 2 of the bill be amended to safeguard the separate identities of Scots law, Northern Irish law, and the law of England and Wales? If so, how is this best achieved?

We consider these issues below.

Is the policy of the bill to replace the Appellate Committee of the House of Lords with a Supreme Court of the United Kingdom correct? (Clause 17(1))

97. The Lord Chancellor told the Committee that “The Law Lords are judges and not legislators: the separation between those two roles should be made explicit” (p 9). The bill seeks to achieve this in two ways: by creating a Supreme Court (Part 2) and by disqualifying serving judges from participating in the legislative and scrutiny work of the House of Lords (Clause 94 in Part 4). These are conceptually distinct policy choices. Different policies would be possible, for example
- a Supreme Court could be established, while retaining a right of the serving Justices of the Supreme Court to sit in Parliament and in some way be involved in legislative and scrutiny work, or
 - the Appellate Committee of the House of Lords could be retained but the right of the serving Law Lords to speak or speak and vote in legislative and scrutiny business of the House be removed.
98. At this point we consider the general policy to establish a Supreme Court. (The main issues relating to Clause 94 are considered below at para.390-407.) There is a natural temptation to view the debate as between those who are for and against the proposed Supreme Court. In fact—as Lord Bingham of Cornhill reminded us—the range of views “is actually a good deal more complex” than this (Q 463). The views made known to the Committee fall into five broad categories:
- strong support for a Supreme Court as provided for in the bill;
 - conditional support for a Supreme Court, subject to being satisfied about matters such as funding arrangements and premises;
 - support for a Supreme Court coupled with regret that the reforms are not more radical in relation to the character and jurisdiction of the court;
 - strong support for the current arrangements;
 - support for the retention of the Appellate Committee while conceding that some reform may be appropriate—for example, a new convention that the Law Lords in office and others who are authorised to sit judicially do not speak or vote at all.

The Government's case for change

99. The Government's case for the Supreme Court is set out in the Lord Chancellor's written and oral evidence to the Committee (p 1; QQ 1-149), as well as in the Department for Constitutional Affairs' consultation papers issued in July 2003⁸ and in speeches in Parliament.⁹ The reforms are proposed in the context of other constitutional changes. Judicial review has developed into a significant check on the lawful exercise of central and local government powers. In recent years, on average approximately a fifth of the appeals heard by the Appellate Committee of the House of Lords originated from the Administrative Court. Moreover, when applying European Union law and the Human Rights Act 1998, courts are now able to call into question legislative provisions passed by Parliament. The Supreme Court will have important powers to adjudicate on devolution issues which may involve disputes about the powers of the United Kingdom Government and Parliament.
100. The Government say, first, that "the Law Lords are judges and not legislators: the separation between those two roles should be made explicit", as it is in many other democracies (Lord Chancellor, p 9). The reasons for this were alluded to by Baroness Hale of Richmond. Writing of her first three months as a Law Lord, she told the Committee "... this is an intensely political place. This may have become more apparent since the party political balance became closer and the House of Lords has felt much freer to engage in serious challenges to the House of Commons. This is none of our business as judges: yet if we take an interest we risk compromising our neutrality and if we do not we are seen as remote and stand-offish" (p 364). The Government are supported in this argument by Lords Bingham of Cornhill, Steyn, Saville of Newdigate, and Walker of Gestingthorpe: "the separation of the judiciary at all levels from the legislature and the executive as a cardinal feature of a modern, liberal, democratic state governed by the rule of law" (p 116). We also heard evidence in support of this position from the Law Society (Q 540), the Bar Council (Q 540), JUSTICE (Q 295), and academics including Professors Robert Stevens (Q 155) and Diana Woodhouse (QQ 345 & 363). Sir Thomas Legg QC, a former permanent secretary of the Lord Chancellor's Department, told us that establishment of a Supreme Court "is an item of long and outstanding unfinished business from 1875 and I am sure it is a good move" (Q 679).
101. The Government argue that it is not only the principle of separation of powers that is important, but that "there have in fact been a number of very practical examples where a dual role of the Law Lords as members of the Appellate Committee and of the Upper Chamber have raised questions about their ability to sit in specific cases". While the Lord Chancellor is not suggesting that the Law Lords' independence has ever been compromised, his evidence states that the growth in the number of judicial review cases over the past half a century has increased the chance of Law Lords being placed in constitutionally difficult positions (Lord Chancellor, p 1).

⁸ Constitutional Reform: reforming the office of the Lord Chancellor (CP 13/03); Constitutional Reform: a new way of appointing judges (CP 10/03); Constitutional Reform: a Supreme Court for the United Kingdom (CP 11/03).

⁹ See, especially: 26 January 2004, cols 12-30 (judiciary-related functions of the office of Lord Chancellor); 9 Feb 2004, cols 926-941 (Supreme Court); 12 February 2004, cols 1211-1324 (Supreme Court Judicial Reforms); 8 March 2004, cols 979ff (Second Reading of the Constitutional Reform Bill [HL]).

102. Secondly, the Government say that a new Supreme Court would help public understanding of the legal system. The Lord Chancellor told the Committee that “it must be sensible to have constitutional arrangements that reflect the reality. Take the judges out of the legislature, make it clear that they are judges, have a beacon of legal excellence that is the Supreme Court of the United Kingdom. Everybody can then see how our system works” (Q 93).
103. Some witnesses agreed that the current arrangements lead to confusion about the role of the House of Lords and the judges within it. Lord Bingham of Cornhill told us that “people just have no understanding at all of the function of the Law Lords” (Q 405). He suggested that separating the position of senior judges and members of the House of Lords would “make the British public appreciate that actually we are judges” (Q 405). Professor Diana Woodhouse told us “seeing the final and top court in its own building is very important psychologically for public confidence and perception about judicial independence” (Q 363). We were also told that even aspiring law students commonly regard the Court of Appeal as the highest court in the land (Q 405).
104. Thirdly, the Government and others argue that a Supreme Court separate from Parliament is required in order to comply with the requirements of Article 6 of the European Convention on Human Rights (ECHR), which requires that judges “must be independent, impartial and free of any prejudice or bias—both real and perceived. For this to be ensured, judicial independence needs not just to be preserved in practice, but also to be buttressed by appropriate and effective constitutional guarantees. The establishment of a Supreme Court will provide those guarantees” (Lord Chancellor, p 10).
105. Professor Woodhouse supported this view, saying that the ECHR makes the perception of our arrangements even more important: there is a “need for there to be compatibility, and evident compatibility, with the European Convention of Human Rights and with the requirement that judges are not only independent but are seen to be independent. Appearances are becoming increasingly important” (Q 345).
106. Fourthly, the Lord Chancellor told the Committee that the accommodation for the Law Lords in the Palace of Westminster “leaves a lot to be desired”. It is said that the offices of the Law Lords are cramped and inconveniently located, constraints on space limit the number of support staff who may be employed for the court, and “the presence of the Appellate Committee within Parliament makes it difficult for members of the public to gain access to the building, and to see our highest court in action” (p 10). The Lord Chancellor stated that “in the proposed UK Supreme Court, none of these artificial constraints would apply” (p 10). Lord Bingham of Cornhill said: “I would certainly hope that wherever it ends up it is in a place, subject obviously to security procedures, that the public can have access to and one would hope that in the course of time it would be in a building that people would actually feel proud of. If you drive around Singapore everybody says ‘That is the Supreme Court of Singapore’. If you go to New Delhi exactly the same is true, and true in Canada, true in Australia. These buildings are regarded as belonging to the people and they are buildings that they are proud of. I cannot actually see why the fourth richest economy in the world cannot do that” (Q 404).

107. Fifthly, some supporters—and indeed some critics (Professor J A Jolowicz, p 365)—point to the benefits of enabling “devolution issue” jurisdiction to be transferred to the Supreme Court. Since 1998, the Judicial Committee of the Privy Council rather than the Appellate Committee of the House of Lords has been the final court of appeal for cases involving devolution issues. Of the 13 cases so far heard by the Judicial Committee, all have come from Scotland and almost all have raised the question whether the Scottish Executive has breached a right under the European Convention on Human Rights. In other situations, such legal issues would arise under the Human Rights Act 1998 and the House of Lords would be the final court of appeal. Aidan O’Neill QC sought to demonstrate in his written evidence that this “dual apex” to the United Kingdom’s court systems has contributed to inconsistent case law (p 384).
108. Finally, it is part of the case for change that the costs of creating suitable accommodation for the Supreme Court, and the higher running costs, are merited by “the importance which a liberal society attaches to the rule of law” (Bingham, Constitution Unit Spring Lecture, 1 May 2003, quoted by Lord Chancellor p 15). In his written evidence to the Committee, the Lord Chancellor set out information about the estimated running costs of the Supreme Court:

TABLE 2
Estimate of Supreme Court Running Costs

Budget Head	Estimated Costs	Comment
Judicial Salaries	£2,100,000	Unchanged
Staff Salaries	£1,000,000	£600,000 currently – the increase represents the additional staffing requirement of the Court, including the Chief Executive, additional research assistants and support services currently provided by the House (e.g. librarians, messengers etc)
Library	£250,000	£90,000 currently – although this represents the cost of maintaining the Judicial Office library collection only; the Law Lords also enjoy access to the wider library of the House which would need replication, and maintenance, in part.
General Admin	£750,000	Covers utilities, telephones, postage, reprographics, soft services (cleaning, catering, security) etc
Building costs	£1,600,000 - £6,500,000	Annual building costs vary significantly between options and depending on procurement route. However, this figure represents a realistic estimate for a ‘conventionally’ (i.e. non-PFI) procured solution. The figure includes maintenance, rent (where appropriate), rates/capital charge.

109. Against these estimated running costs, the current running costs of the House of Lords Judicial Office have also to be taken into account. In addition to Judicial Office staff salaries and office administration costs (£680,000 for 2002/03), a further £180,000 is apportioned to the Judicial Office for the cost of utilities, accommodation, overheads, telephones and postage. The Judicial Office also benefits from the use of staff employed by the wider House of Lords (library services, security, catering, cleaning and so on)—a conservative estimate of the latter being around £250,000. As to accommodation for the Supreme Court there will also be additional capital costs. At the outset the Lord Chancellor told the Committee that the set up costs have been calculated as between £6 million and £32.5 million. He later informed us that the choice had been narrowed to two options—Middlesex Guildhall and Somerset House—and that the likely set up costs will be at the top end of the range.
110. Aside from the as yet unknown costs of acquiring suitable accommodation for the Supreme Court, the Government estimate that in order to support the ongoing costs of running an independent Supreme Court they will have to invest “a figure of slightly over £3 million per annum in addition to that which is already spent on the judicial work of the House of Lords”. Nevertheless they are confident that this will be “money well spent”. The Lord Chancellor’s written evidence to the Committee states: “The Government is confident that arguments both of principle and practicality justify such a cost, and that the proposals will represent value for money. Once established the court will allow tangible benefits to be realised” (p 15).

Criticisms of the Government’s case for change

111. First, many critics of Part 2 of the bill say there is no theoretical constitutional principle in the United Kingdom requiring separation of judicial and legislative functions. Sir Robert Carnwath (a judge of the Court of Appeal of England and Wales and former chairman of the Law Commission of England and Wales) told us in his written evidence that “Under the British constitution Parliament, under the Crown, is supreme. In different ways, both the executive and the judiciary are servants of Parliament’s will” (p 311). On this view, the United Kingdom operates under principles that include judicial independence and the rule of law—but neither of these principles dictates that the Appellate Committee of the House of Lords should cease to exist (see also Garnier, p 356).
112. Lord Jauncey of Tullichettle reiterated the point that there “was not and never has been a strict separation of powers in the English constitution”. Indeed, we recall that the Royal Commission on the Reform of the House of Lords, echoing evidence they had received from the late Lord Wilberforce, concluded that “as long as certain basic conventions (which we recommend should be set out in writing) continue to be observed, there is insufficient reason to change the present arrangements. Indeed, we see some advantage in having senior judges in the legislature where they can be made aware of the social developments and political balances which underlie most legislation.” (Cm 4534, p 6) It may be added that in November 2001, the Government’s White Paper on reform of the House of Lords accepted that recommendation and stated that “The Government is committed to maintaining judicial membership within the House of Lords. In practice, it has been recognised that the formal judicial function constrains the judicial capacity of active Law Lords to comment on legislation and issues of the day.

However, Law Lords represent a significant body of expertise and experience, which can benefit the House beyond the period when they sit judicially. ... The Government proposes that ... all those appointed as judicial members should continue to be members of the Lords until age 75, whether or not they sit judicially” (*The House of Lords – Completing the Reform*, Cm 5291).

113. A related confusion, we were told, is the assumption made by many advocates for change that the upper House is simply a legislature. This, Lord Cooke of Thorndon states, is “a half truth” as “the House of Lords is more than a chamber of a legislature” (“The Law Lords: an Endangered Heritage” (2003) Vol.119 *Law Quarterly Review* at 49). He drew our attention to the terms of section 4 of the Appellate Jurisdiction Act 1876 which make it clear that the House of Lords is a court: “Every appeal shall be brought by way of petition to the House of Lords, praying that the matter of the order or judgment appealed against may be reviewed before Her Majesty the Queen in *her court of Parliament*, in order that *the said Court* may determine what of right, and according to the law and custom of this realm, ought to be done in the subject-matter of such appeal”. Professor J A G Griffith agrees: “The House of Lords as part of the High Court of Parliament has existed for centuries. The working constitution is a complex piece of machinery which depends on a commixture of functions, not their separation. There is no anomaly” (p 362).
114. As to the practical problem of Law Lords needing to avoid sitting in judgement in cases where they had been involved in the making of legislation, Professor J A Jolowicz of Cambridge University reminded us that this is nothing new: “more than 100 years ago, Lord Halsbury explicitly refrained from writing a judgement on the sole ground that he had been concerned with the drafting of the legislation the interpretation of which was before the House (*Hilder v Dexter* [1902] AC 474, 477-478)” (p 367). We were also told that the June 2000 statement by Lord Bingham of Cornhill was merely a reflection of general restrictions that apply to judges sitting in all courts. Problems are as likely to occur following statements made outside Parliament as they are on the floor of the House (Nicholls Q 411).
115. In this context, some of those in favour of retaining the Appellate Committee of the House of Lords are willing to contemplate reform. Lord Brightman told the Committee of his idea for a new convention that “the Law Lords in office, [and] others who are authorised to sit judicially, do not speak or vote at all. That is a total answer to the problem” (p 328). Lord Hope of Craighead told us “one solution might be to deal with our position by means of a standing order” which would prevent Law Lords from voting (Q 652).
116. Secondly, critics were unconvinced about the accuracy or relevance of the Government’s assertions about public perception—a “belief that the public really not only do not understand what role the Law Lords play but actually believe that the Law Lords are in some way biased, that their decisions are political decisions made for reasons which are not judicial at all” (Lloyd Q 199). Lord Norton of Louth told us that the Government has produced no empirical evidence of such perceptions and, moreover, “reliance on the perceptions of the ordinary citizen—the Government’s perception of perception—is not justifiable as the basis for proceeding with a fundamental measure of constitutional reform” (p 138) (see also Cullen Q 872, Martin Q 851).

117. To the extent that we have been able to assess public perception both of the current situation and of the proposed changes the most we can say is that opinion does not run high. As Professor Stevens said to us, “I am not certain that there is really any public opinion”. He recounted how in 1874 “when the right of the Conservative Party was trying to sabotage the Imperial Court of Appeal and they claimed that public opinion was opposed to it and *The Times* commented... ‘there is no public opinion on this subject any more than there is on the transit of Venus’. I suspect not much has changed since 1874” (Q 199). The e-consultation exercise conducted on our behalf by the Hansard Society received relatively few responses from the general public (see Appendix 7).
118. Thirdly, several witnesses rejected the Government’s reliance on Article 6 of the European Convention on Human Rights. Sir Robert Carnwath stated: “The European Court of Human Rights does not insist on a rigid division of functions between the judges and the legislature. It is concerned with specific connections in individual cases. The Law Lords have responded by a self-imposed restriction on participation in parliamentary debates. There is no reason to think that this is ineffective. Nor is there any evidence that the independence of the Law Lords is in doubt, or perceived to be so by government or anyone else” (p 331) (see also: Garnier p 356, Nugee p 379, Jauncey p 364).
119. Fourthly, some witness disagreed with the proposition that the Palace of Westminster provided inadequate accommodation for the Law Lords, either from the Law Lord’s point of view or that of the general public. Lord Hope told us that the statements that the existing accommodation for the Law Lords leaves a lot to be desired are “exaggerated” and that in his view the Law Lords do not need more staff or space for staff (p 189). He also told us that the Law Lords “receive many visitors in the course of our year from many places for a variety of reasons”, though he conceded that more could be done to improve accessibility (Q 676).
120. Fifthly, some opponents of the creation of a Supreme Court are particularly critical of the plan to transfer devolution issue jurisdiction from the Judicial Committee of the Privy Council. (This question is considered more fully at para.227-36 below.)
121. Sixthly, many critics of Part 2 of the bill are wholly unconvinced that a new Supreme Court will constitute value for money and yield tangible benefits. Lord Mackay of Clashfern stated that “The costs involved in this proposal are considerable and I very much question whether these additional costs on litigants, not only in the Supreme Court itself, but also in all the other civil courts of the United Kingdom is justified by the benefit claimed for the proposal” (p 80) (see also: Brightman p 328, Ackner p 100, Garnier p 356, Hobhouse p 125).
122. A seventh concern relates to judicial activism. Lord Rees-Mogg expressed the fear that should a Supreme Court be established, it might encourage senior judges to usurp the principle of parliamentary supremacy: “I think if we send the Law Lords out into some new place with pillars in front that they will think that the separation of powers is the basis on which we have done it and that, therefore, they have got their powers” (Q 239; Nicholls Q 432).

123. Finally, some witnesses think that the formidable reputation of the Appellate Committee is in itself the most compelling reason for retaining the current arrangements. Even people who are in favour of reform identify the risks involved in change. Richard Cornes told us that the new Supreme Court will not automatically inherit “the aura of authority” enjoyed by the Appellate Committee and “the very act of reform (including the events of last year) have destabilised” the “unwritten understandings” which have underpinned the legitimacy of the United Kingdom’s highest courts (p 339).

Calls for more radical reform

124. Some critics of Part 2 by contrast welcome the removal of judicial business from the House of Lords but say that the bill does not go far enough in reforming the United Kingdom’s top level court and in changing its character. Several witnesses were disappointed that the bill merely seeks to replicate most of the features of the Appellate Committee in the new Court and misses opportunities (for instance) to create a Supreme Court with truly United Kingdom-wide jurisdiction, including over Scottish criminal appeals, or to create a court which sits en banc (we consider this latter question at para.161-4 below).
125. Aidan O’Neill QC told us that the creation of a Supreme Court with jurisdiction over devolution issues was a necessary but not sufficient step to “ensure constitutional coherence and stability for the Union”. He called for a new post within the Supreme Court, similar in position to that of the Advocates General to the European Court of Justice, the function of which “would be, prior to the Supreme Court’s judgment, to draw the attention of the parties, the court and the public at large to the general implications of the Court’s decision in the individual case before it, both for the separate jurisdictions making up the Union, as well as for the UK as a whole” (p 384).
126. Sir Robert Carnwath called for a “full review of the function of the Appellate Committee in the 21st century, and its relationship to the lower courts in the three jurisdictions”. He pointed out that “in other countries the judges of the final court may have a valuable role as ‘think tanks’ for law reform, or pre-legislative scrutiny”. He said, “... if their [the Law Lords’] true role is ‘system-wide’ correction, more of their time might usefully be devoted to helping to correct legislative muddles in advance, rather than sorting them out retrospectively (and much more expensively). There is no necessary conflict between these two roles. Both are concerned with improving the structure of the law. From the point of view of those affected it does not much matter whether this is achieved by legislative action or judicial precedent” (p 332).
127. In a similar vein, Baroness Hale of Richmond asked, in her written evidence, “if we are to have all the upheaval ..., is it not worth contemplating doing something a little more radical?”. In her view, “only cases of real constitutional importance should go to the Supreme Court”, along with ordinary civil and criminal cases “but only on the basis that a serious inconsistency had arisen between two of more jurisdictions of the United Kingdom in the interpretation of United Kingdom legislation or the development of the common law on a subject where the law ought to be same throughout the realm”. She urged that the Supreme Court be given

exclusive power to select which cases to hear and that the criteria for selections should be set out in legislation (p 364).

The views of the judges

128. A decision to remove judicial business from the House of Lords has obvious importance far beyond the wishes and concerns of judges. The views of those actively involved in the life and work of the courts—some of whom we have already cited—do, however, illustrate the stark differences of opinion about the future for the Law Lords. In their response to the Department for Constitutional Affairs consultation in July 2003, the then serving Law Lords were not of one mind, some supporting the general policy of a Supreme Court,¹⁰ others opposed to it,¹¹ and one choosing to express no concluded view¹² (p 116). Since then, three of the Law Lords have retired and three new appointees have taken their place: Baroness Hale of Richmond supports a Supreme Court but would prefer “an even more radical reform than that proposed by the Government” (p 342); in December 2003, Lord Carswell told that House of Commons Constitutional Affairs Committee that he was inclined to the view that if the Appellate Committee “is functioning satisfactorily you might make more trouble from changing it just because of perception” (HC 48-II. Ev 66); Lord Brown of Eaton-under-Heywood has not expressed any public view. We were told by Sir Brian Kerr, the Lord Chief Justice of Northern Ireland, that there was a variety of views in Northern Ireland (Q 1028). The Senators of the College of Justice, the collective body of the senior Scottish judiciary, are unanimously in favour of retaining the existing arrangements (p 249; Q 899). The Judges’ Council of England and Wales have not expressed a collective view on the desirability, or otherwise, of the Supreme Court, though Lord Woolf told us that

“So far as the Supreme Court is concerned, I recognise the different views about that and that the House of Lords is split on that. I do not think one can say, even if you are committed to the Supreme Court, that it has to happen tomorrow. That is not as urgent a matter ...” (Q 511).

The common ground

129. It is helpful to identify issues on which there is a broad degree of agreement. First, there is almost no support for the former practice of the Lord Chancellor occasionally sitting and presiding in the Appellate Committee of the House of Lords.¹³ Moreover, the Concordat specifically provides, as one of its guiding principles, that the “Secretary of State will not be a judge and shall not sit in a judicial capacity” (para.8. See Appendix 6). It therefore seems clear that whether there is a Supreme Court, or whether the Appellate Committee is retained, the Minister responsible for judiciary-related matters will not sit as a judge in it.

¹⁰ Lords Bingham of Cornhill, Steyn, Saville of Newdigate and Walker of Gestingthorpe (i.e. four of the 12 Law Lords). The late Lord Hobhouse of Woodborough argued in favour of the principle but not the current proposals (see his supplementary response, para.124-6).

¹¹ Lords Nicholls of Birkenhead, Hoffmann, Hope of Craighead, Hutton, Millett and Roger of Earsferry (i.e. six).

¹² Lord Scott of Foscote. Bingham, Q 450.

¹³ Upon appointment as Lord Chancellor in June 2003, Lord Falconer of Thoroton announced that he would not exercise his right to sit judicially.

130. Secondly, the overwhelming view—which the Government accepted from the outset—is that the Appellate Committee of the House of Lords has a high reputation at home and abroad for excellence of its judgments, its efficiency and the probity of its judges. It is accepted that as a matter of fact the Law Lords are independent of pressure of any kind (other than through counsel’s submissions) from either Parliament or the Government. Lord Nicholls of Birkenhead told us: “I have never been approached in connection with any case I have been involved in by a member of government, by a fellow Peer or anybody at all. Nor have I ever heard of any other judge being so approached” (Q 408).
131. Thirdly, it is accepted that setting up a new Supreme Court will incur some additional public cost and recurrent expenditure will be higher than it has been for the Law Lords accommodated in the Palace of Westminster.

Opinion of the Committee

132. There was a clear division of opinion within the Committee between those members who agreed that the Appellate Committee of the House of Lords should be replaced by a Supreme Court of the United Kingdom and those members who did not. Accordingly, we make no recommendation to the House.
133. We are agreed however that, were a Supreme Court to be established, it should be housed in a building befitting its importance but it is not for us to make the choice.
134. Given the necessarily limited range of financial information provided to the Committee and the lack of figures for costs of accommodating the current occupiers of premises capable of housing the Supreme Court, the Committee agrees that no conclusion can be arrived at by us as to cost and benefit.

If Part 2 of the bill is enacted, should it come into force before permanent premises are available for the Supreme Court? (Clause 103 is the commencement provision.)

135. The Lord Chancellor told the Committee of the relationship between the bill and the building: “you cannot make progress about the building without there being a legislative process to create the Supreme Court and you cannot get the Supreme Court up and running effectively unless there is a building on its way” (Q 53).
136. The Committee was told by the Lord Chancellor that a process of conducting two searches across London for suitable properties to convert for use as the Supreme Court, and sites to construct a new building, had revealed six potential options (p 16). Following further evaluation against the criteria of suitability, deliverability, prestige and location, and affordability and value for money, two of these options were rejected.
137. On 30 April 2004, Lord Bingham of Cornhill wrote a memorandum to the Committee, reflecting the consensus among the serving Law Lords, in which he expressed concerns about the use of the existing Middlesex Guildhall for the Supreme Court (p 114). The Middlesex Guildhall was built in 1913 for use as criminal trial courts and its historical court rooms of traditional layout and forbidding aspect would be “entirely unsuited to the work” of the Supreme Court. Lord Bingham of Cornhill concluded that “With Parliament Square and the Palace of Westminster to the east, and with Westminster

Abbey to the south, the Guildhall site in our view deserves a building very much more distinguished than the Guildhall is or can ever be”.

138. The Lord Chancellor conceded that “it is inevitable that, even once identified, it will take time to equip the building” and stated: “While we would not wish to rule out any interim arrangements at this point, I can assure the committee that there is no possibility that we will enact legislation on the Supreme Court without ultimately providing suitable accommodation” (p 17).
139. Lord Bingham of Cornhill’s memorandum to the Committee estimated that a delay of three to four years would appear to be the minimum before the Supreme Court could move into its new accommodation.
140. We considered what should happen between the enactment of Part 2 and the time when the Supreme Court’s permanent accommodation is ready for occupation. The Lord Chancellor told us that “I think it would be very, very unlikely that they would go from here [the Palace of Westminster] to one place and then to a permanent Supreme Court building” (Q 73). He also said: “Let us see where we are in relation to the building. The building is bound not to be ready by March 2005, assuming that is the date that the bill passes. There would then be a choice about whether or not one waited until the building was ready or one made some transitional arrangement” (Q 91).
141. There appear, therefore, to be two options.
 - Part 2 could be brought into force before the permanent building is ready, with the Supreme Court, using the Palace of Westminster as its location in the interim.
 - The commencement of Part 2 could be delayed until the court building is completed.
142. The Law Lords were clear in their evidence that if the bill were enacted the second of these options was the preferable one. “We think it essential that new legislation creating a Supreme Court should not come into effect until there is accommodation in which the Court can be established”. The reason for this preference was explained in the following way: “There would be no practical problem if, during the period of delay, the Appellate Committee and the Judicial Committee continue to function as they now do. But an intolerable situation would arise if the new arrangements were to take effect before there was accommodation to which the judges could transfer. ‘Old’ appointees would continue to be peers and as such entitled, presumably, to use the facilities of the House. ‘New’ appointees, unless they were peers, would have no claim to use the facilities of the House or to occupy any of its space. It is not at all clear how the financing of the Court, the employment of staff etc could be handled during the interim period, which would call for very detailed transitional provisions” (p 115).
143. Lord Nolan, a retired Law Lord, agreed. He told us that “the suggestion that the Supreme Court should temporarily (though for an indefinite period) occupy the same accommodation [that is, the Palace of Westminster] will not, I hope, be pursued” (p 379). It is argued that, if it is necessary to demonstrate to the public the separate identity of the Supreme Court, this message is wholly lost if the new court comes into being with the same people doing the same work in the same place as before. Lord Lester of Herne Hill QC, submitting evidence on behalf of the Odysseus Trust,

supported deferring the commencement of Part 2 of the bill until suitable accommodation (and resources) had become available (p 382), as did JUSTICE (p 94).

Opinion of the Committee

144. The Committee is divided on the question of whether commencement of Part 2 of the bill should be delayed pending a move to permanent premises and make no recommendation to the House.

Are the names “Supreme Court of the United Kingdom” (Clause 17(1)) and “Justice of the Supreme Court” (Clause 17 (7)) appropriate?

145. In response to the Department for Constitutional Affairs consultation paper, and since, a number of people have expressed dissatisfaction with the new court’s title: “the Supreme Court of the United Kingdom”. Four main concerns have been articulated as to why the title is misleading or otherwise not apt.
146. First, the court will not be the court of final appeal for Scottish criminal cases and it is therefore not a Supreme Court of the whole of the United Kingdom (Mackay of Clashfern Q 238).
147. Secondly, the bill does not create a new level of “United Kingdom” law separate from the laws of the three jurisdictions (England and Wales, Northern Ireland and Scotland) and, indeed, we recommend below (para.283) that the bill be amended to provide expressly for this. The Supreme Court will not in this sense be a Court “of the United Kingdom”—but, according to the case it is hearing, a court of England and Wales, Northern Ireland or Scotland. Only in relation to devolution issue appeals will its judgments be binding in all three jurisdictions. Lord President of the Court of Session in written evidence said: “The title of ‘Supreme Court’ is perhaps not appropriate, having regard to the different functions which the new court would exercise” (p 251).
148. Thirdly, some fear that the title is apt to confuse the public, who will believe that the court’s functions and powers are similar to that of the United States Supreme Court. Lord Norton of Louth told us: “The argument [in favour of a Supreme Court] is that it will introduce clarity and so what happens you call it the Supreme Court—anybody with informed knowledge of the American judicial system will probably read into it a completely different role to that which it will have” (Q 489).
149. Fourthly, Lord Rees-Mogg suggested that the judges of the Court may themselves be encouraged into inappropriate judicial activism by the name “Supreme Court”. Lord Mackay of Clashfern agreed: “The concerns that Lord Rees-Mogg expressed about the Supreme Court, and that perhaps the use of the name may be influential in this connection, I think have to be taken quite seriously” (Q 238).
150. We heard relatively little evidence as to what the court might be called if not the Supreme Court of the United Kingdom. Lord Mackay of Clashfern tentatively suggested “High Court of the United Kingdom”, on the grounds that this had greater similarity to the High Court of Parliament, mirrors practice in Australia (where the High Court of Australia is the highest court), and avoided the pitfalls associated with “Supreme Court” (QQ 273-277).

151. Lord Bingham of Cornhill takes a different view to those set out above. He told us: “I think it is a totally appropriate title. I appreciate that it has been suggested that it should be called the High Court. There is already a High Court in England, there is a High Court in Justiciary in Scotland, there is a High Court in Northern Ireland and we do not want another high court. The Supreme Court has existed with the Court of Appeal and the High Court since 1875 and it is not a title that is unfamiliar to us. I can see no reason why everybody should have a rush of blood to the head as a result of this title, which is, while not completely accurate, very nearly so. That does not suggest for an instant that anybody has any agenda to create a body of United Kingdom law, nor does it suggest that some takeover bid for the criminal law of Scotland is going to be made, which it most emphatically is not. The truth is that it is the nearest we have got to the apex of the jurisdictional, curial pyramid in the jurisdictions of England, Wales, Scotland and Northern Ireland, and that is the proper name for it in my opinion” (Q 434).

Consequential amendments upon establishing a Supreme Court of the United Kingdom

152. As the Government acknowledged in their July 2003 consultation paper, “there is already an entity known as the Supreme Court of England and Wales, which consists of the Court of Appeal, the High Court and the Crown Court”. Similarly, there is a Supreme Court of Northern Ireland. Moreover, in Scotland, the term Supreme Court has also been used on an administrative basis to refer to the Court of Session and the High Court of Justiciary collectively. The Government stated that “to avoid confusion, in the future the title of Supreme Court will be reserved for the Court to be created as a result of this consultation” (*Constitutional Reform: a Supreme Court for the United Kingdom*, CP 11/03, para.58). The bill does not, however, make any provision to change the name of the Supreme Court of England and Wales, the Supreme Court of Judicature of Northern Ireland, or the short title of the Supreme Court Act 1981 and other primary and subordinate legislation in which the words “Supreme Court” appear in the title. The Lord Chancellor told us that the Government’s policy is to rename the existing Supreme Court of England and Wales as The Senior Courts of England and Wales, and for the Supreme Court of Judicature of Northern Ireland to be renamed as the Court of Judicature of Northern Ireland. Amendments to introduce these provisions will be tabled at a later stage of the bill.

Opinion of the Committee

153. The Committee agree, with varying degrees of enthusiasm, that, if the bill is enacted, the name “Supreme Court of the United Kingdom” and the title “Justice of the Supreme Court” are appropriate. The Supreme Court of England and Wales and the Supreme Court of Judicature of Northern Ireland should be renamed and, where necessary to avoid possible confusion, the short titles of legislation relating to those courts should also be changed.

Is the policy of the bill to specify that “the maximum number of judges is 12” correct? (Clause 17(3))

154. We considered several issues relating to the number of judges.

- How many judges will be needed to despatch the business of the Supreme Court?
 - Should the Supreme Court sit en banc i.e. all together or, as the Appellate Committee does, sit in panels?
 - What provision should there be as to the number of judges from England and Wales, Northern Ireland and Scotland?
155. The Lord Chancellor told us that he intended to move an amendment to Clause 17 “to provide that the number of Supreme Court judges may, by affirmative resolution, be increased or further increased from 12 to some greater number, but that their number cannot be less than 12. Whereas there may, in future be a need to *increase* the number of judges to cope with additional workload it would be appropriate for this to be exercisable by secondary legislation as at present for the number of Lords of Appeal in Ordinary, I am persuaded that it would not be appropriate to *decrease* the membership of the Supreme Court except by primary legislation” (pp 418-9).

The overall number of judges

156. The number of judges needed by a court depends on two main factors: how many cases are received; and how the court organises itself to hear those cases—in particular whether it sits en banc (meaning all the judges of the court sit together to hear all the cases) or in panels (meaning that sub-committees of the court, for example five out of 12 judges, hear cases).
157. The likely caseload of the new Supreme Court can be expected to reflect the current caseload of the Appellate Committee of the House of Lords and the devolution jurisdiction of the Judicial Committee of the Privy Council. In large part, the case load of the Appellate Committee is in the hands of the Law Lords. In the great majority of cases, they select for themselves which appeals to hear and only a small proportion of cases come “as of right” or with leave granted by a lower court. The same arrangements will apply to the Supreme Court. Another factor affecting judicial time is the caseload of the Judicial Committee of the Privy Council. Here there have been and will be significant changes: appeals from bodies such as the General Medical Council are no longer heard; with the setting up of the New Zealand Supreme Court, more than a dozen appeals a year will no longer come to London; and in the foreseeable future, the Caribbean Court of Justice will begin operation with the effect that a further dozen or so cases a year will no longer be heard by Law Lords sitting in the Judicial Committee of the Privy Council.
158. Several witnesses called for the Supreme Court to have 15 (rather than 12) permanent members at its inception. Two main reasons were advanced for this. First, as Roger Smith of JUSTICE told us, there is a general case for a court of 15 as this would provide a “permanent core of justices at the very top of the system” (Q 289) and so reduce the need to call upon members of the supplementary panel.
159. Secondly, a particular case was made for a court of 15 in order to accommodate three (rather than two) judges from Scotland; this issue is considered below.

160. One objection to increasing the size of the court to 15 relates to the “collegiate” nature of the court. Lord Hope of Craighead explained to us that “As far as the difference between 12 and 15 is concerned, my concern is not so much with costs as with the collegiate nature of the body. Our experience has been that we gain a great deal from interaction with each other in the committee system and it is achieved by the way in which the sittings are organised... If you expand the body you make it a little bit more difficult to achieve that constitutionality, and the more the building tends to separate people off from each other, as indeed the building I have seen tends to do, the more likely that is but, more importantly, it is important to make sure that the present system, which operates within the number of 12, is not lost. I think the balance is correctly struck here” (Q 645).

Should the Supreme Court sit en banc?

161. The bill, in Clause 32, envisages that the Supreme Court will continue the practice of the Appellate Committee of the House of Lords and hear most cases by constituting itself into panels—usually of five, but on occasion seven and exceptionally nine judges.

162. Several witnesses told us of their preference for the Supreme Court to sit en banc. If the court did sit en banc, it would require fewer judges (probably nine). This is the view of, among others, Sir Thomas Legg QC (Q 679), Professor Diana Woodhouse (Q 345), the solicitors firm Clifford Chance LLP (p 316), and Richard Cornes (p 338). The General Council of the Bar of England and Wales commented that “an important question which should be addressed is whether the Supreme Court should not always sit ‘en banc’ rather than in separate committees” (p 162). The bill does not permit all 12 Justices to sit to hear a case, as the Supreme Court will be duly constituted only if “the Court consists of an uneven number of judges” (Clause 31(1)(a)).

163. The clear disadvantage of a court sitting en banc is that it could hear far fewer cases than a court of 12 judges sitting in panels of five (though this begs questions as to how many cases the Supreme Court should decide). We were told of two main advantages that accrue to courts that sit en banc. One is that this method of deciding cases promotes consistency and legal certainty.

164. A further advantage of sitting en banc is that it would “thereby avoid speculation about who will sit and what criteria are used to determine this” (Professor Diana Woodhouse p 108). Lord Bingham of Cornhill told the Committee that in the past the Lord Chancellor “used to set the panels, the constitutions which sat, and in amazingly recent memory was willing to manipulate the panels to achieve a certain result—I am not suggesting within the governmental experience of any one person! That is a prerogative that he has entirely given up, it has been in the hands of the two senior Law Lords for the last ten years and out of the hands of the Permanent Secretary since then” (Q 402).

The appointment of judges from Scotland and Northern Ireland

165. The great proportion of appeals heard by the Appellate Committee of the House of Lords emanate from the courts of England and Wales. This will continue to be so in the Supreme Court. No one therefore doubts that the majority of judges appointed to the Supreme Court should have a

background in the law of England and Wales. If current patterns are replicated in the Supreme Court, there will be on average one case from Northern Ireland every eight months or so, and approximately eight appeals from Scottish courts a year (from the Court of Session in civil cases and the High Court of Justiciary and other courts where a “devolution issue” is raised). We therefore considered what arrangements should be in place to ensure appropriate representation from the two smaller jurisdictions of the United Kingdom.

166. The considerations relating to Scotland and to Northern Ireland are rather different. We were told by Sir Brian Kerr, the Lord Chief Justice of Northern Ireland, that the laws and procedures in Northern Ireland were broadly similar to those applying in England and Wales (QQ 1012-1013). In Scotland, many aspects of criminal and civil law and court procedures are significantly different from that in the other parts of the United Kingdom. A further difference is that there is a long-standing constitutional convention that two Law Lords are appointed from Scotland, whereas the practice of appointing a Law Lord from the Northern Ireland is much more recent and less well-established.
167. Several witnesses from Scotland told us that there should ideally be three permanent Law Lords with knowledge of Scots law. This would have the consequence that when an issue of Scots law is being decided by a panel of five judges, or the court is dealing with a devolution appeal relating to Scotland, the majority of the panel could have expertise in Scots law. The use of Scottish judges as “acting judges” was not regarded as a satisfactory measure, the view being taken that acting judges should be used only in genuine emergencies such as illness. The witnesses were agreed that it would not be appropriate to have three out of 12 judges on the Court from Scotland (this would be too high a proportion), and so came the suggestion that the Supreme Court should have a minimum permanent body of 15 judges.
168. A further question relating to the appointment of judges from Scotland and Northern Ireland is whether the bill should state expressly that there are to be two (or three) judges with experience of Scots law and one judge with experience of the law of Northern Ireland. The bill before us makes no express provision for the number of judges from these jurisdictions. The Lord Chancellor told us that the Government wished to make provision for the following (p 416)
- The Supreme Court selection commission will be responsible for assessing both merit and territorial balance, following consultations with the senior judiciary in each jurisdiction, the judges of the Supreme Court (other than the President and Deputy President who are themselves members of the commission), the heads of the devolved administrations and the Minister.
 - The Minister will be able, before the selection commission convenes, to provide non-binding guidance relating to the vacancy that has arisen by, for example, drawing attention to the existing and future jurisdictional balance and requirements of the Supreme Court.
169. Some views we received were generally content to leave the question of appointment of Scottish and Northern Ireland judges to the Supreme Court to be dealt with as a matter of constitutional convention. The Scottish Ministers told us that they did not consider it necessary to set a minimum

number on the face of the bill, though they “were concerned to establish a proper mechanism for the continuation of the convention” of two Scottish judges, and that they are in discussions with the Department for Constitutional Affairs “about the mechanisms for enshrining the convention” (p 298). The Lord Advocate, Colin Boyd QC, was content for the number to be a matter for convention (Q 1094). Sir Brian Kerr told us that he was “agnostic” about whether the bill should expressly require a Northern Irish judge or whether that was achieved as a matter of constitutional convention (Q 1015).

170. Others expressed different views. The Senators of the College of Justice—the collective body of senior Scottish judges—urged that Clause 17 “should be amended to provide that the composition of the Supreme Court is to include at least two judges who have held high judicial office in Scotland. Where a Supreme Court judge who held high judicial office in Scotland resigns, retires or dies, he or she should be replaced by another judge who has held high judicial office in Scotland. In our view, such an amendment is necessary to protect the administration of justice in Scotland and the distinctive principles of Scots law” (p 249). The Faculty of Advocates supports this view (p 234), as did the Law Society of Scotland (Q 815).

Opinion of the Committee

171. The Committee agrees that the number of Supreme Court Justices should be 12. We have amended the bill to allow the Minister by Order in Council (by affirmative resolution of both Houses of Parliament) to increase that number. It should remain a convention that within that number at least two Supreme Court Justices should have been Scottish judges. The Committee further agree that the Supreme Court should sit in panels, the size of which may be varied at the Court’s discretion according to the importance of the case.

Should the qualifications for appointment for a judge of the Supreme Court be amended? (Clause 19)

172. Clause 19 of the bill sets out the formal qualifications for appointment to the Supreme Court. They reproduce the existing qualification requirements for Lords of Appeal in Ordinary. To be eligible for appointment a person must
- have held “high judicial office” for a period of at least two years (as defined by Clause 48), or
 - be a legal practitioner of at least 15 years’ standing.
173. The question of formal qualification is distinct from issues relating to the criterion of “merit”. The Lord Chancellor indicated at an early stage his intention to move amendments to Part 2 of the bill to state expressly that appointments to the Supreme Court shall be on merit and we have agreed those amendments after Clause 19. (“Merit” in relation to appointments by the Judicial Appointments Commission in England and Wales is discussed fully at para.323-35 below.)
174. We heard a variety of criticisms of Clause 19. Lord Cullen of Whitekirk told us that appointments should be restricted to judges who have experience of sitting in appellate courts. In his view, and that of the Senators of the College of Justice, it was not appropriate to appoint practitioners directly to the Supreme Court, even though a number of distinguished Law Lords—

including Lords Reid and Macmillan—had been appointed in this way (QQ 884-885; p 249). He explained that “simply to take over into this bill the provisions of the 1876 Act as to qualifications is perhaps not really in accordance with modern reality. In other words, somebody should demonstrate a proven track record bringing up qualities that show he or she is suitable for promotion to an appellate job. In other words, I see this as a promoting post” (Q 884).

175. Others told us that the problem with Clause 19 was that it was overly restrictive. Lord Lester of Herne Hill QC and The Odysseus Trust argued that Clause 19 was too narrow and that the criteria should be sufficiently flexible to include solicitors and legal scholars—they say this will ensure greater diversity (p 382). Baroness Hale of Richmond suggests non-practising lawyers should be eligible for appointment. She told us that the House of Lords has, and Supreme Court will continue to have, “a role in shaping the law which is quite different from that of the first tier appeal courts in any of the three jurisdictions. It is often involved in questions of legal policy. It needs a variety of legal and life experiences to feed into that discussion” (p 364).
176. In their response to the House of Commons Constitutional Affairs Committee report of February 2004, the Government stated
- “It is vital to maintain the same calibre of judges in the Supreme Court as presently serve in the Appellate Committee. For this reason the Government is proposing that the criteria for eligibility for appointment to the Supreme Court remain the same as those for the House of Lords Appellate Committee.....Whilst it could be argued that this would improve diversity on the bench, the Government recognises that it may be of considerable importance that the members of the Supreme Court should have active experience of presiding in the lower courts” (The Government’s response to the report of the Constitutional Affairs Committee, *Judicial Appointments and a Supreme Court (court of final appeal)*, para.20, April 2004, Cm 6150).
177. In his written evidence (p 402), Sir Konrad Schiemann argued that the definition of “high judicial office” in Clause 48 ought to be expanded to include judges of the European Court of Justice, the Court of First Instance and the European Court of Human Rights. There was little advantage, he told us, of ruling out as a matter of principle someone who has been appointed to one of the European Courts after less than 15 years as a practitioner in the United Kingdom. A further point arises in respect of the eligibility of retired judges of these courts to be members of the supplementary panel.

Opinion of the Committee

178. The Committee agrees with the qualifications for appointment to the Supreme Court as provided in Clause 19. The Lord Chancellor has undertaken to consider further the issue of eligibility of judges of the European courts.

Should the composition of the Supreme Court selection commission be amended? (Clause 20)

179. Clause 20 of the bill sets out the composition of the selection commission for the Supreme Court. The commission must consist of the following members:

- the President of the Supreme Court
 - the Deputy President of the Supreme Court
 - one member of each of the judicial appointments commissions in England and Wales, Northern Ireland and Scotland.
180. The Government indicated at an early stage their intention to move amendments so that “the Secretary of State will always be in a position to ensure that at least one member of the Commission is lay”.
181. Lay membership of judicial appointments commissions is regarded as important for two reasons. First, it ensures that the commission is informed by the widest possible range of appointments and human resource experience. Secondly, it enhances public confidence in the independence and impartiality of the judiciary and the appointments processes. The Commission for Judicial Appointments takes the view that there should always be a lay majority on appointments commissions (p 278).
182. In their written evidence, the Commission for Judicial Appointments told us (p 266) that “there should be a requirement for the three national appointing bodies to be represented by a lay (i.e. non-judicial, non-legal) member on the Supreme Court appointments commission. (In the two cases of Scotland and England and Wales at least this could perhaps most readily be achieved by providing that the chairs of the Judicial Appointments Board for Scotland and the JAC respectively, who are both lay, should normally be their territorial representatives on the Supreme Court appointments commission). This requirement would ensure a lay majority (3 out of 5) on the SCAC”. The Law Society of England and Wales suggested that the commission should have eight persons, of whom half should be lay and that there should be a lay chair (p 162).

Opinion of the Committee

183. We agree that at least one member of the commission to select a Supreme Court judge should be lay and on the basis of an amendment proposed by the Lord Chancellor have inserted a new Schedule on Supreme Court selection which includes such a provision.
184. Members of the Committee expressed the view that the selection commission should have an equal number of judges and lay members, in reflection of the arrangements in the bill for appointing judges to the Court of Appeal of England and Wales. We make no recommendation and leave the matter for further consideration by the House.

Should the Supreme Court selection commission prepare a list of 2 to 5 names for the Secretary of State, or provide a single name? (Clause 21 (3))

185. Clause 21(3)(a) of the bill requires the Supreme Court selection commission to prepare a list of names for the Minister which “must consist of at least 2 and no more than 5 candidates”. The Government indicated their intention to move amendments to this Clause so that the Minister “will receive one name from the Selection Commission along with details of the other candidates seriously considered” (p 418).

186. We heard a number of views in support of such an amendment (Commission for Judicial Appointments p 263, Lester and the Odyssey Trust p 382, Cornes p 338, General Council of the Bar of England and Wales p 160).
187. Several witnesses expressed views against the amendment. Professor Robert Hazell told us that for very senior appointments in England and Wales and to the Supreme Court there should be a list rather than a single name provided to the minister—though this should be coupled with appropriate parliamentary scrutiny (Q 152). He argued that “to present ministers with a single name in my view assumes too simplistic a notion of merit”. Professor Robert Stevens broadly supported this approach (Q 155), as did Professor Diana Woodhouse. She told us “I am concerned that if only one name is given then the Commission might always produce, or is in danger of producing, the ‘no risk’ candidates at all times because they would be so scared of getting it wrong. If there is a degree of choice then in the end it is still going to be the minister who gets the blame, as it were, if he chooses the wrong one. After all, he is the one who is accountable ultimately to Parliament so I think that putting the onus on the minister is not a bad thing” (Q 382).
188. Lord Hope of Craighead thought there should be a shortlist of two (Q 668). Sir Thomas Legg QC was also in favour of the minister having more than one candidate to choose from “because I for my part believe the appointment of judges is a political and governmental act in which the Executive should play a real, important and accountable part. If it is going to do that I think ministers should have a choice” (Q 679). Dr Kate Malleson suggested that bill should enable the appointments commission to decide for itself, in each case, whether to provide the Secretary of State with a list or a single name: “It may well be that sometimes there is one outstanding candidate and the Commission should be able to say we think this person is so far above anyone else, this is the name we want to put forward. There may be other times when there are two or three or four equally excellent candidates and the Commission may say we think any of these would be appointable, but they have different backgrounds and characteristics which the Secretary of State might want to take into account” (Q 154).

Opinion of the Committee

189. We agree that a commission for the selection of a Supreme Court judge should provide the name of only one candidate for appointment. Accordingly, we have amended the bill on the basis of a new Clause amendment proposed by the Lord Chancellor.

Are the arrangements for consultation by the Minister satisfactory? (Clause 21)

190. Clause 21 of the bill as introduced requires the selection commission to consult the devolved administrations and senior judiciary before making a recommendation. It then requires the Minister to consult the same persons and bodies again about the person nominated.
191. We heard four main criticisms of the consultation process laid down by Clause 21. First, it may be thought that consultation by the Secretary of State is a wasteful duplication of effort (Commission for Judicial Appointments p 263). A second concern is that the Minister consulting

fellow politicians in the devolved administrations may be liable to arouse suspicions of inappropriate political involvement in the judicial appointments process. Sir Colin Campbell described the consultation requirement as “realpolitik” (Q 971).

192. Thirdly, the bill requires that “the National Assembly for Wales” be consulted (Clause 21(4)(c)). In relation to Scotland and Northern Ireland, the requirement is to consult with the First Ministers. The bill is expressed as it is in relation to Wales because the National Assembly is a corporate body. Sir Colin Campbell told us that consulting with “an assembly does seem to me to be a bit tricky” (Q 971) and raises questions about how confidentiality will be maintained.
193. Fourthly, the definition of “the senior judges” to be consulted by the selection commission and the Secretary of State, set down by Clause 21(7), may present difficulties. Lord Cullen of Whitekirk, writing on behalf of the Senators of the College of Justice, said: “If the Lord President were to be a candidate for appointment this would lead to a rather odd situation. We are of the view that the Lord Justice Clerk (the second most senior judge in Scotland) should be added to the list of people to be consulted. Moreover, where Scottish candidates are being considered, it seems somewhat anomalous that the Lord Chief Justice, the Master of the Rolls and the Heads of Division are to be consulted, whereas the only member of the Scottish judiciary to be consulted is the Lord President of the Court of Session” (p 251).

Opinion of the Committee

194. The majority of the Committee took the view that consultation with senior judges and devolved administrations should be undertaken by the selection commission before submitting their choice to the Minister. They saw no need for the Minister to repeat that consultation. However, having heard from the Lord Chancellor that it is the wish of the Scottish Executive that there be ministerial consultations too, the Committee agreed to amendments moved by the Lord Chancellor to provide for both.
195. The Committee further agreed, so far as concerns consultation with the devolved administrations, that such consultation should be exclusively with the First Minister in Scotland, the First Minister in Wales and the First Minister and deputy First Minister in Northern Ireland (or the Secretary of State for Northern Ireland until such time as the relevant powers are devolved). This issue remains to be resolved so far as concerns the National Assembly for Wales.

Should the Prime Minister, as well as the Minister, have a role in the appointments process? (subclauses 21 (5) and 22 (1))

196. Under subclauses 21(5) and 22(1), the Prime Minister receives the name of the candidate considered to be most suitable by the Minister and makes a recommendation to Her Majesty that that person be appointed to the Supreme Court.
197. This is the only role given to the Prime Minister by the bill. Under the current arrangements, the Prime Minister—as the sovereign’s principal adviser—makes recommendations to Her Majesty in respect of judicial appointment as: Lord of Appeal in Ordinary, Head of Division of the

Supreme Court of England and Wales, and Lord Justice of Appeal (Court of Appeal judges in England and Wales). Other judicial appointments by Her Majesty are made on the advice of the Lord Chancellor. The bill therefore considerably diminishes the role of the Prime Minister in judicial appointments, confining it to the Supreme Court of the United Kingdom.

198. We considered the role of the Prime Minister in the appointments process. JUSTICE told us that “in view of the importance of the appointment [to the Supreme Court], we think it appropriate that the role of the Prime Minister be more than as a ‘post-box’ for the Secretary of State. The proposed roles for both, should be collapsed into Prime Ministerial responsibility and Clause 21(5) and 22 modified accordingly” (p 94). Lord Cullen of Whitekirk and the Senators of the College of Justice support such a view: “Appointments to the Supreme Court are of such importance that any decision should be taken by the Prime Minister” (p 251). Lord Lester of Herne Hill QC and the Odysseus Trust stated that the appointing commission’s nomination “should be submitted, not to the minister, unless we have a Minister of Justice, but to the Prime Minister” (p 382).
199. We also considered whether the Prime Minister’s inevitably higher political profile might be more liable to fuel suspicions about party political bias in judicial appointments, and whether therefore it should be the Secretary of State who makes the formal recommendations to Her Majesty. Like JUSTICE’s suggestion, this would avoid the fragmentation of ministerial responsibility for Supreme Court appointments.

Opinion of the Committee

200. We agree that the role of the Prime Minister in the procedures for appointing a Supreme Court Justice should solely be to act as a conduit between the Minister and The Queen. We see no reason to make any change to the provisions of the bill in this regard.

Are the arrangements for “acting judges” (Clause 29) and the “supplementary panel” (Clause 30) satisfactory?

201. In addition to the 12 permanent members of the Supreme Court, the bill provides that “acting judges” will be eligible to hear cases (Clause 29). The bill provides for two types of acting judge. First, there will be senior serving judges—a person who holds “high judicial office”. High judicial office is defined in Clause 48(1) as the office of a judge in the Supreme Court of the United Kingdom (not relevant here), the Court of Appeal, the High Court or the Court of Session. The Lord Chancellor has agreed to provide an amendment at a later stage of the bill which will restrict eligibility to those who are judges of the appellate courts in each territorial jurisdiction.
202. Secondly, an acting judge may be drawn from the “supplementary panel” described in Clause 30 of the bill. Essentially, this will consist of people under the age of 75 who have retired from a “high judicial office”, who are members of the Privy Council, and who are invited by the President of the Supreme Court to serve on the panel. The Lord Chancellor has agreed to provide an amendment at a later stage of the bill which will restrict eligibility to those who are judges of the appellate courts in each territorial jurisdiction. A person who is a member of the panel and a peer will be disqualified from sitting and voting in the House of Lords (Clause 94). In future, senior judges

with peerages—or who are contemplating accepting a peerage—will have to make a choice between sitting occasionally as a judge in the Supreme Court or taking part in the legislative and scrutiny work of the House of Lords. The bill does not permit them to do both.

203. Acting judges may be useful in two main situations. One is where there is a shortage of permanent Supreme Court Justices, for example because of the illness. The other is where it is thought desirable for a judge with particular expertise (for example in Scots law) to sit on a panel of the Supreme Court. The Supreme Court may also draw upon the assistance of “specially qualified advisers” (see Clause 34).
204. Concerns were expressed to us about the use of acting judges. Roy Martin QC, vice-dean of the Faculty of Advocates, told us that “reliance on temporary judges or part-time judges or *ad hoc* appointments or whatever one calls them is potentially undermining to the independence of the judiciary” (Q 843). Roger Smith of JUSTICE said “there should be no use or very little use of supplementary justices, and it would be better to bite the bullet and have a slightly larger number of justices than is currently the case” (Q 289). Lord Lester of Herne Hill QC and the Odysseus Trust expressed concern “that the supplementary panel proposed in Clause 30 is contrary to the important constitutional role of the Supreme Court” (p 383). Sir Thomas Legg QC said “the amount of part-time judicial reinforcement at this level I think should be as small as possible” (Q 681).
205. The bill fails to provide for the first members of the supplementary panel (analogous to Clause 18(a), which states that first members of the Supreme Court will be the Lords of Appeal in Ordinary). The Government has indicated that they will move an amendment “to ensure that those who are currently eligible to sit on appeals in the House of Lords as ‘Lords of Appeal’ within the meaning of section 5(3) of the Appellate Jurisdiction Act 1876 should continue to be available to assist the Supreme Court by becoming members of the supplementary panel” (p 419).¹⁴ If they choose to serve, they will, under Clause 94, be disqualified from sitting and voting in the House of Lords.

Opinion of the Committee

206. The Committee agrees that acting judges should be drawn from the appellate courts.
207. The Committee agrees with the other arrangements in the bill for “acting judges” and we understand that, by virtue of sections 5 and 24 of the Interpretation Act 1978, Northern Ireland judges will also be eligible to serve.
208. The Committee also agrees with the arrangements for the supplementary panel. The Lord Chancellor has undertaken to amend Clause 30 to ensure that the Lords of Appeal within the meaning of section 5(3) of the Appellate Jurisdiction Act 1876 who are currently eligible to assist by sitting on appeals

¹⁴ The first members of the supplementary panel might therefore include: Lord Browne-Wilkinson (30 March 2005), Lord Clyde (29 January 2007), Lord Hutton (29 June 2007), Lord Irvine of Lairg (23 June 2015), Lord Millett (23 June 2007), Lord Mustill (10 May 2006) and Lord Slynn of Hadley (17 February 2005). The dates indicate the day up to which they are entitled to sit by reason of age.

in the House of Lords will also be available to assist the Supreme Court.¹⁵ This will fill a lacuna in the bill as currently drafted.

**Is it acceptable that Clause 31(1), by which the Supreme Court is designated “a superior court of record”, extends to Scotland?
(Clause 31 (1))**

209. A permanent record of the judicial business of the House of Lords, like all other aspects of the House’s work, is kept as part of the proceedings of Parliament. As the Supreme Court will not be part of Parliament, alternative arrangements must be made for record keeping. Clause 31(1) of the bill provides that “The Supreme Court is a superior court of record”. By Clause 46, the records of the Supreme Court are defined as “public records” for the purposes of the Public Records Act 1958, and copies of them will be kept as part of the National Archives at the Public Record Office in Kew.
210. The term “court of record” is widely used in common law jurisdictions to describe a court which keeps a permanent record of its acts and proceedings, and which has the power to punish by imprisonment or fine for contempt of its authority. Several courts and tribunals with jurisdiction throughout the United Kingdom are, or have in the past been, designated as a “superior court of record” e.g. the Special Immigration Appeals Commission, the Employment Appeal Tribunal and the Courts-Martial Appeal Court.
211. We nevertheless heard expressions of concern that Clause 31(1) was inappropriate for Scotland. Professor Hector MacQueen in his written evidence asked: “Why is the provision that the court is to be a ‘superior court of record’ not confined to England and Wales, where alone this expression has meaning?” (p 375). For similar reasons, Lord Cullen of Whitekirk and the other Senators of the College of Justice said in their written evidence “We are of the view that it should be made clear that Clause 31(1) does not relate to the jurisdiction referred to in sub-Clause (3)” (p 251).¹⁶
212. Lord Hope of Craighead was less critical of this provision. He told us: “The Scottish system [for keeping court records] is provided for by what are known as the Books of Council and Session which are held in the Public Record Office in Scotland. All records of the Court of Session and the High Court of Judiciary go there. I think it is pre-Union legislation that provided this. I do not see any point in sending records from the new Supreme Court to the Courts of Council and Session and I hope that actually they will not particularly want to receive them. I want to make it clear that while the wording is a bit odd from my point of view the result is a perfectly sensible one, which I respectfully endorse” (Q 645).

Opinion of the Committee

213. The Committee sees no need to change the designation of the Supreme Court as a “superior court of record under Clause 31”.

¹⁵ This provides for “Such Peers of Parliament as are for the time being holding or have held any of the offices in this Act described as high judicial offices” to be eligible to sit, up to the age of 75 years.

¹⁶ Clause 31(3) provides that “An appeal lies to the [Supreme] Court from any order or judgment of a court in Scotland if an appeal lay from that court to the House of Lords at or immediately before the commencement of this section”.

Does the bill satisfactorily define the jurisdiction of the Supreme Court over appeals from Scotland?

214. Clause 31(3) provides that “An appeal lies to the [Supreme] Court from any order or judgment of a court in Scotland if an appeal lay from that court to the House of Lords at or immediately before the commencement of this section”. Broadly speaking, this means that the Supreme Court will hear civil appeals from the Court of Session but will not deal with Scottish criminal appeals: the High Court of Judiciary will remain the highest court for Scottish criminal cases.
215. In 1876 in the case of *Mackintosh v Lord Advocate* the House of Lords decided that “since as a matter of history there had been no right of appeal from the Court of Justiciary to the Parliament of Scotland, no such right of appeal had been created by the Act of Union” in 1707 (Faculty of Advocates p 239). The prohibition on criminal appeal to the House of Lords is now on a statutory basis in section 124(2) of the Criminal Procedure (Scotland) Act 1995.
216. We considered three questions relating to these arrangements.
- Does the bill fail to rectify an anomaly created by the Scotland Act 1998 and the Human Rights Act 1998 in relation to the Law Lords’ jurisdiction over Scottish criminal appeals?
 - Should the Supreme Court have a general jurisdiction over Scottish criminal appeals?
 - Should the Supreme Court have jurisdiction over Scottish civil appeals?

The devolution anomaly

217. The Scotland Act 1998 and the Human Rights Act 1998 create an anomaly that was unforeseen at the time of devolution (O’Neill p 384). Thus, if a criminal defendant alleges that the Scottish *prosecuting authorities* (the Lord Advocate who heads the Crown Office and Procurator Fiscal Service) have breached a Convention right, this is a “devolution issue” and the ultimate court of appeal is the Judicial Committee of the Privy Council.¹⁷ Of the 13 devolution appeals heard so far, 12 arose in the context of Scots criminal law and procedure. Colin Boyd QC, the Lord Advocate, agreed that there an anomaly but told us “What I think can be said as a justification for the continuation of it is this: devolution issues in criminal cases involve, almost invariably, matters involving the European Convention on Human Rights and I think there is a good argument that there should be a common interpretation of the European Convention insofar as it relates to the United Kingdom, so I do not have any problems with these continuing to come to a Supreme Court” (Q 1131).
218. In a review of the practice and procedure of the High Court of Justiciary for the Scottish Executive, the Hon. Lord Bony, a Senator of the College of Justice in Scotland, recommended that “Schedule 6 of the Scotland Act should be amended to make it clear that acts or failures to act by the Lord

¹⁷ The Lord Advocate is a Minister in, and member of, the Scottish Executive and by section 57(2) of the Scotland Act 1997 “A member of the Scottish Executive has no power to make any subordinate legislation or to do any other act, so far as the legislation or Act is incompatible with any of the Convention rights or with Community law”.

Advocate as prosecutor, and anyone acting on his authority or on his behalf as prosecutor, are excluded from the definition of a devolution issue. The Scottish Executive should urge the United Kingdom Parliament to make that amendment” (*Improving Practice: the 2002 Review of the Practices and Procedure of the High Court of Justiciary*, para. 17.14). Lord Mackay of Clashfern told us “I doubt whether it is wise to have it [the Supreme Court] dealing with human rights issues arising in the criminal field” from Scotland (Q 238).

219. It is arguable that the bill pursues two contradictory policies: it transfers devolution jurisdiction from the Privy Council to the Supreme Court, while at the same time seeking to continue a policy of excluding jurisdiction over Scots criminal law and procedure. Unless and until the anomaly described above is addressed, it may be doubted whether the latter can be fully achieved.

Should the Supreme Court have a general jurisdiction over Scottish criminal appeals?

220. A second and different criticism of the bill is that it is wrong to perpetuate what is in effect an ouster Clause, now contained in section 124(2) of the Criminal Procedure (Scotland) Act 1995, which provides that “every interlocutor and sentence pronounced by the High Court [of Justiciary] under this Part of this Act shall be final and conclusive and not subject to review by any court whatsoever and it shall be incompetent to stay or suspend any execution or diligence issuing from the High Court under this Part of this Act”.
221. This denies defendants in criminal trials in Scotland the opportunity to appeal to the Appellate Committee of the House of Lords and, under the bill, the Supreme Court. In his written evidence to us, Lord Donaldson of Lynton questioned “whether it would be such a bad thing if rights of appeal were the same throughout the United Kingdom, particularly in relation to criminal law ... can it really be desirable that what is or is not a crime or that the elements of a criminal offence shall be different on either side of a land border?” (p 351). The Judges’ Council (of England and Wales) in their response to the DCA consultation paper similarly posed the question “If criminal appeals from Scotland which raise devolution issues are in future to go to the new Supreme Court, it might be a matter for consideration whether the new Supreme Court should be the final court of appeal for all criminal cases from Scotland”. In her written evidence, Baroness Hale of Richmond told us that she “would favour a universal ... jurisdiction in Scottish as well as English, Welsh and [Northern] Irish criminal cases” (p 364).
222. A contrary view was set out by the Lords of Appeal in Ordinary in their response to the DCA consultation. Of Scots criminal law, they stated that “It is not a jurisdiction which the Supreme Court (save for its Scottish members) would be well-fitted to discharge. If there is any desire for change in this regard, we would not support it” (p 117). Lord Hope of Craighead told us: “It is difficult to emphasise how different Scots criminal law is, both in terms of substance and procedure. I am not criticising my colleagues in this but I think it is quite difficult for them to grasp not just the terminology, which in almost every respect is different, but how differently cases are handled, how differently judges deal with cases when they sum up at the end of the trial; the whole feel of it is quite different. Without having worked in the system

and known something about it it is difficult to grasp the depth of the difference” (Q 646).

223. The Faculty of Advocates in their written evidence did not altogether rule out change, but concluded that the case for innovation “has not been made out” (p 240).

Should the Supreme Court have jurisdiction over Scottish civil appeals?

224. A third question brought to our attention is whether the Supreme Court should hear civil appeals from Scotland. Professor Hector MacQueen questioned whether “in the light of the very small number of Scottish appeals to the House of Lords over the last 40 years, and the even smaller number of them that succeed in reversing the court below, the appeal should be discontinued” (p 375).
225. Others take a different view. Aidan O’Neill QC stated “The abolition of appeals from Scotland would, in my view be a retrograde step and not one to be recommended if the intention is that the Union is to be maintained. Scotland is a small country and its legal system, lawyers and judges all benefit from appeals to London. It is psychologically very important for all judges to think that they may [be] judged in another forum—the classic ‘*quis custodiet ipsos custodes?*’ problem—so that even if they are not appealed against, they know that they might be, and their reasoning there analysed and held up to rigorous scrutiny” (p 384).

Opinion of the Committee

226. The Committee sees no need to change the provisions of the bill in respect of Scottish civil and criminal appeals at Clause 31(3), which reflect current practice.

Is the policy of the bill to transfer devolution jurisdiction from the Judicial Committee of the Privy Council to the Supreme Court correct? (Clause 31 (4) and Schedule 8)

227. The policy of the bill is to transfer jurisdiction over “devolution issues” from the Judicial Committee of the Privy Council to the Supreme Court (Clause 31(4) and Schedule 8). We heard evidence both for and against this policy.
228. The Privy Council, rather than the Appellate Committee of the House of Lords, was selected as the final court of appeal for cases raising “devolution issues” by the Scotland Act 1998, the Government of Wales Act 1998 and the Northern Ireland Act 1998. Various reasons were advanced to justify that decision.
- The Appellate Committee of the House of Lords, as part of Parliament, would have been an inappropriate court because, devolution issues may raise issues about the powers of United Kingdom Parliament to legislate on devolved issues.
 - The House of Lords has no jurisdiction to hear criminal cases from Scotland and, as some devolution issues would relate to Scottish criminal procedure and law, it was inappropriate to for the Appellate Committee have jurisdiction.

- Concerns were expressed that the Appellate Committee of the House of Lords might become overloaded with devolution cases and therefore be unable to deliver prompt judgments.
 - A broader range of judges are eligible to sit on panels of the Judicial Committee of the Privy Council than in the Appellate Committee of the House of Lords.
 - The Government of Ireland Act 1920 provided a precedent for using the Privy Council to deal with home rule questions.
229. The devolution Acts provide that any decision of the Judicial Committee shall be binding in all legal proceedings (except those of the Judicial Committee itself), including those before the Appellate Committee of the House of Lords.

Arguments in favour of transfer

230. In the July 2003 consultation paper (CP11/03), the Government stated that “on balance” they believed it was right to transfer devolution issue jurisdiction to the Supreme Court: “The argument in favour of this transfer is that there would no longer be any perceived conflict of interest in which a party with an interest in a dispute about jurisdiction—the UK Parliament—was apparently sitting in judgment over the case. The new Supreme Court represents a very material change in circumstances. It will in no way be connected to the UK Parliament. The establishment of the new Court accordingly gives us the opportunity to restore a single apex to the UK’s judicial system where all the constitutional issues can be considered. It would ensure that there is no longer a danger of conflicting judgments arising, for example on human rights cases which might have come to the Judicial Committee as devolution issues and to the House of Lords as ordinary appeal cases” (para.20).

Arguments in favour of retaining Privy Council jurisdiction in devolution cases

231. The policy of the bill to transfer devolution jurisdiction to the Supreme Court has been criticised. In their response to the DCA consultation paper of July 2003, the Law Lords reluctantly concluded that the status quo should be retained (p 116). One factor prompting this is that the Judicial Committee of the Privy Council enables “issues to be decided by judges drawn from the devolved jurisdictions”, in addition to the Law Lords (or Justices of the Supreme Court). This flexibility of membership of the Court is regarded as important in relation to devolution cases, but not one that should apply in all Supreme Court cases.
232. The experience of deciding devolution cases between 1998 and April 2004 does not, however, reveal any significant use of judges other than the Law Lords in the Privy Council. Thirteen cases have been decided—11 full appeals and 2 petitions for leave. In all but two of these cases the panels were drawn exclusively from the full-time Law Lords. In one case a retired Law Lord (Lord Mackay of Clashfern) sat because one of the Scottish Law Lords had been involved that case prior to his elevation to the House of Lords. In another case a Court of Session judge joined the two Scottish Law Lords on a panel of five. In practice, then, the flexibility of membership offered by the Privy Council has not been greatly used.

233. Lord Cullen of Whitekirk and the other Senators of the College of Justice also told us of their opposition to the transfer of devolution issue jurisdiction: “This jurisdiction already results in the anomalous situations in which judges whose training and experience have been in England have to make decisions relating to Scottish criminal trials. The transfer of this jurisdiction to the Supreme Court could result in devolution issues on matters touching on Scots criminal law being decided by a majority composed of English judges, and a growing influence of English law on its reasoning” (pp 249-50; see also Q 846).
234. In his oral evidence, Lord Cullen of Whitekirk said that while “it would be highly desirable that there should be three members there simply in order to make sure that there is as wide a range of expertise as is available” he did not believe that it should be mandatory for panels of the Court to include a majority of Scottish judges. Of the 11 full appeals decided by the Privy Council so far, in only two of them have the panel consisted of a majority of Scottish judges.
235. The Faculty of Advocates (p 234) support the general policy of the bill to transfer devolution issue jurisdiction. The Department for Constitutional Affairs states that following the July 2003 consultation in which respondents were asked “Do you agree that the jurisdiction of the new Court should include devolution cases presently heard by the Judicial Committee?”, “Of the 87 responses to this question 75 (86%) were in favour of the new Supreme Court taking on the devolution jurisdiction of the Judicial Committee of the Privy Council, 12 (14%) of respondents were against the proposal” (*Summary of Responses to the Consultation Paper Constitutional Reform: a supreme court for the United Kingdom*, January 2004).

Opinion of the Committee

236. We agree with the proposals to transfer devolution jurisdiction from the Privy Council to the Supreme Court.

Should Scottish appeals to the Supreme Court lie only with the permission of the Court of Session or the Supreme Court?

237. Appeals from the courts of England and Wales and Northern Ireland to the Supreme Court may be made only with the permission (or “leave”) of the court against whose judgment the appeal is brought, or the Supreme Court itself (Clause 31(6)). Several witnesses told us that it was wrong that no similar requirement is placed on litigants seeking to appeal from Scottish courts. The current Scottish practice, by which an appellant is required to obtain a certificate signed by two counsels that the appeal is one that ought to be heard, will continue.
238. The leave requirement for appeals to the House of Lords was first introduced in 1934 for cases in England and Wales. The principal criterion for granting a petition for leave to the Lords is whether there is “a point of law of general public importance” to be decided. In England and Wales it is now rare for leave to be granted by the Court of Appeal, that Court adopting the view that in most cases it ought to be for the House of Lords to decide for itself whether an appeal should be heard. A significant proportion of petitions of leave presented to the House of Lords each year are refused. In 2001, the House of Lords disposed of 269 petitions for leave to appeal (260 from

England and Wales, 9 from Northern Ireland), allowing 73 to go forward to a full hearing (27 per cent)¹⁸. Petitions for appeal are determined by panels of three Law Lords sitting as the Appeal Committee; occasionally a hearing is held, but often the decision is made on the basis of the written documents.

239. In its July 2003 consultation paper (para.56), the Government set out three reasons for not imposing a permission requirement on appeals from Scottish courts:

“It could be argued ... that it is an unjustified anomaly that citizens in different parts of the Kingdom have different rights of access to its highest court. The disadvantages of changing this are threefold. First, in respect of Scotland, the arrangement where by Scottish civil cases currently lie to the House of Lords as of right is long established; there is no evidence that change is needed; and there are strong arguments for leaving the position unchanged. The second disadvantage, in all respects, is that it would mean that more of the work of the Court would be absorbed in deciding what cases to hear, rather than hearing them. It would lead, in practice, to fewer cases being heard or to cases taking longer to come before the Court. The third disadvantage is that it would mean that all those seeking the judgment of the Court would have to incur the cost of petitioning for the right to appeal”.

240. In addition, some witnesses asserted that the pre-Union right of appeal from the Court of Session to the Scottish Parliament, which was asserted in the Claim of Right of 1689, was transformed into an unqualified right of appeal to the United Kingdom Parliament. (Aidan O’Neill QC took a rather different view (p 394)).
241. Several witnesses from Scotland supported the policy of the bill on not requiring permission for Scottish appeals, including the Law Society of Scotland (Q 608), the Faculty of Advocates (p 234) and Lord Cullen of Whitekirk—who nevertheless conceded that “If one were starting with a completely fresh slate without the history of the matter I dare say one would say, ‘Why should there be a difference?’, but we are looking at a situation in which leave has not been required for many cases for centuries” (Q 894). In their report on the bill, the Justice 2 Committee of the Scottish Parliament recommended that no leave requirement be introduced for Scottish cases (SP Paper 163, para.12).
242. On the other hand, we also heard criticism of the failure of the bill to require Scottish appeals to be put on a similar footing—through the requirement of permission—to those from courts in the United Kingdom’s other two jurisdictions. In her written evidence, Baroness Hale of Richmond told us: “I would favour a universal leave requirement” (p 364) and “There is no justification for continuing to discriminate between the Scots and the rest. Everyone should be subject to a leave filter” (Response by Dame Brenda Hale to DCA Consultation Paper CP11/03).
243. In their response to the DCA consultation, the Law Lords were divided. Some regard the present arrangement as an anomaly that “however rarely” may result in an unmeritorious appeal, while others “would not wish to disturb a long-standing procedure which gives rise to minimal difficulty in practice” (p 122). In relation to all the responses to the consultation, the DCA reports that “There are 67 responses to this question of which 35

¹⁸ House of Lords Library Note LLN 2003/007, The Appellate Jurisdiction of the House of Lords.

(52%) favour retaining the present position regarding Scottish appeals. Thirty two respondents (48%) argue that it should be altered” (*Summary of Responses to the Consultation Paper Constitutional Reform: a supreme court for the United Kingdom*, January 2004, para.21).

Opinion of the Committee

244. The Committee see no reason for changing the leave arrangements for Scottish civil appeals.

Is the provision for the making of rules for the Supreme Court satisfactory? (Clauses 35 and 36).

245. The basic provisions governing the conduct of judicial business are contained in the Standing Orders relating to the judicial business of the House of Lords. These are published in the Practice Directions and Standing Orders Applicable to Civil Appeals (there are separate practice directions for criminal appeals but the Standing Orders are the same). Changes to the Standing Orders relating to judicial business are proposed by the Law Lords, who consult the Lord Chancellor, and they are then moved by the Lord Chancellor and agreed to by the House at public business (in practice this is a formal motion).
246. The meaning of the Standing Orders governing judicial business is explained in detail in the Practice Directions. New and amended Practice Directions are agreed to by the Lords of Appeal in Ordinary sitting as an Appeal Committee and announced in the form of Reports. A recent example is that on 8 May 2003, when all twelve Lords of Appeal in Ordinary made the Thirty-Eighth Report from the Appeal Committee, entitled *Petitions for Leave to Appeal: Reasons for the Refusal of Leave* (HL 89), as a result of which they adopted the practice of giving brief statements for the refusal of petitions for leave to appeal and amended the practice directions accordingly.
247. For the convenience of the public, litigants and the legal profession the Clerk of the Parliaments promulgates the Standing Orders and Practice directions relating to judicial business in three main publications:
- The “Blue Book” is applicable to civil appeals;
 - The “Red Book” regulates criminal appeals;
 - The “Green Book” deals with judicial taxations (that is, assessments of costs).
248. Thus, although traditionally the Lord Chancellor has been consulted about changes to the Standing Orders, proposals for change originate from the Law Lords and not from the Lord Chancellor and in practice he has usually agreed to their proposals. And the Practice Directions are wholly within the control of the Law Lords.
249. Clauses 35 and 36 of the bill make provision for a new system for making rules will be needed for the Supreme Court. By Clause 35 the President may make the Supreme Court Rules. This power must be exercised with a view to securing that “the court is accessible, fair and efficient” and “the rules are both simple and simply expressed”. Clause 36 requires the President to submit all Supreme Court Rules to the Secretary of State for Constitutional Affairs who may allow, or disallow, them. The Supreme Court Rules will

take the form of statutory instruments, subject to annulment pursuant to a resolution of either House of Parliament. The Rules “come into force on such days as the Minister directs”.

250. We considered whether these arrangements are appropriate. It might be thought wrong that the Minister will acquire a controlling power over the rules of the Supreme Court which is not currently possessed by the Lord Chancellor in relation to the judicial business of the House of Lords. This arrangement may do little, either as a matter of reality or public perception, to enhance the independence of the new Court from the Executive—one of the key goals of the policy to create a new Court. It might also be thought wrong that Parliament will now have a veto over changes to the Standing Orders and Practice directions when in the past it has not. Having the rules take the form of a statutory instrument subject to annulment may decrease the flexibility of the Supreme Court rules which at the moment can be quickly adjusted in response to changing circumstances. Finally it might be asked whether a statutory instrument is likely to express rules any more simply than the current Standing Orders.
251. Set against this, however, is the need for accountability and the need for the broader public interest to be brought to bear on the Supreme Court’s rule-making.

Opinion of the Committee

252. We do not think that the Minister should be able to allow or disallow such Supreme Court Rules as may be submitted to him by the President of the Supreme Court. Instead, we agree that the rules should be made by the Supreme Court in consultation with the Minister who will have no power to amend them. An amendment to that effect will be brought forward by the Lord Chancellor at a later stage of the bill.
253. We accept that, in the changed circumstances which would be brought about if the bill were enacted, the rules should be contained in statutory instruments subject to annulment, as proposed in Clause 36(4).

Are the duties placed upon the Minister in relation to supporting the Supreme Court satisfactory? (Clauses 38 to 41)

254. Clauses 38 to 41 of the bill place duties on the Minister to “ensure that there is an efficient and effective system to support the carrying on of the business of the Supreme Court” and “ensure that appropriate services are provided for the Supreme Court”. We considered the role of the Minister in relation to the Supreme Court’s budget and administration. This raises important issues relating to the independence of the Court and to accountability for public funds.

What was proposed by the bill as introduced

255. The Lord Chancellor told the Committee that “the Government’s proposals aim to guarantee genuine independence and autonomy” (p 13). The central features of the funding process envisaged for the Supreme Court are as follows (p 13; Q 56).
- The Chief Executive Officer and the President of the Supreme Court will consider the resources required for the Supreme Court in line with the

Government expenditure planning timescales, and will forward their projections to the Minister.

- The Minister must satisfy himself that the bid is reasonable and affordable: in all democratic systems there must be a mechanism for ensuring courts are not wasteful in their use of public funds.
- The Minister will bid for resources to Her Majesty's Treasury (HMT) in the context of the overall bid for the Department for Constitutional Affairs.
- When HMT allocates resources to the Department, the funds for the Supreme Court will be ring fenced by the Minister as a separate block of funds within the Estimate, which is subject to parliamentary scrutiny and approval.

Concerns about budgetary arrangements

256. In assessing the budgetary arrangements, we noted the views expressed by the House of Commons Constitutional Affairs Committee in their February 2004 report *Judicial appointments and the Supreme Court (court of final appeal)* HC48-I:

“100. Clearly the new court must be seen to be independent. ... the reality of day to day administration is as important for safeguarding the independence of the judiciary as any theory. The argument that Parliament should be able to dismiss all those to whom it votes money is ingenious, if theoretical—there is no prospect of a minister in modern political circumstances being dismissed by Parliament. The ordinary reality of having independence in managing the affairs of the new court is more important. Close attention should be paid to the Australian system, which preserves independence of the High Court within a parliamentary tradition similar to the one in the United Kingdom. “The Department of Constitutional Affairs is not the appropriate organization to run the new court because it is too associated with the England and Wales court system and because giving the Government control over the administration of the new court could offend against the principle of judicial independence.”

257. Some supporters of the general policy to establish a Supreme Court attach great importance to the Court being well funded. The General Council of the Bar stated in their written evidence: “We support the formation of a Supreme Court, provided it is fully and properly resourced and housed in a building appropriate for its purpose and standing. Unless these resources are to be made available, it would be preferable to retain the existing arrangements ...” (p 161).

258. We also heard expressions of concern that the arrangements for determining the Supreme Court's annual budget failed to promote the independence of the Court. Although not advocating any particular model for the budgetary arrangements for the Court, Lord Cullen of Whitekirk told us “if independence from the executive as a matter of perception is important then I would have thought that in both the reality and in the matter of perception it is important that the Supreme Court should be as independent as possible from the executive” (Q 860).

259. In considering what arrangements should apply to the Supreme Court, it is important to bear in mind the current system for funding the judicial

business of the House of Lords. While the salaries of the Lords of Appeal in Ordinary are paid direct from the Consolidated Fund, the administrative costs of the Judicial Office (and of course of accommodation) are borne on the House of Lords vote, or request for resources, and accounted for by the Clerk of the Parliaments. The estimates are laid by the Treasury, in like manner as far as a non-departmental public body, though they are not cash limited. While these arrangements differ from those of the House of Commons, whose estimates are laid by the Speaker, it may be thought that they afford the finances of the final court of appeal a degree of independence from the executive. (In addition, the Clerk of the Parliaments is Registrar of the court, and as Corporate Officer employs the staff.)

260. Although no detailed models were presented to the Committee, we were told that an alternative to the budgetary arrangements set out in the bill would be one where the Minister was not interposed between the Supreme Court and HM Treasury. In his written evidence, Professor Ian Scott of the University of Birmingham stated: “The Court, with the assistance of its executive officers should prepare its own budget and should collect and keep its own fees. The budget should be negotiated directly with the Treasury. Any Treasury objection to this should be met with the robust argument that the Court is not simply another government agency or service whose entreaties for money should be filtered through a ministry, but an organization sitting at the top of a co-equal branch of government and exercising prerogative power” (p 409).
261. The practical benefits of such an arrangement are not indisputable. We were told that there might be benefits for the Supreme Court in retaining a role for the Minister. Lord Hope of Craighead told us: “I am a little concerned, using my background as Lord President, where I dealt with the Secretary of State in managing the court affairs, about being separated out from ministerial accountability and indeed the value of having a minister to argue one’s position where it needs to be argued. I found it quite useful to be able to go to the Secretary of State for Scotland and make representations to him about how I thought our court should be run and discuss with him points about administration and other matters. I am not myself alarmed by the idea of the matter being handled through the department” (Q 653).
262. In addition to general concerns about the role of the Minister in determining the reasonableness of the Supreme Court’s budget, some witnesses from Scotland expressed a third and more particular anxiety in relation to budgetary arrangements and Article 19 of the Treaty and Act of Union 1707. In their written evidence, the Royal Society of Edinburgh told us: “It will also be important for a Supreme Court’s United Kingdom character, to be administered and funded by an independent Supreme Court Service rather than by the Department of Constitutional Affairs which is responsible for the English but not the Scottish legal system” (p 399). The Faculty of Advocates told us: “first, and I think the most important, is the control of the Court’s resources by the Department for Constitutional Affairs and the Minister (I am referring in particular to Clauses 38 to 43 of the bill). The Faculty takes issue with this from the point of view of Article XIX of the Act of Union, but I think it stands consideration from a much more general perspective ... the Supreme Court Service should be an independent body under the control of the President of the Court and provided for by a one-line budget in Parliament. This is a model which I think exists elsewhere, in particular the

High Court of Australia which is a court of similar significance, including constitutional significance and a reasonable parallel” (Q 815).

263. This final criticism is viewed as misconceived by the Government and was anticipated by the Department for Constitutional Affairs in its July 2003 consultation paper, in which it stated: “The Government proposes that the administration and resources for the new Court should come within the responsibility of the Department for Constitutional Affairs. Although the bulk of the Lord Chancellor’s Department’s responsibilities for the courts system traditionally did not extend outside England and Wales, it already has some responsibilities for tribunals which go beyond England and Wales. Like most other departments, it can fulfil both a UK jurisdiction where the law requires it, and an England/Wales one (only) where the law requires that. Its responsibility for the constitutional settlement is already a UK-wide function and responsibility for the Supreme Court would be consistent with that. The new Court will have jurisdiction throughout the UK which will be defined in statute. In the Government’s view, therefore, this will be a sufficient guarantee of separation from the judicial system in England and Wales to be compliant with the terms of the Act of Union with Scotland” (*Constitutional Reform: a Supreme Court for the United Kingdom* CP11/03, para.64; see also Lord Chancellor p 14).

Court administration

264. We considered the arrangements for the administration of the court set out in the bill. Clauses 38 to 42 of the bill make provision not only for the financial resources but for the administration and staff of the Supreme Court. The Minister will have a duty to provide them.
265. As already noted, the Lord Chancellor told the Committee that under the arrangements set out in the bill, it will be the Chief Executive of the Supreme Court who determines how the annual budget is spent, reporting to the Justices of the Supreme Court. The Chief Executive will hire employees of the Court: “In essence, it will be a body with its own budget, with its own chief executive and its own ability to determine how it spends the money assigned to it by the Treasury” (Q 56).
266. In assessing these arrangements, we noted a memorandum to the Delegated Powers Committee from the Department for Constitutional Affairs in which the Government stated:
- “13. The Secretary of State for Constitutional Affairs is, by virtue of Clause 38, under a duty to ensure that there is an efficient and effective system to support the carrying on of the business of the Supreme Court, and that appropriate services are provided to the Court. Clause 40 empowers the Secretary of State for Constitutional Affairs to make such staffing arrangements with third parties as he considers appropriate for discharging that general duty. He may only make such arrangements if authorised by an order made by him under subsection (3). Before making such an order, he must consult the senior judiciary listed in subsection (5); and by virtue of subsections (1) and (2) of Clause 99; such an order is to be made by statutory instrument subject to negative resolution procedure. This level of Parliamentary control for such a function, allied to the requirement of prior consultation, is considered appropriate for a function which does not fall within the affirmative resolution categories of the Brooke Report, and is preceded in the Courts Act 2003”. (Published as Annex 1 to the Tenth

Report of the House of Lords Select Committee on Delegated Powers and Regulatory Reform, HL 55).

267. Some concerns were expressed to us about the approach adopted in the bill towards providing administrative support to the Court. Professor Ian Scott in his written evidence told us: “The Court should be responsible for its own administration. Whether administrative authority should be given to the senior judge or to the judges collectively is not a matter that should be difficult to resolve. The Court should appoint its own administrative officers and employ its own staff. The Court should have its own library and IT facilities” (p 409). In their response to the DCA consultation, the Law Lords agreed, stating that it was “essential that the new Supreme Court should enjoy corporate independence in the sense used by Professor Ian Scott ... The independence of the judges requires not only that they be free of extraneous pressure but also that the court be institutionally free of administrative pressures” (p 116).

Opinion of the Committee

268. While some members of the Committee agree with those witnesses who saw some advantage in the financial and administrative arrangements provided for in the bill, a majority considered that the Supreme Court should have greater financial and administrative autonomy than currently envisaged under Clauses 38 to 41. The Committee therefore agree that the Supreme Court should be established according to the model of a non-ministerial department. Funding would go direct from the Treasury to the Supreme Court (not into the DCA’s budget). The degree of ministerial involvement would be slight, but remains an issue for some members of the Committee. The Lord Chancellor will bring forward amendments at a later stage of the bill.

Are the arrangements for setting fees payable to the Supreme Court satisfactory? (Clause 44)

269. The Supreme Court will be funded from two main sources. First, some aspects of its work—criminal appeals and devolution cases—will be financed directly by the Department for Constitutional Affairs through general taxation.
270. A second source of funding will be from fees from civil claims in courts throughout the United Kingdom, including the Supreme Court which, under Clause 44, through its own fee structure will contribute towards that fee income. The principle of recouping the costs from fees in all civil courts is enunciated in the Lord Chancellor’s written evidence: “So far as England, Wales and Northern Ireland are concerned, Government policy was announced to the House of Lords by Lord Irvine of Lairg on 19 November 1998. This was that all the costs of administering the civil courts (including capital and judicial costs) should be recovered, through fees, from users of the civil courts. The justification for this policy is that services provided by the Government should be paid for by those who use them, rather than spread among the generality of taxpayers. Concerns about levying fees preventing access to justice are met by the system of exemptions, remissions and subsidies. In relation to the civil courts of England and Wales, this issue was extensively debated by the House of Lords in relation the Courts bill on 18 February 2003 and 27 March 2003 and an amendment was carried

against the Government excluding judicial costs from the calculation. But the Other Place disagreed, and asserted its privilege to legislate on areas concerning finance. This was accepted by this House when the bill returned to the Commons on 12 November 2003. The policy is therefore settled in respect of all civil business arising in England, Wales and Northern Ireland, and will naturally apply to the civil work of the Supreme Court” (p 14).

271. In Scotland, the financing of the civil justice system is a devolved matter under the Scotland Act 1998. The Lord Chancellor told us that the “Government is therefore in discussion with the Scottish Executive over the arrangements, which should apply to the funding of the Supreme Court in the UK in respect of that part of its workload attributable to civil appeals from Scotland” (p 15).
272. Further information about the role of fees in funding the work of the Supreme Court has been set out by the Department for Constitutional Affairs in their Regulatory Impact Assessment on Constitutional Reform Bill, which states:¹⁹ “The costs of the UK Supreme Court attributable to civil business will be recovered through fee recovery. The Supreme Court will have a UK Wide jurisdiction and will be the final court of appeal for all civil matters in the United Kingdom. The precedents set by the Supreme Court will be of value to all litigants in the England & Wales civil jurisdiction (in relation to cases heard under the law of England & Wales), Northern Ireland civil jurisdiction and the Scottish civil jurisdiction (in relation to cases heard under the law of Scotland). The fee structure for the Supreme Court will be based upon that applicable to the Appellate Committee, but will be restructured in order to bring it into line with fee structures in the lower courts. The total revenue to be for the court is projected to amount to £4.5M-£5M per annum. This is based upon assumptions made at present regarding accommodation costs, administrative overheads (including non-judicial staff salaries), building refurbishment capital charge and judicial salaries. At present no location has yet been chosen for the Supreme Court and so these figures are only approximate. The costs of the court attributed to criminal appeals and devolution cases are likely to amount to approximately £1.7M and will be met by direct taxation via the DCA vote”.
273. We heard expressions of concern about the funding arrangements and in particular fees. Lord Mackay of Clashfern was concerned that in setting Supreme Court fees the Minister was required to consult but not seek concurrence from heads of division and others listed at subclause 44(4): “In Section 130, I think it is, of the Supreme Court Act the Lord Chancellor was bound to secure the concurrence in civil fees on three out of the four heads of division (no doubt on the view that one of them might be absent for some reason) and the Lord Chancellor on criminal cases. You have to get their consent. It is purely consultation that is here” (Q 268).
274. The Law Society of Scotland were concerned that spreading the costs through fees charged across all civil courts was unfair: “There are aspects of civil litigation in small claims which it is anticipated, I think, from the Explanatory Memorandum would have increased costs who have no right of appeal to a Supreme Court in those matters. There are matters of Employment Tribunal work where there is a right of appeal to the Supreme Court which would have no impact on their costs because no costs are

¹⁹ <http://www.dca.gov.uk/risk/constrefria.htm#part5>

payable for those. We think it is a matter of principle that the value of cases being decided and the law being clarified in the Supreme Court have greater general application beyond the parties in any particular dispute” (Q 612).

275. Lord Hope of Craighead in his written evidence pointed out that there was no mechanism in the bill for securing a contribution through Scottish civil court fees towards the costs of the Supreme Court: “Fees are recovered from litigants in the Scottish courts under regulations made under section 2 of the Courts of Law Fees (Scotland) Act 1895, which refers to fees payable to any officer of any office or department connected with the Scottish courts the expenses of which are paid wholly or partly out of the Consolidated Fund or out of moneys provided by Parliament. The definition of ‘the Scottish courts’ does not mention the House of Lords, and there is no provision for the recovery of fees payable in one of the courts listed in the definition to be used to subsidise the cost of running another.” (Hope pp 191-2). The Royal Society of Edinburgh makes a similar point, stating that the bill would need an amendment so fees charged to litigants in the Scottish courts could be surcharged by the amount needed to contribute to the cost of the Supreme Court. (p 399)
276. Some witnesses (JUSTICE p 92; Law Society of Scotland p 92 and p 162; Law Society of England and Wales (Q 557)) object to the proposal that litigation fees might rise, even by the 0.8-1.0% suggested in the Explanatory Notes to the bill. They point out the role of the Supreme Court is the development of the law and not the settlement of private disputes.

Opinion of the Committee

277. So far as concerns the setting of the Supreme Court’s own fees, the Committee broadly agrees with the provisions of Clause 44 as drafted, although one member wished to see them pegged in real terms to the fee structure currently in force.
278. So far as concerns the Government’s intention to recover the civil appeal administrative costs of the Supreme Court from fees charged by the civil courts system as a whole, opinion within the Committee differed. The Committee acknowledges that these arrangements lie outside the scope of the bill and are matters for the Treasury and the rest of the civil court system. Nevertheless, the issue is an important one which we draw to the attention of the House.

Should Part 2 of the bill be amended to safeguard the separate identities of Scots law, Northern Irish law, and the law of England and Wales? If so, how is this best achieved?

279. We heard criticism of Clause 31(3) and Part 2 of the bill relating to the fact that they fail to provide sufficient protection for the separateness of Scots law.
280. Lord Cullen of Whitekirk told us that if “one is moving to a United Kingdom court there might be a tendency to take the view that because it is a United Kingdom court now perhaps what really matters is a solution right for the United Kingdom and hence a tendency to find an easy way to avoid abiding by Scots law” (Q 857). Lord Hope of Craighead told us that “what is missing from the bill ... is a Clause which recognises the separate existence of the jurisdictions. It needs to be emphasised ... that under the existing system in

the House of Lords, according to our own jurisprudence, the appeal systems are separate” (Q 645).

281. The Government have responded to these concerns and indicated their intention to move an amendment which “will make clear that a decision of the Supreme Court on an appeal from one jurisdiction within one jurisdiction within the United Kingdom is not to have effect as a binding judicial precedent in any other such jurisdiction, or in a subsequent appeal before the Supreme Court from another such jurisdiction”. The Lord Chancellor told us “This provision is essentially declaratory of the position which is generally accepted to pertain in proceedings on appeal before the House of Lords” (p 418).
282. This provision will not apply to devolution issue appeals, where a United Kingdom-wide jurisdiction is created by the Scotland Act 1998, the Government of Wales Act 1998 and the Northern Ireland Act 1998.

Opinion of the Committee

283. The Committee agrees that an amendment which safeguards the separate jurisdictions to be exercised by the Supreme Court in respect of Scottish, Northern Irish, and English and Welsh law is desirable. An amendment to that effect will be brought forward by the Lord Chancellor at a later stage of the bill.

Summary of changes made or recommended by the Committee to Part 2 of the bill

284. It will be helpful to pull together the principal changes we have made to Part 2 of the bill and those changes which, largely in consequence of our deliberations, will be brought forward by the Government at a later stage.

Summary of amendments made to the bill as introduced

285. The principal amendments we made to Part 2 of the bill as introduced, all of them proposed by the Lord Chancellor, are as follows. First, following our amendment, the Minister will have power to increase—but not decrease—the number of Justices, which initially will be 12, by Order in Council subject to affirmative resolution procedure (para.171). Secondly, there is a new requirement that at least one of the five person selection commission be a lay member (para.183). Thirdly, the bill now makes explicit that the criterion for appointment is merit (para.173). Fourthly, the selection commission will recommend to the Minister only one name for each vacancy, not a list of two to five names as provided for in the bill as introduced (para.189). In carrying out its task, the selection commission will be responsible for assessing both merit and the territorial balance of the Supreme Court. The Minister will be able, before the selection commission convenes, to provide non-binding guidance relating to the vacancy that has arisen, by for example drawing attention to the existing and future territorial needs of the Supreme Court and its requirements for expertise in particular fields of law. In carrying out the selection the Commission will consult the senior judiciary and the devolved administrations. Having received the Commission’s choice, the Minister will consult the same bodies. The Minister will have the power to ask the selection commission to reconsider its recommendation or to reject its recommendation outright; he will be able to exercise each of these options

only one and must provide his reasons in writing. These amendments bring the procedure for Supreme Court appointments more broadly into line with the procedure for judicial appointments in England and Wales provided for in Part 3 of the bill.

Summary of further amendments proposed by the Government

286. The Lord Chancellor indicated to us his intention to bring forward further amendments as a later stage, as follows. First, an amendment will restrict eligibility to be an acting judge of the Supreme Court—whether as serving judge in a court or a retired judge under the age of 75—to those judges who are or were judges of the appellate courts in each of the United Kingdom’s territorial jurisdictions (para.201-2). Secondly, a Clause will be introduced to make provision for the initial members of the supplementary panel of retired judges able to be called upon to sit in the Supreme Court (para.208). Thirdly, an amendment will be introduced to give power to the Supreme Court rather than the Minister to make the Supreme Court Rules (para.252). Fourthly, amendments will be brought forward to give the Supreme Court the status of a non-ministerial department enjoying a high degree of financial and administrative autonomy (para.268). Fifthly, the Minister told us of his intention to bring forward an amendment to safeguard the separate identity of the jurisdictions of the United Kingdom in the case law of the Supreme Court (para.283). All of these amendments are in principle broadly supported by the Committee.

CHAPTER 4: JUDICIAL APPOINTMENTS AND DISCIPLINE (PART 3 OF THE BILL)

Issues relating to judicial appointments and discipline

287. The Committee have identified the following issues arising in evidence which relate to judicial appointments and discipline.

- Is the proposal for a “recommending” Commission (rather than one that makes appointments directly) appropriate?
- Should the work of the JAC be subject to audit?
- Are the provisions relating to lay involvement with the Judicial Appointments Commission adequate? (Schedule 10)
- Are the arrangements for appointments panels satisfactory?
- Should a Judicial Appointments and Conduct Ombudsman be established? (Clause 50)
- Should the arrangements for defining “merit” be amended? (Clause 51(4))
- Should Chapter 2 of Part 3 of the bill be amended to impose a duty upon the Judicial Appointments Commission to engage in a programme of action designed to secure, so far as it is reasonably practicable to do so, a judiciary reflective of the community in England and Wales?
- Should the Minister be placed under an express statutory duty to reject or require a reconsideration of a selection only in “exceptional” circumstances? (Clauses 57, 63 and 69)
- Should the Minister be required to consult the Lord Chief Justice before withdrawing a request to the Commission to make a selection? (Clauses 66 and 72)
- Does the amendment of section 27 of the Courts Act 2003, proposed by para.380 of Schedule 1 to the bill, adversely affect the continued independence of justices’ clerks and assistant clerks?
- Are the proposals of the bill relating to confidentiality adequate? (Clause 81)
- Should the Lord Chief Justice’s disciplinary powers be dependant on the agreement of the Minister? (Clause 83(2)).

We consider these issues below.

Is the proposal for a “recommending” Commission (rather than one that makes appointments directly) appropriate?

288. Chapter 2 of Part 3 of the bill provides that the Commission recommends names to the Minister for appointment to all levels of the judiciary in England and Wales (other than for members of the Supreme Court). It is the Minister and not the Commission who has the power to make the final decision on all appointments.

289. In his written evidence the Lord Chancellor (p 18) put forward three options:
- “a commission that recommends candidates for appointment by the Secretary of State for Constitutional Affairs (or, for the more senior judges, appointment by Her Majesty on the recommendation of the Secretary of State);
 - “an appointing Commission that would make appointments or advise Her Majesty directly for the more senior appointments; and
 - “a hybrid of the two, which would appoint the more junior judiciary, but make recommendations to the Secretary of State for the more senior appointments”.
290. An appointing commission was not a popular option amongst our witnesses. However several did support the hybrid model, often on the grounds that the recommending model would be unnecessarily bureaucratic. It was suggested that for the lower levels of the judiciary the Minister would only be rubber-stamping the decision of the Commission. Professor Sir Colin Campbell (the First Commissioner for Judicial Appointments) told us: “The consultation paper from the Government asked if the JAC should be appointed by recommending or hybrid. It is our view that the JAC should be a hybrid, appointing candidates for up to the Circuit Bench and then recommending candidates for the High Court and above. We can see the point about public accountability for the High Court and above, so there should be a carefully circumscribed Ministerial check. We think the idea of there being a Ministerial check on the appointments below that, some 2,000 a year, could lead to wasteful bureaucracy or be a rather hypocritical rubber stamp” (Q 938).
291. In their response to the Government consultation paper, the Law Society also favoured a hybrid commission with all appointments up to the Circuit Bench being made by the Commission. They did however acknowledge that there needed to be democratic accountability for more senior appointments.
292. Sir Colin Campbell agreed that there is a need for democratic accountability for more senior appointments but he did not think this argument held for all levels of the judiciary: “I can understand the Government’s argument that there is a public interest in who is appointed to the High Court and it does seem to me that a Commission then should put their arguments, their nominations to the Secretary of State, whose powers are circumscribed but they are there, and he can challenge because... even the JAC might become a little eccentric. However, below that there is such an amount of grinding work to be undertaken I cannot see the point of that going to the Secretary of State because he either rubber stamps it, and why bother, or else he has to have another rather expensive bureaucracy to replicate the JAC” (Q 955).
293. However the Government’s position is that a recommending Commission is the best option. The Lord Chancellor, in his written evidence to the Committee, wrote that: “appointing judges is a central function of the State. Parliamentary accountability for the appointments system must therefore be retained, through the Secretary of State. It follows that a Secretary of State who is accountable for appointments should have a real, albeit carefully tempered, discretion in those appointments... The recommending model also preserves the Constitutional convention that The Queen acts solely on the advice of her Ministers” (p 18). The Lord Chancellor argued that, for

junior appointments, the fundamental principles outlined above remain the same.

Opinion of the Committee

294. Some members of the Committee recognise that there is some force in the argument that the Judicial Appointments Commission might be given responsibility for making appointments itself—rather than merely making recommendations—at the lower levels. Some members would in principle have preferred a hybrid commission. However, they recognised the importance of the agreement reached between the Lord Chancellor and the Lord Chief Justice (the “Concordat”), and the desire of the magistrates to be included in the appointments to be made, and were willing to accept the proposals in the bill for a recommending Commission rather than reopen that issue. Accordingly, we do not recommend any change in the recommending role that is envisaged for the Commission.

Should the work of the JAC be subject to audit?

295. Currently judicial appointments are subject to audit by the Commission for Judicial Appointments. (The Commission for Judicial Appointments already exists. It was set up in 2001 to oversee the procedures by which judicial appointments are made in England and Wales.) The bill does not make comparable provision that appointments by the statutory Commission will be audited. Sir Colin Campbell said: “as drafted the current audit function which the CJA possesses would not continue, there is no self interest for us and this would be a serious mistake. You can get some things from investigating complaints for three years but you do not get other things and systemic audits done from time to time can throw up findings that individual complaint investigations would not. For example our investigation of silk found the old process so flawed that we still have not managed as a country to come up with a new version. Our audit of the tribunal and deputy district judge also encouraged the Department to proceed in one way rather than another. We are now trying to complete our audit of High Court appointments which, again, will show things that no one has previously seen, and some of them are quite disturbing. This is not a plea for my Commission to continue to audit; it is a plea for somebody to continue to audit because even the JAC might develop bad tendencies which somebody might be able to flush out” (Q 938).
296. The Lord Chancellor disagreed with this proposal. He told us that the audit function will no longer be needed as the system is being made more transparent: “The Judicial Appointments and Conduct Ombudsman will handle complaints from individuals. But he will not have a general audit function, such as that which the existing Commissioners for Judicial Appointments have performed. The existing Commission was set up to audit an appointments system that is an integral part of the structure of the executive, in the hands of a single Government Minister and which is seen as closed and opaque. However, we are seeking to put in place something very different. A key first-principle, grounding each aspect of our policy, has been recognition of the need to devise a significantly more open and transparent system. I believe we have achieved that, not least in the provisions for the Commission’s independent status, the appointment and composition of its membership, and the freedom it will have to organise and run appointments.

In addition to this, we will have the safeguards of a rigorous complaint handling system, backed up by an independent Ombudsman and, of course, I will remain accountable to Parliament for the appointments system as a whole. We see no need to have the additional layer of a separate auditing body, or to invest such a role in an existing body” (p 22).

297. The Lord Chancellor told us that this situation mirrors his agreements with the judiciary as set out in the Concordat (para.100–102, see Appendix 6). Finally he points out that the National Audit Office (NAO) could examine the Commission in the same way as it can examine any non-departmental public body and that Parliament will have a scrutiny role because the Commission and the Ombudsman will have to lay their annual reports before Parliament.

Opinion of the Committee

298. The Committee agree that no further provision in respect of audit of appointments need be made.

Are the provisions relating to lay involvement with the Judicial Appointments Commission adequate? (Schedule 10)

299. Schedule 10 to the bill provides that there will be 15 members of the Judicial Appointments Commission. We made amendments to the bill, proposed by the Government, to make clearer that the chairman holds an office distinct from the other 14 Commissioners. The chairman must be a lay member. The amended Schedule provides that of the five Commissioners who are judicial members,

- 1 must be a Lord Justice of Appeal
- 1 must be a High Court judge
- 1 must be either a Lord Justice of Appeal or a High Court judge
- 1 must be a circuit judge
- 1 must be a district judge

300. There will be one practising barrister, one practising solicitor, a lay justice. One further member must be a holder of an office listed in Part 3 of Schedule 12 (that is, one of the large number of tribunal chairmen, tribunal members and arbitrators established under a variety of Acts of Parliament). In total, the Commission will accordingly consist of six lay members (people who have never held a judicial office or been a practising barrister or solicitor), five professional judicial office-holders, two practitioners, a lay justice, and a tribunal member.

301. We amended the bill to permit the Minister, with the agreement of the Lord Chief Justice, by Order to increase (but not decrease) the number of Commissioners. The making of such an Order may have the effect of altering the balance between judicial and lay members (an important issue, discussed further below). The Committee’s view is that the requirement of concurrence between the Lord Chief Justice and the Minister as to the number and category of Commissioners in any proposed increase is a sufficient safeguard against disproportionately disturbing the composition of the Commission.

302. Whilst the largest single group on the Appointments Commission will be lay members, some witnesses called for the Commission to have a clearer lay majority. Professor Sir Colin Campbell (Q 938) told the Committee that the Commission for Judicial Appointments believe, quite strongly, there should be a lay majority on the Judicial Appointments Commission. The value of a lay majority is partly that it would be “symbolically important.” (Q 956). But a lay majority, Sir Colin argued, had more tangible benefits too. He succinctly laid out the arguments for a lay majority in his supplementary memorandum to the Committee:

“There are two main reasons why it is essential for the Judicial Appointments Commission to have a lay majority:

- To ensure that the Judicial Appointments Commission is informed by the widest possible range of appointments and HR expertise.
- To enhance public confidence in the independence and impartiality of the judiciary and the appointments process. It would symbolise that the appointments process is led by HR expertise.

The judiciary clearly have a central role in the appointments process, providing input into the formulation of job and person specifications. The judiciary are also likely to be an important source of information about candidates’ ability to perform in post. The Commissioners see the role of the judicial members as ensuring that the Commission access this expertise (although it is likely that the judicial members of the Commission will have detailed knowledge of all candidates in only a minority of competitions)” (p 278).

303. In his oral evidence, Sir Colin emphasised that a central role of the Commission will be to manage a large-scale appointments process, and that this role is often better fulfilled by people with professional expertise outside the law: “What this Commission will need is enormous organisation, management and HR skills. It is important, if I may say so, to remember that while the exciting material might be appointed to the High Court and above actually the most material, the grind going on day after day for 2,000 inferior appointments is much more likely to be well organised by the people I have met rather than by senior judges.” (Q 946) “What I am asking for”, Sir Colin told the Committee, “is a marriage between lay expertise and public accountability and the indispensable judicial expertise.” (Q 948)

Opinion of the Committee

304. The Committee agrees that the provisions relating to the overall composition of the Judicial Appointments Commission, and in particular to lay involvement, as set out in Schedule 10 are satisfactory and adequately represent the different voices that are required to be heard in the appointments process.

305. The Committee agrees that an order to increase the number of Commissioners should be subject to the affirmative resolution of both Houses of Parliament and we are satisfied that the bill as currently drafted and the provision of Clause 99(4)(c) reflects that view.

Are the arrangements for appointments panels satisfactory?

306. Given the number of appointments to be made, it will not be possible for every Commissioner to be directly involved in every recommendation. It is envisaged by the Government that there will be:
- Two distinct senior appointments panels for Heads of Division appointments and Court of Appeal appointments;
 - Committees of the Commission (which will in turn be able to form sub-committees); and
 - Assessment panels, which will do the work of selecting and sifting etc. for may appointments.

This is provided for in the bill (Schedule 10, para.18–19).

307. In relation to recommendations for appointment below the Court of Appeal the bill requires that panels must not contain fewer than three Commissioners. The bill does not as it stands, however, make any requirements as to the composition of these panels.
308. The Lord Chancellor has told the Committee that: “It is a matter for the Appointments Commission to determine who makes up the panels. In some cases it may not be panels that would be appropriate rather than some sort of assessment centre approach, for example, as was taken recently in relation to a round of appointments of deputy district judges. Ultimately it is for the Judicial Appointments Commission to decide how it runs the selection system.” (Q 143) However, he accepted that it would be desirable to introduce an amendment to ensure both lay and judicial representation on appointments panels (Q 144), notwithstanding the principle that that it is for the Commission to determine who sits on its panels.
309. The Lord Chancellor indicated his intention to bring before the Committee an amendment to ensure that both lay and judicial expertise is present on each panel, and that the panel includes a Judge who is at least as senior as the position to which the appointment is being made. This is a “Concordat amendment” (p 423). We agreed this amendment (para.316).

Appropriateness of special selection panels for senior appointments

310. The bill provides for specially constituted panels, consisting of two senior judicial and two lay members (including the Chairman of the Commission) to make recommendations for the offices of Lord Chief Justice and Heads of Division (Clause 55) and Lords Justices of Appeal (Clause 61). One question is whether, although selection panels will be necessary in order to process the very large number of judicial appointments each year, selection panels are appropriate when making the most senior judicial appointments in England and Wales (considered by the Law Society and JUSTICE to be the High Court and above, and by the Bar Council, the Judges’ Council, and the Equal Opportunities’ Commission to be the Court of Appeal and above).
311. The arguments for not using selection panels for senior appointments are, first, that the whole Commission needs to take ownership of such senior appointments, and, secondly, that involvement of all members of the Commission in these decisions adds importance and value to the work of both the Commission as a whole and also its individual members.

Appropriateness of arrangements for appointment of High Court judges

312. Clauses 65 to 71 of the bill and Schedule 12 make the same arrangements for appointment of Justices of the High Court (who are also known as puisne judges) as for circuit judges, recorders, district judges, district judges (magistrates' courts), and a number of other judicial office holders in the lower courts. Some of us consider this to be inappropriate and that High Court judges should instead be appointed in a manner similar to Lords Justices of Appeal (who sit in the Court of Appeal). The numbers of various categories of full-time judges at 1 May 2004 are set out in the table below.

TABLE 3**Numbers of Full-Time Judges in England and Wales**

Heads of Division	5
Lords Justices of Appeal	37
Justices of the High Court (puisne judges)	107
Circuit judges	610
District judges	414
District judges (magistrates' courts)	103

313. The main difference in the bill for the appointment for High Court judges and Lords Justices of Appeal is that the selection panels for the latter must include two senior members of the judiciary (the Lord Chief Justice or his nominee and a Head of Division or a Lord Justice of Appeal) and two lay members (the chairman or his nominee and one other lay member) with the Lord Chief Justice having a casting vote. In contrast, the bill does not specify the size or composition of sub-committees to which the task of appointing puisne judges, circuit judges and district judges may be delegated save that (following an amendment we have made) such sub-committees must include at least one judicial member and one lay member.
314. In some ways it can be said that the High Court judge is the key appointment in the judicial system. Thus the case for requiring that High Court judges be appointed by panels similar to those to be used for Lords Justices of Appeal is that these two ranks of judge have more in common with each other than do High Court judges, circuit judges and district judges. The High Court and Court of Appeal are both superior courts of record. The rules of law enunciated in the judgments of these courts (in contrast to the county courts and magistrates' courts) may be reported in the law reports. Both courts determine claims for judicial review through which the legality of governmental decisions may be challenged. In civil claims, the High Court generally deals with cases where the facts, law or evidence are more complicated, and the financial value of the claim is greater, than those cases heard in the county courts. Moreover, High Court judges and Lords Justices of Appeal share the same stringent safeguards against improper removal from office: dismissal may occur only following Addresses of both Houses of Parliament to Her Majesty—an exceptionally rarely used power. In contrast, circuit and district judges under current arrangements may be removed from office on grounds of incapacity or misbehaviour by the Lord Chancellor, with the agreement of the Lord Chief Justice. In relation to disciplinary powers to be transferred to the Minister by the bill, Clause 84(4) continues to

differentiate between “senior judges” on the one hand (defined as high court judges, Lords Justices of Appeal and Heads of Division) and all other judges.

315. The Lord Chancellor told the Committee that he rejected the proposal that the bill be amended to equate the appointment of High Court judges with Lords Justices of Appeal. Appointment to the latter post is almost always by way of promotion—in contrast to the appointments of high court judges, circuit judges and district judges which share the common feature that they are all typically first appointments to the bench of people in full-time practice as barristers and solicitors (though in common with other judicial appointees they may well have already occupied part-time judicial positions). From the perspective of human resource management, therefore, the process of appointment of high court judges has more in common with circuit judges and district judges than Lords Justices of Appeal. The principal justification for requiring judicial greater input into the appointment of Lords Justices of Appeal is that their promotion will require assessments to be made of the quality of their written judgments. It has also to be remembered that High Court judges and circuit judges both sit in the Crown Court. The Lord Chancellor told us that the Lord Chief Justice was content with the arrangements for appointing high court judges set out in the bill and that they reflected the Concordat.

Opinion of the Committee

316. We have agreed amendments proposed by the Lord Chancellor to ensure that every panel shall include a judicial member and a lay member.
317. The Committee cannot agree on whether high court judges should be “Schedule 12 appointments” or whether they should be appointed in like manner as Lords Justices of Appeal and accordingly make no recommendation.

Should a Judicial Appointments and Conduct Ombudsman be established? (Clause 50)

318. The bill, in line with the majority view expressed in the Department for Constitutional Affairs’ consultation, creates a separate body, with a reviewing and complaints function, to be established alongside the Judicial Appointments Commission. The DCA received much evidence in support of the appointment of the Ombudsman, and it is included in the Concordat (para.100–102).
319. In his written evidence, the Lord Chancellor told the Committee: “The Judicial Appointments and Conduct Ombudsman will deal with complaints from candidates for judicial office about the way in which their application was handled, and judicial appointments matters referred to him by me. He will also provide recourse to anyone who has complained about a judge (or the judge complained of) if they are unhappy with the handling of the complaint” (p 21).
320. We nevertheless heard views critical of the proposed Ombudsman. The British and Irish Ombudsman Association in their written evidence told us: “In relation to dealing with complaints about the appointments process, we consider that this would be compatible with and appropriately handled by the Office of the Commissioner for Public Appointments. We understand that Dame Rennie Fritchie, the Commissioner, would have no objection to

this” (p 308). And on judicial conduct they said: “we have grave doubts as to whether the limited functions envisaged in the proposal add up to anything that is really an ombudsman role. The proposal says more about what the Ombudsman will not be able to do rather than what he or she will be empowered to do. In para.21 it is proposed that the Ombudsman would ‘review the handling of the complaint and may make recommendations to the Lord Chief Justice and Secretary of State’. In para.23 it is proposed that the Ombudsman’s report will say whether a complaint about the *handling of the process* was found to be justified. If the Ombudsman’s role is to be confined to examining whether procedures have been properly followed without commenting on the merits of the complaint, it is unlikely that the Ombudsman will be able to satisfy anyone, or add much by way of underpinning confidence in the system as a whole. Given that the lessons of enquiries into judicial (mis)conduct ought sensibly to feed into the process of making new appointments, there may be a case for embedding the proposed task within the Judicial Appointments Commission, and assigning this as a particular function to one of the Commissioners” (p 329).

321. The Council on Tribunals also expressed reservations, telling the Committee that “In the Council’s view, complaints about appointment procedures and complaints relating to conduct do not sit happily together. The Office of the Commissioner for Public Appointments seems an appropriate body to consider complaints about the judicial appointments process. The very limited remit proposed for the new Ombudsman in matters relating to judicial conduct hardly seems to amount to a true ombudsman role” (p 343).

Opinion of the Committee

322. A substantial body of opinion on the Committee did not consider that the appointment of a Judicial Appointments and Conduct Ombudsman under Clause 50 was necessary but, in the absence of agreement on the point, we leave this question for the House to determine.

Should the arrangements for defining “merit” be amended? (Clause 51(4))

323. We received no evidence questioning the merit of the judiciary at the moment. On the contrary, all our witnesses made clear that the calibre of the judiciary is respected the world over. In their written evidence the Law Society stated that “no one disputes the calibre of the judges who are appointed” (p 184). The Government’s written evidence stated “There can be no doubt that we are served by judges, tribunal members and magistrates of the very highest calibre, in many ways the envy of the world” (p 17). There was agreement amongst witnesses that merit should continue to be the criterion for the recruitment of judges. This is reflected in the bill (Clause 51(3)).
324. Selecting on merit can be understood in two ways: selecting “the best candidate”; or setting a very high threshold of competences above which other factors may be taken into account. Sir Colin Campbell’s view was that “merit is a threshold” and that when selecting for a post there are often several candidates who each pass this threshold (Q 963). He suggested that at that point it is sometimes appropriate to select between them using other criteria such as the need for diversity (this is discussed further below). He

also said (see para.344 below) that finely graded distinctions of merit can be “quite spurious” (Q 963).

325. Currently the guiding principle underpinning the Lord Chancellor’s policies in selecting candidates for judicial appointment is that appointment is strictly on merit. “The Lord Chancellor appoints those who appear to him to be the best qualified regardless of gender, ethnic origin, marital status, sexual orientation, political affiliation, religion or disability. Decisions on merit are based on assessments of candidates against the specific criteria for appointment” (Department for Constitutional Affairs Consultation Paper, *Constitutional reform: a new way of appointing judges*, CP 10/03, July 2003). The bill does not propose to change this principle and therefore the debate is about who should elaborate on existing criteria.
326. The bill provided that after consulting the Lord Chief Justice the Minister may prescribe considerations that are to be taken into account in assessing merit and these would be subject to affirmative approval in Parliament. However, at Second Reading the Lord Chancellor announced his intention to bring forward amendments to Clause 51. He told us that he intended to “look to the Commission to refine and improve our existing definitions of merit” and that, with the involvement of recruitment experts and a range of judges, the Commission will be uniquely well placed to do so (p 21). He therefore wished to amend Clause 51 of the bill so as to delete subsections (4) and (5) so that the Minister no longer has a power to specify considerations that are to be taken into account in assessing merit.
327. This amendment was welcomed by all our witnesses who commented on this question (e.g. Arden Q 777, Malleson Q 154, Clifford Chance LLP p 336) and is in line with the recommendation of the House of Commons Constitutional Affairs Select Committee (HC 48-I, para.159).
328. The bill provided that the Commission must have regard to any guidance issued by the Minister when selecting judges. At Second Reading the Lord Chancellor stated that the Government wished to amend Clause 52 and he told us that the amendment would: “... stipulate that the Lord Chief Justice must first be consulted about any guidance issued by the Minister to the Commission under this section, and that guidance must be issued in the form of a statutory instrument laid before Parliament and subject to the affirmative resolution procedure. The Clause should also provide that such guidance may, for example, relate to such matters as the need to encourage applicants for judicial appointments from a more diverse pool of candidates...”(p 419).
329. There will therefore be parliamentary oversight of the guidance to which the Commission will work. Lady Justice Arden told us that this guidance will essentially be “like a code of practice” (Q 777) and that “it is particularly useful to have a code of practice where you wish to ensure flexibility for the future or impose a requirement which may not necessarily be adhered to the letter in a given situation” (Q 742).
330. We considered the drafting of Clause 51(3) which provides that “Selection must be on merit”. The Committee agreed that selection must, indeed, always be on merit and that it is right for the bill to state this expressly. Some of us, however, would prefer the Clause to be amended to provide that “Selection must be solely on the basis of merit” in order to put the matter beyond doubt and to remove any suggestion that the merit criterion is in

some way or other qualified by considerations of diversity (such as the amended provision in Clause 52(3) that the Minister may issue guidance to the Commission “for the encouragement of diversity in the range of persons available for selection”). We noted that Section 3 of the recently enacted Justice (Northern Ireland) Act 2004 provides that judicial appointments in that part of the United Kingdom “must be solely on the bases of merit” and some of us take the view that it is unwise to use different forms of words to achieve the same policy in different jurisdictions. We noted also that para.28 of the Concordat states that “primary legislation should provide that the sole criterion for making judicial appointments is merit”, but the Lord Chancellor told us that the Government’s view is that to use the words “solely on the basis of” in Clause 51(3) may be otiose.

331. Another suggestion was made to us that the bill should go further to include definition of “the ‘merit’ qualification for judicial appointment” (Lord Alexander of Weedon Working Party p 469).

Opinion of the Committee

332. The Committee agrees that “merit” should not be defined by the Minister and we have accordingly made an amendment, tabled by the Lord Chancellor, to leave out subclauses 51(4) and 51(5).
333. Although we agree that selection should be on merit alone, as a drafting issue we are unable to agree whether the addition of “solely on the basis of” to the merit provision is necessary or not and accordingly make no recommendation.
334. The Committee does not accept that the merit criterion is to be understood as a threshold.
335. The Committee also agreed to make the further amendment proposed by the Lord Chancellor to provide that any guidance issued under Clause 52 relating to appointments be subject to consultation with the Lord Chief Justice and made by regulations under affirmative resolution procedure.

Should Chapter 2 of Part 3 of the bill be amended to impose a duty upon the Judicial Appointments Commission to engage in a programme of action designed to secure, so far as it is reasonably practicable to do so, a judiciary reflective of the community in England and Wales?

336. The Committee were told that the social make-up of the senior judiciary does not reflect that of society as a whole, or the legal professions, in terms of the proportions of women and people from ethnic minorities. In their recent *Interim Report on Women Working in the Criminal Justice System*, the Fawcett Society state that only 7 per cent of High Court judges are women, 8 per cent of Lords Justices of Appeal are women, 11 per cent of Circuit Judges are women and yet 59 per cent of law graduates are women. They point out that “Women were first admitted to the legal profession in the early part of the last century, yet it is only this year that the first woman was appointed to the highest judicial body, the House of Lords”. The Association of Women Barristers agreed: “The very low number of women at Circuit Bench, High Court, Appeal Court and House of Lords level is regarded by some as a national disgrace, given the number of eligible women lawyers” (p 321). The Law Society made a similar point: “While the number of women, minority ethnic and solicitor members of the legal profession who would meet the

criteria for appointment have grown substantially, they remain significantly under-represented in the senior ranks of the judiciary. Research has indicated that women, in particular, are under-represented even when allowance is made for the proportion they form amongst lawyers of appropriate seniority” (p 164).

337. While the bill expressly preserves merit as the sole criterion for appointment to the bench, the bill makes no express provision to address the other factor that almost all our witnesses recognised as essential: progress towards a judiciary that includes more women and people from ethnic minorities. The bill does not, for example, place any statutory duty on the Judicial Appointments Commission to engage in a programme of action designed to secure, so far as reasonably practicable to do so, a judiciary which is reflective of the community—a provision that is included in the provisions of the Justice (Northern Ireland) Act 2002 setting up the Judicial Appointments Commission in that part of the United Kingdom. Issues relating to diversity will instead be dealt with by means of ministerial guidance issued under Clause 52.
338. We received evidence from witnesses who want the Commission to have an express statutory duty to undertake a programme of action to secure that a range of persons reflective of community is available for consideration when appointing judges. It has been suggested that there is contradiction between the Government’s position that “One of the key areas in which the Commission must provide improvements is the diversity of the bench” (p 18) and the absence from the bill of a statutory duty to promote diversity. However the Lord Chancellor told us that he believes the bill will encourage diversity by opening up the pool of candidates who apply for judicial posts. “Increasing the pool, I believe, will increase the diversity of the bench” (Q 130). The pool will be opened up through the use of modern human resources practices. Whether the Commission would be required to increase the size of the pool further, through policies specifically designed to encourage applicants from minority groups, will depend on what guidance the Minister chooses to lay under Clause 52 of the bill. It was suggested, for example, that the Commission should not wait “passively for candidates to apply” (Lord Alexander of Weedon Working Party p 469).
339. There was agreement that the narrow pool of candidates is one of the factors leading to the lack of diversity in the senior judiciary. Clifford Chance LLP agreed with the Lord Chancellor that “Widening the pool... would greatly increase the field of potential candidates, and so tend to drive up quality over time, to the benefit of the public interest” (p 337). In their written evidence the Fawcett society told us “There are few women and no black or ethnic judges in the higher courts which is the pool from which the very highest echelons are drawn. Recruiting on the basis that experience in the High Court is essential, when that is confined to this narrow social pool, excludes otherwise qualified candidates and may be indirectly discriminatory.” (The Fawcett Society, *Women and the Criminal Justice System*, p 28).
340. Dr Kate Malleson: told us “What the bill does not have is any statutory requirement that the Commission should take account of diversity and I think there should be one... It is common in most commissions around the world” (Q 154). In comparative research conducted by Kate Malleson it was found that the judicial appointments commissions in other countries that are more successful in broadening the diversity of the judiciary “are those which

have been specifically tasked with this aim and have the political backing to achieve it.”¹

341. Professor Diana Woodhouse agreed: “What I want the statute to do is state clearly that [promoting diversity] is a priority... that their first and paramount job is to appoint the best possible judges that they can, but their equally important job is to do that while encouraging greater diversity in the judiciary” (Q 185). Baroness Hale of Richmond also supported this idea and said that “It would be extraordinary if the equivalent bodies in Scotland and Northern Ireland were set such a task but the body in England and Wales was not” (p 363).
342. The Government have placed a statutory duty on the Northern Ireland Judicial Appointments Commission to secure a judiciary reflective of the community in the recently enacted Justice (Northern Ireland) Act 2004. They have made it clear that “reflective of the community” relates as much to the under representation of women than to the community background of the judiciary in Northern Ireland. The 2004 Act amends the Justice (Northern Ireland) Act 2002 to provide that:
- “5.—(8) The selection of a person to be appointed, or recommended for appointment, to a listed judicial office (whether initially or after reconsideration) must be made solely on the basis of merit.
- (9) Subject to that, the Commission must at all times engage in a programme of action which complies with subsection (10).
- (10) A programme of action complies with this subsection if—
- (a) it is designed to secure, so far as it is reasonably practicable to do so, that appointments to listed judicial offices are such that those holding such offices are reflective of the community in Northern Ireland;
- (b) it requires the Commission, so far as it is reasonably practicable to do so, to secure that a range of persons reflective of the community in Northern Ireland is available for consideration by the Commission whenever it is required to select a person to be appointed, or recommended for appointment, to a listed judicial office; and
- (c) it is for the time being approved by the Commission for the purposes of this section.”
343. The non-statutory Judicial Appointments Board of Scotland has as part of its remit to make recommendations “on merit, but in addition to consider ways of recruiting a Judiciary which is as representative as possible of the communities which they serve.”
344. The Committee inquired whether a requirement to seek the most meritorious candidate and a requirement to increase diversity are compatible. Sir Colin Campbell told us he was a “little bit suspicious of people who say we only appoint on merit end of argument because I find that quite spurious. I think merit is a threshold and anyone who confidently says about 100 QCs or 100 professors he is 96 and he is definitely not 95 loses my support” (Q 963). He went on to stress that this would not mean you would not appoint the best candidate for the job but simply that sometimes there is not one best candidate and when you have to choose between several candidates

¹ “Creating a Judicial Appointments Commission: Which Model Works Best?” [2003] *Public Law*, p 107.

of equal merit the need for diversity can be factored into the decision. As Professor Robert Stevens put it “Merit is not synonymous with, there is only one possible candidate and, if you really want to make a more diverse bench, then it is not impossible to make a more diverse bench without retreating from the notion of merit” (Q 184).

345. The question is whether the Government’s intended objective of the Commission leading to a more diverse bench would be better achieved by including a statutory duty similar to that in the Justice (Northern Ireland) Act 2002 on the face of the bill rather than relying upon guidance issued by the Minister under Clause 52.

Opinion of the Committee

346. The Committee agrees that diversity among the judiciary should be promoted. This diversity should be achieved without diluting the principle of merit. While agreeing on this, we were unable to agree on the question whether a statutory duty should be placed on the Judicial Appointments Commission to engage in a programme of action to promote diversity along the lines of the Justice (Northern Ireland) Act 2002 and accordingly make no change to the bill as drafted. We have however agreed an amendment to Clause 52 so as to include the “encouragement of diversity in the range of persons available for selection” in the provision on guidance.

Should the Minister be placed under an express statutory duty to reject or require a reconsideration of a selection only in “exceptional” circumstances? (Clauses 57, 63 and 69)

347. Clauses 53–58 of the bill deal with the selection of the Lord Chief Justice and Heads of Division. Clauses 59–64 deal with the selection of Lords Justices of Appeal. Clauses 65–71 deal with the selection of High Court (puisne) judges and other office holders. When a vacancy arises, the Judicial Appointments Commission appoints a selection panel, and the selection panel reports to the Minister, stating who has been selected. Under Clauses 57, 63 and 69, the Minister has three options:
- to recommend the appointment of the person selected;
 - to reject the selection;
 - to require the panel to reconsider the selection.
348. If the Minister requires the panel to reconsider the selection, then the panel may select the same or a different person; where the Minister rejects the selection, the panel must select a different person. The Minister cannot reject or require the reconsideration of a candidate more than twice in regard of any one vacancy. The bill, therefore, removes the Minister from being in charge of the process, and limits the Minister’s power to reject candidates.
349. Under this procedure, the selection panel will pass to the Minister, not only the details of the candidate it recommends, but also the details of those candidates whom it thinks are “appointable” but are not being recommended for appointment (Q 132). The Lord Chancellor said that this was necessary “Because one of the aspects of appointment is bound to be the relative merit of the individual with reference to others” (Q 133).

350. The Lord Chancellor defended the continued involvement of a Cabinet Minister in the appointment of judges. At the moment, the Lord Chancellor is in charge of the system. Under the bill, the Secretary of State would be involved in the appointment of judges, but in a different way. The Minister will still be supplied with all the applications which fulfilled the formal criteria for the post, in addition to those of the candidate or candidates which the Judicial Appointments Commission are recommending, “Because one of the aspects of appointment is bound to be the relative merit of the individual by reference to others” (Q 134). The Minister might use this information to determine whether the nominated candidate is the “best suited” to the post.

A Constitutional Convention?

351. The Judges’ Council has been concerned that the powers of the Minister might be used quite extensively. Lady Justice Arden told the Committee that: “For my own part, when the consultations took place, I submitted, as my primary argument, that Ministers should not be involved in the [appointments] process, but in my evidence and in my response I put in the alternative that if there was to be a power, it should only be used exceptionally and there would be a parallel then between, for instance, the acceptance by the Prime Minister on nominations for people’s peers or the acceptance of outside candidates selected for senior Civil Service. In other words, it seemed to me that the best route of retaining, the best route of balancing the need for accountability of the Minister in making recommendations to the Queen with the *consideratum* that appointments be non-political is that the powers to reject should only be exercised in exceptional circumstances and that that should be the convention. I am not suggesting a provision in the statute, but a convention.” (Q 735) “I am not suggesting it be a provision of the bill, merely a convention, but it can be dealt with by a statement by the Minister in the course of the passage of the bill, if that is what Parliament thinks that the position should be” (Q 775).

Could the recommendations be made to the Lord Chancellor?

352. When questioned about why the Judicial Appointments Commission could not recommend names to a Lord Chancellor, rather than a Secretary of State, the Lord Chancellor told the Committee that “once you are no more than in receipt of recommendations, which is what we are proposing in the bill, you are doing a completely different job in relation to that from what you were doing when in fact you were running the whole system, and indeed, are actually looking at all the evidence and choosing between a whole variety of candidates. It is a different sort of function” (Q 45).

The options

353. Three options therefore present themselves:

- To place the Minister under an express statutory duty to reject or require a reconsideration of a selection only in “exceptional” circumstances;
- To make a statement during the passage of the bill;
- To leave the bill as it is, without either creating an express statutory duty or attempting to establish a constitutional convention.

Proposed substantive amendment by the Lord Chancellor

354. The Lord Chancellor proposed substantive amendments to the bill. “Clauses 57 and 58, 63 and 64, and 69 and 70 enable the Minister to reject the selection made by the Commission and require it to make a new selection, or to require the Commission to reconsider its selection. I wish to amend these provisions in order to make it clear that the Minister may only reject a selection if he considers that the selected candidate is unsuitable for that judicial appointment; and that he may only require the Commission to reconsider if he is not satisfied that the selected candidate is the best suited to the post. In either case, the Minister will have to give reasons for his decision in writing” (p 420).

Opinion of the Committee

355. The Committee agrees that the discretion of the Minister to reject or cause reconsideration of a selection made by the Judicial Appointments Commission is too widely drawn in Clauses 57, 63 and 69 as they stand. We therefore welcome the amendments tabled by the Lord Chancellor to this part of the bill which make it clear that the Minister may reject a selection only if he considers that the candidate is unsuitable and require the Commission to reconsider only if he considers that the selected candidate is not the best suited to the post. We have amended the bill accordingly.
356. Although not consistent with the terms of the bill as drafted, some members of the Committee considered that, where candidates of equal merit presented themselves, the Judicial Appointments Commission might submit more than one name to the Minister in respect of posts under Part 3 of the bill.

Should the Minister be required to consult the Lord Chief Justice before withdrawing a request to the Commission to make a selection? (Clauses 66 and 72)

357. The issue here is that while under Clause 66 the Minister is required to consult the Lord Chief Justice before requesting the Commission to make a selection under Part 2 of the bill, under Clause 72 he is not so required in respect of withdrawing such a request. In their written evidence to the Committee, the Judges’ Council Working Party on the bill states that the Concordat does not deal with this matter expressly. “The bill provides that the Minister may withdraw a request at any time before the making of the appointment for which the JAC was requested to make a selection. The power is in general terms. We propose that the Minister should be required to consult the Lord Chief Justice before he exercises the power to withdraw a request” (p 215).
358. Lady Justice Arden, the Chairman of the Working Party, reinforced this written evidence with her oral testimony before the Committee: “At the moment under the bill, the Minister may withdraw a request for a selection at any time before the appointment for which that selection is required is actually made. Now, this power was not actually in the Concordat. We do not want to see this power capable of being used as a backdoor route to rejecting the selection made by the Judicial Appointments Commission. We accept there may be cases where the Minister wishes to withdraw a request after he has received a selection, for instance, because he has since learnt that some other member of the judiciary has indicated his wish to retire which

makes it appropriate to choose a candidate with different attributes. However, if this sort of flexibility is desired, then there should be safeguards and we suggest that the appropriate check and balance in this case would be a requirement to consult the Lord Chief Justice” (Q 713).

Opinion of the Committee

359. The Committee agrees that the bill should provide that that the Minister should consult the Lord Chief Justice before withdrawing a request to the Commission to make a selection. Accordingly the Committee has agreed to an amendment brought forward by the Lord Chancellor to that end.
360. An amendment applying this provision to the appointment of Lords Justices of Appeal will be brought forward at a later stage.

Does the amendment of section 27 of the Courts Act 2003, proposed by para.380 of Schedule 1 to the bill, adversely affect the continued independence of justices’ clerks and assistant clerks?

361. Concerns were expressed to us that the independence of justices’ clerks and assistant clerks are detrimentally affected by a provision of the bill.
362. Justices’ clerks have a hybrid role. They are engaged in management within magistrates’ courts and also provide legal advice to lay magistrates. In the provision of that advice and related roles, the importance of the independence—as a matter of fact and in public perception—of justices’ clerks is widely acknowledged. Section 29 of the Courts Act 203 provides:

“29. – (1) A justices’ clerk exercising –

(a) a function exercisable by one or more justices of the peace,

(b) a function specified in section 28(4) or (5) (advice on matters of law, including procedure and practice), or

(c) a function as a member of the Criminal Procedure Rule Committee or the Family Procedure Rule Committee,

is not subject to the direction of the Lord Chancellor or any other person.

(2) An assistant clerk who is exercising any such function is not subject to the direction of any person other than a justices’ clerk.”

363. When Her Majesty’s Courts Service (the unified courts agency) is established in April 2005 under the provisions of the Courts Act 2003, all staff employed by magistrates’ courts committees—including justices’ clerks—will become civil servants. In their written and oral evidence, the Justices’ Clerks’ Society made plain their view that as a matter of principle justices’ clerks “should be outside the civil service” (p 399). That, however, is a matter outside the remit of the Committee, and a status that arises from recently enacted legislation.
364. A more particular concern of the Justices’ Clerks’ Society, which does relate to the bill, is the transfer of responsibility for appointing justices’ clerks from the Lord Chancellor to the Secretary of State for Constitutional Affairs. The bill achieves this by amending section 27 of the Courts Act 2003 by substituting “Secretary of State for Constitutional Affairs” for “Lord Chancellor” for the purposes of appointment and assignment of justices’ clerks and assistant clerks (see para.380 of Schedule 1 to the bill).

365. The Justices' Clerks' Society stated:

“The public will require confidence and expect transparency in any new system. The current situation, on abolition of the post of Lord Chancellor, would result in Justices' Clerks and Legal Advisers being appointed by a politician, in the form of the Secretary of State for the Department of Constitutional Affairs. (At present the appointment by the Lord Chancellor is an appointment in his judicial capacity). If the Justices' Clerk is a civil servant he or she will be bound by the civil service code and, although theoretically protected by statute, the day to day pressures could easily result in the Government's view of legislation, rather than an independent view, being presented. The clear separation of roles inherent in the proposal to abolish the role of the Lord Chancellor, will be specifically reversed in relation to Justices' Clerks, who are the legal advisers to the branch of the Judiciary that delivers 97% of all criminal cases and a large percentage of Family cases. It is difficult to envisage how a member of the public could conclude that a civil servant appointed by a Government Minister will be open and transparently independent in the advice given in any situation” (pp 308-9).

366. In his evidence, Mr Neil Clarke of the Justices' Clerks' Society told us that, while justices' clerks did not seek to be judges, they should be appointed by the Judicial Appointments Commission and bound by an appropriate judicial officer's oath for the office held (p 310). The South Wales Bench Chairmen echoed this, stating “Arrangements must ensure that the appointment, training, relocation, and removal of justices' clerks are outside of Executive Control” and “As Bench Chairmen, we ask that our justices' clerks be appointed as ‘judicial officers’ with their promotion, discipline, training and removal being under judicial lines rather than through the unified [courts] administration. Whether or not they are deemed to be ‘civil servants’, this protection from real or perceived interference is of crucial constitutional significance” (p 477).

367. The Government responded to such proposals by saying that “Justices' clerks do not fulfil the functions of judges so it would not be appropriate for them to be appointed by the Judicial Appointments Commission nor to take the judicial oath” (p 462). Moreover,

“The Lord Chancellor currently appoints justices' clerks in line with his statutory functions for the magistrates' courts rather than his judicial capacity. He assumed these functions in 1992 from the Home Secretary who previously appointed justices' clerks and who is not a judicial figure. The Government believes that it is appropriate for the Secretary of State to continue to appoint justices' clerks given their hybrid role but it is proposing to bring forward an amendment to section 27 (1) in the Constitutional Reform Bill to provide that this should be in consultation with the Lord Chief Justice. In practice this will be achieved by including a judge or magistrate on the selection panel for any justices' clerk appointments. This is in line with other appointments for the new agency where judges and magistrates have been members of the selection panels. The Government is also prepared to bring forward an amendment to the bill to strengthen section 27 (4) of the Courts Act 2003 by providing that a reassignment of a justices' clerk should only take place after consultation with the Lord Chief Justice (in practice a Presiding Judge of the region concerned) as well as with the relevant Bench Chairmen” (p 462).

Opinion of the Committee

368. Some members of the Committee agreed with the Lord Chancellor that with the creation of Her Majesty's Court Service in April 2005, justices' clerks should become civil servants, but with the Lord Chief Justice consulted on appointment, deployment and role. Others felt that the Judicial Appointments Commission should appoint justices' clerks. We therefore make no recommendation.

**Are the proposals of the bill relating to confidentiality adequate?
(Clause 81)**

369. Some witnesses have been particularly concerned that the confidentiality of applicants for judicial office, at all levels, should be preserved. However, the confidentiality provisions of Clause 81 extend only to the Judicial Appointments Commission and staff.
370. In his oral evidence to the Committee, Professor Sir Colin Campbell emphasised that he feels "very, very strongly" that the confidentiality of applicants must be preserved. (Q 972) Sir Hayden Phillips, the permanent secretary of the Department for Constitutional Affairs, concurred, telling the Committee: "In any application system for any job confidentiality of the identity of those who come forward should be preserved whether it is in the judicial system, the civil service area or in public appointments generally, that must be the rule." Although, he said, "We all know in life there are (a) leaks and (b) gossip and those, I am afraid, the appointed authorities cannot always absolutely control", he agreed with the policy of strict confidentiality (Q 686).
371. Clause 81 imposes a statutory duty upon members of the Commission not to "disclose confidential information, except with lawful authority". But the provision relates only to the Commissioners and their staff. In evidence, the Committee has heard some concern that, if a nominee was rejected or referred by the Minister, the fact of this rejection or referral, or the reasons given, might become known.
372. The issue weighed heavily with Professor Sir Colin Campbell who told the Committee: "I think that the Minister's power should be circumscribed. He or she should not be able to supplant a new name. He or she should be able to ask for it to be reconsidered, which is sending out a very strong signal that this could probably still be done protecting confidentiality. One should think long and hard about the Minister being able to reject. There is an argument in favour, which is parliamentary sovereignty and accountability. There is an argument against, which is the systemic damage that will be done if very distinguished people are publicly humiliated" (Q 998). Dr Kate Malleson pointed out to the committee that there were tensions between holding the Minister to account for his or her decision to reject or refer a candidate, and the need to maintain the confidentiality of that candidate (Q 154).

Opinion of the Committee

373. The Committee agrees that a duty of confidentiality relating to the judicial appointments process should extend beyond the Commissioners and staff (as currently provided for in Clause 81) to others involved in the appointments process. Amendments to that effect will be brought forward by the Lord Chancellor at a later stage in the bill.

Should the Lord Chief Justice’s disciplinary powers be dependant on the agreement of the Minister? (Clause 83(2)).

374. Clause 83 sets out the Lord Chief Justice’s powers of discipline over the judiciary but under subsection (2) he may exercise these powers only with the agreement of the Minister. This has been criticised on several levels. Issues include:

- Is there a need for the consultation procedure?
- Are there any circumstances on which a Minister could say “no”?
- Is the level of power held by the Minister appropriate?
- Should there be a link between the person who hires and the person who disciplines?

Is there a need for the consultation procedure?

375. JUSTICE (p 95) told the Committee in written evidence that it supported the conclusions of the House of Commons Constitutional Affairs Committee that “any new system of discipline will need to be firmly within the control of the judiciary in individual cases and we believe that the Lord Chief Justice should be the person primarily responsible for it” (HC 48-I, para.165). JUSTICE told us “that the making of new disciplinary provision for the judiciary is justifiable but we have considerable doubts about the approach taken in the bill, whereby the new disciplinary powers may be exercised by the LCJ only with the agreement of the Secretary of State for Constitutional Affairs. In particular, we believe it wrong that the LCJ should be able to give advice, warning or a formal reprimand to a judge only with the agreement of the Secretary of State. This would mean the injection of an inappropriate bureaucratic relationship into matters of judicial conduct that should in principle be entrusted to the LCJ, working in accordance with procedures approved by the Judges Council. In so far as provision in the bill may derive from present practice within the Lord Chancellor’s Department, that practice is justifiable only because the Lord Chancellor is head of the judiciary.”

376. Professor Diana Woodhouse concurred, stating that she did “not see why there is a need for the Lord Chief Justice to consult over disciplinary matters with the minister” (Q 383). Lord Woolf, however, told the Committee that “In discipline, as I mentioned in my earlier remarks, he [the Minister] already has a central role in discipline and the only difference now will be that this question of consent will be in a statutory form. The correspondence passed almost daily between the Lord Chancellor and myself on matters of discipline” (Q 510).

Are there any circumstances in which a Minister could say “no”?

377. Lord Ackner told the Committee: “I do not think the Secretary of State should be able to say that he does not agree to any disciplinary action which the Lord Chief Justice has proposed” (Q 313). It is arguable that, except in the most extreme situation, the Minister could not advise against a disciplinary procedure, lest he or she be accused of interfering politically with the judicial process. In this situation, therefore, the consultation might become no more than a statutory rubber stamp.

378. Lord Justice Thomas considers that judicial self-restraint and self-regulation is insufficient. He told the Committee of his own view: “if judges are allowed to discipline judges there will come a point in time where their independence could be undermined because it is said, ‘Well, they’re just looking after themselves’” (Q 767).

Is the power held by the Minister appropriate?

379. One of the criticisms of the requirement for the Lord Chief Justice to consult the Minister is that this will be an overly-cumbersome procedure, which will both be too time-consuming and will force the abandonment of more subtle—and more effective—disciplinary mechanisms. Lord Justice Thomas pointed out to the Committee that not all disciplinary matters required the concurrence of the Secretary of State: “one of the problems that often used to arise ... was judges not getting judgments out in time. That is a matter which will in future be dealt with entirely by the Lord Chief Justice. Justice—the ordinary running of the system—that is actually what matters.” (Q 767)

380. Certainly, it seems that it is not the intention of the bill to prevent informal cajoling and disciplining of judges by the Lord Chief Justice, as the Lord Chancellor noted: “It is most certainly not intended that the Lord Chief Justice should not be able to have a quiet word, or even a noisy word, with a judge about particular pieces of his or her conduct in particular circumstances. I think it is clear from the context of Clause 83 that advice in that context is a formal disciplinary conclusion, as it were” (Q 769).

Suspension

381. Lord Justice Thomas addressed the concern that the Minister’s powers were drawn so broadly that they would lay the judiciary open to potential interference. He told the Committee: “powers that are put in are often expressed in terms which are necessarily broad, but you can only use the power for a proper purpose. It would be the independent judiciary that would be preventing the improper use of this power. If this Clause is thought to be too broad (and I personally do not think so) it could always be looked at again. My reading of this Clause is that it is a broad suspensory power because, regrettably, it does happen from time to time that the question arises of a judge being suspended. I do not think presently I can think of any case where a problem has arisen and a judge has not agreed to take a voluntary position of not sitting; but the power has to be there in case someone did not behave honourably” (Q 773).

382. A further criticism made of the suspensory powers contained in the bill is that they apply to “senior judges” (defined in the bill as High Court judges, Lords Justices of Appeal and Heads of Division) and judges of the lower courts alike. Some members of the Committee believe that it is wrong for the Minister to have any power to suspend a senior judge. Since the Act of Settlement 1701, judges of the superior courts—which today are the High Court and Court of Appeal—may be removed from office only following an Address of both Houses of Parliament to Her Majesty the Queen. This is a formal constitutional safeguard of great significance in ensuring the independence of the judiciary. Clause 83(6) of the bill as introduced allows the Minister to “suspend a senior judge for any period during which the judge is subject to proceedings for an Address”, which on one view undermines the protection conferred by the Act of Settlement. Lord Woolf

let the Committee know his view that in relation to senior judges, the powers of suspension should be more limited than those contained in the bill as introduced.

Should there be a link between the person who appoints and the person who disciplines?

383. Lord Mackay of Clashfern told us that the responsibility for discipline should rest with the person who nominates candidates for appointment to the Queen, and that “so long as the Minister, the Lord Chancellor (if that is the way it was still to be) has responsibility for nominating to the Queen or appointing, depending on the level of the judicial officer, then I think it would be appropriate that that person should have responsibility for discipline. I find it very, very difficult indeed to share this discipline business.” (Q 253). The Liberal Democrat Lawyers Association, on the principle that there should be a link between the body appointing judges and the body disciplining judges, suggested a role for the Judicial Appointments Commission in the disciplining of Judges (p 370).

Opinion of the Committee

384. The Committee agrees that the general approach of Clause 83 is correct in respect of formal disciplinary procedure, but it is open to further consideration by the House as to whether “advice” offered under subsection 83(3)(a) should require agreement of the Minister under section 82(2).
385. The majority of the Committee believe that it is necessary and desirable for some form of suspensory power to exist in relation to senior judges. It is open to further consideration by the House whether the powers contained in the bill as introduced strike the correct balance between protecting the public and safeguarding judicial independence.

Summary of changes made or recommended by the Committee to Part 3 of the bill

386. It will be helpful to pull together the changes we have made to Part 3 of the bill, largely as a result of amendments proposed by the Government.

Summary of amendments to the bill as introduced

387. First, we made clearer that the chairman holds an office distinct from the other 14 Commissioners (para.299). Secondly, the bill is amended to permit the Minister, with the agreement of the Lord Chief Justice, to increase the number of Commissioners (para.301). Thirdly, we have made an amendment to ensure that every selection panel of the Judicial Appointments Commission shall include a judicial member and a lay member (para.316). Fourthly, we removed the power of the Minister to define “merit”; the bill as amended makes this a matter for the Judicial Appointments Commission (para.332). Fifthly, the guidance to be issued by the Minister to the Judicial Appointments Commission is made subject to consultation with the Lord Chief Justice and the guidance is to be made by regulations under affirmative resolution procedure (para.335). Sixthly, the bill has been amended to include expressly as one of the matters on which the Minister may issue guidance to the Judicial Appointments Commission the “encouragement of diversity in the range of persons available for selection” (para.346).

Seventhly, amendments have been made to restrict the discretion of the Minister to reject a selection so that this may be done only if he considers that the candidate is unsuitable, and for the Minister to order a reconsideration of a selection only if he considers that the selected candidate is not the best suited to the post (para.355). Eighthly, the bill now provides that the Minister should consult the Lord Chief Justice before withdrawing a request to the Commission to make a selection (para.359).

Further amendment proposed by the Government

388. The Lord Chancellor indicated to us his intention to bring forward amendments at a later stage to extend the duty of confidentiality relating to the judicial appointments process beyond the Commissioners and its staff (para. 373).

CHAPTER 5: PARLIAMENTARY ISSUES

Issues relating to disqualification of judges from Parliament and a parliamentary Committee on judiciary-related matters

389. The Committee considered two issues in relation to the removal of judges from Parliament.
- Should senior judges who hold peerages be disqualified from sitting and voting in the House of Lords? If so, how should that disqualification be effected? (Clause 94)
 - Should a parliamentary committee with responsibility of oversight of judiciary-related matters be established?

We consider these issues below.

Should senior judges who hold peerages be disqualified from sitting and voting in the House of Lords? If so, how should that disqualification be effected? (Clause 94)

390. Clause 94(2) of the bill disqualifies from sitting and voting in the House of Lords:
- judges of the Supreme Court;
 - members of the supplementary panel of the Supreme Court (i.e., retired judges of the Supreme Court and some other retired senior judges);²
 - other serving judges who hold peerages.³
391. In future, serving judges will not be granted peerages. Judges who hold peerages at the time when Clause 94 is brought into force will remain in receipt of a writ of summons but will be barred from taking part in the legislative and scrutiny work of the House.
392. The senior judges who hold peerages are able to take a formal part in the non-judicial business of the House of Lords in a number ways. First, they may contribute to debates and other proceedings in the Chamber, though in doing so they are constrained by the conventions set down in the 22 June 2000 statement made by Lord Bingham of Cornhill. Since then, of the currently serving Lords of Appeal in Ordinary, 8 have not spoken in debate and 2 others have spoken only once (both in respect of the current reforms). The two remaining Lords of Appeal in Ordinary have spoken on 5 occasions (Lord Hope of Craighead) and 11 occasions (Lord Scott of Foscote). A table is to be found at Appendix 8.
393. Serving Law Lords are also, by tradition, appointed as chairmen of Sub-Committee E of the European Union Committee. Serving or retired Law Lords chair the Joint Committee on Consolidation Bills and the

² See para.202 above.

³ These include, as of 24 June 2004: Lord Cullen of Whitekirk (President of the Court of Session—head of the Scottish judiciary); Lord Hardie (a judge of the Court of Session and the High Court of Justiciary); Lord Mackay of Drumadoon (who received his peerage in 1995 while serving as Lord Advocate and is now a judge of the Court of Session and the High Court of Justiciary); Lord Phillips of Worth Matravers (the Master of the Rolls); and Lord Woolf (the Lord Chief Justice of England and Wales). Sir Brian Kerr, who was appointed Lord Chief Justice of Northern Ireland in January 2004, does not hold a peerage.

Ecclesiastical Committee. The Committee for Privileges is made up of 15 peers, including four serving Law Lords.

394. Removing serving judges from the House is, as previously discussed in Chapter 3, conceptually distinct from the creation of a Supreme Court. The Committee heard various views about the future of senior judges in the House, including support for the:
- separation of roles of judges and legislators, as provided for in the bill
 - removal of their right to vote but otherwise retaining senior serving judges as members of the House
 - retention of the current arrangements, whereby all members of the United Kingdom’s highest court and some other senior judges (notably the Lord Chief Justice of England and Wales, the Lord President and the Lord Chief Justice of Northern Ireland) receive peerages and are able to speak and vote in the House. Their participation in the non-judicial work of the House would continue to be guided by the 22 June 2000 statement.
395. In their response to the Department of Constitutional Affairs consultation in July 2003, the then serving Law Lords expressed differing views (p 116). Some considered that the President of the Supreme Court, the Lord Chief Justice of England and Wales, the Lord President of the Court of Session and the Lord Chief Justice of Northern Ireland should be appointed members of the House⁴. Others considered that “complete effect should be given to the separation of judicial and legislative activity”⁵.
396. The responses to the Department of Constitutional Affairs Consultation paper showed a mix of views. In response to the question “Should the bar on sitting and voting in the House of Lords be extended to all holders of high judicial office?” 78% of respondents were in favour of a bar and 22% were not. Respondents who argued for a bar were split between wanting a complete bar (e.g. JUSTICE and the Faculty of Advocates) and allowing some members of the higher judiciary to remain in the House (as proposed by Lords Nicholls of Birkenhead, Hope of Craighead, Hutton, Hobhouse of Woodburgh, Millett, Scott of Foscote, Rodger of Earlsferry and Walker of Gestingthorpe). This was the position of the Judges’ Council in their response to the consultation paper: “...the bar should not extend to the Lord Chief Justice of England and Wales, the President of the Supreme Court, the Lord President of the Court of Session or the Lord Chief Justice of Northern Ireland.” Those who objected to a bar included Lord Cullen of Whitekirk and the Senators of the College of Justice but they did suggest that a convention that peers who hold high judicial office would not vote might be appropriate (CP(R) 11/03 pp 19-20).

The case for change

397. The Government’s case for removing the right to sit and vote from the Lords of Appeal is set out in the Lord Chancellor’s written and oral evidence to the Committee (p 1; QQ 1–149), as well as in the Department for Constitutional

⁴ Lords Nicholls of Birkenhead, Hope of Craighead, Hutton, Hobhouse of Woodburgh, Millett, Scott of Foscote, Rodger of Earlsferry and Walker of Gestingthorpe.

⁵ Lords Bingham of Cornhill, Steyn, Hoffmann and Saville of Newdigate.

Affairs' consultation papers issued in July 2003⁶ and in speeches in Parliament.⁷

398. The Government consider it a matter of principle that senior serving judges should not be in the legislature—they are there to rule on laws not to make them (p 1). Removing the right of Supreme Court judges to sit and vote is part of the movement towards a greater separation of powers which is the principle behind the Constitutional Reform Bill and embodied in the establishment of the Supreme Court.
399. While the replacement of the Appellate Committee by a Supreme Court would help simplify the constitutional situation, confusion could still remain if the Supreme Court judges were members of the House. None of our witnesses were aware of any study on public perception of the position of the Law Lords but the point was illustrated by anecdotal evidence from Lord Bingham: “I was being driven home last night and my driver said ‘Have you made some good laws today?’ and I said ‘I do not really make laws, I am a judge’. Long silence: ‘Have you ever sat in a court?’ he said” (Q 405). Several witnesses agreed with the Government that “appearances do matter” and therefore “the time has come to take the Law Lords out of the legislature.” (e.g. Professor Robert Stevens Q 155).
400. Although the House would be losing the expertise of the serving Law Lords upon their appointment as Justices of the Supreme Court, the House would not be deprived of judicial or legal expertise because of the presence of retired Supreme Court judges and other senior judges who are likely to be given life peerages, and of other distinguished lawyers in the House. We noted the Government’s response to the Constitutional Affairs Committee’s February 2004 report, in which the Government agreed with the Committee’s recommendations that all Justices of the Supreme Court should be appointed to the House of Lords upon retirement (Cm 6150, para.22).

The case against change

401. Many of the arguments relating to public perception and separation of powers advanced in favour of retaining the judicial function of the House of Lords and considered at length in Chapter 3 can also be advanced in support of continued membership of the House of Lords for Supreme Court judges and other senior judges. We do not repeat these here.
402. Critics of the proposals say that the Law Lords’ membership of the House is beneficial to the House and vice versa. Lord Mackay of Clashfern told us he thought “the House would be all the better for some contributions” from the Law Lords (Q 258). Lord Hope of Craighead agreed pointing to Sub-Committee E of the European Union Committee as an example where the experience of Law Lords in the chair has been very helpful (Q 647). He suggested that the work involved in chairing committees was too much for a retired Law Lord to take on. His own experience was that chairing Sub-Committee E took eight or nine hours a week: “I would have reservations

⁶ Constitutional Reform: reforming the office of the Lord Chancellor (CP 13/03); Constitutional Reform: a new way of appointing judges (CP 10/03); Constitutional Reform: a Supreme Court for the United Kingdom (CP 11/03).

⁷ See, especially: 26 January 2004, cols 12-30 (Judiciary-related functions of the office of Lord Chancellor); 9 Feb 2004, cols 926-941 (Supreme Court); 12 February 2004, cols 1211-1324 (Supreme Court Judicial Reforms); 8 March 2004, cols 979ff (Second Reading of the Constitutional Reform Bill [HL]).

about a retired Law Lord taking the job on at the age of 75. I really do not think that is a sensible solution. If one is contemplating the absence of Lords of Appeal in Ordinary, one would really have to find other peers who were lawyers who were active enough and willing enough to give up eight or nine hours a week of time to spend on this work” (Q 649).

403. Lord Nicholls of Birkenhead told us that membership of the House was also beneficial to the Law Lords: “...the law courts are judge-centred and when I came here I found that there was a broader and much more helpful perspective by being in a place which is not just judge-centred but has other activities of a legislative character and so forth that one could participate in and it gave one a broader perspective, and I think myself that the Law Lords benefit from this real advantage” (Q 390). Lord Hope of Craighead agreed, saying membership of the House gave them a forum to represent concerns to Ministers and although this could be done through correspondence or other means the alternatives would probably not be as effective (Q 652).
404. It may also be said that the heads of the judiciary in England and Wales (the Lord Chief Justice of England and Wales), Scotland (the Lord President) and Northern Ireland (the Lord Chief Justice of Northern Ireland) will be better placed to represent the views of the judiciary to Parliament, the Government and the public if they are members of the House of Lords and entitled to take part in the proceedings of the House.

Method of exclusion

405. The means of excluding the judges already holding peerages has also been called into question. We received evidence from the Clerk of the Parliaments drawing attention to the fact that Clause 94(3) “provides that a writ of summons will still be issued to a peer who is for the time being disqualified by reason of holding a judicial office”. Other categories of peers who are disqualified from attending the House (e.g. bankrupts) do not receive a writ of summons. He suggests that there are two reasons why the provisions of Clause 94(3) might not be the best way to disqualify senior judges from participation in parliament: “(a) It might be thought discourteous to the Queen to require her to issue a command, couched in peremptory terms, which is nugatory. It is also potentially confusing to recipients. (b) If the purpose of disqualification is to separate the judiciary from the legislature then this provision appears to weaken that separation. If, on the other hand, it is not thought necessary to make the separation complete, then it is arguable that disqualification is unnecessary and that it would be sufficient to expect peers who are judges to take leave of absence” (p 336).
406. The Government suggested that Clause 94(3) was drafted in this way “to distinguish between [judges] and others who are disqualified from sitting—namely bankrupts” (p 336).

Opinion of the Committee

407. There was a clear division of opinion within the Committee between those who agreed that senior judges who hold peerages should be disqualified from sitting and voting in the House and those who did not. Accordingly, we make no recommendation to the House.

Should a parliamentary committee with responsibility for oversight of judiciary related matters be established?

408. If the bill is enacted three channels of communication between the judiciary and Parliament will be abolished; namely the Lord Chancellor, the Lords of Appeal in Ordinary and other senior judiciary who have seats in the House. There would be “no direct channel between the Judiciary and Parliament” (General Council of the Bar; p 162). It has been suggested that it may therefore be appropriate to establish a parliamentary committee with responsibility for the oversight of judiciary related matters through which the judiciary could communicate with Parliament and through which the Lord Chief Justice could have a voice to Parliament.
409. The Lord Chancellor supports some “identifiable channel to Parliament” through which the representative voice of the professional judiciary could be expressed: “I think it is for Parliament to decide what they think the best structure to allow that voice to be expressed is. It could be a Select Committee, it could be a Joint Committee, it might be other ways, and I am quite sure it is some structure like that rather than sitting as a normal legislator” (Q 4).
410. The Lord Chief Justice told us that he valued being able to speak directly to the House but if he were unable to do that a committee would be a way to foster communication between the judiciary and Parliament (QQ 507-509).
411. The General Council of the Bar and JUSTICE suggested such a committee would help protect the judiciary: “A Parliamentary Joint Committee on the Judiciary should be established along the lines of the very successful Committee on Human Rights. Its duty should be to consider and report upon the independence, impartiality, dignity, accessibility and effectiveness of the courts. It should receive appropriate reports, annual and otherwise, from the Minister and the Lord Chief Justice. This would involve both houses of the legislature in the preservation of judicial independence, and give the judiciary access to Parliament to raise any issues of concern” (JUSTICE p 93).
412. Dr Kate Malleson, Professor Robert Hazell and Professor Robert Stevens suggested that senior judicial appointments should be subject to scrutiny by Parliament and that the best forum through which to do this would be a joint committee of both Houses. They proposed that very senior judicial appointees—proposed justices of the new Supreme Court and the four heads of division—should be invited to a scrutiny hearing by such a committee upon their appointment. Professor Hazell was clear that he did not intend such an introduction to be “a confirmation hearing of the kind that takes place in the United States because in our parliamentary system such a committee would have no power of veto... The main purpose of the hearing would be to introduce the new appointee to Parliament and to give the committee the opportunity to develop a dialogue with the most senior judges on constitutional, legal and judicial policy” (Q 152).
413. The Government consultation paper considered confirmation hearings being held by Parliament but rejected the idea: “The Government sees difficulty in such a procedure. MPs and lay peers would not necessarily be competent to assess the appointees’ legal or judicial skills. If the intention was to assess their more general approach to issues of public importance, this would be

inconsistent with the move to take the Supreme Court out of the potential political arena” (CP 11/03, para.45).

414. The House of Commons Constitutional Affairs Committee also considered this suggestion in their recent report. While they rejected the principle of a formalised introduction hearing they noted:

“That does not preclude a parliamentary committee from seeking formal opportunities to meet justices of the Supreme Court, including recently appointed ones... While we had no convincing evidence to indicate that confirmation hearings would improve the process of appointing senior judges, we recognise the potential benefits to public understanding of the role of the new Supreme Court if a practice were to be adopted of inviting judges, including recently appointed ones, to appear before an appropriate committee from time to time.” (HC 48-I, para.85 and 87)

415. Some of our witnesses, though not opposed to such a committee, sought to make it clear that they did not see such a structure as compensating for the potential loss of contact between the judiciary and Parliament that would come about if senior judges were not allowed to sit and vote in the House of Lords. Lord Nicholls of Birkenhead said: “The point that I have been seeking to make is not one that relates to structured discussions; it is perspective” (Q 397). Lord Hope of Craighead suggested that while there are many ways for the senior the judiciary to make Ministers aware of their concerns the best was meeting them face to face for a discussion, something easy to do as members of the House. “I could write, and sometimes have written, to ministers pointing out points of concern... but it is more helpful to do it in discussion, and it is easier if the minister knows the face of the person who is writing to him or her and can take it up directly” (Q 651).
416. Sir Brian Kerr, Lord Chief Justice of Northern Ireland, told us that a joint committee of both Houses of Parliament inviting representations from the Lord Chief Justice “Would be one way of ensuring that the Lord Chief Justice of Northern Ireland could represent the views of his jurisdiction to Parliament” (Q 1026). However he went on to say “I have some slight reservations about the efficacy of that. It seems to me that it is perhaps a rather elaborate mechanism for receiving views that, for instance, the Lord Chief Justice may wish to communicate regularly or on an ad hoc basis” (Q 1026).
417. Lord Alexander of Weedon’s Working Party wrote, “Such a Committee’s role would need to be carefully circumscribed. It would be wrong for it to impinge upon the independence of the judiciary by considering the conduct of individual judges or by holding judges to account for their judgements. It would also be inappropriate for the Committee to examine the merits of individual appointments or of complaints against judges. Equally, judges would need to be cautious in expressing views on legislation which they might have to consider in their judicial capacity. These limitations need to be set out clearly in the standing orders and terms of reference for the Committee. We consider that such a Committee would have a valuable function even if, as we recommend, the office of Lord Chancellor is retained” (p 473).
418. There are two basic ways in which such a committee could operate: as a parliamentary committee, or as a statutory committee of members of the two Houses established in the bill. Establishing a parliamentary committee would

be a matter for Parliament itself. The two Houses would decide whether it was desirable and would determine the form it would take (i.e. a committee of one House or a joint committee), its terms of reference and its membership. There are several examples of statutory committees, peopled by members of the two Houses, supported by staff in parliament and operating procedurally like select committees but with statutory functions. These include the Ecclesiastical Committee (established by the Church of England Assembly (Powers) Act 1919)—a joint committee—and the Speaker's Committee on the Electoral Commission (established by the Political Parties, Elections and Referendums Act 2000), a committee of MPs only.

419. The advantages of a statutory committee is that its existence is protected by statute whereas a parliamentary committee has to be re-appointed by Parliament each Session and at each re-appointment its terms of reference, and very existence could be called into question. The powers of a statutory committee on the other hand can be enshrined in the Act. The disadvantage of a statutory committee is that its terms of reference and powers may be less flexible and therefore the development of its role is likely to be less fluid.

Opinion of the Committee

420. The Committee agrees that it is desirable for a committee of Parliament to act as a bridge between Parliament and the judiciary, particularly in the event of the senior judges being excluded from the House. Such a committee should not seek to hold individual judges to account. The advantages of a statutory committee were not obvious to the Committee and a clear majority preferred the joint committee option. We recognise that Parliament itself will wish to consider this issue further.

CHAPTER 6: SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

Lord Chancellor

Abolition of the office of Lord Chancellor (Clause 12)

421. The Committee agrees that, in view of the Concordat, the future duties of the Lord Chancellor/Secretary of State office-holder should be responsibility for “judiciary-related” matters (that is, the provision of systems to support the carrying on of the business of courts and tribunals, judicial appointments, and overseeing judicial discipline); and responsibilities as the “constitutional conscience” of Government, defending judicial independence and the rule of law in Cabinet.
422. There was a clear division of opinion within the Committee between those members who considered that the office-holder should be called Lord Chancellor, be a senior lawyer and sit in the House of Lords on the one hand; and those members who considered that the name of Lord Chancellor should not be continued (since its retention would be confusing), and that there was no necessity for the office-holder to hold a legal qualification or sit in the House of Lords on the other hand (that is, the policy of the bill). Accordingly we make no recommendation to the House.
423. We are not attracted to the proposal to retain the traditional office of Lord Chancellor radically reduced in scope.
424. Some of us wish to record that we are attracted to the idea that the minister responsible for judiciary-related matters should be called the Secretary of State, or Minister, for Justice. This title would carry more status and be more easily understood than that of Secretary of State for Constitutional Affairs. Those of us for whom the traditions of the Lord Chancellor’s role remain of real practical importance believe that it would be possible to get the best of both worlds by retaining the title of Lord Chancellor, as head of the Ministry of Justice.

Legal qualification of the Minister

425. There was a clear division of opinion between those members who thought that the Minister should be a senior lawyer and those who considered that there was no need for the office-holder to hold a legal qualification. Accordingly, we make no recommendation.
426. The Committee agrees that the future duties of the Lord Chancellor/Secretary of State office-holder are such as not to require the taking of a judicial oath.
427. The Committee is divided on the question of whether some alternative form of oath should be taken by the Minister and leave this for the House to determine

Lords v. Commons

428. There was a division of opinion on the question whether there should be a presumption that the Minister responsible for judiciary-related matters

should be a member of the House of Lords or, at the discretion of the Prime Minister, of either the Commons or the Lords.

Rule of law (Clause 1)

429. During our deliberations we were able to agree, without difficulty, that it is desirable for the bill to make reference to the rule of law. We also agreed, first, that the reference to the rule of law should replicate, as far as possible, the responsibilities in regard to the rule of law currently discharged by the Lord Chancellor. Secondly, we agreed that while other Ministers have responsibilities in regard to the rule of law (for example, they abide by decisions of the courts), the Lord Chancellor/Secretary of State for Constitutional Affairs has and should continue to have a special role in relation to the rule of law within the Cabinet as a result of his responsibility for the justice system.
430. Most of us also agreed that the responsibility of the Lord Chancellor for the rule of law is not and should not be directly in force through the courts, but stem from his position in Cabinet and is exercised by way of his influence in discussions with colleagues.
431. We were unable to agree a new Clause tabled by the Lord Chancellor on the rule of law and accordingly leave this matter for the House to determine. (The new Clause amendment and other amendments on this issue which were moved and withdrawn may be found in the Minutes of Proceedings at Appendix 3.)

Judicial independence (Clause 1)

432. The Committee is divided on the question of whether any further strengthening of the judicial independence provision in Clause 1 is required. Accordingly, we make no recommendation.

Concordat

433. The Committee agrees that the terms of the Concordat should be fulfilled and that, to the extent that statutory provision is required, this bill should be the vehicle for effecting those changes. Accordingly, we have made many of the amendments referred to by the Lord Chancellor in his paper “Government Amendments to the Bill” (pp 420-5) and a large number of minor and drafting changes.
434. We do not consider it possible, beyond the provisions made by the bill, to accord the Concordat a quasi-statutory status. However we have decided that greater publicity might be given to the document (hitherto published internally by the Department of Constitutional Affairs as “The Lord Chancellor’s judiciary-related functions: Proposals”) were we to publish it as an Appendix to this report. Accordingly, it may be found at Appendix 6.
435. We agree that the Lord Chancellor/Secretary of State should consult the Lord Chief Justice over the appointment of judges to boards, committees and public inquiries, rather than seek his concurrence. We consider that convention will suffice and accordingly make no change to the bill in this connection.

Extension of Clause 1 to Scotland

436. We agree with the advice of the Lord Advocate and the opinion of the Justice 2 Committee of the Scottish Parliament that the provisions of Clause 1 should not be extended to Scotland.

Speakership of the House of Lords (Clause 1)

437. The Committee takes the view that the question of the future of the Speakership of the House of Lords is not a statutory matter and so we make no comment on the policy whereby the Lord Chancellor would cease to sit as Speaker. Alternative arrangements are for the House as a whole, and not this Committee, to determine.

Supreme Court*Establishment of the Supreme Court (Clause 17)*

438. There was a clear division of opinion within the Committee between those members who agreed that the Appellate Committee of the House of Lords should be replaced by a Supreme Court of the United Kingdom and those members who did not. Accordingly, we make no recommendation to the House.
439. We are agreed however that, were a Supreme Court to be established, it should be housed in a building befitting its importance but it is not for us to make the choice.
440. Given the necessarily limited range of financial information provided to the Committee and the lack of figures for costs of accommodating the current occupiers of premises capable of housing the Supreme Court, the Committee agrees that no conclusion can be arrived at by us as to cost and benefit.

A Supreme Court building and commencement (Part 2 and Clause 103)

441. The Committee is divided on the question of whether commencement of Part 2 of the bill should be delayed pending a move to permanent premises and make no recommendation to the House.

Titles (Clause 17)

442. The Committee agree, with varying degrees of enthusiasm, that if the bill is enacted the name “Supreme Court of the United Kingdom” and the title “Justice of the Supreme Court” are appropriate. The Supreme Court of England and Wales and the Supreme Court of Judicature of Northern Ireland should be renamed and, where necessary to avoid possible confusion, the short titles of legislation relating to those courts should also be changed.

The number of justices (Clause 17)

443. The Committee agrees that the number of Supreme Court judges should be 12. We have amended the bill to allow the Minister by Order in Council (by affirmative resolution of both Houses of Parliament) to increase that number. It should remain a convention that within that number at least two Supreme Court judges should have been Scottish judges. The Committee further agree that the Supreme Court should sit in panels, the size of which may be varied at the Court’s discretion according to the importance of the case.

Qualification for office (Clause 19)

444. The Committee agrees with the qualifications for appointment to the Supreme Court as provided in Clause 19. The Lord Chancellor has undertaken to consider further the issue of eligibility of judges of the European courts.

The selection commission (Clause 20)

445. We agree that at least one member of the commission to select a Supreme Court judge should be lay and on the basis of an amendment proposed by the Lord Chancellor have inserted a new Schedule on Supreme Court selection which includes such a provision.
446. Members of the Committee expressed the view that the selection commission should have equal number of judges and lay members, in reflection of the arrangements in the bill for appointing judges to the Court of Appeal of England and Wales. We make no recommendation and leave the matter for further consideration by the House.

Selection of Supreme Court judges (Clause 21)

447. We agree that a commission for the selection of a Supreme Court judge should provide the name of only one candidate for appointment. Accordingly, we have amended the bill on the basis of a new Clause amendment proposed by the Lord Chancellor.

Consultation (Clause 21)

448. The majority of the Committee took the view that consultation with senior judges and devolved administrations should be undertaken by the selection commission before submitting their choice to the Minister. They saw no need for the Minister to repeat that consultation. However, having heard from the Lord Chancellor that it is the wish of the Scottish Executive that there be Ministerial consultations too, the Committee agreed to amendments moved by the Lord Chancellor to provide for both.
449. The Committee further agreed, so far as concerns consultation with the devolved administrations, that such consultation should be exclusively with the First Minister in Scotland, the First Minister in Wales and the First Minister and deputy First Minister in Northern Ireland (or the Secretary of State for Northern Ireland until such time as the relevant powers are devolved). This issue remains to be resolved so far as concerns the National Assembly for Wales.

The role of the Prime Minister (Clause 21)

450. We agree that the role of the Prime Minister in the procedures for appointing a Supreme Court Justice should solely be to act as a conduit between the Minister and The Queen. We see no reason to make any change to the provisions of the bill in this regard.

Acting judges and the supplementary panel (Clauses 29 and 30)

451. The Committee agrees that acting judges should be drawn from the appellate courts.

452. The Committee agrees with the other arrangements in the bill for “acting judges” and we understand that, by virtue of sections 5 and 24 of the Interpretation Act 1978, Northern Ireland judges will also be eligible to serve.
453. The Committee also agrees with the arrangements for the supplementary panel. The Lord Chancellor has undertaken to amend Clause 30 to ensure that the Lords of Appeal within the meaning of section 5(3) of the Appellate Jurisdiction Act 1876 who are currently eligible to assist by sitting on appeals in the House of Lords will also be available to assist the Supreme Court.⁸ This will fill a lacuna in the bill as currently drafted.

Superior court of record (Clause 31)

454. The Committee sees no need to change the designation of the Supreme Court as a “superior court of record” under Clause 31.

Scottish appeals (Clause 31)

455. The Committee sees no need to change the provisions of the bill in respect of Scottish civil and criminal appeals at Clause 31 (3), which reflect current practice.

Devolution jurisdiction (Clause 31)

456. We agree with the proposals to transfer devolution jurisdiction from the Privy Council to the Supreme Court.

Leave to appeal in Scottish cases (Clause 31)

457. The Committee see no reason for changing the leave arrangements for Scottish civil appeals.

Rules (Clauses 35 and 36)

458. We do not think that the Minister should be able to allow or disallow such Supreme Court Rules as may be submitted to him by the President of the Supreme Court. Instead, we agree that the rules should be made by the Supreme Court in consultation with the Minister who will have no power to amend them. An amendment to that effect will be brought forward by the Lord Chancellor at a later stage of the bill.
459. We accept that, in the changed circumstances which would be brought about if the bill were enacted, the rules should be contained in statutory instruments subject to annulment, as proposed in Clause 36(4).

Financial and administrative autonomy (Clauses 38 to 41)

460. While some members of the Committee agree with those witnesses who saw some advantage in the financial and administrative arrangements provided for in the bill, a majority considered that the Supreme Court should have greater financial and administrative autonomy than currently envisaged under Clauses 38 to 41. The Committee therefore agree that the Supreme Court should be established according to the model of a non-ministerial

⁸ This provides for “Such Peers of Parliament as are for the time being holding or have held any of the offices in this Act described as high judicial offices” to be eligible to sit, up to the age of 75 years.

department. Funding would go direct from the Treasury to the Supreme Court (not into the DCA's budget). The degree of ministerial involvement would be slight, but remains an issue for some members of the Committee. The Lord Chancellor will bring forward amendments at a later stage of the bill.

Fees (Clause 44)

461. So far as concerns the setting of the Supreme Court's own fees, the Committee broadly agrees with the provisions of Clause 44 as drafted, although one member wished to see them pegged in real terms to the fee structure currently in force.
462. So far as concerns the Government's intention to recover the civil appeal administrative costs of the Supreme Court from fees charged by the civil courts system as a whole, opinion within the Committee differed. The Committee acknowledges that these arrangements lie outside the scope of the bill and are matters for the Treasury and the rest of the civil court system. Nevertheless, the issue is an important one which we draw to the attention of the House.

The separate jurisdictions

463. The Committee agrees that an amendment which safeguards the separate jurisdictions to be exercised by the Supreme Court in respect of Scottish, Northern Irish, and English and Welsh law is desirable. An amendment to that effect will be brought forward by the Lord Chancellor at a later stage of the bill.

Judicial Appointments and Discipline

Appointment vs. recommendation

464. Some members of the Committee recognise that there is some force in the argument that the Judicial Appointments Commission might be given responsibility for making appointments itself—rather than merely making recommendations—at the lower levels. Some members would in principle have preferred a hybrid commission. However, they recognised the importance of the agreement reached between the Lord Chancellor and the Lord Chief Justice (the “Concordat”), and the desire of the magistrates to be included in the appointments to be made, and were willing to accept the proposals in the bill for a recommending Commission rather than reopen that issue. Accordingly, we do not recommend any change in the recommending role that is envisaged for the Commission.

Audit of appointments

465. The Committee agree that no further provision in respect of audit of appointments need be made.

Overall composition of the Judicial Appointments Commission

466. The Committee agrees that the provisions relating to the overall composition of the Judicial Appointments Commission, and in particular to lay involvement, as set out in Schedule 10 are satisfactory and adequately

represent the different voices that are required to be heard in the appointments process.

467. The Committee agrees that an order to increase the number of Commissioners should be subject to the affirmative resolution of both Houses of Parliament and we are satisfied that the bill as currently drafted and the provision of Clause 99(4)(c) reflects that view.

Composition of selection panels etc (Clause 49 and Schedule 10)

468. We have agreed amendments proposed by the Lord Chancellor to ensure that every panel shall include a judicial member and a lay member.
469. The Committee cannot agree on whether High Court judges should be “Schedule 12 appointments” or whether they should be appointed in like manner as Lords Justices of Appeal and accordingly make no recommendation.

Ombudsman (Clause 50 and Schedule 11)

470. A substantial body of opinion on the Committee did not consider that the appointment of a Judicial Appointments and Conduct Ombudsman under Clause 50 was necessary but, in the absence of agreement on the point, we leave this question for the House to determine.

Merit (Clause 51) and guidance (Clause 52)

471. The Committee agrees that “merit” should not be defined by the Minister and we have accordingly made an amendment, tabled by the Lord Chancellor, to leave out subclauses 51(4) and 51(5).
472. Although we agree that selection should be on merit alone, as a drafting issue we are unable to agree whether the addition of “solely on the basis of” to the merit provision is necessary or not and accordingly make no recommendation.
473. The Committee does not accept that the merit criterion is to be understood as a threshold.
474. The Committee also agreed to make the further amendment proposed by the Lord Chancellor to provide that any guidance issued under Clause 52 relating to appointments be subject to consultation with the Lord Chief Justice and made by regulations under affirmative resolution procedure.

Diversity

475. The Committee agrees that diversity among the judiciary should be promoted. This diversity should be achieved without diluting the principle of merit. While agreeing on this, we were unable to agree on the question whether a statutory duty should be placed on the Judicial Appointments Commission to engage in a programme of action to promote diversity along the lines of the Justice (Northern Ireland) Act 2002 and accordingly make no change to the bill as drafted. We have however agreed an amendment to Clause 52 so as to include the “encouragement of diversity in the range of persons available for selection” in the provision on guidance.

Minister's power to reject (Clauses 57, 63 and 69)

476. The Committee agrees that the discretion of the Minister to reject or cause reconsideration of a selection made by the Judicial Appointments Commission is too widely drawn in Clauses 57, 63 and 69 as they stand. We therefore welcome the amendments tabled by the Lord Chancellor to this part of the bill which make it clear that the Minister may reject a selection only if he considers that the candidate is unsuitable and require the Commission to reconsider only if he considers that the selected candidate is not the best suited for the post. We have amended the bill accordingly.
477. Although not consistent with the terms of the bill as drafted, some members of the Committee considered that, where candidates of equal merit presented themselves, the Judicial Appointments Commission might submit more than one name to the Minister in respect of posts under Part 3 of the bill.

Withdrawal of request to select (Clause 72)

478. The Committee agrees that the bill should provide that that the Minister should consult the Lord Chief Justice before withdrawing a request to the Commission to make a selection. Accordingly the Committee has agreed to an amendment brought forward by the Lord Chancellor to that end.
479. An amendment applying this provision to the appointment of Lords Justices of Appeal will be brought forward at a later stage.

Justices' clerks

480. Some members of the Committee agreed with the Lord Chancellor that with the creation of Her Majesty's Court Service in April 2005, justices' clerks should become Civil Servants, but with the Lord Chief Justice consulted on appointment, deployment and role. Others felt that the Judicial Appointments Commission should appoint justices' clerks. We therefore make no recommendation.

Duty of confidentiality (Clause 81)

481. The Committee agrees that a duty of confidentiality relating to the judicial appointments process should extend beyond the Commissioners and staff (as currently provided for in Clause 81) to others involved in the appointments process. Amendments to that effect will be brought forward by the Lord Chancellor at a later stage of the bill.

Discipline (Clause 83)

482. The Committee agrees that the general approach of Clause 83 is correct in respect of formal disciplinary procedure, but it is open to further consideration by the House as to whether "advice" offered under subsection 83(3)(a) ought to require agreement of the Minister under section 82(2).
483. The majority of the Committee believe that it is necessary and desirable for some form of suspensory power to exist in relation to senior judges. It is open to further consideration by the House whether the powers contained in the bill as introduced strike the correct balance between protecting the public and safeguarding judicial independence.

Judges and Parliament

Parliamentary disqualification (Clause 94)

484. There was a clear division of opinion within the Committee between those who agreed that senior judges who hold peerages should be disqualified from sitting and voting in the House and those who did not. Accordingly, we make no recommendation to the House.

A parliamentary committee

485. The Committee agrees that it is desirable for a committee of Parliament to act as a bridge between Parliament and the judiciary, particularly in the event of the senior judges being excluded from the House. Such a committee should not seek to hold individual judges to account. The advantages of a statutory committee were not obvious to the Committee and a clear majority preferred the joint committee option. We recognise that Parliament itself will wish to consider this issue further.

APPENDIX 1: ORDERS OF REFERENCE

Monday 8 March 2004

Constitutional Reform Bill [HL] — The Queen’s consent was signified; then it was moved by the Lord Falconer of Thoroton that the bill be now read a second time; after debate, the motion was agreed to; then it was moved by the Lord Falconer of Thoroton that the bill be committed to a Committee of the Whole House; then it was moved by the Lord Lloyd of Berwick, as an amendment thereto, to leave out “Committee of the Whole House” and insert “Select Committee”; the amendment was agreed to (see division list); then the original motion, as amended, was agreed to.

Monday 22 March 2004

Constitutional Reform Bill [HL] — It was moved by the Chairman of Committees that, as proposed by the Committee of Selection, the following Lords be named of the Select Committee on the bill:

Viscount Bledisloe
Lord Carlisle of Bucklow
Lord Carter
Lord Craig of Radley
Lord Crickhowell
Lord Elder
Lord Falconer of Thoroton (*Lord Chancellor*)
Baroness Gibson of Market Rasen
Lord Goodhart
Lord Holme of Cheltenham
Lord Howe of Aberavon
Lord Kingsland
Lord Lloyd of Berwick
Lord Maclennan of Rogart
Lord Richard (*Chairman*)
Lord Windlesham

That it be an instruction to the Committee that they should report the bill to the House not later than Thursday 24 June next;

That the Committee have power to appoint specialist advisers;

That the minutes of evidence taken before the Committee from time to time shall, if the Committee think fit, to be printed; and

That the Committee do meet on Wednesday 24 March at 5 o’clock;

After debate, the motion was agreed to.

APPENDIX 2: CONSTITUTIONAL REFORM BILL [HL] SELECT COMMITTEE

The members of the Committee which conducted this inquiry were:

Viscount Bledisloe
 Lord Carlisle of Bucklow
 Lord Carter
 Lord Craig of Radley
 Lord Crickhowell
 Lord Elder
 Lord Falconer of Thoroton (Lord Chancellor)
 Baroness Gibson of Market Rasen
 Lord Goodhart
 Lord Holme of Cheltenham
 Lord Howe of Aberavon
 Lord Kingsland
 Lord Lloyd of Berwick
 Lord Maclennan of Rogart
 Lord Richard (Chairman)
 Lord Windlesham

Declarations of Interests:

Viscount Bledisloe

**12(e) Remunerated directorships*

Trustee, Equitas Holdings Ltd

**12(f) Regular remunerated employment*

Practice as Barrister

**12(g) Controlling shareholdings*

Shareholding in Peter Cheyney Ltd (a private company) (with family)

**13(a) Significant shareholdings*

Shareholding in Peter Cheyney Ltd (a private company)

**13(b) Landholdings*

Together with family trusts, ownership and management of a landed estate in West Gloucestershire, engaged in farming, forestry, property etc

Lord Carlisle of Bucklow

15(d) Office-holder in voluntary organisations

Chairman, Drugwatch Trust

Chairman, Friends of St. Wilfrid's Church, Mobberley, Cheshire

Trustee, Campaign for Children with Leukaemia

Lord Carter

**12(e) Remunerated directorships*

Chairman, British Chicken Marketing Group

Vice-Chairman, English Farming and Food Partnerships

Vice-Chairman, British Association of Biofuels and Oils (BABFO) (unpaid)

**13(a) Significant shareholdings*

32% of the shares in a private farming company which is in the process of being wound up

**13(c) Financial interests of spouse or relative or friend*

Wife is non-executive director of a private farming company which is in the process of being wound up

15(d) Office-holder in voluntary organisations

Vice President of the Farmers' Club

President, Forestry and Timber Association

President, Royal Association of British Dairy Farmers

16(a) Trusteeships

Trustee of the Andrew Carter Trust (a small family charity set up in memory of son which makes grants to disabled people)

The Shaw Trust (employment of disabled people)

Phunkett Foundation (cooperatives)

Village Retail Services Association

16(b) Voluntary organisations

Fellow, Royal Agricultural Societies

Hon. Member, Guild of Agricultural Journalists

Lord Craig of Radley

15(d) Office-holder in voluntary organisations

Fellow, Commonwealth Partnership for Technology Management Ltd

President (RAF), The "Not Forgotten" Association

Vice Chairman of Council, RAF Benevolent Fund

Vice President, Forces Pension Society

President, Royal Air Force Club

16(b) Voluntary organisations

Life Member, RAFA

Lord Crickhowell

**12(a) Parliamentary consultancy agreements*

Consultant, Associated British Ports Holdings plc (£15,000 per annum)

**12(e) Remunerated directorships*

Chairman, ITNET plc

Lord Elder

**12(d) Non-parliamentary consultant*

Consultant, The Smith Institute

Consultant, Forth Ports Plc

Adviser to Daval International Ltd

Consultant, First Group PLC

15(d) Office-holder in voluntary organisations

Chancellor, Al-Maktoum Institute for Arabic and Islamic Studies

Member of the Action Committee for the Scottish National Photography Centre

Lord Falconer of Thoroton

**12(f) Regular remunerated employment*

In receipt of Ministerial salary

**13(b) Landholdings*

Homes in London and Nottinghamshire; joint ownership (with wife) of two flats in London occupied by an employee and a member of wife's family (from whom rent is received); also, co-ownership of a house formerly inhabited by father now rented out

**13(c) Financial interests of spouse or relative or friend*

Wife is a Queen's Counsel practising from 4 Brick Court, Temple, London. She also owns a small cottage (rented) in Flintham, Nottinghamshire

Baroness Gibson of Market Rasen

15(c) Office-holder in pressure groups or trade unions
Member, AMICUS (former National Official of AMICUS)
Trustee, RoSPA (Royal Society for the Prevention of Accidents)
15(d) Office-holder in voluntary organisations
Chair, Andrea Adams Trust
Vice President, Royal Society for the Prevention of Accidents
President, British Diversity Awards

Lord Goodhart

15(c) Office-holder in pressure groups or trade unions
Vice President, International Commission of Jurists
Trustee, Fair Trials Abroad
Vice Chair of Council, JUSTICE
15(d) Office-holder in voluntary organisations
Trustee, Airey Neave Trust

Lord Holme of Cheltenham

**12(d) Non-parliamentary consultant*
Special Adviser to Chairman, Rio Tinto plc
**12(e) Remunerated directorships*
Adviser, NTL
Chairman of the Advisory Board, ISG (Industrial Services Group - an environmental clean-up company in California)
Chairman of the Board, Globescan International, Toronto, Canada (23 March 2004)
Director, Africa International Financial Holdings Llc, Boston, USA (23 March 2004)
Member of the Advisory Board, Liberty Global Partners, Boston
Member of the Advisory Board, Montrose Associates
Member of the Advisory Board, Venture Exchange, Toronto, Canada (30 September 2003)
15(a) Membership of public bodies
Chairman of Governors, English College in Prague
Chancellor, University of Greenwich
15(d) Office-holder in voluntary organisations
Chairman, Advisory Board, British-American Project
Chairman, Centre for the Advancement of Sustainable Development Partnerships
Chairman, Hansard Society for Parliamentary Government
Chairman, Royal African Society (23 March 2004)
Vice-Chairman LEAD International (23 March 2004)
Council Member, Overseas Development Institute

Lord Howe of Aberavon

**12(d) Non-parliamentary consultant*
Occasional consultancy work for Jones Day (a US law firm)
15(a) Membership of public bodies
Bencher of the Middle Temple
Chairman, Steering Committee of Inland Revenue's Tax Law Rewrite Project
15(b) Trusteeships of cultural bodies
Chairman and Trustee, Thomson Foundation
Trustee, Cambridge Commonwealth Trust
Trustee, Cambridge Overseas Trust
Trustee, Rajiv Gandhi (UK) Foundation

15(c) Office-holder in pressure groups or trade unions

Board Member, Britain in Europe

President, Consumers' Association

15(d) Office-holder in voluntary organisations

Council Member, French Aspen Institute

Member, International Advisory Council, Stanford University (California, USA) Institute for International Studies

President, Great Britain China Centre

President, Russian Enterprise Trust

President, Academy of Experts

President, National Centre for Young People with Epilepsy

Lord Kingsland

**12(f) Regular remunerated employment*

Barrister, 2 Harcourt Buildings, EC4Y 9DB

15(d) Office-holder in voluntary organisations

Chairman, Board of Trustees, Plymouth Marine Laboratory clg (unpaid)

Lord Lloyd of Berwick

**13(b) Landholdings*

Woodland near Chichester and in Central Wales

Rental income from a house at Strand-on-the-Green, London W4 (27 October 2003)

15(a) Membership of public bodies

Retired Lord of Appeal in Ordinary

15(d) Office-holder in voluntary organisations

President of Outlook Foundation (which provides residential accommodation for those between 18 and 25 with severe learning difficulties)

President, East Sussex Rifle Association

Trustee, Brighton West Pier Trust

Vice President, Corporation of the Sons of the Clergy

President, Sussex Downsmen

President, Sussex Heritage Trust

Lord MacLennan of Rogart

**13(b) Landholdings*

Croft house in Sutherland

15(b) Trusteeships of cultural bodies

Director, Fruitmarket Gallery, Edinburgh

Director, National Youth Orchestra of Scotland

Director, Northlands Creative Glass, Lybster, Caithness

Lord Richard

**12(f) Regular remunerated employment*

Occasional income as a QC

**13(a) Significant shareholdings*

World Trade Centre Holdings (150 shares)

15(d) Office-holder in voluntary organisations

Chairman, Lease (leasehold advisory service)

Lord Windlesham

15(b) Trusteeships of cultural bodies

Vice-Chairman, Ditchley Foundation

16(a) Trusteeships

Prisoner's Education Trust

Butler Trust (Chairman)

16(b) Voluntary organisations

British Legion

Burford Society

Friends of the Ashmolean Museum, Oxford

Friends of the British Museum

Oxford Preservation Trust

Victim Support

APPENDIX 3: MINUTES OF PROCEEDINGS

Wednesday 24 March 2004

Present:

Viscount Bledisloe	Lord Goodhart
Lord Carlisle of Bucklow	Lord Holme of Cheltenham
Lord Carter	Lord Howe of Aberavon
Lord Craig of Radley	Lord Kingsland
Lord Crickhowell	Lord Lloyd of Berwick
Lord Elder	Lord Maclennan of Rogart
Lord Falconer of Thoroton	Lord Windlesham
Baroness Gibson of Market Rasen	

The Lord Richard in the Chair

The declarations of relevant interests are made.

Professor Andrew Le Sueur is appointed Specialist Adviser.

The Committee deliberate.

Ordered, That the uncorrected transcripts of oral evidence given, unless the Committee otherwise orders, be published on the Internet.

Ordered, That the Committee be adjourned to Thursday 1 April at 4 p.m.

Thursday 1 April 2004

Present:

Viscount Bledisloe	Lord Goodhart
Lord Carlisle of Bucklow	Lord Holme of Cheltenham
Lord Carter	Lord Howe of Aberavon
Lord Craig of Radley	Lord Kingsland
Lord Crickhowell	Lord Lloyd of Berwick
Lord Falconer of Thoroton	Lord Maclennan of Rogart
Baroness Gibson of Market Rasen	Lord Windlesham

The Lord Richard in the Chair

The Order of Adjournment is read.

The proceedings of Wednesday 24 March are read.

The Committee deliberate.

The following witnesses are examined:

The Rt Hon Lord Falconer of Thoroton QC, Mr Edward Adams, Mr Alastair Clegg and Mr Jonathan Freeman.

Ordered, That the Committee be adjourned to Tuesday 6 April 2004 at 10 a.m.

Tuesday 6 April 2004

Present:

Viscount Bledisloe	Baroness Gibson of Market Rasen
Lord Carlisle of Bucklow	Lord Goodhart
Lord Carter	Lord Howe of Aberavon
Lord Craig of Radley	Lord Kingsland
Lord Crickhowell	Lord Lloyd of Berwick
Lord Elder	Lord Windlesham
Lord Falconer of Thoroton	

The Lord Richard in the Chair

The Order of Adjournment is read.

The proceedings of Thursday 1 April 2004 are read.

The Committee deliberate.

The following witnesses are examined:

Professor Robert Stevens and Professor Robert Hazell, UCL Constitution Unit; Dr Kate Malleson, London School of Economics; and Lord Rees-Mogg.

Ordered, That the Committee be adjourned to Tuesday 20 April 2004 at 10 a.m.**Tuesday 20 April 2004**

Present:

Viscount Bledisloe	Lord Goodhart
Lord Carlisle of Bucklow	Lord Holme of Cheltenham
Lord Carter	Lord Howe of Aberavon
Lord Craig of Radley	Lord Kingsland
Lord Crickhowell	Lord Lloyd of Berwick
Lord Elder	Lord MacLennan of Rogart
Lord Falconer of Thoroton	
Baroness Gibson of Market Rasen	

The Lord Richard in the Chair

The Order of Adjournment is read.

The proceedings of Tuesday 6 April 2004 are read.

The Committee deliberate.

The following witnesses are examined:

Lord Mackay of Clashfern, Mr Roger Smith, Director of JUSTICE; and Lord Ackner.

Ordered, That the Committee be adjourned to Thursday 22 April 2004 at 4 p.m.

Thursday 22 April 2004

Present:

Viscount Bledisloe	Baroness Gibson of Market Rasen
Lord Carlisle of Bucklow	Lord Goodhart
Lord Carter	Lord Howe of Aberavon
Lord Craig of Radley	Lord Kingsland
Lord Crickhowell	Lord Lloyd of Berwick
Lord Elder	Lord MacLennan of Rogart
Lord Falconer of Thoroton	Lord Windlesham

The Lord Richard in the Chair

The Order of Adjournment is read.

The proceedings of Tuesday 20 April 2004 are read.

The Committee deliberate.

The following witnesses are examined:

Lord Bingham of Cornhill and Lord Nicholls of Birkenhead; and Professor the Lord Norton of Louth

Ordered, That the Committee be adjourned to Tuesday 27 April 2004 at 10 a.m.

Tuesday 27 April 2004

Present:

Viscount Bledisloe	Baroness Gibson of Market Rasen
Lord Carlisle of Bucklow	Lord Goodhart
Lord Carter	Lord Howe of Aberavon
Lord Craig of Radley	Lord Kingsland
Lord Crickhowell	Lord MacLennan of Rogart
Lord Elder	Lord Windlesham
Lord Falconer of Thoroton	

The Lord Richard in the Chair

The Order of Adjournment is read.

The proceedings of Thursday 22 April 2004 are read.

The Committee deliberate.

The following witnesses are examined:

Lord Woolf, Lord Chief Justice of England and Wales; Mr Peter Williamson, President, Mr Russell Wallman, Director of Strategic Policy, the Law Society; Mr Stephen Irwin QC, Chairman and Mr Richard Drabble QC, the Bar Council.

Ordered, That the Committee be adjourned to Thursday 29 April 2004 at 4 p.m.

Thursday 29 April 2004

Present:

Viscount Bledisloe	Lord Goodhart
Lord Carlisle of Bucklow	Lord Holme of Cheltenham
Lord Carter	Lord Howe of Aberavon
Lord Craig of Radley	Lord Kingsland
Lord Crickhowell	Lord Lloyd of Berwick
Lord Elder	Lord Maclennan of Rogart
Lord Falconer of Thoroton	Lord Windlesham
Baroness Gibson of Market Rasen	

The Lord Richard in the Chair

The Order of Adjournment is read.

The proceedings of Tuesday 27 April 2004 are read.

The Committee deliberate.

The following witnesses are examined:

Mr Duncan L Murray, Mr Gerard A Brown and Mr Michael P Clancy OBE, the Law Society of Scotland; Lord Hope of Craighead; and Sir Thomas Legg KBE QC and Sir Hayden Phillips GCB, Permanent Secretary, Department for Constitutional Affairs.

Ordered, That the Committee be adjourned to Tuesday 4 May 2004 at 10 a.m.

Tuesday 4 May 2004

Present:

Viscount Bledisloe	Baroness Gibson of Market Rasen
Lord Carlisle of Bucklow	Lord Goodhart
Lord Carter	Lord Holme of Cheltenham
Lord Craig of Radley	Lord Howe of Aberavon
Lord Crickhowell	Lord Lloyd of Berwick
Lord Elder	Lord Maclennan of Rogart
Lord Falconer of Thoroton	

The Lord Richard in the Chair

The Order of Adjournment is read.

The proceedings of Thursday 29 April 2004 are read.

The Committee deliberate.

The following witnesses are examined:

Lord Justice Thomas and Lady Justice Arden, and Mr Roy Martin, Faculty of Advocates.

Ordered, That the Committee be adjourned to Thursday 6 May 2004 at 4 p.m.

Thursday 6 May 2004

Present:

Viscount Bledsiloe	Lord Goodhart
Lord Carlisle of Bucklow	Lord Holme of Cheltenham
Lord Craig of Radley	Lord Howe of Aberavon
Lord Crickhowell	Lord Kingsland
Lord Falconer of Thoroton	Lord Lloyd of Berwick
Baroness Gibson of Market Rasen	Lord Maclennan of Rogart
	Lord Windlesham

The Lord Richard in the Chair

The Order of Adjournment is read.

The proceedings of Tuesday 4 May 2004 are read.

The Committee deliberate.

The following witnesses are examined:

Lord Cullen of Whitekirk, Lord President of the Court of Session; Professor Sir Colin Campbell, Chairman for the Judicial Appointments Commission; and the Rt Hon Sir Brian Kerr, Lord Chief Justice of Northern Ireland

Ordered, That the Committee be adjourned to Tuesday 11 May 2004 at 10 a.m.

Tuesday 11 May 2004

Present:

Viscount Bledisloe	Baroness Gibson of Market Rasen
Lord Carlisle of Bucklow	Lord Goodhart
Lord Carter	Lord Holme of Cheltenham
Lord Craig of Radley	Lord Howe of Aberavon
Lord Crickhowell	Lord Lloyd of Berwick
Lord Elder	Lord Maclennan of Rogart
Lord Falconer of Thoroton	Lord Windlesham

The Lord Richard in the Chair

The Order of Adjournment is read.

The proceedings of Thursday 6 May 2004 are read.

The Committee deliberate.

Ordered, That the Committee be adjourned to Thursday 13 May 2004 at 4 p.m.

Thursday 13 May 2004

Present:

Viscount Bledisloe	Baroness Gibson of Market Rasen
Lord Carlisle of Bucklow	Lord Goodhart
Lord Carter	Lord Howe of Aberavon
Lord Crickhowell	Lord Kingsland
Lord Craig of Radley	Lord Lloyd of Berwick
Lord Crickhowell	Lord Maclennan of Rogart
Lord Elder	Lord Windlesham
Lord Falconer of Thoroton	

The Lord Richard in the Chair

The Order of Adjournment is read.

The proceedings of Tuesday 11 May 2004 are read.

The Committee deliberate.

Ordered, That the Committee be adjourned to Tuesday 18 May 2004 at 10 a.m.**Tuesday 18 May 2004**

Present:

Viscount Bledisloe	Baroness Gibson of Market Rasen
Lord Carlisle of Bucklow	Lord Goodhart
Lord Carter	Lord Kingsland
Lord Craig of Radley	Lord Lloyd of Berwick
Lord Crickhowell	Lord Maclennan of Rogart
Lord Elder	Lord Windlesham
Lord Falconer of Thoroton	

The Lord Richard in the Chair

The Order of Adjournment is read.

The proceedings of Thursday 13 May 2004 are read.

The Committee deliberate.

Ordered, That the Committee be adjourned to Thursday 20 May 2004 at 4 p.m.

Thursday 20 May 2004

Present:

Lord Carlisle of Bucklow	Lord Falconer of Thoroton
Lord Carter	Lord Goodhart
Lord Craig of Radley	Lord Holme of Cheltenham
Lord Crickhowell	Lord Kingsland
Lord Elder	Lord Maclennan of Rogart
	Lord Windlesham

The Lord Richard in the Chair

The Order of Adjournment is read.

The proceedings of Tuesday 18 May 2004 are read.

The Committee deliberate.

Ordered, That the Committee be adjourned to Tuesday 25 May 2004 at 10 a.m.

Tuesday 25 May 2004

Present:

Viscount Bledisloe	Baroness Gibson of Market Rasen
Lord Carlisle of Bucklow	Lord Goodhart
Lord Carter	Lord Holme of Cheltenham
Lord Craig of Radley	Lord Howe of Aberavon
Lord Crickhowell	Lord Lloyd of Berwick
Lord Elder	Lord Maclennan of Rogart
Lord Falconer of Thoroton	Lord Windlesham

The Lord Richard in the Chair

The Order of Adjournment is read.

The proceedings of Thursday 20 May 2004 are read.

The Committee deliberate.

The following witnesses are examined:

Rt Hon Dame Sian Elias, Rt Hon Thomas Gault and Rt Hon Sir Kenneth Keith, the New Zealand Supreme Court; Rt Hon Colin Boyd QC, Lord Advocate, and Mr Paul Cackette; Mrs Sally Dickinson, Mrs Rachel Lipscomb, the Magistrates Association; and Mr Neil Clarke, the Justices' Clerks' Society

Ordered, That the Committee be adjourned to Thursday 27 May 2004 at 12 noon.

Thursday 27 May 2004

Present:

Viscount Bledisloe	Baroness Gibson of Market Rasen
Lord Carlisle of Bucklow	Lord Goodhart
Lord Carter	Lord Howe of Aberavon
Lord Craig of Radley	Lord Kingsland
Lord Crickhowell	Lord Lloyd of Berwick
Lord Elder	Lord Maclennan of Rogart
Lord Falconer of Thoroton	Lord Windlesham

The Lord Richard in the Chair

The Order of Adjournment is read.

The proceedings of Tuesday 25 May 2004 are read.

The Committee deliberate.

Ordered, That the Committee be adjourned to Tuesday 8 June 2004 at 10 a.m.

Tuesday 8 June 2004

Present:

Viscount Bledisloe	Baroness Gibson of Market Rasen
Lord Carlisle of Bucklow	Lord Goodhart
Lord Carter	Lord Howe of Aberavon
Lord Craig of Radley	Lord Lloyd of Berwick
Lord Crickhowell	Lord Maclennan of Rogart
Lord Elder	Lord Windlesham
Lord Falconer of Thoroton	

The Lord Richard in the Chair

The Order of Adjournment is read.

The proceedings of Thursday 27 May are read.

The Committee deliberate.

Ordered, That the Committee be adjourned to Thursday 10 June 2004 at 4 p.m.

Thursday 10 June 2004

Present:

Viscount Bledisloe	Lord Goodhart
Lord Carlisle of Bucklow	Lord Holme of Cheltenham
Lord Carter	Lord Howe of Aberavon
Lord Craig of Radley	Lord Kingsland
Lord Crickhowell	Lord Lloyd of Berwick
Lord Elder	Lord Maclennan of Rogart
Lord Falconer of Thoroton	Lord Windlesham
Baroness Gibson of Market Rasen	

The Lord Richard in the Chair

The Order of Adjournment is read.

The proceedings of Tuesday 8 June 2004 are read.

The Committee deliberate.

The Title of the bill is read and postponed.

The Clauses are considered.

Clause 1 is read and postponed.

Clauses 2 and 3 are read and agreed to.

Schedule 1 is read and the following amendments are made:

[Insert amendments 10 to 13, 16 to 18, 21, 22, 24-26, 28 to 111, 116 to 123, 127 to 169, 171 to 188, 190 to 197]

Then Schedule 1 as amended is agreed to.

Clauses 4 to 6 are read and agreed to.

Schedule 2 is read and the following amendments are made:

[Insert amendments 202 to 224]

Then Schedule 2 as amended is agreed to.

Clause 7 is read and agreed to.

Schedule 3 is read and the following amendments are made:

[Insert amendments 225 to 229]

Then Schedule 3 as amended is agreed to.

Clause 8 is read and agreed to.

Then after Clause 8 the following new clauses is agreed to:

[Insert amendment 230]

Schedule 4 is read and the following amendments are made:

[Insert amendments 231 to 240, 242 to 256]

Then Schedule 4 as amended is agreed to.

Then after Schedule 4 the following new schedule is agreed to:

[Insert amendment 257]

Clause 9 is read and the following amendments are made:

[Insert amendments 258 and 259]

Then Clause 9 as amended is agreed to.

Schedule 5 is read and the following amendments are made:

[Insert amendments 260 to 265]

Then Schedule 5 as amended is agreed to.

The question that Clause 10 stand part of the bill is disagreed to.

Clause 11, Schedule 6, Clauses 12 and 13 and Schedule 7 are read and agreed to.

Then after Schedule 7 the following new Schedule is agreed to:

[Insert amendment 266]

Clauses 14 to 16 are read and agreed to.

Clause 17 is read and the following amendments are made:

[Insert amendments 267 to 270]

Then Clause 17 as amended is agreed to.

Clauses 18 and 19 are read and agreed to.

Then, after Clause 19, the following new Clauses are agreed to:

[Insert amendments 271 to 276]

The question that Clauses 20 to 22 stand part of the bill is disagreed to.

Clause 23 is read and the following amendments are made:

[Insert amendment 277]

Clauses 24 to 26 are read and agreed to.

Clause 27 is read and the following amendments is made:

[Insert amendment 278]

Clause 27 as amended is agreed to.

Clauses 28 and 29 are read and agreed to.

Clause 30 is read and the following amendments are made:

[Insert amendments 280 to 282]

Clause 30 as amended is agreed to.

Clause 31, Schedule 8, and Clauses 32 to 41 are read and agreed to.

Clause 42 is read and the following amendment is moved by the Viscount Bledisloe:

[Insert amendment 283]

After debate the amendment is withdrawn and Clause 42 is agreed to.

Clause 43 is read and agreed to.

Clause 44 is read and the following amendment is moved by the Viscount Bledisloe:

[Insert amendment 284]

After debate the amendment is withdrawn and Clause 44 is agreed to.

Clauses 45 to 47 and Schedule 9 are read and agreed to.

Clause 48 is read and the following amendments are made:

[Insert amendments 285 to 287]

Clause 48 as amended is agreed to.

Clause 49 is read and agreed to.

Schedule 10 is read and the following amendments are made:

[Insert amendments 288 to 328]

Schedule 10 as amended is agreed to.

Clause 50 is read and the following amendment is moved by the Lord Kingsland:

[Insert amendment 329]

After debate the amendment is withdrawn and Clause 50 is agreed to.

Schedule 11 is read and the following amendments are made:

[Insert amendments 330 to 338]

Schedule 11 as amended is agreed to.

Clause 51 is read and the following amendments are moved by the Lord Kingsland:

[Insert amendments 339 and 340]

After debate the amendments are withdrawn.

The following amendment is then made:

[Insert amendment 341]

Clause 51 as amended is agreed to.

Clause 52 is read and the following amendment is made:

[Insert amendment 342]

After Clause 52, the following new Clause is agreed to:

[Insert amendment 343]

Clause 53 is read and the following amendments are made:

[Insert amendments 344 and 345]

Clause 53 as amended is agreed to.

Clause 54 is read and the following amendment is made:

[Insert amendment 346]

Clause 54 as amended is agreed to.

Clause 55 is read and the following amendment is made:

[Insert amendment 347]

Clause 55 as amended is agreed to.

Clause 56 is read and agreed to.

Clause 57 is read and the following amendments are made:

[Insert amendments 348 to 352]

Clause 57 as amended is agreed to.

After Clause 57 the following new Clause is agreed to:

[Insert amendment 353]

Clause 58 is read and the following amendment is made:

[Insert amendment 354]

Clause 58, as amended, is agreed to.

Clause 59 is read and the following amendment is made:

[Insert amendment 355]

Clause 59 as amended is agreed to.

Clause 60 is read and the following amendments are made:

[Insert amendments 357 to 359]

Clause 60 as amended is agreed to.

Clause 61 is read and the following amendment is made:

[Insert amendment 360]

Clause 61 as amended is agreed to.

Clause 62 is read and agreed to.

Clause 63 is read and the following amendments are made:

[Insert amendments 361 to 365]

Clause 63 as amended is agreed to.

After Clause 63 the following new Clause is agreed to:

[Insert amendment 366]

Clause 64 is read and the following amendment is made:

[Insert amendment 367]

Clause 64 as amended is agreed to.

After Clause 64 the following amendments are moved by the Lord Lloyd of Berwick:

[Insert amendments 369 to 374]

After debate the amendments are withdrawn.

Clause 65 is read and the following amendments are made:

[Insert amendments 375 to 376]

Clause 65 as amended is agreed to.

Schedule 12 is read and the following amendment is moved by the Lord Chancellor:

[Insert amendment 379]

Then it is moved by the Lord Lloyd of Berwick as an amendment thereto:

[Insert amendment 380]

After debate the amendment is withdrawn and the original amendment is agreed to.

Clause 66 is read and the following amendment is made:

[Insert amendment 381]

Clause 66 as amended is agreed to.

Clause 67 is read and the following amendments are made:

[Insert amendments 382 and 383]

Clause 67 as amended is agreed to.

Clause 68 is read and the following amendment is made:

[Insert amendment 384]

Clause 68 as amended is agreed to.

Clause 69 is read and the following amendments are made:

[Insert amendments 385 to 389]

Clause 69 as amended is agreed to.

Then after Clause 69, the following new Clause is agreed to:

[Insert amendment 390]

Clause 70 is read and the following amendment is made:

[Insert amendment 391]

Clause 70 as amended is agreed to.

Clause 71 is read and agreed to.

Clause 72 is read and the following amendment is made:

[Insert amendment 392]

Clause 72 as amended is agreed to.

Clause 73 is read and the following amendments are made:

[Insert amendments 393 to 394]

Clause 73 as amended is agreed to.

Clause 74 is read and agreed to.

Clause 75 is read and the following amendments are made:

[Insert amendments 395 to 398]

Clause 75 as amended is agreed to.

Clauses 76 to 80 are read and agreed to.

Clause 81 is read and the following amendments are moved by the Viscount Bledisloe:

[Insert amendments 399 to 401, 404]

After debate the amendments are withdrawn.

The following amendments are then made:

[Insert amendments 402 and 403]

Clause 81 as amended is agreed to.

Clause 82 is read and agreed to.

Clause 83 is read and the following amendments are moved by the Viscount Bledisloe:

[Insert amendments 405, 408 to 410]

After debate the amendments are withdrawn.

Then the following amendments are moved by the Lord Lloyd of Berwick:

[Insert amendments 406 and 407]

After debate the amendments are withdrawn.

Clause 83 is read and agreed to.

Clause 84 is read and the following amendment is moved by the Lord Lloyd of Berwick:

[Insert amendment 411]

After debate the amendment is withdrawn.

Then the following amendments are moved by the Viscount Bledisloe:

[Insert amendments 412 and 413]

After debate, the amendments are withdrawn and Clause 84 is agreed to.

Clause 85 is read and the following amendment is made:

[Insert amendment 414]

Clause 85 as amended is agreed to.

Clauses 86 and 87 are read and agreed to.

Clause 88 is read and the following amendments are made:

[Insert amendments 415 to 418]

Clause 88 as amended is agreed to.

Clause 89 is read and the following amendments are made:

[Insert amendments 419 to 420]

Clause 89 as amended is agreed to.

Clause 90 is read and the following amendment is made:

[Insert amendment 421]

Clause 90 as amended is agreed to.

Clause 91 is read and agreed to.

Clause 92 is read and the following amendment is made:

[Insert amendment 422]

Clause 92 as amended is agreed to.

Clause 93 is read and the following amendments are made:

[Insert amendments 423 and 424]

Clause 93 as amended is agreed to.

Clause 94 is read and agreed to.

Clause 95 is read and the following amendment is made:

[Insert amendment 425]

Schedule 13 is read and the following amendment is made:

[Insert amendment 426]

Schedule 13 as amended is agreed to.

Clause 96 is read and the following amendments are made:

[Insert amendments 427 and 428]

Clause 96 as amended is agreed to.

Clause 97 is read and the following amendment is made:

[Insert amendment 429]

Clause 97 as amended is agreed to.

Clause 98 is read and agreed to.

Clause 99 is read and the following amendments are made:

[Insert amendments 430 and 432]

Clause 99 as amended is agreed to.

Clause 100 is read and agreed to.

Schedule 14 is read and the following amendments are made:

[Insert amendments 433 and 434]

Schedule 14 as amended is agreed to.

Clause 101 is read and agreed to.

Schedule 15 is read and the following amendments are made:

[Insert amendments 435 to 461]

Schedule 15 as amended is agreed to.

Clause 102 is read and agreed to.

Clause 103 is read and the following amendment is made:

[Insert amendment 462]

Clause 103 as amended is agreed to.

Clause 104 is read and agreed to.

Further consideration of the bill (in respect of Clause 1, postponed) is adjourned.

Ordered, That the Committee be adjourned to Tuesday 15 June 2004 at 10 a.m.

Tuesday 15 June 2004

Present:

Lord Carlisle of Bucklow	Lord Goodhart
Lord Carter	Lord Holme of Cheltenham
Lord Craig of Radley	Lord Howe of Aberavon
Lord Crickhowell	Lord Kingsland
Lord Elder	Lord Lloyd of Berwick
Lord Falconer of Thoroton	Lord MacLennan of Rogart
Baroness Gibson of Market Rasen	Lord Windlesham

The Lord Richard in the Chair

The Order of Adjournment is read.

The proceedings of Thursday 10 June 2004 are read.

The Committee deliberate.

Ordered, That the Committee be adjourned to Thursday 17 June 2004 at 4 p.m.

Thursday 17 June 2004

Present:

Lord Carlisle of Bucklow	Lord Goodhart
Lord Carter	Lord Howe of Aberavon
Lord Craig of Radley	Lord Kingsland
Lord Crickhowell	Lord Lloyd of Berwick
Lord Elder	Lord MacLennan of Rogart
Lord Falconer of Thoroton	Lord Windlesham
Baroness Gibson of Market Rasen	

The Lord Richard in the Chair

The Order of Adjournment is read.

The proceedings of Tuesday 15 June 2004 are read.

The Committee deliberate.

Ordered, That the Committee be adjourned to Tuesday 22 June 2004 at 10 a.m.

Tuesday 22 June 2004

Present:

Viscount Bledisloe	Lord Goodhart
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Lord Carlisle of Bucklow	Lord Howe of Aberavon
Lord Carter	Lord Holme of Cheltenham
Lord Craig of Radley	Lord Kingsland
Lord Crickhowell	Lord Lloyd of Berwick
Lord Elder	Lord Maclennan of Rogart
Lord Falconer	Lord Windlesham
Baroness Gibson of Market Rasen	

The Lord Richard in the Chair

The Order of Adjournment is read.

The proceedings of Thursday 17 June 2004 are read.

The Committee deliberate.

It is moved by the Chairman that the bill be further considered in respect of Clause 1. The same is agreed to. It is moved by the Lord Chancellor, before Clause 1, to insert the following new Clause:

[Insert amendment A1]

After debate, the amendment is withdrawn.

Clause 1 is read and the following amendments are moved by the Lord Lloyd of Berwick:

[Insert amendments 1, 3-5, 9]

After debate, the amendments are withdrawn.

Then the following amendment is moved by the Viscount Bledisloe:

[Insert amendment 2]

After debate, the amendment is withdrawn.

Then the following amendment is moved by the Lord Kingsland:

[Insert amendment 8]

After debate, the amendment is withdrawn and Clause 1 is agreed to.

The Title of the bill is again read and agreed to.

Ordered, That the Lord in the Chair do report the bill to the House with amendments.

The Committee is adjourned to Thursday 24 June 2004 at 4:45 p.m.

Thursday 24 June 2004

Present:

Lord Carlisle of Bucklow	Lord Goodhart
Lord Carter	Lord Howe of Aberavon

Lord Craig of Radley

Lord Crickhowell

Lord Elder

Lord Falconer

Baroness Gibson of Market Rasen

Lord Kingsland

Lord Lloyd of Berwick

Lord MacLennan of Rogart

Lord Windlesham

The Lord Richard in the Chair

The Order of Adjournment is read.

The proceedings of Tuesday 22 June 2004 are read.

The Committee deliberate.

The Chairman's draft Report is laid before the Committee.

The said draft Report is read and considered.

Paragraphs 1 to 485 are agreed to.

The draft Report is agreed to without amendment.

Ordered, That the Lord in the Chair do make the Report to the House.

The Committee is adjourned.

APPENDIX 4: LIST OF WITNESSES

The following witnesses gave evidence. Those marked * gave oral evidence.

Lord Ackner *
 Lord Alexander of Weedon QC Working Party
 Ross Gilbert Anderson
 Lady Justice Arden DBE, Court of Appeal *
 Association of Personal Injury Lawyers
 Association of Women Barristers
 Professor John Bell QC (hon) FBA, University of Cambridge
 Lord Bingham of Cornhill *
 Blackstone Society
 Professor Vernon Bogdanor FBA, Oxford University
 Colin Boyd QC, Lord Advocate *
 Lord Brightman
 British and Irish Ombudsman Association
 Professor Sir Colin Campbell, Commission for Judicial Appointments *
 Lord Justice Carnwath CVO, Court of Appeal
 David Christie
 Clerk of the Parliaments
 Clifford Chance LLP
 Lord Cooke of Thorndon
 Commission for Judicial Appointments *
 Richard Cornes, Essex University
 Council on Tribunals
 Dr Stephen Cretney QC (hon) FBA, All Souls College, Oxford
 Lord Cullen of Whitekirk, Lord President of the Court of Session *
 Lord Donaldson of Lymington
 Ecclesiastical Judges Association
 Dame Sian Elias GNZM, Chief Justice of New Zealand Supreme Court *
 Lord Elton TD
 Faculty of Advocates *
 Faculty Office of the Archbishop of Canterbury
 Fawcett Society
 Edward Garnier QC MP (Harborough, Conservative)
 Justice Thomas Gault DCNZM, Judge of New Zealand Supreme Court *
 General Council of the Bar of England and Wales *
 Professor John Griffith FBA
 Baroness Hale of Richmond, Lord of Appeal in Ordinary
 Professor Robert Hazell, UCL Constitution Unit *
 Lord Hope of Craighead, Lord of Appeal in Ordinary *
 Lord Jauncey of Tullichettle
 Professor J A Jolowicz QC, Trinity College, Cambridge
 JUSTICE *
 Judges' Council
 Justices' Clerks' Society *
 Sir Kenneth Keith KBE, Judge of the New Zealand Supreme Court *
 Sir Brian Kerr, Lord Chief Justice of Northern Ireland *
 Lords of Appeal in Ordinary
 Law Society *
 Law Society of Scotland *
 Sir Thomas Legg KBE QC *

Liberal Democrat Lawyers Association
Lord Chancellor *
Mr DGB Lyon
Lord Mackay of Clashfern KT *
Dr Kate Malleson, London School of Economics *
Magistrates Association *
Professor Hector MacQueen
Lord Morris of Aberavon KG QC
Lord Nicholls of Birkenhead *
Lord Nolan
Professor the Lord Norton of Louth *
Edward Nugee QC
The Odysseus Trust
Aidan O'Neill QC
Sir Hayden Phillips GCB, Permanent Secretary, Department for
Constitutional Affairs *
Lord Rees-Mogg *
Royal Society of Edinburgh
Mark Ryan
Sir Konrad Schiemann, Court of Justice of the European Communities
Professor Ian Scott, University of Birmingham
Mr Michael Shrimpton
South Wales Bench Chairmen/Cadeiryddion y Fainc De Cymru
Professor Robert Stevens, UCL Constitution Unit *
Lord Justice Thomas, Court of Appeal *
Sir Michael Wheeler-Booth KCB, Magdalen College, Oxford
Professor Diana Woodhouse, Oxford Brookes University *
Lord Woolf, Lord Chief Justice of England and Wales *

The following written evidence has not been printed, but is available for inspection at the House of Lords Record Office (020 7219 5314)

Avon and Somerset Magistrates' Courts
Cambridgeshire Magistrates' Courts Service
Ecclesiastical Law Society
Roger Everest
Lord Simon of Glaisdale QC
Greater London Magistrates' Courts Authority
Lancashire Magistrates' Courts Service
Richard Rhodes
University of Kent at Medway, Constitutional Reform Group

APPENDIX 5: CALL FOR EVIDENCE

Remit

A House of Lords Select Committee has been set up to consider the Constitutional Reform Bill and to report on the Bill to the House by Thursday 24 June 2004.

The Constitutional Reform Bill covers wide-ranging issues including the arrangements to replace the Office of Lord Chancellor, the creation of a Supreme Court, and judicial appointments.

Membership

Lord Bledisloe	Lord Goodhart
Lord Carlisle of Bucklow	Lord Holme of Cheltenham
Lord Carter	Lord Howe of Aberavon
Lord Craig of Radley	Lord Kingsland
Lord Crickhowell	Lord Lloyd of Berwick
Lord Elder	Lord Maclennan of Rogart
Lord Falconer of Thoroton (Lord Chancellor)	Lord Richard (Chairman)
	Lord Windlesham
Baroness Gibson of Market Rasen	

Programme

The Committee is likely to take oral evidence on the Bill at twice weekly meetings until mid-May. It will then consider the Clauses and schedules and any amendments tabled by Members. After the Committee has reported, the Bill will be re-committed to a Committee of the Whole House.

(If the Bill does not complete all its stages in the Lords by the end of the 2003–2004 session it is likely to be carried over to the 2004–2005 session of Parliament.)

Call for Evidence

Written evidence is invited on any aspect of the Bill. Evidence must arrive by **Friday 16 April 2004** and should be submitted to Rhodri Walters, Clerk of Committees, Committee Office, House of Lords, London SW1A 0PW. Where possible both a hard (paper) copy and an e-mail copy should be supplied (e-mail: fordk@parliament.uk).

Short submissions of no more than 4-sides of A4 paper are preferred. Submissions longer than 4 pages should include a summary.

Evidence must be clearly printed or typed on single sides of A4 paper, unstapled. Paragraphs should be numbered and all acronyms defined at first mention. If drawings or charts are included, these must be black-and-white and of camera-ready quality. Evidence should be signed and dated, with a note of the author's name and status, and of whether the evidence is submitted on an individual or corporate basis. Only one copy is required. All submissions will be acknowledged.

Evidence becomes the property of the Committee, and may be printed or circulated by the Committee at any stage. Contributors may publicise or publish

the evidence themselves, but in doing so must indicate that it was prepared for the Committee.

Persons who submit written evidence, and others, may be invited to give oral evidence. Oral evidence is usually given in public at Westminster, and transcripts are published. Persons invited to give oral evidence will be notified separately of the procedure to be followed and the topics likely to be discussed.

NOTES FOR EDITORS:

1. The Constitutional Reform Bill [HL] 2003/04 can be found at:

<http://www.publications.parliament.uk/pa/ld200304/ldbills/030/2004030.pdf>

2. The Explanatory Notes to the Bill can be found at:

<http://www.publications.parliament.uk/pa/ld200304/ldbills/030/en/04030x--.htm>

3. At second reading in the Lords on 8 March 2004 a motion was agreed that the Bill should be committed to a Select Committee.

4. The Constitutional Reform Bill Committee home page is at:

http://www.parliament.uk/parliamentary_committees/reformbill.cfm

APPENDIX 6: THE LORD CHANCELLOR'S JUDICIARY-RELATED FUNCTIONS: PROPOSALS (THE "CONCORDAT")

1. This document sets out more detail on the Government's proposals relating to the transfer of the Lord Chancellor's judiciary-related functions, as set out in the Secretary of State's Oral Statement to the House of Lords on 26 January 2004.

Overview

2. Abolition of the office of Lord Chancellor was announced in June 2003 as part of a suite of constitutional reforms, which also includes establishment of an independent Judicial Appointments Commission and a new Supreme Court. The overall aim of these reforms is to put the relationship between the executive, legislature and judiciary on a modern footing, respecting the separation of powers between the three. This paper sets out the Government's proposals relating to the transfer of the Lord Chancellor's judicial and judiciary-related functions in England and Wales that is intended to be affected by the Constitutional Reform Bill. These proposals are, of course, conditional on Parliamentary approval.

Key statutory responsibilities of the Secretary of State and the Lord Chief Justice

Principle

3. The key respective responsibilities of the Secretary of State and Lord Chief Justice should be set out in statute, so as to provide clarity and transparency in this relationship.

Application

4. The Bill will provide that:
 - (a) The Secretary of State for Constitutional Affairs is:
 - under a duty to ensure that there is an efficient and effective system to support the carrying on of the business of the courts in England and Wales, as set out in Part 1 of the Courts Act 2003.
 - accountable to Parliament for the overall efficiency and effectiveness of the administration of the court system, including the proper use of public resources voted by Parliament.
 - responsible for ensuring that the public interest is served in decisions taken on matters affecting the judiciary in relation to the administration of justice.
 - responsible for supporting the judiciary in enabling them to fulfil their functions for dispensing justice.
 - (b) Neither the Secretary of State, nor any other Minister, will have any role in particular judicial decisions of individual judges.

- (c) The Lord Chief Justice is:

- responsible for ensuring that the views of the judiciary in England and Wales are effectively represented to Parliament, to the Government, and to the Secretary of State in particular, in such manner as the Lord Chief Justice considers appropriate.
- responsible for ensuring that appropriate structures are in place to ensure the well-being of and training and provision of guidance for the judiciary.
- responsible for ensuring that appropriate structures are in place for the deployment of individual members of the judiciary and for the allocation of work within the courts.

Judicial independence

Principle

5. The new arrangements should reinforce the independence of the judiciary.

Application

6. A general statutory duty will be imposed on the Government, all those involved in the administration of justice and all those involved in the appointment of judges to respect and maintain judicial independence.
7. In addition, there will be a specific statutory duty falling on the Secretary of State for Constitutional Affairs to defend and uphold the continuing independence of the judiciary.

Judicial posts held by the Lord Chancellor

Principle

8. The Secretary of State will not be a judge and shall not sit in a judicial capacity.

Application

9. All statutory provisions conferring on the Lord Chancellor a judicial office will be amended to remove such references. Functions exercised by the Lord Chancellor in a judicial capacity should be transferred to the Lord Chief Justice (or other judicial office-holder, as appropriate).

Leadership of the judiciary in England and Wales

Principle

10. It is important to ensure that the roles and responsibilities of the most senior judiciary are clear in the new arrangements.

Application

11. The Bill will provide that the Lord Chief Justice is to assume the title of “President of the Courts of England and Wales”. The courts intended to be covered by this title are as follows: the Court of Appeal, the High Court, the Crown Court, the county courts and the magistrates’ courts.

12. The Lord Chief Justice will no longer act as president of the Queen's Bench Division. A new title of "President of the Queen's Bench Division" will be provided for and a new, separate, appointment will be made to this post. The appointment will be made in accordance with the provisions for the appointment of other Heads of Division.
13. A new statutory title of "Head of Criminal Justice" will be created. This post is to be held *ex officio* by the Lord Chief Justice or, after consultation with the Secretary of State, his nominee.
14. A new statutory title of "Head of Family Justice" will be created; this post is to be held *ex officio* by the President of the Family Division. The existing statutory title of "Head of Civil Justice" will be held by the Master of the Rolls *ex officio*. New statutory titles of "Deputy Head of Family Justice" and "Deputy Head of Criminal Justice" should be provided for. Following the Courts Act 2003 model of the Deputy Head of Civil Justice, these posts are not to be automatically filled, but there will be a power that the Lord Chief Justice may appoint to these posts, after consultation with the Secretary of State. Those eligible to be appointed will be judges of the Court of Appeal.
15. The current title of "Vice-Chancellor of the Supreme Court" will be replaced with a new title of "Chancellor of the Chancery Division" and he will be recognised as the president of the Chancery Division.

Oath-taking

Principle

16. It will not be appropriate for judges to be sworn in by the Secretary of State; those who do so now should instead take their oaths in the presence of the Lord Chief Justice.

Application

17. All statutory provisions relating to oath-taking by judges will be amended to replace "Lord Chancellor" with "Lord Chief Justice".
18. The swearing-in of the Lord Chief Justice will be undertaken by the Master of the Rolls, as the next most senior member of the judiciary, in the presence of the other Heads of Division.

Provision of resources

Principle

19. As set out in Part 1 of the Courts Act 2003, the Secretary of State will be under a duty to "ensure that there is an efficient and effective system to support the carrying on of the business of the courts in England and Wales" and "that appropriate services are provided for those courts". The Secretary of State is responsible for the provision and allocation of resources for the administration of justice (including resourcing the judiciary and the education and training of the judiciary within that system). Resources cover financial, material and human resources. The Secretary of State is accountable to Parliament for his decisions as to the allocation of resources and for the effectiveness and efficiency of the system.

20. Arrangements will be put in place to ensure that the judiciary can be effectively involved in the resource planning of the Unified Courts Agency and the Department for Constitutional Affairs, to ensure that the judiciary is enabled to have early engagement with the new agency and Department at a strategic level, including on issues concerning resource plans and bids.

Application

21. The Secretary of State is responsible for the pay, pensions and terms and conditions of the judiciary.
22. The Secretary of State will be responsible for providing the staff and resources, including financial resources, necessary for the Lord Chief Justice to carry out his functions, including his relations with the media. It is not intended to provide specifically for this responsibility in the Bill. The office of the Lord Chief Justice will be responsible for accounting to the Department for the expenditure allocated to him.
23. Prior to the transfer of any functions to the Lord Chief Justice, the Secretary of State will determine, after consultation with the Lord Chief Justice, the resources necessary in order that the Lord Chief Justice can effectively carry out those functions which have been assigned to that office. The level of such resources will be reviewed on an annual basis by the Permanent Secretary and the Lord Chief Justice.
24. The Framework Document for the new Unified Courts Agency will set out its responsibilities and methods of operation. This Document will be made available in the libraries of both Houses of Parliament. The Framework Document will set out the manner in which involvement of the judiciary is to be achieved; specifically:
- a senior member of the judiciary will be a non-executive member of the Board for the new agency;
 - at least two separate bilateral discussions during the year between the Chief Executive of the new agency and representatives of the Judges' Council will be held, concentrating on providing the opportunity for judicial input into future resource planning of the agency.
25. In addition to this, at a Departmental level:
- a senior member of the judiciary will be a non-executive member of the Corporate Board of the Department for Constitutional Affairs;
 - 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 Public Service Agreement is being worked up, and then again before final Departmental allocations are made after the settlement. Such meetings will be held at a similar stage in non-Spending Review years, focussing on the delivery arms of the Department.

Deployment

Principle

26. The Secretary of State, in consultation with the Lord Chief Justice, will be responsible for the efficient and effective administration of the court system.

This includes setting the framework for the organisation of the courts system (such as geographical and functional jurisdictional boundaries).

27. The Lord Chief Justice will be responsible for the posting and roles of individual judges, within the framework set by the Secretary of State.
28. Real and effective partnership between the Government and the judiciary is seen as being paramount, particularly in this area. Therefore, all significant issues should be decided after consultation or, for those where responsibility must be equally shared, by concurrence.

Application

Numbers, assignment and authorisations of judges to Divisions, Circuit and Districts

29. The Secretary of State will be responsible, after consulting the Lord Chief Justice, for determining the overall number of judges required, including the number required for each Division, jurisdiction and region and the number required at each level of the judiciary; and for the provision of the courts, their location and sitting times and consequent administrative staffing to meet the expected business requirement.
30. Subject to the Secretary of State's decisions above, and the recommendations of the Judicial Appointments Commission for the appointment of new judges to particular posts, the Lord Chief Justice will be responsible, after consulting the Secretary of State, for determining which individual judge should be assigned to which Division, Circuit, District, or Court in accordance with the requirement.
31. The Lord Chief Justice will be responsible, after consulting the Secretary of State, for the authorisation of individual members of the judiciary to sit in particular levels of court other than their usual level (within the statutory framework). In respect of the deployment of Circuit Judges and Recorders to sit in the High Court, the Lord Chief Justice will select from a list he is to maintain of those considered suitable, which will be agreed with the Judicial Appointments Commission.

Distribution of business and conferring of jurisdiction

32. Functions dealing with the distribution of business between courts at different levels (e.g. as between the High Court and County Courts) will transfer to the Secretary of State, with a requirement for consultation with the Lord Chief Justice.
33. Generally, functions dealing with the distribution of business within the same level will be exercised by the Lord Chief Justice, with the concurrence of the Secretary of State. Functions dealing with the distribution of business within Divisions of the High Court will transfer to the Lord Chief Justice, with a requirement for consultation with the Secretary of State.
34. Order-making powers for conferring jurisdiction on specific courts will transfer to the Secretary of State, to be exercised with the concurrence of the Lord Chief Justice.
35. Order-making powers regarding the destination of appeals and where classes of proceedings should be commenced will transfer to the Secretary of State, with a requirement for consultation with the Lord Chief Justice.

Allocation of work to courts/judges

36. The judges are responsible for deciding on the assignment of cases to particular courts and the listing of those cases before particular judges, working with the Court Service (Secretary of State) as at present.
37. The Lord Chief Justice will be responsible, after consultation with the Secretary of State, for deciding the level of judge appropriate to hear particular classes of case (including the issuing of Practice Directions in that regard).
38. The Lord Chief Justice will be responsible, after consultation with the Secretary of State as to for example, numbers, criteria, levels, for the authorisation of individual judges to hear specified cases or classes of case.

Nominations

39. There is a range of nominations to various posts, both permanent and temporary, which are very similar to deployment issues. For example, particular judges may be nominated to deal with specific areas of business, such as patents cases. Such nominations will be made by the Lord Chief Justice, after consultation with the Secretary of State.

Magistrates' deployment issues

40. Section 19 of the Courts Act 2003 provides that rules may make provision for committees (which will build on the current Bench Training and Development Committees) to have certain functions, including responsibility for advising the Lord Chancellor in relation to authorisations of justices as members of family proceedings courts or youth courts, and granting or revoking such authorisations.
41. The general responsibility for this authorisation function will transfer to the Lord Chief Justice in accordance with the general policy in relation to the professional judiciary. It will not be practicable for the Lord Chief Justice personally to issue authorisations to individual magistrates. The Lord Chief Justice will instead be given statutory responsibility, in consultation with the Secretary of State, for making the rules setting out the framework within which authorisations are made and the training which will need to have been completed in order to obtain a particular authorisation. The detailed arrangements as to the granting of individual authorisations will then be handled locally.

Caveat relating to deployment functions with resource implications

42. Functions relating to deployment which have significant implications for resources will transfer to the Lord Chief Justice, with a requirement for the concurrence of the Secretary of State. Examples include authorising certain judicial office-holders to sit beyond their retirement age or to continue hearing a specific case beyond their retirement.

‘Leadership’ posts

Principle

43. The nomination of judges to fill posts that provide judicial leadership, but which do not involve formal promotion, will fall to the Lord Chief Justice either with the concurrence of or in consultation with the Secretary of State.

Application

44. The majority of judicial appointments are planned to fall within the remit of the Judicial Appointments Commission (JAC). In particular, the JAC will handle all appointments to judicial office which require a formal competition. There is a range of posts, however, that do not involve formal promotion to a more senior judicial level (and in which the JAC will not be involved), which can be classed as providing judicial leadership. Such posts are often held for a limited period of time.
45. Examples of the types of post and how these will be handled are set out in the table below:

Post	Concurrence or Consultation
Senior Presiding Judge	Concurrence ¹
Presiding Judges	Concurrence ¹
Resident Judges * (other than where competition required i.e. Senior Resident Judges)	Concurrence ¹
Deputy Chief Justice *	Consultation
President, Employment Appeal Tribunal	Consultation
Vice-President, Court of Appeal (Civil)	Consultation
Vice-President, Court of Appeal (Criminal)	Consultation
Vice-President, Queen’s Bench Division	Consultation
Chancery Supervising Judges *	Consultation
Family Division Liaison Judges *	Consultation
Temporary Chairman of various tribunals (where existing chairman is prevented from discharging his duties i.e. for reasons of sickness)	Consultation

**These posts are non-statutory and it is not intended to place them on a statutory footing*

¹ The Secretary of State will be able to object to the appointment proposed by the Lord Chief Justice within a specified time period, to be agreed between the two, after which his consent will be assumed.

Appointments to committees, boards and similar bodies

Principle

46. The Secretary of State will have responsibility for determining the framework regarding the appointment of judicial office-holders to committees, boards and similar bodies.
47. The Lord Chief Justice will have responsibility for determining which individual judges should be appointed to such bodies.

Application

48. The Secretary of State, after consultation with the Lord Chief Justice (and others as required), will determine the level, mix and numbers of judges required for any such bodies.
49. The Lord Chief Justice, after consultation with the Secretary of State, will be responsible for determining which individual judge should serve, subject to any formal appointments procedures required, for example, in the Code of Practice of the Office of the Commissioner for Public Appointments. It is understood that the Code will not normally apply to appointments made by the Lord Chief Justice.

The making of procedural rules for judicial fora

Principle

50. In general, functions relating to the allowing of procedural rules of court will transfer to the Secretary of State. The making of such rules will rest with the relevant rule committees, where such a committee exists. Where no rule committee exists, functions relating to such rule-making will be exercised by the Lord Chief Justice, with the concurrence of the Secretary of State.

Application

Rule-making where rule committee is responsible

51. The power to allow rules will transfer from the Lord Chancellor to the Secretary of State.
52. The power to disallow rules will transfer from the Lord Chancellor to the Secretary of State with a new requirement that the Secretary of State must provide written reasons in the event that he decides to disallow rules.
53. The power of the Lord Chancellor to alter rules made by a rule committee, subject to consultation with that committee will be repealed. In its place, there will be a new power to provide that the Secretary of State may require a rule committee to change the rules to achieve a particular desired outcome. It would then be for the committee to amend the rules they had made and re-submit them. There will be a corresponding duty on the committee, in accordance with this requirement, to change rules required by the Secretary of State within a reasonable period. Rules made in accordance with such a requirement will remain subject to the Secretary of State's powers to allow or disallow.

54. There will also be a more general power for the Secretary of State to require a rule committee to make new rules on specific issues so as to achieve a particular desired outcome. As above, rules made in accordance with such a requirement will remain subject to the Secretary of State's powers to allow or disallow.
55. The Secretary of State, after consultation with the Lord Chief Justice, will also exercise the power to amend, repeal or revoke any enactments governing practice and procedure to facilitate the making of rules considered necessary/desirable.

Rule-making where no rule committee exists

56. There are a number of existing rule-making powers conferred on the Lord Chancellor alone and the general policy outlined above will be followed. In practice, this will mean that the rule-making powers will transfer to the Lord Chief Justice, but (to mirror the allowing and disallowing powers) the concurrence of the Secretary of State will be required. The two new powers of the Secretary of State to require changes to existing rules or new rules to achieve a particular desired outcome are to be applicable for such rule-making.

Rules for tribunals

57. As announced by the Government in March 2003, a White Paper on tribunals' reform is to be published. Given this, for those tribunals for which the Lord Chancellor currently exercises rule-making powers, such functions will transfer for the time being to the Secretary of State. No change will be made for those tribunals where rule-making powers rest with other Secretaries of State.

Rule committee appointments

Principle

58. Appointments of non-judicial members of rules committees will be exercised by the Secretary of State, in consultation with the Lord Chief Justice. Appointments of judicial members of rules committees will be exercised by the Lord Chief Justice, after consultation with the Secretary of State.

Application

59. Statutory provisions concerning the appointment of non-judicial members of rules committees will transfer to the Secretary of State, to be made after consultation with the Lord Chief Justice. Requirements concerning others who are to be consulted will remain.
60. Statutory provisions concerning the appointment of judicial members of rules committees will transfer to the Lord Chief Justice, to be made after consultation with the Secretary of State. Requirements concerning others who are to be consulted will remain.
61. The Secretary of State, with the concurrence of the Lord Chief Justice, will exercise statutory functions concerning the ability to amend the composition of rules committees.

Practice Directions

Principle

62. The Lord Chief Justice will make Practice Directions, with the concurrence of the Secretary of State. The model introduced by Section 74 of the Courts Act 2003 regarding the making of criminal Practice Directions should be applied uniformly across civil and family business and in all levels of court.

Application

63. The Lord Chief Justice may, with the concurrence of the Secretary of State, give directions as to the practice and procedure of the criminal, civil and family courts.
64. This function may be delegated by the Lord Chief Justice, with the expectation that the power would usually be delegated to the Heads of Justice. Others may make directions only with the approval of the Lord Chief Justice and the Secretary of State.
65. The Lord Chief Justice may act without the concurrence of the Secretary of State for directions concerning guidance as to the law or making of judicial decisions.

Education and training

Principles

66. The Lord Chief Justice is responsible for the provision and sponsorship of judicial training within the resources provided by the Secretary of State.

Application

67. Responsibility for assessing the need for and providing training of professional judicial office-holders should remain, as now, with the Judicial Studies Board, broadly as set out in the Memorandum of Understanding.
68. The Lord Chief Justice will, after consultation with the Secretary of State, appoint the Chair and members of the body delivering judicial training (the Judicial Studies Board). Committee members will continue to be appointed by the Chair, who will consult the Lord Chief Justice instead of the Lord Chancellor.
69. The Lord Chief Justice will be required to appoint *ex officio* members of the body to represent the Secretary of State, as happens now.
70. In line with the arrangements for the professional judiciary, the Lord Chief Justice will also be responsible for the provision and sponsorship of training for the magistracy and tribunal members (in consultation with the Secretary of State) within the resources provided by the Secretary of State. Where there are existing statutory arrangements for the training of certain tribunals' members, however, these will continue as they are at present.
71. As now, the Judicial Studies Board will set out the framework for the training of the magistracy, and provide some national training material, but it will continue to be the case that delivery of training will be managed at a local level by magistrates' courts staff in the form of legal advisers, Justices' Clerks and Training Managers. Following the implementation of the Courts Act

2003, these will be Department for Constitutional Affairs staff. There will need to be a partnership between the Lord Chief Justice and the Secretary of State over the deployment of staff who will have both training and administrative responsibilities.

72. These developments will be reflected in a revised Memorandum of Understanding, the terms of which will be agreed between the Secretary of State and the Lord Chief Justice.

Judicial complaints and discipline

Principles

73. The Lord Chief Justice and the Secretary of State are together responsible for providing a system for considering and determining complaints against the personal conduct of the judiciary.
74. High Court Judges and above can only be removed from office by The Queen, on an Address from both Houses of Parliament. Subject to this, a judicial office-holder will only be removed from office by the Secretary of State with the agreement of the Lord Chief Justice.
75. A judicial office-holder will only be suspended from sitting pending the outcome of an investigation if both the Lord Chief Justice and the Secretary of State agree to this action.
76. Judicial office-holders will be reprimanded, warned or advised as to their behaviour only by the Lord Chief Justice with the agreement of the Secretary of State, in accordance with the process outlined below.
77. In relation to magistrates and tribunal members, the Lord Chief Justice and Secretary of State may, by agreement, delegate the functions of suspending, reprimanding, warning or advising to a nominated judge or the Tribunal President as appropriate.

Application

Structure

78. The framework for handling complaints against the judiciary, magistrates and tribunal members will be set out in a protocol, agreed by the Lord Chief Justice and Secretary of State, which will be laid before Parliament and subject to the negative resolution procedure.
79. The Secretary of State will be responsible for providing and resourcing an effective and efficient complaints secretariat. An independent Head of Secretariat appointed in accordance with the paragraphs below will be responsible to both the Secretary of State and Lord Chief Justice.

The respective roles of the Lord Chief Justice and Secretary of State

80. The Lord Chief Justice and Secretary of State will be jointly responsible for the operation of the complaints system and jointly responsible for the final decisions in relation to individual complaints. All disciplinary sanctions will be decided by them jointly.
81. Sanctions short of removal will be administered by the Lord Chief Justice, in that he will write or speak to the office-holder concerned, or arrange for

another appropriate person to do so. The Secretary of State will be responsible, with the agreement of the Lord Chief Justice, for any decisions to remove judicial office-holders from office (subject to the Parliamentary procedures that apply to the higher judiciary).

82. The Secretary of State will be able to require a judicial investigation of a particular case. He will not be in the position of personally reprimanding judicial office-holders or requiring the Lord Chief Justice to reprimand judicial office-holders.
83. The Secretary of State is accountable to Parliament for the operation of the complaints and discipline system, in the same way that he is accountable for the administration of the courts system, but not for the outcome of individual cases. He will answer Parliamentary Questions on the complaints system, and will reply to letters from Members of Parliament and Peers. Where correspondence raises complaints about specific cases, these will be referred to the secretariat to deal with; they will provide a draft for the Secretary of State who will reply to the Member of Parliament or Peer concerned. Arrangements for consultation with the Lord Chief Justice about such correspondence will be set out in the complaints protocol. The Lord Chief Justice may also appear before the Commons Constitutional Affairs Select Committee to answer questions as necessary, but will not deal with individual cases.
84. The secretariat will prepare a quarterly statistical report to the Lord Chief Justice and Secretary of State about all the complaints that have been dealt with. The report will give details of the number and types of cases dealt with, and what the results of the complaints were, but will not give particularised details of individual cases or judicial office-holders.

Process: minor complaints²

85. Complainants can send their complaints to the Lord Chief Justice, the Secretary of State, the secretariat or an ombudsman (whose role is described in paragraphs 100-102, below). All complaints will be forwarded to the secretariat.
86. If complaints are clearly ill-founded or misconceived (e.g. about judicial decisions) the secretariat will reject them on behalf of the Lord Chief Justice and Secretary of State, giving the reasons for rejection.
87. If a complaint *prima facie* relates to personal conduct, but is minor (i.e. it would not, even if found to be true, justify considering whether to remove the judicial office-holder concerned), initial inquiries will be made by the secretariat in accordance with the protocol procedures. If, as a result of the initial inquiries, it becomes clear that the complaint is clearly unfounded, in that it raises no question of conduct, or is clearly untrue or mistaken, the secretariat will reject it.
88. If as a result of the initial inquiries, a complaint seems to be substantiated, or open to any doubt, it will be referred to an appropriate judge (depending on the seniority of the judicial office-holder complained of and the potential seriousness of the complaint) to consider and propose a course of action.

² For magistrates provisions, see paragraphs 103-07

The Judge's advice will be passed to the Lord Chief Justice and Secretary of State to decide what action to take.

89. Having considered the advice, the Secretary of State and the Lord Chief Justice may find that the complaint is in fact unsubstantiated, or so trivial as not to warrant further action, in which case it will be dismissed. Or they may find that the complaint is substantiated in whole or in part, and will decide what disciplinary action to take. They may decide that the Lord Chief Justice should write to the judicial office-holder formally reprimanding him, or write warning him as to future behaviour, or advising him to reflect further on the complaint; they may decide that the Lord Chief Justice should speak to the judicial office-holder concerned, or ask another judge to speak to him on his behalf. Both the Secretary of State and Lord Chief Justice must agree to the imposition of any disciplinary sanction. If the judicial office-holder is unhappy with the decision of the Lord Chief Justice and Secretary of State, he may ask for the matter to be referred to the Review Body (covered at paragraphs 96-99 below).
90. Before writing a disciplinary letter to a judicial office-holder, the Lord Chief Justice will consult the relevant Head of Division, Presiding Judge, President of Tribunal, Senior District Judge or other equivalent as appropriate.
91. Alternatively, if in the light of the investigation which has taken place either the Lord Chief Justice or the Secretary of State or both views the complaint as so serious that a judicial investigation is required, there will be a judicial investigation.

Process: serious complaints³

92. If either at first sight or after preliminary investigation it appears that a complaint is potentially so serious that, if the complaint turns out to be well founded, removal might be considered, or where the circumstances are so complex that an ordinary investigation is insufficient, the Lord Chief Justice and Secretary of State will appoint an investigating judge either on their own initiative or at the request of the ombudsman.
93. The investigating judge's report will be submitted to the Lord Chief Justice and the Secretary of State; they may accept its findings or either of them can refer the complaint and report to the Review Body for reconsideration. The judicial office-holder who is the subject of the complaint may also require that it be referred to a Review Body, as may the ombudsman.
94. The Review Body will make findings of fact and, where it deems it appropriate, make recommendations as to any sanction to be applied to the judicial office-holder. The Secretary of State and the Lord Chief Justice will be bound by any findings of fact and must decide, subject to any representations from the judicial office-holder concerned, whether or not to accept any recommendations of the Review Body. They may agree not to impose a sanction recommended by the Review Body, or to impose a lesser sanction, in the light of any representations made to them, but may not impose a sanction more severe than that recommended by the Review Body. No disciplinary action may be taken unless both the Lord Chief Justice and the Secretary of State agree that it is appropriate.

³ For magistrates provisions, see paragraphs 103-07

95. If the Lord Chief Justice and the Secretary of State agree that removal is justified, the Secretary of State will write to inform the judicial office-holder concerned, making it clear that he is acting with the consent of the Lord Chief Justice. In the case of a High Court Judge or above, the Secretary of State will then seek an address of both Houses.

The Review Body

96. A Review Body will be established on an *ad hoc* basis in cases where a complaint has been subject to judicial investigation and, either the Secretary of State or the Lord Chief Justice or both of them are not satisfied with the findings of the investigation; or where the judicial office-holder concerned asks for the complaint to be reviewed; or where the ombudsman refers a complaint to be considered by the Review Body.
97. The Review Body will reconsider the merits of the complaint, not merely the way in which it has been handled, and may invite further representations from the judicial office-holder concerned and any other interested parties.
98. In cases where removal is being considered, the Review Body will advise whether, in its view, removal could be justified in the circumstances of the case, although it will not take the decision whether to remove or not.
99. The Review Body will consist of two judges of appropriate seniority and two lay members, appointed by the Lord Chief Justice and the Secretary of State. The senior judicial member will chair and have a casting vote if necessary. If the Review Body is considering the case of a judge, one of the judicial members will be at the same level as the judge concerned. If the Review Body is considering the case of a magistrate, one of the members will be a magistrate. If the Review Body is considering the case of a tribunal member, one of the members will be a tribunal member (lay or judicial as appropriate).

The ombudsman

100. It will be open to a complainant or a judicial office-holder to complain about the handling of a complaint to an ombudsman. The ombudsman will also have a role in considering complaints about appointments: applicants who have complained to the Judicial Appointments Commission about the handling of their application, and who remain dissatisfied after the Commission has considered their complaint, will be able to refer their complaint to the ombudsman. In relation to conduct complaints, the ombudsman will review the handling of the complaint and may make recommendations to the Lord Chief Justice and Secretary of State but cannot make his own decision on the merits of a complaint; he cannot rebuke or reprimand a judicial office-holder, or decide to trigger procedures for removing a judicial office-holder from office. If the ombudsman finds that a complaint has not been considered properly, he can require that it be reconsidered, require that it be subject to judicial investigation, or refer it to the Review Body.
101. The ombudsman can consider the way in which particular complaints, or types of complaint have been dealt with at the request of either the Lord Chief Justice or the Secretary of State and can make recommendations.
102. The ombudsman will submit an annual report, which will be laid before Parliament, in which he will comment on the complaints he has dealt with in

an anonymised form, and on whether they have been handled in an effective and efficient way.

Complaints against magistrates

103. Complaints against magistrates will continue to be investigated, in the first instance, by the local Advisory Committees. If, on investigation, they consider that there is a need for disciplinary action, or if it is desired to remove a magistrate who is no longer sitting, the case will be referred to the complaints secretariat. Each advisory committee will also submit reports to the complaints secretariat from time to time in respect of the complaints which have not resulted in any action being taken.
104. The secretariat will consider the case and prepare advice for the Lord Chief Justice and the Secretary of State. Removal will be by the Secretary of State, with the agreement of the Lord Chief Justice. Any lesser disciplinary penalty will be imposed by the Lord Chief Justice, or a judge nominated by him, in agreement with the Secretary of State.
105. A judicial investigation of a case may take place if, after the preliminary investigation by the Advisory Committee, either the Lord Chief Justice or the Secretary of State decides, after consulting the other, that this is required.
106. A magistrate may ask for his case to be considered by the Review Body, which, in such a case, will include a magistrate as one of its four members.
107. Complaints about these cases may be considered by the ombudsman in the same way as other judicial complaints.

Tribunal members

108. Those tribunals with complaints procedures will continue to deal with complaints internally, referring to the complaints secretariat only those cases in which they wish formal disciplinary action to be taken or which otherwise warrant consideration by the Lord Chief Justice and Secretary of State.

Criminal convictions

109. The full disciplinary procedure is not gone through when a judicial office-holder is convicted of an offence actually or potentially carrying a sentence of imprisonment; this is viewed as generally incompatible with judicial office, and the office holder concerned is required to inform the Lord Chief Justice immediately. If the office holder wishes to argue that there are exceptional circumstances that mean that he should not be removed, he will be entitled to refer the matter to the Review Body. If he chooses not to refer the matter to the Review Body, and the Lord Chief Justice and the Secretary of State agree that removal is appropriate, the Secretary of State will either trigger the Parliamentary procedure or take steps to remove him as appropriate.

The status of the complaints secretariat

110. The complaints secretariat will have a status broadly equivalent to the Judicial Studies Board, but without a Complaints Board. There will be a Memorandum of Understanding setting out the nature of the links between the secretariat the Department for Constitutional Affairs and the Lord Chief

Justice. The staff will continue to be Department of Constitutional Affairs civil servants, as are the staff of the Judicial Studies Board.

111. The Head of the Secretariat will be selected by open competition, run by the Civil Service Commissioners, for a renewable term of three years. Representatives of the Secretary of State and Lord Chief Justice will also be involved in the selection process. The post-holder would assume civil service status (if an external appointee) for the duration of the contract. The Lord Chief Justice would have to approve renewal of the contract or a decision, for whatever reason, to terminate the contract early.

Records

112. The secretariat will maintain records of disciplinary action taken against judicial office-holders. This will be used to provide general statistical information, and will be made available to the Secretary of State in order, for example, to enable him to respond to Parliamentary Questions about the numbers of judicial office-holders who have been reprimanded. The secretariat will not comment publicly on whether or not a particular judicial office-holder has been subject to any disciplinary sanction, save that:
- the complainant in a case will always be told what the outcome is, including whether the judicial office-holder concerned has been reprimanded or removed from office; and,
 - the Lord Chief Justice and Secretary of State may agree in a particular case that public confidence in the justice system demands that the fact that a judicial office-holder has been subject to disciplinary action, or has been exonerated, be made public.
113. Information about particular judicial complaints, and other personal information held about judicial office-holders, will continue to be exempt from disclosure under the Data Protection Act and the Freedom of Information Act as it is at present.

Judicial Appointments Commission – process

114. This section sets out the proposed future process for judicial appointments currently made by the Lord Chancellor. The proposal covers four levels of appointment:
- Magistrates and General Commissioners of Income Tax;
 - All judicial appointments (other than the appointment of magistrates and General Commissioners of Income Tax) up to and including the High Court;
 - The Court of Appeal; and,
 - Heads of Division
115. This section also considers principles relating to judicial appointments that might be set out in legislation, and the membership of the Commission.

Magistrates and General Commissioners of Income Tax

116. Magistrates and General Commissioners of Income Tax have been appointed by the Lord Chancellor on the basis of advice from local Advisory Committees. The Judicial Appointments Commission will assume

responsibility for making recommendations to the Secretary of State for these appointments. The Secretary of State will make the appointment, with the same limited discretion to reject or to ask the Commission to reconsider as professional judicial appointments - as set out at Paragraph 120.

117. Administratively, however, the Commission will not be able to assume responsibility for dealing with appointments of the professional judiciary and of magistrates at the same time. The Commission will instead take on its role in magistrates' appointments and the appointment of General Commissioners of Income Tax when it informs the Secretary of State that it is ready to do so. In the interim period, recommendations from the Advisory Committees will be passed to the Lord Chief Justice, who will submit his approved list to the Secretary of State.
118. Members of the Advisory Committees will be appointed by the Secretary of State in concurrence with the Lord Chief Justice.

Judicial Appointments up to and including the High Court

119. For these appointments, the following process is proposed, up to the point at which a recommendation is made to the Secretary of State:
- a. The Secretary of State, after consultation with the Lord Chief Justice, shall inform the Judicial Appointments Commission (JAC) of a prospective vacancy (or vacancies) and their nature, unless the Lord Chief Justice and the Secretary of State agree that the vacancy need not be filled.
 - b. The JAC advertises the vacancy.
 - c. Applicants apply to the JAC.
 - d. The JAC is responsible for deciding on all aspects of the selection process up to the point at which a single candidate for each vacancy is recommended to the Secretary of State.
 - e. The JAC will identify selection panels to sift applications and interview candidates or otherwise conduct the appointments process. All panels will include at least one judicial office-holder whose seniority and experience is relevant to the posts under consideration.
 - f. The JAC, or a sub-committee of the JAC, will receive all the papers relating to a selection process, and will approve or amend the panel's recommendations.
 - g. Prior to making any decision as to which candidate(s) to recommend, the JAC must consult the Lord Chief Justice about the candidate or possible candidates.
 - h. The JAC will recommend to the Secretary of State the name of one candidate for appointment to each vacancy.
120. The JAC's recommendations – an outline of the process:
- The recommended candidate:
- a. The JAC will recommend to the Secretary of State one name for each vacancy.
 - b. The JAC will also submit their reasons for recommending that candidate.

c. The JAC will provide supporting papers on that candidate.

Other candidates:

d. The JAC will provide the names of those applicants whom the JAC considered appointable.

e. The JAC will provide papers on those applicants to the Secretary of State.

The Secretary of State's responsibility:

f. The Secretary of State has four options at this stage. He can:

i. accept the JAC's recommendation; or

ii. ask the JAC to reconsider, if he considers that the evidence submitted to him does not demonstrate that the recommended candidate meets the criteria, or if the evidence suggests that the recommended candidate is not the strongest candidate; or

iii. reject the JAC's recommended candidate, if he considers that there is some evidence that the candidate cannot be considered for a judicial appointment; or

iv. if the Secretary of State considers that the competition has not been conducted in a proper fashion, he may, after consultation with the Lord Chief Justice, require that the competition be re-run.

g. The Secretary of State must give reasons if he asks the JAC to reconsider, or if he rejects their recommendation.

Reconsideration:

h. If the Secretary of State asks the JAC to reconsider, the JAC can either confirm its initial recommendation, with reasons for doing so or recommend an alternative candidate, with reasons.

i. The Secretary of State may then reject the recommendation put forward by the JAC at this stage only if he considers that there is some evidence that the candidate cannot be considered for judicial appointment. He must give his reasons in writing for doing so. If the Secretary of State exercises his power to reject a candidate at this stage, having previously asked the JAC to reconsider, he is obliged to accept either their next recommended candidate or the candidate originally put forward.

j. If there is no reason to reject the recommendation, the Secretary of State is obliged to accept this further advice, and appoint one of the candidates put forward (whether the initial candidate, or a second recommendation).

Rejection:

k. If the Secretary of State rejects the JAC's first recommended candidate, the JAC must put forward an alternative candidate, giving reasons for their choice. If there is no alternative candidate, the competition must be re-run.

l. The Secretary of State can either accept the Commission's second recommendation, or ask them to reconsider.

- m. If the Secretary of State asks the JAC to reconsider, he is obliged, on receiving the further advice of the JAC, to appoint one of the candidates that have been recommended by the JAC (whether the alternative candidate or any second recommendation that may have been made after reconsideration).

Appointments to the Court of Appeal

121. The proposed process:

- a. The Secretary of State, after consultation with the Lord Chief Justice, shall inform the JAC of a prospective vacancy (or vacancies) and their nature, unless the Lord Chief Justice and the Secretary of State agree that the vacancy need not be filled.
- b. A senior appointments panel would be established by the JAC comprising:
 - i. the Lord Chief Justice (or a deputy chosen by him);
 - ii. a Head of Division, or other Court of Appeal judge appropriate to the vacancy chosen by the Lord Chief Justice;
 - iii. the chairman of the JAC (or a deputy chosen by him from among the lay members); and
 - iv. a further lay member of the JAC, chosen by the chairman.
- c. The Lord Chief Justice (or his deputy) will chair the panel and will have a casting vote.
- d. The process will be supported by the JAC and its staff and will be subject to the approval of the JAC;
- e. The panel will recommend one candidate for each vacancy, and will provide information in support of that recommendation. The panel will also provide the Secretary of State with the names of other candidates whom the panel considered, with their assessment of their suitability for appointment. The Secretary of State's powers will be the same as for more junior appointments: he will be able to ask the panel once to reconsider, and he will have the power to reject a candidate once. If necessary he could require the panel to restart the appointments process.

Appointments to Head of Division (including the Lord Chief Justice)

122. It is proposed that the appointments panel should be:

- i. the most senior of the judges from England and Wales who are members of the Supreme Court from England (or a deputy chosen by him);
- ii. the Lord Chief Justice or, if that is the post being appointed to, a Head of Division or other appropriate judge chosen by the senior judge of the Supreme Court from England and Wales (judges who are candidates for the vacancy cannot be chosen for the selection panel; nor can the Head of Division who is retiring);
- iii. the chairman of the JAC (or a deputy chosen by him from among the lay members); and
- iv. a further lay member of the JAC, chosen by the chairman.

123. The judge of the Supreme Court will chair the panel and will have a casting vote.
124. The panel will be required to consult the retiring Head of Division.
125. The process will be supported by the JAC and its staff and will be subject to the approval of the JAC.
126. The panel will recommend one candidate for each vacancy, and will provide information in support of that recommendation. The panel will also provide the Secretary of State with the names of other candidates whom the panel considered, with their assessment of their suitability for appointment. The Secretary of State's powers will be the same as for more junior appointments: he will be able to ask the panel once to reconsider, and he will have the power to reject a candidate once. If necessary he could require the panel to restart the appointments process.

Process following acceptance of the Commission's recommendations

127. Following the Secretary of State's acceptance of the JAC's recommendation:
 - a. For those appointments made by The Queen⁴, the Secretary of State will inform the JAC he has accepted their recommendation and forward the recommendation to the Palace, or to the Prime Minister for formal transmission to the Palace in the case of judges of the Court of Appeal and above.
 - b. For those appointments made by the Secretary of State, the successful candidate will be informed by the JAC that "the Secretary of State has appointed you on the recommendation of the Judicial Appointments Commission".
 - c. The JAC will inform all unsuccessful candidates, and provide feedback if required.
 - d. The Secretary of State will return to the JAC all papers relating to candidates.
 - e. The JAC will provide the Department for Constitutional Affairs with the information it needs on the successful candidate(s) for the purpose of fulfilling its obligations in relation to pay, pensions, terms and conditions and any related matters.
 - f. The JAC will provide the Lord Chief Justice with a copy of all relevant papers on file for the successful candidate(s). This will form the basis of the personnel file held by the Lord Chief Justice.
 - g. The JAC will hold the reserve list and will submit any recommendation for an appointment to be made from the list (i.e. an appointment without a further competition) to the Secretary of State, after consultation with the Lord Chief Justice. The Secretary of State will then have the same powers as in relation to a recommendation made after a competition.

⁴ Legislation will provide that holders of the offices of District Judge or Master, or equivalent judges of the High Court, appointed under s.89 of the Supreme Court Act 1981 will, in future, be appointed by The Queen.

Appointment principles

128. Primary legislation should provide that the sole criterion for making judicial appointments is merit.
129. Any requirements as to the appointments process, such as the expectation that the JAC will work to encourage a more diverse pool of potential appointees and will take account of the need for expert judicial knowledge in relation to particular posts, will be subject to Parliamentary scrutiny.
130. Any formal guidance for the JAC will also be subject to Parliamentary scrutiny.

Judicial Appointments Commission – membership

131. This section sets out the proposals for membership of the Judicial Appointments Commission.

Number and balance of membership

132. It is proposed that the balance of membership on the Commission should be as follows:
- Five judges:
 - Three judges of the Court of Appeal or High Court (including at least one Lord Justice of Appeal and at least one High Court Judge)
 - One Circuit Judge
 - One District Judge or equivalent (i.e. A Master or equivalent judge from the High Court appointed under s.89, Supreme Court Act 1981 or a District Judge of the county courts or a District Judge (Magistrates' Courts)).
 - Two lawyers:
 - One barrister
 - One solicitor
 - One magistrate
 - One tribunal member – who could be full time or fee paid and legal or lay
 - Six lay members who do not hold judicial office and are not practising lawyers (but may include non-practising academic lawyers), one of whom must have particular knowledge of social, cultural and economic factors in Wales.

Chair of the Commission

133. The chair should be one of the lay members of the Commission. The vice-chair should be the most senior judge on the Commission.

Appointment of Commissioners

134. Membership of the Commission will not be open to Members of Parliament, candidates for Parliament or civil servants.

135. Judicial members below the High Court, lay members and legal members should be appointed following full and open competition. These vacancies should be advertised, and appointments should be made by an independent panel (see paragraph 138), measuring candidates against published criteria.
136. The panel should make recommendations for appointment to the Secretary of State in line with Nolan principles. The Secretary of State would in turn make recommendations for appointment to The Queen.
137. The Judges' Council will nominate the judge of the Court of Appeal and the High Court judge. In providing nominations, the Judges' Council will provide information to the Secretary of State on how the nominees meet the criteria for appointment.

The appointing panel

138. The panel to appoint Commissioners will be chaired by the Commissioner for Public Appointments. The Lord Chief Justice will also be a member of the panel. A third member, who will be neither a member of the Government nor a civil servant, will be chosen by the Commissioner for Public Appointments. After being appointed by the panel, the chair of the Commission will join the panel for the appointment of other members.

Working arrangements

139. Commissioners will perform four key roles:
- i. Approving and selecting candidates and making recommendations for appointment to the Secretary of State;
 - ii. Overseeing the appointments process, and setting the strategy for the Commission;
 - iii. Examining how best to improve the appointments process, to make it more efficient, more effective, and better able to produce a judiciary appointed on merit and more reflective of society; and
 - iv. Advising the Secretary of State for Constitutional Affairs as required on matters relating to the appointment of the judiciary.
140. The length of tenure will be up to five years, although in the establishment phase tenures would need to be staggered with some appointments shorter than five years initially. The minimum length of service will be for three years, which is in line with the Code of Practice for Public Appointments.
141. There would also be the option for members to serve for another term of up to five years, provided they have given satisfactory service, making a total of ten years but no longer.
142. There should be statutory provision to ensure they cannot be removed from office for making a decision that is contrary to the will of those who appointed them. It is therefore proposed that the power to remove members should mirror that for other Non-Departmental Public Bodies: the Secretary of State for Constitutional Affairs may dismiss members if:
- a. they fail to exercise their functions for a continuous period of six months;
 - b. they have been convicted of a criminal offence;
 - c. they have been made bankrupt; or

- d. they are otherwise unfit to exercise their functions.
143. Members should be able to resign by notice in writing to The Queen.
144. A member of the Commission would be required to stand down if that member applied for a judicial post.

Other issues

Ministers of the Crown Act

145. Statutory functions which are to be transferred from the office of Lord Chancellor to the Secretary of State should fall specifically to the Secretary of State for Constitutional Affairs and the provisions of the Ministers of the Crown Act 1975 should be disapplied. This is essential given the specific duty relating to the Secretary of State for Constitutional Affairs' responsibility for defending and upholding judicial independence.

Transfer of functions to the judiciary

146. Unless there are specific reasons to the contrary, all functions that are to be transferred to the judiciary, or where the judiciary is to be consulted, shall be transferred to the Lord Chief Justice.

Delegation of functions by the Lord Chief Justice

147. The Bill will provide that any function that is to be transferred to the Lord Chief Justice may be delegated to another judicial office-holder. The Lord Chief Justice should also be permitted to transfer responsibility for those functions where he is to be consulted by the Secretary of State.

APPENDIX 7: SUMMARY REPORT OF THE ONLINE CONSULTATION ON THE CONSTITUTIONAL REFORM BILL

Background

The Hansard Society e-Democracy Programme is piloting innovative online consultation methods aimed at increasing public involvement and engagement with parliamentary decision making through the use of new media. We are interested in ways of informing representation and facilitating the broadest democratic participation.

The Select Committee on the Constitutional Reform Bill has been set up by the House of Lords to ensure that this Bill, which sets out to modernise the way in which the final court of appeal in this country is selected and organised, is thoroughly scrutinised. In order to gather a wider range of views on the Bill, the Committee commissioned an ‘online forum’ under the auspices of the Hansard Society to accompany its formal evidence-taking.

This online forum commissioned by the Select Committee on the Constitutional Reform Bill ran from 4 May 2004 for four weeks at www.tellparliament.net/constitutional. The Committee Secretariat provided background information about the inquiry, a list of the key questions for the online forum with a brief introductory note accompanying each of them.

Tellparliament.net/constitution was publicised through direct mailings, local media coverage, viral emails, web links and word of mouth. Although the site was designed with a view to encouraging people from all walks of life to take part in the online forum, the specialist subject of the inquiry failed to attract greater audiences and the general public. The majority of participants were experts in the field and came from the legal profession and academia. A list of organisations and academic institutions is available in Appendix 1.

Seventy-nine people registered to take part in the online forum at tellparliament.net/constitution and posted a total of 53 messages. The online forum was male-dominated. Though 18% of the participants registered on the site were female, none of them actually posted a message. As a comparison, in a recent online consultation on Human Reproductive Technology, run on behalf of the Science and Technology Select Committee at tellparliament.net/scitech, there was an even gender balance amongst participants.

The forum closed on 1 June 2004. This report summarises the responses to the online consultation, it does not aim to interpret or evaluate the views given or to make recommendations. All of the contributions to the online forum are available as a reference document and the web based discussion will be archived and accessible to view in full at www.tellparliament.net/constitution. (The full transcript is not published with this Report but will be placed in the House of Lords Record Office.)

This report is not given as a representative view of the population but as a method of representing the experience and expertise of a section of society. The extracts in *italics* have been taken directly from the messages posted in the consultation.

Discussion Summary

The online discussion was structured around four main questions:

‘What is your view of the proposal to abolish the post of Lord Chancellor?’

‘What do you think of the proposal to create a Judicial Appointments Commission to recruit and select judges?’

‘Should the Supreme Court (final court of appeal) remain within Parliament, or be set up as a separate institution?’

‘If a Supreme Court is established, should it be financially and administratively independent of Government?’

A section for ‘General Comments’ was also included. However, the overwhelming majority of posts were confined to discussions around the questions presented above.

The extracts included in this report reflect the depth and range of contributions to this consultation; they are, however, just a glimpse at the topics discussed. For a full account, readers are recommended to see the entire proceedings at www.tellparliament.net/constitution. The messages contain both technical and experiential detail that will greatly add to the understanding of the issues under consideration. During the debate, the Hansard Society moderator interjected asking questions designed to stimulate discussion or introduce relevant news bulletins regarding constitutional reform to the debate. Please see the full transcript of the discussion to see their questions.

General Comments

The General Comments forum followed the established model of internet forum posting which allows for online discussions to evolve organically along and according to the lines of interest of the participants. It was not heavily used as participants chose to direct their comments towards the questions put before them. Summaries of the main points raised in this section are laid out below and grouped thematically.

Access to Justice

Having worked in the field of civil justice for 28 years, I am not infrequently disappointed in our system. On the other hand, particularly at the higher end (High Court and above) on the whole, the system is good and the quality of the judges is high. It might move a bit more swiftly and accept changes more readily but this does not warrant wholesale change and I fear that new elites will flourish and inhabit the new system with their own types of rope ladder. We will not really achieve an objectively better system with these reforms. Alex

The poster was concerned that an objectively better system would not result from the reforms being proposed because, in his view, some of the virtues of the old system would be lost without any guarantee that the advantages envisioned in a new system could not be achieved through a more gradual evolution of the system.

‘What is your view of the proposal to abolish the post of Lord Chancellor?’

This question presented what the bill proposes (the abolition of the Lord Chancellor), who the Lord Chancellor is and what the role involves:

the Secretary of State for Constitutional Affairs, a Cabinet Minister in charge of the Department for Constitutional Affairs, with responsibility for policy on the courts system (amongst other things);

the head of the judiciary, appointing and disciplining judges;

a judge (although our current Lord Chancellor has chosen not to exercise his right to sit as a judge);

the Speaker of the House of Lords (a formal role with no real powers over the proceedings in the House).

Comments on this proposal were split. The initial reaction was simply yes or no—either in support of or against the elimination of the post. The issue of ‘the times’ came up with participants expressing that it is now the 21st century and that maybe the role should be redefined for the times. Conversely, other participants argued that the marching of time was no reason to do away with more traditional institutions.

Just because it is the 21st Century doesn’t mean that long established Government posts have to be abandoned. As head of the judiciary—a single head—the post of Lord Chancellor is as important as that of Queen. Creating additional posts would only increase costs. ppotter64

The discussion expanded from there into a debate of what the benefits would be of the removal of such a post, and what would be the associated costs. It was noted that there would be increased costs in delineating all of the roles filled by the Lord Chancellor into separate ones, but argued that it would allow for a better expression of the removed sections of responsibility. On the negative side, it was noted that the abolition of this office would raise unnecessary fears that the independence of the judiciary would be under threat and that it would be an unnecessary use of parliamentary and legislative time.

People associate the Lord Chancellor most in his executive role, as a member of the government. That is the function I am suggesting should retain the title of Lord Chancellor. To confer the title on a lesser function (such as Speaker in the Lords) or another public office would be even more confusing. The title should remain with the core role, which is to be Minister of Justice and Constitutional Affairs. Professor Robert Hazell

The discussion returned to the question of why the role of Lord Chancellor would necessarily need to be abolished. Participants expressed concern that the removal of the role of Lord Chancellor did not seem to really address the issue of the separation of powers. Other participants pointed to duplications that exist between the role of the Lord Chancellor and the recently created post of Secretary of State for Constitutional Affairs.

The task of Speaker of the House of Lords is a quaint, historical one. It is harmless, and I for one like quaint, historical, harmless things. They cause less grief than charmless, modern, damaging things like the Constitutional Reform Bill. David Radlet

The discussion then shifted to Lord Maugham who had been raised as an example of a Lord Chancellor who had been effective in his role, and who felt competent enough to offer a judicial opinion. This fed into discussions of whether persons appointed Lord Chancellor are suited to the role, but also whether the role itself was logical:

How can the LC be government’s voice in the judiciary, but protector of the judiciary from government? Both the same man? It’s a conflict of interest. The government’s voice in the judiciary should be through having the same entitlement as all the people to make fault findings against court decisions. The judiciary can’t be protected from government by a cabinet politician. Spread out the powers, or at least give the job to a Cross Bencher. Maurice Frank

The discussion moved away from this argument to whether or not the changes would fundamentally alter the constitutional and political relationships of British democracy. A recurring theme was the idea of the 'separation of powers'. Participants were not in agreement as to whether the separation of powers was something that the British system was built around.

There is no big problem that this proposal helps solve. It is based on a notion of separation of powers which is alien to the English Constitution. The English system is based on the mixture of powers, a commixture or intermixture in the words of J.J. Park in *Dogmas of the Constitution*, or a fusion of powers in the term of Walter Bagehot in *The English Constitution*. George Jones

The Rule of Law is fundamental to our form of civilisation, free market, democracy, & this principle is best maintained by constant vigilance to preserve the Separation of Powers within an unwritten (& so, flexible) Constitution of pragmatic rules. The Separation of Powers has been compromised in the latter part of the 20th century by massive parliamentary majorities and a weak, supervisory Constitutional Monarch, so enabling the Executive to dominate the Legislature. This situation needs sorting out but immediately is the threat of the Executive dominating the Judiciary too. This we must address with urgency. Mark Terrell

On the question of the 'separation of powers', a debate ensued as to whether the separation of powers was, in fact, a feature of the British system. The debate also covered whether this is effective in systems where it is employed, such as the United States. The argument was made that if one was to begin with a separation of powers, then the Prime Minister and the Cabinet would need to be removed from the House of Lords. Further, the point was raised that the full separation of the Executive from the Judiciary and the Parliament does not necessarily minimize complaints of undue influence being exercised by the Executive over the Judiciary. Other participants welcomed the move to a more delineated relationship between Parliament, the Executive and the Judiciary.

1. The separation of powers arguments seem to be overwhelming.
2. The statutory duty on ministers to recognise the independence of the judiciary is welcome. This is the crucial point. The convention and statutory duty of judicial independence needs to be asserted, perhaps even in statute, in its particulars. Recent Lord Chancellors have been lawyers at the peak of their profession and, it seemed, without further political ambition. The office is to be replaced in some of its functions by a Secretary of State who, first and foremost, is a politician who is likely to have continuing political ambitions which may be reflected in her or his view of the judiciary. However, the abolition of the office of Lord Chancellor does not in itself threaten independence:- the high quality of recent Lord Chancellors should not blind us to the open political partiality of earlier ones. HDavis

The discussion concluded with a discussion of the effectiveness of such an abolition, continuing the vein of the comment made by participant HDavis who noted the political aspect of the role and the fact that the Lord Chancellor, under the current system, seems to be accountable to no one but the Prime Minister. Participants concluded noting that the abolition of the post would provide for a symbolic separation from political intervention, but the question of the practicalities of such a move were left unresolved.

Abolition would be symbolic provided that the separation from political intervention was, in any case, made quite clear. It may be that a compromise to appease the sentimentalists would allow the description to continue for a non-

political personage. We're quite good at these illusions of tradition, and they usually work. Perhaps a noticeable change in the fancy dress would be cooler in both senses? Andrew Dundas

'What do you think of the proposal to create a Judicial Appointments Commission to recruit and select judges?'

This question presented the case that the current situation in England and Wales was that judicial appointments are primarily the responsibility of the Lord Chancellor. In addition it asked whether participants thought that the creation of a Judicial Appointments Commission was a more independent and accountable way of appointing judges? Should the Secretary of State for Constitutional Affairs retain the responsibility? Should he choose from a list of names or be given one recommendation?

Responses to this question were more homogenous. One participant pointed out that the debate had become polarised between the Judiciary and the Executive, to the effect that the Judiciary wants the selection of judges to be wholly removed from the hands of the Executive. Participants also added that there was no guarantee that the Judicial Appointments Commission would guarantee any more even handedness in the selection of judges than the current system, while greatly adding to the expenses associated with the selection and appointment of judges, with some arguing that the current proposal serves as an insult to current judges.

I am opposed to this proposal because it is an insult to the current judges. It implies they have been appointed in an improper manner and are not up to the job. But our judges are regarded throughout the world as the best, the most distinguished, models to be emulated. They are held in the greatest of respect. So what is the problem that needs to be solved by breaking away from a tried and trusted system? The answer is there is no problem. The motivation of the modernizers is fashionable political correctness that pays scant attention to quality and focusses on irrelevant social and cultural attributes. And, of course, the modernizers are infected by the alien ideological notion of separation of powers. They really should put away Montesquieu and De Lolme, and those influenced by such foreign observers who got it wrong, and study the history of English government as it happened. George Jones

Participants stressed the importance of the role of Parliament in the selection of judges. Participants argued that all three branches of government should play an active role in the selection of judges. There were also calls for the inclusion of lay people in the decision making process about judges.

To select judges is to give a direction to society and that is politics with a small "p". We choose people who have certain views and skills, and we seek a balance in the Bench as a whole. The present proposals for lay members makes them representatives of "civil society", rather than "political society". Politicians, for all their faults, do have both legitimacy and accountability. For all their personal dedication and qualities, lay members chosen from civil society will have neither. Linking the appointments process to Parliament would give authority to the lay members of the Commission in their discussions with the judicial and professional representatives. John Bell

Though the majority of views were opposed to this change, there were dissenting views. Such participants stressed that if a Judicial Appointments Commission could be guaranteed to be free from political influence or control, it seemed to be a good idea for the appointing of judges with the reservation that more senior

appointments be made by the Lord Chancellor. Others appreciated the clear guidelines that such legislation would produce for judicial appointments.

1. I favour of this on the grounds of transparency and formalising the process.
2. There is a case for slightly enhancing the role of the Secretary of State, who at the moment can, as understood, only refuse one name put forward by the Commission. The interesting question relates to the balancing of the “merit” criteria with the other “diversity” criteria. HDavis

However, the majority of participants who posted on this question were of the opinion that the selection of judges through a Commission, such as the one proposed, would not be an improvement in the way that judges were chosen.

Britain should be generally proud of the quality of its judges, even though such pride is sometimes not reflected in the tabloids. A judicial appointments commission it is proposed, should be independent – but independent of what? I would suggest it should be free of political and especially executive influence. Such a system we already have, and since this has served us well there is no need to change it.

It is essential to remember that the duty of a judge, at whatever level, is to uphold the law of Parliament. His/her political views are of no relevance to this duty. Neither should the political views of the selectors for the post be relevant. Consequently there is nothing but potential detriment in any proposal for either judges or their selectors to be made by executive appointment. David Winn

‘Should the Supreme Court (final court of appeal) remain within Parliament, or be set up as a separate institution?’

The question was put before participants in the context of the current state of affairs in which the final court of appeal currently resides within Parliament in the House of Lords.

Participants immediately expressed trepidations about this proposal, with worries of what other constitutional crises the creation of such a body would precipitate.

My only concern if the Supreme Court is separated would this lead to a UK constitution to separate the powers of Parliament and Judiciary. If so, then it should remain within Parliament. A written constitution like the US is unworkable and too rigid and should not be encouraged. If within Parliament who/ how would judges be chosen? This should be brought to the Dept of Constitutional Affairs with various options passed to a committee for final selection. panixxxx

Other participants felt that it might be a pointlessly symbolic exercise and that the Supreme Court (final court of appeal) should remain within the House of Lords.

If the name “House of Lords” is thought to be too elitist (a much misused word), let’s call it the Final Court of Appeal, as in Hong Kong. It is because the Final Court of Appeal does not have power to override the wishes of the legislature - and the legislature can reverse any decision of which it disapproves - that there is no real justification for depriving the House of Lords, as a legislative body, of the experience of the Law Lords, not only on the floor of the House, where they seldom speak on matters of a non-legal nature, but more importantly in the business of the Committees, where they do much more valuable, if generally unsung, work which few without their legal knowledge are qualified to do as well. Edward Nugee, QC

The issue of separation of powers once again raised its head in the discussion. Participants argued that the conception of the separation of powers motivating this decision was too basic and did not fully comprehend the ramifications of its actions, and further, even if the conception was expanded, that the notion of the separation of powers was one which is not compatible to the British system.

I oppose this proposal because it is based on the theoretical doctrine of separation of powers which is alien to our Constitution. We should welcome its fusion with parliament. The judiciary is enhanced by its location in the House of Lords, and the House of Lords is enhanced because the leading judges announce their decisions from it and play a part in its other proceedings. It is an asset for a legislative body to have the most eminent judges part of its membership. Such intermingling of powers facilitates understanding of each other's positions and helps achieve a consensus instead of a paralysing confrontation. George Jones

Participants also discussed the necessity of the Supreme Court having a place to sit. Interestingly, participants opposed to the idea of the Supreme Court, took issue that its coming into existence be delayed because it had no place to 'sit' as an institution.

How strange to delay the creation of an institution of law or government, because a building is not ready? If an institution is right to have, it is better to have it while coping with temporary facilities, than not to have it. Scottish and Welsh devolution was not postponed from beginning until after the buildings had been built. Railways don't usually stop running because a station is being modernised. Maurice Frank

Support was offered on the basis of the separation of powers, but that support was relatively muted. Two such arguments offered in favour were:

I support the idea of a Supreme Court established outside Parliament. The separation of powers arguments are convincing. An informed, fair minded person could reasonably take the view that a trial conducted by a judge who had already expressed himself or herself on the meaning and merits of the legislation in issue, was a trial tainted by an appearance of bias. To avoid this some Law Lords already have a self-denying practice and will not speak or vote in the chamber and independence simply gives institutional effect to this practice. HDavis

The Supreme Court is already de facto separate in most respects. It should now be made clearly and un-mistakenly, a separate Institution. That does not imply that we need a full written constitution. It may be convenient to allow the Supreme Court to be the final appeal court for the whole UK. There are potential conflict situations between the Regions and Countries within the UK (on the one hand) and Parliament (on the other) that might need the intervention of a Supreme Court. One way of avoiding that would be to declare that the UK Parliament is supreme, and hope that is never challenged. Andrew Dundas

Despite these arguments, the majority of the posts from participants came down in opposition to the proposal, with most participants arguing that the change either served no practical purpose or, in other extreme, actually served as a detriment to the Judiciary and the exercise of justice.

It is not reasonable to justify removing Law Lords from the second legislative chamber on grounds of the separation of powers, whatever relevance is placed on this concept. The danger to democracy is not from judges in the House of Lords obstructing the will of an elected government, but from the continuing failure of Parliament as a whole to control executive excesses. David Winn

'If a Supreme Court is established, should it be financially and administratively independent of Government?'

This question asked participants to look at the institutional linkages between the proposed newly separated Supreme Court and Parliament/the Executive. It asks whether the financial and administrative ties laid out in the bill including the Court's budget being part of the DCA's annual budget; the Secretary of State for Constitutional Affairs retaining some role in the appointment of Supreme Court judges; the Secretary of State having a role in disciplining judges; the Court being answerable to the Secretary of State for its administration; the Court's rules being subject to regulations drawn up by the Secretary of State; should be maintained.

Participants' response were mixed to this question. Initial response was that if the Supreme Court was set up independent of the House of Lords, then it should be fully independent. However, there was some objection to this point of view.

I am opposed because the removal of Treasury control over such an important chunk of public expenditure would damage Executive financial responsibility. The Judges would behave irresponsibly, continually wanting more public expenditure on their service. They would have no perspective wider than their own service, unlike the Treasury which has to have regard to demands from other public services and produce a set of priorities for public spending that balance with available resources. The way the judges will behave is already evident from their ambitions for grandiose new buildings. George Jones

It is silly to pretend that the proposed "Supreme Court" can be independent from the rest of government. It has to be paid for by the taxpayers; and that which is paid for by the taxpayers ought to be supervised by their representatives. It cannot be supreme for that matter, for that is the principal political and legislative quality of Parliament, of which the senior court would no longer be a part. David Radlett

A brief detour was taken to the question of the monarchy, with a participant arguing that the Legislature need not be as involved in the dispensing of money as it is, and if the monarchy had a stronger role it could play a greater role in the dispensing of funds to the court. The balance of opinion was that it is part and parcel with the idea of an independent Judiciary that the court be financially independent.

If you take the rationale of a supreme court as to secure the independence of the final court of appeal from the legislature, then it must also a fortiori be independent from the executive. There are obviously going to be some questions as to accountability but this should be balanced against the need to keep the two branches separate. David Christie

The question then shifted back to a debate of how to work the separate funding of an independent court. Participants suggested a number of ideas including strengthening the role of the Lord Chancellor, and then funnelling through that office to avoid interference from other areas of government. The debate concluded with no clear decision reached on the actual substance of the linkages proposed by the bill.

Well, yes. But how would it be funded other than from the Treasury? Some endowment perhaps? Realistically, no public body like this can be independent of government tax revenues and therefore should be accountable. The Supreme Court must be supervised by another body and needs to have its regular reports of activities and policies published and reviewed. I suggest those reviews could be accomplished by a Select Committee appointed by Parliament. Andrew Dundas

11 June 2004,

Milica Howell

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List of organisations taking part

4 New Square Chambers
Bournemouth University
Boyes Sutton & Perry
Cloisters Chambers
Cobden House Chambers
Commonwealth Lawyers Association
Doughty Street Chambers
Fishburn Hedges
Guild of Students
Holborn College
Law School Edinburgh University
London School of Economics
Newman Fitch Altheim Myers, P.C.
Office Depot International (UK) Ltd
People with High Functioning Autistic Disorders
School of Legal Studies, University of Wolverhampton
St Philips Chambers
The Constitution Unit
The Rainbow Project
TLT Solicitors
Trinity Hall, University of Cambridge
University of Huddersfield
University of Cambridge
University of Exeter
University of Kent
University of Kent at Medway
University of Leeds
University of Newcastle
University of Strathclyde
University of Wales Swansea
University of Warwick
Wilberforce Chambers

APPENDIX 8: LORDS OF APPEAL IN ORDINARY—INTERVENTIONS IN THE HOUSE OF LORDS

	No.	Debate
Lord Bingham of Cornhill	0	
Lord Nicholls of Birkenhead	1	12 February 2004 – Debate on Government’s proposals for a Supreme Court and other judicial reforms
Lord Steyn	0	
Lord Hoffmann	1	12 February 2004 – Debate on Government’s proposals for a Supreme Court and other judicial reforms
Lord Hope of Craighead	5	12 February 2004 – Debate on Government’s proposals for a Supreme Court and other judicial reforms 21 May 2003 – Debate on relationship between judiciary, legislature and executive and judicial participation in public controversy 13 May 2002 – Proceeds of Crime Bill, Committee 23 July 2001 – Debate on EU Select Committee Report on Minimum Standards in Asylum Procedures 31 October 2000 – Criminal Justice and Court Services Bill, Report
Lord Saville of Newdigate	0	
Lord Scott of Foscote	11	21 May 2004 – Debate on EU Select Committee Report on The Future Role of the European Court of Justice 20 June 2003 – Debate on EU Select Committee Report on Future Status of EU Charter of Fundamental Rights 9 May 2003 – Debate on Report of EU Select Committee on Review of Scrutiny of European Legislation 6 May 2003 – Extradition Bill, Second Reading 1 November 2002 – Debate on Report of EU Select Committee on Asylum Applications: Who Decides? 14 October 2002 – Debate on Report of EU

		<p>Select Committee on Scrutiny of European Business</p> <p>23 April 2002 – Debate on Report of EU Select Committee on European Arrest Warrant</p> <p>19 November 2001 – Debate on Report of EU Select Committee on Counter Terrorism: the European Arrest Warrant</p> <p>12 March 2001 – Hunting Bill, Second Reading</p> <p>18 January 2001 – Culture and Recreation Bill, Second Reading</p> <p>8 January 2001 – Export Control Bill, Second Reading</p>
Lord Rodger of Earlsferry	0	
Lord Walker of Gestingthorpe	0	
Baroness Hale of Richmond	0	
Lord Carswell	0	
Lord Brown of Eaton-under-Heywood	0	

(Source: House of Lords Library.)