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NOTE: In the text of the report, (Q) refers to a question in oral evidence
CHAPTER 1: INTRODUCTION AND BACKGROUND

Introduction

1. Constructive relationships between the three arms of government—the executive, the legislature and the judiciary—are essential to the effective maintenance of the constitution and the rule of law. In recent years, the character of these relationships has changed significantly, both because of changes in governance and because of wider societal change.

2. We therefore decided to take the annual appearances by the Lord Chancellor and the Lord Chief Justice in front of our Committee as the starting point for a broad assessment of the impact of the changes in these relationships. In particular, we set out to identify points of friction or uncertainty and to offer suggestions to the Government, Parliament and the judiciary as to how these might be tackled.

3. As if to illustrate the importance of conducting such an assessment, midway through our inquiry a serious dispute erupted between the Government and the judiciary over the new Ministry of Justice. This dispute, which was ongoing at the time this report went to print, demonstrates that there are still disagreements and uncertainties about the relationships between the three arms of government. We hope that this report will help point the way to more balanced and harmonious relationships in the future.

Acknowledgements

4. We thank all our witnesses (listed in Appendix 2) for their invaluable oral evidence, and we also express gratitude to Professor Anthony Bradley, Professor Kate Malleson and Professor Paul Craig for their helpful papers.

5. We are also most grateful to our Specialist Adviser on this inquiry, Professor Andrew Le Sueur.

Mapping the Changing Constitutional Landscape

6. In this report we examine the evolving constitutional relationships between the judiciary, the executive and Parliament. The various reforms that have been introduced and the changes that have come about in recent years may be better thought of as a process rather than an event. However, for the purposes of this inquiry we have focused on three milestones that have been particularly influential in defining and influencing the changing character of the relationships.

- The passage of the Constitutional Reform Act 2005 (CRA) and the formation of the concordat between the then Lord Chief Justice of...
England and Wales (Lord Woolf) and the then Lord Chancellor (Lord
Falconer of Thoroton).

- The creation of the Ministry of Justice (MoJ), which formally came into

7. This is not to imply that all the changes have come about as a result
of developments in legislation and governance arrangements. The
relationships have also been shaped by changing attitudes and
perceptions. Since the revocation of the “Kilmuir Rules” in 1987, judges
have been more open in speaking to the news media. For their part, some
ministers have felt able to break with previously understood
conventions and make robust and public comments critical of judges and
judgments. Moreover, the news media play an increasingly important role
in reporting and commenting on the judiciary, and—as in other contexts—
there has been a decline in the culture of deference. Individual judges and
the judiciary as a whole are seen as “fair game” by columnists and
headline writers in the tabloid press. Broadsheet journalists also chart
closely the intrigues of discussions and disagreements between the
senior judiciary and ministers.

**Human Rights Act 1998**

8. It was always clear that the Human Rights Act would have
constitutional importance as well as giving citizens a practical right to use
the European Convention on Human Rights (ECHR) in litigation in our
national courts. Though careful to preserve the essence of parliamentary
sovereignty (that no court may question the validity of an Act of
Parliament), the HRA nonetheless gives the judiciary significant new
powers. Section 3 places a duty on courts in relation to the way in which
they carry out their function of interpreting legislation: “So far as it is
possible to do so, primary legislation and subordinate legislation must be
read and given effect in a way which is compatible with the Convention
rights”.

9. A variety of views have been expressed as to what exactly this requires—to
what extent should words be “stretched”, or new words implied, in order to
make a provision fit with the requirements of the ECHR and the case law of
the European Court of Human Rights? Where the words of an enactment are
so plainly contrary to Convention rights that no amount of interpretation can
make them fit, the courts are empowered to make a declaration of
incompatibility under section 4 of the HRA. Such a declaration does not
affect the validity and enforceability of the provision in question and so offers
little practical help to the aggrieved citizen; rather, it is intended to signal to
the executive and Parliament the view of the courts that remedial action
should be taken to repeal or amend the legislation.

10. To date, 17 declarations of incompatibility have been made by the courts.¹
Thus far the Government have accepted the outcome of court proceedings
which result in a declaration of incompatibility by undertaking to remedy the
clash between national law and Convention rights.² Most declarations of
incompatibility related to statutory provisions enacted before the HRA came
into force in October 2000, at which point Parliament began systematic

¹ See Appendix 6.
² The Government have amended the legislation to remedy the incompatibility (or are in the process of
doing so) in 11 of these 17 cases. They are appealing or considering how to remedy the incompatibility in
the remaining six cases.
scrutiny for possible incompatibility through the Joint Committee on Human Rights (JCHR) and ministers started issuing “statements of compatibility” to accompany all government bills introduced to Parliament. Since then, some bills have been amended by Parliament to address human rights concerns, and two enacted provisions have been subject to declarations of incompatibility. This may call into question the efficacy of the executive’s self-scrutiny of policy proposals and, in relation to the incompatible provisions, parliamentary examination of bills (see Chapter 2).

11. Later in our report, we examine several ways in which the HRA is having an impact on relations between the judiciary, the executive and Parliament, and how this situation may develop in the future. In particular, we consider whether the judiciary should be able to evaluate the general compliance of bills or recently enacted statutes for their compatibility with Convention rights in a process of “abstract review”, a procedure that is common in many jurisdictions throughout Europe. We also consider whether there might be a greater role for “advisory declarations”, in which the courts could be called upon to give guidance to the government on Convention rights, or whether a “committee of distinguished lawyers” could be of use.

*The Constitutional Reform Act 2005 and the Concordat*

12. In previous reports we have expressed our dismay about circumstances in which the Government have announced policy or introduced a bill without apparently being sufficiently aware of the impact of the initiative upon the fundamentals of the constitution. A prime example of confusion about whether an initiative is a simple “machinery of government” change or a major constitutional reform was the announcement in June 2003—in the midst of a Cabinet reshuffle—that the office of Lord Chancellor was to be abolished and that a Supreme Court of the United Kingdom was to be established. That announcement took place without any apparent understanding of the legal status of the Lord Chancellor and without consultation with the judiciary (or anyone else outside government).

13. Soon after that announcement, Lord Woolf (then Lord Chief Justice) and Lord Falconer (then Lord Chancellor) started negotiations over the key principles and principal arrangements that should govern the new situation in which the Lord Chief Justice rather than the Lord Chancellor would be head of the judiciary. The outcome of those talks was set out in January 2004 in an agreement known as “the Concordat” (formally entitled “The Lord Chancellor’s judiciary-related functions: Proposals”). Many aspects of the Concordat were put on a statutory footing by the CRA, but it is clear to us that the Concordat continues to be of great constitutional importance.

14. Lord Falconer agreed with this: “it seems to me to be a document of constitutional significance because, although much of it was then enacted in the Constitutional Reform Act, it sets out the basic principles on which the judges and the executive will relate to each other in the future. I have never known any piece of legislation to be utterly comprehensive; there are bound to be issues that come up in the future where it is the principle that matters rather than precise detailed legislation and I believe the Concordat will be

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important for that” (Q 41). Similarly, the current Lord Chief Justice, Lord Phillips, told us: “I would like to think it has an entrenched quality about it. It has certainly been treated as if it were a constitutional document laying down the division of functions, now largely of course overtaken by the Act but not exclusively, and where the Act does not cover something one needs to go back to the Concordat” (Appendix 8, Q 6).

15. On the question of whether the Concordat might be amended in the future, Professor Robert Hazell of the UCL Constitution Unit suggested that “it has the status of a constitutional convention, and all constitutional conventions are liable to evolve over time in the light of experience and new circumstances, and I would be very surprised if the Concordat did not itself evolve partly in its interpretation, as other conventions have evolved, but partly it could be revisited, and I hope at some point it will be revisited, and possibly this inquiry could provide the trigger for that. I do not think myself it is written in tablets of stone” (Q 473).

16. The terms of the CRA itself differed in several respects from the announcement of 3 June 2003 and the Constitutional Reform Bill as introduced to the House of Lords in 2004. Part 1 of the CRA is about the rule of law, a provision to which we return shortly. Part 2 sets out the main duties and powers of the reformed office of Lord Chancellor, the new role of the Lord Chief Justice of England and Wales as head of the judiciary, and other provisions relating to judicial leadership. Part 3 concerns the new Supreme Court of the United Kingdom. Part 4 deals with judicial appointments and discipline. Clearly the Concordat and the CRA taken together have made important changes to the relationships between the judiciary, the executive and Parliament.

17. As well as redefining formal powers and duties, the CRA and the Concordat were intended to change the attitudes and perceptions relating to these leadership roles. Lord Falconer told us that “having a leader of the judges drawn from the judiciary rather than a politician drives a sense of ownership and momentum. It gives the judiciary confidence that the pressure for change, if it comes from the head of the judiciary, comes from the profession and not from the politicians. Judges have always sought to improve the core processes” (Q 3). The Lord Chief Justice said that under the changes brought about by the Concordat and the CRA he and the Lord Chancellor “become partners in the administration of justice, but as a matter of constitutional principle the Lord Chief Justice is now the senior partner”.

18. In her paper for us, Professor Kate Malleson (Professor of Law at Queen Mary, University of London) forecast that “the idea of a partnership as expressed in the Concordat may well provide a basis for the future relationship, but it would be unrealistic to expect it to be a partnership without tensions. The consequence of a more active judiciary with greater autonomy will inevitably be a more dynamic relationship between the branches of government in which the judiciary have a more structured and active role in defending themselves from criticism and ensuring that the proper resources and support for the courts are in place” (Appendix 3). That comment, written in November 2006, has proved to be prescient. The

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creation of the new Ministry of Justice has thrown up issues of profound disagreement between the Government and the judiciary. By May 2007, the judiciary were expressing frustration that “in the event there has been no real change in attitude at all. The Lord Chancellor and his staff in the DCA continued to act as if he retained primary responsibility for the administration of justice and had sole responsibility for deciding what resources should be allocated to this and how they should be deployed”.

Creation of the Ministry of Justice

19. This brings us to the third milestone in the development of the new relationships: the creation of the Ministry of Justice, which formally came into existence on 9 May 2007. Reports of Government plans for a Ministry of Justice had been circulating for some considerable time. Then in August 2004, there was speculation that the Home Office (then under David Blunkett) would be split, with a department for justice (responsible for courts, police, prisons and probation) and a “department for rights” (with responsibilities for human rights, immigration and asylum, family law and civil disputes, freedom of information, constitutional reform, electoral law and devolution).

20. A Home Office leak in *The Sunday Telegraph* on 21 January 2007 was the first public acknowledgement of the current plans. That article appeared to be the first that either the then Lord Chancellor or the Lord Chief Justice knew of the plans. The new MoJ has taken on all of the responsibilities of the Department for Constitutional Affairs (DCA) and the following responsibilities previously held by the Home Office:

- criminal law and sentencing;
- prisons;
- probation; and
- reducing re-offending.

Lord Falconer became the Secretary of State for Justice (the title of Secretary of State for Constitutional Affairs was abolished), a ministerial office he continued to combine with that of Lord Chancellor. These two posts were assumed by Jack Straw MP in the reshuffle after Gordon Brown became Prime Minister. Appendix 7 sets out the responsibilities of the MoJ as compared to those of the now defunct DCA, and the respective responsibilities of the Secretary of State for Justice and the Lord Chancellor.

21. The judiciary have expressed a number of concerns both about the process by which the MoJ came into being, and about the impact of the new arrangements upon the administration of justice. These matters are discussed in detail in Chapter 2.

Criteria for Assessing the Changing Landscape

22. There are a variety of different ways in which the changes mapped out in this report could be evaluated. Our Committee’s remit is: “To examine the

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6 ibid.
8 Evidence by the Lord Chief Justice and the Rt. Hon. Lord Justice Thomas to the Constitutional Affairs Select Committee, 22 May 2007, Q 62.
constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution”. For this purpose, the Committee has defined “the constitution” as “the set of laws, rules and practices that create the basic institutions of the state, and its component and related parts, and stipulate the powers of those institutions and the relationship between the different institutions and between those institutions and the individual”.9 Our focus for this inquiry has therefore been to consider how the changing relationships between the judiciary, the executive and Parliament impinge on core constitutional principles—notably the rule of law and the independence of the judiciary. The Lord Chancellor has express statutory duties in relation to both.

The Rule of Law

23. Section 1 of the CRA states that “This Act does not adversely affect (a) the existing constitutional principle of the rule of law, or (b) the Lord Chancellor’s existing constitutional role in relation to that principle”. This provision begs several questions, the first of which is what the “rule of law” actually means. To assist our understanding of this term, we commissioned a paper from Professor Paul Craig, Professor of English Law at the University of Oxford (Appendix 5).

24. Although Professor Craig shed much light on the matter, it is apparent that despite its inclusion in the statute book, the rule of law remains a complex and in some respects uncertain concept. Professor Craig drew our attention to three different meanings. First, “a core idea of the rule of law ... is that the government must be able to point to some basis for its actions that is regarded as valid by the relevant legal system”. This is, however, too limited so, secondly, the rule of law requires that legal rules “should be capable of guiding one’s conduct in order that one can plan one’s life”. In other words, legal rules should meet a variety of criteria, including that they should be prospective, not retrospective; that they should be relatively stable; and that there should be an independent judiciary. Professor Craig told us that some commentators regard these “formal” attributes of law to be necessary but not sufficient. So a third meaning of the rule of law held by some is that it encompasses substantive rights, thought to be fundamental, which can be “used to evaluate the quality of the laws produced by the legislature and the courts”.

25. Lord Falconer told us that “the rule of law includes both national and international law as far as I am concerned, therefore if we remained in breach of the European Convention then we would be in breach of international law. I think the rule of law also goes beyond issues such as specific black letter law. I think there are certain constitutional principles which if Parliament sought to offend would be contrary to the rule of law as well. To take an extreme example simply to demonstrate the point, if Parliament sought to abolish all elections that would be so contrary to our constitutional principles that that would seem to me to be contrary to the rule of law. The rule of law goes beyond specific black letter law; it includes international law and it includes, in my view, settled constitutional principles. I think there might be a debate as to precisely what are settled constitutional principles but it goes beyond, as it were, black letter law” (Q 8).

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26. On the question of who is responsible for upholding the rule of law, the Lord Chief Justice told us that “it is the role of the judiciary, in practice, to uphold the rule of law, to apply the rule of law, to enforce the rule of law, and to do that they have to be independent of outside influence. Insofar as it is the Lord Chancellor’s job to uphold the rule of law, this must be very largely a job of ensuring that our independence is observed. Equally, there must be occasions in government where a question may arise as to whether the conduct that the Government is contemplating is or is not in accordance with the rule of law, and there, I would imagine, the Lord Chancellor would have a role to play in his capacity as a minister” (Appendix 8, Q 7). In relation to the rule of law and the HRA, the Lord Chief Justice explained that if a court made a declaration of incompatibility “it would be open to the Government to say, ‘the court has ruled that this is contrary to the Human Rights Act. Notwithstanding that, we do not intend to comply with the Human Rights Act on this point’ and that would be contrary to what I would call rule of law”. That would, however, be the end of the argument “because Parliament is in that field supreme” (Appendix 8, QQ 9, 10).

**Independence of the Judiciary**

27. The other constitutional principle of central importance in governing the relationships between the judiciary, the executive and Parliament is that of the “independence of the judiciary”. This does not and should not mean that the judiciary have to be isolated from the other branches of the State. Nor does it mean that the judiciary—individually and collectively—need to be insulated from scrutiny, general accountability for their role or properly made public criticisms of conduct inside or outside the courtroom.

28. The CRA refers to the independence of the judiciary and offers a guide to some aspects of this principle. Section 3(1) provides that “The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary”. Section 3(5) states that “The Lord Chancellor and other Ministers of the Crown must not seek to influence particular judicial decisions through any special access to the judiciary”. The Lord Chancellor also has additional statutory duties which relate to judicial independence. Under section 3(6), he “must have regard to—(a) the need to defend that independence; (b) the need for the judiciary to have the support necessary to enable them to exercise their functions; and (c) the need for the public interest in regard to matters relating to the judiciary or otherwise to the administration of justice to be properly represented in decisions affecting those matters”.

29. Sir Igor Judge, President of the Queen’s Bench Division, told us that it was important to “appreciate that judicial independence and the proper funding of the judiciary is actually something that belongs to the community. We do not sit in judgment in flummery saying, ‘judicial independence for our own sake.’ The independence of the judiciary is something which is precious to every single member of the community. You must be able to go into court and know that the person sitting in judgment is neutral—not on one side or the other—coldly applying the law that applies to your case. So although people sometimes think that when we defend judicial independence we are simply defending our own corner … that is not the case—we simply are not. The issues which arise here are of great importance to every member of the public” (Q 379).
The Scope of our Inquiry

30. Our focus in this inquiry has been on the relationships between the executive, Parliament and the judiciary of England and Wales. We make only passing reference to developments in Scotland. Questions about relations between the Scottish judiciary, the Scottish Executive and the Scottish Parliament are now matters to be debated and decided north of the border rather than in Westminster. Nor do we deal with the position of the judiciary in Northern Ireland. We note, however, that there are constitutional questions common to all three jurisdictions. The fact that they arise in somewhat different legal systems should not prevent lesson learning. Although we make some reference to the creation of the Supreme Court of the United Kingdom—which will be a court for all three of the United Kingdom’s jurisdictions—it would be premature to attempt any detailed analysis of the constitutional consequences of establishing this new court. It is due to begin its work in October 2009.

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10 Before the change of administration at the May 2007 elections to the Scottish Parliament, the Scottish Executive had published two consultation documents and a draft Judiciary (Scotland) Bill. See Scottish Executive, *Strengthening Judicial Independence in a Modern Scotland: A consultation on the unification, appointment, removal and management of Scotland’s Judiciary* (February 2006); and *Draft Judiciary (Scotland) Bill and plans for other aspects of future legislation* (February 2007).
CHAPTER 2: EXECUTIVE AND JUDICIARY

Introduction

31. As explained in Chapter 1, the nature of the relationship between the executive and the judiciary has changed substantially since the Constitutional Reform Act (CRA) and the Human Rights Act (HRA) were passed. The CRA was intended to represent a move away from the traditional “fusion” model of the British constitution and towards what was said to be a more explicit separation of powers, with relations between executive and judiciary thenceforth being governed by the Act itself and the Concordat agreed between the then Lord Chancellor, Lord Falconer, and the then Lord Chief Justice, Lord Woolf. The senior judiciary now has an identity which is distinct from the executive: as the Lord Chief Justice told us, “we, as judges, are now patently freestanding. The division of powers is quite clear. Now our negotiations with ministers, in particular with the Lord Chancellor, are negotiations between the judiciary and the executive and clearly seen to be so” (Appendix 8, Q 3). Although many of the principles regulating the new relationship between the judiciary and executive are set down in the Concordat, it would not be unreasonable to expect that such profound structural changes, with the judiciary assuming a more distinct identity, would lead to increased tensions between these two branches of the state.

32. The impact of the HRA upon the relationship between the executive and the judiciary has been equally significant. As Professor Anthony Bradley argued in his paper, “the HRA extended the jurisdiction of the courts to deal with matters that previously were not arguable before a judge … [and] takes the courts into the examination of questions that, apart from the HRA, would have been regarded as political questions” (Appendix 4). Similarly, Professor Vernon Bogdanor has predicted that “issues which, in the past, were decided by ministers accountable to Parliament will now come to be decided by the courts”. Charles Clarke MP, the former Home Secretary, agreed that the HRA had “shifted the balance of power towards the judiciary” (Q 141). The possible ways of resolving the tensions that this change has created, particularly with regard to anti-terrorism legislation, are discussed later in this chapter.

33. Summing up the way in which the role of the judiciary has changed in recent years, Professor Kate Malleson wrote, “the senior judges are now required to police constitutional boundaries and determine sensitive human rights issues in a way which would have been unthinkable forty years ago. This new judicial role is still developing, but … the effect of this trend will be to reshape the relationship between the judiciary and the other branches of government” (Appendix 3).

Strained Relationships?

34. None of the witnesses doubted that there had been periods of strain in the relationship between the executive and judiciary in recent years. Opinion was however divided on whether these tensions should so far as possible be avoided, or whether they should be accepted as part of the new checks and

balances of modern constitutional life. Charles Clarke told us that “there is a constitutional tension which is not properly resolved and which it would be beneficial to resolve” (Q 134) and Paul Dacre, editor of the Daily Mail, believed that “the relationship between the executive and the judiciary has become a story and it is possibly creating a gladiatorial sense about some of the reporting that might be causing anxieties on the judicial side” (Q 337).

35. By contrast, Sir Igor Judge, President of the Queen’s Bench Division, thought that “a degree of tension is healthy” (Q 297). The former Lord Chancellor, Lord Mackay of Clashfern, agreed with this: “a certain degree of tension between the judiciary and the executive is inevitable and healthy because from time to time the judiciary are called upon to adjudicate under the judicial review procedure and in other ways on actions of the executive, and there are not many people who completely welcome their activities being judged, particularly if they are found to have failed”. Indeed, he felt that “the present situation between the judiciary and the executive is in fact quite a good relationship; I do not think that, generally speaking, the relationship is in crisis or anything of that sort” (Q 165).

36. Lord Bingham of Cornhill, the senior Law Lord, took a similar approach in a recent speech, stating that “there is an inevitable, and in my view entirely proper, tension between the two [branches]”. He also explained that the tension “is greater at times of perceived threats to national security, since governments understandably go to the very limit of what they believe to be their lawful powers to protect the public, and the duty of the judges to require that they go no further must be performed if the rule of law is to be observed”.12

Managing the Tensions

37. Whether or not the current levels of tension in this relationship are predictable and in general acceptable, they nevertheless have to be managed and kept in proportion if public confidence is to be maintained in the independence of the judiciary and the integrity of government. The Lord Chancellor, with his traditional position as a “bridge” between the executive and the judiciary, has a particular responsibility to ensure that neither the government as a whole nor individual ministers exacerbate these tensions inappropriately. This responsibility is reflected in his key statutory duties as set out in the oath that he must take under section 17 of the CRA:

• to “respect the rule of law”;

• to “defend the independence of the judiciary”; and

• to “ensure the provision of resources for the efficient and effective support of the courts”.

We now consider the first and second of these duties; the funding of the courts is discussed in the next section on constitutional change.

38. The first of these duties was explained by Lord Falconer in the following terms: “where the Lord Chancellor is faced, within government, with action which is contrary to the rule of law, national or international, then he has an obligation to take steps to prevent that action … the office is intended to be a

check on activity which might have political attractions but would either contravene the law, or offend widely accepted constitutional principles".  

This duty is absolutely central to the role of Lord Chancellor.

39. The second duty is an important component of the first: the Lord Chancellor must ensure that the principle of judicial independence is not violated. His duty to “defend” the independence of the judiciary is stronger than the duty of all other ministers to “uphold” that independence, giving him a special enforcement role in relation to the rest of the government. Lord Lloyd of Berwick, a former Law Lord, told us that there were two key aspects to defending judicial independence. The first is “where there is an attempt … by Government … to restrict in some way the jurisdiction of the courts”, for example the proposed “ouster” clause in the Asylum and Immigration (Treatment of Claimants, etc.) Bill in 2004. In such cases, “the Lord Chancellor’s duty is absolute; he must point out in Cabinet that this would undermine the independence of the judiciary” (Q 197). Even though the Lord Chancellor is no longer head of the judiciary, it is essential that he should remain a jealous guardian of judicial independence in Cabinet.

40. The second aspect of defending the independence of the judiciary, Lord Lloyd said, was dealing with ministers who attack individual judges. We have already mentioned that section 3 of the CRA places all ministers under a duty to “uphold” the independence of the judiciary. Lord Falconer explained how this duty applied to the question of ministers commenting on individual cases:

“If you disagree with a decision, say what you are going to do; if you are going to appeal, say you will appeal; if you are going to change the law, say you will change the law. If you cannot appeal and cannot change the law then my advice would be to keep quiet because there is not much you can do about it … It is a pretty unwise thing for a minister to say that there is something [wrong with the law] but we are not going to do anything about it” (QQ 45, 51).

41. Therefore, it is acceptable for ministers to comment on individual cases, but as Lord Falconer told us, “what is objectionable … is something which expressly or impliedly says that there is something wrong with these judges for reaching this conclusion” (Q 50). Lord Lloyd of Berwick agreed with this approach, saying that “it is open to ministers to say they disagree with judgments … What I think is intolerable … is a personal attack on judges” (Q 201). Similarly, Sir Igor Judge said, “if a minister finds there is an adverse judgment against his department in the administrative court, commenting on the judge seems to me to be completely unacceptable, but of course the minister is allowed to say ‘we disagree with the judge’s position and we intend to appeal’” (Q 284).

42. It seems there is widespread agreement on the limits of what ministers should and should not say about individual cases, but this does not mean that ministers will always behave accordingly. The Lord Chancellor’s duty, as the defender of judicial independence in the Cabinet, is both to ensure that ministers are aware of the need to avoid attacking individual judges and to reprimand them if they breach this principle. As Lord Falconer told us, “the

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14 CRA s 3.
effect of the Constitutional Reform Act is that I have got an obligation to speak out both privately and, if necessary, publicly to defend the independence of the judges” (Q 30). As to whether his performance of this role had been adversely affected by the fact that he was no longer a judge or head of the judiciary, he insisted “emphatically not” (Q 3).

43. The Lord Chief Justice has emphasised that this kind of intervention by the Lord Chancellor is “a most valuable constitutional protection of judicial independence”, because the only alternative would be for the Lord Chief Justice himself to intervene publicly, which would risk a high-profile dispute that would not be “in the interests of the administration of justice”. Lord Mackay of Clashfern added that “the sooner a response is made [by the Lord Chancellor] the better” (Q 174).

44. So how effectively has this duty been performed by Lord Chancellors since the advent of the CRA? In fact, it is only quite rarely that ministers attack individual judges so it may be too soon to pass a definitive judgment on this point. Nonetheless, there are a number of examples of ministers attacking judges over the last two decades, suggesting that such situations will arise again in future. For example, David Blunkett MP (then Home Secretary) implicitly criticised a judge in 2003 for upholding the right of six asylum-seekers to receive support from the National Asylum Support Service, writing a strongly-worded article under the headline “It’s time for judges to learn their place”. Similarly, in 1995 Michael Howard MP (Home Secretary at the time) reacted to a ruling by Mr Justice Dyson in relation to IRA prisoners by commenting on the radio that “the last time this particular judge found against me, which was in a case which would have led to the release of a large number of immigrants, the Court of Appeal decided unanimously that he was wrong”.

45. There has moreover been one case since the CRA was enacted where the then Lord Chancellor, Lord Falconer, was forced to speak out publicly. The case concerned the convicted paedophile Craig Sweeney, who was given a life sentence with a minimum tariff of five years and 108 days. When passing sentence in the Crown Court at Cardiff in June 2003, Judge Griffith Williams, the Recorder of Cardiff, explained very clearly how he reached this tariff and emphasised that Sweeney would only be released “when and if there is no risk of you re-offending”. Nonetheless, the then Home Secretary (John Reid MP) attacked the sentence as “unduly lenient” and asked the then Attorney General (Lord Goldsmith) to examine the case as the tariff “does not reflect the seriousness of the crime”, thereby inappropriately casting aspersions on the competence of Judge Williams. Lord Goldsmith’s spokesman responded sharply to Dr Reid’s comments, pledging that “the Attorney will make a decision [on whether to appeal] purely on the merits of the case and not in response to political or public pressure”.

46. A detailed timeline of the ensuing events is set out in Box 1. In short, Lord Falconer did not publicly defend Judge Williams until appearing on the

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BBC’s *Question Time* programme three days after the sentence was handed down. Even then, he defended Dr Reid’s intervention.\(^2^1\) Lord Falconer subsequently had to rebuke and extract an apology from his junior minister, Vera Baird MP, for directly criticising the judge when appearing on a radio programme.\(^2^2\) The Lord Chief Justice later labelled the attacks “intemperate, offensive and unfair”,\(^2^3\) whilst the Secretary of the Council of Circuit Judges, Judge Keith Cutler, told the BBC that “some of the judges felt that there was quite a silence, and there was no-one actually speaking on behalf of the judges … We are thinking that we must perhaps change that”.\(^2^4\) Ultimately, Judge Williams was vindicated when Lord Goldsmith decided not to appeal.

**TABLE 1**

**The Craig Sweeney case: sequence of events**

| Mon 12 June 2006 | Craig Sweeney sentenced to life imprisonment for abducting and sexually assaulting a three-year-old girl; eligible for parole in 5 years and 108 days.  
Home Secretary John Reid attacks sentence as “unduly lenient” and asks the Attorney-General to examine the case as the tariff “does not reflect the seriousness of the crime”.  
The Attorney-General’s spokesman states that “the Attorney will make a decision purely on the merits of the case and not in response to political or public pressure”. He adds that “calling for the file in no way implies that there will be a reference by the Attorney—still less does it imply any criticism of the sentencing judge”. It is also widely reported that the Attorney-General feels that John Reid’s comments are “not terribly helpful”.  
The Chief Crown Prosecutor for South Wales explains the sentencing guidelines in the context of the Sweeney case. |
| Tues 13 June | The sentence handed down to Craig Sweeney generates hostile media coverage. *The Sun* criticises “the arrogance of judges in their mink-lined ivory towers who leave the rest of us to cope with the real crisis of soaring crime” and adds that “judges are a law unto themselves”.\(^2^5\) *The Daily Express* brands the judiciary as “deluded, out-of-touch and frankly deranged” and “combining arrogance with downright wickedness”, suggesting that “our legal system has not only lost touch with public opinion but with natural justice itself … [sentencing] now bears no relation at all to the seriousness of the crime”.\(^2^6\)  
The Prime Minister’s spokesman defends John Reid, suggesting that it was right “to articulate the concern the |

\(^{2^2}\) *The Daily Telegraph*, 20 June, p 4.  
\(^{2^4}\) See [http://news.bbc.co.uk/1/hi/uk/5091590.stm](http://news.bbc.co.uk/1/hi/uk/5091590.stm).  
\(^{2^5}\) Page 8.  
\(^{2^6}\) Page 12.
public has”. Jack Straw MP, Leader of the House of Commons, agrees that it was “perfectly appropriate” for John Reid to have intervened.

Lord Morris of Aberavon, the former Attorney General, states that “our courts are not run by Government ministers ... As far as sentencing is concerned, they [judges] are independent. If he [John Reid] has a concern ... he can amend the acts of Parliament”.

Alun Michael, a Cardiff MP, calls on judges to “wake up and smell the coffee” and suggests that “some judges simply aren’t getting it”.

**Thurs 15 June**

The Lord Chancellor appears on the BBC’s *Question Time*. He says “we need to be extremely careful that we don’t attack the judges on these issues where it is the system” and “the whipping boys for this have become the judges and that is completely wrong ... If we attack the judges, we attack an incredibly important part of the system when it is not their fault ... it wasn’t the judge’s fault”. But he also defends John Reid and claims that he “did not attack the judge”.

**Fri 16 June**

Vera Baird QC, Parliamentary Under-Secretary of State at the DCA, appears on the BBC’s *Any Questions?* She says, “it seems to me that this judge has just got this formula wrong, so I’m critical of the judge for three reasons—one, starting too low; two, deducting too much for the guilty plea; and three, getting the formula wrong”.

**Sun 18 June**

Judge Keith Cutler, Secretary of the Council of HM Circuit Judges, appears on the BBC’s *Broadcasting House*. He says that his colleagues are feeling “pretty low” about the Sweeney case and adds, “some of the judges felt that there was quite a silence, and there was no-one actually speaking on behalf of the judges”. He concludes, “we are thinking that we must perhaps change that”.

**Mon 19 June**

Vera Baird is forced to apologise for her comments on *Any Questions?* The Lord Chancellor accepts her apology.

**Tues 4 July**

The Lord Chancellor gives evidence to the House of Commons Constitutional Affairs Committee. He accepts that the Sweeney case “has had an impact on undermining confidence in the judiciary”.

**Mon 10 July**

The Attorney General decides not to challenge the sentence imposed by the trial judge, concluding that it was *not* “unduly lenient”.

**Tues 18 July**

The Lord Chief Justice, speaking at the Lord Mayor of London’s annual judges’ dinner, labels the recent attacks on judges as “intemperate, offensive and unfair”.

47. When we asked the panel of legal editors about this case, they were highly critical of the then Lord Chancellor. Frances Gibb, Legal Editor of *The
Times, told us that “the Lord Chancellor should have stepped in much more quickly to defend judges in the face of some of his colleagues’ comments”, and Joshua Rozenberg, Legal Editor of The Daily Telegraph, said that the Lord Chancellor had left the judges “to swing in the wind”. Astonishingly, Mr Rozenberg had been told by a DCA press officer that it was for the Lord Chief Justice rather than the Lord Chancellor to speak out on these matters (Q 92).

48. Although the Lord Chief Justice could have publicly criticised Dr Reid, this would probably have exacerbated tensions between the executive and the judiciary at a sensitive time. In fact, the Lord Chief Justice was in Poland at the time and the responsibility for dealing with the controversy fell to Sir Igor Judge. He did not speak to Lord Falconer until two days after the sentence was handed down, and in retrospect admitted that he should have contacted him “more quickly” (Q 272). The Lord Chief Justice should also have been more proactive in ensuring that the matter was being dealt with promptly.

49. The Sweeney case was the first big test of whether the new relationship between the Lord Chancellor and the judiciary was working properly, and it is clear that there was a systemic failure. Ensuring that ministers do not impugn individual judges, and restraining and reprimanding those who do, is one of the most important duties of the Lord Chancellor. In this case, Lord Falconer did not fulfil this duty in a satisfactory manner. The senior judiciary could also have acted more quickly to head off the inflammatory and unfair press coverage which followed the sentencing decision.

50. It would not be necessary for the Lord Chancellor to reprimand fellow ministers at all if they always adhered to the principle of not commenting on decisions of individual judges in an inaccurate and intemperate manner. One possible way of achieving this would be to amend the Ministerial Code (the code of conduct and guidance on procedures for ministers, published by the Cabinet Office) to include reference to the constitutional conventions which ought to govern public comment by ministers on judges. Dr Matthew Palmer told us that such rules were included in the New Zealand Cabinet Manual (Q 522). Although the new Prime Minister has just issued a new Ministerial Code which does not refer to ministerial comment on judges, he could make the appropriate additions when the Code is next revised. Lord Mackay of Clashfern said that this was “an important matter for consideration”, although he was wary of making the Code too long (Q 170). Lord Falconer was non-committal, saying that “I am open to that as a suggestion but I do not think it is that critical” (Q 5). Charles Clarke felt that “getting the codification of this into a better situation is not the answer” (Q 155).

51. The key to harmonious relations between the judiciary and the executive is ensuring that ministers do not violate the independence of the judiciary in the first place. To this end, we recommend that when the Ministerial Code is next revised the Prime Minister should insert strongly worded guidelines setting out the principles governing public comment by ministers on individual judges.

52. Just as ministers ought to demonstrate restraint in commenting on the judiciary, so judges should (and generally do) avoid becoming inappropriately involved in public debates about government policy, matters of political controversy or individual politicians. As the Lord Chief Justice told us, “Essentially, you would not expect judges to comment on political
policy” (Appendix 8, Q 41). Lord Falconer elaborated on this sentiment, suggesting that “it is generally a bad idea for judges to be criticising the government on policy issues” because “the public want judges to be unpolitical” and “those very same judges then have to enforce laws about which it might be said they have expressed disagreement” (Q 58). The Lord Chief Justice and Heads of Division have a responsibility to ensure that judges adhere to this principle.

53. However, the Lord Chief Justice, as head of the judiciary, and perhaps other senior judges with responsibility for specific parts of the justice system, are in a different position from that of other judges. On occasion, it is necessary for them to speak out publicly if a particular government policy is likely to have an adverse impact upon the administration of justice and ministers have failed to provide a satisfactory response during private consultations.

General Channels of Communication

54. Effective channels of communication between the executive and the senior judiciary are vital to ensure that the impact of government legislation or policy proposals upon the administration of justice is fully understood at an early stage. Such communications are facilitated in a variety of ways. First, judges serve on a range of bodies with responsibility for the justice system, for example the National Criminal Justice Board. As Sir Igor Judge said, “it is no longer … a concomitant of independence that judges should be isolated” (Q 297).

55. Second, concerns amongst the judiciary about particular government proposals are conveyed through formal responses to consultations. For example, as was widely reported at the time, the Council of Her Majesty’s Circuit Judges gave a largely negative response to the Home Office’s paper Convicting Rapists and Protecting Victims—Justice for Victims of Rape in January 2007. As Sir Igor Judge told us, a negative response to Government proposals “may create tension” but “we do not expect our response to carry the day” and “in the end Parliament legislates, and then it does not really matter what the judges think” because “the judges apply the law that Parliament has produced” (Q 297).

56. Finally, there are private meetings which take place between ministers and judges (especially the Attorney General, the Home Secretary—probably now the Secretary of State for Justice—and the Lord Chief Justice) to discuss the practicality of particular government policies in terms of the administration of justice. As Sir Igor Judge explained, “week after week these sorts of discussions are going on at ministerial level [and] at official level” (Q 297). Likewise, the former Home Office Minister and new Attorney General, Baroness Scotland, has confirmed that “Ministers do meet the judiciary regularly. These are constructive meetings which ensure there is a regular dialogue between us”. If these meetings do not lead to satisfactory mutual understandings, it should be noted that the Lord Chief Justice can also in appropriate circumstances ask to see the Prime Minister (Q 68).

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Constitutional Change

57. Effective two-way communication is of particular importance when a constitutional change is proposed which is likely to impact upon the judiciary or the administration of justice more broadly. As Lord Justice Thomas told us: “Our constitution … is based both on statute law and on constitutional understandings and conventions. Those understandings and conventions include reliance upon full and appropriate respect for the different positions occupied by the three branches of government” (Q 374). Therefore, he said, there should always be “a proper … and detailed examination, so that you come to a solution that is acceptable across the board to the executive, to the legislature and to the judiciary” (Q 409). This principle is of even greater significance in light of the constitutional changes brought about by the CRA because, in the words of Dr Matthew Palmer, the different arms of government are still “jockeying for position and taking … time to settle down as to what their relationship is likely to be” (Q 518). Maximum co-operation and consultation are therefore essential.

58. We have already noted in Chapter 1 how in 2003 the Government failed to consult relevant stakeholders—including, astonishingly, the judiciary—before announcing the proposed constitutional changes which ultimately became the Constitutional Reform Act 2005 and, after discussion with the then Lord Chief Justice, the Concordat. Thus the Government’s subsequent decision in early 2007 to split the Home Office and create a Ministry of Justice (MoJ) provided an opportunity to ascertain whether they had learnt the lessons of 2003. Whilst the proposals involved a change in the machinery of government, which is a matter for the Prime Minister, Professor Alan Page noted that they were also of “very real constitutional significance” (Q 480). Lord Justice Thomas agreed: “It is our view that the creation of a Ministry of Justice is not simply a machinery of government change [but one that involves] significant constitutional change” (Q 374). Similarly, Professor Anthony Bradley told us that the changes were “of constitutional significance” and affected “the relationship between the Government and the judiciary that resulted from the Constitutional Reform Act 2005”, but he also noted that “there is no clear argument to be made against the proposed Ministry of Justice on constitutional grounds” (Appendix 4).

59. So what constitutional impact might these reforms have? We discuss these issues in greater detail below, but they can be summarised as follows:

- Role of the Lord Chancellor: the impact of combining in one post the Lord Chancellor’s responsibility to defend the independence of the judiciary and some of the Home Secretary’s most controversial duties. The effect of having a Lord Chancellor in the House of Commons.

- Judicial Review: the impact of the Lord Chancellor being subject to a much greater number of judicial reviews upon his relationship with the Lord Chief Justice and the ongoing validity of the Concordat.

- Constitutional Affairs: the impact of constitutional affairs forming a much smaller part of the Lord Chancellor’s department than previously.

- Funding of the Courts: the possibility of the courts budget being squeezed due to the demands of the resource-hungry prison system, and the impact of no longer having a judge on the board of the department.
60. **We agree that the advent of the Ministry of Justice, whilst obviously a machinery of government change, has significant constitutional implications.**

61. The Government did not make a good start: the Lord Chief Justice found out about the mooted policy on 21 January 2007 through a Home Office leak in *The Sunday Telegraph*, whilst the then Lord Chancellor could only recall that he “may have known the day before that something was going to be suggested”.²⁹ The Lord Chief Justice went so far as saying that events unfolded in this manner because the proposal reflected “an anxiety on the part of the Home Secretary to clear the decks so that he could really make a concerted attack on terrorism” and that “it was not a decision that was taken because it would be an extremely good idea to have a Ministry of Justice”.³⁰ Professor Bradley concurred: “the immediate cause of the Government’s decision appears to have been concern about the administrative and political problems of the Home Office, rather than a long-established and fully reasoned commitment to creating a Ministry of Justice” (Appendix 4). Whilst this may be true, it is nonetheless important to note that a possible Ministry of Justice has been on the political agenda for some years and that there are solid and well-rehearsed arguments behind its creation.

62. After the leak occurred, Lord Justice Thomas told us, the judiciary was provided by the DCA with “an outline paper detailing possible models for the Ministry”. The judiciary responded with two working papers setting out concerns in relation to resources, Her Majesty’s Courts Service (HMCS) and sentencing (Q 374). On 19 March, just ten days before the Prime Minister formally announced the Home Office split and the creation of the MoJ, Lord Falconer and the Lord Chief Justice agreed to set up a working group—reporting to them both—to resolve these issues of concern.

63. When the Prime Minister made his announcement, the Lord Chief Justice publicly outlined his concerns about resources and sentencing, warning that the new Ministry could face “a situation of recurrent crisis” if these concerns were not addressed. Provided the necessary safeguards were put in place, however, there would be “no objection in principle” to the proposals.³¹ He subsequently explained, “we did make it quite plain that we thought the right way to go about it was to have in-depth discussions first and to form the Ministry of Justice afterwards”.³² Similarly, Lord Justice Thomas told us that “the judiciary considered that the Ministry of Justice should not be brought into existence until the necessary safeguards had been agreed, given the constitutional importance of the issues. However, the judiciary’s view was not accepted” (Q 374). Indeed, Lord Falconer made his position crystal clear when giving evidence to us on 1 May: “If we cannot reach agreement, that is not going to stop the Ministry of Justice going ahead on 9 May 2007” (Q 423). When pressed, he simply said that any outstanding areas of disagreement would have to “evolve” (Q 426).

²⁹ Evidence by the Rt. Hon. Lord Falconer of Thoroton and Mr Alex Allan to the Constitutional Affairs Select Committee, 22 May 2007, Q 120.

³⁰ Evidence by the Lord Chief Justice and the Rt. Hon. Lord Justice Thomas to the Constitutional Affairs Select Committee, 22 May 2007, Q 90.


³² Evidence by the Lord Chief Justice and the Rt. Hon. Lord Justice Thomas to the Constitutional Affairs Select Committee, 22 May 2007, Q 82.
64. When we asked Lord Falconer about the way in which this process of consultation with the judiciary had been conducted, he told us that he was “completely satisfied it is a sensible way of dealing with it” (Q 413). However, Professor Terence Daintith did not agree: “If prior consultation with the judiciary did not take place before the announcement was made, or before the proposal … was fixed in the mind of government, then I think that is very unfortunate, and one would hope that in any future case bearing on the administrative structure relating to the discharge of judicial functions that omission would not occur”. He felt that the Government had “move[d] ahead as if it was simply in a pre-2003 situation and nothing more needed to be done other than to tell people what it was going to do” (Q 479).

65. Clearly the formation of the working group was a positive step, even if it only came into being slightly more than one month before the MoJ itself. However, Lord Falconer imposed a number of very tight parameters on the working group:

- there must be no change to legislation;
- there must be no change to the Concordat;
- there must be no change to the executive agency status of the HMCS;
- there must be no ring-fencing of HMCS’s budget; and
- it is for the Lord Chancellor to decide, subject to his statutory obligations, on budgetary issues.33

Lord Justice Thomas told us that the judiciary had accepted these parameters because “we felt that if we were to try and protect our position we had no alternative” (Q 382). Nonetheless, he added, it was made clear that “the parameters would have to be revisited if appropriate constitutional safeguards could not be provided within them” (Q 374).

66. At the time of writing—over two months after the MoJ came into being—the working group set up by Lord Falconer and the Lord Chief Justice was still trying to reach agreement. The Lord Chief Justice believed that the relationship between the judiciary and the MoJ was unsustainable and he suggested that he “may very well” be getting near the point where he would be forced to use his “nuclear option” of laying written representations before Parliament under section 5 of the CRA.34 He went on to explain that the judiciary had “reached the firm view” that there must be a “fundamental review of the position in the light of the creation of the Ministry of Justice”, but he noted that “the Lord Chancellor does not believe it is necessary”.35 Lord Falconer, when questioned on this, would only agree that a review could happen “in a year or two”.36

67. We are disappointed that the Government seem to have learnt little or nothing from the debacle surrounding the constitutional reforms initiated in 2003. The creation of the Ministry of Justice clearly has important implications for the judiciary. The new dispensation

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33 Evidence by the Lord Chief Justice and the Rt. Hon. Lord Justice Thomas to the Constitutional Affairs Select Committee, 22 May 2007, Q 42.
34 ibid, Q 58.
35 ibid Q 42.
36 Evidence by the Rt. Hon. Lord Falconer of Thoroton and Mr Alex Allan to the Constitutional Affairs Select Committee, 22 May 2007, Q 145.
created by the Constitutional Reform Act and the Concordat requires the Government to treat the judiciary as partners, not merely as subjects of change. By omitting to consult the judiciary at a sufficiently early stage, by drawing the parameters of the negotiations too tightly and by proceeding with the creation of the new Ministry before important aspects had been resolved, the Government failed to do this. Furthermore, the subsequent request made by the judiciary for a fundamental review of the position in the light of the creation of the Ministry of Justice was in our view a reasonable one to which the Government should have acceded in a spirit of partnership.

68. Whilst we do not have sufficient evidence to analyse in any great detail the judiciary’s outstanding concerns about these latest reforms, we do offer some thoughts and tentative conclusions. First, we consider how the reforms might affect the traditional role of Lord Chancellor and his ability to defend the independence of the judiciary effectively. Lord Justice Thomas was concerned that the Lord Chancellor would become “a quasi-Home Secretary” and predicted that “the conflicts that are being put into one person will make it progressively more difficult as future ministers no longer have the tradition of the office” (Q 383). Clearly, if the roles of Lord Chancellor and Secretary of State for Justice continue to be combined, there is potential for conflict between the statutory duty to defend the independence of the judiciary and the temptation—to which home secretaries have regularly succumbed—to make intemperate remarks about judges and their judgments or sentencing decisions.

69. However, Lord Falconer pointed out that the changes “do not relieve [the Lord Chancellor] of either his responsibilities to the court system or his duties to the judges” (Q 416). He further commented: “The idea that a minister … responsible for courts and the judges cannot also be responsible for prisons, probation and sentencing policy seems completely wrong. It is a model in many other countries and I would regard my ability to defend the judges, their independence and a proper functioning court system as is no way affected by that. That is a critical consideration in me supporting the idea of a Ministry of Justice” (Q 421). These comments were echoed by Professor Alan Page, who said “I do not think there is anything objectionable itself in this combination of responsibilities” (Q 484). Although this is logically correct, the recent experience of negotiations between the judiciary and the Lord Chancellor has not been encouraging.

70. Another issue is whether the changes will have an adverse impact on the status of the Lord Chancellor, making it more difficult for the post-holder to defend the independence of the judiciary effectively. Traditionally the Lord Chancellor was a senior lawyer in the House of Lords who had no prospect of further promotion, and was seen as somewhat removed from the cut and thrust of everyday politics. However, in light of the increased responsibilities of the MoJ, assuming that the post remains combined with that of Secretary of State for Justice, and given the recent appointment of Jack Straw MP as Lord Chancellor, it seems less likely that future Lord Chancellors will be members of this House. This makes it more probable that they will be ambitious for promotion to what are seen as more senior posts, such as Foreign Secretary or Chancellor of the Exchequer.

71. We believe that the role of Lord Chancellor is of central importance to the maintenance of judicial independence and the rule of law. Prime
Ministers must therefore ensure that they continue to appoint to the post candidates of sufficient status and seniority.

72. A related issue is the impact of the Lord Chancellor/Secretary of State being subject to a much larger number of judicial reviews—particularly in respect of prisons—than has been the case in recent years. The Judicial Position Paper on the MoJ noted that “the relationship between the Lord Chancellor and the Lord Chief Justice … depends on continuous dialogue, concurrence and consultation between the two in the field of judicial appointments, discipline and the administration of justice”. Yet the Lord Chief Justice said, “if I was sitting on an appeal to which [the Lord Chancellor] was a party, then I could not myself meet with him or enter into discussions with him while that appeal was pending; one of my other judges would have to”.

73. Whilst this problem could be overcome if the Lord Chief Justice agreed not to hear judicial review challenges to the legality of MoJ policies and practices, Lord Justice Thomas told us that “the Lord Chief Justice must sit in the major cases—that is his job primarily, to decide them. It would be awful and very damaging, I think, to the judiciary as a whole that if because of the need to maintain dialogue under the Concordat with the Lord Chancellor there was any perceived difficulty with him doing that” (Q 386). Therefore, although the Lord Chancellor has always been subject to judicial review in respect of the Legal Services Commission (QQ 419, 432), it will be necessary to give careful consideration to how his relationship with the Lord Chief Justice will operate under the new dispensation.

74. Another consideration is whether the former DCA responsibilities for constitutional affairs will continue to be given the attention that they merit in the much larger MoJ. Professor Terence Daintith expressed concern about “how difficult it is to find constitutional affairs within the organisation chart of the department” and warned that “it is a pretty small part of what the department does” (Q 493). However, Lord Falconer, supported by other witnesses including Professor Alan Page, insisted that “issues like human rights, freedom of information, the constitution of the United Kingdom are inextricably linked, I think, with the rule of law and the running of the courts” (Q 444) and therefore rightfully belonged in the MoJ. Moreover, the new Prime Minister’s decision to propose a series of constitutional reforms (to be overseen by the new Lord Chancellor and Secretary of State for Justice) during his first few days in office indicates that constitutional affairs will remain very much on the agenda. Indeed, the Green Paper setting out these proposals envisages constitutional reforms stretching into the next Parliament. We sincerely hope that constitutional affairs remain central to the Ministry of Justice’s responsibilities and are not downgraded in importance compared to the other duties of the Ministry.

75. The judiciary’s most serious ongoing concern relates to the funding and administrative support of the courts. Even before the announcement of the MoJ, there were problems with the budget-setting process. As the Lord Chief Justice said recently, the Concordat should have resulted in “a sea-change in

38 Evidence by the Lord Chief Justice and the Rt. Hon. Lord Justice Thomas to the Constitutional Affairs Select Committee, 22 May 2007, Q 103.
the attitude of both HMCS and the DCA, under the Lord Chancellor, to the role of the Lord Chief Justice in relation to the provision and administration of court resources” yet “there has been no real change in attitude at all”. Indeed, “the Lord Chancellor and his staff in the DCA continued to act as if he retained primary responsibility for the administration of justice and had sole responsibility for deciding what resources should be allocated to this and how they should be deployed”. The judges were “side-lined” and “decisions were taken without our participation and we were then told what was proposed”.40

76. Whilst the judiciary were in fact attempting to resolve this problem before the MoJ was announced, the Lord Chief Justice explained that the situation had been “tolerable so long as the Lord Chancellor was in the traditional and historic role of that office and so long as providing an administrative system for the courts remained one of his two most important budgetary concerns; the other being legal aid”.41 But with the creation of the MoJ, incorporating responsibilities for the overcrowded and resource-hungry prison system, there will clearly be far more demands on the Lord Chancellor’s departmental budget—which potentially means that the courts budget could be squeezed. As the Lord Chief Justice commented, “whereas before, so far as the Lord Chancellor was concerned, the running of the courts was really probably his primary concern, now he has taken on board an enormous portfolio, and it seems to us, looking at it realistically, that his primary concern is bound to be prisons and offender management”.42 However, one of our witnesses, Professor Robert Hazell, a former senior civil servant, offered an alternative view. He suggested that “the argument about the greater risk to the Courts Service inside a large Ministry of Justice potentially cuts both ways. The budget for the Courts Service itself is relatively small … One could say it is easier to protect the budget of £1 billion within a total budget of £10 billion, because there are more other votes or lines within the budget from which savings can be sought. I therefore do not see the arguments as necessarily all one way or potentially negative” (Q 496).43

77. It is also noteworthy that the creation of the MoJ has resulted in the removal of a key protection in relation to the financial position of the courts: the Senior Presiding Judge’s seat on the board of the DCA. Lord Justice Thomas explained that the Senior Presiding Judge could not take up a seat on the board of the Ministry because “it would be wholly inappropriate for a judge to sit on the board of a ministry where there was a conflict between how much we spend on prisons or how much we spend on the courts” (Q 391).

78. The judiciary’s other concern about courts funding relates to the impact of judgments against the MoJ. As the Judicial Position Paper noted: “If the budget of HMCS is not sufficiently independent of, or safeguarded from, the departmental budget, the consequence is that members of the judiciary

41 ibid.
42 Evidence by the Lord Chief Justice and the Rt. Hon. Lord Justice Thomas to the Constitutional Affairs Select Committee, 22 May 2007, Q 44.
43 Resource budget for the Home Office 2005/06 out turn: Prison Service £2,034,435,000; Probation £821,024,000; National Offender Management £790,763,000; Resource budget for the DCA HM Courts Service 2005/06 out turn £913,166,000.
will find themselves in the invidious position of making decisions which
directly impact on the Lord Chancellor’s ability to fulfil his duty under
section 1 of the Courts Act 2003 [‘to ensure that there is an efficient and
effective system to support the carrying on of the business’ of the courts’]. Sir Igor Judge warned that in 20 years a Minister of Justice may “wonder
why on earth one bit of his department is ordering another bit of his
department to spend money and he may take the view that spending the
money is for him”, thus risking a possible breach of judicial independence.
Moreover, he said, an individual whose judicial review fails may suspect that
“the judge was influenced in his decision against him by the fact that there
would be a huge cost imposed on the Ministry, of which the judiciary formed
a part in financial terms” (Q 378).

79. Lord Justice Thomas set out the reassurances sought by the judiciary in
relation to the funding of the courts as follows:

“there must be a fixed mechanism to set the budget and operating plan
with provision for capital expenditure; and, in the event of a dispute
between the judicial and executive branches of government as to the
resources necessary, the arbiter must be the legislature which of course
ultimately votes the budget in accordance with their view as to priorities
of overall expenditure. It is also necessary to ensure that if adjustments
are proposed to the budget during the year (for example by taking
money from the agreed budget to remedy shortfalls elsewhere in the
Ministry), there is a similar open and transparent mechanism which
must be followed before a change is made” (Q 374).

80. When we asked Lord Falconer about the issue of funding, he said, “I
completely accept the need for a properly funded court system” and pointed
to the statutory protections in section 1 of the Courts Act 2003 and sections
1 and 3 of the Constitutional Reform Act 2005 (Q 420). As for the financial
impact of judgments concerning the MoJ, he commented: “the principle that
I [already] deal with is, from time to time, the courts have to make decisions
about the granting or refusal of legal aid that can potentially have an effect on
legal aid funding and that can in its turn have an effect on funding available
to the courts. The judges obviously make these decisions completely in
accordance with the law and the facts. So far as I am concerned, it gives rise
to absolutely no difficulty in my relationship with the judges” (Q 431).

81. Nonetheless, Alex Allan, Permanent Secretary at the MoJ, demonstrated to
the House of Commons Constitutional Affairs Committee that he was taking
the judiciary’s concerns seriously. He revealed that “we have been working
through quite detailed processes to ensure that there is judicial involvement
in all stages [of the budget-setting process] so that some of their concerns
about the Lord Chancellor arbitrarily raiding the court budget to fund some
other portion of the Ministry of Justice’s budget would be alleviated”. He
also said, “we have produced a solution through this process which meets the
particular concerns to ensure transparency of the budget-setting process and
full involvement of the judiciary”, though at the time of writing it was not
clear that agreement with the judiciary on this point had been reached.45

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45 Evidence by the Rt. Hon. Lord Falconer of Thoroton and Mr Alex Allan to the Constitutional Affairs
Select Committee, 22 May 2007, Q 183.
Whilst greater judicial involvement in setting the courts budget might seem desirable, we do draw attention to a caveat set out by Professor Terence Daintith. He warned us that he would expect “judges always to be saying that they wanted more money for the Courts Service than the department or the Treasury were prepared \textit{ab initio} to give”, resulting in “a situation where there was at least an odour of disagreement floating around”. He felt that there could be “a quite difficult constitutional situation, year by year, in relation to the fixing of this budget” and suggested that if the judges “can stay out of it somehow … that would be perhaps the best way through, but my understanding is that they do not really want to stay out of it” (Q 494).

The integrity of the legal system depends on it being properly funded. We consider it one of the vital tasks of the Lord Chancellor to ensure that the Courts Service and Legal Aid budgets uphold that integrity. Whilst it is not for us to suggest how the courts budget should be agreed in future, we do urge the Lord Chancellor to ensure that it receives maximum protection from short-term budgetary pressures upon and within the new Ministry. Moreover, the budget-setting process must be transparent and the judiciary must be fully involved, both in determining the process and in its implementation.

Finally, we consider the status of Her Majesty's Courts Service (HMCS), an issue which has been highlighted by the judiciary in the context of discussions over the MoJ even though the issue was excluded from the remit of the working group. Indeed, the Lord Chief Justice felt that the question of the status of HMCS “has become a fundamental difference between [the judiciary and the Government]”. He told the House of Commons Constitutional Affairs Committee that HMCS “owes a duty to its minister, but we have urged that the duty it owes to its minister is to discharge the duty that the minister owes to us; that is to provide the judiciary with the resources that they need to provide the public with an efficient and effective system of justice”. Therefore, “its primary loyalty really ought to be to us”.

Lord Justice Thomas expanded on this point, telling us that in Ireland, the Netherlands and Denmark an “autonomous court administration with a greater degree of judicial participation” had been “very successful”, and concluding that “a new structure akin to these models is, in the view of the judiciary, a constitutional safeguard made necessary by the Ministry of Justice” (Q 374).

Reflecting on the motivation behind the concerns expressed by the senior judiciary in relation to HMCS, Professor Robert Hazell told us that “the gradual separation between the executive and the judiciary … was always going to be a process and not a single event, and I believe that it was bound in time to lead to demands from the judiciary for further separation, and those demands are now beginning to emerge, so although the Ministry of Justice has provided the occasion for those demands to be formulated by the judiciary, I do not myself believe that the Ministry of Justice is itself the cause”. He also reminded us that “there is a recent trend throughout northern Europe to introduce greater separation of powers between the executive and the judiciary, and as part of that to give the judges greater responsibility and control for managing the court service” (Q 472).
87. We are not convinced by the judiciary’s claims that the creation of the Ministry of Justice lends any additional urgency to their desire for an autonomous court administration. However, the status of Her Majesty’s Courts Service is of central importance to the administration of justice, and we urge the Government to engage meaningfully with the judiciary on this issue in order to find a mutually acceptable way forward.

**Human Rights Act**

*“Dialogue” in Relation to Convention Rights*

88. The HRA creates a dispensation under which the executive, Parliament and the judiciary each has a distinctive role in ensuring that policy and legislation complies with the European Convention on Human Rights. In relation to bills introduced to Parliament, the HRA requires ministers to make a statement that the bill is (or is not) compatible with Convention rights. This statement is then tested by the Joint Committee on Human Rights (JCHR) and other committees, and through scrutiny of the bill on the floor of both Houses. After enactment, aggrieved citizens who allege that they are victims of a violation of a Convention right may start legal proceedings in the appropriate court. The interaction between the different branches of the state about Convention rights can be regarded as a form of “dialogue”, as Dr Matthew Palmer explained (QQ 502–504). During the course of our inquiry we identified a number of criticisms about the efficacy of this dialogue, to which we now turn.

**Ministerial Compatibility Statements and Parliamentary Scrutiny**

89. Section 19 of the HRA requires the minister in charge of a bill in each House to make a statement, which is in practice published on the face of the bill, that in his view the provisions of the bill “are compatible with the Convention rights” or (something that has not yet occurred) to make a statement to the contrary. Section 19 statements were envisaged to be an important part of the HRA, enabling the executive to signal to Parliament and—important from the perspective of our inquiry—to the courts that a proper assessment of the human rights implications of legislation had been carried out. Although the terms of the government’s advice as to the compatibility of proposed legislation are not disclosed, the explanatory notes to bills summarise the government’s view of which rights are in issue and why the bill does not breach them.

90. Notwithstanding ministerial statements under section 19, there have been cases in which it is clear that ministers have initially adopted a far too optimistic view about the compatibility of provisions in a bill. Although few statutory provisions enacted since the HRA came into force have been subject to declarations of incompatibility by the courts, on a number of

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47 Three provisions enacted after the HRA came into force (in October 2000) have been subject to declarations of incompatibility, though in one case the declaration was overturned by the Court of Appeal: (i) *A and others v Secretary of State for the Home Department* [2004] UKHL 56 in relation to section 23 of the Anti-terrorism, Crime and Security Act 2001 permitting detention without trial (provision repealed by Prevention of Terrorism Act 2005 which put in place a system of Control Orders); (ii) *R. (on the application of Baiai) v Secretary of State for the Home Department* [2007] EWCA Civ 478 in relation to section 19(3) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 dealing with immigration procedures where sham marriages are suspected; and (iii) a declaration was made but subsequently overturned by the Court of Appeal in *Re MB* [2006] EWCA Civ 1140 in relation to Control Orders under section 2 of the Prevention of Terrorism Act 2005.
occasions the Government has had to make or accept major amendments to bills to bring them into line with Convention rights (as Parliament views them). For example, they replaced the “ouster” clause in the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 after strong representations from the JCHR and others. **Where a department has any doubt about compatibility of a bill with Convention rights, ministers should seek the involvement of the Law Officers at a formative stage of policy-making and legislative drafting.**

91. Reports of the JCHR are vital in drawing the attention of both Houses to possible compatibility problems. It is not, however, always clear that the Committee has sufficient time or information from the Government to carry out its role as effectively as it would wish. For example, reporting on the Prevention of Terrorism Bill in Session 2004–05, the Committee said “we regret that the rapid progress of the Bill through Parliament has made it impossible for us to scrutinise the Bill comprehensively for human rights compatibility in time to inform debate in Parliament”. 48 The limits of parliamentary scrutiny also need to be recognised. In many situations the issue is not so much whether the terms on the face of the bill are compliant, but whether a minister will subsequently exercise powers conferred by the bill in a manner which respects Convention rights. Parliament’s control over the use of such powers, once conferred, is necessarily limited.

92. Parliament’s scrutiny of the executive in relation to human rights is always likely to be subject to the problems outlined above. The courts have the central constitutional role in upholding respect for human rights. Is there a way in which they can help ensure compliance with human rights obligations and indeed the rule of law? We consider four options in the following pages: discussions between the Law Lords and members of the executive on issues of principle; a system of “abstract review” of legislation; the creation of a committee of “distinguished lawyers” to scrutinise legislation; and greater use of advisory declarations.

**Greater Guidance to the Executive from the Courts?**

93. Charles Clarke MP, the former Home Secretary, made it clear to us that he was angered that the courts had overturned a number of Control Orders issued under the Prevention of Terrorism Act 2005. He complained that “after the most intense Parliamentary discussions [on the Act], followed by the Home Secretary’s decision taken on the basis of detailed legal advice, and then a series of legal actions up to the Court of Appeal, the Home Secretary [was] then simply asked to take another stab with no guidance whatsoever as to how the highest courts would view the legality of his complicated and difficult decisions”. With the appeal process ongoing, he noted that “more than five years after 9/11 the legal and Parliamentary circus still moves on” and claimed that “this is a ludicrous way of proceeding which dangerously undermines confidence in every aspect of the police and criminal justice system” (Q 123). He added that “you could end up with a state of affairs where we end up leaving the European Convention [on Human Rights] as a result of public pressure” (Q 137).

94. Mr Clarke’s main concern was that “the judiciary bears not the slightest responsibility for protecting the public, and sometimes seems utterly unaware

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of the implications of their decisions for our security”. This criticism of the judiciary was implicitly echoed by former Prime Minister Tony Blair, who wrote recently, “again and again in court judgments we were forced to keep [foreign terror suspects] here” and misleadingly stated that anti-terrorism measures had been “struck down” by the courts (something which the courts are not empowered to do) as if his own Government had not introduced the HRA which the judges were applying. Mr Clarke went on to criticise “the total refusal” of the Law Lords to discuss “the issues of principle involved in these matters” and suggested that “it is now time for the senior judiciary to engage in a serious and considered debate about how best legally to confront terrorism in modern circumstances” (QQ 123, 131). In his view, “the question of where does the responsibility lie for upholding the rule of law in the country is a big, mega constitutional issue [and] for the Law Lords to say, ‘that is not really much to do with us; all we have to do is look at any particular case’ … is a bit rich” (Q 147).

95. Mr Clarke therefore suggested that the Law Lords should meet with the Home Secretary to discuss the broad issues of principle involved, in either a formal or informal setting (QQ 123, 137). He felt that “some proper discussion about what might or might not be legal would be a very helpful thing to do because we have spent five years since 9/11 without getting to a system that works” (Q 145). He added that “the idea that their independence would be corrupted by such discussions is risible” (Q 123).

96. The Lord Chief Justice later addressed Mr Clarke’s proposal in a speech, referring in particular to Lord Bingham of Cornhill’s refusal to meet with the former Home Secretary to discuss Control Orders. Whilst he understood Mr Clarke’s “frustration” on this point, he warned that “judges must be particularly careful not even to appear to be colluding with the executive when they are likely later to have to adjudicate on challenges of action taken by the executive”. Moreover, section 3 of the CRA expressly states that “the Lord Chancellor and other Ministers of the Crown must not seek to influence particular judicial decisions through any special access to the judiciary”. One of the current members of this Committee, the former Lord Chief Justice Lord Woolf, noted that this was particularly crucial in the case of the Law Lords because they “have the responsibility of being the final arbiters on law on the particular facts” (Q 146).

97. Whilst we have sympathy with the difficulties outlined by Charles Clarke in relation to the Human Rights Act, his call for meetings between the Law Lords and the Home Secretary risks an unacceptable breach of the principle of judicial independence. It is essential that the Law Lords, as the court of last resort, should not even be perceived to have prejudged an issue as a result of communications with the executive.

Should there be a System of Abstract Review?

98. In many constitutional systems throughout Europe, procedures exist through which judges (usually in the form of a constitutional court) may be asked to provide a prompt ruling on whether proposed or recently enacted legislation is or is not contrary to basic rights contained in the constitution. Such

arrangements are called “abstract review” because they permit examination of the terms of legislation in the abstract rather than in a “concrete” situation arising when the legislation is applied to a particular situation.

99. The precise basis on which abstract review is conducted differs from country to country, but typically a question is referred to the court by a public body or a group of members of the legislature. In Germany, the Bundesverfassungsgericht (Federal Constitutional Court) has jurisdiction to carry out abstract review of federal legislation referred to it by specified political institutions. In Spain, the Tribunal Constitucional similarly has powers of abstract review; proceedings must be started within three months of the official publication of the law in question. In France, the Constitution of the Fifth Republic established the Conseil Constitutionnel, a body of nine distinguished statesmen whose role includes scrutiny of legislation in judicial proceedings after it has been voted on by Parliament but before it is promulgated. Such scrutiny must be completed within a month.

100. Mr Clarke alluded to something along broadly similar lines when he suggested to us that there was a need in the British constitutional system for “a process whereby the senior judiciary gives a formal opinion upon the extent to which proposals for legislation comply with the European Convention before Parliament debates the bill, rather than possibly years later” (Q 123). Specifically, he suggested that “a senior committee of Law Lords” should make a judgment on the ministerial statement of compatibility with the HRA which is a mandatory part of every government bill. In this way, he continued, “if there were doubt that the Secretary of State’s certificate was correct amongst the highest lawyers in the land, that would be made clear at the outset before the whole of the parliamentary process rather than subsequently”. Mr Clarke did, however, accept that “this would be a massive constitutional departure … because it would immediately introduce the judiciary into the legislative process in some sense” (Q 125).

101. This suggestion would indeed be a constitutional innovation if adopted in the United Kingdom, necessitating a re-examination of current understandings of parliamentary sovereignty and privilege. Moreover, abstract review in other countries takes place in constitutional settings (often encompassing codified constitutions and constitutional courts) that are very different from the British one.

102. Rulings on the general compatibility of primary legislation with Convention rights, whilst sounding unusual to the ears of some lawyers in this country, are however already a feature of the United Kingdom’s devolution settlement. The Scotland Act 1998 enables the Law Officers to refer the question of whether a bill or any provision of a bill would be within the legislative competence of the Scottish Parliament to the Judicial Committee of the Privy Council (in future, the Supreme Court of the United Kingdom) for decision.\(^51\) Similar provision exists in relation to Assembly Measures before the National Assembly of Wales.\(^52\) These provisions, though not yet used, enable the Law Lords to assess (among other things) whether the bill or measure in question is compatible with Convention rights, as it is outside the competence of the Scottish Parliament and the National Assembly of Wales to pass legislation that is incompatible with such rights. Further

\(^51\) Scotland Act 1998, s 33.
constitutional reform along these lines cannot therefore be dismissed as unthinkable. There would, however, be difficulties in designing such a system.

103. One concern is that abstract review as practised in the countries mentioned above could compromise the position of the Law Lords or other senior judges called upon to make findings of compatibility or otherwise. As the Lord Chief Justice explained recently: “the Strasbourg Court requires that any individual whose human rights are adversely affected by governmental action must have a right to challenge that action in a court of law. If the senior judiciary have already resolved the issue before such a challenge is made, how can the individual making the challenge have a fair hearing? It is for this reason that we have separation of powers”. Moreover, the introduction of a system of abstract review risks muddling legislative and judicial processes and drawing the judiciary into the political arena. This would run counter to the principle of greater separation of functions which underpins many aspects of the recent reforms.

104. Another concern relates to the efficacy of “abstract review”. A judicial assessment of the general compatibility of an aspect of a legislative scheme with Convention rights may not be able to anticipate how administrative powers will actually be exercised in particular situations. Bills are often drafted so as to confer very wide discretionary powers on the Secretary of State or other public authorities, with the result that Parliament is unable to make any properly informed assessment of the impact that the exercise of such powers will have on particular individuals (which is a key consideration in judging the proportionality of a measure, an assessment that is necessary in relation to several Convention rights). Moreover, even if a judicial body has given proposed legislation approval in the abstract, individuals cannot subsequently be barred from challenging the application of a policy to their own special circumstances. To do so would not only be contrary to the rule of law but would most likely also be contrary to Article 6 (right to a fair trial) and Article 13 (effective remedies for breach of Convention rights) of the European Convention on Human Rights.

105. A further concern is that creating an opportunity for prior judicial scrutiny of bills could delay the introduction and implementation of the government’s proposals, which is likely to be unacceptable in the case of anti-terrorism policy.

106. Whilst a system of “abstract review” of legislation might seem attractive in some respects, we believe that it could compromise the impartiality of the senior judiciary and that it would not in any case prevent successful challenges under the Human Rights Act to ministerial exercise of statutory powers.

Review of Bills by a Committee of Distinguished Lawyers

107. If it is generally constitutionally undesirable to involve any part of the judiciary in the process of making rulings on the compatibility of bills or draft bills with Convention rights, it may be that a committee of retired Law Lords, professors, former attorneys general and legal practitioners could perform this role instead. However, Mr Clarke felt that “those people would

not have any greater authority really than Home Office lawyers in that situation" (Q 128). A committee of legal grandees also risks duplicating the work already carried out by the JCHR, which has an important role in scrutinising the compatibility of bills with Convention rights and drawing concerns to the attention of both Parliament and the executive. Moreover, the House of Lords as currently constituted has an abundance of distinguished members of the kind outlined above, and can therefore bring this expertise to bear during the passage of legislation through the House.

108. **We do not believe that a committee of distinguished lawyers tasked with scrutinising legislation for compatibility with Convention rights is desirable at this time. If, however, at some future time the composition of the House of Lords changes, this is an idea that may well merit further consideration.**

**Advisory Declarations**

109. We have already explained why we do not believe that a system of “abstract review” would not be appropriate in this country. However, this is not to say that the courts could not exercise a jurisdiction to make **advisory declarations** about the compatibility (or otherwise) of legislative provisions promptly after enactment. Claims for advisory declarations differ from “abstract review” in that they are brought using ordinary legal procedures, arise out of a practical situation and the court hears submissions from two or more parties. The English courts have long been wary of adjudicating on hypothetical issues, but in 1994 the Law Commission of England and Wales recognised that advisory declarations had a role to play and Lord Woolf’s major review of the civil justice system in 1996 recommended that the High Court should have “an express power to grant advisory declarations when it is in the public interest to do so. However, this should be limited to cases where the issue was of public importance and was defined in sufficiently precise terms, and where the appropriate parties were before the court”.

110. Advisory declarations will be inappropriate in some circumstances. Thus the High Court recently held that it had no jurisdiction to issue an advisory declaration (in a case brought by the Campaign for Nuclear Disarmament) on whether Resolution 1441 of the United Nations Security Council (an instrument of international rather than national law) authorised states to take military action in the event of non-compliance by Iraq with its terms. In other situations, however, the courts have been willing and able to give guidance on matters of general public importance. For example, the House of Lords made a declaration on whether a departmental circular was correct to state that a pregnancy was “terminated by a registered medical practitioner”, and therefore lawfully under the Abortion Act 1967, when the termination is prescribed and initiated by a medical practitioner who remains in charge of it, and is carried out in accordance with his instructions by qualified nursing staff. Moreover, the Government has recently shown itself open to the possibility of identifying a test case to bring an issue of importance about the HRA to the courts. Therefore, although not a

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55 Campaign for Nuclear Disarmament v Prime Minister of the United Kingdom [2002] EWHC 2777.


57 YL v Birmingham City Council [2007] UKHL 27.
panacea, it is possible to envisage situations in which an advisory declaration may provide an opportunity for the courts to give guidance on a question relating to a Convention right.

111. **We recommend that the Government and the judiciary give further consideration to how advisory declarations might be used to provide guidance on questions relating to Convention rights.**
CHAPTER 3: PARLIAMENT AND JUDICIARY

Introduction

112. Section 137 of the CRA, when it is brought into force, will disqualify all senior serving judges from sitting and voting in the House of Lords. Although in recent years it has become increasingly rare for the Law Lords and other senior serving members of the judiciary who hold peerages to participate in debates in the House of Lords, section 137 will be constitutionally significant. Moreover, proposals to reform the composition of the House of Lords may result in there being fewer retired judges in the House, or possibly none at all. Against this changing background, it is necessary to consider how the senior judiciary might convey to Parliament any concerns about legislation or policy.

Laying Written Representations before Parliament

113. The most obvious mechanism to convey such concerns is set out in section 5 of the CRA, which allows the Lord Chief Justice (and the Lord Chief Justice of Northern Ireland and the Lord President of the Court of Session in Scotland) to “lay before Parliament written representations on matters that appear to him to be matters of importance relating to the judiciary, or otherwise to the administration of justice”.

114. When we asked the current Lord Chief Justice about the circumstances in which this power should be used, he told us that “this is a power to be exercised when I really want to draw attention to something that is really important, not something to be done as a matter of routine. I see this really as a substitute for what the Lord Chief Justice has been able to do and has done in the past, which is to address the House on a matter which is considered sufficiently important to justify that step” (Appendix 8, Q 38). He went on to describe the power as “a nuclear option” and suggested that it might be used “if something was proposed by way of legislation that was so contrary to the rule of law that judges would feel: ‘We have got to step in and make plain our objection to this’” (QQ 48, 50). Appearing before the House of Commons Constitutional Affairs Committee on 22 May 2007, the Lord Chief Justice indicated that in relation to the failure (as he saw it) of the then Lord Chancellor, Lord Falconer, to provide safeguards following the creation of the MoJ, he was getting near the point of considering it necessary to use his section 5 power.58

115. Perhaps unsurprisingly, Lord Falconer also thought that this power should be a “nuclear option” and “a rarely used power” which would only come into play if the judiciary failed to obtain satisfaction through prior discussions with the executive (Q 61). Indeed, he warned that “if the representations were used on a routine basis … then I think that would greatly reduce the effect of the power” (Q 65). He also suggested that the Lord Chief Justice should only use this power in relation to issues “that touch … the independence or the position of the judiciary”, including inadequate resourcing of the court system or undue interference in the judicial

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58 Evidence by the Lord Chief Justice and the Rt. Hon. Lord Justice Thomas to the Constitutional Affairs Select Committee, 22 May 2007, Q 58.
appointments system (Q 61). Clearly, however, it would be for the Lord Chief Justice to decide when to use his “nuclear option”.

116. This leads us to ask a question which appears to have received remarkably little attention: how should the executive and legislature respond if the Lord Chief Justice were to exercise his right to lay written representations before Parliament?

117. First, it would seem essential for the executive promptly to present Parliament with a formal written response to the Lord Chief Justice’s concerns, probably in the form of a written ministerial statement. Lord Falconer seemed to accept this, saying “I would have thought there would have to be a government response” (Q 63). Furthermore, if the Lord Chief Justice’s concerns relate to a piece of legislation being considered by Parliament, it might be considered appropriate for the response to be made before the bill has progressed too far in either House, in order that the deliberations of MPs and peers can properly be informed.

118. Second, it is clear that Parliament should now give some serious thought in advance as to how it might treat any written representations from the Lord Chief Justice, because it would be inadvisable to wait until a constitutional crisis arises before choosing an appropriate process to scrutinise the concerns in question. In our view, it would be desirable for such representations to be published in Hansard and for the bill or policy in question to be debated on the floor of the House. It might also be useful for there to be more in-depth scrutiny of the Lord Chief Justice’s concerns in order to aid the deliberations of the House. In his paper, Professor Bradley suggested that “when the chief justice … exercises his new right to lay written representations before … Parliament, this should lead to a hearing before a committee” (Appendix 4). It might perhaps be appropriate for this Committee to undertake such a hearing in this House, and for the Constitutional Affairs Select Committee (or its successor committee) to do so in the House of Commons. These hearings might include oral evidence from the Lord Chief Justice himself, the relevant minister and other key stakeholders.

119. **We recommend that any written representations received from the Lord Chief Justice under section 5 of the Constitutional Reform Act 2005 should be published in Hansard; that the business managers should find time for the issue to be debated in the House at the earliest possible opportunity; and that the Government should respond to such representations in good time before either House has finished considering the bill or initiative in question. Further, this Committee will endeavour to scrutinise any such representations in time to inform deliberations in the House.**

**Other Ways of Communicating with Parliament**

120. Since the Lord Chief Justice’s power to lay written representations before Parliament is likely to be a rarely-used “nuclear” option, there need to be other more routine ways in which lesser concerns can be conveyed to Parliament. The Lord Chief Justice asked, “might there not be a machinery, if there was a particular topic that I thought it desirable to ventilate, whereby I could let the appropriate committee know that if they were interested in hearing about this I would be happy to discuss it?” (Appendix 8, Q 43). Lord Mackay of Clashfern agreed with this approach, telling us that “more informal procedures such as
speaking to committees ... are more likely to be productive” (Q 180). We agree that select committees offer a suitable arena for the Lord Chief Justice, or other senior judges, to air concerns about the administration of justice and the impact of legislation and other policy proposals upon the courts and the judiciary. The Lord Chief Justice already appears before this Committee annually, but we would always be open to additional appearances as necessary by him and other senior colleagues, and we trust that other committees of both Houses would take a similar approach.

**The Question of Accountability**

121. It is now necessary to ascertain how the judiciary should be held accountable. Professor Bradley warned that “judicial independence requires that judges are not directly accountable either to the executive or to Parliament for their decisions. The primary form of accountability comes from four aspects of judicial process: (a) most court hearings take place in public; (b) judicial proceedings are usually adversarial; (c) judicial decisions must deal with the submissions of the parties; and (d) most decisions may be challenged by appeal to a higher court” (Appendix 4). Therefore, as Professor Vernon Bogdanor has pointed out, “it is not for Parliament to consider the conduct of individual judges, nor to hold judges to account for their judgments, nor to examine the merits of individual appointments or complaints against judges”.59 In fact, according to *Erskine May*, “reflections” may only be cast upon the conduct of judges in Parliament if there is “a substantive motion, drawn in proper terms” 60

122. Nonetheless, subject to these caveats, Professor Bogdanor noted that “it is a fundamental principle of a democratic society ... that those with power should be accountable to the people, through their elected representatives”. We would add that the House of Lords has special responsibilities as a guardian of constitutional values and should thus play a role here as well. Professor Bogdanor suggested that judges should not be “answerable” to Parliament in terms of justifying their decisions, but should “answer” to Parliament through committee appearances—in other words, they should be accountable to Parliament not in the “sacrificial” sense, but in the “explanatory” sense. We find this an interesting argument.61

123. In a previous report, we noted that Parliament was the “apex” of accountability in the political process.62 This principle is apt here, since the public is the judiciary’s key stakeholder and Parliament represents the people. We have therefore sought to identify ways in which Parliament can help the judiciary to remain accountable. Since the Lord Chancellor is no longer head of the judiciary and therefore cannot answer to Parliament on its behalf, Parliament must hold the judiciary accountable in other ways.

**The Role of Select Committees**

124. Select committees, especially this Committee and the Constitutional Affairs Select Committee (or its successor committee) in the House of Commons,
can play an important role in holding the judiciary to account by questioning judges in public. Our Committee has already adopted the practice of inviting the Lord Chief Justice to appear before us on an annual basis, and there is scope for taking evidence from other senior judges. Committees must be sensitive to the caveats mentioned above, and the need for the judiciary not to become involved in overtly political questions, but judges themselves should be aware of which subject areas they can appropriately discuss. Indeed, Parliament and the judiciary have agreed a set of internal guidelines to help judges appearing before committees.

125. It is clearly acceptable for committees to question judges on the administration of the justice system and the way in which the judiciary is managed. In addition, it may be desirable for discussions to range beyond such issues, with judges being asked about their opinions on broad legal questions such as the use of comparative law, the distinction between sections 3 and 4 of the HRA and the wider interpretation of the Pepper v Hart judgment. Indeed, given that many judges’ views on issues such as these are already in the public domain in the form of articles and speeches, it would be odd if Parliament was denied the opportunity to probe such opinions in more detail. As Professor Bogdanor commented, judges “should not object to discussing [their] views in a parliamentary forum, in the cause of greater public understanding”. However, it would be inappropriate for committees to question judges on the pros and cons of particular judgments.

126. We believe that select committees can play a central part in enabling the role and proper concerns of the judiciary to be better understood by the public at large, and in helping the judiciary to remain accountable to the people via their representatives in Parliament. Not only should senior judges be questioned on the administration of the justice system, they might also be encouraged to discuss their views on key legal issues in the cause of transparency and better understanding of such issues amongst both parliamentarians and the public. However, under no circumstances must committees ask judges to comment on the pros and cons of individual judgments.

A Parliamentary Committee on the Judiciary

127. This leads us to the question of whether there should be a committee tasked solely with scrutinising the judiciary. In 2004, the Select Committee on the Constitutional Reform Bill concluded: “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.” Three years later, no such committee has been formed.

128. The Lord Chief Justice, when asked about the possible creation of such a committee, felt that it was “an option that merits consideration” because

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64 See http://www.ukpac.org/bogdanor_speech.htm.
“Parliament is certainly justified in expecting some way of communicating with the judiciary” (Appendix 8, Q 40). Good communications are indeed both desirable and necessary, because there must be a mechanism for effective parliamentary oversight of, and two-way dialogue with, the judiciary now that there is essentially no judicial representation in the legislature. However, given that judicial affairs are an important element of the constitution, it might be argued that this Committee and the Constitutional Affairs Committee (or its successor committee) in the House of Commons could provide the fora for such communications. On the other hand, a new joint committee could lighten the burden on both the judiciary itself and the two constitution committees.

129. **We are not currently convinced of the need for a joint committee on the judiciary, but we shall keep the situation under review, not least in evaluating our Committee’s effectiveness in providing the necessary oversight and contact. The Constitutional Affairs Select Committee in the House of Commons also has an important role to play.**

*Post-legislative Scrutiny*

130. A recent and interesting development in Parliament is select committee inquiries into the way in which the courts are interpreting and applying legislation. In the past three years, the Joint Committee on Human Rights have twice investigated the courts’ approach to defining the terms “public authority” and “function of a public nature” in section 6 of the HRA. The Joint Committee reached the conclusion that the leading judgments of the courts had given those terms an overly narrow meaning and as a result the true intention of Parliament was not being given effect. With growing awareness of the importance of post-legislative scrutiny, it is likely that in future similar inquiries will consider the judicial interpretation of parliamentary legislation in other contexts. However, we are concerned that post-legislative scrutiny has still not become the “common feature” that we concluded it should be in an earlier report. **We repeat our earlier conclusion that post-legislative scrutiny is highly desirable and should be undertaken far more generally. This would boost the level of constructive dialogue between Parliament and the courts.**

*Confirmation Hearings*

131. Our inquiry has not focused on judicial appointments as it would have been premature to do so: the Judicial Appointments Commission of England and Wales has only recently begun to operate and the selection commission that will seek Justices of the Supreme Court of the United Kingdom will not begin its work until some time after October 2009 (the anticipated date on which Part 3 of the CRA will come into force, transferring functions from the Appellate Committee of the House of Lords to the new court).

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132. No account of communications between the judiciary and Parliament would be complete, however, without mention of confirmation hearings. In a number of constitutional systems there is a requirement or convention that appointees to high judicial office appear in front of a committee of the legislature before being confirmed in their post. However, the possibility of confirmation hearings (or appearances before a select committee soon after appointment) was canvassed during the passage of the Constitutional Reform Bill and firmly rejected.  

133. Nonetheless, we note three developments. The first is the proposed creation for the first time in the United Kingdom of a statutory requirement for confirmation hearings, albeit in the very different context of appointments made by the Mayor of London. The second is the announcement in 2006 by the Prime Minister of Canada that his candidate for a Supreme Court of Canada vacancy (Justice Marshall Rothstein of the Federal Court of Appeal) had agreed to appear before an ad hoc committee of the Canadian House of Commons, chaired by a judge and law professor who were not MPs. A televised hearing was held in which Justice Rothstein answered questions about himself and his view of the role of the Supreme Court of Canada. 

134. The third and most important development is the proposal of the MoJ in their Green Paper The Governance of Britain to introduce pre-appointment or post-appointment committee hearings for certain key public posts. The Green Paper also refers to judicial appointments in the following terms: “The Government is willing to look at the future of its role in judicial appointments: to consider going further than the present arrangement, including conceivably a role for Parliament itself, after consultation with the judiciary, Parliament and the public, if it is felt there is a need”. However, when asked about this point, Baroness Ashton, Leader of the House of Lords, told peers that “to my knowledge there is absolutely no intention” of introducing pre-appointment hearings for judges. Whilst we embrace this assurance from Baroness Ashton, we are concerned that it does not tally with the wording of the Green Paper.

135. We urge the Government to clarify their position on the introduction of appointment hearings for judges at the earliest opportunity, since this would be an innovation with very profound implications for the independence of the judiciary and the new judicial appointments system.

An Annual Report on the Judiciary

136. An additional device to facilitate effective scrutiny would be an annual report by the judiciary of England and Wales to be laid before Parliament. Although numerous different parts of the judiciary already produce annual reports, there would also be value in having one consolidated report on behalf of the judiciary as a whole. The Lord Chief Justice told us in May 2006 that this “is something we are considering” (Appendix 8, Q 39) and then on 17 July 2007

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70 Greater London Authority Bill.
71 The hearing was held on 27 February 2006.
73 HL Deb 3 July 2007 col 933.
he announced that the Judicial Executive Board had agreed to produce such an annual report to be laid before Parliament. Although the mechanism for laying such a report has yet to be determined, we suggest that it should be laid under section 5 of the CRA so that it has a formal status.

137. The question of what should be contained in the report is primarily a matter for the judiciary. However, it might make sense for it to contain an overview of issues relating to the administration of justice—including the funding of the courts and the activities of the Judicial Office—and perhaps an account of concerns amongst the senior judiciary on matters such as sentencing policy.

138. Once the report is laid before Parliament, both Houses should debate it, perhaps after the report has been considered and commented upon by our Committee and the Constitutional Affairs Select Committee (or its successor committee) in the House of Commons. Moreover, Lord Mackay of Clashfern suggested that upon publication of the report, “the Lord Chief Justice would probably give a press conference, explaining the report and answering any questions that might be raised about it by the press” (Q 180).

139. We welcome the Judicial Executive Board’s decision that the Lord Chief Justice should lay an annual report before Parliament, an innovation which this Committee had discussed with the Lord Chief Justice and other senior judges in the course of our deliberations. We suggest that the annual report should be formally laid under section 5 of the Constitutional Reform Act. We further suggest that the report might encompass administrative issues and—where appropriate—areas of concern about the justice system, provided that there is no discussion of individual cases. We believe that the report will provide a useful opportunity for both Houses of Parliament to debate these matters on an annual basis, and for the Lord Chief Justice to engage effectively with parliamentarians and the public.
CHAPTER 4: JUDICIARY, MEDIA AND PUBLIC

Introduction

140. It is essential that the judiciary should engage effectively with the public in order to maintain confidence in judges and the parts of the justice system for which they are responsible. Before considering how this can best be done, it is sensible to assess how the judiciary are currently perceived by the public.

Public Perceptions

141. Unfortunately, as Professor Dame Hazel Genn explained, there is “little information ... about attitudes to the judiciary in England and Wales” because “there has been no sustained tradition of investment in research” (Q 308). However, on the basis of what limited information there is, she told us that “the public believe or know that the judiciary are not corrupt, that they do not tell lies, that they are independent, the public trusts them to apply the law impartially”. And whilst the public also believe that judges are somewhat out-of-touch, Dame Hazel rightly pointed out that “the fact that people say, 'I think they seem a bit out-of-touch, I am not sure that they really know what goes on in the real world' is not inconsistent with saying 'I trust them' and I think they do trust them and what we see from … polls is that by comparison with other institutions they trust the judiciary very much” (Q 306). Moreover, the advent of the Judicial Appointments Commission, bringing greater transparency to the selection of judges and attempting to encourage applicants “from the widest range of backgrounds”, should help to increase public confidence in the judiciary still further (Q 327).

142. However, whilst public confidence in judges appears generally to be holding up, attitudes may be shifting. A panel of legal journalists told us that judges are increasingly seen as “too left-wing, too bleeding liberal, too wet” and “too pro-human rights and too soft”. They also pointed to a perception that “the Government tries to get tough and do things to help the public and the judges sabotage it” (Q 95). Frances Gibb, Legal Editor of The Times, added that people are more willing to speak out nowadays because “it is not off limits to attack anyone in authority in the way it might have been 30 years ago” (Q 100).

143. Similarly, Paul Dacre, editor of the Daily Mail, felt that whilst “the public still have huge faith in the independence and integrity and incorruptibility of the British judiciary”, they are becoming “slightly confused” because they see “political judgments being made by judges which fly in the face of what they perceive as national interests” and “an increasingly lenient judiciary, handing down lesser and lesser sentences”. In his view, the public “still have great faith in the judiciary but there are worries that it is not reflecting their values and their instincts” (Q 335). To support these claims, Mr Dacre commissioned an ICM poll in advance of his appearance which found that, of the more than 1,000 members of the public questioned, only 18 per cent had faith that the sentences they wanted passed against criminals would be reflected by the courts whilst 75 per cent felt that sentences were too lenient (Q 353).

144. In some cases, public attitudes towards the judiciary—whether positive or negative—can stem from ignorance of how the justice system works. As
Dame Hazel said, “people are [not] taught properly about the justice system, about the judiciary and about the difference between civil and criminal courts at school, it is not something that we are brought up on”. As a result, “people grow up in relative ignorance about what the justice system is there for and what it does”. Whilst some people will have first hand experience of the justice system, most people draw their knowledge of the judiciary and their opinions from the media, and “the danger with that is, of course, that the reporting in the media and representations on the television are very selective, they are rather haphazard” (Q 308). Indeed, media coverage of the judiciary tends to focus on controversial or damaging stories and cases, because “a story about a judge behaving with outstanding levels of professionalism in court is not going to make news in the same way as a doctor performing an operation absolutely beautifully does not make news” (Q 309).

145. Given their important role in shaping attitudes towards the judiciary and the justice system, the media have a duty to report proceedings accurately and fairly. However, certain sections of the media might be said to abuse this position of responsibility by attacking individual judges or the judiciary as a whole for carrying out their obligations by implementing the HRA or following sentencing guidelines. For example, the High Court ruled in May 2006 that the nine Afghan nationals who had hijacked an aeroplane should have discretionary leave to remain in the United Kingdom under the HRA. The following day, the Daily Express printed a leader in the following terms: “Using the European Convention on Human Rights as cover, Mr Justice Sullivan made a ruling which many will regard as tantamount to a judicial coup against Parliament … Britain’s out-of-touch judges are increasingly using the Human Rights Act as a means of asserting their will over our elected representatives”.74 Similarly, a Daily Mail editorial in 2003 asserted that “Britain’s unaccountable and unelected judges are openly, and with increasing arrogance and perversity, usurping the role of Parliament, setting the wishes of the people at nought and pursuing a liberal, politically correct agenda of their own, in their zeal to interpret European legislation”.75 This kind of rhetoric is misleading and wholly inappropriate, showing no regard for the consequences. As Lord Falconer has said, it has “an impact in undermining confidence in the judiciary”.76

146. We believe that the media, especially the popular tabloid press, all too often indulge in distorted and irresponsible coverage of the judiciary, treating judges as “fair game”. A responsible press should show greater restraint and desist from blaming judges for their interpretation of legislation which has been promulgated by politicians. If the media object to a judgment or sentencing decision, we suggest they focus their efforts on persuading the Government to rectify the legal and policy framework. In order to ensure more responsible reporting, we recommend that the Editors’ Code of Practice, which is enforced by the Press Complaints Commission, be regularly updated to reflect these principles.

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74 Leader, 11 May 2006.
75 Comment, 20 February 2003.
76 Evidence by the Rt. Hon. Lord Falconer of Thoroton and Mr Alex Allan to the Constitutional Affairs Select Committee, 4 July 2006, Q 250.
147. Furthermore, as discussed in Chapter 2, Ministers can on occasion worsen the situation by making inappropriate comments about judges or their judgments, even though the judges are striving to follow sentencing guidelines and to apply Government legislation. This kind of behaviour by any minister is unacceptable. In addition, Frances Gibb of The Times told us that ministers are all too often “peddling the wrong image” of the HRA (Q 116), a view which echoes the finding of the Joint Committee on Human Rights that ministers are making “unfounded assertions about the Act” and using the Act as “a scapegoat for administrative failings in their departments”.77 This can increase the public pressure on judges charged with interpreting an Act which was introduced by this Government, with the result that, in the words of Paul Dacre, “the perception is that it is the judges’ fault” (Q 358).

148. It will be clear that we believe it is incumbent on the media as well as politicians to exercise restraint when commenting on judges or their judgments. However, this is not to say that the judiciary, particularly with their greater independence from the executive, can merely stand aloof, refusing to engage with the media and the public outside the courtroom. With this in mind, we were disappointed at the reaction of Sir Igor Judge, President of the Queen’s Bench Division, who told us that he was “very troubled” about the Judicial Communication Office’s (JCO) ambition to enhance public confidence in judicial officeholders, explaining that:

“enhancing public confidence is a most difficult concept and it is particularly difficult … for judges who actually are not in the business of trying to sell themselves to anyone. If our judgments do not speak for themselves there is nothing that the Communications Office or the press office can do” (Q 235).

149. Whilst Sir Igor is of course correct that the words of the judge in the courtroom are by far the most important way in which the judiciary interact with the public and the media, Joshua Rozenberg of The Daily Telegraph commented that “the judges have to work for [respect]. I do not think they can assume, as perhaps they used to, that it comes automatically with the role and with the knighthood. That is why public relations is so important and that is why perhaps it is in the judges’ interests for them to be doing more in order to retain—and even regain—the public’s confidence” (Q 101). We have sympathy with this view. The key question is that posed by Lord Falconer: “how do [the judiciary] connect with, and retain the confidence of the public, without forfeiting either their independence or their very role in deciding cases in accordance with the facts before them”?78

The Role of Individual Judges

150. We now consider the ways in which the judiciary can, do and should communicate with the public and the media. First, to take individual judges and their judgments, the Lord Chief Justice warned us that “it ought to be clear from the judgments in question the process of reasons that has led the judge or judges to reach their conclusions … and it would not be appropriate for those who have given the judgment or, indeed, for me to go beyond that”

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RELATIONS BETWEEN THE EXECUTIVE, THE JUDICIARY AND PARLIAMENT

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(Appendix 8, Q 54). Similarly, Lord Lloyd of Berwick, a former Law Lord, told us that “it is highly undesirable that judges should be asked to defend their decisions” (Q 199). Furthermore, Professor Bradley wrote that “even if the judge should wish to correct any misunderstanding of the decision, the judgment itself should have emphasised the factors that explain an unexpected or controversial outcome” (Appendix 4). Paul Dacre agreed that in the case of controversial decisions, the judge should anticipate the “storm” (which, we observe, is often media-driven) and go “out of his way to explain himself” (Q 344). Clearly, then, it is not for individual judges to defend their individual decisions in the media, but they should make every effort to explain the reasoning behind their judgments or sentencing decisions in the clearest possible manner in order to avoid any misunderstanding of the true position by either the media or the public.

151. Notwithstanding the general rule that judges should not defend their rulings in the press, a number of them in the High Court and Court of Appeal have in recent years drafted media releases to accompany their judgments in particularly high-profile or complex cases. For example, in the case of the profoundly disabled baby Charlotte Wyatt, where the parents appealed against a High Court decision on her treatment in the event of a decline in her condition, a media release provided a summary of the Appeal Court’s judgment.79 This kind of accessible and concise explanation increases the transparency of the decision and is to be commended.

152. Another issue is judges speaking publicly outside the courtroom on general legal and constitutional matters. Lord Mackay of Clashfern’s revocation of the so-called Kilmuir Rules meant that individual judges were given the power to decide for themselves whether or not to do so. It can be very beneficial for individual judges to engage with the public and the media in this manner. As Frances Gibb has written, “if the judiciary wants the public to understand how rulings are reached and the constraints under which they work, they need to speak out—often”.80 The only caveat is that judges should not comment on overtly political matters or in a way that might compromise their reputation for impartiality.

153. Whilst it is desirable for judges to speak out on judicial matters in the way outlined above, a different question is whether they should co-operate with so-called “human interest” media stories so that the public can find out more about their lives and their activities in the local community. As Clare Dyer of The Guardian told us, “people want to know more about the people they are reading about. They do not see them as remote sphinx type figures as the judge used to be thought of in the past” (Q 115). Professor Dame Hazel Genn noted that “there are things that individual judges do on their own initiative in their local communities, but I think there is scope for them to do more and I hope that they will do more in the future … It is important that somebody has responsibility for projecting positive images of the judiciary” (Q 321). However, Mike Wicksteed, Head of Judicial Communications, felt that this was not a priority for his office since the focus would be on making sure that “the work [the judges] do in court is well and accurately reported”. Sir Igor Judge was more vehement in his opposition to the JCO doing this kind of work, answering “no, not ever” (Q 227).

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80 Benchmark Number 4 (July 2006), pp 7–8.
154. We now turn to the issue of judges giving off-the-record briefings to journalists, a phenomenon which mirrors the spin culture of Westminster and Whitehall and which appears to be on the increase. Clare Dyer told us that she had done “a series of interviews with judges about a very political subject … on conditions of anonymity”, and both Joshua Rozenberg and Frances Gibb said that they had also reported comments on these terms (QQ 86, 87). We asked a former Lord Chancellor and a senior judge about this practice, and they both condemned it in the strongest terms. Lord Mackay of Clashfern said that he did not like off-the-record briefings “in any circumstances whatsoever” and added that “if I had something to say that was worth saying I was prepared to say it and stand by it” (Q 171). Similarly, Sir Igor Judge told us that “I think it is unacceptable for judges to be making statements … unattributably” and “if you are going to make any statements of that kind you should be prepared to accept responsibility for them”. He concluded, “I think off-the-record briefings … should not happen. That is my very clear view” (Q 298).

155. Whilst judges should never be asked to justify their decisions outside the courtroom, it is desirable for them to communicate with the public and the media on appropriate issues. We therefore strongly encourage the occasional use of media releases alongside judgments, as for example in the Charlotte Wyatt case. Further, we cannot see any reason why judges should not co-operate with the media on features about their activities outside the courtroom, if they so wish. However, we are strongly of the opinion that whatever the media pressure, judges should not give off-the-record briefings.

The Role of the Lord Chief Justice

156. We now consider the role of the Lord Chief Justice in representing the judiciary in the media and wider public eye, a role which has assumed a much greater importance in light of the CRA because the Lord Chancellor is no longer charged with representing the judiciary. As the head of one of the three arms of the state, it is important that the Lord Chief Justice—with the help of other judges and the JCO—ensures that the judiciary’s viewpoint is properly represented and that its profile is maintained. Not only can this help to increase public understanding of judges and the justice system, it can also help the judiciary to place constructive pressure on the executive over areas where there is disagreement or unease. For example, public statements by the Lord Chief Justice, evidence to our Committee by Lord Justice Thomas and Sir Igor Judge, and evidence by the Lord Chief Justice to the House of Commons Constitutional Affairs Select Committee have all played a valuable role in putting the judiciary’s concerns about the MoJ in the public eye.

157. How then has the Lord Chief Justice interpreted this part of his job thus far? Joshua Rozenberg of The Daily Telegraph was implicitly critical of the Lord Chief Justice, telling us that “it is very significant that [Lord Phillips] has not had a single press conference in more than a year … Lord Phillips has quite deliberately chosen not to [speak to the media], which is all the more significant given his increased responsibilities” (Q 87). He further explained, “I do not think there is any harm in the public knowing a little bit more about the views of the Lord Chief Justice of the day … given that he has this important role as head of the judiciary, a role which we do not really understand. We have no idea how he is exercising that role” (Q 120). Furthermore, Mr Rozenberg has warned that “in treating the media as
uniformly hostile, [the Lord Chief Justice] is in danger of bringing about the very breakdown in relations that he has wrongly identified as now existing”.81

158. Although the Lord Chief Justice has since held a constructive and informative press conference, any wariness of such occasions on his part is perhaps understandable. As Sir Igor Judge told us, at Lord Phillips’ first press conference in October 2005, “the media questioning of him [was] designed to elicit some remarks [which would] enable the story to be ‘Lord Chief Justice at odds with’ or ‘Fury at’ … the Government. That is not actually a very happy way for a Lord Chief Justice to be interviewed, and [he] is entitled to take the view that this is not in anybody’s interest” (Q 295). In any case, Lord Mackay of Clashfern felt that the Lord Chief Justice should not be distracted from “his principal role of leading the judiciary in judgment” and Lord Lloyd of Berwick was concerned that an excessive administrative burden might be preventing the Lord Chief Justice from sitting as often as he ought (QQ 179, 184).

159. Aside from press conferences, Lord Phillips has delivered a number of informative and thought-provoking speeches on a range of issues since assuming the role of Lord Chief Justice.82 Whilst these speeches are of great interest to those involved in matters legal and constitutional, the ensuing press coverage is limited except when the Lord Chief Justice says something controversial. It therefore seems unlikely that his pronouncements are reaching a wide public audience.

160. It is wholly within the discretion of the Lord Chief Justice to determine how he can most effectively communicate with the media and the public. However, we suggest that he may from time to time need to re-appraise his strategy in light of the new constitutional relationship between the judiciary, the executive and Parliament. We believe that, in these days of greater separation of powers, it is highly desirable for him to ensure that the views of the judiciary are effectively conveyed to the public.

The Role of the Judicial Communications Office

161. The Judicial Communications Office (JCO), which took over a role formerly carried out by the press office of the DCA, was established in April 2005 by Lord Woolf, then Lord Chief Justice, “to increase the public’s confidence in judges … as part of an overall requirement to enhance public confidence in the justice system”.83 The current Lord Chief Justice has explained that the JCO’s specific role is to provide “a full press office service with advice and support available 24-hours a day, seven days a week”.84 The office has nine staff including two press officers, although one of those posts is a job share (Q 242). In this section, we consider how the JCO operates and how it might do so more effectively in future.

81 Law page of The Daily Telegraph, 12 October 2006.
82 See for example his speech to the Cardiff Business Club on 26 February 2007 and his Judicial Studies Board Annual Lecture on 22 March 2007.
162. Mike Wicksteed, Head of Judicial Communications, told us that the JCO had two elements: the media relations element which “tends broadly speaking to be reactive, but there is a proactive element in it”, and the internal communications element (Q 213). It is the first of these that concerns us here. The Chief Public Information Officer, Peter Farr, explained the work of the press office as follows:

“We usually know in advance if there is a particularly controversial case where a judgment is to be handed down; we do not always know on sentencing, though occasionally a judge will contact us in advance and say you ought to be aware that I am passing down a sentence in this case today, either there has been a lot of media interest in it or it is reasonable to assume that there will be media interest in it. Our approach on those occasions is to … ensure that there is something available to be given to the media, either in terms of a judgment or in terms of sentencing remarks. That is the best prospect really for the media being able to report things accurately and in context … Often if the media are aware of the full picture they are much more likely to write a fair and accurate report” (Q 268).

163. It is undoubtedly helpful for the JCO to provide the media with judgments and sentencing remarks. However, in the absence of any further explanation, this may not be sufficient to ensure that the judiciary are properly represented in the media. For example if, in the Sweeney case (discussed in Chapter 2), the JCO had done more to drive home the message that the judge was simply following sentencing guidelines, newspapers such as The Sun might have moderated their attacks on “the arrogance of judges in their mink-lined towers”\textsuperscript{85} and turned their fire on the guidelines in question. As Clare Dyer of The Guardian told us, “there ought to have been somebody in the Judicial Communications Office who could have found out that information and put it out on the day … We would not then have [had] this idea that there were these terribly lenient judges who were just doing it off the top of their heads. The public needs to know that they are acting on guidelines” (Q 89). Similarly, Frances Gibb wrote that during the Sweeney furore “the media clamoured for a response … and none was forthcoming”.\textsuperscript{86}

164. Unsurprisingly, a number of witnesses felt that the JCO needed to enhance its media “fire fighting” capabilities. For example, Professor Genn told us that the issue of “fire fighting … needs to be sorted out because … sometimes there is misreporting because the people reporting it do not understand what is going on”. She insisted that “there needs to be a system for correcting misapprehensions” (Q 314). Similarly, Paul Dacre of the Daily Mail told us that “perception is everything and therefore the judges need to address that … They need to get their message across [because] if you do not get the message across, you are losing the perception war” by merely giving “a nuts and bolts background to issues” (QQ 341, 342, 351).

165. What then, aside from providing copies of judgments and sentencing remarks, might the JCO do to secure more balanced coverage of the judiciary in the media? We have already suggested that issuing media releases alongside controversial judgments is desirable. In addition, there is the option of the Lord Chief Justice speaking to the media, which may on

\textsuperscript{85} “The Sun says”, 13 June 2006.

\textsuperscript{86} Benchmark Number 4 (July 2006), p 7.
occasion be necessary, but it could be problematic for him to speak about individual cases given his role in the Court of Appeal.

166. Instead, Joshua Rozenberg suggested that the JCO should “act as the public spokesman for the judges in a way that they currently do not do” by offering “a public spokesman who is trained, able and authorised to speak on the judges’ behalf without having to refer everything that he or she might say to an individual judge” (Q 88). Such a spokesman would probably need to be a trained lawyer, something which the JCO currently lacks (Q 243). Alternatively, it was suggested to us that a panel of senior or retired judges could fulfil this spokesman role (QQ 89, 103, 109). Spokesmen of this kind might correct inaccuracies, highlight significant sections in judgments or sentencing remarks, and possibly even explain complex points of law to facilitate more informed media coverage.

167. There are some possible snags with giving the JCO this type of spokesman role, however. Sir Igor Judge felt that “no judge should comment on any other judge’s decision” because it should all be resolved through the formal appeals process. He asked, “what happens if the judge’s sentence is completely barking? It may be way over the top—seven years for a shoplifter. Do we have a spokesman to say the judge was wrong or do we have a spokesman to say ‘well let us try and find some justification’?” In conclusion, he said that “we are responsible for what we say in court and people should not have to defend us or criticise us publicly until it goes to a higher court” (Q 277).

168. The Lord Chief Justice, however, seems amenable to a more active JCO: “the Communications Office offers help and information to the media and is increasingly called on to comment on news stories before they get into print, which tends to ensure that the record is straight rather than needs putting straight” 87 His apparent support for a JCO which does more than merely distribute judgments and sentencing remarks is most encouraging.

169. In addition to “fire fighting”, it is important that the JCO (alongside the relevant government departments) should take responsibility for educating the public and building confidence in the judiciary over the longer-term, as Professor Genn said (Q 314). It is particularly important that school pupils should be taught about these issues, and it is encouraging that political, legal and human rights, civil and criminal law and the justice system are statutory elements of the citizenship curriculum. The judiciary already play some role in the teaching of these topics through participating in mock trials, for example, but there is undoubtedly scope for judges and judiciary officials—subject to their workload—to do more to inform and enliven the teaching of this hugely important part of the school curriculum. 88

170. No matter how the JCO may develop, it is essential that judges should comprehend its vitally important role and co-operate accordingly. As Frances Gibb has written, the JCO “is not an expensive add-on; it is an essential part of a modern judiciary and must be given the tools to do its job”. 89 Specifically, it is important that judges should alert the JCO if there is a possibility of a judgment or sentencing decision being controversial or

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88 See also the work of the Public Legal Education and Support (PLEAS) Task Force, which is chaired by Professor Dame Hazel Genn: http://www.pleas.org.uk/.
89 Benchmark Number 4 (July 2006), p 8.
newsworthy. They should also not shy away from asking the JCO for media training or advice on presentational issues such as how a speech might be portrayed in the media. Sir Igor Judge’s statement that he would be “pretty horrified” if the JCO offered him advice on a speech (Q 226) was perhaps symptomatic of the fact that many judges have yet to reconcile themselves to the need for a professional judicial communications capability.

171. **We conclude that the judges should consider making the Judicial Communications Office more active and assertive in its dealings with the media in order to represent the judiciary effectively.** We suggest that consideration be given to appointing one or more spokesmen with appropriate qualifications and legal experience who would be permitted to speak to the media with the aim of securing coverage which accurately reflects the judgment or sentencing decision. However, under no circumstances should such spokesmen seek to justify decisions as opposed to explaining them.
CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

Executive and Judiciary

Managing the Tensions

172. The Sweeney case was the first big test of whether the new relationship between the Lord Chancellor and the judiciary was working properly, and it is clear that there was a systemic failure. Ensuring that ministers do not impugn individual judges, and restraining and reprimanding those who do, is one of the most important duties of the Lord Chancellor. In this case, Lord Falconer did not fulfil this duty in a satisfactory manner. The senior judiciary could also have acted more quickly to head off the inflammatory and unfair press coverage which followed the sentencing decision. (Paragraph 49)

173. The key to harmonious relations between the judiciary and the executive is ensuring that ministers do not violate the independence of the judiciary in the first place. To this end, we recommend that when the Ministerial Code is next revised the Prime Minister should insert strongly worded guidelines setting out the principles governing public comment by ministers on individual judges. (Paragraph 51)

Constitutional Change

174. We agree that the advent of the Ministry of Justice, whilst obviously a machinery of government change, has significant constitutional implications. (Paragraph 60)

175. We are disappointed that the Government seem to have learnt little or nothing from the debacle surrounding the constitutional reforms initiated in 2003. The creation of the Ministry of Justice clearly has important implications for the judiciary. The new dispensation created by the Constitutional Reform Act and the Concordat requires the Government to treat the judiciary as partners, not merely as subjects of change. By omitting to consult the judiciary at a sufficiently early stage, by drawing the parameters of the negotiations too tightly and by proceeding with the creation of the new Ministry before important aspects had been resolved, the Government failed to do this. Furthermore, the subsequent request made by the judiciary for a fundamental review of the position in the light of the creation of the Ministry of Justice was in our view a reasonable one to which the Government should have acceded in a spirit of partnership. (Paragraph 67)

176. We believe that the role of Lord Chancellor is of central importance to the maintenance of judicial independence and the rule of law. Prime Ministers must therefore ensure that they continue to appoint to the post candidates of sufficient status and seniority. (Paragraph 71)

177. We sincerely hope that constitutional affairs remain central to the Ministry of Justice’s responsibilities and are not downgraded in importance compared to the other duties of the Ministry. (Paragraph 74)

178. The integrity of the legal system depends on it being properly funded. We consider it one of the vital tasks of the Lord Chancellor to ensure that the Courts Service and Legal Aid budgets uphold that integrity. Whilst it is not
for us to suggest how the courts budget should be agreed in future, we do urge the Lord Chancellor to ensure that it receives maximum protection from short-term budgetary pressures upon and within the new Ministry. Moreover, the budget-setting process must be transparent and the judiciary must be fully involved, both in determining the process and in its implementation. (Paragraph 83)

179. We are not convinced by the judiciary’s claims that the creation of the Ministry of Justice lends any additional urgency to their desire for an autonomous court administration. However, the status of Her Majesty’s Courts Service is of central importance to the administration of justice, and we urge the Government to engage meaningfully with the judiciary on this issue in order to find a mutually acceptable way forward. (Paragraph 87)

**Human Rights Act**

*Ministerial Compatibility Statements and Parliamentary Scrutiny*

180. Where a department has any doubt about compatibility of a bill with Convention rights, ministers should seek the involvement of the Law Officers at a formative stage of policy-making and legislative drafting. (Paragraph 90)

*Greater Guidance to the Executive from the Courts?*

181. Whilst we have sympathy with the difficulties outlined by Charles Clarke in relation to the Human Rights Act, his call for meetings between the Law Lords and the Home Secretary risks an unacceptable breach of the principle of judicial independence. It is essential that the Law Lords, as the court of last resort, should not even be perceived to have prejudged an issue as a result of communications with the executive. (Paragraph 97)

*Should there be a System of Abstract Review?*

182. Whilst a system of “abstract review” of legislation might seem attractive in some respects, we believe that it could compromise the impartiality of the senior judiciary and that it would not in any case prevent successful challenges under the Human Rights Act to ministerial exercise of statutory powers. (Paragraph 106)

*Review of Bills by a Committee of Distinguished Lawyers*

183. We do not believe that a committee of distinguished lawyers tasked with scrutinising legislation for compatibility with Convention rights is desirable at this time. If, however, at some future time the composition of the House of Lords changes, this is an idea that may well merit further consideration. (Paragraph 108)

*Advisory Declarations*

184. We recommend that the Government and the judiciary give further consideration to how advisory declarations might be used to provide guidance on questions relating to Convention rights. (Paragraph 111)
Parliament and Judiciary

*Laying Written Representations before Parliament*

185. We recommend that any written representations received from the Lord Chief Justice under section 5 of the Constitutional Reform Act 2005 should be published in Hansard; that the business managers should find time for the issue to be debated in the House at the earliest possible opportunity; and that the Government should respond to such representations in good time before either House has finished considering the bill or initiative in question. Further, this Committee will endeavour to scrutinise any such representations in time to inform deliberations in the House. (Paragraph 119)

*The Question of Accountability*

*The Role of Select Committees*

186. We believe that select committees can play a central part in enabling the role and proper concerns of the judiciary to be better understood by the public at large, and in helping the judiciary to remain accountable to the people via their representatives in Parliament. Not only should senior judges be questioned on the administration of the justice system, they might also be encouraged to discuss their views on key legal issues in the cause of transparency and better understanding of such issues amongst both parliamentarians and the public. However, under no circumstances must committees ask judges to comment on the pros and cons of individual judgments. (Paragraph 126)

*A Parliamentary Committee on the Judiciary*

187. We are not currently convinced of the need for a joint committee on the judiciary, but we shall keep the situation under review, not least in evaluating our Committee’s effectiveness in providing the necessary oversight and contact. The Constitutional Affairs Select Committee in the House of Commons also has an important role to play. (Paragraph 129)

*Post-legislative Scrutiny*

188. We repeat our earlier conclusion that post-legislative scrutiny is highly desirable and should be undertaken far more generally. This would boost the level of constructive dialogue between Parliament and the courts. (Paragraph 130)

*Confirmation Hearings*

189. We urge the Government to clarify their position on the introduction of appointment hearings for judges at the earliest opportunity, since this would be an innovation with very profound implications for the independence of the judiciary and the new judicial appointments system. (Paragraph 135)

*An Annual Report on the Judiciary*

190. We welcome the Judicial Executive Board’s decision that the Lord Chief Justice should lay an annual report before Parliament, an innovation which this Committee had discussed with the Lord Chief Justice and other senior
judges in the course of our deliberation. We suggest that the annual report should be formally laid under section 5 of the Constitutional Reform Act. We further suggest that the report might encompass administrative issues and—where appropriate—areas of concern about the justice system, provided that there is no discussion of individual cases. We believe that the report will provide a useful opportunity for both Houses of Parliament to debate these matters on an annual basis, and for the Lord Chief Justice to engage effectively with parliamentarians and the public. (Paragraph 139)

**Judiciary, Media and Public**

**Public Perceptions**

191. We believe that the media, especially the popular tabloid press, all too often indulge in distorted and irresponsible coverage of the judiciary, treating judges as “fair game”. A responsible press should show greater restraint and desist from blaming judges for their interpretation of legislation which has been promulgated by politicians. If the media object to a judgment or sentencing decision, we suggest they focus their efforts on persuading the Government to rectify the legal and policy framework. In order to ensure more responsible reporting, we recommend that the Editors’ Code of Practice, which is enforced by the Press Complaints Commission, be regularly updated to reflect these principles. (Paragraph 146)

**The Role of Individual Judges**

192. Whilst judges should never be asked to justify their decisions outside the courtroom, it is desirable for them to communicate with the public and the media on appropriate issues. We therefore strongly encourage the occasional use of media releases alongside judgments, as for example in the Charlotte Wyatt case. Further, we cannot see any reason why judges should not co-operate with the media on features about their activities outside the courtroom, if they so wish. However, we are strongly of the opinion that whatever the media pressure, judges should not give off-the-record briefings. (Paragraph 155)

**The Role of the Lord Chief Justice**

193. It is wholly within the discretion of the Lord Chief Justice to determine how he can most effectively communicate with the media and the public. However, we suggest that he may from time to time need to re-appraise his strategy in light of the new constitutional relationship between the judiciary, the executive and Parliament. We believe that, in these days of greater separation of powers, it is highly desirable for him to ensure that the views of the judiciary are effectively conveyed to the public. (Paragraph 160)

**The Role of the Judicial Communications Office**

194. We conclude that the judges should consider making the Judicial Communications Office more active and assertive in its dealings with the media in order to represent the judiciary effectively. We suggest that consideration be given to appointing one or more spokesmen with appropriate qualifications and legal experience who would be permitted to speak to the media with the aim of securing coverage which accurately reflects the judgment or sentencing decision. However, under no circumstances should such spokesmen seek to justify decisions as opposed to explaining them. (Paragraph 171)
APPENDIX 1: SELECT COMMITTEE ON THE CONSTITUTION

The Members of the Committee which conducted this inquiry were:
Viscount Bledisloe
Lord Carter (until 18 December 2006)
Lord Goodlad
Lord Holme of Cheltenham (Chairman)
Lord Lyell of Markyate
Lord Morris of Aberavon
Baroness O’Cathain
Lord Peston
Baroness Quin (from 19 February 2007)
Lord Rowlands
Lord Smith of Clifton
Lord Windlesham
Lord Woolf

Declaration of interests

Viscount Bledisloe
   Barrister (QC) in private practice
Lord Holme of Cheltenham
   Chairman, Hansard Society for Parliamentary Government (until 19 June 2007)
Lord Lyell of Markyate
   Attorney General 1992–97
   Solicitor General 1987–92
   Barrister (QC) in private practice
Lord Morris of Aberavon
   Attorney General 1997–99
Lord Peston
   Chairmen of the Pharmaceutical Price Regulation Scheme Arbitration
   Vice President, Speakability
Baroness Quin
   Minister of State, Home Office 1997–98
Lord Windlesham
   Minister of State, Home Office 1970–72
   Lord Privy Seal and Leader of the House of Lords 1973–74
Lord Woolf
   Lord Chief Justice of England and Wales 2000–05
   Holder of judicial offices
   Chairman, Committee of Inquiry into BAE Systems’ business ethics
APPENDIX 2: LIST OF WITNESSES

The following witnesses gave evidence:

Rt Hon Charles Clarke MP
Mr Paul Dacre, Editor, *Daily Mail*
Professor Terence Daintith, Emeritus Professor of Law, University of London
Ms Clare Dyer, Legal Editor, *The Guardian*
Rt Hon Lord Falconer of Thoroton, Lord Chancellor and Secretary of State for Justice (until 27 June 2007)
Mr Peter Farr, Chief Public Information Officer, Judicial Communications Office
Professor Dame Hazel Genn
Ms Frances Gibb, Legal Editor, *The Times*
Professor Robert Hazell, Director, Constitution Unit, University College London
Rt Hon Sir Igor Judge, President of the Queen’s Bench Division and Head of Criminal Justice
Rt Hon Lord Lloyd of Berwick
Rt Hon Lord Mackay of Clashfern
Professor Alan Page, Professor of Public Law and Dean of the School of Law, University of Dundee
Dr Matthew Palmer
Rt Hon Lord Phillips of Worth Matravers, Lord Chief Justice of England and Wales
Mr Joshua Rozenberg, Legal Editor, *The Daily Telegraph*
Rt Hon Lord Justice Thomas
Mr Mike Wicksteed, Head of Judicial Communications, Judicial Communications Office

The Background to the Constitutional Reform Act 2005

The origins of the Constitutional Reform Act lie in the expanding role played by the higher courts in the UK over the last thirty years. The combined effect of the growth of judicial review, the development of the EU and, most recently, the Human Rights Act and devolution has been to give the courts a more central place in the British constitution. The senior judges are now required to police constitutional boundaries and determine sensitive human rights issues in a way which would have been unthinkable forty years ago. This new judicial role is still developing, but it is clear that the effect of this trend will be to reshape the relationship between the judiciary and the other branches of government. In the light of these changes, the main provisions of the Constitutional Reform Act—reforming the office of Lord Chancellor, establishing a new Supreme Court and restructuring the judicial appointments process—were designed to bring the institutional relationships between the judiciary and the other branches of government into line with the changing substantive role of the courts. In particular, the reforms were intended to secure the independence of the judiciary by ‘redrawing the relationship between the judiciary and the other branches of government’ and putting it on a ‘modern footing’.

Although the timing of the introduction of the Constitutional Reform Bill in 2003 took many by surprise, its content did not. Concerns about the relationship between the judiciary and the other branches of government had been building up over a number of years. Where once there had been a general consensus that the Lord Chancellor’s three roles as member of cabinet, head of the judiciary and speaker of the House of Lords enhanced the functioning of the political system and strengthened judicial independence, they increasingly came to be regarded as a potential source of abuse of executive power. In particular, the Lord Chancellor’s responsibility for appointing the judges became a source of growing concern as the senior judges’ role in scrutinising government decision-making increased. Likewise, the presence of the top appellate court in Parliament had once been widely regarded as an effective means of drawing on the legal expertise of the top judges during the law-making process so enhancing the quality of legislation. By the 1990s, however, many Law Lords themselves had come to regard the lack of separation between the two as problematic as the same senior judges who participated in passing the laws were increasingly asked to decide on the conformity of those acts with basic human rights.

By the late 1990s, far fewer voices were heard in support of the argument that these overlaps between the branches of government were a source of its stability. Increasingly, the interconnection was seen as endangering judicial independence, breaching basic constitutional principles and out of step with the rest of Europe. By the start of the second term of the Labour Government in 2001, the long debate about these issues had slowly generated broad support across the political spectrum for a ‘clearer and deeper’ separation of the functions and powers of the

judiciary from the other branches of government. The decision to embark upon extensive institutional reform was therefore anticipated, but the provisions set out in the Constitutional Reform Act were unusual in a number of respects. First, they ran counter to the trend of recent political developments in that they represented a conscious shift of power away from the executive. Second, they were forward-looking, seeking to construct a new constitutional model which anticipated future needs rather than responding to an immediate perceived problem. In introducing the reforms the Government made clear that there was no suggestion that the overlapping constitutional roles of the Lord Chancellor or the presence of the Law Lords in the House of Lords had, in practice, undermined judicial independence but rather that the present system held inherent structural weaknesses which might give rise to such abuse in the future. The third surprising feature of the reforms is that they explicitly sought to promote constitutional principle above pragmatism.91 Whilst accepting that the previous arrangements had worked effectively, the changes were designed to restructure the relationship between the judiciary and the other branches of government so that it would conform more closely to the concept of the separation of powers. This elevation of principle above pragmatism is surprising given the traditional value ascribed to 'what works' in the British constitution.92

The Office of Lord Chancellor

Undoubtedly the most controversial element of the reforms when introduced was the proposals relating to the office of Lord Chancellor. The Bill initially proposed its complete reformulation into the post of Secretary of State for Constitutional Affairs. After intense debate, this was amended so that the title and the office of Lord Chancellor would remain, albeit in much reduced form, and that the Lord Chief Justice should become the head of the judiciary as President of the Courts of England and Wales. The principal concern expressed over the removal of the title of Lord Chancellor was that it would increase the threat to judicial independence by removing its ability to simultaneously bring together and keep apart the branches of government. Variously described in terms of a link, a bridge, or a form of constitutional 'hinge' a key element of the office was to facilitate understanding of the position of the judges to the executive and vice versa. At the same time, the role was also often characterised as being that of a 'buffer'; holding the executive at arms length from the judges: 'armed with a long barge pole to keep off marauding craft from any quarter'.93 What is clear is that the retention of the title of Lord Chancellor cannot preserve the very particular nature of the office. Future Lord Chancellors will not enjoy the constitutional status which previously attached to that office by virtue of its position at the crossroads of the three branches of state. Not only is the Lord Chancellor no longer head of the judiciary, she or he need not be a member of the House of Lords nor even a lawyer by background.94 Lord Chancellors have traditionally been drawn

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91 Lord Chancellor’s Department Select Committee, Minutes of Evidence, 30 June 2003.
92 Lord Irvine commented when Lord Chancellor: ‘we are a nation of pragmatists, not theorists, and we go, quite frankly, for what works’. Evidence to the Lord Chancellor’s Department Select Committee, 2 April 2003, Q 28.
94 The statutory qualifications for the post-holder require only experience as a minister, member of either House of Parliament, certain types of lawyer, legal academic or such ‘other experience that the Prime Minister considers relevant’. S 2(2) Constitutional Reform Act 2005.
RELATIONS BETWEEN THE EXECUTIVE, THE JUDICIARY AND PARLIAMENT

from an elite corps of very senior lawyers respected or at least accepted by both politicians and the judiciary. The future holders of the post, in contrast, are very likely to be professional politicians and may well be non-lawyers with limited affiliation to or understanding of the role of the judiciary. But perhaps more significant in terms of the impact of the changing role on the relationship between judiciary and executive is the changing nature of the office in terms of career hierarchy. In the past, the office of Lord Chancellor was the pinnacle of a distinguished legal and political career. This fact might have encouraged some to hang on to their place on the woolsack longer than they should have done, but it had the advantage that the occupant had nothing to gain or lose in terms of promotion by standing up for the judiciary and suffering unpopularity amongst his ministerial colleagues or even the Prime Minister. In future the position will be very different. The Lord Chancellor may be a mid-career politician inevitably looking for promotion to one of the higher-ranking departments. Some occupants may be first rate, others may be more mediocre. Either way, it is unrealistic to expect that a passing minister, in post until the next Cabinet reshuffle, will be willing or able to defend the judiciary against attacks by more senior Cabinet colleagues in the same way as Lord Chancellors have done in the past.

One way in which the Constitutional Reform Act sought to address this problem was to reduce the danger of threats from the executive by translating the political obligation on the executive to respect judicial independence into a legal one by including in the Act a provision that the Lord Chancellor and other ministers involved in the administration of justice must respect judicial independence. A key question is whether the provisions can of themselves ensure that judges are protected from improper political pressure in their decision-making on a day-to-day basis. In recent years there have been a number of public expressions of conflict between Home Secretaries and senior judges in the areas of criminal justice and human rights. This has led to speculation as to whether judicial independence is under threat and fears that the Constitutional Reform Act will exacerbate this process by removing the protective role of the Lord Chancellor. Whether or not these fears are founded depends partly on the degree of conflict between ministers and judges which is considered acceptable. Some senior judges themselves have pointed out that a degree of tension between the executive and judiciary is not only inevitable but healthy in a democracy. The difficulty is distinguishing the short-term ebb and flow of the relationship between the executive and judiciary from long-term dangers. Lord Irvine has reported that when Lord Chancellor he had to argue in Cabinet in support of judicial independence on ‘many, many occasions’. Nor is the need for such support likely to diminish. What is clear is that dismantling the office of Lord Chancellor in its traditional form will mean that new methods must be established for mediating and negotiating the relationship between the two branches.

The Concordat

A key element of this new relationship is set out in what has come to be known as the Concordat. Between 2003 and 2005 the Lord Chancellor, Lord Falconer,
and the then Lord Chief Justice, Lord Woolf, met regularly in private to determine how the many roles previously undertaken by the Lord Chancellor would be carried out. Their final agreement was incorporated directly in the Constitutional Reform Act. Before 2005, it was generally unnecessary to articulate whether the Lord Chancellor was acting in his judicial or executive capacity when carrying out a particular function. It was not clear whether, for example, decisions concerning the deployment of judges were a task which the Lord Chancellor performed as the head of the judiciary or a member of the executive. Under the terms of the Concordat it is now explicitly established that this role is for the Lord Chief Justice and therefore falls within the control of the judiciary. Perhaps the most interesting aspect of the Concordat was that it is not simply a carve up of power between the branches of government but is intended to create a form of partnership in which the two branches of government share in the decision-making affecting the governance of the judiciary and the running of the courts through the allocation of decision-making powers ‘with appropriate constraints and mutual consultation’. Most decisions concerning the management of the courts and the judiciary are now formally ascribed to either the Lord Chief Justice or the Lord Chancellor, but in almost all cases there is a duty to consult with the other or obtain their agreement. For example, the overall number of judges is to be determined by the Lord Chancellor after consultation with the Lord Chief Justice because: ‘real and effective partnership between the Government and the Judiciary is seen as paramount, particularly in this area’. Similarly, the Lord Chief Justice has responsibility for judicial discipline but may only warn or reprimand a judge with the agreement of the Lord Chancellor. What has been created is an institutional relationship which envisages two separate but equal branches working together to manage the courts and judiciary. How, in practice, this will work in the future remains to be seen. The Concordat was drafted by two individuals who shared similar career backgrounds, values and priorities. Given the changing role of the office of Lord Chancellor, it will need to be robust enough to function effectively in the context of a Lord Chief Justice and a Lord Chancellor who stand very clearly in different branches of the Government. For this new ‘separate but equal’ system to work, substantial changes are therefore needed to the governance structure of the judiciary.

The Governance of the Judiciary

The transfer of such a wide range of roles into the sole or joint responsibility of the Lord Chief Justice requires a major change in the nature of the judicial support system. Whereas the Lord Chancellor has an entire government department at his disposal, until recently the Lord Chief Justice has had only minimal management and administrative back-up. The traditional approach to judicial governance has

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99 This long private conversation was described by Lord Woolf in the following in his valedictory speech in 2005 as one of ‘almost continuous dialogue’ over two years. Royal Courts of Justice 29 July 2005. http://www.dca.gov.uk/judicial/speeches/lw290705.htm.

100 Lord Falconer commented that the Concordat: ‘... lays down the right kind of partnership between the executive and the judiciary, with clear roles for each within the framework of the separation of powers of both.’ HL Deb 12 February 2004 col 1216. Lord Woolf similarly noted that: ‘A spirit of partnership between the judiciary, the legislature and the executive is essential if the judiciary are to meet the changing needs of society’. Squire Centenary Lecture, Cambridge University, 3 March 2004. See also speech of the Senior Presiding Judge, Lord Justice Thomas, entitled ‘The judicial and executive branches of government: a new partnership’ given in 2005. Available at http://www.dca.gov.uk/judicial/speeches/sp051110.htm.

101 Ibid p 11.

102 S 108(2)
been one which is informal and light-touch. As the court system has expanded rapidly, the administrative roles undertaken by judges have grown in an ad-hoc fashion. By and large, senior judges have simply absorbed additional management roles on top of their adjudicative functions on an ex-officio basis with very limited administrative support. Nor has there been a formal or permanent structure for collective decision-making within the judiciary. This situation arose not simply as a result of lack of resources or a failure by the judiciary to catch up with the governance needs of a greatly expanded judiciary. Rather the arrangements were partly a consequence of a particular vision of judicial independence; one which prioritises the need for judges to be free, not just of external interference, but of interference from other judges. It was for this reason that Lord Taylor when Lord Chief Justice objected to the introduction of performance appraisal in the judiciary on the grounds that it would: ‘clearly endanger the fundamental independence of individual judges, not only from the executive but also from each other’ (emphasis added).\(^{103}\) Thus although the judiciary is a rigidly hierarchical structure in terms of the authority of adjudicative decision-making, it has always pursued an ideal of a flat management structure in which the individual judges retain the greatest possible degree of autonomy over their working lives. Whilst in practice it has been recognised that the Lord Chancellor and the Lord Chief Justice were required to make management decisions for the judiciary as a whole, this has been regarded as a task performed by them as ‘first among equals’. For this reason, the judiciary has traditionally been highly sensitive to claims that any senior judge speaks for the judiciary collectively. Indeed, the notion that there is such a thing as ‘the view of the judiciary’ is widely rejected by many judges who pride themselves on the fact that the only area that judges agree upon is that of judicial pensions.

Yet despite this strong culture of individualism, the move to a more structured governance within the judiciary had begun before the Constitutional Reform Act. By necessity, the rapid expansion in size of the judiciary had led to the expansion in the number and formality of senior administrative positions with named and appointed posts such as the Vice President of the Queens Bench Division, Deputy Lord Chief Justice, and the Head of Civil Justice. Similarly, the Judges’ Council, which until relatively recently was a virtually moribund institution, has been revitalised in order to play a central role in the new governance structure. Because membership is drawn from all the different levels of the judiciary, including more recently members of the House of Lords/Supreme Court,\(^{104}\) the Council has the potential to play a vital role in representing the interests of the judiciary as a whole. Equally important is the newly formulated Judicial Executive Board made up of seven senior judges which appears to be envisaged as a sort of judicial Cabinet. It meets monthly and its core function is to enable the Lord Chief Justice to make policy and executive decisions through it. Administrative back-up will now be provided through a new body, the Judicial Office of England and Wales which has 60 staff including a communications office.

The relatively ad hoc creation of this governance structure from a mixture of new and refurbished institutions raises a number of questions about both judicial accountability and judicial independence. What, for example, are the respective remits in terms of policy-making of the Judges’ Council and the Judicial Executive Board? How do their roles relate to each other? Where are the rules governing

\(^{103}\) From a speech at the London School of Economics, 27 July 1993.

their powers and membership laid down? Who determines these? What, for example, is the process for selecting the representatives from each judicial level for the judicial council? Are they elected or appointed? If the latter, what are the criteria for selection and who chooses them? Clearly many questions remain about the new judicial governance structure, but what is certain is that the overall result of the changes will be a greater concentration of power in the hands of the senior judiciary. This outcome is probably inevitable and may also be desirable as a means of securing judicial independence, but it is not unproblematic both in terms of judicial independence and accountability. These changes represent very real structural and ideological changes within the judiciary.

The Judicial Appointments Process

Under the previous judicial selection arrangements the power of appointment had, in practice, rested with the Lord Chancellor who made his decision after consultation with the senior judges. For appointments to the Court of Appeal and the House of Lords, the decision formally rested with the Prime Minister on the advice of the Lord Chancellor but the extent to which different Prime Ministers engaged with the process was hard to assess since the process of consultation between the Lord Chancellor and Prime Minister was always regarded as confidential. It was in relation to these upper rank judicial appointments that opinion was most sharply divided over the new provisions. Many members of the judiciary argued that it was essential to remove all executive involvement in selecting the senior judiciary since it was at this level that the pressure to manipulate would be greatest. Others argued that it was precisely in relation to these appointments, where the judges were engaged in high-level decisions with policy-making implications, that there should be some real link to the democratic process and that the Lord Chancellor should be more than just a rubber stamp. Initially the Government supported the latter view in relation to the Supreme Court appointments and the Bill provided that the Supreme Court commission would nominate 2–5 names for the Lord Chancellor to choose from, so ensuring a degree of political input. In the end, however, the Bill was amended so that both the Supreme Court commission and the Judicial Appointments Commission for England and Wales were given the ultimate decision-making power, being required to recommend one name which the Lord Chancellor could only reject in limited circumstances. The effect was to remove the danger of improper political interference from the system but it also removed the opportunity for democratic involvement in the selection of public decision-makers.

One way in which the democratic deficit caused by the removal of the executive from the appointment process might have been countered would have been to include the legislature in the process. Currently, Parliament plays no role in judicial appointments, though it has the ultimate responsibility for removing errant senior judges. This power relates solely to judges of the High Court and above, who can be dismissed by the Queen if both Houses of Parliament vote for their removal, though this is a power which has only been exercised once.\(^{105}\) The proposal that judges could be called before Parliament as part of the appointments process was considered by Parliament during the passage of the Bill and rejected. One explanation for this rejection lies in a widely held view of the US Senate confirmation hearings as invading the privacy of individual candidates and undermining judicial independence. Critics of this aspect of the US judicial appointments process have argued that the highly partisan nature of the process is

\(^{105}\) In the case of an Irish judge found to have embezzled court fees in 1830.
such that the hearings can sometimes be little more than a choreographed dance in which very little useful information is revealed. However, the decision of the Canadian Parliament to introduce nomination hearings for their Supreme Court judges in March 2006 as part of a reform designed to reduce party political influence, illustrates the growing awareness outside the UK of the need to explore new ways to enhance democratic accountability in the judicial appointments process whilst at the same time removing political patronage. The debate in Canada which took place before the hearings were introduced almost exactly mirrored that which took place at the time of the passage of the Constitutional Reform Act. The first Canadian parliamentary Supreme Court hearing was widely regarded to have been a success and future hearings will no doubt be watched with interest. It is possible therefore, that this is an option that may be revisited in the UK at some future date.

The other effect of the removal of any substantive input from the elected branches of government into the judicial appointments process was to increase the significance of the membership of the new appointments commissions and in particular the role of the lay members. Their function is a vital one in balancing the interests of the legal and judicial members of the commissions and mitigating the danger of cloning which inevitably arises when appointment is made by those already doing the job. Since the need for greater diversity in the composition of the judiciary was a driving force behind the decision to establish the new system, the lay members’ ability to challenge established approaches and develop innovative means of drawing high quality candidates from beyond the traditional judicial backgrounds into the recruitment pool will be a key measure of the success of the commissions. In particular, the decision that the Chair of the Judicial Appointments Commission for England and Wales would be a layperson was an important step in establishing the central role of the lay membership. The appointment of the highly respected former First Civil Service Commissioner, Baroness Usha Prashar, as the first Chair of the commission in 2006 is likely to ensure that the new system will not be overly dominated by judicial and legal interests.

The Supreme Court

Whereas the provisions for the reform of the post of Lord Chancellor and the judicial appointments process involve an explicit redistribution of power between the branches of government, those for establishing the new Supreme Court, in theory, do not. The new court will exercise the same formal powers as the Appellate Committee of the House of Lords and the devolution powers of the Judicial Committee of the Privy Council, and the first Supreme Court judges will be the existing Law Lords. On the face of it, therefore, the creation of the new Supreme Court is the least radical aspect of the constitutional reforms. In practice, however, the removal of the top court from the legislature and its reformation as an autonomous institution is likely to have a significant and long-term effect on its constitutional role. The current changes need to be understood in the light both of the changing role of the UK judiciary discussed above and also the development of a global community of increasingly powerful constitutional and Supreme Courts.

At a formal level, the most fundamental change to the powers of the top courts in the UK in recent history was the passage of the European Communities Act. This potentially dramatic revision of the principle of parliamentary sovereignty was highly controversial at the time. But in practice its effect has been limited and its occasional application by the courts has not shaken the constitutional foundations as critics feared. For supporters of a traditional conception of parliamentary
sovereignty, the threat lies not in the growing role of the EU but closer to home with the increasing domination of Parliament by the executive and the knock-on effect this has had on the role of the judiciary. During the 1980s and 1990s, the election of Governments with large majorities in the House of Commons gave rise to claims that the only effective opposition lay in the House of Lords and the courts. Fears that the concentration of power within the executive might threaten basic constitutional and political norms led members of the senior judiciary to talk of a ‘higher law’ which would require them to strike down legislation that sought to undermine basic principles such as the rule of law. In 1994 the then Lord Chief Justice, Lord Woolf made clear that if, for example, Parliament ‘did the unthinkable’ and removed the courts power of judicial review he would consider it necessary to: ‘mak[e] clear that ultimately there are even limits on the supremacy of Parliament which it is the courts’ inalienable responsibility to identify and uphold.”106 However, having dipped a toe in these dangerous waters, the senior judiciary then drew back from the brink. Lord Steyn articulated a widely-held view in his statement that:

The relationship between the judiciary and the legislature is simple and straightforward. Parliament asserts sovereign legislative power. The courts acknowledge the sovereignty of Parliament. And in countless decisions the courts have declared the unqualified supremacy of Parliament. There are no exceptions...the judiciary unreservedly respects the will of Parliament as expressed in statutes.107

But despite such assertions, it was never likely that the genie could be put back in the bottle and in the intervening years the underlying political conditions which gave rise to the debate on the proper limits of judicial power have not changed. Moreover, the passing of the Human Rights Act has significantly increased the likelihood that courts will be called upon to consider whether an Act of Parliament conflicts with a ‘higher constitutional law’ giving the judges the role of applying principles of constitutionality ‘little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document’.108 In 2004 the question of how far courts might go when faced with such a challenge to fundamental constitutional principles came close to being tested when the Government proposed legislation which would have removed the courts’ jurisdiction in certain asylum and immigration appeal cases. Senior judges and academics suggested for the first time that the courts might be entitled to ignore an Act of Parliament if the legislation was passed.109 As Lord Woolf asked: ‘What areas of government decision-making would be next to be removed from the scrutiny of the courts? What is the use of courts if you cannot access them?’110 In response to such opposition, the Bill was amended. But the underlying question of the limits to parliamentary sovereignty was revisited in 2005 when the Appellate Committee of the House of Lords was asked to rule on whether the Hunting Act 2004 passed under the 1949 Parliament Act was a valid statute. While the Court upheld the legality of the Hunting Act, it concluded that there were indeed limits to the law-making power of Parliament:

In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a

110 See n. 12 above.
new Supreme Court may have to consider whether this is a constitutional
fundamental which even a sovereign Parliament acting at the behest of a compliant
House of Commons cannot abolish.\footnote{Lord Steyn, para 102 Jackson and Others v Her Majesty’s Attorney General, [2005] UKHL 56.}

This important judgment should be seen as the latest step in the process of
refining the notion of parliamentary sovereignty.\footnote{Lord Justice Sedley, for example, talks about the bipolar sovereignty of courts and Parliament. ‘Human Rights: A 21st Century Agenda’ Public Law [1995] p 389.} What is clear is that the
relationship between the courts and Parliament is in a state of transition between
parliamentary sovereignty and constitutional supremacy.

To properly understand the nature of this evolution, it is necessary to place the
emergence of the Supreme Court and the determination of its powers in the context of
the wider trend of increasing power amongst Supreme Courts and Constitutional
Courts around the world. What we are seeing is the emergence of a global community
of senior judges.\footnote{AM Slaughter A Global Community of Courts, 44 Harvard International Law Journal 191 (2003).} They are drawn from countries with different court structures and
constitutional arrangements; some have the power to strike down legislation and others
do not. But increasingly they see themselves as engaged in a global conversation about
the interpretation of basic human rights and the relationship between elected and
unelected branches of power. They read each others’ judgments and speeches; they
meet at conferences and share thoughts on their roles and functions. The UK
Supreme Court will undoubtedly be a leading and respected member of this
community of top jurists which is likely to have the effect of enhancing the new
Supreme Court Justices’ views of their role. Exactly how the new Supreme Court will
develop is still uncertain. What is clear is that the current trend around the world is for
increasing power and authority to be vested in Supreme Courts and the creation of an
autonomous Supreme Court in the UK, housed in its own building with an
independent budget and staff and a distinct identity is likely to follow that trend.

**The Future**

A central question which arises in assessing the implications of the Constitutional
Reform Act concerns the nature and degree of conflict between the judiciary and the
other branches of government which we can expect to see in the years ahead. The idea
of a partnership as expressed in the concordat may well provide a basis for the future
relationship, but it would be unrealistic to expect it to be a partnership without tensions.
The consequence of a more active judiciary with greater autonomy will inevitably be a
more dynamic relationship between the branches of government in which the judiciary
have a more structured and active role in defending themselves from criticism and
ensuring that the proper resources and support for the courts are in place.

The provisions of the Constitutional Reform Act have an important role to play in
establishing clearer boundaries between the branches of government and taking
the negotiations, tensions and conflicts between them from the private corridors of
power into the public arena. The governance structure of the judiciary, the role of
the Supreme Court and the judicial appointments process are areas of vital
constitutional importance which need ongoing scrutiny and debate. The effect of
the reconstruction of the judiciary as institutionally separate from but functionally
interconnected with the other branches of government will be to move the
judiciary closer to being a distinct third branch of government.

Summary

The paper draws attention to aspects of the present constitutional relationship between judiciary, Government and Parliament. Section A (paras 1–9) explains the need for an independent judiciary in a constitution founded on democracy and the rule of law; in particular, the public law jurisdiction of the courts is likely to bring them into controversy with the Government. Section B (paras 10–11) outlines the main changes made by the Constitutional Reform Act 2005. Section C (paras 12–20) discusses the effect of these changes on the courts and considers whether judicial independence is inconsistent with some forms of accountability. Section D (paras 21–25) outlines the main features of the Human Rights Act 1998 and Section E (paras 26–33) examines whether the Act has affected the constitutional balance between Parliament, executive and the courts. It is concluded that the Act significantly extended the jurisdiction of the courts by enabling the higher courts to review primary legislation for compatibility with the European Convention on Human Rights, though the sole relief that may be granted is a declaration of incompatibility. Section F (paras 34–58) examines the extent to which the law permits excessive or abusive criticism of the judiciary by the media, by parliamentarians and by Ministers, and draws attention to recent criticism of judges by Ministers. It is proposed (para 58) that the Ministerial Code should contain a new chapter setting out the conventions in relation to the judiciary that Ministers must observe.

A The Constitutional Role of the Judiciary

1. The context for this inquiry by the Committee on the Constitution is the changing relationship between judiciary, Government and Parliament following the Constitutional Reform Act 2005 (hereafter, “the CRA” or “the 2005 Act”). The primary aim of that Act was to change the law relating to the constitutional position of the judiciary. For this reason, this paper focuses on the relationship between the judiciary, on the one hand, and Government and Parliament, on the other. It does not deal with the Government/Parliament relationship. While the paper is not a comprehensive review of the subject, it does examine the impact of the Human Rights Act 1998 (hereafter, “the HRA”), since that Act features prominently in current debate on the role of the judiciary.

2. The interaction of judiciary, executive and legislature is a fundamental aspect of any constitution founded on democracy and the rule of law. Unless there is an independent judiciary, able to interpret and apply laws in a manner based on legal rules and principles rather than on political intentions or calculations, the concept of law itself is brought into question. Article 6/1 ECHR recognises the right of every person “in the determination of his civil rights and obligations or of any criminal charge against him” to “a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. In 2002, a high-level international study of challenges facing the judiciary in the 21st Century
led to the issue of *The Bangalore Principles of Judicial Conduct.*\(^{114}\) The preamble to that document emphasised that the implementation of all rights, including human rights, “ultimately depends on the proper administration of justice”; and that a “competent, independent and impartial judiciary” is essential if the courts “are to fulfil their role in upholding constitutionalism and the rule of law”.

3. Every democratic constitution distinguishes, in whatever terms, between the tasks of the legislature, executive and judiciary and contains a statement, however brief, of the distinctive role of the judiciary. Even in countries that have a written constitution based on the formal separation of powers, the significance of judicial independence cannot be discovered from the written text alone. Like other constitutional principles, judicial independence is heavily influenced by a country’s history and culture. Although aspects of the principle have a long pedigree in this country (for instance, the Act of Settlement 1700 declared that judges in England hold office during good behaviour, not at pleasure of the Crown), the position of the judiciary has evolved over the years and will continue to do so in the light of changing social and political factors. By contrast with that evolutionary process, the CRA in 2005 made extensive changes in the institutional framework. At the same time, the CRA declared that

(i) despite these structural changes, the existing constitutional principle of the *rule of law* is not adversely affected (section 1) and

(ii) the executive must continue to uphold the *independence of the judiciary* (section 3). However, the Act did not define the content of the rule of law. Nor did it summarise the notion of judicial independence, other than to outlaw attempts by Ministers to influence particular judicial decisions “through any special access to the judiciary” (section 3(5)).

4. All legislation, and in particular the CRA, has to be read against the inherited constitutional background if it is to be fully understood. In 1995, the relationship between Parliament, executive and judiciary was summarised by Lord Mustill in these terms:

“It is a feature of the peculiarly British conception of the separation of powers that Parliament, the executive and the courts have each their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks fit. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed”.\(^{115}\)

More recently, Lord Bingham has said:

“Whatever overlap there may be under constitutions on the Westminster model between the exercise of executive and legislative powers, the separation between the exercise of judicial powers on the one hand and legislative and executive powers on the other is total or effectively so.”\(^{116}\)

5. But judicial independence is only part of our constitutional structure. At the heart of this structure is the enactment of legislation by Parliament (acting almost

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114 This document was promulgated by the Round Table Meeting of Chief Justices held at the Hague in November 2002; it was based on the Draft Code of Judicial Conduct adopted by the Judicial Group on Strengthening Judicial Integrity, meeting at Bangalore in 2001. The principles amplified in this document relate to judicial independence, impartiality, integrity, propriety, equality, competence and diligence.


invariably on the proposal of the executive). That structure must also include a place for the common law, since in deciding cases the courts frequently apply rules and principles that have not been enacted by Parliament. While rules of the common law may be abrogated or amended by Parliament, the traditions of the common law largely determine the approach taken by the courts in deciding new questions of law that arise, and in interpreting and applying laws made by Parliament. In recent years, the courts have stressed the extent to which the common law influences the task of applying new legislation, particularly when fundamental rights and liberties are affected. Lord Browne-Wilkinson said in 1997,

“…Parliament does not legislate in a vacuum: statutes are drafted on the basis that the ordinary rules and principles of the common law will apply to the express statutory provisions. … As a result, Parliament is presumed not to have intended to change the common law unless it has clearly indicated such intention either expressly or by necessary implication.”

This principle has been applied in particular to what have sometimes been called ‘fundamental constitutional rights’. The background of constitutional democracy against which Parliament legislates includes ‘the principle of legality’. Lord Hoffmann has said that this principle

“means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words”.

6. The duties of the judiciary include applying and enforcing the laws, not merely against private individuals and corporations but if necessary against the executive itself. This duty is a key aspect of the constitutional position of the courts and the executive. As Nolan LJ said in 1992, when the Home Secretary was held to have acted in contempt of court in disregarding a judge’s order to bring back to the United Kingdom a Zairean asylum-seeker,

“The proper constitutional relationship of the executive with the courts is that the courts will respect all acts of the executive within its lawful province, and that the executive will respect all decisions of the courts as to what its lawful province is”.

This formulation properly stresses the element of respect that is due from an all-powerful executive to what has sometimes been called ‘the least dangerous branch’, the judiciary. The statement must of course be read subject to the legislative authority of Parliament. Often legislation will have a decisive effect in determining the limits of the ‘lawful province’ of the executive, but this is not necessarily the case in a dispute involving the grounds of judicial review, which have never been the subject of comprehensive legislation by Parliament.

7. Many aspects of the judicial review of administrative action may be traced back for several centuries, but this jurisdiction of the courts (derived from the common law) is now remarkably prominent. In 2002, Lord Steyn wrote:

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117 A v Secretary of State for the Home Department (SSHD) (No 2) [2005] UKHL 71, [2006] 1 All ER 575.
121 Nolan LJ, in M v Home Office [1992] QB 270, 314, adopting a formulation of the relationship between courts and the executive that had been presented in argument by Stephen Sedley QC.
“Public law has been transformed over the last 30 years. The claim that the courts stand between the executive and the citizen, and control all abuse of executive power, has been reinvigorated and become a foundation of our modern democracy”.122

8. On 31 October 2006, a senior judge, Maurice Kay LJ, gave evidence to the House of Commons’ Constitutional Affairs and Home Affairs Committees. His opening summary included the following points:

(1) “one of the hallmarks of a mature democracy is that political power must be exercised in accordance with the law” (which he took to be the meaning of ‘the rule of law’ as used in the CRA 2005, s 1) and “in any mature democracy, the judiciary has an important role in securing compliance by government and other public authorities with the law”;

(2) “long before the Human Rights Act, the courts developed and expounded the scope of judicial review …. They did so on a case-by-case basis, the centrepiece of the modern jurisprudence being the GCHQ case in 1985, which defined both the principles of modern judicial review and its limits. It made clear … that there were considered to be certain judicial no-go areas, including matters of national security and foreign relations. Indeed, that judicial self-restraint still exists at common law…”;

(3) “the Human Rights Act requires [the speaker’s emphasis] judges to approach a great deal of public law litigation in new ways …” and “all this is leading the courts into new territory” (instanced by the case of the Belmarsh detainees, A v Secretary of State123; and

(4) “in this … the courts are doing no more and no less than carrying out their constitutional function of interpreting and applying the law—in this case, the law enacted by Parliament”.

Finally, and more controversially, Maurice Kay LJ observed that in his view, which differed from what the Lord Chancellor (Lord Falconer) had recently said, the task of making decisions under the HRA “is a matter of judgment according to the law, not discretion”. He further remarked that cases under the HRA “are more illustrative of self-restraint on the part of the judiciary than the sort of militant activism that is sometimes caricatured in the media”.124

9. It will be evident, even apart from the HRA, that the public law jurisdiction of the courts requires them to review the legality of executive decisions. The results of these cases are often unwelcome to ministers and administrators, and may be particularly controversial in the media or in political terms. Successive governments have recognised the far-reaching implications of judicial review, at least since the pamphlet ‘The Judge over Your Shoulder’ was issued to civil servants in 1987. The need for judicial independence in this area is obvious, as also in the area of criminal justice. Section F(3) of this paper will draw attention to recent instances in which Ministers have expressed their irritation at judicial decisions that go against their policies.

124 For the full text of this evidence, see HC 1554-I (2005–06).
B. The Constitutional Reform Act 2005

10. The principal structural changes made by the CRA may be very briefly summarised. They have provided for greater formal separation between government and judiciary (and, as regards the new Supreme Court, between Parliament and judiciary) and for a new statutory interface in England and Wales between government, in the person of the Lord Chancellor, and the judiciary, represented by the Lord Chief Justice.

(A) Contrary to the original intention of the Government, the Lord Chancellor remains in being, but he has lost his status as head of the judiciary in England and Wales and may not now sit as a judge. This greater separation between executive and judiciary made it essential for many functions of the Lord Chancellor to be re-assigned, some being transferred to the Lord Chief Justice, others being exercisable jointly by the Lord Chancellor and the Lord Chief Justice. The Lord Chancellor retains many important executive functions relating to the judiciary (including funding the system of justice, making judicial appointments in accordance with new statutory rules, and approving procedural rules for the courts). Many of these functions are ring-fenced, to ensure that they are not transferred to another Minister by the Prime Minister without further primary legislation. Under the CRA, the Lord Chancellor is not required to have had a legal career, nor to be a member of the House of Lords.

(B) The Lord Chief Justice is now President of the Courts and Head of the Judiciary of England and Wales. He is responsible:

(i) for representing the views of the judiciary to Parliament, to the Lord Chancellor and to other Ministers;

(ii) for maintaining appropriate arrangements for the welfare, training and guidance of the judiciary within resources made available by the Lord Chancellor; and

(iii) for maintaining appropriate arrangements for the deployment of the judiciary and the allocation of work within courts.

These broad duties are accompanied by many specific responsibilities, some of which are exercisable jointly with the Lord Chancellor, or with the concurrence of the Lord Chancellor.

(C) There will be a new Supreme Court for the United Kingdom, to take over the appellate functions now performed by the Appellate Committees of the House of Lords, together with the power to decide devolution issues transferred from the Judicial Committee of the Privy Council. This separation between the ‘Law Lords’ and the House does not mean any change in the extent of appellate jurisdiction. New provision has been made for funding and administering the Supreme Court. The CRA sets out in detail the procedure for the selection and appointment of judges to the Supreme Court, in place of the present practice by which the Prime Minister nominates to the Queen persons for appointment as Lords of Appeal in Ordinary.

(D) Judicial appointments in general are entrusted to the Judicial Appointments Commission, and are no longer a matter primarily for decision by Ministers.

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126 CRA 2005, ss 19, 20 and Schedule 7.
127 CRA 2005, s 4
Within the framework of the CRA, it will be for the Commission to give substance to the statutory rule that selection must be solely on merit (section 63(2)); and the Commission must have regard to the need to encourage diversity in the range of persons available for selection (section 64(1)).

(E) A new post of Judicial Appointments and Conduct Ombudsman is created to deal with two rather different classes of complaint: (a) in relation to the observance of proper procedure in judicial appointments, and (b) in respect of the conduct of judges.

(F) While the historic tenure of senior judges derived from the Act of Settlement continues (subject to a new power to suspend a judge while parliamentary proceedings for removal are pending: section 108(6)), the removal of other judges by the Lord Chancellor is now subject to statutory procedures; in general, disciplinary powers in respect of the judiciary (including power to suspend) may be exercised by the Lord Chief Justice, acting with the agreement of the Lord Chancellor.

11. The cumulative effect of the changes made by the CRA is very extensive. Alongside the statutory provisions has to be read a document known as the Concordat, entitled Constitutional Reform: the Lord Chancellor’s judiciary-related functions, prepared in January 2004 while the Constitutional Reform Bill was before the House of Lords, at a time when the Government was proposing to abolish the office of Lord Chancellor and it was not known what the attitude of the judiciary would be to the proposals. The Concordat represented an agreement between the Lord Chancellor and the Lord Chief Justice (then Lord Woolf) regarding the future exercise of the Lord Chancellor’s judiciary-related functions, and as such it facilitated the passage of the Constitutional Reform Bill through Parliament.

C. In what ways has the CRA affected the constitutional relationship between Parliament, the Executive and the Judiciary?

12. The structural changes in law made by the CRA will in time be supplemented by new working relationships, understandings and conventions, the foundations for which are already being laid. The present inquiry by the Committee will assist in that process. The removal of the Lord Chancellor’s judicial status and the presidential functions of the Lord Chief Justice necessarily make for greater separation between executive and judiciary. So too, the new Supreme Court will make for a clear separation between the final appeal court and Parliament. But these changes may be more important in a formal, analytical perspective than in practical terms. Indeed, if the essentials of judicial independence were not adversely affected by the various roles of the Lord Chancellor, his removal from the judiciary will not affect judicial decisions. Similarly, if the independence of the Law Lords has not been at risk because of their status at Westminster, their decision-making will be unaffected by the change of location. Nonetheless, these structural changes are important in constitutional terms, and will make the distinct status of the judiciary more visible in the media and in the public eye.

13. Reference has already been made to the Concordat between the Lord Chancellor and the Lord Chief Justice that was drawn up in January 2004. This document has an uncertain constitutional status. Many of its provisions have been superseded by what eventually appeared in the CRA 2005. If it contains continuing principles of value that should govern relations between the judiciary and the Government, the document should be revised to take account of the
provisions of the Act, and its status clarified. Rather than it disappearing from sight, a regular review and updating of the Concordat in the light of experience could be of value.

14. The new procedures for appointing judges were welcomed on all sides when the CRA was in Parliament. Ministers have given up a significant power that in many countries is still retained by the executive, but the full effect of the changes will not be felt immediately. If judges in recent years have been selected primarily on the basis of merit, then the new powers of the Judicial Appointments Commission will not directly affect the kind of appointments made. But it remains to be seen how a test of merit will affect the most senior appointments, where candidates will need a range of skills that include the capacity for handling the administrative tasks that under the CRA will be borne by the senior judiciary. At a lower level in the hierarchy, new career patterns in the legal profession may emerge once the Commission’s policies for increasing the diversity of applicants for appointments begin to bear fruit.

15. While judicial decision-making may be unaffected by these structural changes, significant new burdens are placed on the Lord Chief Justice. He or she will have to bear the brunt of representing the judiciary vis-à-vis Parliament, the Government, the media and the public at large. Other senior judges will acquire executive-type responsibilities. The Judges’ Council was re-formed in 2002 \(^{128}\) and it may have an increasingly important role as a forum accessible to the Lord Chief Justice for enabling opinions broadly representative of the whole judiciary to be formulated. Moreover, while the focus in the re-organisation has been on the role of the Lord Chief Justice, the President and Deputy President of the new Supreme Court will have their own statutory functions that may bring them into public prominence in matters affecting the highest level of appeal.

16. The main changes made under the CRA took effect only in April 2006 and it is too soon to know how robust the structure based on the separated functions of the Lord Chancellor and the Lord Chief Justice will be. Difficult questions are likely to arise in respect of funding and resources; maintaining a public understanding of judicial independence; and determining the proper limits and forms of judicial accountability, in particular to the executive and to Parliament. The former Home Secretary, Mr Charles Clarke MP, recently called for

"a mature discussion between parliamentarians and the most senior lawyers in this country about how the criminal justice system deals with the new pressures arising from the possibility of suicide bomb terrorist attacks. One of the consequences of the Human Rights Act is that our most senior judiciary are taking decisions of deep concern to the security of our society, but without any responsibility for that security. One of my most depressing experiences as Home Secretary was the outright refusal of the Law Lords to discuss the principles behind these matters in any forum at all, public or private, formal or informal. To this day I have never met a Law Lord. That attitude has to change." \(^{129}\)

17. An indication of the possible pitfalls that open up if the judiciary are to be more closely engaged in the process of executive policy-making, as Mr Clarke would wish, was given by the experience of senior judges when they were consulted about the Government’s proposal in the forthcoming Asylum


\(^{129}\) Evening Standard, 3 July 2006.
and Immigration (Treatment of Claimants etc.) Bill 2004 to substitute review by the Asylum and Immigration Tribunal for the right to judicial review of immigration and asylum decisions. When the judges replied to the Home Office that the proposed exclusion would not work for reasons that they set out, the response of the Government was to write in additional provisions that sought to fire-proof the exclusion clause against any restrictive judicial interpretation. There may be some matters directly affecting the working of the courts upon which the Lord Chief Justice and senior judges administering the system of justice may necessarily need to be consulted. But it should be the exception rather than the rule for new government policies to be put out to consultation with the judges. If expert advice about the likely effects of legislation is needed by government, there are many qualified people to supply it who are not judges.

18. So far as judicial accountability is concerned, it must be emphasised that judicial independence requires that judges are not directly accountable either to the executive or to Parliament for their decisions. The primary form of accountability comes from four aspects of judicial process: (a) most court hearings take place in public, (b) judicial proceedings are usually adversarial; (c) judicial decisions must deal with the submissions of the parties; and (d) most decisions may be challenged by appeal to a higher court. Even in the case of the Supreme Court, further proceedings are possible on matters of EU law or ECHR law. As an agency of state power, the judiciary as a body are, or ought to be, accountable for the general manner in which the court system serves the public at large. But methods of ensuring this form of accountability must not be such as to prejudice judicial independence.

19. In particular, these considerations must restrict the ability of select committees at Westminster to summon judges to give evidence and question them about judicial decisions. There are of course matters on which dialogue between judges and parliamentarians could be useful.\(^\text{130}\) When the chief justice of any part of the United Kingdom exercises his new right to lay written representations before the relevant parliament (CRA 2005, s 5), this should lead to a hearing before a committee of that parliament: it may be assumed that the chief justice would welcome the opportunity of making his concerns about the judiciary or the administration of justice better known.

20. A separate paper would be needed to deal with these questions in respect of the system of criminal justice. Two brief points may be made. (a) It ought not to be stated or implied by Ministers who seek to ‘re-balance the system of criminal justice’ that the judges are not acting in the interests of the law-abiding public, or that appeal judges allow appeals to succeed on technicalities.\(^\text{131}\) (b) In responding to public concern about crime, governments too frequently have recourse to legislation that removes judicial discretion in sentencing and substitutes an automatic minimum sentence when specified conditions exist. Currently it appears to be realised that judicial discretion in sentencing may indeed be a way of avoiding anomalous results that attract headlines in the press. Frequent and excessive encroachment by Parliament on the sentencing process (as seen in the Criminal Justice Act 2003) is likely to have undesirable side-effects.

\(^\text{130}\) Cf Professor Vernon Bogdanor, “Parliament and the Judiciary: the Problem of Accountability” (Sunningdale Accountability Lecture, given on 9 February 2006).

\(^\text{131}\) Cf Home Office, Rebalancing the Criminal Justice System, July 2006.
D Human Rights Act 1998

21. The main changes made by the HRA are well-known. With the object of ‘bringing rights home’ to Britain, all courts and tribunals must when relevant take account of the Strasbourg case-law (s 2). All legislation in the United Kingdom must where it is ‘possible’ be interpreted consistently with the Convention rights (s 3). Where this is not possible in the case of primary legislation, the higher courts may declare that the legislative provision is incompatible with the Convention (s 4). All public authorities, including the courts but not Parliament, are under a duty to exercise their functions consistently with Convention rights, except where this is excluded by mandatory provision in primary legislation (s 6). The courts may provide appropriate remedies in proceedings in which issues as to Convention rights are raised (ss 7–9), including the award of compensation where this would be consistent with the approach of the Strasbourg court. When a declaration of incompatibility has been issued by a higher court, the incompatibility may be removed by a ‘remedial order’, subject to heightened parliamentary scrutiny (s 10). The Minister in charge of a Government bill in either House must before Second Reading state either that the bill is compatible with the Convention rights or that, while this is not the case, the Government wishes the House to proceed with the bill (s 19). To this framework established by the HRA must be added the Joint Committee on Human Rights at Westminster, which maintains a continuing scrutiny of Government bills, ministerial statements and proposed remedial orders, and from time to time reviews the interpretation of the Act by the courts.

22. The impact of the Act and its application by the courts are now the subject of much examination in books and articles, discussion in the media, and reviews by government departments and Westminster committees. Earlier this year, there was public controversy over the HRA and its effects: three high-profile cases were considered by some to prevent the Government from ensuring public safety, and the Prime Minister asked the Lord Chancellor and the Home Secretary to conduct reviews of the Act’s impact. The review by the Department for Constitutional Affairs on implementation of the HRA was published in July 2006; at the same time the Home Office published papers dealing with the criminal justice system and the Immigration and Nationality Directorate.132

23. In November 2006, the Joint Committee on Human Rights published a report on the DCA and Home Office reviews.133 The Joint Committee’s summary of its report is annexed to the present paper (see annex 1). The Committee welcomed the DCA review, which “in our view makes a very fair and balanced contribution to this important debate” (para 43). The Committee noted the conclusion in the review “that the HRA has not significantly altered the constitutional balance between Parliament, the Executive and the Judiciary” but drew attention to a “significant omission” from the report, namely any substantial consideration of the impact of the Act on the relationship between the executive and Parliament (para 60).

24. Since the departmental reviews and the Joint Committee’s inquiry were largely prompted by allegations in the media about the damaging effects of the HRA on national security, it is notable that the Government and the Joint

132 Rebalancing the Criminal Justice System, July 2006; and Fair, effective, transparent and trusted—Rebuilding Confidence in our immigration system, July 2006.

Committee agree with the view that the HRA “has not significantly altered the constitutional balance between Parliament, the Executive and the Judiciary”.

25. While I readily agree that the constitutional equilibrium has not been put at serious risk by the HRA, I find it difficult to accept that the HRA has not changed the constitutional relationship between Parliament, executive and judiciary. Constitutions evolve, and the United Kingdom constitution is inherently likely to change, both because of its reliance on conventions, and because Parliament’s authority extends to constitutional matters. Both the HRA and the CRA have, in various ways, affected the relationship between Parliament, the executive and the Judiciary, as indeed they were intended to do. The range of changes will be outlined in the next section of this paper.

E. In what ways has the HRA affected the constitutional balance between Parliament, the Executive and the Judiciary?

26. In its White Paper in 1997, outlining the scheme of the Human Rights Bill, the Government stated that it had

“reached the conclusion that courts should not have power to set aside primary legislation, past or future, on the ground of incompatibility with the Convention. This conclusion arises from the importance which the government attaches to Parliamentary sovereignty.”

With this limitation, the scheme in the HRA went as far as it could to enabling the courts to protect Convention rights except where they are prevented from doing so by primary legislation. There have been innumerable statements by judges and Ministers that the HRA keeps in being the fundamental rule of parliamentary sovereignty. Even where the courts declare a provision in primary legislation to be incompatible with Convention rights, as they did in the case of the Belmarsh prison detainees, that declaration “does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given” (HRA, s 4(6)(a)). Nor is there an enforceable legal obligation derived from the HRA to require either Parliament or the Government to alter national law so that it complies with the ECHR. (Such an obligation does however exist at international law by virtue of the ECHR; and the possibility of a remedial order being made under section 10 HRA must add to the political pressure on the Government that may arise to ensure that national law complies with the ECHR). Moreover, section 19 HRA expressly envisages that Ministers may ask Parliament to enact legislation that is inconsistent with the Convention.

27. Nevertheless, a statement that the sovereignty of Parliament is not affected tells only part of the story, since the HRA extended the jurisdiction of the courts to deal with matters that previously were not arguable before a judge. The duty under the HRA to interpret all legislation where it is possible to do so consistently with the Convention is a much stronger duty than that which previously stemmed from the principle that certain common law rights could not be taken away except by express enactment. The new interpretative duty, together with the possibility of a declaration of incompatibility if an interpretative outcome is not possible, takes

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136 See note 11 above.
the courts into the examination of questions that, apart from the HRA, would have been regarded as political questions. In respect of delegated legislation, the HRA empowers the courts to quash delegated legislation on Convention grounds; this power is similar to, but goes beyond, the long-established power of the courts to quash delegated legislation that is ultra vires.

28. Moreover, for a superior court to decide to make a declaration of incompatibility, the court must first have reached a view on the substance of a statute legislation that the courts could not have been asked to make apart from the HRA. The fact that the HRA does not give power to the courts to quash primary legislation on Convention grounds is a limitation on the remedy that the courts provide, not on the substance of what may be argued in court and if necessary decided.

29. This is not to suggest that the new powers entrusted to the courts by the HRA are unsuitable for judicial decision-making. A power to review primary legislation on Convention grounds may indeed be new in the United Kingdom, but such a power is similar to the position in many countries where a court can go further and may set aside legislation that conflicts with the constitution. Under the HRA, a claimant that obtains a declaration of incompatibility will have secured a considerable victory on the substance of the case. He or she will be well placed to go to Strasbourg if the offending legislation continues in being. Indeed, in practical terms the statutory provision can probably no longer be relied on by the Government, unless either the national law is changed (as happened after the Belmarsh prison case) or the Government is prepared to derogate from the Convention obligation in question.

30. The implications of entrusting the judiciary with greater powers of protecting Convention rights were probably not understood by the public at large when the HRA was enacted, despite the clarity with which the White Paper in 1997 explained the scheme. Given the intentions behind the HRA, and the fact that the jurisdiction of the courts was thereby enlarged to include matters akin to the constitutional enforcement of fundamental rights, it is not surprising that appellate judges have given much time to questions arising under the Act. But I do not consider that the record of these decisions establish a case for either reconsidering the scheme of the Act, or supporting allegations that the judges are usurping the authority of the executive or Parliament. In his judgment in the Belmarsh case, Lord Bingham set out the great weight that should be given to decisions of Ministers and of Parliament in matters that involve a pre-eminently political judgment, and said:

“Conversely, the greater the legal content of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions”.139

He drew attention to the Convention regime for the international protection of human rights, which “requires national authorities, including national courts, to exercise their authority to afford effective protection”.140 On the proportionality of the scheme for detainining foreigners suspected of terrorist involvement indefinitely

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139 A v SSHD (note 11 above), para [29].
140 Ibid [40]
without trial, Lord Bingham did not accept a submission by the Attorney-General that distinguished between democratic institutions and the courts, saying:

“The Attorney-General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic—[particularly when the court was performing functions assigned to it under the HRA] ... The 1998 Act gives the courts a very specific, wholly democratic mandate. As Professor Jowell has put it: ‘The courts are charged by Parliament with delineating the boundaries of a rights-based democracy’”. 142

31. The review of case-law by the Department for Constitutional Affairs in July 2006 concluded that decisions of the courts had had no significant impact on criminal law or on the Government’s ability to fight crime. The HRA had had an impact on the Government’s counter-terrorism legislation, but the main difficulties had arisen from decisions of the Strasbourg Court. The Act had had a significant but beneficial effect on the development of policy by central Government. But it had been widely misunderstood by the public and sometimes misapplied, and some ‘damaging myths about human rights’ had taken root. The Government remained fully committed to the ECHR and HRA, but would take steps to give new guidance to departments on human rights, would take a proactive approach to human rights litigation, and would make efforts to inform the public about the benefits of the HRA and to debunk myths that had grown up around Convention rights. 143

32. This appraisal of the HRA has not, however, always been reflected in the reaction of some Ministers to decisions by the courts. A later section will examine some difficulties that have arisen from the response of Ministers to judicial decisions.

33. The question discussed in this section has been: ‘In what ways has the HRA affected the constitutional balance between Parliament, the executive and the Judiciary?’ In summary, my answer is that, so far as the protection of rights guaranteed by the ECHR is concerned, the HRA has vested new powers in the courts to determine the limits of those rights and to decide whether those rights have been respected by public authorities (including the executive) and whether legislation by Parliament (whenever enacted) is compatible with those rights. The HRA has created a new form of judicial review of legislation, and new grounds for the review of executive decisions, thus enabling judicial decisions to be made on human rights claims. However, when primary legislation is concerned, ultimate legislative authority remains with Parliament, acting on the proposal of the executive. This new form of protection for human rights is exactly that envisaged by the framers of the HRA. The effects of the Act have often been misunderstood both in some political quarters, in the media, and by the public at large. Some recent criticisms of the judiciary may have come about because of a failure to understand the constitutional implications of the HRA.

F. Criticism of the Judiciary in the Media, in Parliament and by the Government

34. As has already been seen, the functions of the judiciary are different in both substance and form from those of the executive and legislature; and judicial

141 Ibid [42]
142 Ibid.
143 These points are taken from the Executive Summary of the Review. See note 21 above.
independence is to be contrasted with the democratic accountability of legislature and executive. But does their independence mean that the judges are not ‘accountable’ for their work, whether to Parliament, the executive or to the public? Is judicial independence incompatible with any form of criticism? The next sections examine the extent to which the position of the judiciary is protected in law and constitutional practice.

(1) Should the media be under any special requirement to respect the authority of the judiciary?

35. At one time, the common law on contempt of court enabled the courts, albeit acting as judges in their own cause, to impose penal sanctions should a newspaper or journal exceed the limits of permissible criticism of the judiciary. The law of contempt also applied to publications that might prejudice the holding of a fair trial—for example, a newspaper publishing details of an accused person’s previous convictions, casting doubts on the veracity of witnesses, or urging that severe penalties should be imposed on the accused. The obligation of the press not to prejudice the holding of a fair trial is reinforced by Article 6/1, ECHR.

36. The need for some limitation on freedom of the press as it affects the judiciary is recognised by Article 10/2 ECHR, which permits freedom of expression to be restricted by law where this is necessary in a democratic society for (among other things) “the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.” The common law on contempt of court was modified by the Contempt of Court Act 1981, in response to the decision of the European Court of Human Rights in the *Sunday Times* case. In that case, a majority of the Court held that a ban imposed by the English courts on publishing material relating to the thalidomide disaster (because of a pending civil action against the manufacturers) was not necessary for maintaining the authority and impartiality of the judiciary.

37. Given the changes in the law made in 1981, and a more permissive attitude to forthright discussion of current issues, the law on contempt of court has virtually ceased to be a restraint on the severity of published comment on judges’ decisions. Certainly, an untrue press report that a judge had taken a bribe before reaching his decision could give rise to an action in defamation; and press disclosure of confidential information that in the interests of justice must be kept secret could give rise to liability for contempt of court and possibly to an action for breach of confidence by the person whose confidence had been broken. But the situation would have to be exceptional for even an abusive and scurrilous critique of the judiciary to be held to be in contempt of court.

38. There is a continuing risk of sensational and one-sided reporting in sections of the press. Responses from litigants or other interested parties may attempt to set the record straight. But when a court decision has been given sensational treatment of this kind, it will not generally be possible for the judge to reply. Indeed, the judge’s decision with reasons will usually have been given in open court. Even if the judge should wish to correct any misunderstanding of the

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144 In 1928 the *New Statesman* was found guilty of contempt for publishing a pungent comment on the inability of Avory J to conduct a fair trial of a libel action against Dr Marie Stopes.

145 “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.

146 *Sunday Times v United Kingdom* (1979) 2 EHRR 245.
decision, the judgment itself should have emphasised the factors that explain an unexpected or controversial outcome. If the judge at first instance gets it wrong, the mistake can be corrected by means of an appeal. If no appeal is brought, and a putative mistake of law remains uncorrected, legal journals may comment on the error. In general, the hope must be that good reporting of decided cases will in time come to prevail over selective or biased reporting.

39. It may be that the new presidential responsibilities of the Lord Chief Justice will, in the interests of greater public understanding, enable a statement to be issued when damaging mistakes have been made in press reports of a judgment. The Judges’ Council may also have a role to play. But such action will not in itself remedy persistent misreporting that intentionally presents a judge or judges in a bad light. The unavoidable conclusion may be that this is an aspect of press freedom to which judges, along with other public figures, must become accustomed.

(2) What limits apply or should apply to criticism of the judiciary in Parliament?

40. Article 9 of the Bill of Rights provides the fundamental building-block in the relationship between the courts and Parliament:

> “the freedom of speech and debate or proceedings in Parliament ought not to be impeached or questioned in any court of place out of Parliament”.

Accordingly, no court could penalise or impose liability for statements made in Parliament that judges in general were corrupt, that a judge had committed sexual offences with young people\(^{147}\) or that an accused person facing trial was manifestly guilty and should spend the rest of his life in prison.

41. Nevertheless, Article 9 does not prevent the two Houses from exercising control over what their members say in Parliament. An important example of such control for present purposes is the sub judice rule, which bars members from referring to civil or criminal cases in which proceedings are active in United Kingdom courts. The rule has developed for three main reasons:

(a) to avoid a risk of prejudicing court proceedings in individual cases;

(b) the principle of comity between the courts and Parliament; and

(c) the need to demonstrate that the judiciary operates independently of political pressures.

The Joint Committee on Parliamentary Privilege in 1999 examined the need for the sub judice rule, and concluded:

> “[I]t is not only a question of prejudicing a fair trial. Parliament is in a particularly authoritative position and its proceedings attract much publicity. The proper relationship between Parliament and the courts requires that the courts should be left to get on with their work. No matter how great the pressure at times from interest groups or constituents, Parliament should not permit itself to appear as an alternative forum for canvassing the rights and wrongs of issues being

\(^{147}\) This example is based on an unfortunate affair in the Australian Senate, where a senator abused his freedom of debate by accusing a senior judge of sex offences against young boys, deliberately withholding the name of the judge until the last sentence of his speech. A week later, the senator withdrew his allegations, and apologised for having made them: see E Campbell and M Groves, “Attacks on judges under parliamentary privilege: a sorry Australian episode” [2002] Public Law 183.
considered by the judicial arm of the state on evidence yet to be presented and tested."

42. The report of the Joint Committee caused both Houses to look again at the
*sub judice* rule. Resolutions embodying a revised form of the rule were adopted in
the Lords on 11 May 2000, and on 15 November 2001 by the Commons. The
rule, which does not apply to debates on primary or delegated legislation, is
subject to the Speaker’s discretion and provides for certain exceptions, in
particular when a ministerial decision is in question or where a case in the opinion
of the Chair concerns issues of national importance such as the economy, public
order or the essential services. The rule has recently been examined by the House
of Commons Committee on Procedure: the Committee agreed that the rule be
maintained, subject to some greater flexibility in the exercise of the Speaker’s
discretion. The Committee reminded MPs that they should not say anything on
the floor of the House that would affect evaluation of the merits of proceedings
which were imminent or before the courts, or would influence the result of
proceedings, in particular the likelihood of an acquittal.

43. The *sub judice* rule ceases to apply when civil or criminal proceedings
relating to a matter are no longer active. Thus the rule does not prevent the
members of either House from raising matters concerning the merits of court
decisions that have already been made, so long as no appellate proceedings are
active. There is however a long-standing rule of the House that, unless discussion
is based on a substantive motion on which a vote could be taken (which in this
context would generally mean a motion calling for a judge to be dismissed),
members may not cast reflections on the conduct or motives of a judge or upon
judges generally. In 1987, when the Prime Minister (Mrs Thatcher) said at
question time that she was unable to comment on a particular sentence imposed
by a judge, the Speaker subsequently ruled:

“IT IS PERFECTLY IN ORDER TO CRITICISE OR TO QUESTION A SENTENCE: BUT IT IS NOT
IN ORDER TO CRITICISE A JUDGE. THAT HAS TO BE DONE BY MOTION.”

Although the requirement of a substantive motion may create a real difficulty
where neither the Government nor opposition parties are willing to find time for
debate of the motion, determined back-benchers may be able to find ways (for
instance, by way of an early day motion) of putting on record the substance of
their criticisms of a judge.

44. Rodney Brazier’s account of these matters in 1994 concluded that these
arrangements

“IN GENERAL REPRESENT A SENSIBLE BALANCE BETWEEN JUDICIAL FREEDOM FROM
WRONGFUL PARLIAMENTARY PRESSURE AND PARLIAMENT’S RIGHTS IN RELATION TO
THE ADMINISTRATION OF JUSTICE.”

However, the rules under discussion do not deal with a current question of some
importance, namely whether judges should appear before select committees that
are inquiring into topics in which the performance of the courts is in question.
Moreover, Professor Brazier also had in mind the conventional rules that apply to

149 First Report of Committee on Procedure HC 125 (2004–05); Second Report of Committee on Procedure
HC 714 (2005–06).
151 HC Deb, 2 July 1987, col 641.
Ministers, and emphasised that Ministers are subject to restrictions that do not apply to backbench members.

(3) What limits apply or should apply to criticism of the judiciary by the Executive?

45. One aspect of the constitutional relationships under discussion that has recently caused concern is the extent and manner of criticisms made by Ministers of judicial decisions. In particular, concern has arisen in two areas – decisions of the courts in judicial review cases involving the Human Rights Act, and the sentencing of convicted offenders.

46. Where a court on judicial review holds a government policy or an executive decision to be unlawful, the Government has the usual right of an unsuccessful litigant to seek leave to appeal, if necessary to the House of Lords. The appeal process will determine the merits of the legal issues concerned, and this is the right course for a Minister to take when a decision has been made on a matter of departmental importance. What is not acceptable is for a Minister to react to an unfavourable decision by blaming the judges, casting doubt on their integrity, alleging that they are intentionally thwarting the wishes of Parliament or claiming that they have taken leave of their senses. Nor ought Ministers to instigate or condone hostile criticism of a judge in the media through off-the-record briefing that will cause some newspapers to pillory the judge concerned.

47. Moreover, when proceedings are pending before a court or tribunal, a Minister should not publicly call for a certain outcome (as occurred within recent weeks when a Minister asserted that a Muslim classroom assistant in dispute with her employers over the wearing of the veil must be dismissed). It would be equally wrong for a Minister to demand that an accused person who was on trial for a criminal offence should be convicted.

48. Recent incidents arising from three cases where Ministers intervened with comments about the Human Rights Act have been examined by the Joint Committee on Human Rights. The only one of these incidents to involve criticism of a judge was the case of the Afghani hijackers. The judge in the Administrative Court was Sullivan J, and the ministerial comment was (in effect) that he must have taken leave of his senses. On appeal by the Home Office, the Court of Appeal upheld the judgment, noting that the case “has attracted a degree of opprobrium for those carrying out judicial functions” and commending Sullivan J for “an impeccable judgment”. After hearing evidence from the Lord Chancellor, Lord Falconer, about the case, the Joint Committee found that the Human Rights Act had been used “as a convenient scapegoat for unrelated administrative failings within Government”. On the case of the Afghani hijackers, the Committee observed:

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153 The Minister’s comment was made at a time when the case had been fully heard by an employment tribunal and the decision was pending. The final paragraph of the tribunal decision, announced on 19 October 2006, states: “Since preparing this Judgment and Written Reasons, this claim has, since 13 October 2006, become the subject of intense and extensive coverage by local and national newspapers and radio and television. It is most unfortunate that politicians and others have made comments on a case that was sub judice. The Tribunal wish to put on record that all the findings of fact and our conclusions were completed by close of business on 6 October 2006, so that none of the comments reported in the media have in any way affected our judgment.”

154 See para 23 above.

155 See R(S) v SSHD [2006] EWHC 1111 Admin (Sullivan J) and (on appeal) [2006] EWCA Civ 1157.
“In our view high level ministerial criticism of court judgments in human rights cases as an abuse of common sense, or bizarre or inexplicable, only serves to fuel public misperceptions of the Human Rights Act and of human rights law generally”.

49. The Sweeney case in June 2006 was examined by the House of Commons Constitutional Affairs Committee. The Home Secretary had expressed strong criticism of the sentence given to Craig Sweeney by Judge John Griffith Williams QC, after he had pleaded guilty to abducting and sexually assaulting a 3-year old girl. The situation was not helped by a statement on radio by the Parliamentary Under-Secretary of State (Vera Baird QC) to the effect that the judge’s sentence was wrong. This was promptly followed by correspondence between the Minister and the Lord Chancellor, in which she withdrew her comments and acknowledged that they should not have been made. Annex 2 to this paper contains an extract from the evidence given by the Lord Chancellor to the Constitutional Affairs Committee. Annex 3 contains the text of a letter sent by the Lord Chief Justice to circuit judges dated 19 June 2006. Such a letter may have raised their morale, but would not bring to the public generally that it was not the error of a judge that had caused the controversy.

50. At one time, it was considered to be a constitutional convention that members of the Executive would not criticise members of the judiciary. While the Government might properly say that a court decision differed from the legal advice on which it had acted or that it proposed to bring in amending legislation, Ministers were expected not to state that a court’s decision was wrong, nor to impute improper motives or incompetence to the court. To quote Brazier again, writing in 1994:

“Ministers are by convention expected to show due inhibition when commenting in Parliament on judicial words and deeds...”

to which the author added the comment,

“It would never be proper for Ministers to criticise the judiciary outside Parliament”.

51. The interpretation and effect of many conventions fluctuate over time. The behaviour of some Ministers in recent years makes it necessary to consider whether the convention stated by Brazier still survives, or whether it has merely lost some of its former authority and been ignored.

52. In 1995, there was a period of acute tension between the Home Secretary (Mr Michael Howard) and the judiciary, resulting from a series of judicial review decisions involving the Home Office. Criticisms of the judiciary by Mr Howard were accompanied by attacks launched by several newspapers on judicial review, on the judiciary in general, and on individual judges. The Times (3 November 1995) said,

“it is tempting to observe a pattern emerging, a potentially alarming hostility between an over-mighty executive and an ambitious judiciary”.

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156 Note 22 above, para 21.
157 See transcript of evidence given by the Lord Chancellor to the Constitutional Affairs Committee, HC 1060-iii.
53. In February 2003, the Home Secretary, Mr David Blunkett, reacted with anger to a decision of Collins J upholding the right of six asylum-seekers to receive support from the National Asylum Support Service (NASS), an agency of the Home Office. The case arose under section 55 of the Nationality, Immigration and Asylum Act 2002, which prevented the Home Secretary from granting support to certain asylum-seekers but empowered him to grant support to them where this was necessary for avoiding a breach of their Convention rights. In the absence of a right of appeal against a refusal of support by NASS, the flood-gates opened to a torrent of claims for judicial review. The decision by Collins J led Mr Blunkett to say on radio:

“Frankly, I’m personally fed up with having to deal with a situation where Parliament debates issues and the judges then overturn them”.

In a newspaper article, he said that it was “time for judges to learn their place”. The Daily Mail, along with some other newspapers, complained that Collins J “had chosen to set his will above Parliament’s”. A Labour MP wrote in the Express on Sunday, “We’re used to lawyers trying to bend the rules. What is not so easy to forgive is the destructive activity of a judge.”

55. In dealing with the Home Secretary’s appeal in this case, the Court of Appeal explained that the task of the courts was to interpret the laws made by Parliament, and commended “the care with which, in his lengthy judgment, [the judge] addressed the difficult issues before him”. The judgment of Collins J was largely upheld, although not entirely, but the court endorsed the view that the Home Office’s decision-making failed the test of fairness. Later, when other cases reached the House of Lords, section 55 was considered by the Law Lords to be inherently likely to cause the Home Secretary to breach the right of a destitute asylum-seeker not to be subjected to inhuman or degrading treatment. The same view of the section had been taken by the Joint Committee on Human Rights when the proposed clause was rushed through Parliament without adequate debate. Some aspects of this episode were highly specific to the immediate context, but the affair vividly illustrates the need for an independent judiciary able to interpret the laws made by Parliament, particularly when Ministers do not appear to understand the constraints that apply to their policies, or indeed the full content of legislation that they proposed to Parliament.

56. It is not known whether Lord Irvine, Lord Chancellor at the time of Mr Blunkett’s attack upon Collins J, intervened with his Cabinet ministerial colleague. But some months later, Lord Irvine referred to the role of the executive under the HRA and said:

“But what about when the courts disagree with the executive? In a democracy under the rule of law, it is not mature to cheer the judges when a win is secured and boo them when a loss is suffered. Under the previous administration, the public would have been forgiven for thinking that on occasions the executive and the judiciary had ceased to be on speaking terms. In the latter two years of the last government, there was unprecedented antagonism between judiciary and government over judicial review of ministerial decisions. Some Conservative politicians even went so far as to call judicial review into question. We

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160 See R (Q) v Secretary of State [2003] EWHC 195 Admin. For an account of these events, see A W Bradley, “Judicial Independence under Attack” [2003] Public Law 397.
161 R (Q) v Secretary of State [2003] EWCA Civ 364; [2003] 2 All ER 905.
have come a long way since then and the Human Rights Act has helped us do so.”163

Later, in evidence to a House of Commons committee, Lord Irvine gave an ‘absolute assurance’ that while Lord Chancellor he had frequently argued within government to insist that judicial independence was upheld.164

57. While it is certain that recent governments have found it difficult to welcome decisions on judicial review to which Ministers are opposed, it is not possible to assess the extent to which Lord Chancellors have had to intervene in such moments of strain. But the record since the mid-1990s set out above suggests that some Ministers today find their constitutional duties in this respect to be irksome. Today, as has been seen above, all Ministers are required by the Constitutional Reform Act 2005, s 3(1) to “uphold the continued independence of the judiciary”. If the earlier convention that Ministers should not criticise the judiciary has been seriously eroded, as it seems to have been, steps are needed to re-state the convention in the light of that statutory duty.

58. Since this is primarily, but not exclusively, a question that affects the conduct of Ministers, it would be appropriate for a new chapter to be included in the Ministerial Code that would make a full statement for the guidance of Ministers and their advisers of their obligations in respect of the judiciary. It should include—

(a) a statement of the implications of sections 1 (rule of law) and 3 (judicial independence) of the CRA for Ministers and their advisers, including the special role that the Act prescribes for the Lord Chancellor;

(b) a statement of the sub judice rule from Parliament, but adapted for a ministerial context, emphasising the need to avoid intervening with comments that might prejudice the outcome of a current or pending trial or hearing; the rule should go further than the rule in Parliament by applying not only to court proceedings but also to tribunal proceedings;

(c) a statement of the limitations that ought to apply to comment on and criticism of decisions that have been made by courts or tribunals;

(d) a reminder of the respect that Ministers, as members of the executive, should extend to the courts and the judiciary;

(e) a suggestion that Ministers should seek advice if necessary on the legal issues involved before making off-the-cuff comments on current or recent court and tribunal proceedings; that advice should be available both within departments and also from the Lord Chancellor or the Attorney-General.

It is indeed remarkable that the Ministerial Code is at present silent on the subject of relations with the judiciary.165 The inclusion of a statement on these lines in the Ministerial Code would have the further advantage of making it readily available to the advisers of all members of the Government.

164 Evidence to the House of Commons Committee on the Lord Chancellor’s Department, 2 April 2003.
165 The Ministerial Code, para 1.1: “Ministers of the Crown are expected to behave according to the highest standards of constitutional and personal conduct in the performance of their duties.” Para 1.2: “This Code provides guidance to Ministers on how they should act and arrange their affairs in order to uphold these standards. It lists the principles which may apply in particular situations drawing on past precedent...” The duties of Ministers in relation to the judiciary plainly come within these objectives.
G. Conclusions

59. This is a long paper, but it has not dealt with all the issues that are relevant to this ‘short inquiry’ by the Committee on the Constitution. Thus I have not mentioned participation by judges in the media, the use of judges for governmental inquiries, or the appointment of judges to such posts as the Intelligence Services Commissioner under the Regulation of Investigatory Powers Act 2000. Although I have dealt separately with the implications of the CRA 2005 and the HRA 1998, an integrated picture of the changing position of the judiciary would require these two very different Acts to be taken into account together. A comprehensive assessment would include the role of national courts in respect of EU law, and possibly also the effects of devolution.

60. Despite the political controversies that have arisen in relation to the HRA, and although the internal balance between Parliament, Executive and the judiciary has changed because of that Act, an appraisal of the present role of the judiciary would in my view be incomplete without some recognition of the way in which the judges have answered the difficult questions that arise from the HRA and the ECHR. The case-law includes some remarkable judgments that have fully justified the aim of the Act in enabling United Kingdom judges to contribute to the developing understanding of human rights protection in the 21st Century.

ANNEX 1


Summary

Introduction

In May 2006 there was public controversy over the Human Rights Act 1998 (HRA). Three high-profile cases led some to argue that the HRA, or the way it was being interpreted, was preventing the Government from ensuring public safety, and that it should be repealed or amended. The Prime Minister asked the Lord Chancellor and the Home Secretary to conduct reviews of the impact of the HRA. He also asked the Lord Chancellor to “devise a strategy, working with the judiciary, which maintains the effectiveness of the HRA, and improves the public’s confidence in the legislation”, and asked the Home Secretary “to consider whether primary legislation should be introduced to address the issue of court rulings which overrule the government in a way that is inconsistent with other EU countries’ interpretation of the European Convention on Human Rights.” (paragraphs 1–2).

On 18 May the Joint Committee on Human Rights decided to conduct an enquiry into “the case for the Human Rights Act”. In October 2006 we also decided to inquire into the human rights implications of Home Office proposals drawing in part on its internal review of the impact of the Human Rights Act and the European Convention on Human Rights on decision making in the criminal justice, immigration and asylum systems. We also raised with the Home Secretary the Chahal judgment. We took oral evidence from the Lord Chancellor and Baroness Scotland on 30 October. The main purpose of this Report is to inform Parliament about the Government’s recent reviews of the Human Rights Act (paragraphs 3–8).
Events giving rise to the Reviews

In our view, none of the three cases which sparked controversy—the Afghani hijackers’ judgment, the Anthony Rice case and the failure to consider foreign prisoners for deportation—demonstrates a clear need to consider amending the Human Rights Act. The Lord Chancellor agrees and confirms it is the view of the Government as a whole that none of them justifies amendment or repeal of the HRA. We very much welcome the Lord Chancellor’s assurance that there is now an unequivocal commitment to the Human Rights Act across the Government, but, in our view, public misunderstandings will continue so long as very senior Ministers make unfounded assertions about the Act and use it as a scapegoat for administrative failings in their departments (paragraphs 9–41).

The DCA Review

We welcome the DCA Review which in our view makes a fair and balanced contribution to the debate, and the Home Office’s unequivocal acceptance that the HRA has not impeded in any way the Government’s ability to protect the public against crime. Although the Review does conclude that the HRA has had an impact on the Government’s counter-terrorism legislation, mainly because of the Chahal case, we also welcome the Lord Chancellor’s conclusion that the HRA has not significantly inhibited the state’s ability to fight terrorism. We believe the Government has policy options to counter the terrorist threat in a way compatible with the UK’s human rights obligations. We welcome the Lord Chancellor’s acceptance that the HRA has not had any adverse impact on the Government’s policy on immigration or asylum (paragraphs 42–48).

The DCA review records a significant beneficial effect of the HRA on development of policy by Government. We welcome the Review’s acknowledgment of the importance of good guidance on human rights compatibility in policy-making, the DCA’s embrace of a championing role in relation to human rights and its publication of guidance for officials in public authorities. We also welcome the Lord Chancellor’s commitment to consult us on draft human rights guidance in future (paragraphs 49–59).

The DCA Review concludes that the HRA has not significantly altered the constitutional balance between Parliament, the Executive and the Judiciary. We welcome the Lord Chancellor’s acknowledgment that it should be possible to give fuller reasons explaining the Government’s view of the compatibility with human rights obligations of proposed new legislation. We favour a free-standing Human Rights Memorandum based on the existing ECHR memorandum edited if necessary to protect the Government’s legal professional privilege (paragraphs 60–66).

The DCA Review states that the HRA has been widely misunderstood by the public and seeks to debunk some myths. We agree that there clearly exists a public perception that the HRA protects only the undeserving, at the expense of the law-abiding majority. We welcome the Review’s proposal to be proactive in debunking myths. In our view, the public’s commitment to human rights, and to the HRA, depends on wider dissemination of positive examples the HRA is making in practice, e.g. for those in residential homes, the disabled, carers and council tenants (paragraphs 67–80).

The DCA Review rules out withdrawing from the ECHR or repealing the HRA but does not rule out amending the HRA. We welcome the fact that the Lord Chancellor sees no current need to amend the HRA as contemplated in the Review and are clear that there is no need to amend the HRA or introduce specific legislation to clarify that public safety comes first (paragraphs 81–85).
We asked the Lord Chancellor to consider primary legislation to clarify the interpretation of “public authority” under the HRA. Though not ruling out the possibility, he preferred a case-by-case-approach. We were disappointed by the Government’s new concern about driving private providers out of the market by widening the definition of “public authority”. It seems seriously at odds with the Government’s avowed intention elsewhere in the Review to make a positive case for the HRA. We do not see insuperable obstacles to drafting a simple statutory formula which makes clear that any person or body providing goods, services or facilities to the public, pursuant to a contract with a public authority, is a public authority for the specific purposes of the HRA (paragraphs 86–92).

We were very surprised the DCA’s “strategic review” of 2004 on implementing the HRA has not been published and welcome the Lord Chancellor’s promise to think about making a copy available confidentially to the Committee (paragraphs 93–96).

The Home Office Review

This Review has not been published. Baroness Scotland drew our attention to the CJS Rebalancing Report. Most agencies in the criminal justice system found the HRA helpful but also identified a “risk-averse culture” based on a “sometimes cautious interpretation” of the ECHR and HRA. But there are few concrete examples. We welcome proposals for practical steps to improve understanding of how to implement the HRA and for a proactive approach to myth-busting. But in our view the Home Office Review should be published. (paragraphs 97–107).

Rebalancing the Criminal Justice System

The premise of many of the Government’s proposals is that the HRA has led to public safety being treated as of less importance than the human rights of terrorists or criminals, or at least is perceived by the public to have had this effect. We welcome the acceptance by Baroness Scotland that rebalancing must not be unfair or unjust to the offender but better represent and support victims. Our concerns about the Government’s attempt to overturn the Chahal case in the European Court of Human Rights remain unalloyed. Attempting to distinguish between inhuman and degrading treatment on the one hand and torture on the other is unlikely to find favour, is unattractive and fails to solve the Government’s central problem. We welcome the Government’s recognition that there is a question whether the criminal justice system contains any in-built discrimination on racial grounds. We also welcome the Government’s recognition that too many non-dangerous people with mental health problems continue to be imprisoned (paragraphs 108–125).

Reforming the IND

We consider human rights issues raised by the Home Secretary’s proposals, notably over the intention to bring in a presumption that various categories of foreign criminals will be deported. We are concerned by the Prime Minister’s announcement of an automatic presumption of deportation, which raises the prospect of deportation to a country where there is a real risk of treatment contrary to Article 3 of the ECHR. On deportation of EU and EEA nationals, we are also concerned that the Home Secretary may be blaming the courts for something laid down by EU law. Finally, Baroness Scotland assured us there was no racial profiling in deciding IND activity on high risk routes (paragraphs 126–137).

Building a Human Rights Culture

We believe that a culture of respect for human rights is a goal worth striving for. We see the DCA Review as an important milestone in bringing one about. It
cannot be achieved exclusively through the courts, but needs shifts in public perception. This in turn requires wider knowledge of the benefits of the HRA. But, with the establishment of the Commission for Equality and Human Rights pending, there remain unresolved questions about how far a culture of human rights is developing. We will pursue these issues during the remainder of this Parliament (paragraphs 138–146).

ANNEX 2

Extract from oral evidence given to the House of Commons’ Constitutional Affairs Committee, 4 July 2006

Q250 Jeremy Wright: Although you are no longer head of the judiciary, we know that you still have an interest in the judiciary and are responsible for what happens there. We also know that what has happened in the press recently has been a very public and apparent argument between politicians and members of the judiciary. Does it concern you that as a result of that very public spat the public may take a different view of judges and lose a degree of confidence in them?

Lord Falconer of Thoroton: I think you are wrong to say that the problem was necessarily a spat between the Government and judges. What has been happening over a period of time is that a lot of people have been saying that part of the problem in relation to sentencing is the judges. A variety of parts of the media has been explicitly critical in blaming the judges for a number of things that have happened in sentencing. I believe that that has had an impact in undermining confidence in the judiciary. Separately from that, there have been reports of rows between the judges and the executive. I should make it clear that neither the judges nor the executive wants such rows, nor do they believe that there is any such row going on between them. They are both as concerned as they could be to ensure that public confidence in the judiciary is maintained. But it goes deeper than that. If people think there are rows going on between different bits of the state that undermines their confidence in the ability of the state as a whole to deal with the problems that it has to face, for example terrorism and crime.

Q251 Jeremy Wright: Do you accept that clearly the judges are worried about this? Several senior judges have expressed concerns about politicians—I do not refer specifically to the Government but politicians generally—interfering in judicial matters and making comments upon decisions in individual cases. Do you not believe that that is causing a potential problem of public confidence?

Lord Falconer of Thoroton: Judges have been careful not to criticise politicians at any stage. I have made comments to the effect that the judges should not be made the whipping boys for various problems. For example, the other day there was a rather graphic piece in either the Daily Telegraph or The Times in which a judge said that it might be time for him to resign and go off into the Thames or something like that. Earlier in the same article it was said that an unnamed part-time judge was thinking of resigning. I know of such judge. I know of no judges who are thinking of resigning because of that. Everybody involved, judges and executive alike, is concerned to ensure that confidence is not lost but equally is aware that these events occur from time to time and the important thing is to cool the temperature, identify the policy issues and get on with solving them.
ANNEX 3


On behalf of the senior judiciary I want to share with you our grave concern at recent media coverage of sentencing issues.

The judiciary—and circuit judges in particular—have unfairly borne the brunt of this criticism. As we all know, much of it is unbalanced and plainly wrong, and the principles which judges are required to apply when making their sentencing decisions have been ignored. We have great sympathy for those judges who individually have been singled out for intemperate personal attack.

The President of the Queen’s Bench Division and I … have been addressing and continue to address these issues with the Lord Chancellor. Some of you will have seen his answers during the Question Time programme on Wednesday evening, and others will have heard his interview on the Today programme on Thursday morning. These will have contributed to an improved public understanding of the issues related to sentencing and we are grateful to him for putting the record straight.

It is quite legitimate for the media and commentators to criticise any particular sentence and the judiciary recognise and accept that. But they are entitled to expect such criticism to be accurate and objective. Personal and unmerited attacks on the characters of individual judges can only damage the public’s understanding of, and confidence in, the criminal justice system as a whole. We will continue to do what we can to counter such unfair and damaging criticism.

I and the senior judiciary would like to reassure you that judges who have been the subject of unfounded media criticism have our sympathy and full support.

Further Paper by Professor Anthony Bradley

Summary

This paper has been written to consider whether and to what extent the content of my earlier paper, “The new constitutional relationship between the judiciary, Government and Parliament”, has been affected by the Government’s decision to create the Ministry of Justice. While that decision is of constitutional significance, and it affects the relationship between the Government and the judiciary that resulted from the Constitutional Reform Act 2005, many of the expressed concerns are about the practical consequences of the decision, and there is no clear argument to be made against the proposed Ministry of Justice on constitutional grounds. If adequate assurances are given by the Government that meet these concerns, the assurances should be placed on the public record.

1. The Committee have given me the opportunity to consider whether changes or additions are needed to my paper, “The new constitutional relationship between the judiciary, Government and Parliament”, in light of the Government’s decision, announced on 29 March 2007, to move responsibility for prisons and the probation service from the Home Office to the Department for Constitutional Affairs (to be re-named the Ministry of Justice), the changes to take effect on 9 May 2007.

2. The main aim of that earlier paper was to discuss the structure of relations between the judiciary, on the one hand, and Government and Parliament, on the
other, resulting from the Constitutional Reform Act 2005. While the paper assumed that the ministerial and departmental arrangements resulting from that Act would continue, it did not discuss the manner in which the new statutory functions of the Lord Chancellor would be performed within the Department for Constitutional Affairs. However, the creation of a Ministry of Justice and the range of functions of the Ministry will have implications for the position of the courts and the judiciary that the Committee may wish to address.

3. The idea of a Ministry of Justice has received attention at various times since it was recommended by the Haldane Report on the machinery of government in 1918. Proposals for such a Ministry in the years since then were usually blocked by the argument that this was not necessary (or not desirable) because of the office of Lord Chancellor, whose responsibilities were both executive and judicial in character. Fears were expressed that the judiciary would be prejudiced were their affairs to be handled by an ordinary Whitehall department. The idea of a Ministry of Justice encountered opposition from the Home Office, because of the latter’s historic responsibility for criminal justice and criminal law. Indeed, the difficulty of how to locate responsibility in government for the criminal justice system (including criminal law) has probably been the decisive factor that explains why a Ministry of Justice for England and Wales has not been created until now.

4. The Constitutional Reform Act 2005 both brought to an end the historic combination of the Lord Chancellor’s judicial and executive functions, and maintained the office in being but with defined statutory responsibilities relating to the judiciary. It is significant that the Act gave special protection to these responsibilities by excluding them from the customary “machinery of government” power of the Prime Minister to re-organise Whitehall departments; in law, this power is exercised by means of Orders in Council under the Ministers of the Crown Act 1975. Primary legislation would be needed if the office of Lord Chancellor in its new form were to be abolished or the powers and duties of that office were to be transferred. But the office of Secretary of State for Constitutional Affairs is not so protected, and primary legislation is not needed to give effect to the Government’s recent decision. The office of Lord Chancellor will continue in being, as required by the 2005 Act, but it will be held with the position of Secretary of State for Justice, rather than that of Secretary of State for Constitutional Affairs.

5. There was certainly a case to be made in 2003 for the decision then taken to replace the former Lord Chancellor’s Department by the Department for Constitutional Affairs (despite the inept way in which the re-organisation was handled). There is also now a case to be made for re-naming the department and for extending its responsibilities for criminal justice. But it is unfortunate that the immediate cause of the Government’s decision appears to have been concern about the administrative and political problems of the Home Office, rather than a long-established and fully reasoned commitment to creating a Ministry of Justice. It has long been the practice in British government for departmental structure to change in response to political judgments made by the Prime Minister and in

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166 Cd 9230, 1918. For comment on that report, and the controversy that it created, see R Stevens, *The Independence of the Judiciary: the view from the Lord Chancellor’s Office* (1993, chap 2). In 1981 the Home Affairs Committee of the House of Commons recognised the advantages of unifying the component parts of the criminal justice system in a Ministry of Justice but Lord Hailsham, then Lord Chancellor, said: “I regard myself as the Minister of Justice but I would not desire to have either the prosecuting process or the penal treatment process under my responsibility because I think that they are incompatible”: quoted in J L Edwards, *The Attorney-General, Politics and the Public Interest* (1984), p 193.
response to changing political circumstances. A further instance of this practice was seen with the decision announced on 29 March 2007. Whereas departments in Whitehall and their ministers must accept that their tasks may be re-shuffled at short notice, the added factor here is the impact of the re-organisation on the judiciary and the courts. At the least, it would appear that there was a lack of full consultation with the judiciary before the decision was announced. Arguably, private communication involving the Lord Chief Justice and his most senior colleagues is not sufficient in a matter that may be seen as affecting the constitutional position of the courts, so recently established by the 2005 Act. A fuller and more open consultation could, for instance, have confirmed that the changes do not in fact pose a threat to that position.

6. To move on from the question of consultation, while it will be a novelty in British government to have a Ministry of Justice by that name, I do not consider that there is a case to be made against such a ministry based on fears that this might endanger the position of the judiciary. Reasons for this view include the fact that many countries in western Europe have a Ministry of Justice, as indeed do numerous Commonwealth countries (where the positions of Minister of Justice and Attorney-General may be held together, as for instance in New Zealand). Moreover, the relationship between judiciary and executive was placed on a new statutory basis in 2005. In my view, the essential features of that relationship are not affected by the new departmental structure. Indeed, but for the problem presented by the Home Office’s responsibility for criminal justice, “Ministry of Justice” would have been a suitable name for what in 2003 was created as the Department for Constitutional Affairs.

7. What may have caused the greatest current concern is the placing of responsibility for prisons and the probation service within the Ministry of Justice. These matters are of an operational kind that distinguishes them from responsibility for criminal law, relations with the courts and so on. The case for moving these services to the Ministry of Justice appears in part to be the wish to enable the Home Office’s remit to be re-focused, and in part to enable there to be a “joined-up” system of criminal justice. The points made for questioning that approach include the following: (a) the Minister for Justice, who will also hold the position of Lord Chancellor, will in all probability be appointed from the House of Commons, and may have no legal qualifications; (b) resources available to the courts and judicial system will suffer if within the same department they are competing with funding for prisons; (c) administration of prisons will call for an approach that is incompatible with the leading role played by the Ministry of Justice in respect of human rights legislation, and will erode the Lord Chancellor’s statutory commitment to maintain the rule of law; (d) the Ministry may wish for political reasons to influence judicial practice on sentencing (for example, to reduce the prison population), thus undermining the statutory commitment to maintain judicial independence; (e) the ministerial attention that will need to be given to the prisons may as a practical matter cause less time to be spent on other aspects of the Ministry’s remit. Concerns of this kind about the future operation of

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167 See the question about this asked of the Lord Chancellor by Lord Kingsland, on 26 April 2007 (HL Deb, col 766).
168 The administration of the courts and of legal aid also involve operational matters, but they deal with matters so closely related to the essential purposes for which courts exist that it is unlikely that policy pressures would lead to decisions that would ignore those essential purposes, or run contrary to them. See for instance the Courts Service Key Performance Indicators 2007–08 which were announced by the Lord Chancellor to the House of Lords on 29 March 2007 (WS 170).
the new arrangements are of a practical kind and are difficult to assess by constitutional criteria.

8. Evidence dealing with these matters has been given by the Lord Chancellor (Lord Falconer) to committees in the House of Commons.\(^{169}\) Thereafter, he assured the House that the Lord Chief Justice, Lord Phillips, had made it clear “that the senior judiciary have no objections in principle to the creation of a Ministry of Justice, subject to the provision of safeguards to protect the independent administration of justice”.\(^{170}\) However, Lord Woolf has given evidence about his concerns to the Home Affairs Committee,\(^{171}\) in the course of which, before expressing reservations about the decision, he said: “Obviously, there is logic in having a ministry of justice”. Lord Woolf explained the importance of the departmental changes by saying that there is “much more interplay between the departments and courts than is sometimes appreciated”; and it had been difficult to establish an effective sentencing policy “because of the highly political nature of sentencing”.

9. It is, certainly, in the area of criminal justice, including sentencing, that the most difficult questions for the structure of the justice system arise. As Lord Falconer emphasised to the Commons’ Constitutional Affairs Committee on 17 April 2007, there will continue to be a trilateral relationship in government involving (1) Home Office responsibility for protecting the public against crime, for the incidence of crime, and for police and crime-detection; (2) the functions of the Attorney-General in supervising the Crown Prosecution Service; and (3) Ministry of Justice responsibility for the criminal law (both substance and procedure, including evidence and modes of trial), criminal courts and judicial process, and the penal system. In the course of his evidence, he said that one of the strongest lessons learned by government since 1997 is that “all of the bits of the criminal justice system – the police, the prosecutors, the courts and the prisons and probation – have to work together as closely as possible” (emphasis supplied). The qualification “as closely as possible” is from a constitutional viewpoint all-important. The reason that the criminal justice system comprises distinct components of police, prosecutors, courts and penal institutions is that a criminal justice founded upon the rule of law and on the due separation of powers requires both the existence of distinct functions, and also the development of separate institutional and professional skills. Some forms of “working together” or institutional co-operation would blur lines of demarcation (such as the process of a fair criminal trial, where judicial impartiality is required as between the prosecution and the defence).

10. It is essential that the judiciary and the criminal courts should not be drawn into endorsing a simplistic approach to criminal justice in which current administrative or executive wishes cause harm to the public image of the criminal process. From this viewpoint, the leading role to be played by the Ministry of Justice may be given a cautious welcome. It should, for instance, reduce the tendency for government ministers to appear to blame the judges for problems caused by recent legislation or by government policies.\(^{172}\) And it must be hoped that it will curb the excessive tendency in recent years for the Home Office to

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\(^{169}\) To the Constitutional Affairs Committee on 17 April 2007 and to the Home Affairs Committee on 24 April 2007.

\(^{170}\) HL Deb, 26 April 2007, col 767.

\(^{171}\) 17 April 2007.

\(^{172}\) And cf the implied criticism of the judiciary in such Home Office statements as *Rebalancing the Criminal Justice System*, July 2006.
resort to legislation by Parliament as a panacea for dealing with every new concern in the media and public opinion over crime and sentencing decisions. What would be less welcome would be a situation in which the Ministry of Justice is nominally the lead department on matters relating to the criminal law, but the driving political force remains with the Home Office. And it would be unfortunate if problems arising in the operation of prisons were to cause the Ministry of Justice to seek to place responsibility for the problems on the judges’ sentencing decisions. It is relevant here to note that, as a result *inter alia* of European human rights law, discretionary decisions determining the release of long-term prisoners are now made by the Parole Board or by the judiciary, no longer by the Secretary of State.

11. I have already (in paragraph 8 above) quoted from the Lord Chancellor’s recent statement confirming that the senior judiciary “have no objections in principle to the creation of a Ministry of Justice, *subject to the provision of safeguards to protect the independent administration of justice*” (emphasis supplied). The Committee may wish to inform itself as to the concerns that gave rise to the need for such safeguards and as to the safeguards that have been or will be given. Assuming that adequate assurances are given to the Lord Chief Justice, it would be appropriate for these to be placed on record, and this might possibly be best done by the preparation of a revised form of the Concordat, that could take full account of the creation of the Ministry of Justice.173

12. To conclude, my earlier paper remains relevant in the new situation caused by the decision to create a Ministry of Justice, a decision that was made before the new relationships resulting from the Constitutional Reform Act 2005 have had time to settle down and stand the test of experience. The decision to create the new Ministry is of some constitutional significance, and understandable fears have been expressed about it, particularly in view of possible adverse effects upon the judiciary and the machinery of justice, and the apparent lack of full consultation with the judiciary. If acceptable assurances are given by the Government about the future, they should become a matter of public record.

30 April 2007

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173 See paragraphs 11 and 13 of my earlier paper.
APPENDIX 5: PAPER BY PROFESSOR PAUL CRAIG: THE RULE OF LAW

1. Introduction

This paper seeks to provide guidance concerning the meaning of the ‘rule of law’, in the light of section 1 of the Constitutional Reform Act 2005, which makes explicit reference to that concept.

A ‘health warning’ is in order for anyone venturing into this area: a cursory glance at the index of legal periodicals revealed 16,810 citations to books and articles concerned with the rule of law, and that is certainly an underestimation, since many articles discuss the concept in ways that might not necessarily be picked up by the search engine and the number only covers legal material.

There is considerable diversity of opinion as to the meaning of the rule of law and the consequences that do and should follow from breach of the concept. I will nonetheless attempt to identify as objectively as possible different senses of the rule of law.

2. Dicey’s Conception of the Rule Law

Modern conceptions of the rule of law will be considered below. It would however be odd not to advert to Dicey’s conception,\(^\text{174}\) given the prominence that it has had in the UK. It should nonetheless be realised that his conception of the rule of law was ambiguous in certain respects.

Dicey’s first principle of the rule of law was that ‘no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint’.

The first sentence requires that laws under which people are condemned should be passed in the correct legal manner and that guilt should only be established through the ordinary trial process. This is an important principle, although it should be noted that nothing here speaks to the content of the laws which an individual will have to face when taken before the courts. The meaning of the second sentence is more problematic. The word ‘arbitrary’ could connote a clear law, which was properly enacted by Parliament, but which might nonetheless be regarded as arbitrary if it was thought to infringe certain fundamental rights, or if it entailed excessive punishment. The word ‘arbitrary’ could alternatively be used to describe a law passed in the correct legal manner, but where it was very vague or unclear, with the result that individuals had no real idea how to plan their lives in the light of the relevant legal rule. This sense of arbitrariness is independent of whether the content of the legislation was just or unjust.

Dicey’s second principle of the rule of law concerns equality: ‘every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals’.

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This formulation is concerned primarily with equal access to the courts, not with the nature of the rules which individuals find when they get there.\textsuperscript{175} It is true that Dicey was explicitly against officials being accorded any special privileges, but beyond this Dicey’s second principle does not take one very far. He showed little concern with the role of law in deciding whether different rules applicable to different groups were defensible on the ground that there was some rational justification for the difference in treatment.

Dicey’s third principle was that the unwritten constitution in the UK could be said to be pervaded by the rule of law because rights to personal liberty, or public meeting resulted from judicial decisions, whereas under many foreign constitutions such rights flowed from a written constitution.

This third limb of the rule of law is ambiguous. It might be read to mean that a society must possess certain individual rights if it is to conform to the rule of law. The alternative reading was that if you wished to protect such rights then the common law technique was better than that employed on the continent. Dicey dealt in detail with the precarious protection of rights on the continent, where constitutions enshrining rights would often be abrogated at the stroke of the pen or the point of a sword. He felt that in the UK, where individual rights were the result of numerous judicial decisions indicating when the individual was at liberty to speak freely etc, it would be considerably more difficult for an authoritarian regime to sweep these rights aside.

3. Modern Conceptions of the Rule of Law

The Diceyan view of the rule of law was therefore ambiguous in certain respects, and similar uncertainties surround the historical meaning of the phrase ‘government of laws, not of men’.

The modern literature on the rule of law is, as noted above, extensive and diverse. A number of different meanings of the rule of law can nonetheless be identified.

(a) The Rule of Law and Lawful Authority

A core idea of the rule of law to which all would subscribe is that the government must be able to point to some basis for its action that is regarded as valid by the relevant legal system. Thus in the UK such action would commonly have its foundation in statute, the prerogative or in common law power. The relevant measure would then have to be made by the properly authorised person or institution, in the properly authorised manner.

If the government cannot provide a legal foundation for its action then the UK courts would regard the action as unlawful, since there would be no lawful authority for it.

This core meaning of the rule of law tells one nothing as to the nature of the challenged governmental action. The government might be seeking to achieve some benign objective, or it might be attempting to do something that most would regard as undesirable. This is irrelevant for the purposes of the present inquiry. The measure would be equally contrary to the rule of law if the government could not point to some basis for its action that would be regarded as valid by that legal system.

\textsuperscript{175} G. Marshall, Constitutional Theory (Clarendon, 1971), p 137.
(b) The Rule of Law and Guiding Conduct

The meaning of the rule of law considered in the preceding section is important, but limited. Any law properly passed by Parliament would meet the rule of law defined in this manner. Thus the fact that laws should be passed in the correct legal manner is a necessary facet of the rule of law, but it is not sufficient.

It is for this reason that most would agree that the rule of law demands more than this. A further important aspect of the rule of law is that the laws thus promulgated should be capable of guiding ones conduct in order that one can plan ones life.

It is from this general precept that Raz deduced a number of more specific attributes that laws should have in order that they could be said to comply with the rule of law. All are related to the idea of enabling individuals to be able to plan their lives. The ‘list’ includes the following: that laws should be prospective, not retrospective; that they should be relatively stable; that particular laws should be guided by open, general and clear rules; that there should be an independent judiciary; that there should be access to the courts; and that the discretion which law enforcement agencies possess should not be allowed to undermine the purposes of the relevant legal rules.

The rule of law in the sense articulated here could be met by regimes whose laws were morally objectionable, provided that they complied with the formal precepts of the rule of law. It is equally the case that not all laws passed by a democratic regime will necessarily comply with the rule of law.

The rule of law on this view is essentially a negative value, as Raz himself admits. Given that the law can empower the state to do all manner of things the rule of law minimises the danger created by the law itself. It does so by ensuring that whatever the content of the law, at least it should be open, clear, stable, general and applied by an impartial judiciary.

It would however be mistaken not to recognise the more positive side of the rule of law when viewed in this manner. Even if the actual content of the law is morally reprehensible, conformity to the rule of law will often be necessary to ensure that individuals actually comply with the demands which the law imposes.

It is also important to recognise, as Raz emphasises, that the rule of law in the above sense is only one virtue of a legal system, and may have to be sacrificed to attain other desired ends. We may feel that the rule of law virtues of having clear, general laws should be sacrificed if the best or only way to achieve a desired goal is to have more discretionary, open-textured legal provisions. This may be so where it is not possible to lay down in advance in the enabling legislation clear rules in sufficient detail to cover all eventualities. Modifications to the rule of law in this manner are not somehow forbidden or proscribed. Given that it is only one virtue of a legal system it should not prevent the attainment of other virtues valued by that system.

It is moreover important to be clear as to the consequences of breach of the rule of law in the sense considered in this section. The fact that a law is vague or unclear, and that it therefore provides little by way of real guidance for those affected by it, will not lead to a statute being invalidated in the UK. The courts may well interpret such a statute narrowly, in favour of the individual in such circumstances. They might also read it down pursuant to the Human Rights Act 1998, if the particular statute would otherwise infringe rights derived from the European

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Convention on Human Rights. If the courts felt unable to read it down, they could issue a declaration of incompatibility under the HRA, and the matter would be sent back to Parliament for reconsideration. The courts therefore have considerable interpretive techniques at their disposal to ensure that legislation that fails to meet the requirements of the rule of law set out above is construed narrowly in favour of the individual. This does not alter the fact that UK courts have not traditionally exerted power to invalidate an Act of Parliament on such grounds.

The matter is different if the provision that fails to comply with the rule of law is something other than a statute. There is nothing to prevent the courts from invalidating other measures, whether they take the form of delegated legislation, individual ministerial decisions, acts of local authorities or decisions of agencies. If such a measure fails to comply with the requirements of the rule of law it is always possible for the courts to use one of the principles of judicial review to annul the measure. Thus if a minister purports to make a measure retrospective the courts will require express authorisation from the enabling statute, or something closely akin thereto, before they would be willing to accept that the minister’s powers extended this far. Similarly, if the contested ministerial measure was very vague or unclear the courts would have a number of options at their disposal. They might decide that this was not consistent with the primary legislation; that it should be annulled under section 6 of the HRA; that the vagueness of the measure was indicative that the minister was acting for improper purposes; or that the challenged measure was an unreasonable exercise of the discretionary power vested in the minister.

Many would subscribe to the analysis presented above, although they might well disagree either as to its application in any particular instance, or as to whether the rule of law values should be ‘sacrificed’ to attain some other desirable goal.

There have however been more radical challenges by those who argue that the formal conception of the rule of law was always a mask for substantive inequalities in power, and that in the modern day this formal conception is in any event increasingly unattainable.

A key issue is whether the rule of law should encompass more than the formal conception presented in this section. The contending arguments are complex, but the essence of the disagreement can be presented as follows.

The rule of law as presented thus far is not concerned with the actual content of the law, in the sense of whether the law is just or unjust, provided that the formal precepts of the rule of law are themselves met. To put the same point in another way, it is necessary on this view to consider the content of the law in order to decide whether it complies with the precepts of the rule of law concerning clarity, generality, non-retrospectivity etc, but provided that it does so comply then that is the end of the inquiry.

The rationale for restricting the rule of law in this manner is as follows. We may all agree that laws should be just, that their content should be morally sound and that rights should be protected within society. The problem is that if the rule of law is taken to encompass the necessity for ‘good laws’ in this sense then the concept ceases to have an independent function. There is a wealth of literature

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177 If there were express authorisation in the primary statute then it might be challenged under the HRA.


179 Raz, n.3, 196.
devoted to the discussion of the meaning of a just society, the nature of the rights which should subsist therein, and the appropriate boundaries of governmental action. Political theory has tackled questions such as these from time immemorial. To bring these issues within the rubric of the rule of law would therefore rob this concept of an independent function. Laws would be condemned or upheld as being in conformity with, or contrary to, the rule of law when the condemnation or praise would simply be reflective of attachment to a particular conception of rights, democracy or the just society. The message is therefore that if you wish to argue about the justness of society do so by all means. If you wish to defend a particular type of individual right then present your argument. Draw upon the wealth of literature which addresses these matters directly. It is however on this view not necessary or desirable to cloak the conclusion in the mantle of the rule of law, since this will merely reflect the conclusion which has already been arrived at through reliance on a particular theory of rights or the just society.

(c) The Rule of Law, Justice and Accountable Government

The view presented above has however been challenged. Those who support the opposing view accept that the rule of law has the attributes mentioned in the previous section, but they argue that the concept has more far-reaching implications. Certain rights are said to be based on, or derived from, the rule of law. The concept is used as the foundation for these rights, which are then used to evaluate the quality of the laws produced by the legislature and courts.

It has also been argued that the rule of law provides the foundation for the controls exercised by the courts over governmental action through judicial review. In this sense the rule of law is expressive of how the state ought to behave towards individuals in society. The rule of law is said to demand that governmental action conforms to precepts of good administration developed through the courts, this being an essential facet of accountable government in a democratic society. The constraints imposed on government through judicial review are in part procedural and in part substantive. The range of these principles varies, but normally includes ideas such as: legality, procedural propriety, participation, fundamental rights, openness, rationality, relevancy, propriety of purpose, reasonableness, equality, legitimate expectations, legal certainty and proportionality. There has been a vibrant academic debate as to whether such principles must be legitimated by reference to legislative intent. There is nonetheless general agreement that it is the courts that have developed the principles of judicial review over the past 350 years.

This general view has been advanced by a number of writers and judges, although the precise detail of their analyses differ.

Thus Dworkin has argued forcefully that subject to questions of ‘fit’, the courts should decide legal questions according to the best theory of justice, which is central to the resolution of what rights people currently possess. 180 According to this theory, ‘propositions of law are true if they figure in or follow from the principles of justice, fairness and procedural due process that provide the best constructive interpretation of the community’s legal practice’. 181 It is integral to the Dworkinian approach that, subject to questions of fit, the court should choose between ‘eligible interpretations by asking which shows the community’s structure of institutions as a whole in a better light from the stand-point of political

180 R. Dworkin, Law’s Empire (Fontana, 1986).
181 Ibid. p 225.
morality'. On this view an individual will have a right to the legal answer which is forthcoming from the application of the above test.

Dworkin accepts the formal idea of the rule of law set out above, labelling this the ‘rule book’ conception. This requires that the government should never exercise power against individuals except in accordance with rules which have been set out in advance and made available to all. Such values feature in any serious theory of justice. However as Dworkin notes, this says little if anything about the content of the laws which exist within a legal system. Those who restrict the rule of law in this manner care about the content of the law, but regard this as a matter of substantive justice, which is ‘an independent ideal, in no sense part of the ideal of the rule of law’.

Dworkin argues that we should however also recognise a rights-based conception of the rule of law. On this view citizens have moral rights and duties with respect to one another, and political rights against the state. These moral and political rights should be recognised in positive law, so that they can be enforced by citizens through the courts. The rule of law on this conception is the ideal of rule by an accurate public conception of individual rights. In the words of Dworkin, this view of the rule of law ‘does not distinguish, as the rule book conception does, between the rule of law and substantive justice; on the contrary it requires, as part of the ideal of law, that the rules in the book capture and enforce moral rights’. It does not mean that this conception of the rule of law is consistent with only one theory of justice or freedom. There is no such argument. It does mean that it is not independent of the particular theory of justice, or vision of freedom, which constitutes its content at any point in time.

Similar themes have been advanced by Sir John Laws, writing extra-judicially. In an important series of articles he articulated the role of the courts in the protection of fundamental rights. The detailed nature of the argument is not of immediate concern to us here. Suffice it to say for the present that Sir John Laws presented an essentially rights-based conception of law and the role of the judge in cases involving fundamental rights. He posited a higher order law which was binding on the elected Parliament, with the courts as the guardian of both fundamental individual rights, and what may be termed structural constitutional rights. The thesis is premised on a particular conception of liberalism and individual autonomy, with a divide drawn between positive and negative rights. The rule of law is held to encompass an attachment to freedom, certainty and fairness. The first of these elements is the substantive component of the rule of law, while the second and the third bring in the more traditional attributes of the formal rule of law.

The important recent lecture by Lord Bingham on the rule of law is also relevant in this regard, more especially because it was given against the background of the
Constitutional Reform Act 2005. Lord Bingham articulates eight principles that comprise the rule of law. Certain of these principles address the more formal dimensions of the rule of law. These include the idea that the law must be accessible, and so far as possible, intelligible, clear and predictable; that questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion; and that means should be provided for resolving without prohibitive cost or inordinate delay bona fide civil disputes which the parties themselves are unable to resolve.

It is however clear that Lord Bingham considers the rule of law as extending beyond these basic precepts. He regards it as including the central idea that the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation, and that it demands that the law must afford adequate protection for fundamental rights. Lord Bingham expressly confronts the objection advanced by Raz to the inclusion of fundamental rights within the rubric of the rule of law, but disagrees with him in the following terms.

A state which savagely repressed or persecuted sections of its people could not in my view be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp or the compulsory exposure of the female children on the mountainside were the subject of detailed laws duly enacted and scrupulously observed. So to hold would, I think, be to strip the existing constitutional principle affirmed by section 1 of the 2005 Act of much of its virtue and infringe the fundamental compact which … underpins the rule of law.

It is equally clear that Lord Bingham views the principles of judicial review as having their foundation in the rule of law. Thus he states that 'ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers', and ‘adjudicative procedures provided by the state should be fair’.

Jowell has also articulated a view of the rule of law, which has both a formal and a substantive dimension. He accepts that one must be careful about equating the rule of law with the substance of particular rules. He accepts also that a significant part of the rule of law is concerned with procedure or form as opposed to substance. Jowell does however believe that the rule of law has a substantive dimension. He perceives the rule of law as a principle of institutional morality and as a constraint on the uninhibited exercise of government power. The practical implementation of the rule of law takes place primarily through judicial review. Its substantive dimension is manifest in the judiciary’s willingness to strike down administrative or executive action if it is unreasonable, arbitrary or capricious.

Allan’s interpretation of the rule of law also contains an admixture of formal and substantive elements. He argues that we should go beyond the formal conception of the rule of law, but that we should stop short of regarding the rule of law as the expression of any particular theory of substantive justice. The rule of

191 Ibid. p 18.
192 Ibid. p 23.
193 Ibid. p 26.
law on this view does not entail commitment to any particular vision of the public good or any specific conception of social justice, but does require that all legal obligations be justified by appeal to some such vision. The rule of law should embrace, in addition to its formal attributes, ideals of equality and rationality, proportionality and fairness, and certain substantive rights. These are said to constitute central components of any recognisably liberal theory of justice, while leaving the scope and content of the rights and duties which citizens should possess largely as a matter for independent debate and analysis. Formal equality is to be supplemented by a more substantive equality, which requires that relevant distinctions must be capable of reasoned justification in terms of some conception of the common good. Allan’s theory also embraces certain substantive rights, namely freedoms of speech, conscience, association, and access to information. It is recognised that there will be other rights within a liberal polity, which should be faithfully applied, but these are not regarded as a constituent part of the rule of law.

It should be recognised that any approach of the kind under examination will require some choice as to what are to count as fundamental rights, and the more particular meaning ascribed to such rights. This choice will reflect assumptions as to the importance of differing interests in society. This is unavoidable. It is of course true that any democracy to be worthy of the name will have some attachment to particular liberty and equality interests. This leaves entirely out of account the issue as to how far social and economic interests ought to be protected. It also fails to take account of other visions of democracy, of a communitarian rather than liberal nature, which might well interpret the civil/political rights and the social/economic rights differently. It is therefore neither fortuitous, nor surprising, that in other common law systems which possess constitutionally enshrined rights, such as the United States and Canada, there is considerable diversity of opinion even amongst those who support a rights-based approach, as to whether this should be taken to mean some version of liberalism, a pluralist model, or a modified notion of republicanism.

This point is equally true of ideas such as legality, rationality, participation, openness, proportionality, procedural fairness and the like, which can be given interpreted differently depending upon the more general scheme into which they are to fit.

The consequences of breach of the rule of law in the sense considered within this section should also be addressed. It is important, as when discussing other versions of the concept, to distinguish between the consequences of breach of the rule of law in relation to primary statute and in relation to other measures.

The short answer in relation to a primary statute that violates the rule of law is as follows. The fact that a statute does not conform to this conception of the rule of law does not in itself lead to its invalidation. The UK courts have not traditionally exercised the power of constitutional review to annul primary statutes for failure to conform to fundamental rights, or other precepts of the rule of law that constitute the principles of judicial review. This proposition must nonetheless be qualified in three ways.

First, there are statements by judges countenancing the possibility that the courts might refuse to apply an Act of Parliament in certain extreme circumstances. The examples tend to be of (hypothetical) legislation that is morally repugnant, or of
legislation through which Parliament seeks to re-order the constitutional structure by abolishing judicial review, by making illegitimate use of the Parliament Acts or by extending very considerably the life of a current Parliament. It should moreover be recognised that the case law authority for the traditional proposition that courts will not invalidate or refuse to apply statute is actually rather thin. There are to be sure many judicial statements extolling the sovereignty of Parliament, but they are principally just that, judicial statements rather than formal decisions. Insofar as there are formal decisions that could be said to be based on the traditional proposition, the facts of such cases were generally relatively innocuous. They were a very long way from the types of case where courts might consider it to be justified to refuse to apply a statute, which also means that such cases could be readily distinguished should a court feel minded to do so.

Secondly, one who subscribes to the version of the rule of law discussed in this section might well argue that courts should generally exercise the ultimate power to invalidate statute for failure to comply with constitutionally enshrined rights, or with rights that are regarded as fundamental or foundational even where they are not formally enshrined in a written constitution. Dworkin is a prominent exponent of this view. The literature on this topic is vast, with the debate for and against such judicial power being replayed in successive academic generations.

Thirdly, courts or judges who subscribe to the conception of the rule of law discussed in this section have in any event powerful interpretive tools at their disposal through which to read legislation so that it does not violate fundamental rights or other facets of the rule of law. Thus even prior to the Human Rights Act 1998, the courts made it clear through the principle of legality that statutes would be read so as to conform to such rights. If Parliament intended to infringe or limit fundamental rights then this would have to be stated expressly in the legislation, or be the only plausible reading of the statutory language. Legislation was therefore read subject to a principle of legality, which meant that fundamental rights could not be overridden by general or ambiguous words. This was, said Lord Hoffmann, because there was too great a risk that the full implications of their unqualified meaning might have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts would therefore presume that even the most general words were intended to be subject to the basic rights of the individual. Parliament had, therefore, to squarely confront what it was doing and accept the political cost. An interpretive approach is clearly evident once again in the Human Rights Act 1998, section 3, which provides that ‘so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights’. Section 3 does not, however, affect the validity, continuing operation or enforcement of any incompatible primary legislation. Where a court is satisfied that primary legislation is incompatible with a Convention right then it can, pursuant to section 4 of the HRA, make a declaration of that incompatibility.

The consequence of breach of the rule of law in relation to measures other than primary statute is more straightforward. Insofar as the rule of law is regarded as the foundation of the principles of judicial review then it follows that breach of the rule of law, manifested through breach of one of the more particular principles of judicial review, can lead to annulment of the measure. This says nothing about whether the judicial decision will be controversial or not. The great many judicial review decisions generate no political controversy, but there will inevitably be instances where Parliament, or more usually the relevant minister, feels that the court’s judgment was ‘wrong’ in some way. There will more generally be wide-
ranging academic debate about the principles of judicial review and the way in which they are applied in particular cases.

It is fitting to conclude this paper by reverting to Lord Bingham’s lecture, the catalyst for which was the statutory mention of the rule of law in the Constitutional Reform Act 2005, section 1. The importance of the interpretive tools used by courts is apparent once again in the following extract.196

[T]he statutory affirmation of the rule of law as an existing constitutional principle and of the Lord Chancellor’s existing role in relation to it does have an important consequence: that the judges, in their role as journeymen and judgment-makers, are not free to dismiss the rule of law as meaningless verbiage, the jurisprudential equivalent of motherhood and apple pie, even if they were inclined to do so. They would be bound to construe a statute so that it did not infringe an existing constitutional principle, if it were reasonably possible to do so. And the Lord Chancellor’s conduct in relation to that principle would no doubt be susceptible, in principle, to judicial review.

### APPENDIX 6: DECLARATIONS OF INCOMPATIBILITY MADE UNDER SECTION 4 OF THE HUMAN RIGHTS ACT 1998

Part 1: These are the declarations of incompatibility we are aware of which have been made under section 4 of the Human Rights Act 1998 in respect of provisions in primary legislation, and which have not been overturned on appeal (although some remain subject to appeal—see the “comments” column). Declarations of incompatibility which have been overturned on appeal are set out in Part 2 of the table below.

<table>
<thead>
<tr>
<th>Case name and description</th>
<th>Date</th>
<th>Content of the declaration</th>
<th>Comments</th>
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<tbody>
<tr>
<td>R (on the application of H) v Mental Health Review Tribunal for the North and East London Region &amp; The Secretary of State for Health (Court of Appeal) [2001] EWCA Civ 415</td>
<td>28 Mar 2001</td>
<td>Sections 72 and 73 of the Mental Health Act 1983 were incompatible with Article 5(1) and 5(4) in as much as they did not require a Mental Health Review Tribunal to discharge a patient where it could not be shown that he was suffering from a mental disorder that warranted detention.</td>
<td>The legislation was amended by the Mental Health Act 1983 (Remedial) Order 2001 (SI 2001 No.3712) (In force 26 Nov 2001)</td>
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<tr>
<td>McR’s Application for Judicial Review (Kerr J) [2003] NI 1</td>
<td>15 Jan 2002</td>
<td>Section 62 of the Offences Against the Person Act 1861 (attempted buggery), which continued to apply in Northern Ireland, was incompatible with Article 8 to the extent that it interfered with consensual sexual behaviour between individuals.</td>
<td>Section 62 was repealed in NI by the Sexual Offences Act 2003, sections 139, 140, Schedule 6 paragraph 4 and Schedule 7. (In force 1 May 2004)</td>
</tr>
<tr>
<td>International Transport Roth GmbH v Secretary of State for the Home Department (Court of Appeal, upholding Sullivan J) [2002] EWCA Civ 158</td>
<td>22 Feb 2002</td>
<td>The penalty scheme contained in Part II of the Immigration and Asylum Act 1999 was incompatible with Article 6 because the fixed nature of the penalties offended the right to have a penalty determined by an independent tribunal. It also violated Article 1 of Protocol 1 as it imposed an excessive burden on the carriers.</td>
<td>The legislation was amended by the Nationality, Immigration and Asylum Act 2002, section 125, and Schedule 8. (In force 8 Dec 2002)</td>
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<tr>
<td>Case name and description</td>
<td>Date</td>
<td>Content of the declaration</td>
<td>Comments</td>
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| R (on the application of Anderson) v Secretary of State for the Home Department (House of Lords) [2002] UKHL 46 | 25 Nov 2002 | Section 29 of the Crime (Sentences) Act 1997 was incompatible with the right under Article 6 to have a sentence imposed by an independent and impartial tribunal in that the Secretary of State decided on the minimum period which must be served by a mandatory life sentence prisoner before he was considered for release on licence. | The law was repealed by the Criminal Justice Act 2003, sections 303(b)(I), 332 and Schedule 37, Pt 8. Transitional and new sentencing provisions were contained in Chapter 7 and Schedule 21 and 22 of that Act.  
(Date power repealed 18 Dec 2003) |
| R v Secretary of State for the Home Department, ex parte D (Stanley Burnton J) [2002] EWHC 2805 | 19 Dec 2002 | Section 74 of the Mental Health Act 1983 was incompatible with Article 5(4) to the extent that the continued detention of discretionary life prisoners who had served the penal part of their sentence depended on the exercise of a discretionary power by the executive branch of government to grant access to a court. | The law was amended by the Criminal Justice Act 2003 section 295.  
(In force 20 Jan 2004) |
| Blood and Tarbuck v Secretary of State for Health (Sullivan J) Unreported | 28 Feb 2003 | Section 28(6)(b) of the Human Fertilisation and Embryology Act 1990 was incompatible with Article 8, and/or Article 14 taken together with Article 8, to the extent that it did not allow a deceased father’s name to be given on the birth certificate of his child. | The law was amended by the Human Fertilisation and Embryology (Deceased Fathers) Act 2003.  
(In force 1 Dec 2003) |
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<tr>
<th>Case name and description</th>
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<tr>
<td><strong>Bellinger v Bellinger</strong></td>
<td>10 Apr 2003</td>
<td>A post-operative male to female transsexual appealed against a decision that she was not validly married to her husband, by virtue of the fact that at law she was a man. Section 11(c) Matrimonial Causes Act 1973 was incompatible with Articles 8 and 12 in so far as it makes no provision for the recognition of gender reassignment. The case was remedied by the Gender Recognition Act 2004. <strong>(In force 4 April 2005)</strong></td>
<td>In <em>Goodwin v UK</em> (11 Jul 2002) the ECtHR identified the absence of any system for legal recognition of gender change as a breach of Articles 8 and 12. This was remedied by the Gender Recognition Act 2004.</td>
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<tr>
<td><strong>R (on the application of M) v Secretary of State for Health</strong></td>
<td>16 Apr 2003</td>
<td>Sections 26 and 29 of the Mental Health Act 1983 were incompatible with Article 8, in that the claimant had no choice over the appointment or legal means of challenging the appointment of her nearest relative. The case concerned a patient who lived in hostel accommodation but remained liable to detention under the Mental Health Act 1983. Section 26 of the Act designated her adoptive father as her “nearest relative” even though her adoptive father had abused her as a child.</td>
<td>These provisions will be replaced by Part 1, Chapter 3 (clauses 24–27) of the Mental Health Bill currently before Parliament. The Bill was introduced in the House of Lords on 16 November 2006. It completed its Lords stages on 6 March 2007 and will now pass to the House of Commons.</td>
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<tr>
<td><strong>R (on the application of Hooper and others) v Secretary of State for Work and Pensions</strong></td>
<td>18 Jun 2003</td>
<td>Sections 36 and 37 of the Social Security Contributions and Benefit Act 1992 were in breach of Article 14 in combination with Article 8 and Article 1 of Protocol 1 in that benefits were provided to widows but not widowers. The case concerned Widowed Mothers Allowance which was payable to women only and not to men.</td>
<td>The law had already been amended at the date of the judgment by the Welfare Reform and Pensions Act 1999, section 54(1). <strong>(In force 9 Apr 2001)</strong></td>
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<td>Case name and description</td>
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<td><strong>R (on the application of Wilkinson) v Inland Revenue Commissioners</strong></td>
<td>18 Jun 2003</td>
<td>Section 262 of the Income and Corporation Taxes Act 1988 was incompatible with Article 14 when read with Article 1 of Protocol 1 in that it discriminated against widowers in the provision of Widows Bereavement Allowance.</td>
<td>The section declared incompatible was no longer in force at the date of the judgment having already been repealed by the Finance Act 1999 sections 34(1), 139, Schedule 20. (In force in relation to deaths occurring on or after 6 Apr 2000)</td>
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<tr>
<td><strong>R (on the application of Sylviane Pierrette Morris) v Westminster City Council &amp; First Secretary of State</strong></td>
<td>14 Oct 2005</td>
<td>Section 185(4) of the Housing Act 1996 was incompatible with Article 14 to the extent that it requires a dependent child who is subject to immigration control to be disregarded when determining whether a British citizen has priority need for accommodation.</td>
<td>DCLG are considering how to remedy the incompatibility.</td>
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<tr>
<td><strong>A and others v Secretary of State for the Home Department</strong></td>
<td>16 Dec 2004</td>
<td>The Human Rights Act 1998 (Designated derogation) Order 2001 was quashed because it was not a proportionate means of achieving the aim sought and could not therefore fall within Article 15. Section 23 of the Anti-terrorism, Crime and Security Act 2001 was incompatible with Articles 5 and 14 as it was disproportionate and permitted the detention of suspected international terrorists in a way that discriminated on the ground of nationality or immigration status.</td>
<td>The provisions were repealed by the Prevention of Terrorism Act 2005, which put in place a new regime of control orders. (In force 11 Mar 2005)</td>
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<td>Case name and description</td>
<td>Date</td>
<td>Content of the declaration</td>
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<td><strong>R (Gabaj) v First Secretary of State</strong>&lt;br&gt;(Administrative Court)&lt;br&gt;(unreported)</td>
<td>28 Mar 2006</td>
<td>The case was a logical extension of the declaration granted in the case of Morris above, except that it was the claimant’s pregnant wife, rather than the claimant’s child, who was a person from abroad.</td>
<td>DCLG are considering how to remedy the incompatibility.</td>
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<tr>
<td><strong>R (on the application of Baiai and others) v Secretary of State for the Home Department and another</strong>&lt;br&gt;(Silber J) [2006] EWHC 823 (Admin)</td>
<td>10 April 2006</td>
<td>Section 19(3) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (“the 2004 Act”) is incompatible with Articles 12 and 14 of the European Convention on Human Rights in that the effect of this provision is unjustifiably to discriminate on the grounds of nationality and religion and that this provision is not proportionate. An equivalent declaration was made in relation to Regulations 7 and 8 of the Immigration (Procedure for Marriage) Regulations 2005 (which imposed a fee for applications). (Home Office Immigration Guidance was also held to be unlawful on the grounds it was incompatible with Articles 12 and 14 ECHR. This did not involve s4 HRA.)</td>
<td>The Home Office did not appeal the judgment of Silber J on Article 14 and are considering how to remedy the incompatibility with Article 14. (A Home Office appeal to the Court of Appeal on the Article 12 findings was unsuccessful: [2007] EWCA Civ 478. They are considering whether to seek permission to appeal to the House of Lords on that issue.)</td>
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<td>R (on the application of (1) June Wright (2) Khemraj Jummun (3) Mary Quinn (4) Barbara Gambier) v (1) Secretary of State for Health (2 Secretary of State for Education &amp; Skills (Stanley Burnton J) [2006] EWHC 2886 (Admin)</td>
<td>16 Nov 2006</td>
<td>Section 82(4)(b) of the Care Standards Act 2000 was incompatible with Articles 6 and 8.</td>
<td>The judgment is subject to appeal by the Department of Health.</td>
</tr>
<tr>
<td>R (Clift) v Secretary of State for the Home Department; Secretary of State for the Home Department v Hindawi and Another (House of Lords) [2006] UKHL 54</td>
<td>13 Dec 2006</td>
<td>Sections 46(1) and 50(2) of the Criminal Justice Act 1991 were incompatible with Article 14 taken together with Article 5 on the grounds that they discriminated on grounds of national origin.</td>
<td>The provisions had already been repealed and replaced by the Criminal Justice Act 2003 save that they continued to apply on a transitional basis to offences committed before 4 April 2005. The Home Office is considering how to remedy the incompatibility in relation to offences falling within that transitional category.</td>
</tr>
<tr>
<td>Smith v Scott (Registration Appeal Court, Scotland) [2007] CSIH 9</td>
<td></td>
<td>Section 3(1) of the Representation of the People Act 1983 was incompatible with Article 3 of the First Protocol to the Convention on the grounds that it imposed a blanket ban on convicted prisoners voting in Parliamentary elections.</td>
<td>The Court ruled that it was part of the Court of Session for the purposes of section 4 of the Human Rights Act, and therefore had power to make a declaration of incompatibility under that section. The Government is</td>
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</table>
### Declarations of incompatibility made but overturned on appeal

Part 2: These are the declarations of incompatibility we are aware of which have been made under section 4 of the Human Rights Act 1998 in respect of provisions in primary legislation, but which were subsequently overturned on appeal.

<table>
<thead>
<tr>
<th>Case name and court that made the declaration</th>
<th>Date of original decision</th>
<th>Substance of declaration of incompatibility</th>
<th>Court that overturned declaration</th>
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<tbody>
<tr>
<td>R (Alconbury Developments Ltd.) v Secretary of State for the Environment, Transport and the Regions (Divisional Court, Harrison J &amp; Tuckey L.J) [2001] HRLR 2</td>
<td>13 Dec 2000</td>
<td>The Secretary of State’s powers to determine planning applications were challenged on the basis that the dual role of the Secretary of State in formulating policy and taking decisions on applications inevitably resulted in a situation whereby applications could not be disposed of by an independent and impartial tribunal.</td>
<td>The House of Lords overturned the declarations. 9 May 2001 [2001] UKHL 23</td>
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<tr>
<td>Case name and court that made the declaration</td>
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<td>Substance of declaration of incompatibility</td>
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<td>Wilson v First County Trust Ltd (No.2) (Court of Appeal) [2001] EWCA Civ 633</td>
<td>2 May 2001</td>
<td>Section 127(3) of the Consumer Credit Act 1974 was declared incompatible with the Article 6 and Article 1 Protocol 1 by the Court of Appeal to the extent that it caused an unjustified restriction to be placed on a creditors enjoyment of contractual rights.</td>
<td>The House of Lords overturned the declaration. 10 Jul 2003 [2003] UKHL 40</td>
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<tr>
<td>Matthews v Ministry of Defence (Keith J) [2002] EWHC 13</td>
<td>29 May 2002</td>
<td>Section 10 of the Crown Proceedings Act 1947 was incompatible with Article 6 of the ECHR in that it was disproportionate to any aim that it had been intended to meet.</td>
<td>The House of Lords upheld the Court of Appeal decision to overturn the declaration. 13 Feb 2003 [2003] UKHL 4</td>
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<td>R (Uttley) v Secretary of State for the Home Department (Moses J) [2003] EWHC 950</td>
<td>8 Apr 2003</td>
<td>Sections 33(2), 37(4)(a) and 39 of the Criminal Justice Act 1991 were incompatible with the claimant’s rights under Article 7, insofar as they provided that he would be released at the two-thirds point of his sentence on licence with conditions and be liable to be recalled to prison.</td>
<td>The House of Lords overturned the declaration. 30 Jul 2004 [2004] UKHL 38</td>
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<tr>
<td>R (on the Application of MH) v Secretary of State for Health (Court of Appeal) [2004] EWCA Civ 1609</td>
<td>3 Dec 2003</td>
<td>Section 2 of the Mental Health Act 1983 is incompatible with Article 5(4) of the ECHR in so far as: (i) it is not attended by provision for the reference to a court of the case of an incompetent patient detained under section 2 in circumstances where a patient has a right to make application to the MHRT but the incompetent patient is incapable of exercising that right; and (ii) it is not attended by a right for a patient to refer his case to a court when his detention is extended by the operation of section 29(4).</td>
<td>The House of Lords overturned the declaration. 20 Oct 2005 [2005] UKHL 60</td>
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<tr>
<td>Re MB (Sullivan J) [2006] EWHC 1000 (Admin)</td>
<td>12 Apr 2006</td>
<td>The procedure provided by the 2005 Act for supervision by the court of non-derogating control orders was held incompatible with MB’s right to a fair hearing under Article 6 ECHR (right to a fair trial).</td>
<td>The Court of Appeal overturned the declaration. The judgment is subject to an appeal to the House of Lords but we understand this does not relate to the decision to overturn the declaration. 1 August 2006 [2006] EWCA Civ 1140</td>
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This table has been prepared for information by lawyers in the Ministry of Justice. We have endeavoured to make it comprehensive, but if you are aware of any omissions or errors please contact James Adutt at James.Adutt@justice.gsi.gov.uk Last updated: 30 May 2007
### Comparison of DCA and MoJ areas of responsibility

<table>
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<tr>
<th>Former DCA</th>
<th>Ministry of Justice</th>
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<tr>
<td><strong>Justice</strong></td>
<td>The core components of the new Ministry of Justice are:</td>
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<tr>
<td>We focus on driving up performance in the justice system—across the criminal, civil and family courts, and in the other administrative courts and tribunals including those dealing with asylum appeals.</td>
<td>• the National Offender Management Service: administration of correctional services in England and Wales through Her Majesty’s Prison Service and the Probation Service, under the umbrella of the National Offender Management Service;</td>
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<td>Our responsibilities include:</td>
<td>• Youth Justice and sponsorship of the Youth Justice Board;</td>
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<td>• Her Majesty’s Courts Service;</td>
<td>• sponsorship of the Parole Board, Her Majesty’s Inspectorates of Prisons and Probation, Independent Monitoring Boards and the Prison and Probation Ombudsmen;</td>
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<td>• major improvements in the efficiency and performance of the courts;</td>
<td>• criminal, civil, family and administrative law: criminal law and sentencing policy, including sponsorship of the Sentencing Guidelines Council and the Sentencing Advisory Panel and the Law Commission;</td>
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<td>• improving the enforcement of criminal penalties; and</td>
<td>• the Office for Criminal Justice Reform: hosted by the Ministry of Justice but working trilaterally with the three CJS departments, the Ministry of Justice, Home Office, Attorney General’s Office;</td>
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<td>• provision of an efficient asylum appeals process.</td>
<td>• Her Majesty’s Courts Service: administration of the civil, family and criminal courts in England and Wales;</td>
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<td><strong>Rights</strong></td>
<td>• the Tribunals Service: administration of tribunals across the UK;</td>
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<td>We focus on supporting the disadvantaged and delivery for the public. This includes reforming legal aid and legal services, and tackling the compensation culture.</td>
<td>• Legal Aid and the wider Community Legal Service through the Legal Services Commission;</td>
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<tr>
<td>Our responsibilities include:</td>
<td>• support for the Judiciary: judicial appointments via the newly created Judicial Appointments Commission, the Judicial Office and Judicial</td>
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<td>• the law and policy on human rights;</td>
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<td>• information rights including freedom of information and data protection; and</td>
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<td>• gender recognition.</td>
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<td><strong>Democracy</strong></td>
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<td>Our priority is to improve engagement between the citizen and the state.</td>
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<tr>
<td>Our responsibilities include:</td>
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<tr>
<td>• Electoral reform and administration.</td>
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Communications Office;
- the Privy Council Secretariat and Office of the Judicial Committee of the Privy Council; and
- constitutional affairs: electoral reform and democratic engagement, civil and human rights, freedom of information, management of the UK’s constitutional arrangements and relationships including with the devolved administrations and the Crown Dependencies.

### Division of responsibilities between the Lord Chancellor and the Secretary of State for Justice

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<tr>
<th>Lord Chancellor</th>
<th>Secretary of State for Justice</th>
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<tr>
<td>• Custody &amp; exercise of the Great Seal*</td>
<td>• National Offender Management Service, including the prison and probation services</td>
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<tr>
<td>• Judicial appointments and all matters related to the judiciary and lay magistracy, including titles, pay, pensions, conduct and discipline*</td>
<td>• Criminal Law and Sentencing Policy</td>
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<tr>
<td>• Procedural rules, appointments to rule committees/ advisory councils, fees as applicable in Criminal Justice, Civil Justice, Family Justice and Administrative Justice*</td>
<td>• Sponsorship of relevant inspectorates and NDPBs, including the Prison Service, Parole Board, Youth Justice Board</td>
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<tr>
<td>• HM Court Services (i.e. administrative systems, staff, services and accommodation, for the Supreme Court of England &amp; Wales (including the crown courts and district probate registries), the county courts and the magistrates’ courts)*</td>
<td>• Devolution</td>
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<tr>
<td>• The Tribunals Service</td>
<td>• Data Protection</td>
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<tr>
<td>• The Land Registry</td>
<td>• Freedom of Information</td>
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<tr>
<td>• The Northern Ireland Court Service*</td>
<td>• Human Rights</td>
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<td>• The Law Commission</td>
<td>• Electoral Law</td>
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<tr>
<td>• Public records</td>
<td>• Regulation of the Legal Professions</td>
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<td>• The National Archives</td>
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<td>• The Crown Dependencies</td>
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<tr>
<td>• Legal Aid</td>
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* These are Great Seal, judiciary-related or judicial appointment functions which are entrenched in the Lord Chancellorship and cannot be transferred by order under the Ministers of the Crown Act 1975.

Source: Ministry of Justice
Minutes of Evidence

TAKEN BEFORE THE SELECT COMMITTEE ON THE CONSTITUTION
WEDNESDAY 3 MAY 2006

Present: Bledisloe, V Carter, L Elton, L Hayman, B
Holme of Cheltenham, L (Chairman) O’Cathain, B Peston, L

Examination of Witnesses

Witness: Lord Phillips of Worth Matravers, a Member of the House, Lord Chief Justice, examined.

Q1 Chairman: Lord Phillips, welcome.
Lord Phillips of Worth Matravers: Thank you very much. Good afternoon.

Q2 Chairman: It is very good to see you here and we are grateful that you have found the time for this. I know what a busy time it must be for you. I should say that the proceedings are being televised. Therefore, if you would not mind, just for the purposes of the camera, formally identifying yourself.
Lord Phillips of Worth Matravers: Yes. I am Lord Phillips of Worth Matravers, the Lord Chief Justice.

Q3 Chairman: Perhaps I could open the batting with one or two of the larger constitutional questions which obviously particularly interest this Committee. Looking back on the passage of the Constitutional Reform Act, the Government made quite a considerable feature of the discussions that this would lead to greater separation of powers between the judiciary and those of the Executive and of Parliament. I wondered if, in your perception, the relationship has now changed. Is it changing? Either as a result of the Act or for other reasons, do you feel the relationship is changing?
Lord Phillips of Worth Matravers: I think the relationship is changing and has been changing over the last few years before the Act. The Act has really seved what you might call the Siamese triplets at the head, because the head of the judiciary, the legislature and the Executive was one person and now the judiciary can be seen to be freestanding. Perhaps the most significant change relates to judicial appointments, in that there is now an independent commission to appoint judges. That is very significant. Also important is the fact that there is now a freestanding body to deal with complaints against judges. Although, at the end of the day, decisions have to be taken jointly by myself and the Lord Chancellor, we, as judges, are now patently freestanding. The division of powers is quite clear. Now our negotiations with ministers, in particular with the Lord Chancellor, are negotiations between the judiciary and the Executive and clearly seen to be so.

Q4 Chairman: So it is more of a negotiating relationship now.
Lord Phillips of Worth Matravers: It is more of a negotiating relationship.

Q5 Chairman: What is the significance of the concordat within that? Various views have been expressed about its constitutional status and significance.
Lord Phillips of Worth Matravers: I think it is probably a unique constitutional document. It was the basis, of course, for the Act. The Act was based on what had been agreed in the concordat. There are still some important elements of the concordat which are not expressly enacted in the statute. Perhaps the most important, I think, is that it is for the Lord Chief Justice to decide how judges are deployed. I regard this as one of my most vital functions, deciding which judges do what kind of work and where they do it.

Q6 Chairman: Do you see it as a mutable piece of paper or does it have an entrenched quality about it?
Lord Phillips of Worth Matravers: I would like to think it has an entrenched quality about it. It has certainly been treated as if it were a constitutional document laying down the division of functions, now largely of course overtaken by the Act but not exclusively, and where the Act does not cover something one needs to go back to the concordat.

Q7 Chairman: The Act prescribes the Lord Chancellor’s continuing role in relation to the rule of law. I think to lay members of this Committee, which includes me, it is quite puzzling to work out what the rule of law means in practice over and above the Lord Chancellor’s role, if you like, as political guarantor of the independence of the judiciary. I think we all understand that very well, but what, over and above
the independence of the judiciary, do we mean by the rule of law?

Lord Phillips of Worth Matravers: I think the independence of the judiciary and the rule of law are very difficult to sever. It is the role of the judiciary, in practice, to uphold the rule of law, to apply the rule of law, to enforce the rule of law, and to do that they have to be independent of outside influence. Insofar as it is the Lord Chancellor’s job to uphold the rule of law, this must be very largely a job of ensuring that our independence is observed. Equally, there must be occasions in government where a question may arise as to whether the conduct that the Government is contemplating is or is not in accordance with the rule of law, and there, I would imagine, the Lord Chancellor would have a role to play in his capacity as a minister.

Q8 Chairman: So the independence of the judiciary is necessary for the rule of law but may not be sufficient. There may be elements to what we understand by the rule of law which go beyond the independence of the judiciary.

Lord Phillips of Worth Matravers: Yes. I think the role of the judiciary is to uphold the rule of law. Ultimately society is governed by legal principles and it is for the judiciary, where those are in issue, to resolve the issue and to ensure that the rule of law is applied. The rule of law arises in relation to civil disputes between individuals. It arises as a matter of public law, increasingly: it arises in the field of the family; it arises in the criminal field, where it is the job of the judiciary to make sure that legal principles are observed in criminal trials and criminal procedure.

Q9 Lord Carter: Could I ask a question on that last point. If you take the example of the Human Rights Act, where the judiciary say there should be a remedial order to put an act right in terms of the human rights and the Executive decided not to do that, would that be a breach of the rule of law?

Lord Phillips of Worth Matravers: Provided the judiciary were correct—and of course Strasbourg is the ultimate arbiter if one is dealing with human rights—it would be open to the Government to say, “The court has ruled that this is contrary to the Human Rights Act. Notwithstanding that, we do not intend to comply with the Human Rights Act on this point” and that would be contrary to what I would call rule of law.

Q10 Lord Carter: That is the end of the argument.

Lord Phillips of Worth Matravers: That is the end of the argument, yes, because Parliament is in that field supreme.

Q11 Chairman: Referring to the independence of the judiciary, you are now head of the judiciary, and, as you said a moment or two ago, the process of the appointment of judges is now entirely independent of the Government. What would you expect of the Lord Chancellor, in the event that you felt that the independence of the judiciary, even with these two pillars of independence in place, were thrown in some way? What would then be the appropriate role of the Lord Chancellor?

Lord Phillips of Worth Matravers: The role of the Lord Chancellor would be to stand up for the judiciary. If their independence is threatened, one has to try to envisage the nature of the threat before one can really address what one would expect the Lord Chancellor to do. But, to take an example, imagine that a government minister were to launch a virulent personal attack on an individual judge, not merely saying that he did not accept the decision he had reached but suggesting that the judge had not been acting judicially, in that situation one would hope and expect that the Lord Chancellor would stand up for the judge, and, if the nature of the attack were not appropriate, that he would make that plain.

Q12 Chairman: And stand up for them in Cabinet? In public?

Lord Phillips of Worth Matravers: Wherever it was appropriate to do so, yes. Sometimes in public. Sometimes privately.

Q13 Baroness O’Cathain: From a practical point of view, how could that happen? If the Lord Chancellor, being a Cabinet member, in charge of the Department of Constitutional Affairs, had one of his colleagues, he would have to stand up for the judges against one of his ministerial colleagues. Would that actually happen?

Lord Phillips of Worth Matravers: I think it might well happen. I would not be surprised if it has happened in the past. One does not know what goes on in the Cabinet.

Q14 Baroness O’Cathain: That is true.

Lord Phillips of Worth Matravers: I would certainly hope, if an issue arose in Cabinet where the independence of the judiciary were under threat, that the Lord Chancellor would stand up and say, “Hey, come on. You are crossing the line. You have got to leave the judges to do their own job.”

Baroness O’Cathain: The Lord Chancellor’s first loyalty is to the judges rather than his Cabinet colleagues.

Q15 Chairman: Is that quite right? I think his loyalty is to what he is prescribed to do under the Act.
3 May 2006

Lord Phillips of Worth Matravers: Yes.

Q16 Baroness O'Cathain: And he is prescribed to do that, to stand up for the judges.

Lord Phillips of Worth Matravers: The Act now places him under a statutory duty. I think it would be a sorry day if we had to rely upon an Act of Parliament to say that ministers must have regard to the independence of the judiciary, but if you are enacting constitutional principles it is not a bad place to start.

Q17 Chairman: Of course the Act, interestingly, does in that respect draw on the past and not simply on the Act, by talking about the existing constitutional role of the Lord Chancellor.

Lord Phillips of Worth Matravers: Yes.

Q18 Chairman: In other words, the Act is supposed to enshrine what we hope would always have happened, which was that the Lord Chancellor would be standing up for the rule of law, part of which, as you have explained, the indispensable precondition of which, is the independence of the judiciary.

Lord Phillips of Worth Matravers: Yes. In my time in the law, that, in my experience, has been the case. We have been well served by Lord Chancellors.

Q19 Lord Peston: I may have missed something you have said. You are now the head of the judiciary.

Lord Phillips of Worth Matravers: Of England and Wales—if I may just qualify it.

Q20 Lord Peston: You did not say that you rejected the idea that it would be included in your job description to speak up for the judiciary.

Lord Phillips of Worth Matravers: No, I did not.

Q21 Lord Peston: If a particular judge were being attacked.

Lord Phillips of Worth Matravers: It certainly is my job.

Q22 Lord Peston: You would speak out.

Lord Phillips of Worth Matravers: Yes.

Q23 Lord Peston: But in the sort of terms: “I am not standing for this”?

Lord Phillips of Worth Matravers: I do not think I would commit myself necessarily to the terms or to the way in which I would put this.

Q24 Lord Peston: But it is certainly something that you would feel is clearly within your remit, and your judges—if I may call them your judges—would rely on you to do that because they wish to show their independence and operate the rule of law.

Lord Phillips of Worth Matravers: They certainly would. I would hope that if there was somebody acting inappropriately, he might come under a two-pronged attack: one from me and one from the Lord Chancellor.

Q25 Lord Elton: Forgive my ignorance, but I do not think the Lord Chancellor and the Secretary of State for Constitutional Affairs are necessarily the same person. In which case, with which person does the defence of the judiciary belong and how do you secure sufficient weight for his representation in Cabinet?

Lord Phillips of Worth Matravers: The weight that he or she carries in Cabinet is not something we can control obviously. The title of the Lord Chancellor has been preserved and is presently a title that the Minister of State for Constitutional Affairs also has. I think we judges tend to refer to him as the Lord Chancellor. If one divorced the two, one would have to see what function the Lord Chancellor was left with.

Lord Elton: Is it part of the concordat that they should be the same person? It does not seem to be in the Act that they should be.

Q26 Baroness O'Cathain: I thought it was.

Lord Phillips of Worth Matravers: The answer to that is I am not sure. One has proceeded on this basis that this title would be that.

Chairman: I think the Act does prescribe they are the same person.

Baroness O'Cathain: Yes, I think it does.

Q27 Chairman: But, since this is the Constitutional Committee, perhaps we should find out! Could I ask one other question before I pass the bat to one or two of my colleagues. As we have now arrived with the concordat—just on the broad constitutional topic still—how would you define the constitutional relationship between the Lord Chief Justice and the Lord Chancellor? With the concordat, in the new dispensation, how would you define that?

Lord Phillips of Worth Matravers: I would say that we have independent roles in trying to achieve the same end, which is the application of the rule of law. I, as head of the judiciary, am the leader of a very large team, which now includes magistrates: about 40,000 people. Each individual judge is independent. I cannot tell my colleagues how they should decide cases but I am their leader. I will do my best to represent their views, their anxieties to ministers, in particular to the Lord Chancellor, and it is our job to administer the law. It is the Lord Chancellor’s job to provide the resources we need to do so and the administrative staff that we need to do so. So the judiciary have to work in very close partnership with the Executive, headed by the Lord Chancellor, in
making sure that the two go together, so that we are providing the judges and I am deploying the judges but there are courts in the right places in which I can deploy my judges. His role is essentially an executive role; my role is leading for the judges and communicating the needs and wishes of the judges to the Executive. There are some roles in which we come together. We each have an input to make to the appointment of the judiciary, informing the judiciary of the judges we need, what types of judge we need, where we need them, and we each have a role to play in relation to discipline, because, at the end of the day, we have to decide between us what action, if any, it is appropriate to take in relation to a complaint against a judge.

Q28 Chairman: In practice, you and the Lord Chancellor together are the hinge. On the one hand the heavy door of the independent judiciary and on the other hand the door jamb of the Government, and the two of you, between you, are the hinge. Lord Phillips of Worth Matravers: Yes.

Q29 Chairman: I suppose, just as the concordat was arrived at effectively by negotiation, it means that within this notion of greater separation, greater independence, there nevertheless is going to be, practically, a fairly continuing negotiation between the two parties who represent the partnership you have just described. Lord Phillips of Worth Matravers: Yes. It is very important that there should be and that there should be negotiation or working together at all levels. If you change the police areas, you immediately have to ask: What implications is this going to have for the administration of justice? How are the magistrates going to function? How is justice in the community going to function within new areas? That is just an example of somewhere where judges and the Executive need to work together.

Q30 Chairman: Do you expect that over time you will be developing processes? Clearly it is helpful if you have good personal relationships, but, since that cannot always be assumed, and sometimes there are points of tension and disagreement, then it matters that there are processes for dealing with that so it is not simply two people eye-ball each other across the table. Do you see the development of a precedent and process operation? Lord Phillips of Worth Matravers: I do see the development of processes. There are some areas which we are considering very carefully at the moment. There are some very difficult areas that one has to deal with, such as: How does the Lord Chief Justice express the views of the judges to ministers? With the statutory provision for my putting before Parliament any matter of importance, in what circumstances should I avail myself of that right? What other avenues are there for communicating to ministers matters of importance? How do we deal with parliamentary questions? If it is a parliamentary question which relates to the judges’ field of activity, how should that be dealt with? These are examples of quite complex areas that we are looking at the moment.

Q31 Viscount Bledisloe: It is absolutely plain from what you have been saying that there remain a large number of areas where you and the Lord Chancellor have to act in cooperation, either by both agreeing something or by one of you consulting the other or vice-versa. There are also areas in which you have to negotiate on matters which affect the way judges work and are paid and so on and so forth. How do you feel about the possibility, which we are told is a real possibility, that one day you might find yourself dealing with a Lord Chancellor who was not a lawyer at all and had no experience of the law? Lord Phillips of Worth Matravers: Experience in the field is obviously a valuable attribute of any minister. It is difficult to answer your question in the air. I do not view it as essential that the person with whom I am dealing should be a lawyer, but obviously the person with whom I am dealing is going to have to have a grip of the particular area in which we are most concerned. If that person happens to come into office as a lawyer who already has experience in the field, that is obviously going to be an advantage for him or her and probably an advantage for me. But one would hope that anyone who is appointed to this important office will have the qualities necessary to do the job, whether or not they are qualified lawyers.

Q32 Viscount Bledisloe: I would like to turn to a different topic, which is the administrative burden upon you under the new regime, which I understand, of course, has only been in force completely for a short period. Lord Phillips of Worth Matravers: Yes.

Q33 Viscount Bledisloe: And how that conflicts with your judicial activities. First of all, do you enjoy more judicial work or administrative work? Lord Phillips of Worth Matravers: I enjoy judicial work more than administrative work, but I have found—somewhat to my surprise, I must confess—that I am quite enjoying the administrative side as well.

Q34 Chairman: Secondly, under the new regime, can you give us some idea about how many hours a week you see yourself working and how much of that you
see being judicial and how much of that you see being administrative?

**Lord Phillips of Worth Matravers:** That is a very fair question. Over the last six months the administrative burden has been particularly great because we have been putting in place really the mini civil service that we need to help us with the new functions. I have been working out to whom I should delegate various functions, which ones I shall and which ones I shall not. The aim is that I should have sufficient time to continue to sit as a judge, which I think is absolutely essential for the Chief Justice. My plan is, at the moment, since you ask, that I will keep the first and the last week of term free completely. In the other weeks, I would hope to sit. Ideally, I would like to sit three days a week and deal with administration the other two, but, to date, one does find that there are some things which you have to do in your sitting week which impinge on the sitting.

**Q35 Viscount Bledisloe:** That is, of course, going to prevent you taking long cases.

**Lord Phillips of Worth Matravers:** I think it would be very difficult for me to take a long case. But that, I think, has been the case for some while as far as the Lord Chief Justice is concerned.

**Q36 Viscount Bledisloe:** In my view, at least—and I think most people would agree—it is vital to attract to your job top quality lawyers like Lord Bingham and yourself. Do you see the administrative burden being a real discouragement to getting successors of the same quality?

**Lord Phillips of Worth Matravers:** I hope not. I do not think so. Obviously people differ in their attitude to their job. In the immediate future, certainly, anyone who would be considering the job will be somebody who became a judge on the basis that what they wanted to do was being, not administration. Having said that, quite a few of my colleagues now are quite heavily engaged in administration. I think most of them are enjoying this—some are enjoying it very much—so that I would hope that it would be possible to find successors to my position of high calibre as lawyers and judges but who nonetheless are not put off by the administration.

**Q37 Chairman:** To follow Lord Bledisloe on this question of the balance between administration and more narrowly defined judicial functions, you mentioned a few moments ago the leadership of the judiciary. Presumably, to some extent, that depends, like leadership in other fields, on getting around and building morale and indicating strategy and all the things that leaders do, and being seen to do that. I wondered, given that we are talking about judges, how important acting as a judge is in demonstrating leadership of the judiciary.

**Lord Phillips of Worth Matravers:** I would think it is essential. I do not think the Lord Chief Justice can hope to keep the respect of the judges if they do not see him sitting and deciding important cases. My intention is to sit in all the jurisdictions, so that I will sit on criminal appeals, on civil appeals and on family appeals, and that is what I have set out to do. I have been sitting today in crime. I am taking the Criminal Division of the Court of Appeal next week to sit in crime in Oxford. I have done that already in Manchester. Apart from sitting, I have been going around the country, meeting as many people as possible and talking to them, just so that I get to know them and listen to their concerns. I intend to continue to take the Criminal Division of the Court of Appeal out on circuit, but later on this term I shall be sitting in civil for a few weeks.

**Q38 Baroness O'Cathain:** Section 5 of the Constitutional Reform Act 2005 states that: “The Chief Justice may lay before Parliament written representations on matters that appear to him to be matters of importance relating to the judiciary, or otherwise the administration of justice in that part of the United Kingdom” How do you think you would exercise that power?

**Lord Phillips of Worth Matravers:** I have not finally reached conclusions on this because it interrelates with a lot of other things. My current reaction is that this is a power to be exercised when I really want to draw attention to something that is really important, not something to be done as a matter of routine. I see this really as a substitute for what the Lord Chief Justice has been able to do and has done in the past, which is to address the House on a matter which is considered sufficiently important to justify that step. As it happens, in theory that is still open to me, but it will not be in the future and I personally have not taken any part in the business of the House as a matter of personal choice.

**Q39 Baroness O'Cathain:** Would you envisage making an annual report?

**Lord Phillips of Worth Matravers:** It is something we are considering, as to whether this would be appropriate. There are various alternatives. One could maybe appear before a committee once a year on a rather general discussion in relation to matters of concern that I wanted to raise on behalf of the judges. There are different ways of doing this.

**Q40 Lord Carter:** If there were a written report—this is to Parliament, not to the Executive—how would you expect Parliament to respond? You have just mentioned an appearance before this Committee. How do you see the relationship between a formal right to lay a written representation before Parliament and a more informal invitation to appear
before the parliamentary select committees? There was a recommendation in the Select Committee’s Report on the Constitutional Reform Bill that there should be a joint select committee of Parliament to relate to the judiciary. Would you see that as being over-burdensome? What would that do, other than you appearing before the Constitutional Committee once a year, for example?

Lord Phillips of Worth Matravers: It would depend to some extent on the terms of reference of the committee. It is certainly an option that merits consideration. In looking ahead at the relationship between the judiciary and Parliament, one needs to be very careful that one is preserving the independence of the judiciary. At the same time, Parliament is certainly justified in expecting some way of communicating with the judiciary.

Q41 Lord Carter: Are there areas which you regard as off limits in dialogue between senior members of the judiciary and parliamentary select committees such as this one?

Lord Phillips of Worth Matravers: There certainly are. Again, we are at the moment considering whether there is some form of guidance I have to give to all the judges as to how they should react if invited to come and appear before a committee of Parliament. It would not be appropriate — this is quite obvious — for you to be asking me or me answering questions about the case I have been sitting on this afternoon. There are a number of other no-go areas where, if a judge should say, “I do not think it is really appropriate that I should comment on that,” I would hope that this would be respected. Essentially, you would not expect judges to comment on political policy.

Q42 Lord Carter: Could we take the example of today, where the Home Secretary has made a statement on this business of foreign nationals and deportation. If a parliamentary select committee asked you for your views on the policy, would you regard that as off-limit?

Lord Phillips of Worth Matravers: Yes, I think I would. If you are asking me what the implications are for my judges, that would be a different matter.

Lord Carter: Of course. Thank you.

Q43 Viscount Bledisloe: You have said, in my view understandably, that you would only want to exercise the section 5 power to lay representations in a case about which you felt very strongly. Is it not the case that, if you did have regular appearances, once a year, say, before committees such as this, that would give you an opportunity to indicate topics on which you were less than 100% happy but which in your view were not so ghastly that you felt the need to lay written representations.

Lord Phillips of Worth Matravers: It would, and I am not rejecting the idea that this might be a good way of conveying these matters but would it necessarily have to be an annual appearance? Might there not be a machinery, if there were a particular topic that I thought it desirable to ventilate, whereby I could let the appropriate committee know that if they were interested in hearing about this I would be happy to discuss it?

Q44 Viscount Bledisloe: I am certainly not setting annual as being a maximum but maybe setting it as being a minimum.

Lord Phillips of Worth Matravers: Yes.

Q45 Lord Peston: Would you regard it as reasonable, if you were appearing before a parliamentary committee, to answer questions about the way the judiciary conduct themselves? I entirely accept what you have said on specific cases. We know there would be no argument but that what you have said is right. May I give you two examples — and I do not want you to comment on them, but they indicate what I have in mind. If we take the judge in the Da Vinci Code case and also the recent Court Martial case, I do not want you to comment at all on what the decisions were but, in both cases, as a layman I would put it to you that I was rather puzzled that that was the way the judiciary thought it was okay to behave. As I have said, I do not want you to comment on them, but, if you were to see examples of the sort where you felt the judiciary were not acting with appropriate gravitas and courtesy, would you feel it was your duty to do something about it? And, if asked by a parliamentary committee, “Did you take note of that?” to answer, “Yes, I did.”

Lord Phillips of Worth Matravers: I would certainly regard it as appropriate for me to take action personally with a judge who behaved in a way in which I felt called for some form of admonition; falling short, obviously, of any kind of disciplinary process. But it might equally be the case where I would think this is something that could be better done by the head of his division rather than by myself. If I then came before this Committee and you asked me what I thought about the way this judge had behaved, I think I would probably say I would prefer not to comment on that.

Q46 Lord Elton: If I may take a little further what you said about the interface between yourself and your successors in Parliament. At present we have in this House a copious supply of very experienced judicial brains. That is going to dry up unless it is artificially remedied. That being so, do you think the remedy should be the return of the Law Lords into this House — judges of appeal or whatever? If not, does your contemplated annual meeting with a
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Lord Phillips of Worth Matravers

committee or whatever constitute the only way in which you can influence the development of legislation itself? What worries me is that we have a lot of people at the moment who can hold our hands when laymen rush ahead to do something foolish in a statute and we will be told how it went wrong in 1948 or whatever. How is that loss going to be made up through the system you have in mind?

Lord Phillips of Worth Matravers: The first thing I would say is that there is going to be a jolly good reservoir of legal brains. My retirement age is 75, but for those who were appointed more recently they have to retire at the age of 70. A lot of those still have a lot to contribute and I would hope that reservoir will be used to replace those available to the House at the moment. So far as legislation is concerned, there are ways in which judges can properly assist with legislation, as, for instance, by protesting that we have much too much of it.

Viscount Bledisloe: Hear, hear.

Q47 Lord Elton: I quite agree.

Lord Phillips of Worth Matravers: We can perfectly properly comment on the implications for the running of the judicial system of proposed legislation. There is already a committee in existence, the Rose Committee, named after Sir Christopher Rose, which does this in the criminal field.

Q48 Lord Elton: Do you see a relationship here between the formal right to lay written representations, which I think you have already said you regard as for grand occasions only, and the more informal invitation to appear before a parliamentary committee. Is there another vehicle for the sort of concern I am asking you about?

Lord Phillips of Worth Matravers: So far as laying things before Parliament, I feel I need a nuclear option, so that when I adopt it everyone sits up and says, “This must be important.” It is difficult and delicate for judges to be involved in the legislative process. It would not be appropriate for a judge to appear before a committee to discuss proposed legislation because it would be very difficult to keep this within the proper boundary. The proper boundary is really saying, “If you are going to do this, you are going to double the number of appeals coming up to the Court of Appeal. We are going to need another 10 judges to deal with it.” Or possibly: “If you are thinking of doing that, you want to give careful consideration to the following legal implications it will have.”

Chairman: The point of nuclear options is not to use them but to threaten them, I believe!

Q49 Baroness Hayman: I could continue the metaphor, but I think it may get very tangled. You gave a very clear answer that it would be inappropriate to comment on policy development; for example, in the case we are concerned about at the moment. But could I go back to the issue of the responsibility of upholding the rule of law and whether there is any circumstance where the division seemed in a way, from what you have said earlier, to be the responsibility of the Lord Chancellor to uphold the rule of law in policy development and of the judiciary to ensure it in adjudicating after the event on legislation.

Lord Phillips of Worth Matravers: Yes.

Q50 Baroness Hayman: But it is possible for legislation or policy to be proposed that might be considered to go beyond what is normally considered the rule of law? We had an example of the ouster clause, but, equally, there would be Human Rights Act implications in certain of the policy proposals in our discussion at the moment. Do you consider that there is a sort of temporal divide between your responsibility and the Lord Chancellor’s on the rule of law? Or might that be one of the situations in which the nuclear option came into play?

Lord Phillips of Worth Matravers: I think the nuclear option could come into play if something was proposed by way of legislation that was so contrary to the rule of law that judges would feel: “We have got to step in and make plain our objection to this”—rather the kind of situation that Lord Steyn was contemplating. You could reach a crunch situation, where fundamental constitutional principles, such as judicial review, if it was proposed, should be abrogated wholesale, I can conceive that in a situation like that the judiciary would want to make their voice heard.

Baroness Hayman: Thank you.

Chairman: Let us press on. Lord Peston, you have a question you want to ask.

Q51 Lord Peston: I think you have largely answered the question I had in mind, but, for the record, the broad measure of the question that I am putting to you is whether, if we go, as I think we will, for greater post-legislative scrutiny in due course, parliamentary inquiries will be looking much more precisely at judicial decisions. The example I have been asked to draw to your attention, although I cannot say I fully understand it myself, is the remarks the Joint Committee on Human Rights made about the judgments of the Appeal Court in the matter of functions of a public nature. I cannot tell you of the precise topic.

Lord Phillips of Worth Matravers: I think I understand.

Q52 Lord Peston: The general question is one on which I would like your view.
Lord Phillips of Worth Matravers: It is perfectly appropriate, obviously, for Parliament to consider decisions being reached by judges and to express perhaps disappointment that the judges are interpreting the law in this way, and it is open to Parliament, if judges are interpreting the law in this way, to change the law. Ultimately, of course, it is the House of Lords rather than the Court of Appeal that has the last say so far as important principles of law are concerned. It has to get up to them, but, if Parliament is disappointed with the way in which laws are being interpreted by the judiciary, of course they are entitled to say so and to consider whether the case of the scrutiny committee we have to have our
Parliament is disappointed with the way in which
laws are being interpreted by the judiciary, of course they are entitled to say so and to consider whether the law needs to be changed. What would become less satisfactory is if the thing becomes very personalised, because the judges are actually doing their best to apply the law objectively.

Q53 Lord Peston: Assuming it was this Committee and assuming some of us had been involved in the legislation and thought we knew what the law we had passed meant—and I do not push that too strongly, but thought we knew what we were doing—who would we then call before us if we were scrutinising the legislation? Would we call you and say, “Can you at least explain to us how your judges came to this different interpretation?” I take it you are not suggesting that we should call the judge in question.
Lord Phillips of Worth Matravers: No. Nor should you call me.

Q54 Lord Peston: Then who would we ask?
Lord Phillips of Worth Matravers: It ought to be clear from the judgments in question the process of reason that has led the judge or the judges to reach their conclusions. We have to give our reasons. We do our best to explain as clearly as we can what those reasons are and it would not be appropriate for those who have given the judgment or, indeed, for me to go beyond that. I could possibly help with a bit of identification of legal principles if there was puzzlement.

Q55 Lord Peston: I am still a little bit lost. As you probably realise, on a committee like this we get a majority of people who are not lawyers but who are not stupid—if I may dare say that. Sometimes it is impossible. Certainly I take a great interest. When I read law reports, though I try, I cannot follow the logic of what is being said at all. Happily I have friends here and I say, “How in heaven’s name did he ever get to that answer?” and they try to explain it to me—and I cannot say that I am a very good pupil—in a way that I can understand. I do not see how we, doing pre-legislative scrutiny, could do it without some very senior legal advice as to how the logic worked in that case. As you know, I am an economist, and there are lots of unwritten things that the layman does not understand, which is how one earns a living, because we are the only ones who know what it really means. That is how lawyers earn their living as well, I imagine.

Lord Phillips of Worth Matravers: There are plenty of lawyers who are not serving judges who could perform that function, and they busily do in the universities in commenting on the important decisions and very often commenting adversely, saying, “This does not make sense at all.”

Q56 Lord Peston: Your view would be that in the case of the scrutiny committee we have to have our own lawyer.
Lord Phillips of Worth Matravers: Yes.

Q57 Lord Carter: If I could give you an example of the situation that Lord Peston referred to. The report of the Joint Committee on Human Rights was critical of the judgments of the Court of Appeal in which the term “public authority” was given a narrow meaning. The Disability Discrimination Act 2005 placed a duty on public authorities to prevent discrimination against disabled people. That judgment presumably would be relied upon by a public authority if it moved just outside of the narrow definition that had been given by the Court of Appeal. Will they have to go to the House of Lords to get that sorted out?
Lord Phillips of Worth Matravers: If the facts were fairly and squarely within the decision of the Court of Appeal, and you could say, “Applying this decision of the Court of Appeal, this particular body would not be considered to be a public authority and therefore not within the scope of the Act,” I think the answer probably would be yes. This is judicial precedent. But the case in question did not go to the House of Lords.

Q58 Lord Elton: An increasing amount of legislation has become justiciable as a result of European legislation and the Human Rights Act. How is that developing? How do you think it may affect relations between Parliament and the legislature in the coming years?
Lord Elton: Parliament as the legislature and the judiciary.

Q59 Baroness O’Cathain: And the Executive.
Lord Phillips of Worth Matravers: It is quite simple to state the judges’ task, which is simply to apply the law. If there are areas of the law where the United Kingdom Parliament is no longer supreme, the court has to face that fact, and if it reaches the conclusion that an Act of Parliament is incompatible with European legislation, it has to say so. So far as the Human Rights Act is concerned, it cannot say that
the Act of Parliament is incompatible and is trumped by European law, but it simply makes a declaration that a particular Act of Parliament is not compatible with convention. That should not, in an ideal world, alter the relationship between the judiciary and Parliament. The judges are doing their job. It is a rather different job. The effect of what the judges are deciding is more dramatic. But many people make the mistake of personalising it and thinking this gives the judge carte blanche to overrule Parliament; it is undemocratic. It is not. The judge is just doing his job of applying the law and enforcing the rule of law. It is the law that is changed.

**Q60 Lord Elton:** In a perfect world, indeed. We do not live in a perfect world and I am really asking you whether this is going to throw grit into the machinery. Do you foresee this, as the volume inevitably increases, as needing some sort of palliative initiative as a result?

*Lord Phillips of Worth Matravers:* It risks throwing a bit of grit into the machinery. It risks provoking—and I will not give any specific examples, but I suspect everyone can think of examples where there have been reactions by ministers against judicial decisions which do not recognise that the judge was simply doing his job objectively to apply the law but suggested the judge may have had his own agenda.

**Q61 Lord Elton:** Then it comes to the Lord Chancellor presumably to protect the rule of law.

*Lord Phillips of Worth Matravers:* Then I hope the Lord Chancellor would step in.

*Lord Elton:* Thank you.

**Q62 Baroness Hayman:** As a constitution committee we have obviously been very interested in the implications of the judgments in *Jackson v Attorney General*. I wonder if you could tell us what you regard as the long-term constitutional significance of that judgment.

*Lord Phillips of Worth Matravers:* This is a case I was involved in in the Court of Appeal. The Court of Appeal suggested that there were implicit limitations on what would be achieved by the Parliament Act. The House of Lords disagreed and, therefore, for the constitutional implications we really need to do no more than read the speeches in the House of Lords and perhaps, particularly, Lord Steyn’s analysis of the constitutional implication, which is, by the use of the Parliament Act, that Parliament can radically alter the constitutional framework. Of course, Lord Steyn suggested that, even there, there might be some explicit restriction on how far it can do so.

**Q63 Baroness Hayman:** You may not wish to answer this, but, in the responsibility of the judges to the rule of law, given that the Court of Appeal’s view was overturned by the House of Lords and therefore there is not inherent in the statute that limiting mechanism, would you feel that constitutionally there was a limiting mechanism—an override, if you like?

*Lord Phillips of Worth Matravers:* I do not think I will answer that question. It is not a question it is really possible to answer. We are getting into very, very deep water when we are asking the question: Are there certain constitutional principles which are now entrenched and which Parliament is no longer in a position to change?

**Q64 Baroness Hayman:** Whenever I am asked how many times I will vote against the Government in the House of Lords, I say, “Well, I recognise the supremacy of the elected House, but I have an opt-out clause for the slaughter of the first-born Bill” you know.

*Lord Phillips of Worth Matravers:* Yes.

**Q65 Baroness Hayman:** I just wondered whether there was a judicial opt-out clause. But that you obviously do not want to be pressed on.

*Lord Phillips of Worth Matravers:* It will be a sorry day if we reach the crunch point.

*Baroness Hayman:* Thank you.

**Q66 Chairman:** Something that has interested this Committee quite a lot is the possibility of getting better post-legislative scrutiny. One of the ways of achieving that which has been suggested is that Acts of Parliament should be clearer in their purpose or, as you might call it, their objectives, and that, if that were so, it would make it easier to subsequently see whether Acts of Parliament had indeed produced the effects which had been contemplated by the Government in introducing them. I think we are very unclear what the attitude of the judiciary would be towards greater clarity of purpose, whether it is on the face of the Bill or on the explanatory notes, and what the attitude will be of those who have to interpret the legislation subsequently. I would be very interested in your views on that.

*Lord Phillips of Worth Matravers:* Ideally, the legislation should be so clear that the judge does not have to ask himself or herself the question: What is this trying to achieve? You can simply see what the Act says can or cannot be done and you apply it. Unfortunately, it is a fact of life that a lot of legislation lacks that clarity. The first thing I would say is that it is much better to set out to make sure your legislation is properly considered and is clear. We judges spend an awful lot of time in those kinds of situations looking behind the legislation to see what the purpose was as an aid to construction. There are quite complex technical rules as to what is and what is not legitimate to look at when trying to...
see the purpose of the legislation. So I cannot simply answer the question just like that. If it made the judges’ task easier, because there you have a statutory statement of the purpose, then I think judges would have no trouble with this at all and would find it made their life easier. But it all depends on how clearly this is done. If it were not done very clearly, you might then find you were in conflict between what is said to be the purpose and what the language of the Act seems to state, which could itself give rise to problems. It would involve consideration of a new approach to statutory interpretation. A lot of statutes have a preamble which tells you a bit about the purpose already.

Q67 Lord Carter: I believe the purpose clauses were quite common sometime ago and they have dropped out of favour. I have the feeling that one of the reasons was that the public realised they were more open to judicial review, if they had a purpose clause and it was not framed exactly correctly, as you have said. Recently we had a Bill which much to my surprise had a purpose clause: the Natural England and the Rural Communities Bill. As a former chief whip, I hated any idea of a purpose clause, because I knew what would happen: it would be debated endlessly at second reading and again we would have a second reading debate on every line of the purpose clause, which is exactly what happened on the Natural England Bill. It has led me to believe that they cause more trouble than they are worth because, unless you get it absolutely right and you think of every suitable way in which it could be interpreted, you could leave the argument open then for judicial review.

Lord Phillips of Worth Matravers: I think I would agree with what you have said but the proof of the cake is in the eating. If it actually makes the judges’ job easier in interpreting the statute, fine, but it can give rise to problems. Certainly, if you set out a purpose, it opens the door to arguments on judicial review that this Act was being used in a way which is not consistent with the purpose for which it was passed.

Chairman: Perhaps this is a discussion I should have with Lord Carter some other time, but it is argued that for the House at second reading to discuss what the purpose is is exactly what the House should be doing, even if chief whips do not like it very much.

Lord Carter: That is fine. Not the clause.

Chairman: Let us get on, because time, sadly, is pressing.

Q68 Baroness O’Cathain: Are there types of public inquiry which you think a judge should not be asked to chair?

Lord Phillips of Worth Matravers: Yes. I do not think a judge should be asked to chair an inquiry with a political flavour. This is something that falls within my own experience because I was invited to chair the BSE inquiry. That inquiry was, by its terms, an inquiry into the conduct of a previous administration. When considering whether to accept the invitation or not, I considered very carefully the object of the exercise: Am I satisfied this is a genuine fact-finding inquiry or is it politically motivated? I satisfied myself that it was a genuine fact-finding inquiry and therefore I accepted the invitation to chair it. But if I felt it was politically motivated, I would have declined.

Q69 Lord Elton: You told us right at the beginning that you are responsible for the deployment of the judges. Does that mean that any invitation to sit on a public inquiry under the Act must be directed to you and not to an individual judge?

Lord Phillips of Worth Matravers: It is a very nice question. It is strongly arguable that, as I am responsible for the deployment of judges, my approval should be obtained before a judge is invited to chair an inquiry if I were unhappy aboutpressing. the judge doing so.

Chairman: That is fine. Not the clause. would be surprised if a judge would accept an invitation to chair an inquiry if I were unhappy aboutpressing. the judge doing so.

Lord Phillips of Worth Matravers: I would expect thereview.

Q70 Baroness O’Cathain: Would you discuss it with the Lord Chancellor?

Lord Phillips of Worth Matravers: I would expect the request for a judge to chair an inquiry to be made either by or through the Lord Chancellor and that I would discuss it with him.

Q71 Chairman: You will recall that Lord Woolf reported during the Constitution Reform Bill that the Judges’ Council had expressed a view that it should go beyond consultation to concurrence, that there should actually be a sign-off by both the Lord Chancellor and you on behalf of the judiciary when a judge was to be appointed as chairman of a public inquiry. What is your view on that?

Lord Phillips of Worth Matravers: I think I would be happier with concurrence but at the end of the day I suspect it would not make any difference because I would be surprised if a judge would accept an invitation to chair an inquiry if I were unhappy about the judge doing so.

Q72 Viscount Bledisloe: Where you have said, “no. I do not think this is a suitable topic” and the Lord Chancellor has said “nonetheless, I want the judge”,
are you happy that a judge could safely say, “I am sorry, I am not doing it” without detriment to his own career prospect?

Lord Phillips of Worth Matravers: Yes, I am. The Lord Chancellor is no longer in a position to control the career or prospects of the judge in question. If promotion is being considered it would be for the Judicial Appointments Commission or the statutory machinery, depending on what area they are looking at, to decide whether the individual is or is not going to find his career advanced.

Baroness O’Cathain: If the judge was asked to chair the inquiry and you did not think it was a very good idea and he went ahead and did it, could he go ahead and do it? Could you potentially say, “no, you cannot do it”?

Lord Phillips of Worth Matravers: I am not in a position as a matter of law to forbid a judge accepting that invitation. This is part of the independence of the judiciary, that an individual judge, if he or she chooses to accept such an invitation, can do so.

Chairman: What you have just enunciated is the independence of judges whereas the issue is perceived by many people to be the independence of the judiciary, not the abuse rather than use by the Government to take hot potatoes and carry them around. The independence of a judge or the independence of the judiciary may be principles somewhat in conflict or could potentially be in conflict.

Lord Phillips of Worth Matravers: An individual judge might decide to do something which would reflect adversely on the public’s view of the independence of the judiciary.

Chairman: Lord Phillips, you have been extremely generous with your time and your insights, we are grateful. I have one final question. Would you think it a good idea if we, as a Committee and if you were willing to come along, were to do this from time to time? I know we would find it very useful.

Lord Phillips of Worth Matravers: I personally am very happy to accept an invitation from time to time as long as it is not too frequent.

Chairman: Thank you very much indeed.
Minutes of Evidence
TAKEN BEFORE THE CONSTITUTION COMMITTEE
WEDNESDAY 22 NOVEMBER 2006

Present
Bledisloe, V
Carter, L
Goodlad, L
Holme of Cheltenham, L
(Chairman)
Morris of Aberavon, L

O’Cathain, B
Peston, L
Rowlands, L
Smith of Clifton, L
Windleham, L
Woolf, L

Examination of Witnesses

Witness: Rt Hon LORD FALCONER OF THOROTON, a Member of the House, Lord Chancellor and Secretary for Constitutional Affairs, examined.

Q1 Chairman: Lord Chancellor, may I welcome you very warmly to the Committee. We always look forward to your appearances before us; thank you for coming. I wonder if I might open the questions with an issue that has been in front of the Committee this morning. I have to say, as a Committee we were very concerned by the response to our most recent report on Waging War: Parliament’s Role and Responsibility. We were concerned for two reasons, one is that the response was later than the guidelines indicate. I think the normal indications for responses come within two months; in fact this was five weeks after that. You were kind enough to write to me apologising for the tardiness. I think we had rather hoped that, being late, it would be more substantial. We were seriously disappointed that the response was not just tardy but very cursory. The normal length of government’s response to select committee reports generally runs into ten, fifteen, twenty pages; we were honoured with a one and a half page response to a very carefully considered report in the course of which we took a lot of evidence, some of it very authoritative and distinguished, and I feel, on the part of the witnesses (let alone this Committee who spent quite a lot of time on deliberation and some care in our conclusions) that we might have hoped for a more substantial and thoughtful response from the Government. I have jumped into this because it is very much at the top of the Committee’s mind although I would hope in a moment to give you a chance to make a general opening statement. I wanted to take this very topical issue first, if you do not mind.

Lord Falconer of Thoroton: First of all, I apologise for the delay. The reason for the delay was that there were internal discussions within government as to how best to respond, which seemed to me to be the appropriate way to deal with it. I am very sorry that you think the response was cursory and did not deal adequately with the arguments; I apologise if that is what you think. You can see from the response that we gave that we did not go as far as the Committee would like us to have gone in relation to the issues that they raised. Both myself and the Attorney General gave evidence to the Committee in which we set out what the Government’s position was and what the constitutional position was on waging war. I think our response, to a large extent, drew on that evidence and referred to that evidence and also referred to what the Prime Minister had said, basically saying that although the constitutional position is that it is the executive that decides, in practice the legislature will always be involved. Length on its own does not have that much merit. That was our position; we made it clear in the evidence and we made it clear again in the report. I am not sure that there is much more that we can do.

Q2 Chairman: The most compelling phrase is that “the Government keeps its policies under review” so the position taken by the Government is not fixed and immutable.

Lord Falconer of Thoroton: It is not fixed and immutable but it does have a position.

Q3 Chairman: Thank you for that. I think these issues will no doubt be raised in the debate on the report in the House but it is good of you to restate what your position is. Could I apologise for slightly jumping the gun there and invite you to make your opening statement?

Lord Falconer of Thoroton: I was not going to make a long opening statement, you will be relieved to hear. Could I say how much I welcome coming every year and I welcome the opportunity to come before the House of Lords Constitution Committee for our fourth annual discussion on the Constitution. There is only one thing that I would like to deal with in my
opening statement and that is about the effect of the Constitutional Reform Act 2005. Some of its provisions have only been in force since April 2006, such as appointments and the appointment of the Lord Chief Justice as head of the judiciary. Others, such as the Supreme Court, have not yet been introduced, but the new structure for the role of Lord Chancellor is in place; he is no longer a judge or head of the judiciary but he remains, however, a staunch and statutory defender of judicial independence within government. I believe the changes are an improvement and bring clarity where previously there was ambiguity. My ministerial colleagues are in no doubt that I will defend the judges privately and, where necessary, publicly as was required surrounding the Sweeney sentencing issues. In private I will speak in Cabinet or privately to ministers where necessary to defend the independence of the judiciary. I have never had any difficulty in obtaining agreement. Have I been hampered in defending the independence of the judges within government by reason of the fact that I am no longer a judge or head of the judiciary? Emphatically not. The separation of roles has, I believe, strengthened the Lord Chancellor in terms of dealing with individual colleagues and publicly where the force of a main stream cabinet minister speaking out is substantial. The separation of roles has been equally effective for the leadership of the judiciary. Having a leader of the judges drawn from the judiciary rather than a politician drives a sense of ownership and momentum. It gives the judiciary confidence that the pressure for change, if it comes from the head of the judiciary, comes from the profession and not from the politicians. Judges have always sought to improve the core processes. In the new arrangements they are keenly and effectively engaged in the partnerships which are required to make justice work better. Court resources and judges are the two things which help the courts work better; clarity in our respective roles has made for better working. These changes to the role of Lord Chancellor have made, I believe, substantial improvements to the system.

Q4 Chairman: Thank you very much. That very interesting and clear statement does prompt one immediate question which is in terms—you may have been told we are mounting a short inquiry on this in this Committee—as to whether those issues of the relationship between ministers and the judiciary ought (and this would seem consistent with what you have just said to us) to form part of the ministerial code as well as being subject to the ad hoc defence within government of yourself and others.

Lord Falconer of Thoroton: The ministerial code starts with the proposition that the ministerial code has to be read in the context that ministers have to comply with the law. Part of the law is to do nothing to undermine the independence of the judiciary. You can undermine the independence of the judiciary as a government minister if you make inappropriate remarks about judges so to some extent it is already in the ministerial code. Would it be helped by there being an explicit reference to not undermining the independence of the judiciary? (Remember the effect of the Constitutional Reform Act 2005; there was a specific duty on every single minister not to undermine the independence of the judiciary.) It might do, but I do not think it is a particularly critical issue in determining the relationship between the judges and the ministers.

Q5 Chairman: So you are open to that as a possibility.

Lord Falconer of Thoroton: I am open to that as a suggestion but I do not think it is that critical.

Q6 Chairman: Moving on to other questions, the first is a process question. As you know we have always called for bills that have constitutional implications to be published in draft and we were pleased that the Draft Tribunals, Courts and Enforcement Bill was put out for pre-legislative scrutiny, but very disappointed that the period of consultation coincided almost exactly with the summer recess which clearly reduces the ability of Parliament and committees like this to do anything about it. Why did that happen?

Lord Falconer of Thoroton: Because I was very keen that we published a draft copy of the bill. The bill was ready in July. It was important to publish a draft copy of the bill so that it would have been available for pre-legislative scrutiny before it was introduced into Parliament. I think it has already had its first reading. We have had a period from July to November in which it has been available publicly. I was extremely keen that a parliamentary committee should take it up for pre-legislative scrutiny and none would. I am as deeply regretful as you are that it was not subject to pre-legislative scrutiny, but could I throw the ball straight back into your court and say, “Find a committee that will do it and I would welcome it” but it is too late now unfortunately.

Q7 Chairman: This is a slight catch 22 you are throwing us.

Lord Falconer of Thoroton: No, I do not think it is a catch 22. We were keen for it to have pre-legislative scrutiny; the bill has been available for quite some time. There were other bills that my department were doing that for reasons I cannot adequately explain to you people found more interesting to look at. For example, the Constitutional Affairs Select Committee looked at the Coroners Bill which is now not in the Queen’s speech; for example, a joint
committee of both Houses was set up to look at the Legal Services Bill. It is a parliamentary matter and not an executive matter that they did not decide to take up the Tribunals Bill and it may be because the people who make these decisions decided they were not interested enough in the Tribunals, Courts and Enforcement Bill, but it is certainly not through any want of enthusiasm on our part for there to be pre-legislative scrutiny.

**Q8 Chairman:** Maybe we can do a deal. If you can help on timing we might be able to help on scrutiny. Can I move from those processes into a slightly loftier sphere of discussion which is reverting to this question of the meaning of “the rule of law” of which you are the defender within government? Of course it appears in section one of the Constitutional Reform Act. When we met last time I think your definition—although you said a lot of other very interesting things—was that Parliament determines what the rule of law is. When we met the Lord Chief Justice in the summer we got a rather more expansive definition from him. He said, for instance, that if a court ruled that something was contrary to the Human Rights Act and the Government then refused to comply with that ruling, even if the principle of parliamentary supremacy meant that that was the end of the debate, it nevertheless would be contrary to the rule of law. Do you agree with the Lord Chief Justice’s analysis of that, that something could be contrary to the rule of law and yet parliamentary supremacy could be invoked to end the matter?

Lord Falconer of Thoroton: The rule of law includes both national and international law as far as I am concerned, therefore if we remained in breach of the European Convention then we would be in breach of international law. I think the rule of law also goes beyond issues such as specific black letter law. I think there are certain constitutional principles which if Parliament sought to offend would be contrary to the rule of law as well. To take an extreme example simply to demonstrate the point, if Parliament sought to abolish all elections that would be so contrary to our constitutional principles that that would seem to me to be contrary to the rule of law. The rule of law goes beyond specific black letter law; it includes international law and it includes, in my view, settled constitutional principles. I think there might be a debate as to precisely what are settled constitutional principles but it goes beyond, as it were, black letter law.

**Q9 Chairman:** To help us think what the constitutional principles might be, could you give an example less—hopefully—far fetched than the abolition of elections?

Lord Falconer of Thoroton: I would be quite unkeen to do so. Something that substantially undermined our democracy would be what I have in mind. I do not want to go much further than that.

**Q10 Chairman:** It is an important issue because whether you take A V Dicey saying that there are two pillars, one is the rule of law and the other is parliamentary sovereignty or whether you take the growing impact—as you have referred to—of international law, there clearly is an area of proper debate which is: what does the rule of law mean over and above parliamentary sovereignty? I can understand your reluctance to be drawn into an adumbration of what those principles are or examples of them, but would you agree that it is a proper area of understanding now that the Government itself has engineered a greater separation of powers and this is an important area for democratic understanding?

Lord Falconer of Thoroton: I agree entirely with that. I am not sure that much is achieved at the moment by trying to draw up a list of things where it might be that even though there was not an offence to black letter law, nevertheless parliamentary sovereignty would not apply. What you are doing is constantly trying to define unnecessarily the constitution in an area where there is no conflict at the moment. There is no conflict between parliamentary sovereignty and the rule of law that I believe to be imminent at the moment. It does not necessarily assist public understanding by trying to define where the conflict might be when no such conflict is imminent. However, I think it is a very important area to look at generally.

**Q11 Chairman:** Constitutions are supposed to anticipate and find ways of dealing with such conflicts and therefore for this Committee it is an important issue and I suspect there is growing interest outside.

Lord Falconer of Thoroton: The reason I am not keen to be drawn into this particular area is because there has been a debate amongst legal academics as to what are the sorts of issues where the courts could, as it were, strike down particular bits of law. There was an issue about whether or not a clause that ousted the court’s jurisdiction in certain areas would be something that the courts could strike down. I have a strong view in relation to that; there is no issue about it at the moment because the issues have always been avoided and for 150 years there has been this potential conflict between the rule of law on the one hand and parliamentary sovereignty on the other and we have managed to get through it without ever bringing it to a point.
Q12 Chairman: This is a particularly pointed question for you as Lord Chancellor because it is possible that it is you who would have to say to colleagues in the Cabinet and in Government, “It may well be that Parliament has decided this but I believe this is contrary to the rule of law”.  
Lord Falconer of Thoroton: In relation to the Human Rights issue, the problem does not arise starkly because it would be a breach of international law not to comply. If we were not committed to the European convention and there was a breach of the terms of the Human Rights Act which Parliament decided not to change, that is where the difficulty would arise. At the moment I do not think it is a particularly difficult. In any event, another incredibly good example, I think, is where we have a constitution which depends upon cooperation and that cooperation is always provided. For example, the courts have declared on I think nine occasions provisions of primary legislation as being incompatible with the Human Rights Act. It is clear that it is a matter for Parliament to decide whether or not they correct the incompatibility and the Government has always promoted legislation to correct the incompatibility. So cooperation works.

Q13 Lord Morris of Aberavon: Could I ask you, Lord Chancellor, in view of the fact that you occupy two offices—Lord Chancellor and you also call yourself Secretary of State for Constitutional Affairs—what roles precisely do you do under each of these hats? We noticed in the opening of Parliament that you were there in your robes, performing the role of Lord Chancellor. On the opening of the new session of the courts you were there in the Abbey, not in robes, and marched up together with the Lord Chief Justice. If the future Secretary of State for Constitutional Affairs were in the Commons, what repercussions would there be on what has happened so far?  
Lord Falconer of Thoroton: I have a list of what are formally the Lord Chancellor’s responsibilities and what are formally the Secretary of State for Constitutional Affairs’ responsibility. Can I pass those round subsequently rather than go through the list? Broadly, what I do under the hat of Lord Chancellor are those things that tend to be connected with the courts like judicial appointments, all matters related to the judiciary, procedural rules relating to what the courts do, the running of the Court Service in England and Wales, the running of the Court Service in Northern Ireland. What the Secretary of State for Constitutional Affairs does historically is look at things that have come from other departments: devolution, human rights, data protection, electoral law, that sort of issue. That is where the split is. As you know at the State Opening of Parliament the person handing over the speech is Her Majesty’s Government and not either the Speaker of the House of the Lords or the head of the judiciary. The Lord Chancellor has always traditionally dressed up in the way that he has; those robes are not necessarily judicial robes (although judges wear similar robes) and you can see the Speaker of the House of Lords wearing quite similar robes to me. I thought we should not change the State Opening of Parliament and if I am doing it as a government minister—the Lord Chancellor has been doing it as a government minister for however many hundreds of years that ceremony has been going on—I could see absolutely no reason to change it because there is no different symbolism in relation to it. In relation to the opening of the legal year the Lord Chancellor used to lead the procession as the head of the judiciary. Changing my clothes there is intended to indicate that I am no longer a judge or head of the judiciary. That is why the changes were made. The fundamental change in the role is that it is no longer a judge or head of the judiciary.

Q14 Lord Morris of Aberavon: What happens if the Secretary of State is in the Commons?  
Lord Falconer of Thoroton: If he is not the Lord Chancellor he cannot dress up in the finery you saw me wearing the day before yesterday (or whatever day it was). It is a matter for the House authorities and the Government to decide who is going to hand over the speech to Her Majesty. It has to be somebody who is a member of the Government. The Speaker cannot do it. These are questions not to ask but to ask, as it were, the great constitutional ceremonialists I suspect. From the point of view of the ceremony I was very keen that it should look the same. It is the most impressive looking event and the symbolism is not changed by the change in the role of Lord Chancellor. Indeed, I was keen to walk backwards but I was told I could not because all the other people now walk forwards and I would look like a very crazed Lord Chancellor on that basis.

Q15 Lord Carter: I have a question on the previous question. On the process of the discussions within government on the rule of law, independence of judiciary, my hunch—perhaps you could confirm it—is that all these discussions take place outside the cabinet room; they are done within government. There is a phrase meaning “discuss it with colleagues” which you have used yourself and it was also used by your predecessor, Lord Irvine. The number of times a question will come to the cabinet table I would think would be very, very rare. My question is this, I believe the Attorney General now attends the Cabinet and is able to speak.  
Lord Falconer of Thoroton: Yes.
Q16 Lord Carter: Perhaps this is entirely hypothetical, but if a question needed to be discussed in the Cabinet you would deal with it in your role as Lord Chancellor but would the Attorney General, as the main legal adviser to the Government, sit quietly? It would be rather odd if he did.

Lord Falconer of Thoroton: The Attorney General and not the Lord Chancellor is the prime adviser to the Government on a legal issue. If there is a legal question that is relevant for cabinet discussion it is not the Lord Chancellor who gives legal advice to the Government, it is the Attorney General. It is the Attorney General’s view that is decisive, not the Lord Chancellor’s. Indeed, never in our government—but if you look back in quite recent history, you will see lots of difficulties between the Lord Chancellor and the Attorney General if the Lord Chancellor has sought to give advice. It has always been constitutionally clear that the Attorney General is the decisive voice on legal advice.

Q17 Chairman: That happened in Suez.

Lord Falconer of Thoroton: Yes and in Suez the then Attorney General, Reginald Manningham-Buller, was not consulted at all on whether or not it was lawful to go to war but the then Lord Chancellor—I think it was Lord Kilmuir—gave private advice to the prime minister and there has been a series of articles subsequently in which the exclusion of the attorney from that advice both gave rise to outrage and established the principle for today. Recently, very interestingly, the National Archive published correspondence between Lord Hailsham, Mr Heath and Sir Peter Rawlinson in which (and this is all public) Sir Peter Rawlinson, the Attorney General complains bitterly that every time he gave advice to the Cabinet—because the Attorney General has frequently gone to the Cabinet in the past—Lord Hailsham would tend to say that that is wrong and give reasons. He writes to say that this must stop and eventually the publicly disclosed documents reveal that Mr Heath, the Prime Minister, spoke to all of them and the problem was resolved (but it does not say how). There was no doubt of what the constitutional position was.

Q18 Lord Carter: I understand the point about the legal advice but what I meant was that if the question arose at the cabinet table and somebody—I would think it would be the Lord Chancellor—would say, “I have to advise colleagues here that there is a problem with the rule of law”. That would be your role. My question really was, does the Attorney General then give legal advice on your view?

Lord Falconer of Thoroton: He will not give legal advice on my view but a large part of the rule of law is complying with black letter law so you have to know what the law is. The only areas it seems to me where difficult questions about the rule of law will arise is where you are talking about constitutional principles beyond black letter law. If the attorney says to the government that this is against the law then you do not need the Lord Chancellor to say that it is against the rule of law because it is already clear that it is against the law. It is the much deeper, grey areas where the Lord Chancellor may have a role.

Q19 Lord Goodlad: Lord Chancellor, in the Magna Carta lecture which you gave in Sydney on 13 September on the Role of Judges in the Modern Democracy, you said: “Whilst the role of Lord Chancellor has changed, the office, rightly, has been preserved.” That surprised many people because you pressed for the abolition of the office of Lord Chancellor during the passage of the Constitutional Reform Bill.

Lord Falconer of Thoroton: Not for long.

Q20 Lord Goodlad: Could you tell the Committee what brought about the change of mind?

Lord Falconer of Thoroton: It was perfectly obvious that in being a defender of the independence of the judiciary and the rule of law within government you are greatly assisted by holding a great historical office. In those circumstances, whilst I strongly believed and believe that the role of the Lord Chancellor should change, in particular no longer being the head of the judiciary, I think there is no benefit whatsoever in abolishing the office if one of the things the office has to do is to defend the judges within government.

Q21 Lord Goodlad: But you thought differently before.

Lord Falconer of Thoroton: I did; I was wrong but I made that clear throughout. I regret being wrong. I should make clear that the Magna Carta lecture was not the first occasion I had admitted my profound error; I had admitted my profound error to the House of Lords on many, many occasions. If you think I have not eaten enough humble pie, I am more than happy to do so again.

Q22 Chairman: Do you envisage as likely or possible that a prime minister might want to de-couple the offices of Secretary of State for Constitutional Affairs and Lord Chancellor?

Lord Falconer of Thoroton: I do not know; I do not think so. Unless you are doing both lists of things that I have referred to, whilst there is more than enough to do as Lord Chancellor, the Secretary of State for Constitutional Affairs, if all he or she was doing was data protection and freedom of information, there is not a job there it seems to me. Equally, I think putting the Lord Chancellor’s role together with freedom of information, human rights,
electoral law, that sounds a very, very appropriate mix.

Q23 Baroness O’Cathain: Lord Chancellor, how many civil servants do you have in DCA?
Lord Falconer of Thoroton: I am responsible for 22,000 over all. That is the Court Service. There is a very, very, very full time job running the Court Service, running the Tribunal Service, running Legal Aid and those issues which probably employ 80 or 90 per cent of the officials for whom I am responsible. If you said that all that the person was responsible for was, say, freedom of information—

Q24 Baroness O’Cathain: I did not say that.
Lord Falconer of Thoroton: I am not quite sure what the underlying—

Q25 Baroness O’Cathain: What you said was that if you did not have the job of Lord Chancellor there really would not be a job.
Lord Falconer of Thoroton: You are seeking to draw from that, and there you were trying to abolish the Lord Chancellor’s role. Is that the pay-off line?

Q26 Baroness O’Cathain: You are now saying that they have to be combined; at least that is what you are implying.
Lord Falconer of Thoroton: Yes.

Q27 Baroness O’Cathain: If they were not combined there would not be a role for another person; there would not be two different heads, so to speak, one as Lord Chancellor and one as DCA.
Lord Falconer of Thoroton: That is correct.

Q28 Baroness O’Cathain: I am just finding that rather strange if there is such a big job. First of all you say there is not a job but in fact there is a big job.
Lord Falconer of Thoroton: The original proposal was that the Secretary of State for Constitutional Affairs would do both the jobs in the Lord Chancellor’s list and the jobs in the Secretary of State for Constitutional Affairs’ list. What then happened was that the role of Lord Chancellor was preserved and certain jobs were basically tied to the office of Lord Chancellor. I still have two titles and in my view rightly so. There is still a very, very big job to do. If, however, you separated out those things which I do under my heading of Secretary of State for Constitutional Affairs there is not very much in those.

Q29 Chairman: Your advice to future prime ministers would be to not separate the two roles.
Lord Falconer of Thoroton: It would be.

Q30 Lord Morris of Aberavon: Could I ask you about the duty to defend the judiciary and the different obligations and the different people: there is the Lord Chief Justice, yourself, all ministers and all worded slightly differently. Does it matter?
Lord Falconer of Thoroton: It does, I think. I think the effect of the Constitutional Reform Act is that I have got an obligation to speak out both privately and, if necessary, publicly to defend the independence of the judges, in particular from attack from within government. I think the effect of the Constitutional Reform Act 2005 means that I have much, much greater licence than any other ministers to speak publicly on that issue.

Q31 Viscount Bledisloe: Earlier you said that you did not see any need to include anything in the ministerial code about what ministers should say about judges, but there have been things which surely you would accept were the wrong side of the line of personal attack and would it not be much better if those were spelt out as things that ministers should not do rather than merely them knowing that they have a duty to uphold the independence of the judiciary?
Lord Falconer of Thoroton: If they were the wrong side of the line then they were contrary to the law so there would already be a breach of the ministerial code because there is a specific legal duty in the Constitutional Reform Act. I accept what you say, that from time to time ministers do go too far. That is not a problem just with this particular Government; it has happened since there were judges and ministers. I do not think the problem is whether it is in the ministerial code or not; I think the line is quite difficult to draw and I think there are inevitable tensions in the relationship between the executive and the judiciary. I do not think the position would be materially changed, as I said in answer to Lord Holme’s questions. I do not think it would make much difference. I do not think, for example, it would make it easier to resolve precisely where the line is.

Q32 Viscount Bledisloe: Are these conflicts between government and judges partly because, on the really critical issues like what is contrary to the Human Rights Act, it always seems to be decided on argument and impression? Would it not be better if evidence was called when somebody said, “This is going to have a very serious effect on so and so” and it was all done much more with evidence so that the judge could say, “Well, I am founding my view on what was said by X or Y”?
Lord Falconer of Thoroton: I think the courts would say that they do decide the cases on evidence rather than on impression. For example, in relation to the Belmarsh case (the detainees after the 2001 Act) an important issue was the extent to which terrorism might come from home as opposed to abroad
because the issue the judges were dealing with was whether there was a discriminatory effect in only being able to imprison people that you can also deport who would naturally be foreign. Certainly in many of the judgments the approach that was taken in the House of Lords Appellate Committee was: what is the evidence on foreign based terrorism as opposed to national terrorism? So it was decided on the evidence. I am not quite sure what point you are getting at. There is evidence of the basic facts; a legal conclusion has to be reached on that. By and large the courts have been using evidence rather than assertion or anything else.

Q33 Lord Morris of Aberavon: My understanding, Lord Chancellor, on your answer that the distinction between a ministerial duty for all ministers and your own is that yours is a bigger and weightier responsibility.

Lord Falconer of Thoroton: Yes.

Q34 Lord Morris of Aberavon: Does that apply to the junior ministers in your department? On the Sweeney case which you are familiar with the judgment was handed down on the 12th, there was complete silence governmentally on the 13th and the 14th and I think on the 15th June you said something and then on the 16th your junior minister said something which she had to completely withdraw.

Lord Falconer of Thoroton: The duty is upon me and not upon my junior ministers. I would expect every one of my junior ministers to entirely agree with what I say and say publicly what I say and if they do not then obviously, as happened on that particular occasion, they will have to accept that they accept what I say or something happens.

Q35 Lord Morris of Aberavon: An exchange of letters.

Lord Falconer of Thoroton: I take the view that Vera Baird is an extremely good contributor to the Government. There appeared, on the face of it, to be a disagreement; she accepted she should not have said it and as far as I am concerned that is the end of the matter.

Q36 Lord Morris of Aberavon: It was just unfortunate.

Lord Falconer of Thoroton: Yes, it was, but it is a matter that is over now.

Q37 Lord Rowlands: Let me remind you of the quote because it was put in a kind of rhetorical question: “Where is the legitimacy for courts to challenge and indeed strike down the acts of the executive where it is plain those acts would have majority support amongst the electorate?” If the public opinion is heavily in favour of locking everybody up in certain circumstances judges should go along with it.

Lord Falconer of Thoroton: The answer I give is that you cannot, as a judge, decide things on the basis of popularity. One of the things judges have got to do is defend unpopular people because the law says even though everybody hates you, even though everybody thinks you have done wrong, your legal rights are this. In asking the question: what is the legitimacy for it? There is a legitimacy you can have in our society or in part of our constitutional arrangements which comes from somewhere other than democratic election. As far as the judges are concerned the legitimacy comes from the fact that our society, as Lord Holme said at the outset, is based in part on democratic election of the executive and legislature.
and in part on the idea that in the rule of law everybody is equal before the courts. The only way you get to that proposition is having independent judges, so that is their legitimacy.

Q40 **Lord Rowlands:** You imply a little later that there had been a significant change. In the seventies, for example, the legislative response to the terrorists outrages were exclusively a matter for the UK Parliament; post 2001 it is a dual responsibility. You went on to say that judges have to make the law and answer a policy question, but at the same time you are trying to keep them out of politics. Is that going to be a rather impossible balancing act?

**Lord Falconer of Thoroton:** We have made a decision as a society that we want judges more involved in those issues in determining, for example, the limits of lawfulness in relation to our response to terrorism. The example you are referring to which I gave in the speech was that immediately after the Birmingham bombings Parliament passed a variety of anti-terror legislation and there was no question that the judges would question whether they thought the legislation was right or wrong, they simply enforced the legislation. Now, at a time when I think people do want more of a sense of individual rights, the judges do have a role in determining the compatibility or otherwise of the human rights legislation. However, their legitimacy does not come from democratic election; their legitimacy comes from a sense that outer limits of lawfulness have to be set.

Q41 **Lord Smith of Clifton:** Lord Chancellor, how would you describe the constitutional status of the concordat you agreed with Lord Woolf in January 2004 on the Lord Chancellor’s judiciary-related functions?

**Lord Falconer of Thoroton:** I think it is a document of constitutional significance and I am not just saying that because Lord Woolf is on the Committee. It seems to me to be a document of constitutional significance because, although much of it was then enacted in the Constitutional Reform Act, it sets out the basic principles on which the judges and the executive will relate to each other in the future. I have never known any piece of legislation to be utterly comprehensive; there are bound to be issues that come up in the future where it is the principle that matters rather than precise detailed legislation and I believe the concordat will be important for that.

Q42 **Lord Smith of Clifton:** Thank you for that answer because it covers my supplementary, does it still have a continuing practical importance. I will ask instead, do you think it provides a precedent—as indeed Baroness Kennedy’s Power Inquiry suggested—for resolving demarcations between different levels of government (local government and central government and so on)? Do you think it provides that this notion of a concordat will be prayed in aid as a precedent?

**Lord Falconer of Thoroton:** I think it could do because I very much welcomed it and thought it was a very good thing to have done, but the nature of the concordat that the executive and the judiciary struck on that occasion was between the executive (which, however it may appear, is a unified and coherent body) and the judges (who, in fact, have always had strong leadership) and therefore it was possible for two people to sign a document and there would be a sense that they brought with them the groups they were representing. It would be a very good idea for there to be a concordat between central and local government. Obviously central government would have one voice but to what extent would it be possible for, as it were, the president of the LGA to say, “I speak on behalf of Liverpool and Hertfordshire in making this arrangement”. I think it is a precedent we need to look at and see whether it can apply in other areas. How difficult would it be to apply to other areas? I suspect it would be quite difficult.

Q43 **Lord Woolf:** I would like to ask you whether you feel it is going to have a continuing role in the relationship day to day between the judiciary and the executive.

**Lord Falconer of Thoroton:** I think that it will. Just by way of example, very frequently I see documents which will either go to the executive or go to the judges, in terms of documents from one judge to another or from one judge to a group of judges or from me to other departments, and they will very frequently refer to a paragraph in the concordat saying that is what has been agreed on deployment or this is what has been agreed on the role of the resident judge in the concordat. It still plainly has a continuing day to day impact on the actual practical resolving of particular issues.

Q44 **Lord Woolf:** Do you see its role changing when you cease to be Lord Chancellor?

**Lord Falconer of Thoroton:** No, I think it will go on forever. I think it will be more important when I have gone because it is the record of what we agreed and it represents the settlement that was reached at that particular time. It seems to me that I can always say at the moment “What we meant was this” which my successor cannot do, he will have to rely on the words.

Q45 **Baroness O’Cathain:** From time to time in recent years there have been periods of tension or disagreement between the judiciary and the Government, often arising from Home Office matters and involving robust comment from ministers to the news media. What advice do you give to your fellow
Baroness O’Cathain: Q48
Lord Falconer of Thoroton: Q46
Baroness O’Cathain: Q47
Lord Falconer of Thoroton: Q49
Lord Peston: Q50
Lord Peston: Q51

ministers about the content and tone of their remarks about individual court judgments?

Lord Falconer of Thoroton: You should never do anything that undermines respect for the court system. If you ever attack an individual judge or a group of judges as having a particular motivation, that undermines respect for the system. That does not mean that you cannot comment adversely on particular decisions because it is perfectly legitimate to disagree with decisions. If you disagree with a decision, say what you are going to do; if you are going to appeal, say you will appeal; if you are going to change the law, say you will change the law. If you cannot appeal and cannot change the law then my advice would be to keep quiet because there is not much you can do about it.

Q46 Baroness O’Cathain: What happens if they do not?
Lord Falconer of Thoroton: Then I will speak to them privately and tell them not to do it again. If they do it again then I will say something publicly. That is too black and white an account of it, but broadly that is the way it works.

Q47 Chairman: Has that very sequence not happened recently?
Lord Falconer of Thoroton: It has happened from time to time.

Q48 Baroness O’Cathain: Recently?
Lord Falconer of Thoroton: Recently, yes.

Q49 Lord Peston: Could I go back to this whole question of the independence of the judiciary? I am right, Lord Chancellor, in saying that we do not mean by “independence” that the judges should not be subject to critical scrutiny?
Lord Falconer of Thoroton: No, indeed not, quite the contrary.

Q50 Lord Peston: They should be subject to critical scrutiny.
Lord Falconer of Thoroton: Of course. To take an easy example to start with, the mesothelioma decision in the House of Lords in which the House of Lords came to a particular conclusion which people regarded as making it harder for mesothelioma sufferers to recover. There was widespread criticism of that decision which was then reversed by an act of Parliament. Not a soul that I am aware of, including those who were party to the unpopular decision, regarded the debate that followed the mesothelioma decision as being remotely improper or inappropriate. Nobody would regard that as being the situation. The judges were in effect criticised for coming to the wrong conclusions; that was regarded as legitimate debate and the law was changed. What is objectionable is not critical discussion of decisions; it is something which expressly or impliedly says that there is something wrong with these judges for reaching this conclusion. That is where the problem arises. Because a government minister saying that has a particular impact, the Government has to be particularly careful not to do that because it undermines one bit of our constitution. As an addition to that, the judges are always advised, whether by the Lord Chief Justice or the Lord Chancellor, to try to avoid controversy in what they say. That does not mean they cannot say controversial things in their judgments, it does not mean that they cannot lecture on the law, but they should not externally get involved in what might be described as political debate. They are, to some extent, disabled from defending themselves so for that reason as well it is quite important to have a clear view about how ministers should behave. I cannot obviously deal with non-ministers, politicians or the media; the judges have always had to put up with that. However, a responsible government should not seek to undermine judges in the way that I have described.

Q51 Lord Peston: There was something else that you added to that that slightly puzzled me. You seemed to say that if you are a minister you might be saying, “Yes, the law absolutely means that the judge has to take the decision, we are not criticising the judge”. You would then add, “There is something wrong here” which as a minister—an elected person—you are entitled to say that. You then seem to be saying that if you are not in a position to right that wrong you really ought not to be saying that there is something wrong here. To take an obvious example, there was a judge on television this morning (something to do with a programme that is coming up) and this judge said something to the effect that he applies the law and when it comes to sentencing he does the right sentence as he sees it, even though if he sends someone to prison he is also aware of the fact that there may be no places in prison to send anybody to. I thought that was all very sensible and was exactly what I would have done in his position. Clearly you are not saying that a minister then should not say, “We have to do something about this”.
Lord Falconer of Thoroton: You are right to pick me up. What I was saying was that if you are a government minister and you are saying that the law is wrong and it should be changed but unfortunately you cannot do anything about it, there is nothing wrong so far as the independence of the judiciary is concerned. It is a pretty unwise thing for a minister to say that there is something but we are not going to do anything about it. That is all. I was not implying that it would be wrong for a minister to say, “The law is
this, I think the law is wrong, there is nothing I can do about it”.

Q52 Lord Carter: It is now almost three months since the DCA July 2006 report on the implementation of the Human Rights Act called for myth busting to correct erroneous impressions about human rights. What in practice will this or has this entailed? Can you envisage circumstances in which the HRA could be repealed or substantially amended?

Lord Falconer of Thoroton: You read in the newspapers and hear in our own chamber people say that the Human Rights Act is a bad thing, for example because Dennis Nilson was given the right by the Human Rights Act to receive hard core pornography in prison. That is a famous myth which is untrue; he was not allowed to receive hardcore pornography in prison by the prison governor. He sought leave to apply to court to be given the right to do so and the judges dismissed his application even to try. The Human Rights Act gave no such right. Another myth: the man on the roof who was holding a Human Rights Act right to have Kentucky Fried Chicken supplied to him. That is another myth. It is another myth that the Human Rights Act requires the state to give prisoners drugs in prison. That was last week’s myth. All we can do in myth busting terms—is this what we have committed ourselves to doing—is that every time such a myth appears in the public print or on television or wherever, we disseminate the right answer. For reasons I cannot adequately explain to you, the press appear to be much more interested—some of the press, not all of the press—in disseminating the myth than disseminating the myth busting. All we can do—we have committed ourselves to doing it and the Home Office are doing it as well—is to correct it. There was a newspaper called The Daily Telegraph which reported—I am not sure whether it actually reported it as fact or not—somebody quoting the Dennis Nilson myth. They were kind enough to publish on their letters page a correction by Cathy Ashton that that was not in fact true. I think that was very good of The Daily Telegraph to publish the letter. However, I am not sure about the chance of the letter getting as much readership as the bit earlier on in the newspaper which referred to the Dennis Nilson myth.

Q53 Lord Carter: My second question was about the chance of repeal or substantial amendment. Do you not see this?

Lord Falconer of Thoroton: I do not see it no. Will we repeal the incorporation into domestic law of the European Convention? No, we will not. The report you referred to in July 2006 reaffirmed the whole government’s commitment to sticking with the Human Rights Act.

Q54 Lord Carter: To go back to the myth busting, you are always having to play catch up with the myth.

Lord Falconer of Thoroton: Yes.

Q55 Lord Carter: Have you made any attempt to circulate all editors with a note explaining the problem and trying to stop it at source?

Lord Falconer of Thoroton: No, I have not done that. I think we need to think about how we try to get ahead of the game. We have published many, many documents saying what the Human Rights Act does and does not do. In all of those documents we try to bust the myths. We send them to all the newspapers; I have not sent them directly to each individual editor. You can judge as well as I what progress we are making in that respect.

Q56 Chairman: Of course the Human Rights Act does need this sort of particular defence from you and your department because by definition it often deals with minorities who may not, as you were implying earlier, in popular newspaper terms be popular people or well-respected people. They may be the very people who most need the defence of the Human Rights Act and therefore in a sense it is a compensatory role that you have to play in getting the balance of public opinion which is majority opinion to understand that this exists to protect minorities or individuals.

Lord Falconer of Thoroton: Yes, and the other bit of it is that all of the rights that are in the Human Rights Act would be rights that I think most individuals would regard as being obviously necessary and obviously right. Who is going to object to the right to a fair trial or the right to free speech or the right to a private life, all of those matters? The Human Rights Act in effect brought those rights together. Because, however, they are perceived to be too lawyerly in some places and perhaps coming from Europe, that leads to an unpopularity which they do not deserve.

Q57 Chairman: When you say “coming from Europe” I think it is probably true that most of the content of the European Convention on Human Rights came originally from British lawyers.

Lord Falconer of Thoroton: You are absolutely right.

Q58 Lord Goodlad: Lord Chancellor, the Kilmuir rules no longer operate to bar judges from speaking to the news media, giving speeches or writing articles that might be critical of government policy or on matters of public controversy. In what kind of circumstances do you think it is now legitimate for members of the senior judiciary to criticise government policy outside the confines of the
courtroom? As a supplementary, can I ask whether you draw a distinction between the role of the Lord Chief Justice, as head of the judiciary, and other judges?

Lord Falconer of Thoroton: To take the general point first, I think it is generally a bad idea for judges to be criticising the Government on policy issues for two reasons. The first reason is that I think the public want judges to be unpolitical and criticising the Government on its policy issues tends to get you into political areas. Secondly—and separately—where there are debates on policy in which judges appear to disagree with the Government it may very frequently be the case that those very same judges then have to enforce laws about which it might be said they have expressed disagreement. Generally I think it is a bad idea and that is why the sort of quid pro quo that I was referring to before, that because the judges are inhibited in publicly defending certain things or making public speeches, the quid pro quo should be the Lord Chancellor and all the other government ministers behaving in a particular way with the Lord Chancellor defending them within government.

There are areas where I think it is legitimate for judges to speak out and say particular things and those are areas where they speak with a particular expertise, for example how the courts work and issues like that. It must be legitimate for judges to say, “If you introduce this proposal the consequence will be that all the courts get gummed up and nothing will happen for years”. I think it is quite a limited area. I am guided in what I say by, in part, what Lord Bingham said in the practice direction that he issued about when lords who are judicial lords should speak in the Lords on issues. He said, “Do not speak on issue of political controversy: do not speak on any issue where it might be that the courts have to rule on the particular point”. That seems to me to be the right way to inform the way that judges should talk. Should the Lord Chief Justice have a special role? Yes, I think he should. I think by and large—although it is a matter for the judges and not for me—one voice is better than a cacophony of voices. I think decisions about when the judges should speak out about an issue that affects them particularly or in respect of which they have an expertise should be a matter for the Lord Chief Justice because I think, as a matter of practicality, all of the judges speaking is not such a good idea.

Q59 Lord Goodlad: If a senior member of the judiciary were to speak out in a way that you thought was inappropriate, would you think it appropriate for you to do anything about it?

Lord Falconer of Thoroton: I could not do anything about it. If the Lord Chief Justice thought it was appropriate to do something about it then he would have to do something about it, but I certainly could not now say to an individual judge in any official capacity, “Do not say that”. If I thought that he was going too far I might raise it with the Lord Chief Justice.

Q60 Lord Goodlad: You might speak privately to the Lord Chief Justice.

Lord Falconer of Thoroton: Yes.

Q61 Lord Windlesham: Can we now turn to domestic relationships, and that is the continuing presence of the senior judiciary in the House of Lords and the relationship between the two? I was personally not alone I think in welcoming the continuation of this strange, almost unique, arrangement, but there it is, it is in the Constitutional Reform Act and it can be welcomed as a result. However, some questions arise. The senior judiciary will no longer have the ability to speak on the floor of the House to raise concerns they may have about government policy affecting the judiciary and instead the Lord Chief Justice may make written representations to Parliament (that is under section five of the Constitutional Reform Act). Lord Woolf is no doubt listening closely to this question. May I ask you this, on what sort of issues do you envisage this new mechanism being exercised? Do you see it in your mind as a rarely used power or would you welcome a more routine and regular use of the mechanism? The written representations will be to Parliament rather than to the Government, but do you envisage that the Government will often need to respond formally in some way?

Lord Falconer of Thoroton: The sorts of issues that I would envisage the new mechanism being exercised for would be serious issues only. It would be, in my view, a rarely used power; it would be used for issues that touch and concern in particular the independence or the position of the judiciary. So, for example, if there was a proposal which the Lord Chief Justice regarded as affecting the independence of the judiciary (for example something that affected their terms and conditions in a way that he or she regarded as undermining their independence). It is that sort of issue. Or, in a very extreme case, if the Lord Chief Justice thought the resourcing of the court system was such that there could not be a properly functioning court system, that would be another sort of issue that could be raised. Or, if the Lord Chief Justice thought there was undue interference in the appointments system (which is now handled by the Judicial Appointments Commission). Those sorts of issues, as it were very, very serious issues, the representations to Parliament being the nuclear option, because almost invariably the sorts of issues will be issues that are primarily with the executive and I would envisage that prior to representations being made to Parliament those
issues would have been raised between the judiciary and the executive and there would have been a lack of satisfaction in relation to those debates.

Q62 Lord Windlesham: Could I ask you, without compromising the need to preserve ministerial discretion in these matters, did you have difficulty with your ministerial colleagues in persuading them that judges should still be in the House of Lords, this strange situation which has arisen for historical reasons? Or is it accepted that this is the way things work in this country?

Lord Falconer of Thoroton: I do not recall having difficulties. Without breaking any confidences, my ministerial colleagues have a variety of differing views about the House of Lords. By and large I find that most of my ministerial colleagues’ views on the House of Lords do not focus on the judicial element in the House of Lords; there are a lot of other, more significant issues as far as the House of Lords is concerned which they tend to stop at before they get to the judges. They have not seen problems in relation to the judges in the House of Lords particularly. The issue about the judges coming out of the House of Lords was to do with the principle of whether or not you should have a supreme court and they were supportive of that principle.

Q63 Lord Carter: I am not entirely clear on this point. There was discussion when all this was going on about having either a select committee or a joint select committee which would be there to receive the representations. In the absence of that it seems to me now that your annual visits to this Committee and other representations will do, if they used the nuclear option and referred to Parliament, not the Government, who would respond? Presumably Parliament hands it over to the executive to respond.

Lord Falconer of Thoroton: I would have thought there would have to be a government response. Can I just pick up on one thing? As a matter of practice the Constitutional Affairs Select Committee in the Commons has, from time to time, had as witnesses senior members of the judiciary. Quite recently a number of family judges came and spoke about the extent to which family proceedings should be public. That seems to be a classic issue in which the judges have a view because they are extremely used to knowing what the effects of having press or public in would be. I believe this Committee has, from time to time, had judges before it as well. Lord Woolf will be better able to say this authoritatively than I, but in the course of the discussions we had during the passage of the Constitutional Reform Act there was absolutely no hostility on the part of the judges to the judges regularly giving evidence to committees in Parliament as long as it was about issues that did not touch on individual cases and was not drawing them into politics. Lord Woolf himself has given evidence to various select committees; I think Lord Phillips has given evidence here.

Q64 Chairman: As a matter of record, if I could interrupt, we have only had Lord Chief Justice Phillips in front of this Committee.

Lord Falconer of Thoroton: Yes, but other judges have gone to the Constitutional Affairs Select Committee in the other place. This is not the only route and by large there does not seem to be that much difficulty about it. It is one of those areas where it is easy to reach agreement.

Q65 Chairman: It would probably be a pity if one were to think of Parliament’s role in this greater separation of powers between the three arms of the constitution if Parliament’s role were thought of as the nuclear option because there may well be a point at which parliamentary accountability is helpful and not simply a last resort.

Lord Falconer of Thoroton: I think there is a world of difference between Parliament being quite legitimately critical of ministers for doing things that Parliament might regard as offending against constitutional principles or the independence of the judges and the Lord Chief Justice on the other hand taking advantage—we assume legitimately—of a particular power to say, “What the Government proposes is so difficult for me that I feel I have to tell you, Parliament, why I object to it”. Indeed, I think that if the representations were used on a routine basis—which I am quite sure would not be the intention—then I think that would greatly reduce the effect of the power. You want the power to be used in circumstances where, if it is used, the constitutional ramifications are such that you would want the representations to be acted upon. That, inevitably, involves using the power, I believe, very sparingly.

Q66 Chairman: I think we may, in different ways, be saying the same thing, that a normative lower key method of communication might be valuable.

Lord Falconer of Thoroton: Yes.

Q67 Lord Rowlands: When senior members of the judiciary express concerns to the Government, how open and transparent should these be?

Lord Falconer of Thoroton: I think this goes back to the questions I was being asked about whether judges should make public their concerns about policy. I think there should be detailed discussions privately on particular issues. By and large I do not think they should be made public. If they are made public you do not want to create that question in the public’s mind: “Do the judges like this law or not?” The success of our system is that judges do not do politics;
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they simply give effect to the law in an independent way.

Chairman: Lord Woolf, if you would like to come in on this round of questioning you would be extremely welcome.

Q68 Lord Woolf: I can indicate that what the Lord Chancellor has said very much accords with my own views, particularly with regard to putting a statement before the House (or both Houses) is undervalued it seems to me if it was used other than for issues of constitutional importance in the eyes of the judiciary. As I understand it, the Lord Chancellor agrees with me about that. Do you see as a second part of that power the related power which is dependent on convention that in appropriate circumstances the Chief Justice can ask to see the prime minister to express his concerns?

Lord Falconer of Thoroton: Yes. Of course the Lord Chief Justices can do that. Whether it is part of the constitution or whether there is a prime minister in the world who would refuse to see the Lord Chief Justices I do not know. On the basis that it is used sparingly, yes.

Q69 Lord Windlesham: Has it been done in modern times and, if so, on what issue?

Lord Falconer of Thoroton: I am aware of it being done on two occasions, once during the course of this Government and once during the course of the previous Government. I will not say which, but one was completely unsuccessful and one was successful.

Q70 Chairman: What do you mean by “successful”?

Lord Falconer of Thoroton: The Chief Justice said that they disagreed with this and they wanted this and that happened. The other one they said the same and the Prime Minister said, “I’ve listened to what you say but I am sorry, I am continuing with the course I have adopted”.

Q71 Lord Windlesham: Was this done in confidence?

Lord Falconer of Thoroton: Obviously the content is in confidence, yes.

Q72 Lord Windlesham: The fact that there had been discussions or intervention, was that known?

Lord Falconer of Thoroton: It may well have been done in confidence but it certainly became known on both occasions. It was reported widely in the newspapers on both occasions. It was intended to be secret. I am quite sure.

Q73 Lord Carter: In the debate on the ouster clause in anti-terrorism, I have just forgotten how that got into the public domain. Was that a statement by Lord Bingham? Was it a representation?

Lord Falconer of Thoroton: The ouster clause was not in terrorism, it was in the Asylum and Immigration Bill and it was actually in the bill and I think the then Lord Chief Justice, Lord Woolf, made a number of public speeches complaining bitterly about the ouster clause. That was a very, very public debate. You can check that later but I think that was broadly the position and then we withdrew the clause from the bill between the Commons and the Lords.

Q74 Chairman: This infrequent event of the Lord Chief Justice wanting to see the Prime Minister, would you expect that to be done through the Lord Chancellor or directly?

Lord Falconer of Thoroton: I think the office may facilitate the arrangement but the intention is that the Lord Chief Justice should speak directly to the prime minister. I suspect it is partly to do with the fact that they may not be getting satisfaction from the Lord Chancellor at the time; I am pretty sure that could be the reason.

Q75 Lord Morris of Aberavon: The chiefs of the general staff, they have access direct to the prime minister.

Lord Falconer of Thoroton: Yes, quite.

Chairman: And the Archbishop of Canterbury.

Q76 Lord Peston: I think you have more or less dealt with the question I was supposed to ask you, it is about the problems arising from the inter-relationship between the Government, Parliament and the judiciary. Would I be right in interpreting everything you have been saying today that where these problems exist you personally see the way to deal with them as a rather informal approach, rather than starting to write new bits to the constitution in a very formal way.

Lord Falconer of Thoroton: Yes, subject only to this, that there is resting on the Lord Chancellor’s shoulders a responsibility to try to make them work so that there is a formal responsibility on him to try to ensure that they work. My experience is that because the Lord Chief Justice and the Lord Chancellor both have a responsibility—informal so far as the Lord Chief Justice is concerned but formal so far as the Lord Chancellor is concerned—by and large, because their motivation is for there to be peace rather than tension, it works.

Q77 Lord Smith of Clifton: Referring to our meeting last year, Lord Chancellor, I did ask you about your review of different voting systems in this country and you said you were undertaking it and your permanent secretary has since said to the Constitutional Affairs Committee that the report would definitely be published. Might I ask when?
Lord Falconer of Thoroton: You may ask when. As you can tell from the fact that this is a question being asked 12 months later, this is a most serious piece of work that is going on internally and it will be published; I reaffirm our commitment to that. I cannot give you a precise date, but I can tell you that progress is being made in relation to it.

Q78 Chairman: Can you give us an indication of the sort of timescale? Soon?
Lord Falconer of Thoroton: Not really. It will certainly happen. We have a manifesto commitment to it. I would not like to commit myself to “soon”, but within a reasonable time.

Q79 Viscount Bledisloe: Is the new system wholly in place or are there still parts of the judicial appointments that are being made under the old system?
Lord Falconer of Thoroton: It is not wholly in place. I am continuing to make judicial appointments in the old way where the process for a particular competition was half-way through, and that includes the High Court Bench (which I will continue until approximately spring of next year). Once spring is reached then I will completely relinquish any role, save in one area which is appointments to the House of Lords, which depends on the supreme court coming into force.

Q80 Chairman: Are you happy that it is taking until next spring for you to remove yourself from that?
Lord Falconer of Thoroton: I think it is an incredibly important thing to do, to get a whole new Judicial Appointments Commission in place and running. I think it is sensible for there to be a transition period that takes as long as it takes for it to happen. I do not think the right thing to do is to rush into it. I have tried to do it as quickly as is reasonable. For example, in relation to High Court appointments there was a competition in which people were urged to apply; we are still operating on that list. The Judicial Appointments Commission have advertised for new people to apply; they will not be ready with a list until the spring of next year so the sensible thing is that I continue to take responsibility for something that is not their work and then they take it over when they can.

Q81 Chairman: Are you able to tell yet what sort of impact this is having on the composition diversity balance of the Bench? Is it too early to tell?
Lord Falconer of Thoroton: The Judicial Appointments Commission started in place in April 2006, a few months ago, and they have made incredibly few appointments. It is impossible at the moment to tell what effect it has had. The main effect on diversity—remember that merit is the sole basis of appointment—is going to come from people being more encouraged to apply, increasing the pool of people who apply. I think it is too early to say what effect that has had.

Q82 Chairman: If you remember, this was a matter of great concern on all sides in the House that the quality of the Bench should not be compromised and yet the Government wanted there to be a wider pool from which meritorious candidates could be drawn. I realise it is early days, but can you take a view of how long it will be before you and the Judicial Appointments Commission between you are able to take a view of how successful you have been in balancing those two aims?
Lord Falconer of Thoroton: In the three and a half years that I have been making judicial appointments before the Judicial Appointments Commission has come in, I think there has not been remotely a dilution in quality—indeed I think it has gone up—and I think the pool has increased. If you look at the figures the number of black and minority ethnic judges and the number of women judges has gone up.

Q83 Chairman: There is progress but it is too soon to make any overall assessment.
Lord Falconer of Thoroton: I hope there will be continuing progress—I am sure there will be continuing progress—but there is a long way to go.

Q84 Chairman: Lord Chancellor, you have been very generous with your time. Thank you very much for your candid, sometimes provocative, answers.
Lord Falconer of Thoroton: Thank you for having me.
WEDNESDAY 6 DECEMBER 2006

Present
Bledisloe, V
Goodlad, L
Holme of Cheltenham, L
(Chairman)
Lyell of Markyate, L
Morris of Aberavon, L
Peston, L
Rowlands, L
Smith of Clifton, L
Windlesham, L
Woolf, L

Examination of Witnesses

Witnesses: Ms Clare Dyer, Legal Editor, The Guardian, Ms Frances Gibb, Legal Editor, The Times, and Mr Joshua Rozenberg, Legal Editor, The Daily Telegraph, examined.

Chairman: Good morning and welcome. Thank you very much for coming to share your insights with us; we are very grateful. As you know we are doing a short inquiry into the relationships between the judiciary and the executive in the new post-reform situation in which we now are and we are trying to see what role, if any, there is for Parliament in that as well. It is good to have the chance to talk to distinguished doyens of the legal journalism profession of the sort we have here. I should just say that this evidence session will be televised and also I have to ask my colleagues whether they have any declarations of interest to make before we start. I should declare that I am Chairman of the Hansard Society for Parliamentary Government. Are there any other declarations?

Lord Woolf: I declare an interest as a former Chief Justice who still sits as a judge.

Q85 Chairman: Thank you. I should also say that a transcript of the evidence will be available for you to look at afterwards. I do not know if any of you would like to make any sort of opening observations; if not we will go straight into questions. If there is something that each or all of you would like to say, now is a good moment to do it.

Mr Rozenberg: I would just say that I did write something about this subject in response to some draft questions from your learned clerk which appeared in The Telegraph on 20 October. By all means, if that is of any use to you, please take that as my evidence. Apart from that I think all we wanted to say was that it is going to be rather difficult for us to report this session, so we are in a rather unusual position.

Q86 Chairman: To start the questioning, obviously our focal interest is the ways in which the news media portrays judges and, when there are these periodic spats between ministers and judges, the way they are reported. I wonder in your own careers—particularly that part of your careers as legal editors—how you perceive relationships having changed between the senior judiciary and the news media, given that you have had a very great change in the reality of what you are reporting in terms of the relationships. How do you perceive the changes in the way the news media report it? Perhaps I should say, do not feel obliged all of you to respond to every point, but if you have something that might help us we would be grateful.

Ms Dyer: Perhaps I could start off with the relationship between the news media and the judges. My career goes back to the early 1980s; the Kilmuir Rules go back to 1955 and the Lord Chancellor at the time, Lord Kilmuir, was asked by the BBC to allow judges to take part in a programme about famous judges of the past. He wrote a letter back saying that judges should not appear on the wireless or on television without the consent of the Lord Chancellor. It developed that judges did not speak to the media because of course they knew that if they asked the Lord Chancellor the Lord Chancellor would say no. Lord Hailsham continued that tradition and it was not until Lord Mackay became Lord Chancellor in 1987 that he, in his first interview, said that the Kilmuir Rules no longer apply and that judges were free to decide themselves whether to speak to the media or not. Since then judges have participated a lot more in discussion in the media and have taken part in programmes. Lord Chief Justice, Lord Taylor, was on Question Time on television and of course Lord Woolf, when he became Lord Chief Justice, was very media friendly and gave regular briefings. To some extent it depends on the Lord Chief Justice of the time. I think Lord Phillips has not yet given a media briefing, he has just given one interview. However, the judges themselves have become much more forthcoming and are interviewed. I did a series of interviews last year with judges about a very political subject. Traditionally they have not spoken on politics, but in this case they spoke on conditions of anonymity and were very, very forthcoming indeed about how they felt the Government was trying to marginalise them with a series of acts which were reducing their discretion.
Q87 Chairman: That last point is exceptionally interesting. Are we going to move in the same direction as the parliamentary press gallery and lobby terms? Are we going to have judges giving deep background briefings but strictly non-attributable that you would then write stories about?

Ms Dyer: I have done that since then on another issue which now escapes me. I have spoken to a number of judges since then.

Mr Rozenberg: I wrote a story a week or two ago saying that senior judges were concerned about legislation which has been passed and which is due to come into effect. I did not name the judges but two judges had spoken to me spontaneously and independently expressing concern. I do not think it is going to be particularly widespread but one does see judges informally more and more and sometimes if there is something that they are concerned about they do in fact talk about it.

Ms Gibb: Can I go back to what Clare was saying at the beginning on the historical context? I think in 20 years, as Clare was saying, it is quite a change not just with the Lord Chancellors and the Kilmuir Rules but actually a change in the attitude of the judiciary following Lord Lane’s tenure. He very much took the view that judges should just say what they had to say in court and should have nothing to do with the press. In a sense that really brought the whole issue to a crisis because he was quite widely criticised—unfairly to some degree—but partly that emanated from the stance he took. Following that Lord Taylor took a distinct decision to open the whole thing up, to do the Question Time that Clare has mentioned and to do press conferences, interviews et cetera. It was a policy decision. Some feel that he actually went too far, that the Question Time performance was a mistake because there you had a senior judge talking about matters beyond the criminal justice or civil justice system and discussing policy matters. Following that I think there has been a bit of a rowing back as well and now we are at the position where I think judges are trying to find a middle way, not quite back to the Question Time, but how do they, in the new regime, have a relationship with the media?

Ms Dyer: I think that is true of the Lord Chief Justice but I do not think things have changed with the individual senior judges. I think they are as forthcoming as they were previously.

Mr Rozenberg: I think it is very significant that the present Lord Chief Justice has not had a single press conference in more than a year. Lord Woolf, when he was Lord Chief Justice, followed the practice of his immediate predecessors and did speak to the media. Lord Phillips has quite deliberately chosen not to, which is all the more significant given his increased responsibilities about which I know you want to talk.

Q88 Chairman: The logic of a greater separation of powers is that the judiciary, like other important bodies in our society, has in a sense to make a case for itself. It has to constantly be validating what it does, the value of what it does and how well it does it to various stakeholders, notably the British public. I wondered what you thought of the Judicial Communications Office which presumably, if there were a press conference or if there were a press release, would be dealing with it. What more, if anything, should they be doing or are they doing?

Mr Rozenberg: What they could do is act as the public spokesman for the judges in a way that they currently do not do. Either the Lord Chief Justice or somebody deputising for him could and should speak out or, if he thinks that he wants to maintain a low profile for tactical reasons, the Judicial Communications Office could have a public spokesman who is trained, able and authorised to speak on the judges’ behalf without having to refer everything that he or she might say to an individual judge. In the sense that Sir Bernard Ingham knew Lady Thatcher’s mind, this spokesman would know what the judges were thinking without the need to check each individual comment that he or she might make. This would be a radical departure, but if the judges are going to follow the practice of the present Lord Chief Justice and not speak publicly when they are under attack, it might be a good idea to enlarge the role of the Judicial Communications Office beyond the routine of putting out press statements and organising press conferences.
authority from a senior judge or the individual judge concerned. They will gladly put out the judge’s sentencing remarks or any comments that the judge wants to be passed to the media but, as Clare says, they are not going to take a proactive role and explain something—quite unlike the press office of any department—the Department for Constitutional Affairs, for example—which would move quite rapidly to rebut something that ministers do not like. 

**Ms Dyer:** They need to be following the media, hearing what is on the radio and immediately get in touch with the judge, work out what the actuality is and put that out immediately.

**Q90 Lord Woolf:** That should happen; it is obviously highly desirable. However, I would question the practicality of it happening as quickly as that, speaking with some experience. First of all the press office has to find out what the judge actually said in his sentencing remarks. Without that it is very difficult to form a judgment. Secondly, there has to be somebody who is sufficiently familiar in that particular area of the law and I am afraid our law has become so complicated that there are problems in being able to make a clear answer. For the judiciary to issue something which is not correct can make the position worse. Do you think there is force in what I have just suggested to you and really you are asking something which the judiciary would not be capable of doing? I should add, the judges who could give authority would have to be of seniority and they are probably sitting in court.

**Ms Dyer:** I think it can and should be done within a day. You can get out the sentencing remarks that very day if it is a high profile, controversial case. That part of it should be possible. As for finding a judge who is available, that is where you need to build up a network of people who can and are able to issue a statement. It does not need to be long but it needs to be there. The Sweeney case was a perfect example of how damaging it can be to have that gap with nobody stepping in and in this case neither the Lord Chancellor nor the Lord Chief Justice actually said anything for two or three days by which time pages and pages of the story were running, particularly in the tabloid press.

**Q91 Lord Morris of Aberavon:** The case of Sweeney has been mentioned. There was a gap. The judgment was on a Monday; I was rung up on the evening of Monday and discovered what had happened in the course of Tuesday. I did 10 television and radio interviews but there was a complete gap from the Lord Chancellor. If you recall I think he made a statement first to defend the Home Secretary. Only lately, after the intervention of a junior minister, did he speak up. The correction of fact is simple; that could have been done. What do you expect this information office to do other than that?

**Ms Dyer:** They do not need to have huge expertise in wide areas of the law. The main area of controversy is sentencing actually. Most controversial cases involve sentencing. You could have somebody who knew about sentencing who was there for that particular purpose. They have about three press officers I think so you could have one person there who knows about sentencing and who is in contact with the judges. Surely with technology the sentencing remarks could be put through the intranet. You can anticipate to some extent which cases are going to give rise to controversy.

**Q92 Lord Lyell of Markyate:** The Sweeney case almost tested the system to destruction for a few days. Whether or not the responsibility is on both sides, you pointed out what the Judicial Communications Office might in future do in circumstances like that, but was there not also a very immediate duty on the Lord Chancellor and on all ministers to abide by what is now the law about not criticising judges and being extremely temperate in any comment one makes on a judicial decision?

**Ms Gibb:** That case was unusual in that judges were under fire both from ministers and from the media and I think that neither party acted swiftly enough. In that case the Lord Chancellor should have stepped in much more quickly to defend judges in the face of some of his colleagues’ comments. Simultaneously the Lord Chief Justice could have given a short statement saying that the judge was acting within the law as set down by Parliament.

**Mr Rozenberg:** The context of that case was, as Lord Morris says, that the judgment was on a Monday but the previous day The Sunday Times had reported that more than 200 of Britain’s top judges had given unduly lenient sentences to criminals guilty of serious crimes, according to a list released by the Attorney General. There was already an appetite by Monday for lenient sentences and soft judges. The Sun started naming and shaming these judges. I rang up the Department of Constitutional Affairs to see if the Lord Chancellor was going to be speaking and I was told by a relatively junior press officer that given the constitutional position having changed and the Lord Chief Justice now being head of the judiciary it was a matter for the Lord Chief Justice to speak out, although I was then told that the Lord Chancellor had agreed to do Question Time on the television late that Wednesday evening and I was given to understand he might say something, but of course it was going to be too late for Thursday’s papers. The Lord Chief Justice was abroad in Poland, but even so more could have been done and it appeared to us that the Lord Chancellor was leaving the judges to swing in the wind, feeling that it was a matter for the Lord
Chief Justice to respond—which he felt he did not want to do, certainly publicly.

Q93 Chairman: Just moving on a little bit, you clearly are very potentially influential in shaping perceptions, and I wonder the extent to which jointly and severally you see yourselves—as I am sure all journalists of integrity do—as merely reporting as accurately as you can what is going on or whether you would concede that what you write and what is written in other sorts of newspapers how far that actually serves to shape the public’s perception of the judiciary and therefore whether all journalists who report on this sort of issue have any special responsibility over and above the general integrity of a good journalist.

Mr Rozenberg: I think we do have that responsibility. There is a limit to what we can do on our own initiative, although I think we all tried to explain to as many people as wanted to listen the basis of the Craig Sweeney decision. It so happened that yesterday the same judge, the Recorder of Cardiff, Judge Griffith Williams QC, passed a sentence of two and a half years for involuntary manslaughter. It was recalled by the news agency that he was in the judge in the Sweeney case and there was the makings of a soft judge (in quotation marks) story. “Was he not the judge in the Sweeney case?” people said. “Yes”, we responded to our news desks, but of course he was entirely vindicated in that case when the Attorney General decided not to refer the case to the Court of Appeal as unduly lenient because the Attorney General took the view that the sentence would not be increased by the Court of Appeal and indeed the sentence—or, to be more accurate, the tariff—was endorsed by the Lord Chancellor. I made it clear to my news desk that whether or not two and a half years was unduly lenient—and it struck me that it was not on the authorities in this sort of case—it certainly was not another example of a judge getting it wrong because the Recorder of Cardiff had got it right on the previous occasion. We do all the time talk to our news desks, and those involved, and explain how we see the stories as being different from the immediate reaction of those who have not been in this area of work for as long as we have.

Q94 Chairman: Do either of your colleagues have anything to add on that point?

Ms Dyer: I think that is right but I do think that the media do play a big role in how the public see judges, not only in this country but in other countries as well. I come from Canada and in Canada the supreme court has had a very bad reputation for a long time for being too interventionist just as the judges here in some quarters are thought to be too human rights based, too ready to allow things on human rights law that the public disagree with. Even among quite sensible commentators in Canada there was a view which has apparently changed now because the court recognised this and tried to do something about it in their judgments. It is certainly not new. I remember back in the time of Spycatcher one of the tabloids ran a front page of the judges upside down, the ones who had ruled in favour of the Government and it said, “You fools” at the top of it. I think there is a lot of incorrect reporting about the judiciary which does play a big role in how the public see the judges.

Q95 Lord Goodlad: I would like to ask how the witnesses see the perceptions of the readers of your respective newspapers of the role of the judges and how, if at all, that has changed in recent years.

Ms Dyer: Judges were seen to be too right-wing in the time of John Griffith who wrote The Politics of the Judiciary back in the time of Thameside (Lord Woolf said that when he died “Thameside” was bound to be written on his heart). They were then seen to be too right-wing generally. Now they are seen to be too left-wing, too bleeding liberal, too wet.

Mr Rozenberg: Too pro-human rights and too soft. Too soft on sentencing is how they are perceived.

Ms Dyer: At one time they were seen to be terribly establishment minded and they would always rule on the side of the Government and to some extent that is true. Now they are seen to be much too liberal. The Government tries to get tough and do things to help the public and the judges sabotage it. That is the general view.

Q96 Lord Goodlad: Is this reflected in readers’ letters to you and your news editors?

Ms Gibb: Not to us.

Q97 Lord Goodlad: How do you reach that impression?

Mr Rozenberg: It is difficult but I think it is the public view that you get reflected from news desks. Just as there is a popular myth that judges in this country bang gavels, these myths are very hard to dispel. Stories fit into a particular template. The story of a soft judge letting somebody off too lightly fits into that template very well and therefore tends to get prominence in a newspaper because it is a story that a news desk can understand. If it is something particularly obscure, however interesting to the lawyers, but does not fit into a preconceived category like sentencing or like ministers being successfully judicially reviewed and being found to be acting unlawfully it is more difficult to get that sort of story into the paper.

Q98 Lord Rowlands: I wonder if I could broaden the discussion. Is this discussion we are having now reflecting the sea change taking place between us with the executive and the judiciary, between Parliament...
and the judiciary? I read with interest Vernon Bogdanor’s lecture on “Parliament and the Judiciary: The Problem of Accountability”. He says this: “that judges are increasingly making decisions, which used to be made by politicians, and which many will characterise as political. The decisions made by judges tend to limit the options available to government. It is very possible, therefore, that there will be greater conflict between the judiciary and Parliament”. Has there been a change in the whole relationship beyond the issue of just the way it is being reported?

Ms Dyer: Yes. The law has changed and the judges are only interpreting the law.

Q99 Lord Rowlands: So you think human rights legislation has been the watershed in this?

Ms Dyer: Incorporating the European Convention of Human Rights into our law means that the judges have to go further than they previously might have gone in deciding something. It gives them more discretion because they have to see whether something complies with article two, article three. It has brought discretion in judicial review.

Ms Gibb: That was the previous change, the growth of judicial review, which really brought the judges into the limelight and made them have to adjudicate on more politically sensitive decisions.

Mr Rozenberg: It is interesting to speculate on what would have happened if the Human Rights Act had not been enacted, whether judicial review would have grown anyway. I think that it might because if you look at the period up to the general election of 1997, you saw the then Labour Opposition very cautious about opposing what was going on for fear of not winning the 1997 election and you saw to some extent the judges under Lord Taylor stepping into the gap and acting as a sort of unofficial opposition I think. You have seen that subsequently under the present Government when again the Opposition has been reluctant to oppose too much and the judges to some extent see themselves as defenders of the public interest.

Ms Dyer: If a government has a big majority—as this one has, or certainly had—and tries to exceed their powers or push their powers as far as they can go, then the judges have to step in and it is not because the judges are suddenly exceeding themselves trying to oppose the Government necessarily, it is because the Government is pushing at the boundaries and that is what these judges I spoke to were complaining about. For instance, with the ouster clause that they were proposing when they were trying to fetter the courts’ ability to do anything, to have any say about immigration and asylum decisions, to question the legality of these decisions, that was something that judges would have done something about if they had not stepped back and decided not to go ahead with it.

In things like the control or detention without trial this Government has tended to push its powers further perhaps than some other governments, also with mandatory minimum sentences.

Q100 Lord Peston: The response of some of the media at least to sentencing and other things could fairly be regarded as feverish. Am I right that it is much more feverish than it used to be? It has grown remarkably. This also relates to Lord Lyell’s question earlier about ministers, when I was young it would be inconceivable for a minister to start launching an attack—literally inconceivable—on a judge: it now happens. The world in that sense really has changed.

Ms Gibb: I think there are two things about that. People now obviously challenge any authority figures and it is not off limits to attack anyone in authority in the way it might have been 30 years ago. Secondly the sentencing framework that judges are currently working under requires them, as you know, to impose sentences. The discretion is fairly fettered and a lot of these sentencing controversies arise because judges have applied the law—as we said earlier on in the Sweeney case—but that is not necessarily explained fully; the press or the media do not necessarily explain it fully and the public do not understand or want to understand that someone is coming out half way through the sentence. It is the framework they are operating within and the lack of the explanation as to how they reach the decision because it is immensely complex.

Q101 Lord Peston: Should we assume on this Committee that we have lost respect for judges, it has gone forever?

Ms Gibb: I prefer to think about it as public confidence. Respect is a bit of an old fashioned word and I think people can still have confidence in, say, the medical profession—call it respect if you like—whilst they can still be open to scrutiny. We have had Harold Shipman and we have had other medical controversies which have not damaged the standing generally of the medical profession in the eyes of the public. I think you can have respect and/or public confidence while having greater public scrutiny and criticism.

Mr Rozenberg: I think the judges have to work for that. I do not think they can assume, as perhaps they used to, that it comes automatically with the role and with the knighthood. That is why public relations is so important and that is why perhaps it is in the judges’ interests for them to be doing more in order to retain—and even regain—the public’s confidence.

Chairman: Listening to Ms Gibb, it may be more appropriate to say that it is deference that has gone, but that does not mean it is not possible to have respect. It is notorious that all institutions now have a sort of deference deficit, including this august House.
Q102 Lord Peston: Could I just make sure I understand something that was said? You introduced this, Ms Dyer, when you were talking right at the beginning in response to somebody. Are you saying that Lord Phillips really ought to be taking a much stronger role in this? That seemed to be more or less what you were saying but you did not quite say it in those terms. Even if we cannot act as quickly as you said, as Lord Woolf has pointed out, someone ought to be speaking up much more now saying, “These people are doing a very difficult job in very difficult circumstances. They are trying very hard to play according to the rules one way or another and some of you ought to shut up” (that is perhaps a bit harsh). Ms Dyer: Now that they have their own communications office with several press officers they should be doing this. It was done on a fire-fighting basis by the Lord Chancellor’s Department previously, but they ought to be anticipating and they ought to have a system geared up to respond quickly to these emergencies.

Q103 Chairman: We are left with Lord Woolf’s problem. I remember the evidence to us from Lord Chief Justice Phillips was that he sometimes found it difficult to speak for all judges at all times and he had an extremely senior and individualistic profession by definition. It would be difficult for a spokesman to speak up. Ms Dyer: The spokesman would basically be giving information; he is not speaking for the judges as such. He is giving correct information to correct inaccuracies and it is not hard to anticipate the areas of controversy. Ms Gibb: I think it should not all fall on the shoulders of the Lord Chief Justice. Half a dozen senior judges could be ready to be on Newsnight or whatever so that we always had the judicial view put in general terms even if they do not know the specific details of the case. There are always general points that can be made. Mr Rozenberg: It is not that difficult. When these controversial decisions emerge I sometimes get calls from broadcasters asking if I will appear on a radio or television programme and the first question is, “Why has the judge done this?” It is not my job to speak for the judges but I can at least put some of the context before the public and if I do it then a judge can do it a very great deal better even if he or she is not familiar with the precise details of that case at that time.

Q104 Lord Woolf: I am very interested to hear what you say, but could I first of all ask you if you think the establishment of the Judicial Communications Office has improved the position? It is clear from what you say that it is not satisfactory, but do you think there is an improvement? Ms Gibb: I think it is an essential first step as a facilitator if nothing else to put out speeches, particularly now that the judges have their own empire.

Q105 Lord Woolf: The second thing that I think comes out of what you are saying is that that information office should know that sentencing is the hot topic and they should really go on a course or have somebody among them who knows something about the intricacies of sentencing so that they can give an authoritative explanation of what law requires. Ms Gibb: Them and/or the judges themselves.

Q106 Lord Woolf: You would like to see a judge or judges being always available to make a clarifying statement. The last point is a question of whether it is feasible under the pressures which the judiciary face. If they are going to be good judges they must also sit as judges. Mr Rozenberg: The compromise would be to have a lawyer available because the people in that office are press officers trained in journalism but they are not trained as lawyers. Lord Woolf: That is a very clear message, if I may say so.

Q107 Lord Lyell of Markyate: Just glancing at the big picture and looking back over the last few years, we had Lord Irvine who stood up strongly for the judges, who was then dismissed and we had the Constitutional Reform Act 2005 and a re-drawing of the lines, but the Constitutional Reform Act quite clearly puts a duty upon the Lord Chancellor and ministers to uphold the independence of the judiciary. If that does not happen, is it not more effective if the Lord Chancellor steps in quickly rather than expecting the Judicial Communications Office or the Lord Chief Justice to step in? Should not each control their own? Ms Gibb: Yes, I think they have distinct roles. I think that is absolutely right. The Lord Chancellor should be dealing with errant ministers but when judges are under fire or being misunderstood by the media or whatever the Lord Chief Justice should step in. They both have their roles to play.

Q108 Viscount Bledisloe: Just taking up what you said about there being a lawyer, it is going to need more than that, is it not? As I understand it at the moment you have press officers putting out statements and that sort of thing but who do not have the status to make pronouncements. You are really going to need at the head of this office somebody of the same status as the judge who can say, “I do not know the facts at the moment, I will come back to you”, pick up the telephone, get the judge himself
who did the thing saying, “I must talk to you urgently”, get an answer and ring back. The press officers, I am sure, do not get to speak to the judge, they get to speak to the judge’s clerk.

Ms Dyer: They do speak to the judge.

Mr Rozenberg: Yes, they do speak to the judge but they are maybe less able to speak for the judge and understand what the judge is saying, and they are certainly not able to speak on behalf of the judge without having first spoken to the judge, whereas a lawyer would be able to understand the point rather more quickly and before speaking to the judge would be able to say something rather more authoritative than a press officer can who has to wait for a statement from the judge and is simply reduced to putting that statement out.

Q109 Viscount Bledisloe: He is not going to have to be a 25-year-old who was called two years ago; he is going to have to be somebody of considerable seniority who can punch his weight and get the judge to really talk to him.

Ms Gibb: Alternatively you could use recently retired circuit judges. I think the Judicial Communications Office has been considering this, a network of recently retired circuit judges who are good with the media.

Q110 Viscount Bledisloe: That is what I say, somebody with status.

Ms Gibb: Yes. There are one or two now who tend to be wheeled out.

Chairman: Perhaps we should stop there before we draw up a detailed job specification.

Q111 Lord Smith of Clifton: Given the broad bipartisan nature of British politics in which there is not really much difference between one party and another, do you think there is a tendency on the part of editors, sub-editors and journalists to try to put up the ante in this respect to try to put back a bit of the poetry and the contest into British politics which is lacking in the fields of economics and other things? In other words, do you think that the reporting of legal matters and judicial decisions has been seen as a compensation for the rather boring nature of the rest of British politics?

Ms Dyer: Things tend to be seen as conflict, do they not? News desks love conflict and conflict between judges and the executive is seen as more interesting. A judge deciding such and such a thing which happens to be not quite the way the Government wanted it is played up as a snub for the home secretary. Mind you, ministers play into that nowadays in the way they react to court decisions against them.

Chairman: That is one of the aspects that may be worrying about the off-the-record briefing possibility that you started with because it makes a perfectly satisfactory headline, “Judges’ fury at minister’s statement”. What is that based on? It is based on an off-the-record conversation—which is perfectly legitimate—which a good journalist seeking to make a conflict story would feel entitled to go on. Off the record someone might say, “I’m hopping mad and all my colleagues are as well”, then you have a “Judges’ fury” headline, have you not? There are some difficulties about the informal thing for the judiciary, I would have thought.

Q112 Lord Windlesham: I would like to probe, if I may, the relationship between the views of individual journalists and what might be regarded as the general outlook and policy of the paper as a whole. It is a delicate matter here.

Mr Rozenberg: When I joined The Daily Telegraph from the BBC in the year 2000 I was not asked whether I shared the political outlook of the paper as it then was. I suspect that Charles Moore who offered me the job assumed that I did not share the political outlook of the paper as it then was and I have not been asked since. I do not think I do support everything that is in the leader columns of the paper and I am pleased to say that that is not a prerequisite and it does not seem to cause me any problems. I can say things on the weekly page that I write which express my view and they may well be different from the approach of the paper particularly on, for example, human rights, and the paper seems to respect that which is exactly as it should be and very gratifying.

Q113 Lord Windlesham: All three of you are of course from what might be regarded as the more serious end of Fleet Street and therefore your own individual way of operation probably differs, nevertheless you are all in the same sort of business. Is this true of the mass circulation press, sensationalism being one obvious aspect of it?

Ms Gibb: I think it is. To answer the first question, I think Joshua is right; I do not think individual views come into it. I think we all have to work to a news desk agenda and above that in each paper there is the framework and the philosophy and the particular interests of that editor and above him the owner. That is quite removed, I have to say. We might all write the story in a similar way but the actual prominence it gets—this is the same with the tabloids—and the tone of it and the space and so on and whether it carries an editorial, that is what makes a difference. That is decided by the paper’s own interest to a degree.

Ms Dyer: I am in the same position as Joshua; no-one has ever asked me about my politics or my views.
Q114 **Lord Windlesham:** I was not thinking entirely of that, but there is the style and the underlying quality of sensationalism which is a crucial part of the mass circulation. Reporting crime is sensational.

**Ms Dyer:** If you write for *The Daily Mail* if you write the same story as we are writing you will write it in a completely different way. You have to follow the paper’s agenda I would say.

**Mr Rozenberg:** I think that is right. Other newspapers do have a view of the world and in their selection of the news that is reflected.

**Ms Dyer:** Not only in their selection of news but in the way they treat a news story.

**Mr Rozenberg:** I agree. It might be difficult to work on a paper that gave one a very strong direction as to the way in which that paper expected the story to be presented. I do not think any of us is in that unfortunate position but it would be very difficult were we told by a news editor, “This is how we see this story, make sure you fit that template”.

**Ms Dyer:** If you worked on *The Daily Mail* I do not think you would even have to be told that, you would know you should write the story.

Q115 **Chairman:** You have mentioned conflict but of course there is another respect in which the tone of a popular newspaper likes to personalise the news so instead of reading about Judge A you read about a 52 year old father of five, passionately interested in ballroom dancing as though that were in some way relevant to his judgment. That, of course, is part of the pop culture, to find personalities through which people can relate to public events. I do not know whether deference or respect are involved here, but it certainly makes it quite difficult for figures of authority when they are put in that intensely personalised frame.

**Ms Dyer:** Figures of authority. I do not think people think in that way now. People want to know. Papers are becoming personalised.

**Ms Gibb:** I think it is unavoidable.

**Ms Dyer:** There is human interest; people want to know more about the people they are reading about. They do not see them as remote sphinx type figures as the judge used to be thought of in the past.

**Ms Gibb:** I think Lord Falconer said recently that judges ought to be robust enough to be able to withstand that kind of comment.

Q116 **Lord Morris of Aberavon:** We would like to hear the advice you would give to the Government about handling human rights. The DCA reviewed the Implementation of the Human Rights Act in July and concluded that “negative and damaging myths prevail about the Human Rights Act” and suggested that the media were responsible for this. Do you agree with this assessment? What advice would you give to the Government in tackling it in a practical way, tackling the myth that has apparently arisen?

**Mr Rozenberg:** I am not sure it is entirely our job to be advising the Government on this or even this Committee. To some extent the Government has its own advisers and they should be capable of telling it how it should fight its public relations campaign. The Government is perfectly entitled to complain if we perpetuate these myths, but I do not think it is for us—I speak personally on this—to help the Government out of a problem that it finds itself in.

**Ms Dyer:** And partly through its own creation because one or two home secretaries have themselves floated the idea of getting rid of the Human Rights Act or even coming out of the European Convention. The Lord Chancellor knows but did not say for a long time that it is impossible because part of belonging to the European Union is that we continue to comply with the European Convention on Human Rights and if we abolish the Act it would simply mean that people would just go to Strasbourg. The Lord Chancellor, in my view, has not been proactive enough and is only recently coming to the fore on this issue. He should in the past have stopped all this speculation. The Prime Minister himself speculated on it. They must know that it is an impossible thing to do, so why speculate on it as if it would be a good thing.

**Mr Rozenberg:** I am not sure the Prime Minister does know but he famously got it wrong.

**Ms Gibb:** The Joint Human Rights Committee recently in their report in November actually criticised the Prime Minister and ministers, as you know, for the way that the Act is being reported. It was not the media; they said it was ministers. I think that is what the Government should be doing, bringing ministers into line on it. They are peddling the wrong image of their own legislation basically.

**Ms Dyer:** The Lord Chancellor and the Attorney General have been making speeches saying that the Human Rights Act is a wonderful thing, et cetera, but it does not seem to have gone to the other departments.

Q117 **Lord Morris of Aberavon:** I take your point that your role is not to advise the Government. Can I put it another way? We are trying to write a report, what advice would you give us as to what to put in that report to correct the myths which apparently have grown?

**Mr Rozenberg:** The Government has published documents, reports and papers setting the record straight. The Government has passed advice to officials who may not have legal training not to exaggerate the significance of the Human Rights Act, which is perfectly sensible. The Lord Chancellor writes letters to the newspapers and appears on radio and television to correct myths. I think Frances is
absolutely right, if the Prime Minister can say in print that the Human Rights Act allows primary legislation to be overturned by the courts as he did then it is not up to us to try to put it right. If he cannot get it right, it is not surprising that papers sometimes mis-report it.

Q118 Lord Lyell of Markyate: We have covered a certain amount of ground that I wanted to ask you about. I think we have agreed that both the Lord Chief Justice and the Lord Chancellor have important but distinct roles in the protection of the independence of the judiciary. If we look back about six months to 19 June this year the present Lord Chief Justice, Lord Phillips of Worth Matravers, wrote to circuit judges to express his “great sympathy for those judges who individually have been singled out for intemperate personal attack” in relation to sentencing. He went on to say that “personal and unmerited attacks on the characters of individual judges can only damage the public’s understanding of and confidence in the criminal justice system as a whole”. Do you agree that such reporting damages public confidence in criminal justice?

Mr Rozenberg: Yes, I think there is truth in that. This of course followed the Craig Sweeney episode that we have just been talking about and following his unwillingness to speak up publicly on behalf of those judges, although the letter was inevitably leaked as I expect he thought it would be. The point to emphasise is the word “reporting” in your question. There is a limit to what we as reporters can do on our own initiative. Yes, we can write columns; yes, we can do broadcasts, but our main job is to report what other people say and for that we rely on people in authority speaking up on their own behalf.

Q119 Lord Rowlands: In your answers to other questions we agreed that there was a changing role for the judiciary and the whole relationship between the executive and judiciary had changed with regards to legislation and trends. This raises the question that if judges are going to play this wider role, in what form should they be accountable? Again I refer to the Bogdanor lecture where he argued that it would be perfectly reasonable, for example, for select committees of Parliament to ask a judge about his judicial philosophy or general attitude to law and so forth. Indeed, judges do give lectures and do give their views. How accountable do you think in the new environment should judges be and what form should that accountability take?

Ms Dyer: The main thing about judges is that they have to be independent so in terms of their decisions they are not accountable. They are accountable to the head of the judiciary, the Lord Chief Justice, for their behaviour but in terms of their decisions they are independent and their decisions can be overturned on appeal if they are wrong. Ministers keep saying “these unaccountable, unelected” judges as if they should be accountable to somebody, but in fact they are there to uphold the rule of law.

Q120 Lord Rowlands: That would have been a standard reply in any age. Do you not think that the change in environment and the way in which the judiciary are playing their new role in human rights legislation and so forth does raise the issue of accountability?

Ms Dyer: I do not think it makes it any different. I suppose they could be asked questions but they would be bound to give you fairly anodyne answers because if they strayed into areas where they gave their opinions on issues then they would be in danger of being taken off cases because of apparent bias, as happened to Lord Steyn in the Belmarsh case because he had previously expressed a view on an issue in the case.

Ms Gibb: The only area I can see now where they are going to be increasingly accountable—I do not think it is incompatible with independence—is over the way they are appointed, because of the setting up of the new Judicial Appointments Commission which obviously requires annual reports to Parliament and so on, and the whole method is transparent and open to public scrutiny. The whole thrust towards a more diverse judiciary is another factor which should improve public confidence and respect, to come back to that earlier question. I think it is not incompatible with being independent: it reinforces it in some ways.

Mr Rozenberg: I can see dangers. Nobody wants to go down the road to the extent that you have a candidate for appointment as, perhaps, Lord Chief Justice being questioned by this Committee as to his views and his suitability for appointment as you would see in the United States. On the other hand, I do not think there is any harm in the public knowing a little bit more about the views of the Lord Chief Justice of the day once he or she has been appointed given that he has this important role as head of the judiciary, a role which we do not really understand. We have no idea how he is exercising that role. I know he has given evidence to this Committee but we do not know to what extent he is influenced by his officials, to what extent he works with his officials, how much of his time he spends on administration, what he sees his role as head of the judiciary as. I think these are questions that if he does not want to answer from us, the press, he should certainly answer from a committee such as yours and we should know a little bit more about him personally if we think that his personal views and his philosophy on life are going to affect the way in which he carries out his public responsibilities.
Lord Rowlands: You actually said earlier on that you thought they were liberal judges or the judges were more left wing; you characterised it yourselves at the beginning. That is picked up because of individual decisions, but in that sense judges are entering the political arena in many respects. By even limiting options government has they do limit and they do therefore enter political debate through judgments, therefore is it not reasonable that they can be criticised? Or is not reasonable that we should make them more accountable?

Mr Rozenberg: They would say they are not acting politically and they would say they cannot answer back. It is not as clear cut as those answers would suggest because, in the broader sense, what they are doing has a political impact and to some extent they can answer back. However, they are right to say that they are not politicians and should not be treated as politicians. Whenever they come into conflict with politicians—as the late Lord Taylor did with Michael Howard when he was Home Secretary in the years up to 1997—the judges inevitably come off second best because they do not have the political skills to engage with experienced politicians.

Chairman: I am afraid we are going to have to stop in a moment, but if there is anything that you have not said that you would like to say—anything burning but also brief—we would be extremely interested to hear it. You have covered a lot of ground; maybe we have covered everything. In that case, could I say on behalf of the Committee how grateful we are. It has been a very valuable session; thank you for being so candid and helpful.
**WEDNESDAY 17 JANUARY 2007**

Present

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Examination of Witnesses

Witness: MR CHARLES CLARKE, a Member of the House of Commons, examined.

**Q122 Chairman:** Good morning and welcome. Thank you very much for coming; it is much appreciated. Could I say that these proceedings will be televised and perhaps I could invite you, Mr Clarke, to say, for the record, who you are?

*Mr Clarke:* My name is Charles Clarke. I am Member of Parliament for Norwich South. I have served in government in various capacities, most recently as Home Secretary.

A good recent example of the last is the Appeal Court judgments upon the cases of the Afghan hijackers which successive home secretaries, including myself, have regarded as a tacit invitation to terrorist hijackers. The underlying cause of the problem is straightforward. It is that guilt for a criminal act can only be proved after the act has been committed. This means that arguments around the definition of intent, and how to prove it indisputably, become central. In such circumstances protection of the rights and liberty of a suspected prospective criminal often seem to take higher priority than dealing with the prospective criminal act however horrific. And, particularly since 9/11, the threats of terrible crimes have been shown to be real, notably in the case of the suicide attacks on July 7, 2005. Other threats have existed, and I have no doubt continue to exist, and these give rise to wholly understandable public concern. The huge pressure on the police and intelligence services to prevent such attacks before they happen requires a variety of techniques, some of which are criticised as an affront to basic civil liberties, not least in Parliament, and in this House. This is of course a legal minefield and a good recent illustration is the Appeal Court judgment handed down on 1 August last year, 2006, the details of which I have given you. This case essentially covered the extent to which the conditions set in a control order made by the Home Secretary amount to deprivation of liberty under the European Convention on Human Rights. The relevant legislation was the Prevention of Terrorism Act 2005, which I took through Parliament, and had been necessitated by a Law Lords judgment, handed down the day after I became Home Secretary, which declared that previous legislation to control some people suspected of potential terrorist attacks to be unlawful in certain respects. This Act was exhaustively debated in Parliament, not least by many members of this Committee over a period of months with the active engagement of many highly distinguished lawyers, and had been the subject of historic all-night sittings as Lords and Commons took different views. Once the Bill was enacted I, as Home Secretary, made...
certain control orders with the benefit of the highest quality legal advice from Home Office lawyers. These were the orders that were then overturned at least in part by the Appeal Court, meeting commendably—and I would say unusually—quickly after the initial decision. Moreover their judgment at paragraphs 27 and 28 of the judgment rejected the suggestion that the Court itself modify or direct the Secretary of State to modify, the terms of the orders in order to make it comply with the Appeal Courts interpretation of the European Convention. The Court stated that the Secretary of State has (and I quote from the judgment): “the power, should be decide, in the absence of a derogation order, to make new control orders. . . . If the Secretary of State decides to exercise this power, he will have to devise a new package of obligations imposing controls on the respondents. This is an exercise that the Secretary of State is very much better placed to perform than the Court.” I found this aspect of the judgment incredible. After the most intense Parliamentary discussions, followed by the Home Secretary’s decision taken on the basis of detailed legal advice, and then a series of legal actions up to the Court of Appeal, the Home Secretary is then simply asked to take another stab with no guidance whatsoever as to how the highest Courts would view the legality of his complicated and difficult decisions. In fact the Home Secretary then imposed new control orders and then on 15 September last year petitioned for leave to appeal against this Appeal Court judgment. Four months later we await the Lords decision on this petition. More than five years after 9/11 the legal and Parliamentary circus still moves on. I maintain that this is a ludicrous way of proceeding which dangerously undermines confidence in every aspect of the police and criminal justice system, at a time when the public first and foremost seeks protection against terrorist threats. I therefore argue that it is vital for the three constitutional arms—executive, legislature and judiciary—to discuss the best way to act in the circumstances. Such decisions should look for practical means of reaching a better process of decision on these matters and should not address individual legal cases. One possible outcome of such discussions might be to agree a process whereby the senior judiciary gives a formal opinion upon the extent to which proposals for legislation comply with the European Convention before Parliament debates the Bill, rather than possibly years later. I do not accept that the practical meaning of “upholding the rule of law” and its impact on the security of our society can be resolved only by the most senior judiciary, the Law Lords. As the Appeal Court judgment I mentioned earlier makes clear, the judiciary bears not the slightest responsibility for protecting the public, and sometimes seems utterly unaware of the implications of their decisions for our security. I regard it as disgraceful that no Law Lord is prepared to discuss in any forum with the Home Secretary of the day the issues of principle involved in these matters. The idea that their independence would be corrupted by such discussions is risible. In contrast as Home Secretary I was able usefully to discuss these matters with Mr Luzius Wildhaber, the Swiss President of the European Court of Human Rights in a way which could not prejudice the hearing of any individual case. I strongly believe that the attitude of the Law Lords has to change. It fuels the dangerously confused and ill informed debate which challenges Britain’s adherence to the European Convention on Human Rights. It is now time for the senior judiciary to engage in a serious and considered debate about how best legally to confront terrorism in modern circumstances. Thank you for the chance of making that opening statement.

Chairman: Thank you for that very clear and very trenchant evidence which is an excellent way to start our discussion this morning. Lord Woolf?

Q124 Lord Woolf: I find myself in a somewhat embarrassing position. I am very grateful to Mr Clarke for the generous remark he made about our personal relationship when I was Chief Justice and he was Home Secretary. However, we did have conversations, as he makes clear, and I would be anxious to try to elicit a rather different reaction from Mr Clarke because I think what he has said misunderstands the position of the Law Lords. However, having regard to the fact that we had had these personal conversations which were confidential, I feel I would only do so if Mr Clarke is happy that I should do so.

Mr Clarke: I am very happy for that.

Chairman: Would you like to intervene at some point?

Lord Woolf: If I may, yes.

Q125 Chairman: Thank you for that. Could I start with the specific suggestion you have made about the senior judiciary signing off, as it were, on bills in terms of their compliance with the European Convention at a time before parliamentary debate rather than years later? This assumes, of course, that the judiciary are dealing with the principle of legislation rather than with the practical effects. Could you just explain how you think that might work?

Mr Clarke: The very real difficulty that is faced is that at the moment the Secretary of State has to give a certificate to Parliament on the basis of advice from his or her lawyers about the compliance or otherwise of a particular piece of legislation with the European Convention on Human Rights. I did that on a number of occasions. To be candid, I was both confident in the statement I was making but I was...
also doing it on the basis of the legal advice I received from the Home Office lawyers. If necessary the Attorney General could be involved in giving further advice on that if that was thought to be advisable; it happened in some cases but not in others. The convention was that the essence of that advice could not be made public, even to Parliament. Indeed, the fact of that lack of publicity about that was a cause of parliamentary debate on a number of different occasions. We have a state of affairs where that was done. We then have the whole debate through Parliament with controversy about whether the Secretary of State’s certificate was or was not valid taking a long period of time. Then you get at a later juncture to a series of legal judgments based on the accuracy or otherwise of the Secretary of State’s statement about compliance with the European courts. So you can have a process of literally years going past before a higher court makes a judgment on whether or not the Secretary of State’s certificate is correct. How could this be changed, because it seems to me a ludicrous state of a

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differing views about what this is, but it just seems to me that getting to a resolution is important because otherwise you have a scenario that goes on for years which can only give rise to the view in the country as a whole that there is a game being played here which does not play much part in their own concerns about their own safety and security.

Chairman: I realise of course this is simply a suggestion and I do not want to spend too long on it, but we are very fortunate as a Committee not only having a former Lord Chief Justice but two former Attorney-General, and I would like to bring in Lord Lyell and Lord Morris on this particular suggestion. Lord Lyell?

Chairman: I suppose one could anticipate that one possible problem with your formulation is that you might get a different judgment from this panel, whoever they are, of Law Lords than that of your lawyers who have given you the advice and presumably potentially including the Attorney General that the legislation is human rights compliant. Mr Clarke: Absolutely, but I would say that it is better to have that right at the outset before Parliament debates the whole question than going through the whole process and then precisely the same thing happening at some point further down the line where the Law Lords take the view, following legal process, that the certificate was wrongly issued in the first place. I think it would be better to have that right at the outset. Classically these are narrow matters of judgment and the definition of deprivation of liberty to which I have alluded in the opening statement is a classic case of very narrow judgment. Some of the Law Lords’ judgments are very tightly cast; some of the parliamentary judgments are very tightly cast. People of perfect integrity can take different views about what this is, but it just seems to me that the legal advice you were describing that you had as Home Secretary was in respect of section 19, I imagine, of the Human Rights Act which means that you have to make a declaration as minister that the legislation is human rights compliant, as it were.

Mr Clarke: That is correct.

Chairman: I suppose one could anticipate that
I was involved in it. What I sympathise with in your suggestion is that this would be in addition to either pre-legislative or early legislative scrutiny, but you will recognise the very great difficulty, given very proper separation of powers—which I sometimes think is too formalistic—of putting those who are actually going to have to judge the cases into a position of taking an active part in the exact formulation of legislation. Might what you seek to achieve be done by perhaps making available the Home Office’s advice to a committee of, say, retired Law Lords, professors, former attorney generals and legal practitioners expert in the area who could give guidance at an early stage as to pitfalls which sometimes can become obvious or only too obvious later?

Mr Clarke: Lord Lyell, we have crossed swords on the floor of the House and in committee on many occasions during those moments and I am entirely familiar with what you say. You are quite right that there was controversy about whether the statements of the Secretary of State were correct or not. The only doubt—and it is a serious doubt—that I would have with your particular suggestion is that what you are actually suggesting is another group of people who are eminent lawyers by some description or another to advise the Home Secretary along with the legal team he already has. I have no objection to that in principle, but I do not think it would actually add to or solve the situation since by definition those people would not have any greater authority really than Home Office lawyers in that situation. Where you are right in your criticism of what I said, of course, is that it does draw the senior judiciary into a possibly compromised position in relation to individual cases. I understand the point that you are making in that regard and it is a very serious one. However, my point is this: trying to continue to say that you have a total separation between particularly the executive and the judiciary—but even executive, legislature and judiciary—in the circumstances of the Human Rights Act where judgments are being made does not seem entirely sustainable. I went through the process of pre-legislative or early legislative scrutiny, but you, Mr Clarke, in your concern for uncertainty. My recollection is that the ministerial certificate of the compliance of legislation with the Human Rights Act, the aim of that was to ensure that there would not be uncertainty. Obviously your lawyers—I have the utmost respect for them, I know many of them individually—sometimes get it wrong and they have been getting it wrong in the Home Office from time to time from Michael Howard’s days down and maybe earlier. Are there not practical difficulties here if you have a panel looking at these matters? As you have said, judgments are frequently on a narrow basis dealing with the facts. Here they would be asked to opine on the hypothetical. Are there not difficulties there? Secondly, would there not be difficulties in that they would be debarred subsequently from considering the matter in their formal judicial capacity and you might get one answer from one set of eminent Law Lords and another answer from another set in the same way as your lawyers have got it wrong so far as the court is concerned?

Mr Clarke: That is fascinating. Thank you very much for that, Lord Morris. In one case different lawyers take different positions; in other cases the Home Office lawyers get it wrong. I do not think that is the case. I think all of these people—Home Office lawyers, Law Lords—take their different positions on the issues and to say that one of them is right (in quotation marks) is only true in the sense that there is a final court which makes a final decision, but it does not mean that the earlier judgments made either by lower courts or by particular lawyers advising the Home Secretary or by the Attorney General or whoever are necessarily in some sense wrong; it just means they have made a different judgment on the issues that were there before getting to the final court. Judgments have to be made and I would say that the
earlier you get to a final judgment the better it is for good governance. I say that provisional judgment at the beginning with the Home Secretary and then going through the Commons debate, the Lords debate and then tested through various processes of the hierarchy of the courts is not a very good way of doing that on these kinds of questions. The reason I gave the example I did in the opening statement is that this question of what is the deprivation of liberty—what is meant by deprivation of liberty when you are talking about a control order in the context of the European Convention—is obviously a very serious question and one which occupied a lot of time. However, at the end of the day, I think saying there is a right or wrong judgment about what adds up to a deprivation of liberty is difficult and that is why I highlighted the paragraph in the Appeal Court judgment which said that this is an exercise that the Secretary of State is very much better placed to perform than the court precisely because there is not an absolute answer of what is a deprivation of liberty. What I am saying is that it is better to get to a final judgment of this, of what will be legally sticking, insofar as you can achieve it as early as possible and as directly as possible. That is what I think you can do. On the debarring point, I do think that is a point of substance and a substantial criticism of what I propose. I do not know whether some device somewhere between what Lord Lyell has said and what you have said, Lord Morris, and what I have said might be possible whereby there was some judicial committee of some kind which was made up of very, very senior lawyers indeed but people who are not actually current Law Lords or something of that kind, but whose decisions would, by hypothesis, be given great weight by the Law Lords when a judgment on a particular case arose. That is why I argue for some kind of process of discussion of these questions because it may well be that the debarring issue rules out, as it were, what I particularly propose, but I am certain that getting to an early decision in front of the country as to what the law is on these matters is a much higher priority than simply allowing due process to go on for often years in an unsatisfactory and unconcluded way.

Chairman: We have a lot of questions we want to ask you in a relatively limited period of time so I am just going to take two more quick questions from Lord Peston and Lord Bledisloe on the specific suggestion which I do not want to labour to death because, as I say, it is only one part of your submission.

Q130 Lord Morris of Aberavon: What about putting bells on the ministerial certificate, making it firmer and stronger.

Mr Clarke: That could be a way of doing it, but there needs to be some buy-in by the judiciary to the ministerial certificate, if I can put it like that. If many senior lawyers regard Home Office lawyers as congenitally wrong (I know you do not, Lord Morris, from your initial remarks, but some do) then it would be better to get to a state of affairs where we were in a different position of the authority of that ministerial statement from the outset.

Q131 Lord Peston: All I am looking for is a little bit of clarification because looking at your statement and what you have since talked about you seem to be discussing two different things at the same time. One is the general principle or the general question: “Does this piece of legislation comply with the European Convention et cetera?” and it seems to me that you, as Home Secretary, can do nothing but go with what your lawyers tell you and you can tell Parliament that and then Parliament proceeds on that basis. It may well be you need better lawyers to help you. That is the general question, but your actual concern, listening to you and looking at your opening statement, does not really seem to be about the general question, it is about the application of the general scene in the specific case. That is what is troubling you, am I not right? Whatever we do it seems to me in a specific case the courts can come up with an answer that the Home Secretary does not like.

Mr Clarke: Of course, and I accept that completely, Lord Peston. At the end of the day the courts must be independent and must make their judgment on the situation and may well take decisions which any given executive or Home Secretary does not like. Of course that is right. What I disliked strongly when I was Home Secretary—and dislike strongly now—is the sense of flailing around in a cloud of different legal opinions from different people all purporting to be very senior lawyers, in fact being very senior lawyers but with very different opinions, and the difficulty of getting to a firmness of accuracy in that situation. I do not believe the answer is, quote, “better Home Office lawyers” because firstly I think that the current Home Office lawyers are a very good and highly professional team with a strong record of success. Also I do not see how you would really get to that in a better way. What I am angry about—which is reflected in my submission—is the total refusal of the Law Lords in any way to exchange even a word on any of these matters. Lord Woolf may clarify what their thinking is on these matters, although we have actually talked about it in private as well. I think it is disgraceful.

Q132 Lord Peston: You will see that I am talking as an amateur, but even if the Law Lords were willing to talk to you early on, surely when it came to a case before them they would have to start de novo anyway, and if someone put their hand up and said, “You told us something different last time”, they will say, “Well,
Mr Clarke: Let me be very clear. I am positively against, in the strongest terms, any idea of any Home Secretary talking to Law Lords—or indeed any other lawyers—about particular cases. I think that would be quite the wrong way to go about it and would breach a large number of principles. The place for that is in the courtroom, through the proper procedures and rules of the court. I am absolutely clear about that and I have never had any view different from that on any case whatsoever, including the cases which I was dealing with immediately we came in. What I do think, however, is that there are serious issues of principle here and the issue of the difficulty of dealing with these matters before a criminal act has been committed which would benefit from serious discussion. I think it is bad that that serious discussion does not happen. Parliament has a lot of discussion about it, some of it well informed and some of it not. As Home Secretary I had very substantial discussions about it with my counterparts in other countries trying to deal with these issues, in the United States and elsewhere, who faced very similar questions. I would receive deputations from Canadian parliamentarians, Australian parliamentarians, all trying to get to grips with the problem of how we deal with that with broadly similar approaches, but not with the senior judiciary in Britain. I just think it is an extraordinary gap.

Q133 Chairman: I think Lord Bledisloe has had his point answered so what I would like to do is to move the questioning back to some of the larger contextual issues. The Government of which you were a leading member introduced the Constitutional Reform Act and quite explicitly one of the aims was to have greater separation of powers than has been the case historically. We now have greater separation of powers between the executive, the judiciary and Parliament than we have had hitherto. I suppose the question is, in the absence of a written or codified constitution, do you think there is clear understanding on the part both of the general public and of decision makers like yourself of what the respective roles are of the ministers and judges. Do you think people understand what their respective parts are in the constitutional process?

Mr Clarke: I think the players—the politicians, the ministers, the judges and the parliamentarians—generally do understand the broad roles of the different categories. I think citizens do not and they find it very, very confusing when there are rows taking place between different parts of the system. I think there is a real doubt, even amongst those who do understand it, about the extent to which common goals are shared and what are those common goals between the different arms of government. I think that that is where discussion would be beneficial. I regarded it as my responsibility as Home Secretary to do what I could to try to uphold the basic constitutional structure of the country and therefore I would try never—and I think I never did—to criticise police decisions or CPS decisions or judicial decisions simply because I thought that if, as Home Secretary, I started getting into second guessing how a police operation had gone or how poor judgment was made I would have the risk of bringing into disrepute those decisions and, as in most of the cases we are talking about, my own information would inevitably be far less than those who were actually taking the decisions. I thought it was invidious to do so despite a great deal of pressure, particularly from the media, in certain circumstances. I think that is important. I think I was, in taking that decision, doing the correct thing but slightly overstating the fact that there was a common purpose because actually I am not convinced the common purpose between judiciary, executive and legislature was as strong as it needed to be.

Q134 Chairman: There does seem to be palpable tension between at least the executive and the judiciary. Do you think it is possible that your former colleague, John Denham, got it right when he said that this seemed to be an emerging constitutional crisis? Do you think that is accurate?

Mr Clarke: In spirit yes. I do not like the word “crisis”; I do not think it is a very helpful word for anything because we live through a terrible, dramatic crisis just about every 24 hours in some way or another. I would not use the world crisis but I do think that if you took a slightly softer word like “tension” I think there is a constitutional tension which is not properly resolved and which it would be beneficial to resolve and leads to demeaning things being said all over the place which ought not to be said, and I think the essence of my position is to face up to this new situation. This is not something which goes back in history; the Human Rights Act is a specific construct of this Government as is, as you say, the Constitutional Reform Act. Both of them I think are correct steps. I supported both of them and do support both of them, but they have consequences. What I would say is that the consequences of those forms of legislation just need to be thought through and worked through in a very specific way.

Q135 Chairman: I suppose what I am pushing you on a bit is that the logic of separation of powers in constitutions that have separation of powers as we now do partially is that tension is good; tension is not intrinsically a problem because that is one of the points of having separation of powers. The issues which are addressed in your opening statement which
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Mr Charles Clarke

You are trying to raise with us—and we much appreciate it—are issues partly of communication and partly of mechanisms of dealing with a tension which I suppose you could argue is constitutionally appropriate and inevitable.

Mr Clarke: Only up to a point. There are a large number of mistaken understandings of what the meaning of the Human Rights Act is for the operation of particular parts of the state. There are a lot of examples of this that crop up, sometimes in the Home Office, sometimes in local government, sometimes in the police as various assertions are made—often inaccurately—about what the Human Rights Act means for the way in which you conduct your business in a particular area of life. That leads to public concern about the way that decisions are taken on the executive side. I would say that getting clarity about the legal position on all these things is very important. Immigration is a classic example. The whole of the operation of the immigration system in the past few years has been beset by doubts about what can or cannot be done about the state in relation to particular individuals as legal cases are taken to the highest levels. I do not in any sense say that those legal cases should not be taken to the highest level, they should, but I do say that some kind of basic common understanding of what the law is is pretty important.

Q136 Chairman: One of the practical questions which emerges from this is the extent to which it is appropriate for there to be discussions and contact between the government and the judiciary, which is something you raise in your submission. I have to say that I for one am rather confused about this. In the most recent spat it was said that there was not proper contact between ministers and the judges and you deprecate the fact that Law Lords are not prepared to discuss issues of principle with you. Lady Scotland wrote a letter to The Times saying that ministers do meet the judiciary regularly; there are constructive meetings which ensure there is a regular dialogue between them. This is not the regular dialogue you are talking about; you are talking about sort of principal summits, are you?

Mr Clarke: What I really think is with the Lord Chief Justice and the Home Secretary—certainly with Lord Woolf and with Lord Phillips—there was a regular exchange as a situation arose to talk about issues that might arise. Lord Phillips invited me to attend the Sentencing Guidelines Council at one point to discuss what they were doing and we had a meeting with some senior judiciary as well. Not only do I believe that those contacts were beneficial, I think they were cordial and positive. None of them discussed any particular case at all at any time because it would have been quite wrong to do so, but I thought it was a perfectly appropriate way of proceeding and it seems from Baroness Scotland’s letter that I am sure it is to that type of exchange which she is referring in the letter you have just cited. My particular point is about the Law Lords explicitly with whom there is no exchange of view at all as far as I am aware and I think that is wrong. I think there should be a routine discussion which is moderated by the Lord Chief Justice and in my experience that has worked reasonably well. I do not know how it works now; I do not know how it worked in the period before I was doing it. Certainly for my part I have no complaint to make and I think the two Lord Chief Justices I dealt with were both principled and had integrity but were also open-minded to discussing what needed to be discussed.

Q137 Chairman: The debate you called for in your own Evening Standard article last summer involving the senior judiciary about how best to legally confront terrorism and so on, in a perfect world, were you able to write the scenario that you believe would work, how could such a debate happen?

Mr Clarke: I think it could be either informal or formal; either in a room like this or even informally at social occasions and so on (but I would prefer it to be formal). It should be with an agenda about the issues of the day in a general way. I was frequently invited to dinners at the Inns of Court where I was told that if I was nice enough to wear the appropriate white tie and clothing I would be able to meet a Law Lord and touch his hem and discuss matters if I behaved myself appropriately. I decided not to take up any of those very nice invitations because I did not think that met what I was talking about. What I was talking about was a substantive discussion about these very, very important issues. I think they have taken on a much greater significance since 9/11 and then 7/7 because people are very, very exercised about whether or not we are preventing these crimes effectively. There have been calls—Michael Howard made a call at one point—for us to leave the European Convention on Human Rights. Serious politicians have made those calls. I said to the President of the European Court, the Swiss judge, that I thought that was a very serious issue and I know he very much appreciated the work that Lord Woolf was doing for the European Court on precisely those matters. I said that you could end up with a state of affairs where we end up leaving the European Convention as a result of public pressure. I believe that very seriously; I think it is completely underestimated as a possibility. I can easily see it being something that happens because if the court, in upholding human rights, is not seen to protect the public, then the public will say “No thanks”.
Q138 Lord Rowlands: You have repeatedly said to us “the consequences of the Human Rights Act”, when that Act was being prepared and developed within Whitehall and between ministers, were any of these consequences anticipated? Were any of them when that Act was being prepared and developed us “the consequences of the Human Rights Act”,

Mr Clarke: I do not think it was a question of surprise. I was not personally involved in the discussions around the Human Rights Act; I was either not in government or in Education at that time. I am certain that all of this was thought through at great length.

Q139 Lord Rowlands: Why does it appear that everybody is surprised by the consequences?

Mr Clarke: I do not think it is a question of surprise; I think it is a question that as you pass legislation it then has to be implemented in the new circumstances as it comes through. The logical conclusion of saying that we do not quite know how this relationship will work out five years down the line is that you do not do the legislation in the first place and I do not think that would have been right. There is no doubt in my view that patriating—if I can put it like that—the European Convention has been a positive thing for the operation of the judicial system in this country and the legal system and has made it more efficient for the individual potential petitioners and so on. All of that has been positive, but there are consequences. To what extent could those consequences have been foreseen? I do not think I would have foreseen the extent of questioning of Secretary of States’ certificates that there has actually been. I certainly would not have seen the deprivation of liberties as sharp as they are, and that is a direct consequence of 9/11 which had not happened at the time.

Q140 Lord Rowlands: So it is more 9/11 rather than perhaps the human rights legislation that has changed the forum.

Mr Clarke: It is the human rights legislation in the context of 9/11. I have no doubt that 9/11 has made an absolutely dramatic impact on all of this. The legislation which was overthrown the day after I became Home Secretary was brought in by the then Home Secretary, David Blunkett, in response to 9/11 and the Prevention of Terrorism Act was then an attempt to correct that and all the subsequent terrorism legislation goes back to 9/11. And why? While you could live with the consequences of people preparing crimes if they were not going to be so serious and therefore not worrying too much about how you stop crime if it was not terribly serious, if it was blowing up people and possible atrocities of even greater scale than 9/11 the civil societies could not accept that you did not do your very, very best to catch the people and stop the people who were potentially committing those crimes. That is exactly the territory we are in with control orders and the rest of it. All of that is a direct consequence of 9/11. I think it might have been as well after 9/11 for the senior judiciary and Parliament and the executive to talk together about how all of us together dealt with this new environment that had arisen post 9/11.

Q141 Lord Goodlad: Mr Clarke, to what extent do you think the Human Rights Act has changed the balance of power between the judiciary, Parliament and the Government?

Mr Clarke: I think it has definitely shifted the balance of power towards the judiciary. I think most people were conscious of that when the Human Rights Act was passed and most people thought that was by and large a good thing because the judiciary is generally, by the country as a whole, held in high regard. I do not wish to reverse that shift; I think that shift has happened and I think that shift has, broadly speaking, been beneficial. What I simply say is that the consequence of that change in balance of power is that the judiciary needs to engage itself in some of the principle discussions about how we operate.

Q142 Lord Goodlad: The Joint Committee on Human Rights recently criticised what it described as “very senior ministers” for making “unfounded assertions about the Act” and using it as “a scapegoat for administrative failings in their departments”. Do you think that ministers are doing enough to counter the so-called myths about the Human Rights Act which seem to appear fairly regularly in the popular press?

Mr Clarke: I think they are doing quite a lot to try to do it, but it is very difficult. I think the remarks which the Joint Committee made and which you have quoted relate to the period after I was Home Secretary rather than the period that I was Home Secretary. I certainly think that more can be done publicly but it is more serious than that. What it is is the uncertainty that many people who have to carry out decisions at a wide range of different levels have about how they will or will not succeed in winning support for their judgments in the courts when they are challenged as they inevitably are by people who seek to challenge them, as Lord Wilson said in a piece he wrote for the papers yesterday. In the Home Office you are dealing with a large number of people who do not want to be compliant with what you do and will use any technique that they can to try to turn it over, including a wide range of legal techniques. If there is uncertainty about the way in which judgments will go then people change their conduct to try to protect themselves against the consequences of being thought to have behaved illegally. That is why I give that example in my opening statement that I do. The Home Secretary has taken a decision about these new control orders but with absolutely no guidance.
whatsoever as to whether he is behaving legally at all. It is absolutely outrageous. That is the experience which runs right through the whole of the people trying to take the decisions in many parts of the Home Office. That is why I tried as Home Secretary to give as much clarity as I could about what the law was so that then the people who had to operate that law—thousands of people—knew how to do it in a correct way, and they did.

Q143 Lord Woolf: There is obviously here a difference of view of what is the proper thing for judges to do in certain circumstances. Myself and my successor—and I believe my predecessor—had no difficulty in deciding that there were things that it was absolutely proper to discuss with the Home Secretary when they are Chief Justice because chief justices are responsible for the working of the criminal justice system as a whole. Do you accept the Law Lords are in a different situation because they have no responsibility for the working of the criminal justice system as a whole except insofar as they have to give decisions which have an impact on the criminal justice system?

Mr Clarke: I do accept what you said, Lord Woolf, but I think the final qualification in what you said is a very important one. The impact of the decisions of the Law Lords is absolutely immense as, by the way, to give a different example, is the impact of the decisions of the European Court. The Chahal judgment about terrorism in the European Court is something which has reverberated throughout our legal system for a long period of time and the British Government is now trying to challenge it. The question is, can the Law Lords distinguish themselves from the impact of their judgments? I think that is a very, very hard and difficult question.

Q144 Lord Woolf: If I may, Lord Chairman, through you, probe this a little bit further. What amounts to detention is at the heart of the decision of the Law Lords which struck down certain decisions you made as a control order. The Human Rights Act requires certain steps to be taken if there is going to be detention. What I am going to suggest to you is that it would be obvious to the Law Lords. What you were wanting to ask them about would be very dependent on the facts of the particular case because the requirements that you imposed in your control order can change with every detainee.

Mr Clarke: That is true, but let me put it a slightly different way, Lord Woolf. My predecessor and then I struggled after 9/11 with the issue of what do you do about people who you feel certain are seeking to commit a terrorist act but you cannot prove it? That is the core of the issue. Control orders emerged because of the failure of the previous regime as judged by the Law Lords to be discriminatory as between UK and non-UK nationals.

Q145 Lord Woolf: Which in fact over-ruled a decision of mine to the contrary.

Mr Clarke: I am well aware of that. The point I am making is that what then happened—I can say from personal experience—home secretaries (my predecessor with whom I discussed this, my successor with whom I have discussed it), their legal advisors, other senior government ministers were thinking the whole time, how can we deal with these people whom we know to be real threats and keep them under control legally? The key question is “legally” because all of us would wish to operate the rule of law. I remember very well a civil servant coming into my office after the Law Lords’ judgment, the day after I was appointed, saying that maybe we are going to have to return to this idea of control orders. People had plenty of doubts about whether it would be the most effective regime. In the last day or so we have seen some excellent examples of that. That seemed the only alternative given the previous decision of the Law Lords to rule out what we were doing. All I am saying, Lord Woolf, is that some proper discussion about what might or might not be legal would be a very helpful thing to do because we have spent five years since 9/11 without getting to a system that works.

Q146 Lord Woolf: You are then putting the Law Lords in a position where they have a discussion with the Home Secretary behind closed doors as to what will or will not do and when the case comes before them with the same issue there are two parties involved, the persons who are subject to the control order as well as the Home Secretary and they know that the judges have been talking behind their backs without them being present on the very issue which the Law Lords are going to be deciding. The Law Lords have the responsibility of being the final arbiters on law on the particular facts.

Mr Clarke: I understand, but then the consequence of that line of thinking is that the Law Lords are, in the purest sense of the word, utterly irresponsible for the outcomes of their decisions and for the security of society. If the Law Lords are prepared to say that is the case then okay, but that is not how it seemed more generally.

Q147 Lord Woolf: The Law Lords’ responsibility surely— I think you would accept this—is to be the final arbiters of the law on particular facts.

Mr Clarke: I am not sure. That is what I was trying to say about the question of the responsibility to uphold the rule of law. I think the question of where does the responsibility lie for upholding the rule of law in the country is a big, mega, constitutional
issue—it is actually at the heart of what your Committee is investigating at the moment—and I simply say that for the Law Lords to say, “That is not really much to do with us; all we have to do is look at any particular case” I think is a bit rich (if I can put it like that). Actually the Law Lords’ judgments, their outcomes on individual cases, have a massive impact on the way in which the system then operates throughout the whole of the rest of the system.

Q148 Lord Woolf: Can I say straight away that I accept there is a problem; you are quite right to identify a problem. Do you think it helps to condemn the Law Lords who are applying the conventional approach in very strong language, language which you then extend to the Court of Appeal, when they are performing the normal role which judges are required to perform? The Court of Appeal quite obviously were leaving it open for you to make a control order because they accepted that you can have a lawful control order—Parliament has given the authority—but in order to decide whether it is lawful or not there have to be two things. First of all there has to be a control order made and that is the Home Secretary’s job; secondly, it then has to be assessed whether he has got it right or wrong.

Mr Clarke: As has been going on for five years with the Law Lords making a set of judgments about whether the Home Secretary gets it right from time to time. I am critical of the Law Lords, Lord Woolf, it is quite true. I hope I am not critical of the Appeal Court; I feel the Appeal Court has behaved completely correctly.

Q149 Lord Woolf: You are referring to the particular judgment in the Afghan case.

Mr Clarke: The Afghan case and also the statement in the Appeal Court judgment that this is an exercise the Secretary of State is very much better placed to perform than the court (which I agree with, by the way). The fact is that the consequence of that is that the Home Secretary or the state or whatever government can never get it right in those circumstances. It simply cannot get it right.

Q150 Lord Woolf: It cannot be sure of getting it right.

Mr Clarke: All I would say is that governments over the last five years have utterly failed to get it right in the eyes of the Law Lords. That is the state of affairs. There are Law Lords who have made judgments which I think are completely incomprehensible, a very small number of them but they have. The fact is that I think it is a duty on people who are making immensely important decisions of this kind to engage in public discussion about the impact of their decisions.

Q151 Chairman: Of course this discussion assumes slightly that Parliament is passive between the executive and the judiciary when in fact Parliament has spent a lot of time and angst on trying to define what is not just lawful but is appropriate as a reaction to this. There are three parties to this.

Mr Clarke: Yes, and in particular the House of Lords, because it has such a high participation of senior lawyers, is a major participant in that discussion which is not under the heel of the government of the day and of course we have seen in the debate on these matters a great deal of exchange between both Houses. Lord Woolf is quite right to rebuke me, I do not wish to go down a course of advancing a slanging match between various aspects of the system, but, to be honest, I do not see how one can get to a proper discussion about this unless one acknowledges—as I think there is—that there is a real issue to be addressed. I deplore particular statements by particular ministers attacking particular judgments as I deplore particular statements by particular judges attacking government for particular policies. I do not think that helps. I am not a minister in this I would point out and I was not the Home Secretary who then re-issued the control orders in this particular case, and I would not give evidence in this way were I Home Secretary. However, I think you asked me to give evidence as a former Home Secretary from my observations and I feel entitled so say that in this way because I think it is important that these issues are developed.

Chairman: We have a few other questions we would like to ask in a relatively short time. Baroness O’Cathain?

Q152 Baroness O’Cathain: In answer to a question from the Lord Chairman on the Constitutional Reform Act you said that you were under a great deal of pressure from the media. Ministers from time to time respond publicly in the news media to particular judgments. How significant a factor are the media themselves in determining the decision of a minister to speak out? Can you describe for us the process by which a decision is taken to make a public comment in response to a case?

Mr Clarke: As I say, my practice—and I do not think I will be found wrong in this although my recollection may not be perfect—was not to comment on particular judgments. I thought, as Home Secretary, I should not comment on particular judgments. I do not think that it is right to do so, as I did not comment on particular judgments to prosecute or not to prosecute, or particular police actions or whatever. In my case the process by which a decision was taken to make public comments was straightforward because I sought not to make public comments despite very substantial pressure from the media on
many occasions. The current Home Secretary has made some comments about particular judgments. I cannot answer your question because I do not know by what process it happened, nor can I say to what extent he was influenced by the media in so doing. I do not think it was the right thing to do and I do not think he should have done it. Equally, I do not think the judges’ cases—there was a case in The Times on Saturday of a judge criticising the Government in terms of the criminal orders—help the whole process either. I think there should be a self-denying ordinance on all parts.

Q153 Baroness O’Cathain: As a supplementary to that, you did say that part of the problem was that the greater public just do not understand what Parliament, the executive and the judiciary are doing, but do the media help or hinder a greater understanding of the function of the courts?

Mr Clarke: Fundamentally hinder it, but I qualify that criticism with this very important point. The public concern about terrorism is real and substantial. The public concern about whether individuals are protected in the public against violent criminals or mentally ill criminals or whatever is absolutely real. I do not think it is at all surprising that the media should try to illustrate that point, nor do I think it is unreasonable for them to do so. It is our obligation to provide protection. These are exactly the areas where the human rights issues are very profound. They are exactly the areas where we need to do better in getting it right in a wide variety of different ways. When I was Home Secretary there was a terrible killing that arose as a result of proper procedures by probation not having been followed and these are very bad states of affairs. I think to say that the media is behaving unreasonably in highlighting these is not fair; I think the media are behaving reasonably in doing that. As you put the question, it is certainly the case that the media are not explaining well what the whole process is, but it just illustrates again the point I am trying to make throughout, that judges operate in the media spotlight which is effectively a public spotlight; politicians do; Parliament does. In those circumstances we would do a lot better to talk about how we deal with these questions rather than not doing so.

Q154 Lord Morris of Aberavon: In 2002 Lord Irvine said that “in a democracy under the rule of law it is not mature to cheer the judges when a win is secured and boo them when a loss is suffered”. You know that parliamentary rules under Erskine May forbid reflections in debate on the conduct of judges except by way of substantive motion. How do you reconcile that with some of the comments that have been made? Howard, Reid and you, yourself, have said some rich statements. You have already made the point this morning that you do not comment on a particular judgment but let me single out one of them. You have accused judges of not taking proper consideration of the wider public interest in the fight against terrorism. Is there a risk that sustained public criticism of judges by senior ministers—we had one by John Reid the other day—will undermine public confidence in the legal system?

Mr Clarke: Yes, there is, and there is a risk that sustained judicial criticism of ministerial positions can undermine confidence in politics as well. Both are true. The quote you gave was simply the rephrasing of what I have been saying here instead of the Evening Standard piece. I do not think I have made criticisms of particular judgments. I am subject to correction on that, but I do not think I have; I certainly would not have wished to do so. What I believe—and I believe it very, very strongly—is that the judiciary has to acknowledge that it is taking its decisions in the modern world as well as every other part of the state and it needs to do that. In answer to your implication, should politicians or ministers in particular not criticise particular judgments, I would agree, they should not.

Q155 Chairman: Do you think the Ministerial Code could be usefully amended to cover this sort of situation?

Mr Clarke: Not really. What you have here is one group of people saying that ministers should not criticise judges and another group of people saying that judges should not criticise ministers. I do not think that that is a very helpful state of affairs. I think that getting the codification of this into a better situation is not the answer. I think the answer is to get a better common understanding of the common purposes which is upholding the rule of law in this country. That is what needs to be achieved in my opinion. The idea that judges are above criticism is one that I could not go along with. I can go along with the idea that government ministers should not criticise judgments but the idea that the judges are a group of people who are so distinguished and so eminent and so right and so deep in their knowledge of British life that they are beyond criticism is one I just could not go with.

Q156 Chairman: There is a problem with the terms of trade because ministers are used to the harshest personal criticism and that comes with the territory. There is probably a difference, is there not, between criticising decisions and the judiciary and the sort of knockabout that politicians take for granted?

Mr Clarke: There is, but again I say—and perhaps I have not been clear enough—the consequence of the Human Rights Act in the atmosphere (as Lord Rowlands has highlighted) of post 9/11 events mean
that it is difficult in my opinion for the senior judges simply to stand aside from that overall climate. I think it would be better if there was an understanding which meant that that did not happen.

Q157 Lord Smith of Clifton: Following on from that, Mr Clarke, how do you think section 3 of the Constitutional Reform Act of 2005—which places an express statutory duty on all ministers to “uphold the continued independence of the judiciary” and on the Lord Chancellor to “defend that independence” will affect the way that ministers approach relations with the judiciary?

Mr Clarke: I do not think it will change it a lot because I think that ministers, as far as I am aware, broadly accept today the terms of the Act which you just read out and I think they have done over a long period of time. There may occasionally be deviations from that of the type that were raised earlier, but fundamentally I think ministers accept the independence of the judiciary in the ways you have just set it out.

Q158 Lord Smith of Clifton: When you were Home Secretary what advice did you seek or receive from the Lord Chancellor about making public comment on particular judgments or the role of the courts in general? How well did these arrangements work, and how could they be improved?

Mr Clarke: I did not because it was my practice not to seek to make comment on particular judgments and so the issue did not arise. I had a good relationship with the Lord Chancellor and we used to talk about a lot of things generally. I think that was as it should be. I suppose, if there were a practice to emerge—which is implied by the questions you have been asking—that ministers did make comments on individual judgments, some kind of procedure and protocol of relations between different government departments would need to evolve, but I think it would be better not to go down that course by discouraging comments on particular judgments rather than establishing protocols for the way in which such comments should be made.

Q159 Lord Lyell of Markyate: Can I just say that the fact that you did not comment was very refreshing. I did not because it was my practice not to comment on particular judgments, some kind of procedure and protocol of relations between different government departments would need to evolve, but I think it would be better not to go down that course by discourage comments on particular judgments rather than establishing protocols for the way in which such comments should be made.

Mr Clarke: I do not think it will change it. I am not a student of the history of this aspect of things, but I assume that at some point in the past the membership of the House of Lords of the Law Lords was actually an active and vital thing in the sense that debates took place in Parliament in which the Law Lords participated. In my recent experience—I am sure Lord Woolf can put me straight on this—the general disposition of the Law Lords was not to use their position to comment on legislation that went through for the reasons that have been argued here and so to formalise that, as this change will do, I do not think will change things very substantially. It was irritating to me when I was Home Secretary that former Law Lords—I recall Lord Ackner when he was alive doing this—commented a lot with great apparent authority on what the Government was doing in these areas as a very senior former Law Lord, but I do not think that will be changed by this particular aspect. I do not think this change will actually change very much because I think current practice has been—again I am open to correction on this—that Law Lords do not really participate in the debate very much and I cannot see this changing in any great direction.

Q160 Lord Lyell of Markyate: You may be right in that the effect of the Convention on Human Rights has caused judges to play much less part in Parliament, which personally I regret. Do you agree with me that actually there was a very considerable strength in the Law Lords’ position being in Parliament and that they knew very well the limits of what they should not do when they took part in legislation and that we may lose something when they go and that we have great benefit, for example, by retired Law Lords taking an active part?

Mr Clarke: In principle yes, but in practice I have my doubts on two grounds. Lawyers are not quite as bad as economists but they are nearly as such. You get a very great range of very distinguished lawyers giving completely different and contradictory opinions on points with a great wealth of history. For the non-lawyer to observe it with interest is not necessarily clarifying. I am not certain that it is possible to get to a state where affairs with superior wisdom coming to bear on these matters. Secondly I think precisely what you said, Lord Lyell, reinforces the case I am making that there needs to be some forum where there is proper discussion of some of these issues. That may not be the House of Lords and I think it is open to question whether the House of Lords would have been a good forum for that, but there needs to be some forum for exchange and to that extent I agree. I know that you, yourself, are doubtful about some of the ways in which the European Union has operated and indeed the Council of Europe in some of these cases and the impact it has had upon our life in this country. However, we are members of the European Union, we are members of the Council of Europe, we live under the European Convention on Human Rights, we have done for a considerable period of time now. I do not anticipate that changing and therefore we need to find some arrangements which fit the world in which that is a reality. Whether that is a proper
debate, to be honest I do not have a very good proposition as to what that should be, but I think we should be trying to edge towards a greater common understanding between the different arms of government about how we operate in these circumstances.

**Q161 Lord Woolf:** My last question goes back to what we have been discussing before in this way. You are suggesting there should be informal methods of communication between the Law Lords and the executive which work better than they do at present. However, do you think that Parliament could play a role by establishing new constitutional arrangements to provide better channels of communication between the judiciary and the executive? It is a different constitutional set up but in France there is a process where legislation comes before the Conseil d’Etat before it is passed and the Conseil d’Etat, which is in many respects the final arbiter like our Law Lords, then gives a decision although later on it can come to a different decision.

*Mr Clarke:* I am aware of the French example and I think it is quite interesting. Obviously France has a completely different legal system and so on but nevertheless I think there are some interesting points. Just for the avoidance of doubt, I am not arguing that informal is the only way to proceed. I think there needs to be a form of exchange of views which could very well be formal and in answer to Lord Woolf’s point I certainly can envisage Parliament having a role in that process that would carry things through in a special way. Obviously the new parliamentary committees—the Joint Committee on Human Rights, for example—are efforts to try to take that forward in a better way. However, it needs to be evolved in a politically non-partisan way and I think that is the real problem. I think that because of the political partisanship about much of this legislation which I am acutely aware of has been so sharp, it has made it difficult sometimes to get to a broader interest in all this and I think that that arises here too. My answer to your question is yes, Parliament could play a major role and I think actually it could well be the moderator between the executive and the judiciary which could enable a better set of relationships to be established.

**Q162 Lord Woolf:** Parliament requires from various bodies annual reports which can then be discussed. Certainly when I was Chief Justice I actually did produce annual reports on the civil division and the criminal division of the courts explaining what we had done. Do you think it would help if there was something similar from the Law Lords explaining their position? At the moment you have explained your views but the Law Lords have no similar forum to explain their position.

*Mr Clarke:* May I offer them one in my drawing room next week if they would like to take that up? The answer is yes, I do think an annual report of that kind is very helpful. I really do think it is critically important to find some framework of debate on these matters and annual reports and devices of that kind are very, very positive proposals.

**Q163 Chairman:** Thank you very much, Mr Clarke, for exceptionally interesting and forthright evidence. It has been very helpful to the Committee. We shall produce a transcript of your evidence and if you have any second thoughts that you would like to let us have we would be very grateful. Meanwhile thank you very much indeed.

*Mr Clarke:* Thank you very much.
WEDNESDAY 24 JANUARY 2007

Present
Bledisloe, V
Goodlad, L
Holme of Cheltenham, L
(Chairman)
Lyell of Markyate, L
Morris of Aberavon, L
O’Cathain, B
Peston, L
Rowlands, L
Windlesham, L
Woolf, L

Examination of Witnesses
Witness: Rt Hon Lord Mackay of Clashfern, a member of the House, examined.

Q164 Chairman: Good morning, Lord Mackay, we are most grateful to you. This session is being televised so I wonder if you would be kind enough, for the cameras and for the record, just to identify yourself.

Lord Mackay of Clashfern: Yes, surely, so far as I can. My name is Lord Mackay of Clashfern. I was the Lord Chancellor from 1987 to 1997 and before that I practised the law in Scotland. I became Lord Advocate in 1979 and remained in that office until 1984. I had previously been the Dean of the Faculty of Advocates, which was the elected head of the Scottish Bar, so I had a reasonable experience of the law before I became Lord Chancellor.

Q165 Chairman: Thank you very much. You are well aware that this short inquiry which the Committee is conducting is prompted, in part at least, not just by the greater separation of powers consequent on the Constitutional Reform Act, but also by recent incidents of highly publicised tension between the Government and the judiciary, and we are trying to look in a slightly more systematic way at the changes in the constitutional relationships and how they can best operate. What I wanted to ask you, if I may, is do you think the tensions of the last two or three years are something new, either in kind or degree, or do you think from your own experience as Lord Chancellor in Conservative Governments that they are systemic, endemic and bound to break out from time to time?

Lord Mackay of Clashfern: First of all, a certain degree of tension between the judiciary and the executive is inevitable and healthy because from time to time the judiciary are called upon to adjudicate under the judicial review procedure and in other ways on actions of the executive, and there are not many people who completely welcome their activities being judged, particularly if they are found to have failed—there are some exceptional individuals maybe, but generally speaking that is a characteristic. The second point is that it depends a little on what is happening. In the time that I was Lord Chancellor the major difficulty arose in connection with the then Home Secretary’s proposals for minimum sentences. As far as I was concerned, Parliament was entitled to make such rules if they thought it was advisable, and what I was concerned to do was to make sure that the judiciary in particular cases had an opportunity to go outside these minima if they thought that justice required it, if there were exceptional circumstances. I could see the advantage also of people knowing in advance just what the situation is in relation to particular crimes and the sentence they might expect, so as long as the judiciary retained a degree of discretion to deal with exceptional circumstances, I did not myself feel that it was in any way unconstitutional. On the other hand, the very fact that what was being proposed had in it an element of restricting judicial discretion provoked a certain degree of difference of opinion between some members of the judiciary and the Home Secretary, but I never thought it got to extreme proportions. The present situation between the judiciary and the executive is in fact quite a good relationship; I do not think that, generally speaking, the relationship is in crisis or anything of that sort. There have been particular cases in which senior members of the Government have made adverse comment on particular judicial acts, particularly sentencing. One of the reasons for that is that those in charge of large ministries such as the Home Office do not really know the rules that they themselves have laid down, or their predecessors have laid down, through acts of Parliament and other executive acts. If you actually look at the statutory provisions and the guidelines for sentencing and so on, you can hardly blame the Home Secretary for not remembering in detail what they are because they are extremely complicated and even those who administer that branch of the law from day to day find them quite difficult. The root of the matter, I think, is a degree of lack of familiarity with the policies that the department you are the head of has been pursuing, and therefore unless you study it carefully—and you want to come out with some reaction very quickly, because our modern press require immediate reaction—you give your off-the-cuff reaction without thinking too much. The other
thing that has a bearing on this is a general tendency to lack of respect. As you know, the Prime Minister has what he refers to as a “respect agenda” which is intended to restore the respect for authority in the generality of the population. The lack of respect can permeate into both individuals of the judiciary and also into individuals who are in the Cabinet or in other positions in government. If a senior minister took a moment to think that a judge has really had an opportunity to consider the case in much more detail than he or she is likely to have had, they might be just a little slower to comment and, of course, once the comment comes out the results flow very quickly and it is very difficult, once that action has been taken, to stop the consequences, even with the best will in the world. My summary is that it varies from time to time, but the general condition of a degree of tension is healthy and inevitable.

Lord Mackay of Clashfern: It depends on your analysis of the reasons for the problems which lead to this decision, and there is something to be said for the view that what is the cause of a good number of the present problems is lack of co-ordination, and if lack of co-ordination is the real problem then breaking the edifice into two is only likely to exacerbate that instead of helping. The problem that I see is the difficulty for a minister in really coming to terms with all the policies that his department is pursuing, but that is by no means confined to the Home Office. The Home Office is an example, but there are other areas where it is difficult. On the other hand, that produces or might produce a degree of reticence about criticising other people who may be in some way involved in your department’s activities, or affected by them.

Q166 Chairman: Just on that last point, I recall that you, in the passage of the Constitutional Reform Act, had quite a lot of reservations about it, but I imagine you would acknowledge that part of the intention was to get a greater degree of separation of powers between the executive and the judiciary, and I imagine the logic of that is that some degree of tension is constitutionally appropriate and necessary, otherwise why strive for a greater separation of powers. Should we accept, quite aside from the sort of short term secular causes, which you have identified, that a degree of tension is and should be built into any system which has somewhat separate powers?

Lord Mackay of Clashfern: Yes, that is true. I think that existed long before the Constitutional Reform Act and of course, as you say, the Constitutional Reform Act has sought to formalise to a greater degree separation of powers. I saw that Mr Clarke, in his evidence to you, has complained that he, when he was Home Secretary, was having difficulty in getting comment on his proposals from the senior judiciary; if you exclude the senior judiciary altogether from the legislative process, that is not surprising because they are supposed to stand aside from it, and this is an example of people responsible for policy not always appreciating fully all the consequences that might flow from that policy.

Q167 Chairman: I just wanted, if I may, to pick up your very interesting reference to the sheer size of the Home Office being part of the problem for a Home Secretary who might not be familiar with every detail of sentencing rules, tariffs and so on. Would it follow from that that you personally would think the current proposals for breaking the Home Office into two more manageable pieces would be a good idea, a quasi ministry of justice, as we read in the papers; would you think that is a good idea?

Q168 Chairman: On the issue of criticism, ministers of course are bound to uphold judicial independence and what the Committee is grappling with is what limits are there and should there be on ministers criticising judicial decisions. You mentioned at the beginning, and I was interested in what you said, about judges pronouncing on government decisions. Were you thinking of judicial review there?

Lord Mackay of Clashfern: Yes, principally judicial review, but there are other areas where it is necessary also; for example, they sometimes comment on the conduct of the Crown Prosecution Service, which is an agency of government, and the way that cases have been handled and of course, as you know, other departments have prosecution rights which can sometimes raise questions about criticism and so on, but it is in judicial review primarily that that tension exists.

Q169 Lord Morris of Aberavon: Lord Mackay, twenty years ago it was almost unheard of for a minister to comment in the press upon a court judgment, let alone in combative terms, and you have illustrated that by your comments a few minutes ago. There are classical precedents for not opening your lips because once the words are released it is very difficult or impossible to recall them, but it seems that there has been a sea-change. Erskine May makes it quite clear that the conduct of a judge cannot be discussed except on a substantive motion. These comments are usually in the press; should not the same rules apply in Parliament and outside, and what do you think are the constraints on conduct, if there are any other than Erskine May’s? How would you interpret ministers’ statutory responsibilities under the 2005 Act to uphold judicial independence? The Lord Chancellor is specifically mentioned, other ministers are mentioned; is it the same for all, does it apply to all ministers, for example, in the Lord
Chancellor’s Department? Do they have the same duty?  
Lord Mackay of Clashfern: The Lord Chancellor himself has, as you know, a particular duty, and I would think that that would apply to all ministers in his department as a particular responsibility of the department of which he is the head, but there is a provision in relation to other ministers also which is a slightly less prominent type of provision. It is just a question of a degree of restraint. You may feel strongly about something and I know that everyone has experience of that, but on the whole it may be wiser not to express that until you have had an opportunity to consider it, and of course in many cases that ministers feel aggrieved about there is a right of appeal and there is nothing to prevent them saying they are proposing to appeal. Basically, the change may have occurred due to not altogether realising or respecting the fact that the judges have had to consider the details of the case in a way that the ministers will not have had to do, and he or she will have had the benefit of argument before them about it and also a fairly close application to—in the case of sentencing, for example—very, very detailed regulations.

Q170 Lord Morris of Aberavon: May I ask a follow-up? Obviously, restraint is a burden that should apply to a judge; do you see any value in the suggestion that the Ministerial Code should be amended to include principles to guide ministerial reaction? We have the statutory duty in the Lord Chancellor and all ministers, and what the Ministerial Code now says in code 1.5 is that there is “an overarching duty on ministers to comply with the law . . . to uphold the administration of justice . . .” et cetera. Would it help if the Code itself, which you are familiar with, were to be strengthened?  
Lord Mackay of Clashfern: It is certainly for consideration. I suppose it is a matter ultimately for the Prime Minister, but it is certainly for consideration. I have to say that one of the matters that you have to keep in mind in a ministerial code, or indeed in any other code, is that there is a limit to the power of recall that people have in their daily work. I do not know that there are many ministers who would be able to tell you everything that was in the ministerial code, and of course the bigger it gets the more difficult that is. There is a limit to the effectiveness of adding to codes like that; on the other hand what you have to do is put in the important matters, I suppose, and this is quite an important matter for consideration.

Q171 Chairman: Could I just revert to the other side of the fence, not ministers commenting on judges but judges commenting on issues in general? One of your first acts as Lord Chancellor was to abolish the Kilmuir rules; I wonder in retrospect whether you feel that was the right thing to do, and if I can just ask a supplementary, we have had evidence earlier in this inquiry from some leading legal journalists that what I will call off-the-record briefing from the judiciary is on the increase, so that to get a headline “Judge’s fury at Government decision”, rather like the political world now where an awful lot of information seems to be transmitted by off-the-record briefings, that practice is now spreading to the judiciary. I wonder how to relate those two questions of the ability of judges to comment in the news media with what we are told is the practice of off-the-record briefing. I am interested in your opinions, either on the retrospective wisdom of your decision and/or this new practice.  
Lord Mackay of Clashfern: So far as retrospective wisdom is concerned, if I might take that first, I remain entirely convinced that it was completely right to get rid of the Kilmuir rules and I say that, not just because I did it but because I think the principles underlying it are absolutely undeniable. Judges are supposed to be independent, and independent of the Lord Chancellor when he was head of the judiciary, as much as of any other judge. The idea that the Lord Chancellor’s consent should be required before a judge is entitled to express a view to the media seemed to me to be utterly inconsistent with that. I may say that it happened at my first press conference because the press asked me about what the basis of the rules was and I had to say what I believed was the position. I had some experience of this from the Faculty of Advocates because it did have at one time a rule preventing advocates from speaking to the press, and when I was dean we got rid of that rule because it was found to be completely unworkable. Advocates or judges often have something to say which is of general importance and, after all, they are in my view an important section of the community, and why they should be mute when everybody else can say what they like I could not see. On the other hand, I did think that if a person was sufficiently fit to be a judge of the bench in England and Wales he or she should have sufficient judgment to know when they should speak and when they should be silent in matters with the media, so I do not repent of that; I repent of other things but not of that. That was a wise decision and one that was generally accepted by the judiciary. At first some people felt they could always say, if the press rang up, “I am sorry, I have not got the Lord Chancellor’s permission so I cannot speak to you”, which was a very interesting defence. On the other hand, when the Kilmuir rules went they had to say “I am sorry, I do not think it is right for me to talk about this and that” so it is a slightly stronger version of what was required. Very soon it was generally accepted that the Kilmuir rules were not based on a principle that prevailed in the twentieth century. The
business of off-the-record briefings; if I may say I do
not like these in any circumstances whatsoever and
when I became Lord Chancellor I made it clear that
I would not give an off-the-record briefing to
anybody; if I had something to say that was worth
saying I was prepared to say it and stand by it as
having said it and I was not prepared to give an off-
the-record briefing. Obviously, if people came to
come to discuss with me some problem that they had, I would
be prepared to have discussions with people, but not in a way that was a briefing for them to use in their
own newspapers or other media.

Chairman: Thank you very much. Lord Goodlad.

Q172 Lord Woolf: I wonder if, through you, My
Lord Chairman, I could just ask Lord Mackay,
because I would be very interested to hear his
response, my practice when Chief Justice—which I
think was in accord with what my predecessors were
doing—was to accept the correctness of the
generality of the approach that Lord Mackay has just
indicated, but to give advice to judges generally, and
this is now reflected in a type of code of conduct
which they have. As a generality, however, it is not
desirable for the judge to talk about a case which he
has been involved in as a judge and, secondly, he or
she should bear in mind whether it is better that they
leave the matter of making comment to a senior judge
who has got the responsibility of expressing the
views, either as his own or the views of the Judges’
Council. I wondered what Lord Mackay would say
about that sort of approach.

Lord Mackay of Clashfern: I would think, generally
speaking, that it is quite wrong for a judge to
come to comment on a case in which he or she has been
involved except in open court.

Q173 Lord Woolf: I meant that.

Lord Mackay of Clashfern: Perhaps a degree of
improvement has taken place in recent years over the
way in which remarks on sentencing or judgments are
formulated in the light of whether the case may be
one of public concern, because certainly when we had
a press officer who advised—when I was Lord
Chancellor our press officer and the press office
advised judges about what should happen in relation
to the media and tried to help them in that
connection—the advice was that if you knew the case
was likely to provoke some kind of public concern it
was wise to try to take account of that in the way you
formulated your sentencing remarks or your
judgment so that the issue was dealt with in an open
way. It is undesirable for judges to become involved
in discussion of cases in which they themselves have
participated. There may be very, very exceptional
circumstances, but it is not very wise. I am in
agreement with Lord Woolf on that.

Chairman: Thank you very much. Lord Goodlad.

Q174 Lord Goodlad: Thank you, My Lord
Chairman. In 2004 you opposed the Government’s
proposals to abolish the office of Lord Chancellor.
What degree of confidence do you have in the ability
of the Lord Chancellor Mark II—no longer a judge
or head of the judiciary; perhaps in the future not a
Member of this House or even a lawyer—to defend
judicial independence and the rule of law?

Lord Mackay of Clashfern: It must depend very much
on the individual and the individual’s capacity and
perhaps loyalties as well. At the moment we have a
lawyer who is also a Member of the House of Lords,
so the position has not been tested—and so far as I
am concerned the longer the test is put off the
better—of having a person who is neither a Member
of the Lords nor a lawyer. I find it difficult, for
example, to see how somebody who was not a lawyer
could have dealt with the criticism that was made of
the judge in Wales in the sentence that he
pronounced, because you need to be pretty familiar
with the situation to do that and you need to be pretty
steeped in the particular law and the rules. It took the
present Lord Chancellor a little time to respond—I
think the Lord Chief Justice was abroad at the time—
and as I said earlier the sooner a response is made the
better. It is quite difficult to know how that might be
handled by somebody who was not a lawyer or a
judge. There is no doubt that these new arrangements
have put a greater distance between the Lord
Chancellor, whoever he or she is, and the judiciary
and there is a very good explanation by Baroness
Kennedy of The Shaws in one of the debates on the
Constitutional Reform Act about the effect that
being appointed Lord Chancellor under the old
system had on a person. There was a very big weight
of responsibility; you were holding an office which
had lasted from before the Norman Conquest, although
with changes, and you had a very, very
responsible role in relation to the judiciary. Things
have changed and I just feel that the new Mark II (as
you refer to it) Lord Chancellor is at a greater
distance from the judiciary and therefore is less
sensitive to the concerns of the judiciary, generally
speaking, than otherwise he might be. Let me just
take an example. The present Lord Chancellor, in
opening the debate on the Legal Services Bill, made
a remark about the way that consumers regarded the
Lord Chief Justice. In order to be sure that I have it
right I have brought the sentence with me—this is in
Hansard for 6 December, column 1164—where he
says in relation to the appointment and dismissal of
members of the Legal Services Board: “I have to say
it gives little comfort to consumers, who rightly see
the Lord Chief Justice, who is a man beyond
reproach, as another lawyer in the process.” It is the
word “rightly” that I find rather sad in a way. The
junior minister was tackled about this later on and
sought to explain it, but in all fairness the explanation
does not give much weight to the word “rightly” which the Lord Chancellor used. I do not think that the idea that the Lord Chief Justice is just another lawyer is a very wise stance to take up, because after all he is a lawyer, certainly, but he is a judge, and a pre-eminent judge, in our system. Incidentally, they say once or twice that he is appointed by the Prime Minister; technically, that is not correct, the Lord Chief Justice is appointed by the Queen on the advice of the Prime Minister and it is important to remember that he is elevated from the ranks of lawyers into a very, very special position. Most consumers—certainly most that I have come across—recognise that and have a faith in the Lord Chief Justice which, generally speaking, is quite high.

Q175 Lord Goodlad: Thank you. Can I ask if you think that the office of Lord Chancellor was irremediably weakened by the events of the summer of 2003 when the Prime Minister removed the head of the judiciary from office in a Cabinet reshuffle?

Lord Mackay of Clashfern: That was accompanied with the idea that the office of Lord Chancellor could be terminated overnight, and I have been asked by many people since then how that could possibly come about, that the Prime Minister’s office should issue a press release which suggested that? I do not know the answer to that of course, except that obviously they were at the time acting without legal advice within the Cabinet on the situation, because the outgoing Lord Chancellor was not consulted about it and of course, as we know, there was quite a lot of scurrying about on the next day in relation to the Woolsack. It is important that the Cabinet should have within it a member who has legal experience and qualifications. As you know, the Attorney-General, for good constitutional reasons, is not a member of the Cabinet although his advice is available to the Cabinet, but it is quite important that the Cabinet should have in its membership somebody who is familiar with the legal system and with the requirements of the judiciary. I just point out that the Scottish devolution arrangements put the Lord Advocate as a member of the Scottish Executive, which has other points about it, but at least from the point of view of having legal experience within the executive it is provided for.

Q176 Lord Rowlands: A rather separate question; I wonder what assessment you make of the impact of the Human Rights Act upon the relationship between courts, Parliament and the Government. Do you see it as something of a watershed?

Lord Mackay of Clashfern: It is certainly a very considerable change, but the actual effects of it in result may not have been as great as some people thought because, after all, we were already signatories to the Human Rights Convention, which is the basis of the Human Rights Act, and it is said to be bringing into this country the human rights legislation. In a sense that is true and it is possible to litigate about it here, but the biggest effect of it is the increase in the amount of litigation that has taken place, raising questions in our courts of a human rights kind, and the actual result—I do not know whether it has made as much difference as at first was thought might happen.

Q177 Lord Rowlands: Do you think it has brought the judiciary more into political decision-making in the sense, particularly since 9/11 and all the anti-terrorism legislation, that the two together have created different kinds of tensions between the judiciary and the executive?

Lord Mackay of Clashfern: Certainly, it may have made it a bit sharper. As I said, the Human Rights Act incorporates into our law what was already something that we were signatories to and which was being given effect to in our courts in the sense that it was possible to interpret legislation in the light of the Human Rights Convention. It may have made sharper some of the decisions about, for example, proposals for dealing with terrorism, and the House of Lords decision on that is an example of that where it has come right up against the proposals of the executive. This was partly what Mr Clarke may have been referring to when he gave evidence here about the difficulty of getting the views of judges in advance. It would be very helpful, I can see, for the administration to be able to say to the House of Lords “Now if we did it this way, would that be all right?” and the House of Lords—I do not know anything about it, I am not party at all to any of the deliberations that may have gone on between them, but I can well see that they might not wish to become embroiled in that. Of course, as I said earlier, if you separate out completely the Law Lords and the judiciary from the legislature, as the Constitutional Reform Act has done, one of the other consequences must be that the judges all wish to stand apart from the formulation of policy, particularly in sensitive areas—you formulate the policy and then we will decide.

Q178 Lord Peston: Lord Mackay, you have largely answered the questions I was going to ask you but, just to clarify, we have the Lord Chief Justice as now head of the judiciary as a formal matter, and the Lord Chancellor has as his explicit role independence. In a sense they both hold a role in terms of independence; do you see any room for conflict between them?

Lord Mackay of Clashfern: Again, that depends a bit on the relationship of the individuals. I believe that the attitude of the present Lord Chief Justice is that the Lord Chancellor will be involved as closely as he wishes to be in the affairs of the judiciary to keep the
situation as much in his mind as possible. The leadership roles have now been separated of course and they are different; the Lord Chief Justice’s primary role is as a judge, the leading judge of England and Wales, with an authority as a judge which goes right across the whole system because he sits in the civil court and in the criminal court from time to time, and he is the leading judge, leading the whole judiciary as far as judging is concerned. The Lord Chancellor is now completely out of the judicial process and therefore his leadership is more of a political type of leadership and he is primarily concerned with the Government’s arrangements and the Government looking to doing what he is required to do to maintain the independence of the judiciary. When it comes to speaking out, as from time to time may be required, under the present arrangements if they are both available they will discuss who is more appropriate to do the speaking. As it happened, when the Wales case came up, as I said the Lord Chief Justice was out of the country but still it was the Lord Chancellor who seemed to be the appropriate person to speak on that case because it was one of the ministers who was speaking about the case and also, incidentally, particularly to do with jurisdiction or responsibility of the Attorney-General. There is room for the two and they are distinct, and so long as the personal relationships are reasonable between them the scope for conflict does not arise.

Q179 Lord Peston: Looking at the speaking out in a more general sense rather than just about a specific case, you have got the Lord Chief Justice in his role and we have this new body which I have to confess I do not understand at all, what is called the Judicial Communications Office—but it does include the word “communications” which suggests that that must be an important part of its role. Do you yourself have any view or even any understanding of what should be going on in terms of explaining to the media, and what you yourself call the consumer, as it were, about things like the constitutional role of judges and the concept of independence—I wonder what that means. Do you see them as having an active role here?

Lord Mackay of Clashfern: As I said, the principal job of the Lord Chief Justice is judgments and it is a fulltime job and a difficult one. I had a press office which assisted the judges as and when they needed assistance, and on the whole the system worked quite reasonably well. That part of the press office has become an office of the Lord Chief Justice and their principal job is to try and ensure that the press understand the situation in relation to particular cases and so on; if they can give background that sometimes helps. So far as the general instruction of the community is concerned, in relation to the position of judges and so on, that is primarily the responsibility of the Lord Chancellor. The Lord Chief Justice will no doubt have an opportunity when the courts report, within each year, for a general discussion of the matter, and no doubt a press conference at that time, but I do not think that the Lord Chief Justice ought to be involved in distracting from his principal role of leading the judiciary in judgment.

Chairman: Thank you very much. Lord Windlesham.

Q180 Lord Windlesham: Let us turn now, Lord Mackay, to the role of judges in Parliament. Under the Constitutional Reform Act it would seem that the judiciary will no longer have the ability to speak on the floor of the House of Lords, and so raise concerns they may have about Government policies affecting the judiciary; instead of this the Lord Chief Justice may make written representations to Parliament under section 6 of the Constitutional Reform Act. May I ask you, on what sort of issues do you envisage that this new procedure should arise?

Lord Mackay of Clashfern: There are two matters I would want to mention. First of all, it has become much more common now for the judiciary—the senior judiciary particularly, but not always the senior judiciary—to come to speak to parliamentary committees, such as the Home Affairs Select Committee, and now the Constitutional Affairs Committee—and Home Affairs is still of importance in relation to prisons and that kind of thing. I believe that the section 5 representations would be appropriate only for very critical—I do not mean critical in the sense of finding fault, I mean critical in the sense of very important—matters; I do not think it is a procedure that I would envisage being used very often. It would be something really fundamental, I think, that one would expect to be raised if that procedure was to be used. More informal procedures such as speaking to committees and so on are more common and more likely to be productive. I, of course, greatly regret that the senior judiciary are not able to speak in the House of Lords; that is a pity. It is part, as My Lord Chairman said, of the separation of powers; separation of powers is well in theory but I doubt whether it always produces the best results in practice if carried too far, but as Lord Falconer said yesterday, that is history. Parliament has done this now. The senior judiciary often contributed very importantly to debates in Parliament, on matters not directly affecting them. For example, I remember a very interesting and eloquent speech of the late Lord Wilberforce on the insurance provisions in relation to buildings and in relation to the surveying of buildings by the local authority, and the liability that failure to survey properly might produce. He was an absolute master of that area and Parliament is deprived of the benefit of that. No doubt he could put it in a lecture or something, but it is not quite the same as a direct
address to Parliament. My answer is that section 5 is only for very dramatic and extremely important developments, otherwise less formal communication, particularly with the committees of both Houses, is important.

Chairman: I want to bring Lord Lyell in but could I just ask you a supplementary. If written representations under section 5 are a sort of ultimate deterrent, were not to be used lightly but for, as you say, critical issues, the question arises of what sort of normative patterns of communication are there rather than exceptional. One idea which has been put to the Committee and has found some support from various witnesses is that the judiciary might produce an annual report to be laid before Parliament every year, setting out activities and issues of public interest that they want to put in the public domain, and that that every year would occasion a Parliamentary debate and be an opportunity to, as it were, sum up in a less dramatic way than section 5 written representations, although it could be complementary to it. What would be your reaction to that idea?

Lord Mackay of Clashfern: My impression is that there is already a provision for the court reporting annual; the Court of Appeal has done it for some time but it is more general now. That is a method of communication that I would regard as very appropriate and rather routine, and it is on that occasion normally that the Lord Chief Justice would probably give a press conference, explaining the report and answering any questions that might be raised about it by the press.

Q181 Lord Lyell of Markyate: Following that up, Lord Mackay, one of the great strengths, it always seemed to me, of our constitution was that in a sense all three arms came together in Parliament—the executive, the judiciary, the legislature. The previous Lord Chancellor, Lord Irvine of Lairg, in a quite seminal debate in 1996, which you took part in, said: “I turn to the role of the Law Lords, both sitting and retired, in your Lordships’ House. Their expertise in the administration of justice allows them to make an invaluable contribution to our debates on that subject.” I would take it that you would agree with that. At the moment, at least, unless there is some change, the sitting judges have been pushed out of Parliament, but for retired Law Lords the position does not seem to be entirely clear. Would you encourage the fact that they should, when they retire, come in and seek to contribute actively to our debates?

Lord Mackay of Clashfern: Of course, the position will change in that the members of the Supreme Court will not be Lords once the new Supreme Court arrangements come into place, and therefore that option after that will not be available unless they are given peerages on retirement. That could happen, but I do not know whether you expect it to happen. I am not sure. Anyway, unless and until they get a peerage they will not be able to participate, and that is a pity, if that is the way it works out. If I may say, I entirely agree with what Lord Irvine said in that debate and I would not be surprised if his view on that matter remained the same in June 2003, which led to the events of which we know.

Chairman: I am afraid this will have to be the final question because we have another distinguished witness, but Lord Bledisloe.

Q182 Viscount Bledisloe: You began by saying that you are aware of the evidence which Mr Clarke gave to us last week; can I ask you a bit more about that? He was suggesting that the senior Law Lords should be prepared to discuss with him legislative proposals which he intended to bring forward, and indeed he went so far as to suggest that they might give a formal opinion upon their validity before they were enacted. Indeed, he went so far as to say that it is disgraceful that a Law Lord is not prepared to discuss with the Home Secretary of the day the instances of the principle involved in this matter. What is your view of the constitutional propriety of a discussion of that kind as to the validity of a law before it had been challenged in court?

Lord Mackay of Clashfern: Under the new arrangements, in effect putting the Law Lords out of Parliament—though it has not quite happened yet—on the basis that it is to happen the consequence of that is the situation which Mr Clarke found difficult or objectionable. On the other hand, it would be possible because some of the courts in Europe have the possibility of pronouncing on bills before they become fully law, but that would require a statutory provision that would enable a minister to put his bill before the courts for discussion in the court. One of the difficulties Mr Clarke may not fully have appreciated is that a Law Lord sitting in his room in the House of Lords or elsewhere, presented with Mr Clarke’s proposals, might see them as quite reasonable, but he has not heard the full argument and when somebody comes along with the opposite argument, his mind may change. After all, I believe that the essential quality of our judges is their ability to have an open mind, to decide the case in the light of the arguments. I was once at a conference with the then Chief Justice of the United States and the Chief Justice of Canada, and the subject of judicial appointments came up. I ventured the opinion, in the presence of these gentlemen, that in the United States judges were appointed for their opinions—because they were examined in great detail in the Senate Committee—whereas here they were appointed for their ability to form opinions after they heard the argument, and I think William Rehnquist was prepared to accept that. One of the difficulties of Mr
Clarke’s proposal in the informal shape of it is just that, that judges would be forming opinions without a full argument about it, and that is highly dangerous. On the other hand, if there was a formal statutory procedure for ministerial proposals being put to the courts, say in a draft bill, then argument would be open and everyone who had an interest in it would have a chance to state their point of view before the judges came to a decision.

Chairman: Thank you very much, Lord Mackay; we are most grateful. There will be a transcript of your evidence and if you have any seconds thoughts or things that you would wish to have said, we shall be extremely grateful to receive them, but as it is could I thank you very much, it has been very helpful evidence indeed. Thank you.

Examination of Witnesses

Witness: LORD LLOYD OF BERWICK, a Member of the House, examined.

Q183 Chairman: Lord Lloyd, it is very nice to see you here and thank you for coming to give your evidence to the Committee. This will be televised so would you be kind enough to just identify yourself for the cameras.

Lord Lloyd of Berwick: Lord Lloyd of Berwick, former Law Lord.

Q184 Chairman: Lord Lloyd, you have been kind enough to supply us with an opening statement. We have all read it—I checked that before you came—so would you like briefly to sum up the gist of it for the Committee?

Lord Lloyd of Berwick: Yes. It is in many ways early to say what the ultimate result of the 2005 Act is going to be so far as arrangements are concerned. But one thing which is already apparent is the enormous additional burden which is now placed, not just on the Lord Chief Justice but also on other members of the higher judiciary. I was very interested to hear what Lord Mackay was saying, that the primary job of a judge is actually to sit in court. That is the best way in which they can influence, in the case of the Lord Chief Justice, the criminal justice system. But the same applies to the other heads of division, the Chancellor in the Chancery Division and the President in the Family Division. What worries me is that the burden on all of them is now so high that they are not able to sit more than two or three days a week, some even less. For example, I mentioned the fact that Lord Justice Leverson, who occupies a very important position as the Senior Presiding Judge, is scarcely able to sit at all now. He is a very good criminal judge but he cannot sit as a criminal judge; I find that very depressing. In the long run, it may be very deleterious to judicial appointments because it may affect—I have explained this in the paper—those who are willing to accept these top positions. The best judges may feel they are not very good as administrators. It is also affecting recruitment to the High Court bench; these are the points I tried to make in my opening.

Q185 Chairman: As you say, it is somewhat complementary to the point that Lord Mackay made to us a few minutes ago, those of us on the Committee who are not lucky enough to be lawyers know that the phenomenon you are describing applies in many spheres of life and many professions—one hears the same thing, that people are brilliant research scientists and they end up administering gigantic laboratories, or people are very able architects and they find themselves chairmen of architectural firms and associations and so on and so on.

Lord Lloyd of Berwick: That is a very good analogy.

Q186 Chairman: It is a phenomenon which is not unique to any self-governing profession really, is it?

Lord Lloyd of Berwick: That is very true, it is a very good analogy. But the beauty of the old system was that it was all taken off the shoulders of the judges by the Lord Chancellor’s Department. Now, of course, it is not, because a great deal of the administration is being transferred to the Lord Chief Justice and his colleagues. They now have large numbers of civil servants under their direct command, and I think that is a great pity.

Q187 Chairman: Point well taken. Are there any other observations you would care to make on the way the new arrangements are working other than the important thing you have just said?

Lord Lloyd of Berwick: No, except it is important to recognise—and this was again recognised by Lord Mackay—that at the moment relationships between the Lord Chief Justice and the Lord Chancellor are very close and very good and I do not see any sign of any problem arising in that respect.

Chairman: Lord Bledisloe, did you have a point you wanted to make?

Q188 Viscount Bledisloe: I just wanted to add a suggestion to Lord Lloyd’s point about not wanting to be involved in administration. Would it be fair to say that whereas architects and other people may have gone into professions knowing they might have administrative responsibilities, those who have gone...
to the Bar have gone deliberately to a profession where there is no administration at all?  

Lord Lloyd of Berwick: That is a very fair point, and that puts in one sentence what I have put in two or three pages in my opening statement. It must not be overlooked.

Q189 Baroness O’Cathain: The question actually asked for your observations on how the new arrangements are working, but is it not true that the new arrangements are still not in place? Although the Act was in 2005 it has not been finally introduced. Does the Lord Chancellor not still oversee the appointment of High Court judges, or has that changed recently?  

Lord Lloyd of Berwick: No, that has changed.

Q190 Baroness O’Cathain: It is totally out of his hands now.  

Lord Lloyd of Berwick: The Judicial Appointments Board is already functioning; it has not done a lot yet, as it happens, but it is certainly functioning. That part is certainly in force.  

Baroness O’Cathain: I just thought that the Lord Chancellor himself actually did say in his evidence that he would still have a handle on that for another few months. Am I wrong?

Q191 Chairman: Your recollection is right, the Lord Chancellor himself told us that there were still some appointments in which he would continue to be involved for the next few months.  

Lord Lloyd of Berwick: I do not understand how that can be. But if he said that it must be true.

Q192 Lord Woolf: So far as the Law Lords are concerned, the Lord Chancellor says that the special appointments section does not come into play until the Law Lords move out. We have had a Law Lord appointed very recently and he was appointed by the old system.  

Lord Lloyd of Berwick: That, I think, is the explanation.

Q193 Baroness O’Cathain: I did think it was High Court judges actually.  

Lord Lloyd of Berwick: No, I am pretty sure that as far as High Court judges go the system is already operating, but I will be corrected if I am wrong.

Q194 Viscount Bledisloe: Can I ask you to remove my uncertainty? I take your position, Lord Lloyd, as regards the Law Lords; has the Lord Chancellor, as I understand it, fully got rid of any responsibility for nominating other members of the judiciary? I am not quite clear; I thought there was a gap.  

Lord Lloyd of Berwick: I think he has; that was certainly one of his objectives, to hand the whole of that over to the Judicial Appointments Commission and I thought he had succeeded in doing that.

Q195 Chairman: One thing that is beyond debate is that of the responsibilities left to the Lord Chancellor one is this mighty but somewhat ill-defined responsibility for the rule of law. It is very interesting to ask you as a senior judge and lawyer what the rule of law is in your opinion, over and beyond the independence of the judiciary. What is his responsibility, for which he has the political and public responsibility, not just through history but now through statute? What is it?  

Lord Lloyd of Berwick: I will attempt to answer that question, mainly by referring, if you are not already familiar with it, to a lecture which was given on this very topic by Lord Bingham. Could I perhaps just take you up on something you said in asking that question, which may have suggested that the responsibilities left to the Lord Chancellor had been very largely diminished. That is, if I may say so, a misapprehension.

Q196 Chairman: That was not my intention.  

Lord Lloyd of Berwick: The Lord Chancellor’s responsibilities are still, in running the courts system, very largely as they were. It is only in the more limited spheres of not acting as a judge and not being responsible for judicial appointments that his responsibilities have been mitigated. On your question as to the rule of law, I do recommend the Committee to get hold of a copy if they were not present at the lecture. If I may be forgiven I cannot resist mentioning one thing which he says early in his lecture about the academic view as to what the rule of law is. One academic said: “It may well have become just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians. No intellectual effort need therefore be wasted on this bit of ruling-class chatter.” Then a little later he refers to another academic commenting on the Bush v. Gore case in the Supreme Court who said that the impression is now recognised that “utterance of those magic words is little more than ‘Hooray for our side!’.” Having said that, Lord Bingham does go on to give a very neat definition of what we mean by “rule of law”: “all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts.” That is the general statement and he then breaks that down into eight sub-rules as he calls them. I will not go through them all at the moment, but they are all the ones that one might expect and in
particular, of course, that ministers, like everybody else, are subject to the ordinary courts.

**Chairman:** Thank you, it sounds as if the Committee would be well-rewarded by studying Lord Bingham. Thank you very much for that, it is very helpful.

Q197 Baroness O’Cathain: How effectively is the Lord Chancellor fulfilling his duty to defend the judiciary and what role do you think the Lord Chief Justice should play in this regard?

Lord Lloyd of Berwick: When one talks about defending the independence of the judiciary one has to unpack that to some extent. The independence of the judiciary arises in two rather separate ways, one where there is an attempt by the legislature, if you like, or by Government—to put it more accurately—to restrict in some way the jurisdiction of the courts. There the classic example with which we are all familiar was the recent attempt to oust the jurisdiction of the courts in the asylum and immigration field. There, it seems to me, the Lord Chancellor’s duty is absolute; he must point out to the Cabinet that this would undermine the independence of the judiciary. He failed, as it happens, in that case, as we all know. But it was subsequently drawn to the attention of Parliament in other ways. There is an entirely separate sense in which the independence of the judiciary can be attacked—again you discussed this with Lord Mackay—and that is by ministers attacking the decisions of individual judges and also, of course, members of the press attacking the decision of individual judges. What would worry me would be if there were some sort of split whereby it was thought that the Lord Chancellor had to deal with ministers and that the Lord Chief Justice had to deal with the press; that would be a great mistake. It seems to me that the Lord Chancellor still has a duty in respect of both these matters. No doubt he would discuss the performance of that duty with the Lord Chief Justice, but it certainly is his duty to defend the integrity of the judges, both when attacked by ministers and when attacked by the press.

Q198 Lord Peston: Just very briefly, to make sure I understand what you are saying, if you take a specific judgment are you saying that it is unacceptable for anyone in public life, whether a minister or a Member of this House, to say of a particular judgment “that makes no sense whatsoever”? Are you saying that should be ruled out, or are you saying that is allowable but the defender of this nonsensical judgment would not be the judge but the Lord Chancellor? I am not very clear. I have a specific case in mind which I am not going to mention.

**Chairman:** Would you mind if we just skipped back for a moment to the rule of law? I think Lord Lyell has a supplementary.

Q199 Lord Peston: Well, if you want to know the case it was that poker is a game of chance and simply no-one who knew any mathematics or probabilities theory or theory of games could possibly come to that conclusion, and I am sorry, I did not really want to mention it but since you press me my point is, were one to write an article and say that, who is to defend the judge? Since I take it the view is that the judge himself should not be asked to justify his own—

Lord Lloyd of Berwick: I entirely agree with what Lord Mackay said about that. I think it is highly undesirable that judges should be asked to defend their decisions.

Q200 Lord Peston: I understand that but who should? Are you telling us that the Lord Chief Justice knows, or that the Lord Chancellor should be the one to defend them?

Lord Lloyd of Berwick: I think in practice it would and should be done between the two. That is why it is so important that the relationship between the Lord Chancellor and the Lord Chief Justice should be as close as I have no doubt it is, and they will discuss it and they will say which of them is the more appropriate to deal with it. In general, where the attack is by a minister, it would be more appropriate for the Lord Chancellor to do it: it may be more appropriate in other cases for the Lord Chief Justice to do it. I think if I had to say one or the other I would say primarily the Lord Chancellor. But as long as somebody does it that is the essential thing, and not what happened when, as you discussed with the journalists, there was that gap when the Lord Chancellor thought the Lord Chief Justice was going to do it and he did not realise he was in Poland. That must not happen again.

**Chairman:** Would you mind if we just skipped back for a moment to the rule of law? I think Lord Lyell has a supplementary.

Q201 Lord Lyell of Markyate: If I may take my supplementary here and now, is not really this problem of interplay between ministers and the judiciary really a matter of courtesy and reasonable restraint on both sides? It does not mean that you cannot say that a judgment is, in your view, very unwise or to be tested on appeal or to be considered by Parliament: it is the way you pitch in, and if you do it with courtesy and explanation that has always been fine. The problem is that there have been rather too many occasions over the last X years when that has not been the case.

Lord Lloyd of Berwick: I entirely agree. Of course, it is open to ministers to say they disagree with judgments, and generally they will appeal if they can and if that appeal is lost then they will say, “Well, we
still do not like it and we may have to consider legislation”. What I think is intolerable, and I think this lies behind your question, is a personal attack on judges because the minister has disagreed with a particular judgment. I am afraid that did reach a very serious point when Mr Blunkett was Home Secretary when he attacked a judge in an article in the Evening Standard and so on. That is what should not happen.

Q202 Chairman: Do you have the impression there are more of these ad hominem attacks?
Lord Lloyd of Berwick: I think they reached a crescendo during Mr Blunkett’s tenure of the office of Home Secretary. With Mr Clarke I think it was somewhat better, in fact much better, and one just does not want to see that happening again. But there is still obviously a tension.

Chairman: Thank you very much. Lord Goodlad?

Q203 Lord Goodlad: Can I ask Lord Lloyd how difficult he thinks it is for the Lord Chief Justice to represent the diverse views of the judiciary under the new arrangements?
Lord Lloyd of Berwick: Yes. The important point to stress here is that there are very diverse views among the judiciary. I think Lord Woolf would be the very first to accept that. Judges all have independent minds. Very often they do not agree, as we know, when they are giving judgments. They are unlikely to agree all the time about the future arrangements in the administration of justice. So there are clearly diverse views which will continue to exist. I cannot see there is any real problem in the Lord Chief Justice representing these diverse views. He can say what the diverse views are. I recall very well a speech made by Lord Bingham in the House of Lords when he expressed what the views of the judges were—I cannot remember what it was about. I think it may have been about minimum sentences or something of that kind—and then to everybody’s surprise he said: “Well, those are the views of the judges but I actually think differently”. So he can represent the views and I suppose his job will be to reconcile them so far as he can.

Q204 Lord Goodlad: Could I ask further, please, how representative, Lord Lloyd, you think the Judges’ Council is, and under what circumstances you think it would be acceptable for judges other than Lord Chief Justice to criticise government policy outside the courtroom?
Lord Lloyd of Berwick: So far as I know the Judges’ Council is completely representative but, again, Lord Woolf himself would be the best person to give you evidence on that. Judges are often asked to give their views about future legislation in the form of consultation papers. This is perhaps not always recognised. The circuit judges have done that quite recently in relation to the proposed changes to the law of rape. If they are asked to give their opinions then obviously they must give their own opinions and, if they happen not to agree with the views of the government, then too bad. I am nervous about judges expressing too readily their views about public policy generally. As Lord Woolf said when Lord Mackay was giving evidence, they must be encouraged to use as much self-restraint as they can.

Q205 Viscount Bledisloe: I think we are all aware that you are less than wholeheartedly enthusiastic about the arrangements for the new Supreme Court and the removal of the Lords of Appeal from this House, but what appreciable impact do you think that will actually have on the constitutional relationships between the judiciary, Parliament and the Government?
Lord Lloyd of Berwick: I think the main one will be, and I regret this very much, that judges, and in particular the Lord Chief Justice, will no longer be able to represent the views of the judges in Parliament. That has worked well in the past: there has never been any difficulty with it, and nobody has been able to think of a satisfactory way of replacing that role. Section 5 is obviously not going to operate very frequently. Of course, the Lord Chief Justice can appear before parliamentary committees. But there was nothing quite like successive Chief Justices being able to come to the House and explain, for example, why minimum sentences do not really work, how they necessarily involve injustice in particular cases. Three successive Chief Justices expressed their view in the House. Now they can only do it in lectures or however it may be, and that is not satisfactory. As for the Law Lords, let us suppose for a moment the Constitutional Reform Act had never been passed. I think there might have been a period during which for various reasons the Law Lords were not taking a very active part in the chamber of the House of Lords. One is that they work very hard and they just simply do not have the time to take as much interest in legislative matters as they used to do. But that might well have passed and I think there would have been future Law Lords—and perhaps there are some now—who would have wanted to take part in the legislative process. They can be a very great help to the House in doing so. Lord Mackay mentioned Lord Wilberforce but I can name any number of others. Lord Scarman is a good example of someone who made a great contribution to the House and there are many others. So I think when it comes into operation it will have a deleterious effect on the work which the House does.

Q206 Viscount Bledisloe: Now that there is an automatic retiring age for Law Lords do you not think that that can largely be solved by bringing some
of the retired Law Lords back into the House in whatever form the reformed House takes?

Lord Lloyd of Berwick: I do not think that will work myself. One of the advantages of the old system, (and I am sorry just to defend the old system but you have asked me why I defend it), was that when a man became a Law Lord this place was at first quite strange to him. He might have felt a little shy—and I can see the Chairman finding that odd! It takes quite a lot for a Law Lord to take part in the ordinary business of the House of Lords. It happens generally through a Law Lord being Chairman of one of the Committees of which Law Lords have traditionally been Chairman. Gradually they get to know members of the House and so on, and that leads on to their taking a part after they have retired. If they do not become members of the House of Lords until after they have retired I can guarantee that none of them will come. I cannot see why they should.

Chairman: That is a very touching picture of these shrinking violets! I am afraid this is going to have to be the last question. Lord Rowlands?

Q207 Lord Rowlands: What impact do you think Human Rights Act has had upon the relationship between the courts, Parliament and the Government?

Lord Lloyd of Berwick: I basically agree with what Lord Mackay said. There is sometimes a confusion between the effect of the Human Rights Act on the relationship between the courts and Parliament and the effect of the European Communities Act way back in 1972. The only way in which the judges can overrule, if you like, primary legislation is under Section 2 of the 1972 Act, on the ground that it is inconsistent with the Treaty of Rome. Some people have got, I think, confused between the 1972 Act and what happens under the Human Rights Act, which is utterly different. There is no ability under the Human Rights Act for judges to declare an Act of Parliament to be unenforceable.

Q208 Lord Rowlands: But, in effect, it can happen. If you strike down in this particular case virtually the whole basis of the legislation, then that is virtually having the same effect as striking the statute, is it not?

Lord Lloyd of Berwick: Well, no. In the terrorism cases—which is what you are thinking about?

Q209 Lord Rowlands: Yes.

Lord Lloyd of Berwick:—that was not so. All they did was to say that the 2001 Act was incompatible with the Human Rights Act; that is all they could do. It was then up to Parliament to decide what to do about it. The critical moment was in 2004 when, if the Secretary of State had said: “Well, I do not care what the judges have said, I am going to go on with the 2001 Act”, there really would have been a crisis. But he did not. The Home Secretary accepted the decision of the Law Lords and provided something in its place.

Q210 Lord Rowlands: So you do not think that the combination of both the Human Rights Act and the issues of anti-terrorism legislation has brought the judges more into the political scene?

Lord Lloyd of Berwick: Well, it certainly has highlighted the importance of the function which they perform, which is to say whether or not any legislation complies with the Human Rights Act which, after all, Parliament itself passed. That is all they can do. In most cases it happens quite easily. I did ask somebody once how often there has been a declaration of incompatibility. It is somewhere between 40 and 50 cases. In every case Parliament has had no difficulty in adjusting the situation. It is only when it is in a very high profile case, as it was in terrorism, that it hits the headlines. Otherwise it happens, not all that frequently but it does happen, all the time. And it does not create any problem.

Q211 Lord Rowlands: What do you think of Charles Clarke’s view that you should have an opportunity for getting some sort of advisory view on legislation before it is passed?

Lord Lloyd of Berwick: Well, Lord Mackay was a little more understanding of that idea than I am. I think that is an impossible idea. I do not think one could conceivably have ministers going to the Lords saying: “Will this be all right or not?”, it just underlines another point Lord Mackay made, how little people who ought to know better, understand how things actually work. Astonishing.

Chairman: That seems a very good note on which to conclude your very helpful evidence. May I say, as I said to Lord Mackay, if you do have any second thoughts that you would like to show to this Committee we would be grateful, but meanwhile thank you very much for coming along. It has been a very helpful session.
Examination of Witnesses

Witnesses: RT HON SIR IGOR JUDGE, President of the Queen’s Bench Division and Head of Criminal Justice, MR MIKE WICKSTEED, Head of Judicial Communications, Judicial Communications Office, and MR PETER FARR, Chief Public Information Officer, Judicial Communications Office, examined.

Q212 Chairman: Good morning, Sir Igor, a warm welcome to you and your colleagues. We realise that in these early days of relationships between the judiciary and Parliament settling down under the new dispensations, your being here is testing new ground. We are going to be televised, so I wonder if you would care to introduce yourself and your colleagues for the record.

Sir Igor Judge: Certainly. I am Igor Judge, President of the Queen’s Bench Division and Head of Criminal Justice. Mike Wicksteed is from the Lord Chief Justice’s Communications Office and Peter Farr is from the Lord Chief Justice’s Press Office.

Q213 Chairman: Thank you very much. Perhaps I could plunge straight into the questioning. The Judicial Communications Office is obviously, in this greater separation of powers, quite an important hinge on the door, and being a hinge is potentially rather uncomfortable, you feel quite a lot of pressure and you have to make sure that it is possible for people to pass through the door. I just wonder how you see your own role and—perhaps this is a question for Mr Wicksteed—how you conceive of the role of the office. How far are you reactive—and there has been plenty to react to in the past few months—and how far do you think you have a proactive public affairs function, if you like, of putting forward the best face of the judiciary and increasing public understanding of what they do and how they do it?

Mr Wicksteed: We structured the office to take into account both sides of that particular equation. There are two elements to the office, one looks after the media relations and tends broadly speaking to be reactive, but there is a proactive element in it, and the other element is corporate communications or the internal website type of affairs that it looks after. With regards to the press office part of the office, whilst a lot of it is reactive in dealing with media requests, it is actually there to support the judiciary. We are a judicial facility and our prime objective is to make sure that judges, magistrates and tribunals of the judiciary have the support they need in the communications arena. The press office is also involved in proactive work on behalf of the judiciary.

Q214 Chairman: I wonder whether I could ask Sir Igor whether he and his colleagues, particularly in the senior judiciary, feel that this is an important aspect of support for your work. How far do you think the judges know about the Judicial Communication Office and if they do know do they think, oh good, we have got that important and valuable support; or do they think, I wonder what on earth they do?

Sir Igor Judge: If they do not know about it they are not reading what they are provided with; I doubt very much if there is a judge who does not know about the Judicial Communications Office. As to support, they recognise that there is a limit to the amount of support that can in fact be provided, but my reading of the situation would be that they are very pleased with how things have gone so far, but they do recognise that there is a limit to what the Judicial Communications Office can do and in particular what the press office can do. I do not want to be discourteous, but they know that we are not a Government department. They know that everything they say is taken down and is capable of being reported; there is no going back on the words you have used in court, you cannot regret them and think I wish I had phrased that rather differently and avoided tomorrow morning’s headlines, and so there is nothing that can be done about that. I have quite strong views about how cases are reported, but the answer to your question is yes and yes.

Q215 Chairman: Could I just ask for information, Mr Wicksteed and Mr Farr, what were your previous jobs?

Mr Wicksteed: My previous job was in external communications in the DCA/LCD and just before I came across to the Judicial Communications Office I was head of corporate communications in DCA.
Q216 Chairman: Were you a civil servant?
Mr Wicksteed: I am a civil servant, yes; I have been since I arrived in 1990.

Q217 Chairman: What about Mr Farr?
Mr Farr: Thank you, My Lord Chairman. I have been a civil servant since 1998 in the DCA press office, or the Lord Chancellor’s Department as it then was. That was my previous job and in fact I was dealing with the judiciary in the DCA immediately prior to coming across to the new office.

Q218 Chairman: Given that, is it right to say that your whole loyalty and commitment now would be not to the DCA but to the Judicial Communications Office?
Mr Wicksteed: Absolutely, there is blue water between us and Government communication offices or Government departments. We are a judicial facility.

Q219 Chairman: I have not got absolutely clear how the press office fits in—is it simply a very important part of the ICO?
Mr Wicksteed: Correct.

Q220 Chairman: It is not a separate, free-standing organisation.
Mr Wicksteed: No, and I do not think Peter would want it to be.

Q221 Lord Rowlands: Lord Mackay in his evidence said to us “if a person was sufficiently fit to be a judge of the bench in England and Wales he or she should have sufficient judgment to know when they should speak and when they should be silent in matters with the media”. Does the creation of your office say that is not quite the case, it needs backing up or supporting or what?
Mr Farr: On that one, if I may lead, it is not always the case that a judge is conscious that they are speaking to the media; sometimes they are making sentencing remarks and so forth and it is picked up by the media and becomes a story, and in those situations, particularly where they are not expecting to be prominently featured, they are very appreciative of the support that we are sometimes able to give them. It is not always the case that the judge are aware that they are going to become a story-piece.
Sir Igor Judge: If I may say so, the provision is not of a spokesman. For example, if there is a sentencing decision which looks as though it is going to hit the headlines, it is very useful for the press office to be supplied with every single thing that the judge has said from the start of his sentencing remarks to the end of them, so that if some editor is choosing to pick out one phrase, at least the reporter can be provided with the full story so that the phrase can be put in context. That may or may not affect the way in which the case is reported, but that is an example of the value of having a press office.

Q222 Baroness O’Cathain: May I go back to something Mr Farr has just said in response to Lord Rowlands’ question? Obviously, I read through all the information and thank you very much for giving us this, it has been very good information and the website is terrific by the way.
Mr Wicksteed: Thank you.

Q223 Baroness O’Cathain: In the bit about media support in this little booklet you say “We are always grateful to hear of judges involved in things that might interest the media, e.g. speeches, articles, or who have views on media coverage.” That indicates to me that they could be getting very close to becoming part of the media circus, if they get in touch with you to say “There is an interesting point here, why not actually explore this in the media?” Would that happen?
Mr Farr: If I may, I do not think that is so much the issue, their awareness is that they are operating in a very public arena, there is a lot of interest, there is likely to be coverage of a particular case that they are hearing and they are therefore conscious of everything they say being gone over with a fine toothcomb. They want to flag up where there is a fact that the media are interested and so, for example, we regularly send out judgments and summaries of judgments on behalf of the judges because we know there is a media interest in them and, of course, if they have the full wording of the judgment or the sentencing remarks there is a much better prospect of the media being able to report it accurately and fairly.

Q224 Baroness O’Cathain: I see, so you are there as a service to them so they do not actually put their foot in it.
Mr Farr: I would not put it like that myself.

Q225 Baroness O’Cathain: Why not?
Sir Igor Judge: Because if we were going to put our foot in it we would put our feet in it, I am afraid. For example, if a judge is going to make a public speech then the sensible thing is for the press office to have it and then there is no argument, but I do not invite Peter or Mike to look at the speech I am going to make and say, “how will this go down with any particular element of the media?”

Q226 Baroness O’Cathain: It is just giving it as a fait accompli, this is the speech I am going to make, and you could not say there is a complete howler there, do not do it.
Sir Igor Judge: I would be pretty horrified, but on the other hand if there was a real howler I would not mind somebody just raising a little red flag.
Baroness O’Cathain: Thank you.

Q227 Chairman: Mr Wicksteed, would part of your communications brief be to make judges in general and particular judges more human, more media-friendly, are you looking for human interest stories that such and such a judge played the organ for eight hours in his village church for charity? Are you trying to get human interest stories out there?
Mr Wicksteed: The quick answer to that is no, not at this stage of the game. We are a new office, this is a new concept really for the judiciary and it is really part of a culture change, as is the whole Constitutional Reform Act, and we are part of that culture change. It will take a long time for it to bed down, but in the meantime what we are here to do is to make sure that the work that they do in court is well and accurately reported broadly speaking.
Sir Igor Judge: I must say, if I may, “no, not ever” would be my answer to the question as to whether they really should be saying Mr Justice X is particularly good as a tenor in the local village choir. I really do not think that is what Mike or Peter’s job is.

Q228 Chairman: Just a supplementary and then I will bring Lord Rowlands in: is it part of your practice to put the senior judiciary through media training?
Mr Wicksteed: We have provided media training for those who are going to be interviewed by reporters for those who want it, but it is not a regular practice, we do not have regular sessions, and that is a service that I think we should be in a position to provide them with because giving an interview to a national newspaper can be quite a complicated thing sometimes, especially if you are not used to dealing with journalists at that level.

Q229 Chairman: Is that “prepping” a judge for a specific interview or is it generic training?
Mr Wicksteed: It tends to be generic. What we did produce, and I have brought copies with us if you would like to look at them later—in LCD was a booklet called The Media: A Guide for Judges and that gave quite a lot of information on how judges could interact with the media; it was put out to all judges serving at the time and passed out to newly appointed judges. That is what that Ryman’s bag is, and I will pass it up to you later. It is very, very generic in terms of the information we give out.
Chairman: Thank you very much; we will look at that with interest. Lord Morris.

Q230 Lord Morris of Aberavon: I am very interested in the comments made regarding the service of providing, where required, the full wording of a judgment at the request of the press. Could you give some rough indication what proportion of the press office’s work that is; it would seem to me to be very important to get the odd expression which may be not quite fortunate into its right perspective. As Sir Igor said, once the words are uttered it is impossible to reclaim them—I think that comes from Virgil, but never mind.
Mr Farr: I would not like to put it in percentage terms, but it is certainly a reasonable proportion of the time. We are constantly looking ahead to what cases are coming up and whether we can provide material for the media on the cases, but of course a lot of the time is spent in dealing with enquiries both from journalists and from the media themselves, and preparing for announcements and speeches and other matters in due course. A fair proportion of our time, therefore, is preparing and so on, yes.

Q231 Chairman: Perhaps, Sir Igor, I could ask you something which is very topical in the Committee’s mind which is that you yourself are a very senior judge with wide experience. I wonder if you would be prepared to characterise your reaction or that of any of your colleagues to the recent statement from the Home Secretary, which was issued together with the Attorney-General, which ostensibly was a clarification of sentencing guidelines, but in relation to the overcrowding of prisons. I can see that that might be innocently interpreted as a reminder of the status quo, which was basically the gloss that was put on it subsequently, or it might have been seen as a tap on the shoulder saying watch out, the prisons are very overcrowded so be sure to follow the guidelines very closely, please. I just wondered whether it was seen as a steer or a reminder by you and your colleagues.
Sir Igor Judge: There is a certain amount of misunderstanding about the sequence of events. The Home Secretary, the Lord Chancellor and the Attorney-General in the National Criminal Justice Board, of which I am a member, produced a statement relating to the overcrowding of prisons. I showed that statement to the senior presiding judge, Lord Justice Levison; he took the view, in the exercise of his function, that that was an appropriate clarification of sentencing guidelines, but in relation to overcrowding of prisons. I can see that that might be innocently interpreted as a reminder of the status quo, which was basically the gloss that was put on it subsequently, or it might have been seen as a tap on the shoulder saying watch out, the prisons are very overcrowded so be sure to follow the guidelines very closely, please. I just wondered whether it was seen as a steer or a reminder by you and your colleagues.
judgment that the Lord Chief Justice, Lord Justice Latham and I gave. There has been a certain amount of uncertainty, I think is the way to put it, about the way in which those events unfolded.

Q232 Chairman: I am grateful to you because you are clearly in a position to know what the facts are and that is very helpful to the Committee, but can I just be absolutely clear, there was no question of these very senior ministers saying we would be grateful if this could be passed on to all the judges.

Sir Igor Judge: I am a member of the National Criminal Justice Board so they will have known that I will have got it and I saw it. I decided to pass it on; I think they would have assumed that I would have passed it on but I decided that I should pass it on and it was not for them to tell me whether to do so or not, and then it was for Lord Justice Levison to decide whether or not it was something that he thought it appropriate to have circulated to judges, and he did.

Q233 Chairman: It is very helpful to have that. What do you think the effect was on the recipients in this perfectly proper way as you describe it? Maybe you know what the reaction was.

Sir Igor Judge: I do not know what they all thought, but by the time 24 hours had gone by it would have been very difficult for anybody to know what the actual facts were. Certainly those who thought that the Home Secretary was seeking to influence their sentencing decisions would have been absolutely outraged; that is not something that judges are prepared to stomach, and so if there were misunderstandings, there were. But the facts are as I have given them to you. I think the judges now understand the sequence of events because they will have had their letter from Lord Justice Levison saying this is the statement prepared by the NCJB. I should add that we are very worried about overcrowding in prisons; it is an issue which troubles judges.

Q234 Chairman: To get it right, these very senior ministers could reasonably have assumed that you would see that it was passed on, that would have been a reasonable assumption on their part.

Sir Igor Judge: That would have been a reasonable assumption; I would have been failing in my duty if I had not passed it on.

Chairman: Good, thank you very much. Perhaps we can move on. Baroness O’Cathain.

Q235 Baroness O’Cathain: Thank you. The DCA website says that your organisation was drawn up “to enhance public confidence in judicial office holders in England and Wales”. Although it has only been going for a short period of time, do you have any evidence that it is actually achieving great success or just modest success or no success at all?

Sir Igor Judge: If you are asking me, the ambition is rather a large and wide one. Enhancing public confidence is a most difficult concept and it is particularly difficult, if I may say so, for judges who actually are not in the business of trying to sell themselves to anyone. If our judgments do not speak for themselves there is nothing that the Communications Office or the press office can do. There are much deeper problems about the way in which our judgments are reported, about public attitudes to judges based on the way our cases are reported, so my answer to your question is I am very troubled about the target. As to whether it is being achieved or not, I do not know how you tell but there are various statistics which show that the public tends to trust judges rather more than it trusts, shall we say for the sake of argument, politicians.

Q236 Baroness O’Cathain: That would not be terribly difficult.

Sir Igor Judge: Mike Wicksteed might be in a better position to add to that.

Q237 Baroness O’Cathain: Have you had surveys done or do you intend having a survey done?

Mr Wicksteed: At this stage of the game, no, we do not. The concept of enhancement sort of indicates that there is a problem. To my way of thinking there is not a problem and I have attached to the material that I provided Committee members a couple of surveys that were conducted last year, one from YouGov and one from Mori. Those show that the judiciary are third in both cases in terms of, broadly speaking, public trust. We do not take credit for that and as you can see from the Mori poll that has been the case now for many years; I think it goes back as far as 1983. The terminology may not be quite right, but our objective is more than the public-facing confidence in the judiciary, our objective also contains a requirement to support internal communication with the judiciary. That is extremely important, that the Lord Chief Justice and the senior judiciary can get messages down to judges, magistrates and tribunals of the judiciary.

Q238 Baroness O’Cathain: Does that mean that the Lord Chief Justice is going to spend even more time doing what in effect is media relations?

Mr Wicksteed: No, I do not think so.

Q239 Baroness O’Cathain: Or preparing for media relations.

Mr Wicksteed: No.
Q240 Baroness O’Cathain: One of the interesting things in the YouGov poll was that judges actually came higher than BBC news journalists.
Mr Wicksteed: That would probably have been in the days of Mr Rozenberg, when he was there. The interesting thing about the YouGov poll was that the judiciary were the only profession to have actually increased in public confidence in the three years since the previous poll was taken. Every other single profession was a negative. Why that is I do not know, but I thought it was pretty impressive.

Q241 Chairman: Are you claiming credit for that?
Mr Wicksteed: No, I am afraid I cannot.

Q242 Lord Goodlad: Could I ask something about the organisational structure of the JCO? How many people work in the JCO; how many of them are press officers and how many of them are qualified lawyers and to whom does the head of the JCO report?
Mr Wicksteed: I will answer the last question first. I report to Deborah Matthews who is head of the Directorate of Judicial Offices for England and Wales and that directorate comprises our office, the Judicial Office and the Judicial Studies Board. I work to the Lord Chief Justice and the senior judiciary. The office itself has eight posts; we actually have nine staff because one of those posts is a job share. There are two press officer posts, Peter is one and the job share post is in fact the other press officer post so we are actually getting 0.2 of a press officer for free under that particular set-up. The corporate side of the office has a staff of four: two who look after Web and intranet issues, one who is the editor of Benchmark which is the monthly judicial magazine, and that is headed up by Mr Golding who oversees that team.

Q243 Lord Goodlad: Are they lawyers?
Mr Wicksteed: None of them are lawyers, or none of us are lawyers, no.

Q244 Lord Goodlad: Could I ask if, when the set-up and operation of the office was designed, you looked at similar organisations in other legal systems? Do you have sufficient resources and what is the size and nature of your budget?
Mr Wicksteed: We did look around to see if there were similar organisations; there are not. I am not saying we are the only judicial communications office in the world, but in other jurisdictions and in other countries they tend to have a responsibility not only for the judiciary but for the courts themselves. We do not have that responsibility; Her Majesty’s Court Service has its own communications team so in that sense we are fairly unique. I might be wrong, but I have not come across another office that supports the judiciary. You asked whether I have enough staff resource; we are governed by a head count ceiling which means that even if I wanted another member of staff to increase the eight to nine or ten I cannot do that in the present climate, and that ceiling is across Whitehall at the moment. We are constantly reviewing the set-up that we have within our own head count resource and it could well be that maybe in a year’s time we would be in a position to increase the press office side of the business to maybe three press officers, but then we would have to lose someone somewhere else. We are not quite at that stage yet.

Q245 Lord Goodlad: And the budget?
Mr Wicksteed: The budget for next year is £890,000. I have the detail: £452,000 of that goes on salaries; office running costs will be £55,000; training for the staff, visits, team visits and suchlike will be £25,000; the Web is expensive, that is £90,000; Benchmark the judicial magazine, which is only published electronically, we do not publish it in printed format because that would be absolutely extortionate, comes in at £45,000 and then we have the running of the press office and projects that we may be looking at next year but we have not confirmed yet.
Chairman: Discussion of budgets always excites supplementary questions. Lord Peston and then Lord Morris.

Q246 Lord Peston: £400K is the wage costs.
Mr Wicksteed: £450K approximately.

Q247 Lord Peston: How many staff?
Mr Wicksteed: Eight staff.

Q248 Lord Peston: That is £50,000 odd each.
Mr Wicksteed: It would be jolly nice if we all got the money but we do not.

Q249 Lord Peston: That staff includes secretaries and researchers.
Mr Wicksteed: That includes the eight of us.

Q250 Lord Morris of Aberavon: That is everybody.
Mr Wicksteed: Everybody, yes.

Q251 Lord Peston: The eight are the press people and secretaries.
Mr Wicksteed: The press people, the corporate communications team.

Q252 Lord Peston: Eight seems very few but on the other hand £400K seems about the right number, that is why I am trying to get my head round it a little bit.
Mr Wicksteed: Maybe I am paid too much.
Q253 Lord Peston: I assumed when you said the eight that in addition to the eight each of the eight would have a secretary and then you would have researchers and people answering the phone.
Mr Wicksteed: No, we do all that ourselves.

Q254 Lord Peston: You are a very economical organisation in that sense.
Mr Wicksteed: In the sense that I do not have a secretary to support me, yes.
Lord Peston: In terms of almost fundamental economics that is bad, you ought not to be doing that, your comparative advantage is in being what you are, not in being a secretary, a phone-answerer and all that.

Q255 Baroness O’Cathain: That is very old-fashioned, Lord Peston.
Mr Wicksteed: It would be nice but, as I say, we are governed by the head count.
Lord Peston: You are economical so that is a good plus.

Q256 Lord Morris of Aberavon: You say you are new; you replaced something, what of the staff of what you replaced?
Mr Wicksteed: I am sorry, I did not follow that.

Q257 Lord Morris of Aberavon: You are an organisation of eight people and you have a new function. There must have been somebody doing some of your work before. Now we have one and a half press officers it seems to be very slim, but what have you replaced?
Mr Wicksteed: We do not replace anything, we are brand new. What Lord Mackay did when he became Lord Chancellor was he made his press office back in the Lord Chancellor’s Department, available to the judiciary and so up until April 2005 all calls relating to the judiciary were handled by the Lord Chancellor’s Department or latterly the DCA press office.

Q258 Lord Woolf: Forgive me, it is not right, however, to say that the decision to have a press office was linked to the decision no longer to have a Lord Chancellor. If I may just refresh your memory, there had been problems about the Lord Chancellor’s Department acting as the press office for the judiciary before the Lord Chancellor’s office was reformed and at least the negotiations for the creation of a press office predated the demise of Lord Irvine.
Mr Wicksteed: Yes, and the office does not exist under the Constitutional Reform Act, it would have happened anyway if that Act had come into force or not.

Q259 Chairman: Am I right in thinking, or have I got this wrong, that your budget, this £800,000 or so, is actually DCA money?
Mr Wicksteed: It is allocated through DCA, yes.

Q260 Chairman: Do you account to the DCA for your expenditure?
Mr Wicksteed: I do not, I account to the Judicial Executive Board.

Q261 Chairman: Do they in turn account to the budget provider, the Department?
Mr Wicksteed: Yes.

Q262 Chairman: Do you think it would be better if you had your own budget?
Mr Wicksteed: I do not think that is for me to say, I am afraid.

Q263 Chairman: When the Supreme Court is set up will that have a parallel organisation to your own to your knowledge?
Mr Wicksteed: To my knowledge it will have a press office, certainly, or an information office. How large that will be I do not know and what its role will be I do not know either.

Q264 Chairman: Do you see that that would be likely to be a DCA budget or the Supreme Court having its own funding and therefore its own budget?
Mr Wicksteed: I suspect that if the Supreme Court is to be funded separately it will be part of the Supreme Court budget.

Q265 Chairman: It will have its own budget for information and press and so on?
Mr Wicksteed: Yes.

Q266 Chairman: Do you see dangers of you falling over each other’s feet?
Mr Wicksteed: No, not at all. There is a colleague in Scotland who is a press officer for the Scottish judiciary, they are about to appoint a press officer for the judiciary in Northern Ireland, we are in contact with them quite regularly and we would just see the Supreme Court as being another team to be in contact with.

Q267 Chairman: You will have to put something in your budget for travel and entertainment when all you press people get together I imagine.
Mr Wicksteed: I travel on the Tube; it does not get very expensive.

Q268 Lord Smith of Clifton: What is the office’s strategy for dealing with judgments and sentences that are likely to be criticised in the newspapers? You said you were reactive by and large so you only know
that it is likely to be a hot potato issue after the event, so to speak.

Mr Farr: That is not always the case. We usually know in advance if there is a particularly controversial case where a judgment is to be handed down; we do not always know on sentencing, through occasionally a judge will contact us in advance and say you ought to be aware that I am passing down a sentence in this case today, either there has been a lot of media interest in it or it is reasonable to assume that there will be media interest in it. Our approach on those occasions is to try our best to ensure that there is something available to be given to the media, either in terms of a judgment or in terms of sentencing remarks. That is the best prospect really for the media being able to report things accurately and in context because the judgment and the sentencing remarks will take into account all the preceding weeks of evidence and the cases on both sides, it will take account of things like the aggravating factors or the mitigating factors that the judge has considered in the sentence and also the statutory framework and any sentencing guidelines. Often if the media are aware of the full picture they are much more likely to write a fair and accurate report than if the focus narrows down just on the X number of years sentence or X number of years minimum tariff.

Mr Wicksteed: In the pack that you will get after this with the media guides there are a couple of examples of summaries that we issued on behalf of judges, one last week and one the week before.

Q269 Lord Smith of Clifton: That will be very useful, thank you very much. What sort of scanning operation do you do? Do you have some sort of internal radar which can tell you or do you rely upon the judges by and large to inform you that it is going to be a special case?

Mr Farr: It is a combination. Quite often judges do contact us and let us know in advance; quite often it only becomes clear on the day and a story can be prompted by, for example, some relative’s reaction to the sentence, the outcry is what makes it a story and all of a sudden the judge finds that the sentence he passed is now controversial.

Q270 Lord Smith of Clifton: Is there a different incidence according to the seniority of the court? Is there more drama in the Crown Court as opposed to the Court of Appeal or what?

Mr Farr: That is a difficult one. The Crown Court certainly has the theatrical elements—the jury and the packed public gallery—which in a sense the Court of Appeal does not, but it really can be any court at any time. I have seen County Courts that have been involved in very controversial or high profile cases and it can depend on the parties; there is a whole range of different factors that makes something of value and interest to the media and to the wider public.

Lord Rowlands: I was going to raise the Sweeney case and it might appropriately come in here; is that all right, My Lord Chairman?

Chairman: Yes, please.

Q271 Lord Rowlands: What about the Sweeney case which was almost one of the first tests of communication. The Lord Chief Justice was abroad when the trial judge was criticised; have you devised any contingency plans since to cover the situation where you had a kind of media silence and the press reported what it reported?

Sir Igor Judge: Do you mind, My Lord Chairman, if I start by answering that? Again, a certain number of myths have arisen about the Sweeney case and let me see if I can address some of them. The Lord Chief Justice was out of England, but he was not that far away, he was in Poland. I was speaking to him on the telephone, I have no doubt his office was speaking to him on the telephone, he had not disappeared.

Second, you never know when a case is going to suddenly erupt as that one did. It erupted in fact following an article in The Sunday Times about over-lenient judges, which was addressed by the press office on Monday morning and then came this ghastly case, and it certainly was a ghastly case, on any analysis. By the evening of that day the television was reporting it and we perfectly well knew that on Tuesday there would be a lot of newspaper headlines.

What of course you cannot tell with the newspapers is whether today’s headlines are tomorrow’s, or forgotten because something else has overtaken the newspapers’ interest. The complication in that case was that a senior minister commented on the case. That is really something that we are not used to; we do not expect senior ministers to comment on judges’ sentencing decisions. The Attorney-General has a role to play, he will decide whether or not the sentence in his judgment is unduly lenient and will refer it to the court, but he will not make a speech about it, he will simply say that he proposes, if he does, to refer it. By Wednesday the story was still running and there were two problems: one, does a judge, whether the Lord Chief Justice or me, in effect dealing with this particular case because it was a criminal case, actually take a stand and start arguing publicly with a minister of the Crown about whether or not the minister’s intervention was appropriate and start a whole issue running about the Government and the judiciary embattled. That, if I may say so, is a topic which the media loves to explore: I suppose you are all used to them being keen to demonstrate that you are all embattled in different ways. This was a big current story. I took the view, and that was my responsibility, that if a minister was
in effect to be addressed it had to be done by the Lord Chancellor. The second feature of the case, which is sometimes overlooked, is that if the Attorney had decided to refer it, which he might have done, or if the defendant, notwithstanding the press, had decided the sentence was excessive he would have had a right of appeal; that appeal would almost certainly have been heard by a constitution consisting of the Lord Chief Justice or me or a senior judge or, indeed, more than one of us. We could not comment on the sentencing process if we were likely to be sitting for more than one of us. We could not comment on the sentencing process if we were likely to be sitting for all sorts of obvious reasons, and so the right person to deal with that was the Lord Chancellor. I spoke to the Lord Chancellor personally on the Wednesday morning—

Mr Farr: We were aware that the sentence was going to be passed and it was a high profile case, certainly. The force of the coverage was in the juxtaposition of the media climate at the time of sentencing is soft and something must be done about it, and this case arrived bang on cue, unfortunately for the judge concerned, in the middle of that period.

Q275 Chairman: It is very good of you to have explained that. I was struck, listening to it, that you were personally playing the role of crisis manager of this little media storm and trying to work out what should be done and who should do it.

Sir Igor Judge: I suppose so, yes.

Q276 Chairman: It is clearly quite important that as well as an issue that we have been thinking about, as well as there being a senior judicial spokesman or spokesperson available, that there is someone saying “Okay, this is what has to be done.” I wonder in that context whether as well as getting hold of the Lord Chancellor—and it is easier to look back on these things than to cope at the time—there should not have been some sort of holding statement from the JCO saying the judge was simply following the sentencing guidelines until you could get the Lord Chancellor to do his stuff within the Government and ask ministers to shut up.

Sir Igor Judge: Looking back on it, maybe, but I do not think it has ever been thought necessary in the past for anybody to say the judge was following sentencing guidelines.

Q277 Chairman: Why? Because the media would know this, would they?

Sir Igor Judge: That is a very interesting question, because the truth is that you do not know how a case is going to be reported and the moment somebody speaks up in effect and says the judge was only following sentencing guidelines, you then enter what I regard as an extremely difficult world. You have somebody who is not the judge in the case commenting on the judge’s decision; in my view no judge should comment on any other judge’s decision. The Court of Appeal will if the matter goes to the Court of Appeal. Who is the spokesman to be, an unqualified member of the press office, a qualified member of the press office, a lawyer, but what can he say beyond what the judge has set out in his sentencing remarks? In that case the sentencing remarks were absolutely plain: “I start at this, I have to take account of that and I then have to take account of this”. Anybody reading it would know perfectly well that he had followed the sentencing requirements. I am troubled about the idea of a spokesman. What happens if the judge’s sentence is completely barking? It may be way over the top—seven years for a shoplifter. Do we have a spokesman.
to say the judge was wrong or do we have a
spokesman to say, “well let us try and find some
justification?” Judges cannot have their decisions
justified ex post facto, their decisions have to be made
in court, every word spoken in court to the people
who really matter: in criminal cases the defendant,
the victims and the people who were present in court,
and if the jury decided that the verdict should be
guilty, they too. We do have to be very careful not to
create of our Judicial Communications Office the
idea that they are spin doctors; there is going to be
unattributable briefing, all the paraphernalia that
goes with—I hope I am not being discourteous to
anybody—running a government department. We
are responsible for what we say in court and people
should not have to defend us or criticise us publicly
until it goes to a higher court.

Q278 Chairman: We have all become very aware of
and are sympathetic to the problem, and you have
articulated it in a way we have not heard quite so
clearly, but the problem with the media is that they
abhor a vacuum and into a vacuum they will put
whatever is necessary to keep the story going. I see
the problem.

Sir Igor Judge: Do you mind, may I just show you the
sort of thing you are up against? I am now going to
show you two newspaper headlines the morning after
the British crime statistics were published. I use this
on a lecture I give on sentencing, if you will forgive
me. You will not know which newspaper it is but here
is the headline in one newspaper: “Lawless UK”.
“Serious violence up 15 per cent; sex offences up 7 per
cent; violence with no injury up 24 per cent.” Another
newspaper: “Crime—The Truth”. “New figures
reveal that crime has fallen 39 per cent. The falling
crime rate: vandalism down 27 per cent, vehicle theft
down 51 per cent, all violent crime including rape
down 36 per cent.” What was I reading here—
“Serious violence up 15 per cent; sex offences up 7 per
cent; violence with no injury up 24 per cent.” The
newspaper editors of those two particular
newspapers would get hold of a sentencing decision
by a judge and they might very well have a completely
different angle on the decision. We had an example
of that last week where, sitting with the Lord Chief
Justice, we decided to allow an appeal against
sentence on the basis that this was not a prison case—
it was an assault occasioning actual bodily harm—
and it got a lot of headlines. I will not go into the
details of the case but there were very serious
criticisms made of the decision and there were also
some favourable comments; there was no
spokesperson who could possibly have said anything
about that case.

Lord Rowlands: You do not need a Judicial
Communications Office.

Q279 Baroness O’Cathain: I was going to say exactly
the same thing.

Sir Igor Judge: If I may, the answer is yes, but not to
act as a spokesman to justify a judicial decision.

Q280 Lord Goodlad: Could just ask Sir Igor to go
back to his very interesting comment that in
retrospect after there had been a ministerial comment
on a sentencing decision he might have acted a few
hours earlier to prompt the Lord Chancellor to
intervene. Do you think, Sir Igor, that the Lord
Chancellor might intervene without having to be
prompted by you; as a corollary do you think the
Lord Chancellor perhaps should not intervene unless
prompted by you?

Sir Igor Judge: The answer to the specific question is
I am quite sure he intended to intervene on the
Wednesday by the time I rang, so I would not myself
claim any credit for prompting him, but there was a
discussion in which he made clear he had decided to
speak that evening. As a second point, we have to be
very careful about the constitutional position here.
The Lord Chancellor is a member of the Government
whose role has changed rather dramatically; he is no
longer head of the judiciary but he has his
constitutional obligations in relation to judicial
independence. There is a judgment to be made on
each of these occasions and if the judgment may not
be a judgment—speaking personally, and purely
personally—that I think is right, I feel perfectly
titled to ring him up and make my comments, but
in the end of course the decision that he makes is for
him not for me. I am not sure that is an answer to
your question, but if I have not answered it, would
you like me to add a comment?

Q281 Lord Goodlad: The main question was should
he or should he not have acted after a minister had
commented on a sentencing decision without having
to be prompted by you?

Sir Igor Judge: As I say, I would not want to leave the
impression that I am saying he was prompted by me,
because on the Wednesday he told me that he had
already decided what he was going to do. I did not say
“Will you do something this evening on Question
Time?”

Q282 Lord Morris of Aberavon: My Lord Chairman,
on that issue of delay, was not his first comment to
defend the minister’s right to raise the matter publicly
with the Attorney-General and it was thereafter that
he defended the judge?

Sir Igor Judge: Your memory is better than mine, I
had forgotten that.

Chairman: These are difficult areas and I have a
number of my colleagues who would like to come in.
Lord Lyell.
Q283 Lord Lyell of Markyate: Sir Igor, we are focusing on the heart of this matter at the moment, and if I just ask the question in a very straightforward way—it will probably make it more difficult to answer—what is your understanding of the respective roles of the Lord Chief Justice and the Lord Chancellor in publicly defending judicial independence?

Sir Igor Judge: As the Lord Chief Justice is head of the judiciary I would have thought it would absolutely follow that one of his major obligations was to defend judicial independence. The Lord Chancellor has a statutory obligation to do so and, again, I would have thought this was an elementary part of the obligations of the Lord Chancellor of the day. As to where one goes if they are not talking from the same hymn sheet, I would expect the Lord Chief Justice of the day to do whatever he thought was right, irrespective of the view of the Lord Chancellor, because he is head of the judiciary and must represent the judiciary.

Q284 Lord Lyell of Markyate: If we go back to the origins of this and Lord Irvine and Mr Blunkett—because there were a number of preceding cases before the change in the constitutional position—would you not agree that the constitutional position remains that the Lord Chancellor has a very strong duty to protect judicial independence, that he should be ready to stand up for that as soon as it appears to be called into question and that ministers should recognise that they have a duty. Of course they are entitled to make balanced comment, but they should exercise significant restraint in the way that they do it.

Sir Igor Judge: Yes, and yes, to both halves of that. The Lord Chancellor continues, notwithstanding the changes in the constitutional arrangements, to have his or her own independent obligation to defend judicial independence; I have no doubt about that. The same applies to the second; ministers undoubtedly should be careful. For example, if a minister finds there is an adverse judgment against his department in the administrative court, commenting on the judge seems to me to be completely unacceptable, but of course the minister is allowed to say “We disagree with the judge’s position and we intend to appeal”. There is no reason why he should say he accepts a decision if he does not, but criticism of his judging seems to me to be inappropriate.

Q285 Lord Lyell of Markyate: Sir Igor, that is very valuable. You have the press office and Mr Wicksteed and Mr Farr are here. It is obviously important to a Lord Chancellor or a Lord Chief Justice to be thoroughly acquainted with the facts; if I can turn to your colleagues, to what extent is there close communication between the press offices of the Judicial Communications Office and the Department of Constitutional Affairs so that the Lord Chancellor is swiftly put in the picture?

Mr Wicksteed: That is a good question for Peter.

Mr Farr: We have regular contact with the Department for Constitutional Affairs press office and other press offices as appropriate, the Home Office and so forth. It is not a case of agreeing a common position on occasions, it is more a case of how are you responding to this? We get their lines and they get our lines, our position on something, so that we are aware of what each other is saying.

Q286 Lord Lyell of Markyate: If we go back to the Sweeney case, how quickly did the Judicial Communications Office recognise that the trial judge had precisely followed and very carefully followed all the sentencing requirements and how quickly was the Department of Constitutional Affairs press office also aware of that?

Mr Farr: We were quite quickly aware because once a transcript became available we were sent a copy of the sentencing remarks which we duly sent out, although it tended to get a bit lost in the storm. I am not sure how quickly the DCA press office was aware but certainly I know that they would have been sent it. I believe it was sent to them roughly the same time as ourselves.

Q287 Lord Lyell of Markyate: If it happened again do you think it would happen more swiftly?

Mr Farr: I think so.

Chairman: While we are in this area, Lord Peston might have a question.

Q288 Lord Peston: My question has been answered, My Lord Chairman, very clearly by Sir Igor as to the role of a judge, possibly retired, in explaining why the decision had been taken, and Sir Igor has categorically said no way.

Sir Igor Judge: I would be particularly worried about a retired judge doing it because he certainly would not know about the 2003 Criminal Justice Act and although I know about it, I have to look it up every time I have to make a decision. It is not easy legislation.

Q289 Chairman: There are no circumstances in which you would want a senior spokesman.

Sir Igor Judge: I am speaking only for myself, not in relation to the judicial decision; I do not want the decision justified other than by the judge. How the office works to make sure that all the facts are available to those with an interest in the case is a different matter, but to have all the facts of the case available and then have a retired judge saying “I think the sentencing judge did a jolly good job here” is not actually the way I personally would like to see it work, but that is my own view.
Q290 **Chairman:** As you said earlier in response to my question the reason for your feeling that is it then creates a game of tit-for-tat; that is the reason you do not want the judiciary’s best case made early in the piece, you want it to be part of the process that happens invisibly between the Lord Chief Justice and the Lord Chancellor and probably more visibly between the Lord Chancellor and fellow ministers.

**Sir Igor Judge:** Yes, and the judge has the responsibility of making clear why he has reached the decision that he has. The most important people for that—Mr Rozenberg will forgive me—are not the press, it is the people in court, the defendant, the victims. They are the people to whom these remarks have to be addressed.

**Chairman:** Thank you. Let us go to Lord Windlesham.

Q291 **Lord Windlesham:** Running through the dialogue I had a question dating back to my own time, many, many years ago, at the Home Office. Does the Home Office—I seek information here—have any role currently on sentencing policy and decision?

**Sir Igor Judge:** No. That is the answer, but there is something more to come. We now have a Sentencing Guidelines Council and the way in which that system works, taking it very briefly, is that the Sentencing Guidelines Council, after taking advice from the sentencing Advisory Panel, produces a draft guideline which has to be submitted directly to the three ministers—the Home Secretary, the Lord Chancellor and the Attorney-General—and the Home Affairs Committee. They are entitled if they wish to comment on the draft guideline in any way they think appropriate. When the consultation period is over those observations come back to the Sentencing Guidelines Council which then reflects on them and then produces the guideline which it thinks appropriate, so in fact there is a link between the Home Affairs Committee, the Home Secretary of the day and the Sentencing Guidelines Council.

Q292 **Lord Windlesham:** There are a lot of people now involved, are there not? At one stage the Home Secretary had almost complete oversight of proceedings, but now there are others as well and you have indicated who they are.

**Sir Igor Judge:** Yes.

Q293 **Lord Windlesham:** Does that lead to a degree of diversification and therefore no real certainty as to what the likely outcomes will be?

**Sir Igor Judge:** On the particular issue that you asked me about there is no problem. When the information comes back, it is considered by the Sentencing Guidelines Council which produces its answer. But if I may say so you are asking a much wider question, which is, who is going to be responsible for policy in relation to prisons, probation, mandatory sentences, sentences of imprisonment and public protection and so on. There the answer is the legislature, and the answer is the Home Office is still in charge of the legislation which produces our criminal justice system.

Q294 **Lord Morris of Aberavon:** Could I ask about the role of the Lord Chief Justice in media strategy? Under what circumstances is he asked for guidance and asked by the media to make an appearance?

**Mr Farr:** As head of the judiciary, as you would expect, we keep the Lord Chief Justice abreast of all the significant news stories relating to judges. Certainly if we were preparing a response to an issue that was very topical and controversial we would either use the Lord Chief Justice’s own words or we would make sure that the form of words that the office was using was one that he was content with. In terms of media interest in the Lord Chief Justice, interview bids arrive regularly from all sorts of media organisations for all sorts of things. Some of them are quite inappropriate, for example would the Lord Chief Justice like to come along and talk about this particular decision in this particular case which, as Sir Igor has outlined, is clearly not something we can entertain. Others are broader, and he considers those and he makes a judgment with his other commitments permitting whether he would accede to that request.

Q295 **Lord Morris of Aberavon:** Could I follow that up regarding how he makes a judgment. Mr Joshua Rozenberg said the other day that he had not given a press interview for a year; is that unusual? What is the advice tendered to him, should he be more accessible or not or is he making the right decision?

**Sir Igor Judge:** I would like to say something, with respect, if you do not mind. The Lord Chief Justice gave an interview in October 2005 and if you have at any time a chance to read the transcript, the media questioning of him—and I emphasise media, not just newspapers—page after page after page includes at least one question which is designed to elicit some remarks from the Lord Chief Justice which will enable the story to be “Lord Chief Justice at odds with . . . ” or “Fury at . . . ”—you can write your headline no doubt as well as I can—“with the Government”. That is not actually a very happy way for a Lord Chief Justice to be interviewed, and if the object of having a conference is simply to address practical issues but the questions are loaded to produce the “Fury with Government” kind of headlines, the Lord Chief Justice is entitled to take the view that this is not in anybody’s interest. The other point, I know, is that he intends to give the Judicial Studies Board lecture this year which will be
in March; that will be just under one year since the new arrangements came into force. That in my view—although ultimately of course it is for him—is the minimum time that is appropriate to pass; one year is not much in a constitution that has been here for a thousand or more, and he will be able to address in that lecture how things are running and how he sees them. Over-exposure to the media, in my view, is not necessarily—indeed in my view it definitely is not—in the public interest, but ultimately it is for the Lord Chief Justice of the day to decide what he thinks.

Q296 Lord Morris of Aberavon: With respect I tend to agree with what you have said, but by last October the date I have here is 11 October 2005, is that right? Sir Igor Judge: Yes, if you look at page 5—if my memory is right—there are at least three questions in a pretty short bit of transcript which are designed to provoke the Lord Chief Justice to say something which can be given a headline.

Lord Morris of Aberavon: I have read it. Time after time after time. Thank you very much.

Q297 Chairman: Sir Igor, one of the things that the Committee is wrestling with is if the Government set out to produce somewhat greater separation of powers between the executive and the judiciary, is not the inevitable consequence of that—and it may be constitutionally desirable—that there will be a degree of tension because the essence of separation is the creation of tension? What we are wrestling with—and indeed you are at the very sharp end of—is how to manage that tension in a sort of normative, regular and appropriate way. Should we not be somewhat more philosophical about separation meaning tension?

Sir Igor Judge: I hope I will not be misquoted, or at any rate have some sub-editor writing a good headline about it, but I think a degree of tension is healthy. We all very loosely say “the Government”, but in the end Parliament legislates, and then it does not really matter what the judges think. The judges apply the law that Parliament has produced. If the Government has an idea and it seeks the views of the judges, the judges must express their honest views and it may therefore be a view that completely disagrees with the Government and that may create tension. In the end the Government takes its bill to Parliament and Parliament decides what it will put before the two Houses, and so it goes on. I have meetings, for example, with the Attorney-General. I saw him on Monday. I can see no reason why I should not tell you that one of the things he told us was that he proposed to make a statement about the evidence of Professor Southall; that does not impinge on our independence, or his. He also told us that he was concerned about the way in which the deployment of judges for dealing with heavy fraud cases was working; it is a legitimate concern, he drew it to our attention and that is for us to deal with. I can tell you that week after week after week these sorts of discussions are going on at ministerial level, at official level, and so on. I do not think myself that expressing our views has created serious tension and, more important, I do not myself think that that impinges in any way on my judicial independence or the acknowledgement by the minister of it. I am sorry that has taken me so long, but there is quite a lot of material in this.

Q298 Chairman: It is well worthwhile, Sir Igor, we are grateful for that, thank you. We will have to conclude shortly, but just reverting to your understandable nervousness about exposing the Lord Chief Justice to loaded questions that are designed to provoke a visible row of some sort, one
of the reactions to not going on the record is to go off
the record. I was quite disturbed when we had several
distinguished media editors to hear that in their
opinion the practice was growing of off the record
briefings, I will say by the judiciary but I do not point
at any particular judge and nor did they. Of course,
this is the world of politics that most people in this
room are very familiar with where you do read the
next morning X’s fury with Y because somebody has
daid off the record, when asked, yes, pretty fed up
about that and that was transmuted the next morning
to the judge’s fury. Let me ask you very directly—and
this is obviously a question for the JCO—what is
your attitude towards the culture of off the record
briefings by judges?
Sir Igor Judge: Mine is easy: we have to distinguish
between a conversation that I may have—I have
conversations with Mr Rozenberg perhaps and
regard him very highly. I do not regard my
conversations with him as a briefing, they are
discussions about this that and the other. Myself, I
think it is unacceptable for judges to be making
statements to journalists about a proposed policy, a
proposed piece of legislation or indeed one that has
just come into force unattributably, so that it is
printed. If you are going to make any statements of
that kind you should be prepared to accept
responsibility for them, but I do not think you should
be making them because one day you may very well
be sitting in judgment on the very legislation which
you are criticising. For my part I think off the record
briefings of the kind that you are asking me about
should not happen. That is my very clear view.

Q299 Chairman: I am delighted to hear that. It is, as
we all know, quite difficult to distinguish between an
agreeable lunch with Mr Rozenberg subsequently
appearing as background and senior judges are
expressing concern about that. Is that part of a
conversation over lunch or is it an unattributable
briefing?
Sir Igor Judge: I would not expect, if I were to say
something as indiscreet as that, that Mr Rozenberg
would report it at all.

Q300 Chairman: But what about the people sitting
at the next table?
Sir Igor Judge: There is a difference, is there not?
There is the legitimate interest of legal
correspondents in the way things are going, and we
have a part to play in that—there was one newspaper
which had four articles or references to comments by
four of my colleagues. My own view about that—and
it is personal—is that that is wrong and I feel very
strongly that that is wrong. I do feel very, very much
that we have to bear in mind—I keep saying it—that
you legislate and we then apply the law that you
provide us with.

Q301 Chairman: When you say it is your personal
view, would that be the view of the Judicial
Communications Office?
Mr Wicksteed: Absolutely, yes.

Q302 Lord Lyell of Markyate: We are all on a
learning curve here. Suddenly judges have got the
Judicial Communications Office to a degree which
they have not had in the past; ministers, particularly
the Lord Chancellor—although no longer technically
head of the judiciary—still have a role to defend the
judiciary and their independence in Parliament, and
I think we are making progress in seeing it working
properly, but there is a bit further to go. Would you
agree?
Sir Igor Judge: There is always progress to be made—
always—and, yes, this is very new. I meant what I
said earlier: to me a year is a very short time indeed
for very major constitutional changes to bed down
and, if I may say so, I would regard it as rather
reckless to draw final conclusions on the basis of one
year. We should look at it now and see where steering
should come, see whether we are apparently going
down an inappropriate route, and then stand back
and look at it again a year on. Forming a final view
about this until four or five years have passed might
very well be mistaken and, again, one needs to
remember that in the political world there will be a
General Election before the next five years are up.
There may—I am not advocating this of course—
there may be a change of Government and that may
very well be mistaken and, again, one needs to
remember that in the political world there will be a

Q303 Chairman: Thank you very much indeed; it
has been extremely interesting to have you and your
colleagues here. I realise it is not easy; we are taking
a small and tender plant while it is still putting down
roots, heaving it up and trying to look at how it is
growing. Our hope of course is that Parliament can
be part of the solution here rather than part of the
problem, so it is good to see you here. Thank you very
much for your evidence.

Mr Wicksteed: Thank you for the opportunity.
WEDNESDAY 7 MARCH 2007

Present: Bledisloe, V
Goodlad, L
Holme of Cheltenham, L
(Chairman)
Lyell of Markyate, L
Morris of Aberavon, L
O’Cathain, B
Peston, L
Smith of Clifton, L
Windlesham, L
Woolf, L

Examination of Witness

Witness: Professor Dame Hazel Genn, examined.

Q304 Chairman: Good morning, Dame Hazel. Welcome to the Committee; it is good of you to come. Could I say that these proceedings are being filmed for the BBC. Also, could I say to members of the public who may be with us that there is an information sheet near the door which relates to the discussion we are about to have. Dame Hazel, I wonder if you would be kind enough, given the television coverage, to identify yourself for the camera?

Professor Dame Hazel Genn: I am Hazel Genn, Professor of Socio-legal studies in the Faculty of Laws at University College London.

Q305 Chairman: Is there anything you would like to say to us by way of an opening statement? You know the ground that we want to cover.

Professor Dame Hazel Genn: Thank you for sending me the questions but I do not think I want to make a statement, I am happy to answer your questions.

Q306 Chairman: I am very interested by your academic research and of course you have an unusual locus of being both, in a sense, part of the wider judicial scene and yet also a distinguished academic commentator. In your research, Paths to Justice, one of the conclusions which struck me which corresponds with a pretty familiar stereotype is that people see judges as out of touch with ordinary people’s lives and this is a long-held perception or misperception of judges, but at the same time the YouGov survey in The Telegraph, which we have seen, shows not only that judges are absolutely well-trusted but relatively well-trusted compared with other groups of people—

Professor Dame Hazel Genn: I do not see them as inconsistent. Before I start to say why I do not see them as inconsistent I would draw your attention to the fact that I have brought with me some findings from a more recent piece of work, the Committee on Standards in Public Life, which asks those questions. If you look on there, the relative standing—it is not the standing of judges, it is the extent to which the public trust the judiciary to tell the truth as compared with other groups of people—is actually even better than the YouGov results that you sent to me. I think what we have got there in 2006 is about 81 per cent of the general population saying that they would trust judges to tell the truth. I do not think that the two positions that you have put to me are inconsistent. I think the first thing that it is necessary to say is that public attitudes insofar as we know about them are quite complex, they are not simple. What we are tackling here are two different things. When you say “Do you trust judges to tell the truth” or the public say “I trust judges to tell the truth”, that is an expression of a basic confidence in our judiciary which I believe we take for granted, that the public believe or know that the judiciary are not corrupt, that they do not tell lies, that they are independent, the public trusts them to apply the law impartially, which is what judges are supposed to do. As I said, I think that we take that for granted and we criticise judges for other things. I think if you ask that question in many other jurisdictions, they would not be able to come up with 81 per cent of people saying that they trusted the judiciary in that way. I think that is something that we forget and one of the things that I will say later on is that I think it is necessary for us to make those kinds of things clear and to remind the public of the extent to which they do have confidence in the courts in that broader sense. On the other hand, if you ask people about what is their vision of the judiciary, how do they characterise the judiciary, people say that they see them as being rather elderly, male, rather upper-class and, to be frank, that would not be an unfair representation. Indeed, even if you are a woman, like our first lady Law Lord, if you dress them up in a wig they are going to look pretty much like an old man, so we do have a problem with that. The fact that people say, “I think they seem a bit out of touch, I am not sure that they really know what goes on in the real world” is not
inconsistent with saying “I trust them” and I think that they do trust them and what we see from these YouGov polls is that by comparison with other institutions they trust the judiciary very much. I think what that is expressing is a basic fundamental confidence in the justice system, in the courts. Yes, we can make criticisms about how individual decisions might be reported, but I think we do need to remember that and I do not see those two things as inconsistent. People might say, “I would like to see a few more women on the bench” and if people took their wigs off they might see a few more women on the bench. They might like to say, “I would like to see the judiciary more reflective of the diversity of society”. None of that is inconsistent with saying “I feel confident about the judiciary that we have”.

Q307 Chairman: That is such a helpful analysis and I do not want to pick it apart too much but you have built an awful lot in your answer on that question, “Do they tell the truth?” I suppose it would be perfectly possible for people to see judges as a class of person who you would expect to tell the truth without necessarily committing yourself to all those other good qualities that you adumbrated of impartiality.

Professor Dame Hazel Genn: I think if you look at the evidence, the question is asked in different ways. We ask them “Do you trust judges to tell the truth?” One of the other pieces of evidence that you gave me is asking the general question, “Do you trust them?” What I am saying is it is a kind of expression. The answer to that question is an expression of public sentiment about the judiciary and you can compare that, for example, with public sentiment about politicians or government ministers, or, indeed, estate agents which come fairly low on that list.

Q308 Chairman: Accepting your description, how do people arrive, the people who answer opinion polls, at their perceptions of the judiciary? Very few people in their lifetimes appear in court in front of a judge and have a chance to see them in action, so how do they arrive at these conclusions?

Professor Dame Hazel Genn: I have got some views but before I give you the views one of the things that I want to say, and I think it is important and I think it is helpful that there is an opportunity to say in this Committee, is that we are all fumbling a little bit in the dark here and the reason that we are fumbling in the dark is that there has been no sustained tradition of investment in research into public attitudes to the judiciary. When I was doing my research on Paths to Justice I was absolutely staggered at how little information there was about attitudes to the judiciary in England and Wales. In other jurisdictions there is a long tradition of taking the temperature of the public in relation to the courts and specifically in relation to the judiciary and we do not have that. I remain staggered that often when we have conversations about what the public think about the judiciary, in the end everyone falls back on those three or four questions that I asked in Paths to Justice and which have been repeated subsequently by the Legal Services Research Centre that is always doing those things. I think it is appalling that we are depending on that for our knowledge. The other surveys that I have looked at, like the British Crime Survey, citizenship surveys, that do test the water a little bit in relation to public attitudes are always about the criminal justice system, generally about crime and often about sentencing. We do not have a good understanding of what public expectations are, what they think and how those views are formed. I have finally brought myself back to your question. How are those views formed? I think in a rather haphazard way and I have no doubt, and I know this is one of the things that is on your mind, that the media plays a role in shaping public perceptions about the judiciary. I do not think that people are taught properly about the justice system, about the judiciary and about the difference between civil and criminal courts at school, it is not something that we are brought up on. People grow up in relative ignorance about what the justice system is there for and what it does. What people think is that the justice system is simply about bringing criminals to justice. When you ask people, as I have done, how their views are formed they will say, “I do not know, I suppose it is the media, what I read in the newspapers and what I see on the television”. The danger with that is, of course, that the reporting in the media and representations on the television are very selective, they are rather haphazard. They focus very much on criminal courts because that is what is interesting and that is what is sexy, crime and criminals. They do not focus particularly on what happens in all of the other areas of the justice system that are often very much more important to the lives of ordinary people. They absorb things from the newspapers, they watch fictionalised, dramatised representations of the judiciary and that is how they form their view. There is something that is a part of that which is what is it that the media report about the judiciary and largely the kinds of things they report are the odd comment that is made in court, criticising the judiciary occasionally for being a bit soft or maybe not seeing eye to eye with the Government, as they do not, on questions about human rights. What they are not reporting is serial bad behaviour by the judiciary so the high standards of the judiciary that we have, their commitment and professionalism does not give the newspapers that much material to seriously damage the fundamental beliefs in our judiciary so we do not have stories
about corruption, the way that the public would learn about it would be through the newspapers.

**Q309 Chairman:** The media coverage is more isolated, high profile quirks or incidents than it is of the assumed sustained professionalism of the judiciary.

**Professor Dame Hazel Genn:** Yes, because that does not make news. Atrocity stories make news and headlines. Where is the headline in this? What is the handle for this story? A story about a judge behaving with outstanding levels of professionalism in court is not going to make news in the same way as a doctor performing an operation absolutely beautifully does not make news. That is a fact of life, it is not just about the judicial system, it is everywhere else, newspapers have a job to do and they do their job. If we are saying that is the principal source of information for the public about the judiciary, we have to ask questions about what kind of information we get and whether that is a satisfactory state of affairs and I would say probably not.

**Q310 Chairman:** One thing I do not want to lose from your remarks is the point about schools, the sort of work, for instance, the Citizenship Foundation has done over the last 20 years or so; one assumes that should be a plank of citizenship studies in schools.

**Professor Dame Hazel Genn:** There should, but there is a lot more to be done on that. There are real problems in getting education down at that level in a way that is attractive to young people and engages their attention. Wearing another hat, I have been involved in a public legal education task force and talking to people about the problems of providing this sort of education and learning in schools and we have a problem which is that the people who are in schools who have responsibility for delivering this learning themselves do not really know the difference between the civil and criminal courts, in fact they are not sure what civil courts are and they do not know that we have them. We have people saying to us, “How can we become better educated so that we can pass on this information to people in schools?” I think there is an acceptance that this needs to be done, that it is not reasonable that people grow up being able to distinguish between different varieties of trees but not know that there is a difference between civil and criminal courts.

**Q311 Chairman:** I cannot resist asking you, since you are probably a better interpreter of this than anybody else we can find, what effect do you think a programme like Judge John Deed has on the general public’s perceptions?

**Professor Dame Hazel Genn:** I think the general public think that is how judges behave and, of course, judges are appalled looking at Judge John Deed but where else are they getting their information from? As part of my research I have talked to people waiting to go into, not so much courts, but things like tribunals which are very informal, people sitting around a table, and they think they are going to go into a room that will have a judge and a jury in there because the only image that the public has in their mind is of a crown court because that is all they see on the TV.

**Q312 Chairman:** You do not think the fact that Judge John Deed is constantly slugging it out with the Lord Chancellor assists the popularity of the perception?

**Professor Dame Hazel Genn:** I think the constitutional significance of that may be lost on the average viewer.

**Q313 Lord Morris of Aberavon:** Professor, defending the judiciary is an obligation placed on the Lord Chancellor, ministers generally and the Lord Chief Justice. Given this evidence that we have had regarding the disparity in trust, and it is a huge one, whichever figures you have, with 81 per cent plus trusting judges to tell the truth and showing very low esteem for government ministers, would you not expect the Lord Chief Justice to have a greater capacity, to be more persuasive to defend the judiciary, than the Lord Chancellor and other ministers?

**Professor Dame Hazel Genn:** I think that is quite a sophisticated question, I looked at that quite hard when it was first asked. I think the first thing that I want to say is that we all have a responsibility to defend the independence and the reputation of the judiciary, it matters to all of us, it is extremely important that the public continues to have high levels of confidence in the judiciary. I think we all share that responsibility. As to the question about where the division of responsibility is between the Lord Chief Justice and the Lord Chancellor, these are new times since the Constitutional Reform Act and I think, again, there is a shared responsibility. It is very helpful that these questions are being asked in this Committee so that we are focusing on the question of where that responsibility lies and who has responsibility for what. As to the question of whether the public is more likely to believe what the Lord Chief Justice says than the Lord Chancellor, I do not know, I could not be sure, this would be an interesting question to ask the public. I think what I am clear about is that they both have a very important responsibility and what we have to be careful about is that things do not fall down the gap.
on the assumption on both sides that somebody else is doing it.

**Q314 Lord Morris of Aberavon:** Are there any lessons to be learned from the *Sweeney* case, which I am sure you are familiar with?

**Professor Dame Hazel Genn:** I have read the transcripts on that, I am not sure that it is for me to comment specifically on that case. I do have some views in general about that division of responsibility and about what the Lord Chief Justice and the Lord Chancellor need to be doing in terms of public confidence and I think that there are two issues that arise which in my reading of the transcripts have got conflated in your discussions with the people who have appeared before you. You have got the issue of fire fighting and damage limitation when there is a high profile case that hits the press. That is a really practical, concrete issue that needs to be sorted out because where there has been misreporting, and sometimes there is misreporting because the people reporting it do not understand what is going on, and it is possible that happened on that occasion, there needs to be a system for correcting misapprehensions and there has to be some working out of where responsibility for that lies. It is not my job to say it, but it is absolutely clear from that case that misreporting by the press needs to be corrected by somebody and whose responsibility that is has to be worked out. That is the fire fighting and it is a reactive function but it is very real and it is very important. There is a second question about a proactive longer term responsibility for enhancing, for building public confidence and for educating the public and I am not sure that I am clear where responsibility for that lies. Again, I think it is shared. I think the DCA, the Lord Chancellor and the Secretary of State for Constitutional Affairs being the same person, given their responsibility for the administration of justice, has a responsibility for fulfilling that function. I am talking about education, I am talking about research that we understand public expectations and what we need, I am talking about outreach work. I think that the DCA, the Lord Chancellor, the Secretary of State for Constitutional Affairs has a responsibility. I think also the new Judicial Office, given the Lord Chief Justice’s new responsibilities as the figurehead of the judiciary also shares in that responsibility and that there is potential for proactivity there in thinking about how the Judicial Office with whatever resources it has got, or maybe it needs more resources to do it, can help first of all to understand public expectations and perceptions of the judiciary and what it can do in practical terms to improve that. I think getting those two things muddled up is not all that helpful, it needs to be separated and people have got to sort out where responsibility lies. I said what you do not want is it falling down the middle between the two leaving everyone saying “It is not me”.

**Chairman:** That is a very important point for the Committee as a whole.

**Q315 Viscount Bledisloe:** Lord Morris’s question contrasted the Lord Chief Justice as a judge with the Lord Chancellor as a minister with not much public confidence in them. Is it not the case that at least in the past the Lord Chancellor has been seen as something rather in between and rather differentiated from other government ministers who might have rather greater confidence of the public than ordinary ministers? Is Lord Morris’s worry not likely to get much worse if the Lord Chancellor becomes a career minister in the Commons switched between having been in transport and on his way to foreign affairs, shall we say?

**Professor Dame Hazel Genn:** I think that there could be an issue there. We have been talking about low levels of trust in government ministers and in politicians in general and I do not think that is good. I think we need to be taking seriously about how we can build those levels of trust as well. As I said before, I do not think that the public has a sophisticated understanding of the difference between when the Lord Chancellor is being the Lord Chancellor and when he is being the Secretary of State for Constitutional Affairs. There is no reason why they should, but that is not to say that the public is not capable of understanding if somebody takes the trouble to explain it. You are really asking whether or not if the Lord Chancellor, the Secretary of State for Constitutional Affairs, is somebody in the Commons who just appears like any other government minister, whether that might create a problem, I think it is conceivable that it might but I have not got any evidence to say yes, definitely it would.

**Q316 Lord Smith of Clifton:** You largely anticipated my question with your very full answer. In your book, *Paths to Justice*, you drew attention to “a depth of ignorance about the legal system and the widespread inability to distinguish between criminal and civil courts”. You expatiated at some length on that. Can you, looking ahead, and you were invited in the last supplementary, say to what extent do you think the reforms introduced by the Constitutional Reform Act 2005 will help public understanding of the justice system generally, or do you think that without more remedial action ignorance will continue?

**Professor Dame Hazel Genn:** I think those changes in themselves are not going to create, suddenly over night by osmosis, a new understanding of the justice system. What I was saying was that people do not
have a terribly good understanding of the intricacies of the justice system. I think there were elements in the changes that took place in particular, for example, the establishment of an independent Judicial Appointments Commission, which I think the public does have some understanding of about how judges get appointed, and the fact that you now have a body that is independent of Government is the sort of thing that will probably help to promote public confidence. We are not saying the fact that we have had these constitutional reforms is going to by itself improve public understanding, no.

Q317 Lord Smith of Clifton: Do you think the physical separation from here and the formation of a supreme court will clarify things rather more than the blurred notion that the House of Lords takes judicial decisions?
Professor Dame Hazel Genn: I think it would make it easier for people like me who have to teach the stuff to explain it, particularly when we are doing it in other jurisdictions. Being able to point to a very real physical geographical separation makes it much easier and takes considerably less explanation than the sometimes torturous explanation that one had to give about how we hold the separation of powers dear and the independence of the judiciary, but the head of the judiciary happens to be a member of the government. If we are talking about explaining to the public, that kind of separation will probably make things clearer. I would not say that people were necessarily losing sleep overnight but that is because people did not necessarily know about it or did not really understand it.

Q318 Chairman: We certainly want to make the life of distinguished academics easier.
Professor Dame Hazel Genn: Thank you.

Q319 Lord Peston: You used the expression “People not losing sleep”. Obviously we on this Committee think what we are discussing matters and you as a professor of law think this matters, but has anybody done any research with the public saying “Do you think it matters”? In other words, there is a difference between do you trust the judges, but do you care anyway?
Professor Dame Hazel Genn: You should not confuse not knowing in detail with not caring because I think the public does care very much and one of the things that I said in the *Paths to Justice* book was that although people did not have a good understanding, they have a view and they do care about the judiciary and about matters to do with the justice system. It does matter to people, it is part of a sense of well-being and a kind of confidence that we live in a fair society and that our rights can be protected. When I say people were not losing sleep, the contradiction between having a head of the judiciary, which is supposed to be independent who is also a member of the government, the detail of that is not something that I think members of the public would naturally understand very well. If you were to explain it to people, and people are not stupid by any means, people would be able to understand what the situation was previously and my view is, but I am only speculating here, they would feel more comfortable with that kind of clear separation.

Q320 Lord Peston: What you are saying is that there is research evidence that shows that these are matters which the public cares about.
Professor Dame Hazel Genn: I think there is research evidence that shows that the public cares a lot about the justice system, yes.

Q321 Lord Goodlad: Could I ask Professor Genn to what extent you think that the Lord Chief Justice and the Judicial Communications Office are fulfilling their mission to enhance public confidence in Judicial Office holders and what, if anything, they could do more of or better?
Professor Dame Hazel Genn: I think it is early days, they are finding their feet and they have got a lot to do. There has been a massive shift in responsibility and administrative responsibilities and the like. There is potential there in the future and, I suggested this earlier on, first of all, for dealing with the fire fighting issue, trying to correct misreporting of decisions or misunderstandings about judicial decisions, so I think there is a role there for the Judicial Office. I think there is a longer term role, and I would hope that they would see that there is a longer term role in terms of being proactive. We have not got a lack of public confidence but enhancing public confidence and making sure that it stays high in the future, there is potential there. I do not know whether they are currently exploring that but I think, as I said, there is a shared responsibility between DCA and the Secretary of State for Constitutional Affairs as the person responsible for the functioning of the justice system and the courts but also for the Judicial Office which has responsibility for the judiciary. I think there is potential and I mentioned things about education and about outreach. They have a very good website but it does not come up immediately if you put in “Judicial Office”. There are things that individual judges do on their own initiative in their local communities, but I think there is scope for them to do more and I hope that they will do more in the future. There is a question about resources and how many other things they have got to do. It is important that somebody has responsibility for projecting positive images of the judiciary. If we can
expect the newspapers to rather relish bad news stories the question is who has the responsibility for providing a counterbalance to that and I do not see, and when I wrote *Paths to Justice* I felt this quite passionately, where the responsibility is for providing those positive images and I am not sure that I see it now. This kind of conversation in raising that issue is quite helpful.

**Q322 Lord Goodlad:** Are there any comparable organisations in other countries which you know of that we might learn lessons from?

**Professor Dame Hazel Genn:** That is a good question. I cannot immediately bring something to mind, but what I can tell you is that there is a much greater depth of research in North America and Canada on public attitudes to the judiciary, expectations and experiences of the public in the justice system than we have in this country, particularly in civil justice areas as well as criminal.

**Chairman:** I have got a couple of quick supplementaries on Lord Goodlad’s question.

**Q323 Baroness O’Cathain:** I was very interested in what you said about the Judicial Communications Office website. We had evidence from them at our last session, which I thought was absolutely stunning and the website is terrific. Do you see a role for yourself, wearing your academic hat, of trying to influence a government department like, for example, the Department for Education that this website should be readily available or, indeed, even as part of the curriculum because that would in effect make the young people more conscious? Is there something there that we could get which could break this whole problem with the young?

**Professor Dame Hazel Genn:** I think there is a lot that could be done. As I said, wearing my other hat, leading this public legal education link empowerment task force, one of the things that we are thinking about is precisely how do we manage education, not just in schools but throughout, how do we manage information and education about the justice system so that people understand what it is there for and what the potential is and also to make it less alien, to have a sense that it has a protective function, not only a punitive function.

**Q324 Lord Lyell of Markgate:** I thought you put your finger on it when you said, “We all share responsibility to explain the system”. Would you not agree that if there are shortcomings, if senior ministers (as happens from time to time) and middle ranking ministers pitch in and get it wrong and put in strong criticisms, you can hardly blame the press for being the principal cause of the problem.

**Professor Dame Hazel Genn:** I am not sure what you are driving at.

**Q325 Lord Lyell of Markgate:** I am driving at the criticisms by the Home Secretary and Vera Baird in relation to the *Sweeney* case.

**Professor Dame Hazel Genn:** I think you are right. I have looked at the discussions you had about tensions between the judiciary and the executive. When ministers dive in and criticise the judiciary for particular decisions, I personally do not find that terribly helpful. I think it could have a corrosive effect although, given what we have said about public views of politicians as compared with the judiciary, if what has been criticised is the judiciary what is seen as protection. In that case there was a criticism about it being too soft, but in other cases you get criticisms of the judiciary for insisting on protecting fundamental rights and I do not think that the public would necessarily react badly to that. I am straying away from what I would care to speculate on. The point I want to make is that we all share the responsibility. It matters to us all. We have to think about how we criticise particular decisions.

**Q326 Lord Woolf:** The matters to which you have referred are extremely important. I do not want to gainsay that in any way. But is there any danger of a system such as ours, which has grown up over the centuries, getting too fixed on reforming, because it is said that is what the public wants and, on the other hand, not reforming because that is what the public wants? I and others holding similar offices to my own have been very anxious to get rid of wigs, especially in civil cases, but the Lord Chancellor went out on a consultation on that and there was an overwhelming response by the public that they wanted to keep wigs. Should that influence us? To take another example, that of the Supreme Court. One of the arguments advanced for the Supreme Court is one which you have echoed; namely, that it is easier to understand if you have a Supreme Court. To what extent should that influence us? Now the Attorney General’s office, which is, again, a great historic office, is very much under attack. It is being said that the public do not understand how a minister can wear two hats.

**Professor Dame Hazel Genn:** Certainly public opinion is a factor that should be taken into account. Nobody wants policy-making which is a knee-jerk reaction to immediate events. We have all seen, at times, that people have jumped to policy because of particular events. Sometimes what the public wants, particularly when we do not especially know what the public wants, is used as a way of justifying doing certain things because there are political imperatives to do that. As far as the constitutional reforms were concerned, there were a number of elements in that. I have said before that I think the establishment of an independent Judicial Appointments Commission...
is probably something that would be very much in keeping with what the public would feel was appropriate. I am not sure that there was necessarily a strong body of evidence about what the average citizen thought about the kind of confusion of roles as far as the Lord Chancellor is concerned or the confusion over when is the House of Lords the Upper Chamber in Parliament and when is the House of Lords the Appellant Judicial Committee and all of that. I do not think you can just be making policy on the basis of what the public does or does not think, although it has to be a factor in that. There are other questions there that I think are not for me.

Q327 Baroness O’Cathain: It is far too early to make any assessment of the Judicial Appointments Commission on public confidence and understanding in the system, but how long do you think it will be before we can gauge the success? What, if any, correlation is there between increasing public confidence in the judiciary, which we have just noted, and a greater diversity on the bench (in terms of sex, race and educational background)?

Professor Dame Hazel Genn: I am not here today as a representative of the Judicial Appointments Commission. If you are asking me as a Commissioner what the Judicial Appointments Commission is there for, we know it is there to appoint judges of the highest quality, on the basis of merit, from the widest range of backgrounds. So long as the Judicial Appointments Commission continues to appoint judges of the highest possible calibre—because, as I said at the beginning, that is the most important thing—that will help to support public confidence. The other thing we are trying to do is to show that we have fair and open processes that the public can perhaps better understand. I think that would help to improve public confidence. We are also committed to encouraging applicants from the widest range of backgrounds so long as they are eligible. So long as we succeed in having processes that are absolutely fair to all of those people who apply, then, inevitably, people of a wider range of backgrounds will get to be appointed to the judicial bench. I do not think there is a problem with public confidence that needs improving but there is an interest in seeing a more reflective judiciary, and that should happen, inevitably, given our commitment to fair processes and encouraging applications from a wide range of people.

Q328 Baroness O’Cathain: Do you think it would help to achieve the objectives, the very laudable objectives which you have set yourself and, indeed, that have been set for you, if people knew more about you and knew that you were not actually government appointees, as such, but you were apolitical, independent—fiercely so. I know you do not want to be in the spotlight on that but there is so much anti-quango attitude going around that I think there might be merit in considering putting out more about what the Judicial Appointments Commission is and who are the members of it.

Professor Dame Hazel Genn: If you are saying that from your perspective there needs to be more information, I hear what you say. I think we have a very user-friendly website. We are taking very seriously our outreach responsibility. Are you talking about making ourselves better known to those who might be eligible for judicial office or to the public in general?

Q329 Baroness O’Cathain: I mean the latter, because I am sure that people who are eligible for office know all about it because they would have as an objective to try to become a judge. I do think the latter is important. In fact, I would go so far as to say there are many people in the Palaces of Westminster who do not know.

Professor Dame Hazel Genn: That is helpful feedback. Thank you. I will take that back.

Q330 Chairman: If, in the way you have described through the Judicial Appointments Commission, we end up with what you rather interestingly call a more “reflective” judiciary—which is probably a better word than “representative”—do you believe that would further increase confidence in the judiciary?

Professor Dame Hazel Genn: From the research I have done—and here I am depending on the research I have done—I would say there are sections of the public who would feel more comfortable about the justice system if they walked into courts that looked more diverse, that reflected more the diversity of the society in which we live. That does not mean to say that they do not trust the justice system but they would feel more comfortable about that. From that point of view, that would help to enhance confidence in certain sections in society. Interestingly, there are some minority groups which have higher levels of confidence in the judiciary than the white majority, but there are sections, particularly in relation to the criminal courts, which have some historic concerns and I think it would probably help.

Q331 Lord Windlesham: May I ask you whether you think that Parliament could or should have any role in improving understanding of the judiciary and the relationships between the judges and elected politicians?
**Chairman:** Going back to my Professor Dame Hazel Genn:

Professor Dame Hazel Genn: Going back to my shared responsibility point, I think we need to take seriously the fact that we all have a responsibility. It is hard to think in practical terms what we might do but this kind of conversation, given the fact that it is to some extent publicised, is very helpful. It helps to focus. You have had some very interesting evidence given to you. You have had some extremely coherent and elegant statements about the relationship between the judiciary and the executive and about the constraints on the judiciary. There is a lot of material in there that is not going to find its way particularly into the public domain. It may sit on your website but the average person is not going to find it, and so it may be that you could think about what you might do with the material you have gathered to use it. There is some really interesting material in those transcripts that would be very helpful in explaining to the public certain aspects of the relationship that they would not understand at the moment.

**Lord Windlesham:** It is encouraging that representation on the press benches is considerably greater at the moment on this issue than it is on many, many other matters which come before parliamentary select committees. Thank you very much.

Professor Dame Hazel Genn: Thank you.

**Chairman:** Could I thank you on behalf of the Committee. I think you wrote your own encomium in terms of “coherent” and “eloquent”. You have greatly assisted our work. Thank you very much. If you have any subsequent thoughts, we would be very pleased to have them. Thank you.

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**Examination of Witness**

Witness: Mr Paul Dacre, Editor, Daily Mail, examined.

Q333 **Chairman:** Good morning. Welcome, Mr Dacre. I know you are a busy man. It is good of you to come and share your thoughts with us. We appreciate it. This evidence session is going to be televised for the BBC, so I wonder if you would be good enough for the cameras to identify yourself.

Mr Dacre: My name is Paul Dacre. I am editor of the Daily Mail and Editor in Chief of Associated Newspapers.

Q334 **Chairman:** Thank you. Is there anything you would like to say? You know the general area of interests and we have indicated some of the questions.

Mr Dacre: That is very nice of you but I am just happy to answer your questions.

Q335 **Chairman:** Let me plunge in. One of the questions on the mind of this Committee—and we have just been having some evidence on this before you joined us—is how the British public see the judges, particularly now, in this era of constitutional innovation, where there is greater separation between the judiciary and the executive in the shape of the Government. The question that is preoccupying us is how the public see the judges. I just wonder, from your lofty editorial perch, both at Associated Newspapers and at the Daily Mail, about your own opinion of the way the public see the judiciary.

Mr Dacre: Firstly, I think the public still have huge faith in the independence and integrity and uncorruptibility of the British judiciary. I do not think that can be said loud enough. Having said that, if I am being honest I suspect that many of our readers and many members of the public are slightly confused about the judges these days. They see, with increasing frequency, decisions made by elected governments being overturned by the judiciary; they see increasingly controversial decisions being made by judges, perhaps political judgments being made by judges, which fly in the face of what they perceive as national interests. They see an increasingly lenient judiciary, handing down lesser and lesser sentences for what many regard as serious crimes. I think they are confused. They still have great faith in the judiciary but there are worries that it is not reflecting their values and their instincts.

Q336 **Chairman:** It is interesting that in that answer you, in a sense, ran together the political and judicial dimension. One of the things that is exercising the Committee is, given what a strongly partisan adversarial political culture we have in this country, is it possible that the reporting of judicial decisions is assimilated into what I will call, in shorthand, “political reporting”, that it becomes part of a political narrative of a struggle of ideas, a struggle for power, rather than being seen for what it is: an area circumscribed by law itself? I think there may be a danger that it is seen as part of the glamorous and hard-pitched political struggle in the widest sense rather than having a steer of its own.

Mr Dacre: Forgive me, my Lord Chairman, are you talking about the reporting?

Q337 **Chairman:** I am talking about the reporting and, therefore, ultimately the perception.

Mr Dacre: Newspapers are not immune to battles between politicians and judges, and views expressed by politicians and controversial decisions made by judges. I would like to think that our newspapers...
report factually and comment freely. But there is no doubt about it, the relationship between the executive and the judiciary has become a story and it is possibly creating a gladiatorial sense about some of the reporting that might be causing anxieties on the judicial side.

Q338 Lord Windlesham: Is that more so than in the past?
Mr Dacre: I would certainly think so, yes. I certainly think so.

Q339 Lord Windlesham: Causes?
Mr Dacre: The elephant in the room is the Human Rights Act, which, it is no secret, we believe has placed the judges in an impossible position, whereby it is leading to them making political judgments which is setting them against the politicians.

Q340 Chairman: Perhaps we could come on to the Human Rights Act in a moment because it is something on which we would like to have your views. One of the things that is of concern to the Committee is the fact that it is not appropriate most of the time for judges themselves to get involved in the adversarial combat. In a sense, as we have identified, it is extraordinarily difficult for judges to answer back and in many ways inappropriate for them to answer back if attacked. I wonder to what extent you feel and journalists feel that it is fair game to attack individual judges, understanding that, unlike a politician or even a private citizen, they are not expected to and nor is it appropriate for them to jump into the ring and start punching back.
Mr Dacre: There are two prongs to that question. I am not sure in a modern world—and I am not dogmatic on this—that judges can any longer adopt the position that they cannot explain their actions. It seems to me, when there are very controversial judgments, it is beholden to them to make sure they explain fully their position on these, otherwise it is going to lead to all kinds of misunderstandings. As to whether judges are fair game, my instinct is that, for years, judges have enjoyed immunity from criticism in the press but, in a changing age, a 24-hour media age, an age of instant news, an age in which there is generally a lack of reverence, judges must learn to expect more criticism and will need to think through how they are going to respond to that. I know you say you want to come back to the Human Rights Act but it seems to me that if the judges—and this is a matter of opinion—are making political judgments, then, I am afraid, if they are making political judgments they are going to have to be held more accountable and they are going to be scrutinised more. I am afraid that is the way it is. If they are making more and more lenient sentences—and I know it is not the judges, I know it is the sentencing guidelines, I know it is the politicians—they are going to have to explain their position on this more vocally and more lucidly. What mechanisms they might choose for doing that is for a bigger conversation, perhaps.

Q341 Chairman: I am glad you acknowledge that a lot of these sentencing issues are to attack the judge for administering the law within the guidelines provided by the Government. It suggests to the layman, let alone to a committee like this, that it is the Government who should be in the sights of those criticising rather than the judges doing their job.
Mr Dacre: If I may humbly say so, that is correct, yes. But perception is everything and therefore the judges need to address that, do they not? They need to get their message across.

Q342 Baroness O’Cathain: How can they?
Mr Dacre: Far be it for me to give them advice but the Lord Chancellor and the Attorney General, it seems to me, have become too politicised. The Chief Justice, I suspect, is going to have to assume more and more of a role of speaking up for the judiciary. I do not know. Senior judges, maybe they can speak up for the judiciary. We live in an age, I am afraid, of televisual communication: if you do not get the message across, you are losing the perception war.

Q343 Chairman: It is a shame that you missed—although I know how busy you are—the previous witness, Dame Hazel Genn, who was saying that we all (gesturing at us as well) share a responsibility for seeing that the very qualities you started with as to why the judiciary is admired (its independence, its impartiality, its special position) are not damaged. Because, if we damage it, we fatally damage one of the elements of our public life.
Mr Dacre: I could not agree with you more. If I could be so bold as to say, the free press needs an independent judiciary in the extreme. If I may also be so bold, the judiciary needs a free press to support it against an over-powerful executive. The two can help each other.

Q344 Chairman: One of your very entertaining columnists, Allison Pearson, whose articles I always enjoy personally, criticised the trial judge in the Sweeney case in these terms—and, as you say, criticism in a post-deferential society must be expected: “Judge Williams and his kind”—which I guess means the rest of the judiciary—“just don’t get it, do they?” Cloaked in a little erminetrimmed authority, these men . . . . show contempt for the British public”. Of course, he was following sentencing guidelines, so, in retrospect, does that seem part of the mutual responsibility: of judges for
seeing that we have a free press and the free press for seeing that people understand what judges do? Mr Dacre: I am glad you brought that up and I have obviously given this some thought. The first thing I would like to say is the obvious: Allison Pearson is a commentator. She is a columnist; she is not a reporter. I took the precaution of bringing the Daily Mail's news report of that Monday on this very contentious decision and in my view it was a classically fair piece of reporting. The sixth paragraph of this story read: “But Judge John Griffith Williams QC said he had no choice but to reduce the tariff in the light of Sweeney’s guilty plea. Sentencing guidelines introduced in 2004 meant the judge had to cut a further third off the tariff which would previously have been nine years. That made the tariff six years but a further reduction was made for time served.” That was very high up in the copy and the rest of the story is then reaction to the judge’s comments. Allison Pearson is a brilliant columnist whose genius, brilliance, is to connect with millions of middle-class women in Britain, which she does very successfully. I do not believe that there was a middle-class woman in Britain that Tuesday who did not feel sick in their stomach at reading that a man with 18 previous convictions, who had kidnapped a three-year old little child and subjected her to the most awful three-hour ordeal, who was out on semi parole at the time, then only got five and a quarter years because he had pleaded guilty, despite the fact that he had been caught red-handed—red-handed—in the car and pleading guilty to me and to most people was an utter sophistry. All I can say—and you may say that judges cannot do this—is that the judge in that case should have been more media savvy. Indeed, I think the judges do need to learn to be more media savvy for the age we live in. I think the judge should have anticipated that storm and should have gone out of his way to explain himself. He should have said, in passing this sentence: “Many of you feel astonishment and rage at this, that a man who has done this is only getting five and a quarter years. I refer to the fact that I am bound by reporting restrictions and this issue should be taken up with the politicians and the law makers in this country.” I have read the reports of the case and I do not think the judge said that. He allowed this misunderstanding to mushroom. Of course it was compounded by a minister and a junior minister diving in opportunistically to exploit it, but, again, if I may be so bold, when that situation was running out of control it would have been helpful if someone like the Lord Chief Justice had gone on television and said, “Look, we must get this in perspective.”

Q345 Viscount Bledisloe: It would appear, Mr Dacre, that you thought that maybe the judiciary should be more proactive in dealing with your comments. In the light of the fact that you accept that Judge Williams had no alternative but to pass this sentence, would you therefore have regarded it as perfectly reasonable if he had sued your newspaper for libel? You said he showed contempt to the public. He did what he was bound to do.

Mr Dacre: I do not think that is libellous, with great respect. It is comment really. We are still free to comment. Going back to that story, the irony of this situation is that Allison Pearson is a very liberal lady, a very liberal columnist. Goodness knows what some of the Daily Mail’s columnists might have said. I would refer you, however, if you thought she was tough, to The Sun of that day. The banner headline on the front page was “Guilty as charged.” And that is referring to the judge. “Sack the softies” is their inside story. Their leader read: “What truly beggars belief is the arrogance of judges in their mink-lined ivory towers who leave the rest of us to cope with the real crisis of soaring crime . . . . Judges are a law unto themselves. Far from understanding the public outrage, they round on The Sun for daring to raise the issue at all. What would the ignorant public know about the delicate balance between guilty and punishment? How dare we question their lofty rulings or their right to sit on the bench until they fall off it? As things stand, judges can cock it up every time they sit on the bench and frequently do but he or she is immune from the sack unless caught with his pants down or fingers in the till.” I would humbly suggest that Ms Pearson was very moderate in her views.

Q346 Viscount Bledisloe: That only seems to me to demonstrate that there were other papers that Judge Williams could have sued as well. Mr Dacre: I very much doubt it. I bow to your superior knowledge of jurisprudence but I do believe comment is free in this country.

Q347 Chairman: Reading The Sun, you are astounded at your own moderation! Mr Dacre: I am, yes.

Q348 Lord Lyell of Markyate: The Department of Constitutional Affairs, in its Review of the Implementation of the Human Rights Act in July last year concluded that “negative and damaging myths prevail about the Human Rights Act” and it suggests that the media were responsible. Do you agree with this assessment?

Mr Dacre: The media, of course, are always responsible in this country. They always want to shoot the messenger. No, I do not accept that, I am afraid. There are some papers that are critical of the Human Rights Act; there are others who are passionately in favour of it. The BBC, which is the most powerful voice in Britain, which dwarfs the
influence of Fleet Street, is very pro Europe and very pro the Human Rights Act. So I do not blame the media. I blame the Human Rights Act for placing judges in a very difficult position.

**Q349 Lord Lyell of Markyate:** In part, in relation to the Human Rights Act, has it not stood up for a good many liberties, like the right to a fair trial? **Mr Dacre:** Yes. But, I am afraid, if I am being honest, I have referred to taking decisions that overturn decisions taken by law makers and I have seen the huge and significant impacts the Human Rights legislation has had on my own industry. I believe it is both worrying for my industry in terms of press freedom and worrying for the slight wedge it is driving and the anxiety it is driving in relations between the judiciary and judges, because more and more we are witnessing the emergence of an aggressive, judge-made privacy law based on case law. We have seen some astonishing decisions which are overturning freedoms which we have had for decades. This is being done without any recourse to Parliament. We were assured when the Human Rights came in that it would not lead to the introduction of a privacy law and we are seeing this. I do worry that this is leading to some of the angst between the media and the judiciary. Again, they are being put in a position in which I do not think they should have been put.

**Q350 Chairman:** Could I just ask you whether you think the Constitutional Reform Act with this greater separation between the judiciary and the executive has also affected relationships between the media and the judiciary? “Relationships” may be the wrong word, but the way in which the media see and report upon the judiciary. Do you think that has been affected in any way by the passage of the Constitutional Reform Act? **Mr Dacre:** I do not really think so. Are you referring to the Judicial Communications Office?

**Q351 Chairman:** That, as a manifestation of this greater separation, they now need to explain themselves from their own offices. **Mr Dacre:** I have spoken to my news desk about this. Our view is it does an okay job. It gives a nuts and bolts background to issues. It is employed by good enough people but they are journalists and so they do not really have an understanding of the most controversial issues of the day. I suspect in the Craig Sweeney case that the particular office which you people perhaps would have hoped would have played a role was virtually useless. Virtually everyone said they did not know what the judge’s thinking was. Anyway, again, anonymous spokesmen in a modern communications world are virtually useless: you need a flesh and blood face to go on television or the radio to put the case.

**Q352 Chairman:** It was one of the very powerful points you made earlier in this evidence that the judges need to work out more effectively how to communicate, how to find a spokesman, how to handle the media, how to make the case, both the general case and the specific one. You have made that point but I think you are saying that the Judicial Communications Office, although it is not hindering that process, has not made any enormous difference in your perception. **Mr Dacre:** That is a fair summary, yes.

**Q353 Lord Woolf:** Do you think there is any danger, if the judiciary become overactive in the fields we have been talking about, which are very difficult ones for the judiciary, of their being sucked further into the dispute and in fact damaging their image of being impartial? **Mr Dacre:** Could I just digress for a moment? Forgive me, because I meant to mention this earlier to you. Because one knew that one was coming to this Committee, the Daily Mail commissioned a poll into what the British public thought of the judiciary. We have not carried the poll, we thought that would be discourteous, but we may well carry it after my appearance at this Committee. You might be interested in some of the bullet points. The poll suggests a lack of public trust in the judiciary. Most strikingly, only 18 per cent have faith that the sentences they want passed against criminals will be reflected by the courts. Only 36 per cent said judges could be trusted to put the interests of ordinary people first compared to those of minority groups. In the poll some 56 per cent said judges generally do not understand the lives of normal people and 58 said they do not understand the impact crime has on their lives. An overwhelming 75 per cent said sentences were too lenient. Only three per cent said punishments were too harsh, while 18 per cent considered them about right. Bearing in mind Allison Pearson: women were even more concerned than men, with 77 per cent criticising too lenient punishments, compared to 74 per cent for men. The poll said some 62 per cent of people of all ages said they would disagree with any judge who said sentencing burglars and robbers to a community punishment was a better option. Some 43 per cent said judges were more concerned with the rights of minorities than ordinary people. Some 58 per cent said terror suspects were put first, compared to 32 per cent who said that the right balance was struck. In the poll, some 56 per cent said judges generally do not understand the lives of normal people, and 58 per cent feel they do not understand the impact crime has on their lives. An overwhelming 68 per
Chairman: I do not want to interrupt your answer, but, just noting that with great interest, since you have introduced this into your evidence, and it is very interesting—it does not entirely square with some of the other polling evidence we have heard—but I take it as a serious poll, seriously conducted—would it be possible to share that with the Committee?

Mr Dacre: Yes, and I would do so before we used it in the paper.

Q355 Chairman: We are very grateful. Thank you. I am sorry, I did not mean to interrupt.

Mr Dacre: To try to answer your question, firstly I would suggest that the poll provides you with some fairly powerful indicators that you have quite a job of communicating to do. I would also say you need to be aware that, whatever Allison Pearson says, politicians say in much more robust language about the activities of judges. I have heard Home Secretaries on both sides of the divide speak in terms that certainly would be libellous, with great respect. It goes back to this matter of where the line is drawn and you need to do. You need to address it.

Q356 Lord Woolf: I was seeking to get your answer on whether you think the judges are the right people to do the act which is needed to redress this information you provide. There is a danger of drawing them into—

Mr Dacre: I understand that but surely the senior members of the judiciary can take a magisterial and Olympian role here. You do have that freedom without destroying the independence and accountability of judges below them. Without being silly, could I throw back the question at you? Who do you think should represent them? Clearly the Lord Chancellor cannot any more. Clearly the Attorney General—particularly this Attorney General—cannot. Is there some constitutional mechanism, a new creature you can create in a constitutional role, who can speak up for the judges without being seen to damage the independence of the judges? I do not know the answer.

Q357 Lord Woolf: And I am not giving evidence!

Mr Dacre: No. I was seeking to tap into your superior knowledge, but anyway . . .

Q358 Lord Peston: I am very interested in the survey that you told us about. I am glad you are going to leave it. I was not very clear entirely what you think follows from it. Although I do not have it in front of me, it seems that that survey should be addressed to our political masters, not to the judges at all. Most of them sound like things that require particularly the House of Commons and the Government to do something about them rather than the legal profession.

Mr Dacre: Except, as I keep saying, the perception is that it is the judges' fault. That might be terribly unfair, but you have to address that.

Q359 Lord Peston: If you take the one on vetting, for example, one can see the argument here but surely that is an argument that has to be put before politicians.

Mr Dacre: Yes.

Q360 Lord Peston: And some of the others have to be put before politicians. I am really going back to Lord Woolf’s point. I certainly think the judges ought to communicate better, that is not the problem, but they are not in a position to solve problems. If there are problems, they are not the ones who have the solutions to hand, are they? It is the politicians who have the solutions.

Mr Dacre: Yes, but in the way of the world it is up to the senior members of the judicial trade to make sure this message is communicated to the politicians.

Q361 Chairman: I would like to go back to your answer to Lord Lyell, if I may, on the Human Rights Act. You have made it pretty plain that you are not a great enthusiast and in some ways you are critical of the Human Rights Act. Forgive my ignorance, but is that an editorial line of the Daily Mail: we do not like the Human Rights Act?

Mr Dacre: I think it fair to say that over the last 15 years the Daily Mail has been in the Eurosceptic camp of British journalism. Vast areas of British journalism are not in that camp, mainly the BBC. I think it fair to say that we have been very doubtful about the Human Rights Act from even before it was introduced into British legislation. That is our editorial comment line. If you are asking me if that view is reflected by all our columnists, I would have to answer no. Some of them support it, some of them do not. I think it is a bit of a myth that the Daily Mail has a bit of a line that permeates the whole paper.
Q362 Chairman: We of course would not know exactly how that works, but if a columnist or reporter came up with a warm endorsement of the way in which the Human Rights Act had helped some oppressed minority or individual, would that be spiked? Would it appear in the paper?

Mr Dacre: A reporter would not come out with that view. A reporter reports; he does not give views. I have referred to the Sweeney case. If you compare that with The Sun's version, it is, as I say, a model of great classical, fair, objective reporting. To put it another way: I employ some of the best columnists in Fleet Street—I say, modestly. But we do. Great minds. Great original minds. A great ability to communicate. I am thinking of one, who it would not be fair to mention, and I would be surprised to learn that he was not a great supporter of the Human rights Act. He has total freedom to express his views, as do all our columnists. If you think I can control some of the very headstrong and independent-minded individuals I have on my columnists' rota, you are living under a misapprehension. You really are. I repeat, in the editorial line and in terms of the leader column, we are consistently against the Human Rights Act.

Chairman: Thank you for making that clear.

Q363 Lord Morris of Aberavon: Mr Dacre, I am sure you would agree with the fundamental importance of judicial independence. There is a cry from some for greater accountability of judges. Can they be reconciled or are they compatible?

Mr Dacre: It is very difficult, is it not? It is very difficult. They certainly should not be accountable to politicians, that is for sure. I think I would go back to what I said before. If the Human Rights Act has placed judges in the position where they are making more and more contentious decisions, decisions that seem to fly in the face of strongly held views of politicians, of the populace at large, then I think the demands for judges to be accountable is going to grow. As to whether that is a healthy thing or not, I suspect it is not. I repeat, judges have been put in that position, which I think is undesirable.

Q364 Lord Lyell of Markyate: Perhaps some of the judges’ decisions on terrorism may have been criticised by your paper. I am not sure, but if the Government of this country passed laws which locked people up without trial for indefinite periods I would expect the Daily Mail to speak up against it.

Mr Dacre: I can send them to you. I think we have written a lot of leaders supporting the judiciary and the independence of the judiciary. I passionately believe the free press needs a strong judiciary, I really do. I do worry that the press are not quite getting the support from the judiciary it deserves at the moment. I am sorry, could you repeat your question.

Q365 Lord Lyell of Markyate: If you take the people who were locked up in Belmarsh for three years without ever being brought to trial and the judges said it would not do—

Mr Dacre: The Daily Mail did support the judiciary on this and we have been on the side of civil liberties in this. I do fear that the more terrorist bombs which go off, the more these civil liberties are going to be under huge threat. We have not been supportive of judges where they have seemed to take perverse decisions over immigration, asylum, sham weddings and things like that. We have been critical of those. But successive Home Secretaries have tried to get hold of this shambles and at every turn have been overturned by the judges. My own view, for what it is worth—and it is probably worth very little—is that judges make wonderful decisions in isolation, which are intellectually very pure, but they do not have the mindset, because they do not have the knowledge of how ordinary people think, to place them in the large context of national security, immigration and things like that. I do not know what the answer is there but I make it as an observation.

Q366 Lord Goodlad: Do you think the judges ought to respond to public opinion on that rather than apply the law as it is?

Mr Dacre: No, obviously not. If judges can keep making decisions that fly in the face of what most people perceive as common sense and common justice then they threaten the justice process itself because people do not trust it.

Baroness O’Cathain: That is for the politicians.

Q367 Lord Goodlad: Is that not more for the politicians?

Mr Dacre: We keep going back to Human Rights. You are making judgments that we feel and a lot of people feel are political.

Q368 Lord Goodlad: When you say the press are not getting the support of the judiciary, could you give the Committee one or two examples of that?

Mr Dacre: I think I have already referred to the development and emergence of this judge-driven privacy law. I do not want to go into specifics, but we were simply astonished at the judgment recently which denied a man whose wife had committed adultery with another public figure the right to speak about that. That seemed shattering to me and everything I have understood about newspapers. Injunctions are being handed out with greater and greater frequency, as we have seen over the last few days—a very undifying spectacle, if I may say. Rightly or wrongly, we feel that one or two judges are very anti-press. Very anti-press. They do not understand newspapers. They do not like newspapers. They do not like popular newspapers, in particular, and they do not quite realise that, in their dislike of
popular newspapers, their disdain of popular newspapers, they are disdaining millions of people who read those newspapers. I am afraid that is a feeling very prevalently held by several editors.

**Q369 Lord Lyell of Markyate:** I share your view about that judgment but it is worth recording that it was overturned on appeal.

**Mr Dacre:** No, I do not think it has been.

**Q370 Lord Lyell of Markyate:** It has.

**Mr Dacre:** I do apologise.¹

**Q371 Chairman:** Thinking of your last remarks, could it be that the judiciary, rather like Corporal Jones, “don’t like it up’em”?

¹ Mr Dacre was referring to CC v AB [2006] EWHC 3083; [2007] Entertainment & Media Law Reports 11. Lord Lyell of Markyate was referring to a different judgement, AVB plc [2003] QB 195.

**Mr Dacre:** You said it, sir. I think they like dishing it but not taking it, but that is true of a lot of people. I retract that comment—I really do. One of the things I was going to suggest is that there should be, maybe in the form of forums, opportunities where senior editors and senior members of the judiciary can cross-fertilise their views. Indeed, there have been, on an informal basis, one or two very useful dinners on that basis. I do think judges—and this sounds a little patronising—do need to be a little less sensitive about the media, a little less defensive, maybe a little more magisterial and Olympian and not worry so much about the hurly-burly and cut and thrust of her Majesty’s red-tops.

**Chairman:** Thank you very much. You have been very generous with your time, and, like every good journalist, you have sensed, I am sure, the blood pressure and adrenalin levels of your audience rising considerably.
**TUESDAY 1 MAY 2007**

**Present**
- Bledisloe, V
- Goodlad, L
- Holme of Cheltenham, L
  (Chairman)
- O’Cathain, B
- Quin, B
- Windlesham, L
- Woolf, L

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**Examination of Witnesses**

Witnesses: LORD JUSTICE THOMAS and SIR IGOR JUDGE, President of the Queen’s Bench Division, examined.

_Q372 Chairman:_ Good morning and welcome Lord Justice Thomas and welcome Sir Igor; it is a great pleasure to see you back for the second time after such a brief interval.

*Lord Justice Thomas:* Thank you.

_Q373 Chairman:_ I should say that the proceedings are being filmed and therefore it would be very helpful if you would, before we do anything else, briefly identify yourselves.

*Lord Justice Thomas:* I am John Thomas, Lord Justice Thomas.

*Sir Igor Judge:* I am Igor Judge, President of the Queen’s Bench Division.

_Q374 Chairman:_ Thank you very much. I know that there has been an enormous number of very informative papers produced by the judiciary in the last few weeks on changes to the administration of the justice system. I wonder if you would care to make a brief opening statement?

*Lord Justice Thomas:* We have prepared something and I hope it will be helpful to you if I were to outline our present position? It is our view that the creation of a Ministry of Justice is not simply a machinery of government change (which would ordinarily be solely for the executive branch of government to determine), but it is one that involves, in our view, significant constitutional change. Unlike the reform to the office of Lord Chancellor, it appears possible for this change to be effected without legislation. However, its constitutional importance is undiminished by that fact. Our constitution, as you all appreciate, is based both on statute law and on constitutional understandings and conventions. Those understandings and conventions include reliance upon full and appropriate respect for the different positions occupied by the three branches of government. In the view of the judiciary the proposal to create a Ministry necessitates: first, a clear examination of the best way to achieve the necessary changes, and the complexity of this task has become increasingly evident as work has progressed, just as it did after the decision was made to reform the office of Lord Chancellor. Secondly, it requires the creation of a different relationship between the new Ministry, the judiciary and the court administration. We consider this is necessary to ensure the independence of the judiciary in performing their duties to uphold the rule of law and deliver the proper administration of justice. We began to examine the implications of the proposed Ministry of Justice immediately after the possibility of the immediate creation of such a Ministry was raised in the media on Sunday 22 January this year. We pressed for detailed information and an outline paper detailing possible models for the Ministry was provided by the Department of Constitutional Affairs. On 7 February a memorandum was sent by the judiciary to the Permanent Secretary of the DCA with two working papers, one on resources and HMCS, and another on sentencing. The judiciary asked in those papers for a thorough examination of the issues prior to the creation of the Ministry. Discussions followed with the Permanent Secretary of the DCA and the Lord Chancellor. On 19 March, about 10 days before the announcement by the Prime Minister of the creation of the Ministry of Justice, at the invitation of the Lord Chancellor, the Lord Chancellor and the Lord Chief Justice agreed to set up a working party which would report to them both jointly. The terms of reference of that working party were limited by the Lord Chancellor’s position that the working party must proceed on the basis of a number of parameters and in particular should not involve any legislative change. The judiciary agreed to participate to see if the necessary constitutional safeguards could be effected within these parameters, but made it clear that the parameters would have to be revisited if appropriate constitutional safeguards could not be provided within them. It is our view that there are three substantial issues to be addressed. First, finances. Drawing on the experience of other countries where these problems have been addressed, the judiciary have taken the view that there must be appropriate and transparent mechanisms to ensure the necessary resources are provided for the courts. First, we considered that there must be a fixed mechanism to set the budget and operating plan with provision for capital expenditure; and, in the event of a dispute between the judicial and executive branches of government as to the resources necessary, the arbiter must be the legislature which of course ultimately votes the budget in accordance with their
view as to priorities of overall expenditure. It is also necessary to ensure that if adjustments are proposed to the budget during the year (for example by taking money from the agreed budget to remedy shortfalls elsewhere in the Ministry), there is a similar open and transparent mechanism which must be followed before a change is made. The necessity for such mechanisms both for setting the budget and for any changes is in our view self evident within the Ministry of Justice: in order to be independent and to be seen to be independent the courts must be properly resourced and must also be protected from the adverse effects on the financial assumptions or planning of other parts of the Ministry which may result from any decisions which the judges may make in applying the law. Secondly, there is the topic of Court administration and the position of HMCS. The administrative infrastructure of a court system is integral to the independent administration of justice. The judiciary are drawing on the experience of other countries with Ministries of Justice, and in particular Ireland, the Netherlands and Denmark, where the autonomous court administration with a greater degree of judicial participation has been very successful. It has underpinned the independence of the judiciary, improved the relationship between the judiciary and the court administration and improved the delivery of justice for the public. A new structure akin to these models is, in the view of the judiciary, a constitutional safeguard made necessary by the creation of the Ministry of Justice. The third area is the relationship between the judiciary and the executive. The relationships established just over a year ago through the Concordat and Constitutional Reform Act are complex. In addition, an equally complex set of relationships have been developed to improve the working arrangements between the executive and the judiciary, some of which are set out in the papers we have sent to you. Relations with the Lord Chancellor and a Ministry whose principal function relates to the courts in our view cannot simply be transposed into a relationship with a Ministry with wide-ranging responsibilities for criminal justice and prisons and penal policy. We are very anxious, within the proper constitutional principles, to continue to develop the relationship with the executive. However, working out the principles on which this is to be done and the effect of the operation of the Concordat and the Constitutional Reform Act is far from straightforward. For example, judicial representation on the board of the Department of Constitutional Affairs, one of the important safeguards in the Concordat, is no longer appropriate for the board of the Ministry of Justice, given the conflicts of interest to which it will give rise. A great deal of thought is, in our view, needed to ensure that the constructive and beneficial work done so far is not de-railed. Those are, in summary—and it may seem a bit more than a summary—the views that the working party has begun to address within the terms of reference. Can I tell you that our meetings so far have been constructive in identifying all the issues? We are making progress, but difficult issues of principle still remain between those involved. These require thought, discussion and careful evaluation; we do not think they can be rushed. The working party will report to the Lord Chief Justice and to the Lord Chancellor as soon as it can. However, it is at this stage impossible to tell whether the working party will reach agreement on what should be done or whether the work will reveal (at least in the view of the judiciary) that the necessary changes cannot be made without legislation. The papers provided by the judiciary in February 2007 and the memorandum sent by the Lord Chief Justice to all judges and magistrates on 29 March 2007 (when the creation of the Ministry was announced) made it clear that the judiciary considered that the Ministry of Justice should not be brought into existence until the necessary safeguards had been agreed, given the constitutional importance of the issues. However, the judiciary’s view was not accepted. Since its creation on 19 March the working party has therefore been endeavouring to work as quickly as possible. The pressure of time is imposing a significant burden on all members of the working party but it falls particularly on the officials who are supporting us and who bear this weight, and to whom we are very grateful. We consider that the completion of our work is urgent in the light of the fact that the Ministry will come into existence in a week; and, secondly, there are already issues which highlight the constitutional difficulties which the creation of the Ministry will bring about. There are pending judicial reviews in two main areas—legal aid reforms and prisons. These are two areas of the Ministry’s budget which are demand-led but where the financial provision is in effect already fixed. The potential conflicts of interest are already evident. The problem in relation to legal aid is well understood, but possibly the problems in relation to the prisons need a further word of explanation, particularly as it is a subject of public interest. Under the present legislative framework it is the duty of the judiciary to sentence in accordance with legislation, decisions of the appellate courts and guidelines issued by the Sentencing Guidelines Council. It is the duty of the executive to provide the necessary prison places or funding for community sentences to give effect to those decisions of the courts. The Minister in charge of penal policy must as a matter of law implement the decisions of the courts and find the resources to do so, but his resources are limited by what is provided by Her Majesty’s Treasury. Without new legislation there is simply no Parliamentary mandate for the
judiciary or the Sentencing Guidelines Council to take resources into account in their decisions or in formulating guidelines. It is obviously for Parliament to decide whether it is appropriate for them to do so. One illustration of the problem is the pending judicial reviews in relation to prisons (and, in particular, the pressure on the parole system), which involve issues that, on one view, could have a material adverse effect on prison resources. There is a potential conflict of interest in a situation where the financial position of the courts may be perceived to be at risk from the effect of adverse financial consequences that judicial decisions may have on other parts of the same Ministry’s budget. The present position is that the constitutional implications of the Ministry now seem to be clear. The working party is attempting to find an acceptable solution within the parameters laid down. However, we cannot predict whether we will be successful. As I have already said, difficult issues of principle remain outstanding. In any event, if we are to reach agreement it will also be necessary to make amendments to the framework document for the court service, any changes to which are subject to HM Treasury consent. Furthermore, as the issues are of concern to the judiciary as a whole, the Lord Chief Justice has agreed that there will be appropriate consultation through the Judges’ Council. Finally, we take the view that it will be necessary to embody the terms of any solution in a detailed constitutional instrument. We consider that clearly further debate and scrutiny of the issues and the possible solutions is essential both in the short and long term. We would hope that the Committee would also permit us to update it when the position of the working party is clearer.

Q375 Chairman: Thank you very much; it is an extremely comprehensive statement. It is not a happy story. We will want to revert, in questions to you, to the exact status and prospects of the joint working party, which finds itself at the fulcrum of this, which you and the Permanent Secretary jointly chair, and the timetable and the likelihood of it contributing by May 9 to any solution to some of the many problems you have raised. We will want to revert to that but I would like to start, appropriately for a Constitution Committee, with a question about process. When you first heard of this in January was that a Press briefing, a political Whitehall story or was it a proposal put to the judiciary?

Lord Justice Thomas: No—and Sir Igor will be able to help you directly on this—as I recall it there were articles in the Sunday Press and Sunday media where we first read of the position.

Q376 Chairman: That seems to me particularly relevant because in the new greater separation of powers model, which we are operating in this country between the judiciary and the executive, it clearly, following the Concordat, takes two to tango. If what we are faced with is a unilateral demarche by the government, concealing this, as you have said in your statement, as a machinery of government issue rather than one affecting the fundamental relationships between the judiciary and the executive, it is more likely to be a unilateral government initiative, which is what it seems to be in retrospect, and I would like to know, if you could step back from this multitude of problems that have arisen, and if you can characterise them from the point of view of the judiciary, how a continuing dialogue on issues of constitutional significance, would ideally operate instead of what we appear to have had?

Lord Justice Thomas: Ideally it is important for people to understand what affects the constitution and what affects the machinery of government. For example, if it had been decided merely to split the Home Office in two, without affecting the Lord Chancellor’s Department, it would not directly affect the judiciary. However, once it was decided to move a significant part of the Home Office and amalgamate it with the position of the Department it was not a mere machinery of government change, and we tried to make that clear and it has taken a little time for that fact to be appreciated. If it had been accepted that this was not a machinery of government change but a change which had serious constitutional implications I would very much have hoped that what the judiciary wanted, which was actually—as has happened in other countries where this issue has arisen—a proper, open examination so that we could have something that Parliament was content with, the judiciary was content with and the executive was content with, would have happened, but that did not happen.

Q377 Chairman: It could be argued that this is not the first time that we have been faced in this relationship with this sort of rather hasty administrative and politically driven initiative without recognising that in the new dispensation there is a necessity for a joint approach, as it were.

Lord Justice Thomas: I would say a tripartite approach because I think it would be wrong to ignore the position of Parliament.

Q378 Chairman: That is very flattering of you to say so, and we probably share that view! There clearly are serious process issues from which I think we would all hope lessons would be learned, but if I might just address the substantive issue, which has been a matter of concern, which is this: do you or Sir Igor have concerns about the notion that the same government department should be responsible both for the Human Rights Act, for the preservation of our rights and liberties on the one hand and for, on
the other hand, prisons, probation, criminal law, sentencing policies, all the things that would tend, in one way or another to limit or curtail? It seems in terms of checks and balances it is an uneasy mixture, but maybe I am oversimplifying it?

\textit{Lord Justice Thomas:} Could I make one observation and I will ask Sir Igor to add something? It is right to say that in a number of countries in the world there are Ministries of Justice, but those which work properly recognise that there has to be autonomy of function and clear and transparent mechanisms within them. So I think it is possible to do this but you have to make certain that there is appropriate autonomy of decision-making, for example as regards to the courts in relation to the court administration, and there would be other illustrations. There are Ministries of Justice that have within them prosecution departments and again it is absolutely imperative that you have this autonomy of function.

\textit{Sir Igor Judge:} I am only speaking for myself on this. I am not troubled about the issue of policy and which government department is responsible for the policy, save and unless the day may come—and let us hope that it never will, and I do not anticipate it now—when the government of the day thinks that its policy reflects the law: then we would have a difficulty. We are supposed to, and we do, apply the law whatever the policy of the government, whatever, for that matter, the policy of the opposition. So I am not myself concerned particularly about if it is the current constitutional conventions apply. I have a different concern and that is the one that Lord Justice Thomas' paper raised. May I try and illustrate a particular concern, which is really the nuts and bolts of it? I happen to know—and I am not commenting on the individual case—that an individual who has been sentenced to imprisonment for public protection and therefore is liable to stay in prison until the parole board decides that it is safe for him to be released had a determinate sentence fixed at 12 months. At the end of the 12-month period he is contending that no arrangements have been made for the Parole Board to examine whether it is safe to release him or not; that is an issue which will come before a Judge in due course and, as I emphasise, I do not comment on it. If judicial review is granted that may have substantial implications for the resourcing of a section of the department for which the Ministry of Justice will be responsible after 9 May—the Parole Board and the prisons. It may have—within them prosecution departments and again it is absolutely imperative that you have this autonomy of function.


\textbf{Q379 Chairman:} I think you can probably detect that there is a lack of sympathy in this Committee for what seems to have been at best a very ragged and hasty process, but a cynic might say that all of this is a great deal of huffing and puffing about money and that the issue really at root, the concern to you and your colleagues—and it is an understandable one—is that the adequacy of the funding necessary for you to do your important and necessary work as a result of these changes becomes potentially contingent on other governmental priorities and that everything else is, as it were, a dignified cloak for, “Let us make sure that we are financially viable.”

\textit{Sir Igor Judge:} The cynic would be wrong. That is the short answer, if I may say so, and the reason he would be wrong is because he is failing to appreciate that judicial independence and the proper funding of the judiciary is actually something that belongs to the community. We do not sit in judgment in flummery saying, “Judicial independence for our own sake.” The independence of the judiciary is something which is precious to every single member of the community. We do not sit in judgment in flummery saying, “Judicial independence for our own sake.” The independence of the judiciary is something which is precious to every single member of the community. You must be able to go into court and know that the person sitting in judgment is neutral—not on one side or the other—coldly applying the law that applies to your case. So although people sometimes think that when we defend judicial independence we are simply defending our own corner, acting as a trade union, if I may say so, that is not the case—we simply are not. The issues which arise here are of great importance to every member of the public.

\textit{Chairman:} Thank you for that; I am glad you have said it and you have repelled my cynicism. But there is an interesting mixture here of trade union issues, as you put it, and constitutional issues and it is the logic of the Act and the Concordat that the judiciary should have its proper and adequately assured

\textit{Lord Justice Thomas and Sir Igor Judge}
sources of finance to do its job, but the running together of the issues in the argumentation does sometimes make it difficult for those of us trying to follow it sympathetically.

Q380 Baroness O’Cathain: One of the things you stressed very firmly was that the Lord Chancellor said there should be no legislative changes. In the working party have you taken, as a side issue, the consideration of what legislative changes would be necessary in order to make this run smoothly and to do away with the sorts of problems in terms of resources, both human and financial?

Lord Justice Thomas: We are precluded by our terms of reference.

Q381 Baroness O’Cathain: You are not allowed to even consider it?

Lord Justice Thomas: No. But we wonder whether we can achieve acceptable constitutional safeguards within it. If we cannot, because of those parameters, the judicial members of the committee will say so, but we are not allowed; the Lord Chancellor has stipulated — and that was the term on which the working party was established — that it had to work on the basis that there would be no change to the legislative framework.

Q382 Baroness O’Cathain: Could you not have said, “We will not do that”?

Lord Justice Thomas: We were faced with a very difficult position. Our position at the start had always been that this was a constitutional question. If we look at what happens in other countries there has been a proper debate, an examination. That was refused. And because we were always worried — we were told that this is the view of the government, it was a machinery of government change and it could be made by a ministerial announcement very suddenly — we felt that if we were to try and protect our position we had no alternative, but we always made it clear that if we could not achieve proper constitutional safeguards through a solution that did not involve legislative change we would say so, and that is the position we have maintained throughout.

Q383 Chairman: The Lord Chancellor in the past from time to time properly acted as a counterpoint to the Home Secretary, both in terms of the independence of the judiciary and the rule of law. Would it be as easy for him, do you think, to continue to defend the independence of the judiciary, especially over some of these sentencing issues once he is responsible for criminal justice? Will that be as easy as it was?

Lord Justice Thomas: I think the conflicts that are being put into one person will make it progressively more difficult as future ministers no longer have the tradition of the office. I think one of the problems we saw was that there was a big change in the position of Lord Chancellor as head of the judiciary to Lord Chancellor not as head of the judiciary. One way of looking at the current change is from Lord Chancellor to a quasi-Home Secretary where the relations with the judiciary have been very different. So I think it is inevitable over the process of time, it seems to me, that the tensions will become very considerable.

Q384 Chairman: There is a transition from head of the judiciary, which is what he was, to defender of the judiciary to what now?

Lord Justice Thomas: He will remain the defender of the judiciary and I have no doubt that Lord Falconer will continue to do that, but one has to look forward and actually realise that you are placing in the person of one man — or one woman — as it goes forward a much more difficult balancing act and that, I think, is the problem.

Q385 Chairman: Would you expect there to be a lot more judicial review challenges now?

Lord Justice Thomas: There have always been a lot of judicial review challenges at the Home Office. Sir Igor will be able to help you on that.

Sir Igor Judge: There will undoubtedly be a very substantial increase in the number of judicial review applications against the Ministry of Justice than there ever were against the Lord Chancellor as an individual Minister, simply because great tranches of judicial review relate to prisons, parole — in particular prisons — what happens to prisoners, are they released on time and so on and so forth. So the answer to your question is undoubtedly yes.

Q386 Viscount Bledisloe: Following from that, on the other side, under the Constitutional Reform Act there is meant to be a lot of dialogue between the Lord Chief Justice and the senior judges like yourselves with the Lord Chancellor and his department. Is it going to make it extremely difficult to do that if they are defendants in a large number of judicial review cases?

Sir Igor Judge: Yes.

Lord Justice Thomas: It is. It is an issue that the working party has begun to discuss. The one thing that is of paramount importance is that the Lord Chief Justice must sit in the major cases — it is his job, primarily, to decide them. It would be awful and very damaging, I think, to the judiciary as a whole that because of the need to maintain the dialogue under the Concordat with the Lord Chancellor there was any perceived difficulty with him doing that. One always must look, as Sir Igor has said in an earlier answer, at the perception from the point of view of the litigant. We may understand that if two people
meet together to discuss an issue under the Concordat they would never discuss the case, but actually what is the perception of the litigant? That is terribly, terribly important.

Q387 Viscount Bledisloe: However ingenious a solution you and the Lord Chancellor’s Department come to, is the litigant himself going to believe in this separation and indeed is Strasbourg going to believe in this separation?
Lord Justice Thomas: As I have said, we have identified this as an issue. It is one of the very difficult questions that you start to unpick as you examine the constitutional implications of the change and we have not begun to work out a solution to this particular problem yet.

Q388 Baroness O’Callaghan: The Lord Chief Justice wrote a letter of 29 March to the Judges’ Council that stated, “We have demanded that structural safeguards are put in place if the new ministry is not to threaten the due and independent administration of justice”. What, in your view, are the structural safeguards that are needed?
Lord Justice Thomas: I think there are two essential ones, that the budget for the courts and any change to it is set in an open and transparent manner, and I regard setting the budget as important as the changes to it. The second is the independence of the court service administration. It is very difficult to see why a minister should any longer, when he has these very wide responsibilities, have any need, save in exceptional circumstances, to intervene in the affairs of an executive agency or an agency whose sole function is administration, and those are the two, in our view, fundamental safeguards. The third is making certain that we have put relationships to the new ministry on a basis where there is clear understanding. We are anxious to have, as we have in this country much more than in many others, a good dialogue between the three branches of government, but the one thing that is essential to that is everyone understands the true limits—we can discuss things provided we each know the limitations. Why I used the word “derail” in what I said to you earlier was that if you do not have clear understandings and people go beyond the limits you then make it very difficult to continue the dialogue, and dialogue, I think, between the branches of the government is essential to make it work properly.

Q389 Baroness O’Callaghan: But there were safeguards contained in the Constitutional Reform Act, were there not?
Lord Justice Thomas: Yes.

Q390 Baroness O’Callaghan: Is there an overlap?
Lord Justice Thomas: They were designed for the position of the Lord Chancellor qua Lord Chancellor; they were not designed for the position of Lord Chancellor qua Minister of Justice, and that is the fundamental change.

Q391 Chairman: So is the logic of that that the Concordat, the founding understanding, will need in some way updating something of that—as I think it has been described—quasi entrenched character. Will that need in some way to be updated?
Lord Justice Thomas: I have referred in my evidence to one issue. One of the protections we had in relation to the financial position of the courts was an agreement that the Senior Presiding Judge should sit on the board of the ministry, and it seemed to us that that was acceptable given the narrow remit of the Lord Chancellor’s Department. We have taken the view that it would be wholly inappropriate for a Judge to sit on the board of a ministry where there was a conflict between how much should we spend on prisons or how much should we spend on the courts, and so that safeguard, in our view, has gone and we need to put other safeguards in its place and maybe adjust other provisions of the Concordat.

Q392 Chairman: Is that what you had in mind when you said that this might in the end need legislative change?
Lord Justice Thomas: We hope it will not but we do not know. I am sorry not to be more clear about this, but I think as we found when we came to look at how you unravel the office of the Lord Chancellor these things are more complex than at first sight might appear.

Q393 Chairman: As indeed constitutional issues are, and I think we are all in a learning curve.
Lord Justice Thomas: That is why, if I may say, we said at the beginning that this is an issue that needs thought and scrutiny and help, and we are therefore very grateful to you for your help and scrutiny.

Q394 Lord Goodlad: Could I ask you, Lord Justice Thomas and Sir Igor how, if and when court funding is squeezed the resulting disagreements between the judiciary and the new department will in practice be resolved?
Lord Justice Thomas: We are still in the process of discussions but, as I said, it seems to me—and this is what happens in a number of other countries—if ultimately the judiciary and the executive cannot agree, it is, after all, Parliament that decides on the appropriations and it must ultimately therefore be for Parliament. This is what happens in a number of other countries. One would hope it would very rarely come to that but you always, in my view, have to
build in a process with some form of resolution, and constitutionally it must be Parliament.

**Q395 Chairman:** Would you expect that what the Lord Chief Justice calls the nuclear option of his being able to go directly to Parliament would have to be called into play in order to get that concentration on the issue?

**Lord Justice Thomas:** I would hope it would rarely happen because I would hope that if we can put in place what I would describe as an open and transparent method of setting the budget then one would hope that that would not have to happen very often. My understanding is that in those countries where recourse to Parliament is an option it has never yet happened.

**Sir Igor Judge:** There is a problem with nuclear options, which is that you cannot keep using them.

**Q396 Chairman:** There is nothing left after the first one.

**Sir Igor Judge:** Exactly, therefore we really do not ever want to get into that position and part of our concern is that we should achieve an arrangement in which we never in reality do get to such a position.

**Q397 Chairman:** What that suggests, does it not, is that it is not enough to have dialogue—dialogue is a very good thing, dialogue is excellent—but we really seem to be saying that we need dependable processes that over time can deal with these proper, maybe inevitable points of tension and we need processes in place and not simply a good chat from time to time, is that right?

**Lord Justice Thomas:** That is absolutely right because our view is that this is a fundamental change which has to last to the future and we must have proper process.

**Q398 Viscount Bledisloe:** When you say it should be decided by Parliament, presumably you mean that a Parliamentary committee would sit on this and make a report, rather than it should be debated on the floor of the House of Commons?

**Lord Justice Thomas:** I think it would be presumptuous of me to seek to advise Parliament as to how it should carry it out. That is an issue which we have not addressed but it is I think presumptuous for me to say to you how you should do your work.

**Q399 Chairman:** Although there is much wisdom in this House we have no control over money, of course.

**Lord Justice Thomas:** No, but the other House does. But how you do that I think is a matter for discussion; I would not presume to advise.

**Q400 Lord Woolf:** You have talked about the fact that there is the working party and you have told us one parameter, legislation. What are the other parameters which are ones that you cannot go outside?

**Lord Justice Thomas:** They do not want any changes to the Concordat, any changes to HMCS’s status as an executive agency, no ring fencing of budgets and ultimately the Lord Chancellor has to decide, subject to his statutory obligations, on budgetary issues.

**Q401 Lord Woolf:** So you are not allowed to discuss in the working party, as I understand it, the ring fencing or the budget?

**Lord Justice Thomas:** No.

**Q402 Lord Woolf:** Am I right in thinking that was one of the conditions that the judiciary thought should be met if there was to be this new ministry?

**Lord Justice Thomas:** We think that there is an equal importance to setting the budget as to ring fencing the budget once established. I think we have always accepted that there could be quite exceptional reasons why there was a problem. So we have never said you have to have absolute ring fencing, but we have always said that once the budget is agreed the court administration should be left to get on with administering the courts, providing the administrative infrastructure, and there should in effect be no interference with its budget.

**Q403 Lord Woolf:** You also mentioned that you have looked at other jurisdictions.

**Lord Justice Thomas:** Yes.

**Q404 Lord Woolf:** I noticed in evidence that has been given by the Lord Chancellor that reference is made to Scotland.

**Lord Justice Thomas:** Yes.

**Q405 Lord Woolf:** In Scotland are there steps which are being taken to achieve what you have just described?

**Lord Justice Thomas:** What has happened in Scotland is that the Scottish executive put out a consultation paper and one of the areas that was raised in the consultation was the budget and the operation of the equivalent of the court service. The Judges responded to the consultation paper in about February of this year and the Scottish executive said that it wanted to consider the matter further, but of course at the moment I would imagine that no decision could be made until next week, at the earliest. So the issue is live there. This issue has been looked at very thoroughly; for example, at the moment it is being looked at in Canada. It has been satisfactorily resolved in the Republic of Ireland, in Denmark and Holland where, if one speaks both to the Judges and
to the administrators, they have a system that is workable and that has improved everything from the point of view of everyone and in particular the public.

Q406 Lord Woolf: But you cannot, as part of your discussions in the working party, as I understand it, develop the Irish example.

Lord Justice Thomas: We think that it may be possible to get pretty close to it but that is where we may not be able to, but I think it is very difficult to have a working party and try to reach through discussion some sort of solution without actually leaving my answer to it there.

Q407 Lord Woolf: One last question. What are the prospects of the working party coming to any consensus by May 9?

Lord Justice Thomas: I would think it is very difficult because these issues are complicated. Again, we are trying—we have worked hard many nights, and I know the department has worked hard many nights, and we will continue to do so.

Q408 Chairman: I think an objective observer would be rather gloomy that with the changes due to take place on May 9 and these very large unresolved issues—including no-go areas, which seem incomprehensible to me, but there we are, it does not seem like an equal negotiation—that with negotiation under that sort of pressure will you not on May 9 lose all leverage in that joint working party to arrive at the proper agreed solutions that concern you?

Lord Justice Thomas: I would hope not because if the position is on May 9 that we have not agreed but are making progress, if the Lord Chancellor was to take the position that now it was in being and he need not negotiate very further, then there would be a very serious constitutional problem. I am sure he will not do that.

Chairman: I am sure he is listening very carefully to the point. I am afraid it will have to be the last question, but I would like to bring in Baroness Quin.

Q409 Baroness Quin: On a number of occasions already you have mentioned the experience in other countries and I know that the Judges’ Council has carried out a comparative survey of the processes and institutions in terms of judiciary-executive relations in other European legal systems. Are there any points in relation to that study which you have not already made, about which you would like to take the opportunity of informing the Committee?

Lord Justice Thomas: I think not. I think what is very important is that these are very serious issues and in almost every other country there has been a proper—as we asked for at the beginning—and detailed examination, so that you come to a solution that is acceptable across the board to the executive, to the legislature and to the judiciary and actually you get a solution that is long-term for the benefit of the public. I think that is the most important lesson. The only other thing I would say is that when we look at court administrations in other countries there is a question as to how you constitute the board. For example—and pray excuse me if my memory is wrong—in two countries, of which I think one is Hungary and the other is Norway, to ensure that the legislature has its proper interest in court administration there are members of the legislature who sit on the board. In other countries you have people who represent the legal profession, you have people who represent people who work in the court administration at a lower level and you have experts in finance; but the importance of the constitution of the board, which has been addressed in these countries, shows how important court administration is and how it is a matter of real public interest and not something where a political minister—using the word as a political appointee—should really have any role at all.

Q410 Baroness Quin: Could I just follow that up by saying in the classic split between the Ministry of Interior and Ministry of Justice, which you see in many the European countries, is there a minister who is an obvious defender of the judiciary, and if there is not does that matter?

Lord Justice Thomas: I think we have been very fortunate in the way our constitution has developed and I hope this will always remain, that we have had the special position of the Lord Chancellor, and I know at the time of the debates on the Constitutional Reform Act there were various ideas that he should be made into the sort of protector of the constitution. It is very important for our harmonious working of the constitution that there is some minister who has a specific responsibility, but some of the continental systems work differently—they have differently constituted Judges’ Councils—and as far as I am aware the issue of having someone with special responsibility has not been addressed, but I will certainly look into that and come back to you, if I may.

Q411 Chairman: May I thank you both very much. It is very good of you and we have found the evidence—I cannot say cheering—extremely revealing and I am most grateful to you both for coming.

Lord Justice Thomas: Thank you very much indeed for taking an interest in what to some might appear a very abstruse subject.
Examination of Witness

Witness: Rt Hon Lord Falconer of Thoroton QC, a Member of the House of Lords, Secretary of State for Constitutional Affairs and Lord Chancellor, examined.

Q412 Chairman: A warm welcome, Lord Chancellor. I should say that this is being filmed for television so it would be good of you—although strictly redundant—to identify yourself for the cameras.

Lord Falconer of Thoroton: Lord Falconer of Thoroton, the Lord Chancellor and Secretary of State for Constitutional Affairs.

Q413 Chairman: Thank you very much, and I should also warn you that there are photographs being taken and I hope they do not distract you. We have just heard evidence from Lord Justice Thomas and Sir Igor and one thing that emerges very clearly is that just as on the occasion of the announcement of the abolition of the Lord Chancellor and creation of the Supreme Court we have in the last few months been faced with a government demarche, which is ostensibly about the shuffling of departmental and Cabinet responsibility as a machinery of government issue, but nevertheless appears to have very profound constitutional implications, as the first one did and this one has. I want to ask you very directly: are you satisfied with the way in which these changes are (a) leaked, (b) announced, (c) iterated and (d) turned into a rational process of constitutional change?

Lord Falconer of Thoroton: As to leaks I will not comment. As to the process I am completely satisfied it is a sensible way of dealing with it. Can I briefly summarise what the position is? From February 2007 a Ministry of Justice became a serious possibility. During February and March there were discussions and exchanges of papers between the judiciary and myself. On 19 March, ten days before the formal announcement of the Ministry of Justice, a working party was set up between the Judges and senior officials to discuss the implications because the implications are very important in relation to this change. But what is agreed between the executive and the judiciary is that a Ministry of Justice is in principle constitutionally acceptable, subject to certain safeguards being put in place. The working party is a good, constructive and sensible way of working those details out because I do not think that anybody is suggesting that we change the fundaments of Lord Woolf’s and my Concordat; nor is anybody suggesting we change the fundaments of the Constitutional Reform Act 2005, which changed the Lord Chancellor—and that was a big constitutional change—from being a Judge in government to being a minister in government but with a special relationship with the judiciary, and that special relationship with the judiciary continues and I do not believe—and nor do I believe other people in the working party believe—that that special relationship cannot be preserved subject to sorting out the operational arrangements; they are very important. I am completely satisfied of the method by which it was done; I think it was a sensible way of doing it. I heard the end of some of the questioning of Lord Justice Thomas; there is absolutely no question of having to conclude, if they are not concluded, the discussions by 9 May. I have absolute faith that the Judges, my officials, myself and the Lord Chief Justice are only concerned to reach a conclusion that leads to the best result for the good operation of the machinery of government, and that is absolutely clear from the working of the arrangements that are in place. Why we have done it in this way is because I think you need clarity about the arrangements going forward. If I thought that there was fundamental constitutional uncertainty about doing it in this way then I would have been against it. But that is not my view; I believe that the arrangements we have put in place deal with all the legitimate concerns and I am confident that with people of the quality of John Thomas, Igor Judge, Alex Allan and my senior officials we will reach agreement.

Q414 Chairman: We are impressed by your faith and confidence, but let me put this to you. It seems that the government may not have come to terms with the very deep constitutional implications of its own Constitutional Reform Act, of which you were the co-parent, and I will put it this way: if there is a greater measure of separation of powers and the independence of the judiciary, and their sphere is more clearly delineated from that of the executive and the government, surely it stands to reason that changes which affect both parties should be mutually arrived rather than there being a unilateral demarche by the government, albeit—and I hear what you say about the working party that follows that up—should you not have started with the working party, with the judiciary who have their own sphere here to work through the implications of this, rather than having the usual simplistic machinery of government drive towards it?

Lord Falconer of Thoroton: This is an important change that has implications. You are completely wrong. I do not know whether it is your words or the Judges’—unilateral demarche—

Q415 Chairman: No, it is my word.

Lord Falconer of Thoroton: That is a completely inaccurate account of it. The critical thing is—

Q416 Chairman: I am sorry, was it discussed with the Judges before the announcement started coming out of Whitehall?
Lord Falconer of Thoroton: I cannot comment on the leaks, I had nothing whatsoever to do with that. As soon as it became a serious prospect then I discussed it, as you know, with the Judges and that started in February. The important thing is to focus on the constitutional implications of the Constitutional Reform Act because you are absolutely right when you say that that has to be the foundation of everything. The Constitutional Reform Act involved a fundamental change in the role of the Lord Chancellor. What happened to the Lord Chancellor as a result of that Act of Parliament was that he ceased to be a Judge, he obtained certain statutory responsibilities, including protecting the independence of the judiciary; and also the courts and the Lord Chancellor were linked by primary legislation. The impact of the changes that we are now discussing involves bringing prisons, probation and sentencing to the Lord Chancellor. It does not relieve him of either his responsibilities to the court system or his duties to the Judges. What has to be worked out is how, in the light of his increased responsibilities, in operational terms, that will affect his relationship with the Judges. That is what the working party is doing and it is very important, I think, to focus on the fact that the Lord Chief Justice, speaking on behalf of the Judges, has said in principle that subject proper to safeguards that is okay, and it is, I think, right to focus on the process but wrong to think it is either the wrong process or one that will not produce a result.

Q417 Chairman: You are not inclined to think that what seems to be a very considerable amount of questioning on behalf of the judiciary reflects dissatisfaction with the way in which this has been dealt? You are not inclined to take that seriously?

Lord Falconer of Thoroton: I take everything genuinely—and I read in the newspapers dissatisfaction with some elements discussed by individual Judges—and I am as keen as I possibly can be and I hope my record reveals over the past four years that I have been personally as committed as I possibly can be to having a good constitutionally productive relationship with the Judges because I recognise my role under the constitution and my role under the various pieces of legislation. I do believe that this process is one that will produce results.

Q418 Chairman: I was interested in the Judges’ Council paper, which you will of course see.

Lord Falconer of Thoroton: I have.

Q419 Chairman: The words that say, “The creation of a Ministry of Justice is not a simple machinery of government change but one which impacts on the separation of powers.” Would you agree with that?

Lord Falconer of Thoroton: The critical framework for the separation of powers now comes in the Constitutional Reform Act and the constitution. It has very important implications because what you have to deal with in the machinery of government changes where there are implications is a Lord Chancellor with all of the constitutional position laid out in the Constitutional Reform Act with these additional responsibilities. The sorts of things that then arise are, one is worried with maybe the prison or probation service seeking money—could that impact on the funding of the courts? Judicial reviews will come—actually judicial reviews come in to the Legal Services Commission at the moment and the way that the courts resolve those could well have an impact on funding for the courts, but we have been able to accommodate that. The fact we have been able to accommodate that does not mean it will not be different in practical terms going forward, and that is what we need to talk about.

Q420 Chairman: We were told in the dying moments of the evidence which you have just heard that the subject of the ring fencing of the costs of the judiciary was expressly excluded from the agenda of the working party.

Lord Falconer of Thoroton: Before the announcement on 29 March and before the setting up of the working party I made it clear that I was against ring fencing, and I will tell you the reason I am against ring fencing is because I found, doing it for the last four years, that from time to time I have had to move money from the courts. The best example is I moved money away from the courts at one point in order to fund better the Legal Aid Fund because ensuring a good justice system may involve saying some maintenance on the court buildings has to be delayed in order to ensure that people are properly represented in court. So I am against the idea of ring fencing of the court budget, but I completely accept the need for a properly funded court system. The protections there come in Section 1 of the 2003 Courts Act and Sections 1 and 3 of the Constitutional Reform Act 2005. If ring fencing was regarded as a necessary acceptance of the Ministry of Justice then no doubt I would have been told, “I am afraid on that basis we cannot agree to it,” but that is not what I was told.

Q421 Chairman: I would just like to come back to your own key responsibility as the defender of the independence of the judiciary. In a sense, your role has morphed from, in the old days, being head of the judiciary to being the protector or defender of the judiciary now. Do you see yourself, in the light of these changes and the creation of the Ministry of Justice, being in any way inhibited in that role?
Lord Falconer of Thoroton: Absolutely not. The idea that a minister being responsible for courts and the judges cannot also be responsible for prisons, probation and sentencing policy seems completely wrong. It is a model in many other countries and I would regard my ability to defend the judges, their independence and a proper functioning court system as in no way affected by that. That is a critical consideration in me supporting the idea of a Ministry of Justice.

Q422 Viscount Bledisloe: You have said you are convinced that this is going to work subject to the safeguards being in place. You have said that you are confident that the working party will come to a solution. The other half of this negotiation has said that it is very unconfident that it will come to a solution, particularly in the light of the bars you have put down on any new legislation and so on. Supposing it does not come to a solution? What happens? Do you unravel the changes you have made? Would it not be more sensible to wait until the working party has solved the problem before implementing this change?

Lord Falconer of Thoroton: No, absolutely not. First of all, I did not hear all Sir John Thomas's and Sir Igor Judge's evidence. I did hear Sir John Thomas saying that maybe we will not reach agreement by 9 May. I have not heard him say—that he thinks they will not reach agreement.

Q423 Viscount Bledisloe: He said that it is very difficult and very doubtful.

Lord Falconer of Thoroton: My own view is that it will be possible to reach agreement but no doubt we will wait and see. If we cannot reach agreement, that is not going to stop the Ministry of Justice going ahead on 9 May 2007. We have made it absolutely clear and the judges know perfectly well that the Ministry is going to go ahead on 9 May. I believe that what needs to be done is that the working party needs to go through the various issues. I believe they have gone through a number of the issues and have reached agreement on a number of the issues, but it is all subject obviously to an overall agreement.

Q424 Viscount Bledisloe: They are negotiating with no muscle at all because it is going to happen anyhow, whether they agree or not.

Lord Falconer of Thoroton: The judges and the executive are negotiating in good faith to achieve a common end. You need to strike a balance between, on the one hand, there not being a prolonged period of uncertainty in relation to which ministry is in charge of what against the need to agree in principle the things that matter. The position of the judiciary has been it is okay subject to suitable safeguards being worked out. That is what the Lord Chief Justice has said and that is what is now being negotiated.

Q425 Viscount Bledisloe: They are not worked out.

Lord Falconer of Thoroton: I believe that they will be.

Q426 Viscount Bledisloe: It takes two to tango and to make an agreement. If an agreement is not made, what happens?

Lord Falconer of Thoroton: If an agreement is not made there will be areas where there is agreement and there will probably be areas where there is disagreement. Those areas that are agreed will be put into effect and the rest will have to evolve.

Q427 Chairman: With your ministerial hat on, you are saying that this is going to go ahead on 9 May. Then you are saying that there is this very successful negotiation, which is not the impression we got from the judges. We have the impression that there are some very large issues still unresolved but you will talk to your Permanent Secretary about that. We do not have an impression of an easy, downhill slope for the next few days; we have some big issues. What sort of negotiation is it that says it does not matter whether we agree or not because we are going ahead?

Lord Falconer of Thoroton: Both of us, like in so many areas in politics, accept that the best thing to be achieved is agreement even though neither side has any sort of leverage in relation to it. I completely agree with you that there are difficult issues to be negotiated but I have complete confidence, particularly in regard to those doing the negotiations on both sides, that because they both want to reach agreement it will be possible to reach agreement. That is not in any way to underestimate the difficulties of the negotiations but my own view is that they will reach agreement despite the difficulties. If they do not, there will be some areas of disagreement but I suspect there will be agreement on most things. I suspect one will find that ways will be found over time to deal with those areas of disagreement.

Q428 Chairman: Do you think there will be a role for Parliament to play in trying to make sure that agreement is reached?

Lord Falconer of Thoroton: Of course.

Q429 Chairman: How might that work?

Lord Falconer of Thoroton: There would have to be a debate in Parliament upon it. The fundamentals of the relationship between the judiciary and the executive are those set out in the Constitutional Reform Act and the concordat. They are not changing.
Chairman: The concordat which you negotiated with Lord Woolf, which is the foundation stone of the Constitutional Reform Act, is of enormous constitutional significance. It has been represented to us—and I think we probably agree—that it has been a quasi-entrenched piece of parliamentary and constitutional significance. Is it not possible in the light of what has been negotiated and changed here that it will need to be developed in some way?

Lord Falconer of Thoroton: There is an issue about whether or not a judge or judges should sit on the DCA board or the Ministry of Justice board. I am more than happy to discuss that. We need to discuss whether or not they should be on the HMCS board as well as the DCA board or not on the DCA board. The fundamentals of the concordat do not need changing, I do not think. The question of whether somebody should sit on the DCA board needs to be looked at but I do not regard that as going to the fundamentals of the concordat because, as you know, basically what the concordat says—and this is reflected in the Act—is that the Secretary of State is under a duty to ensure that there is an effective and efficient court system to support the carrying on of the business of the courts as set out in part one of the Courts Act. He is accountable to Parliament for the overall efficiency and effectiveness of the administration of the court system. He is responsible for ensuring that the public interest is served in decisions taken on matters affecting the judiciary and he is responsible for supporting the judiciary in enabling them to fulfil their functions for dispensing justice. That fundamental principle and obligation on the part of the Secretary of State for Justice remains the same. There are responsibilities put upon the Lord Chief Justice on behalf of the judiciary and they equally remain the same. What the concordat was doing was establishing a new relationship once the Lord Chancellor stopped being a judge. That remains the position.

Lord Goodlad: Do you think there is any risk that the Secretary of State and the Lord Chancellor will be routinely a defendant in judicial review claims?

Lord Falconer of Thoroton: No, I do not. I am not sure “routinely” would be quite fair but I completely accept there will be many more judicial reviews from the Ministry of Justice in relation to prisons. Again, the problem is there in principle already. I do not think you need to change the Constitution to deal with that problem.

Lord Goodlad: Do you think there are likely to be difficulties in having the kind of regular dialogue with the Lord Chief Justice and other senior judiciary over the administration of justice under the Constitutional Reform Act when they are sitting in judgment on the legality of policies and executive action taken by the Ministry of Justice?

Lord Falconer of Thoroton: No. They are already doing that to a certain extent in relation to legal aid issues. That has given rise to absolutely no difficulty whatsoever, even though those are important issues, even though they may be, as it were, finding my department breaking the law in some way, and even though those decisions may have an effect on conduct.

Lord Goodlad: Do you think there will be any constitutional problems flowing from the fact that the Secretary of State and the Lord Chancellor will be routinely a defendant in judicial review claims?

Rt Hon Lord Falconer of Thoroton QC
rise to a problem and I do not think it will give rise to a major problem.

Q435 Chairman: Is that too on the agenda of the working party?  
Lord Falconer of Thoroton: Yes, it is. The judicial review stuff is a point that has been raised.

Q436 Baroness O’Cathain: Both you and Lord Justice Thomas have said that there will be more judicial reviews. Obviously they are going to cost money. Therefore, the whole exercise is going to need additional funding or is it going to get additional funding? Is some other part of the legal system going to be deprived of funding? Has this been cleared with the Treasury?  
Lord Falconer of Thoroton: There has been a transfer of funds from the Home Department to the Ministry of Justice. The people who resist and pay for defending judicial reviews at the moment are plainly in the prisons bit, if you are talking about prisons judicial reviews, of the Home Department. All of their budget has come over to me so it is not going to create any more pressure on the courts’ budget but there are judicial reviews which are going on anyway at the moment. They are being funded by the Prison Department.

Q437 Baroness O’Cathain: I thought the implication was that there were going to be more judicial reviews.  
Lord Falconer of Thoroton: Unless I have misunderstood Alastair’s and Harry’s question, it is basically that the Home Department currently gets lots and lots of judicial reviews. They will transfer from the Home Department to the Justice Department. You are going to be the Justice Minister. That means the courts will be deciding a lot more issues affecting your department than previously. They are not suggesting the fact that there is a Ministry of Justice means that there will be more judicial reviews in respect of prisons. Harry is nodding.

Q438 Viscount Bledisloe: It is your role as the Lord Chancellor to make certain that the government is not infringing the rule of law in what it is doing. The greatest number of cases where in recent times it has been held that government is infringing the rule of law is in the Home Office in some of the areas that have been transferred to you. Can you really see yourself saying to yourself, “I must not do that, though that is what my department wants to do, because if I did that I would be flouting the rule of law”?  
Lord Falconer of Thoroton: Most certainly. I think it is a good thing that these things come over to the Department of Justice. It is an extremely good thing and entirely beneficial to the Constitution that every minister has an obligation in relation to the rule of law spelt out in section one of the Constitutional Reform Act. The Lord Chancellor has a special obligation in relation to that and I think it is a thoroughly good thing.

Q439 Viscount Bledisloe: Do you see the litigant bringing one of these cases being delighted to see that the Department of Justice whom he is suing is the person who is responsible for the courts and the court system?  
Lord Falconer of Thoroton: The litigant is already willing to sue me even though I am in charge of the court system. I do not think he will be deterred by that.

Q440 Viscount Bledisloe: The initial movement for this change came because the Home Office was said to be overworked and there was more than the Home Secretary, senior officials and senior ministers could cope with. Are you at present underworked?  
Lord Falconer of Thoroton: No, I am not underworked.

Q441 Viscount Bledisloe: Are you not going to become overworked when you get this?  
Lord Falconer of Thoroton: No, I do not think I will be. I would not have agreed to these changes unless I was a strong supporter and proponent of a Ministry of Justice. I am enthusiastically in favour of the idea of bringing prisons, probation the running of the court system, sentencing policy and criminal law all under one roof. It is extremely important to reach an agreement with the judges which I believe we will do but there is such a prize and an opportunity in terms of the good administration of justice to obtain a Ministry of Justice. Yes, there are issues in relation to the quite legitimate focus on the part of the Secretary of State for Home Affairs on issues of crime and terrorism but there are fundamentally good reasons as well, which I strongly support and have supported for some considerable time, for the creation of a Ministry of Justice. Let us get the detail of how we deal with the judges absolutely right and to their satisfaction but let us not lose sight of the overall benefits of doing this as well.

Q442 Viscount Bledisloe: Assuming there is a case for a Ministry of Justice and the continuance of the Home Office, why should not the Lord Chancellor not be a third, detached person who fulfils neither of those roles?  
Lord Falconer of Thoroton: Because I strongly believe that part of the justification for the Ministry of Justice is that the courts, subject to proper safeguards and with a minister with a special responsibility to protect the administration of the courts and the independent judiciary, should be there in the
Ministry of Justice as well. In my view, that has to be an integral part of it and that is why the government made the decision to go ahead on 9 May with this Ministry of Justice.

Q443 Chairman: We can see you are very excited about the Ministry of Justice. Lord Falconer of Thoroton: Yes, I am very supportive.

Q444 Chairman: What will happen to those important constitutional affairs for which you are presently responsible? Will they become orphans? Lord Falconer of Thoroton: No, they remain in the Ministry of Justice and it is a thoroughly good thing that they do. Issues like human rights, freedom of information, the Constitution of the United Kingdom are inextricably linked, I think, with the rule of law and the running of the courts. It is the right place for them to be. It is a job of substance. It is a big job. It is a bigger task than being just a Department for Constitutional Affairs. I do not want in any way to underestimate it but the size of it does not mean it is the wrong organisation of government and does not mean it is wrong in constitutional terms. Far from it. I think it is right.

Q445 Viscount Bledisloe: Making that very interesting connection, if in an uncertain future another machinery of government change is proposed to dismember the constitutional issues from the court system and the Ministry of Justice, you would be very unhappy? Lord Falconer of Thoroton: I am in favour of the current arrangements.

Q446 Viscount Bledisloe: The current arrangements start on 9 May. Lord Falconer of Thoroton: Sorry. I stand corrected. You are absolutely right. I am in favour of the arrangements running from 9 May.

Q447 Baroness O'Cathain: If you are so enthusiastic about it, what is your objection to having legislation putting the framework in a very solid form so people could see exactly what is happening? Lord Falconer of Thoroton: Because I do not think we need legislation. The fundamental, constitutional change which occurred was in 2005 where the Lord Chancellor ceased to be a judge. He was rightly subjected to a number of duties and obligations and continued the obligation under the 2003 Act. That is the right constitutional arrangement. I stand by that as being absolutely the right arrangement. I am against ring fencing for the reasons I have given. Therefore, legislation is neither required nor appropriate.

Q448 Baroness Quin: Perhaps I can also follow up the concern about your workload. You have just been asked by the Chairman about the constitutional issues. You are very much attached to the idea of retaining all those, including things like electoral reform, devolution and so on, within the Ministry of Justice rather than, say, the Cabinet Office or some other part of government? Lord Falconer of Thoroton: Yes, I am. I think the arrangements are correct. There are objectivity issues about courts obviously. People need confidence in relation to electoral administration, in relation to the working of the Constitution but there is a degree of objectivity which I think is most appropriately to be found in a Ministry of Justice.

Q449 Baroness Quin: In terms of the practicalities of the change, because obviously this change is coming very soon, are you confident that the new arrangements will ensure the necessary coordination? I ask this question having been in the Home Office myself and remembering the importance of, say, weekly meetings between ministers and the heads of relevant departments so that there was a good flow of communication. We have seen in recent issues how important that is and how difficult it can be if there is not sufficient communication and coordination. How is this going to be ensured over this rapid changeover? Lord Falconer of Thoroton: In relation to criminal justice, those very important issues of coordination have to some extent been addressed by setting up the Office of Criminal Justice Reform which is trying to operate trilaterally across the three relevant criminal justice departments. We need to promote and deepen trilateralism, which I think will become easier under a Ministry of Justice. In addition, it is not just the criminal justice issues but there are, for example, issues concerning relations between the prison estate and the Immigration and Nationality Directorate in so far as they are responsible for the immigration estate. We need to be absolutely clear that good relations, proper working arrangements in respect of those issues, have to be promoted. I am very convinced of that.

Q450 Baroness Quin: Will there be regular meetings between ministers and heads of department in both the Home Office and the Ministry of Justice working together? Lord Falconer of Thoroton: Yes. Obviously the working arrangements need to be sorted out between the various departments but I would envisage yes, there would be. For example, the National Criminal Justice Board brings together a whole range of heads of agencies irrespective of which department they may be connected with. It also brings ministers there as well. That approach of bringing together agencies
that interact with each other and ministers who interact with each other, separate from any Cabinet Committee system, is extremely important. I think the Ministry of Justice gives an opportunity to promote that.

Q451 Baroness Quin: In terms of European Justice and Home Affairs Councils, how are the arrangements going to work there both at ministerial and official level?

Lord Falconer of Thoroton: In relation to European relations, the Justice Ministry will deal with criminal procedure, sentencing issues and criminal law issues. The Home Department will continue to deal with terrorism and precharge issues in dealing with Justice and Home Affairs Councils. Obviously the Ministry of Justice will also continue, as they have done in the past, to deal with civil justice issues. You will know from your experience that the justice-interior split is quite well known. The response of a variety of European ministers is that they understand what has happened and are keen to work with the new arrangements.

Q452 Lord Windlesham: Can we look at the relationship between the two Houses of Parliament and your own situation as a peer? Can you envisage responsibility for constitutional reform being the responsibility of a new minister? In short, do you think there are going to be some changes between the two Houses?

Lord Falconer of Thoroton: The Lord Chancellor being in the Lords is obviously historically what has happened over many hundreds of years. I do not think a Lord Chancellor with responsibility for constitutional reform in the Lords is remotely unusual and it has occurred over a considerable period of time. Prisons, probation, criminal law and sentencing, as you know much better than I do, have traditionally been in the Home Office and the Secretary of State for Home Affairs has obviously always practically got to be in the Commons. What judgment anyone makes in the future about where the mix should be is a matter for Prime Ministers to come. A judgment will be required. I do not think it is impossible for the job to be done in the Lords. Whether at a particular time it is the right thing or the wrong thing depends upon the circumstances at the time.

Q453 Lord Windlesham: The circumstances at the time might include individuals. One perhaps in the whole of your office at the moment might be particularly suited to the House of Lords and might be brought in by the Prime Minister from outside the Cabinet and that should be relatively easy in the Lords but not at all in the Commons. That narrows the field.

Lord Falconer of Thoroton: It is very difficult to speculate on what a future Prime Minister might do in relation to it. You are right. You can bring in somebody into the Lords from outside under the current arrangements. The contrary argument obviously is that there are issues of public expenditure and issues that have considerable effects. Prisons, probation and crime are issues in some ways more suited to the Commons. A balance has to be struck.

Q454 Chairman: If you were to give advice to a future Prime Minister as you have to the present one, what advice would you give?

Lord Falconer of Thoroton: On what particular topic?

Q455 Chairman: On the very topic we are talking about.

Lord Falconer of Thoroton: It would depend upon the circumstances of the time.

Q456 Chairman: You would have no subtle view?

Lord Falconer of Thoroton: I think it would depend.

Q457 Lord Windlesham: It does allow a degree of flexibility for the Prime Minister which no doubt the Prime Minister greatly appreciates.

Lord Falconer of Thoroton: Yes, I agree with that. I am all for flexibility.

Q458 Lord Woolf: Clearly you thought it was important that there should be the agreement of the Chief Justice in principle to the change. Is it right to stress that agreement in principle if in fact the principle was made subject to his being satisfied on requirements when we do not know yet whether the requirements are going to be met or not?

Lord Falconer of Thoroton: I emphasised that because if it had been said that this is not doable that would no doubt have had a considerable influence on what happens. What the Lord Chief Justice is saying—I do not want in any way to understate the importance of the process that is going on—is, subject to safeguards, this is doable. I know what he has in mind in relation to it. I knew what he had in mind at the time of the discussions. It involves work, detail, getting down to reaching an agreement but, on the basis of what he said, I believe, as I said publicly before, this is doable but it is very important that agreement be reached.

Q459 Lord Woolf: You have excluded from the working party safeguards which certain members of the judiciary think are necessary.

Lord Falconer of Thoroton: You are absolutely right. What I said was I am not in favour of ring fencing. I do not believe you need to change the basic statutory or concordat arrangements or the basic role of the
Lord Chancellor. That is the basis on which I am looking at it and the working party has been set up on that basis.

Q460 Chairman: You really did not like me saying “unilateral” but that sounds pretty unilateral to me.
Lord Falconer of Thoroton: I did not like you saying “unilateral demarche” and I think it was wrong. I do not think it reflects the position.

Q461 Viscount Bledisloe: It is not unilateral to say that it would be nice to have some safeguards; I rule out the following safeguards ----?
Lord Falconer of Thoroton: No. This is a friendly arrangement, not an unfriendly arrangement. We are thinking of having a Ministry of Justice. Yes, if you arrange certain safeguards, that will be okay. I would not be in favour of these sorts of safeguards. Okay, although we might want them in play, shall we set up the working party on the basis of that? Yes, we agreed to that and I believe, with the people of the talent we have on the working party, we will be able to reach a solution to it.

Q462 Lord Woolf: Are not the changes, if they go ahead on 9 May, going to involve substantial expenditure just on matters of location, for example, of staff and handing over of resources? Are you getting any new resources to cover the transition from the Home Office to the Lord Chancellor’s Department?
Lord Falconer of Thoroton: There will be expenses in, for example, new signage, launching, moving staff from one building to another, IT and stuff like that.

Q463 Lord Woolf: The Home Office has moved to new quarters recently.
Lord Falconer of Thoroton: It has, to Marsham Street.

Q464 Lord Woolf: The Lord Chancellor’s Department is due to go to other quarters.
Lord Falconer of Thoroton: We were due in 2008 to go to Queen Anne’s Gate. The Ministry of Justice will now use Queen Anne’s Gate as its headquarters. Although there will be some staff moved to Selborne House from Marsham Street—for example, NOMS, which is one element of the change—the vast majority of the staff will stay in Marsham Street. Yes, there are expenses. There is no specific budget for those additional expenses but I think they are able to be accommodated.

Q465 Lord Woolf: Being able to be accommodated means coming possibly out of the court budget.
Lord Falconer of Thoroton: I am under a statutory obligation to ensure a properly funded court system, as you know.

Q466 Lord Woolf: What is the bill at the moment that is outstanding for maintenance of the courts? Is it approximately 100 million?
Lord Falconer of Thoroton: I think it is more than that. Judgments have to be made from time to time as to what is the critical thing for justice. Is it making sure that all the maintenance is up to date or is it, from time to time, making sure that somebody is represented in their criminal case?

Q467 Lord Woolf: Is that the right approach to the administration of justice, that the courts’ condition can deteriorate very substantially? I can remember the time when I was responsible for matters when courts up and down the country were leaking.
Lord Falconer of Thoroton: The position has improved since then, as you will agree. You will also agree that significant amounts of money have been obtained for maintenance. You will also agree that in the deal done with the Treasury specifically extra amounts of money were found. I cannot guarantee that I will always be able to keep up with all the maintenance in all the courts. Judgments have to be made.

Q468 Lord Woolf: Do you not agree that your task is going to be all the more difficult because of the ability of the penal system to soak up great sums of money which have to be found?
Lord Falconer of Thoroton: No, I do not think that is right. The critical issue about the funding of the courts is what money can be obtained from the Treasury. I do not believe that getting responsibility for prisons and probation in any sense weakens the ability of the Secretary of State for Justice to negotiate.

Q469 Lord Woolf: Because of these issues, would it not have been better to take a bit more time over it than to make a decision by 9 May?
Lord Falconer of Thoroton: The decision has been made. We are going ahead on 9 May. I believe that the detail of it, which is very important, can be worked out, if not before 9 May then after.

Q470 Chairman: Thank you for your usual lively evidence. This is not the last time today when you and I are going to encounter each other.
Lord Falconer of Thoroton: It is all agreement, is it not?
Chairman: Thank you very much.
WEDNESDAY 9 MAY 2007

Examination of Witnesses

Witnesses: Professor Robert Hazell, Professor Terence Daintith and Professor Alan Page, examined.

Q471 Chairman: Good afternoon, gentlemen, and welcome. Thank you very much for coming and helping us with our deliberations. For me it is the second time today being with Professor Hazell; always a great pleasure. I wonder if you would be kind enough just for the record to identify yourselves.

Professor Page: I am Professor Alan Page, Professor of Public Law and Dean of the School of Law, University of Dundee.

Professor Daintith: Professor Terence Daintith, Emeritus Professor of Law, University of London.

Professor Hazell: Professor Robert Hazell, Director of the Constitution Unit at University College London.

Q472 Chairman: Thank you very much. I think you know we are doing an inquiry into executive/judicial relations which have been given particular point by the initiation today of the split of the Home Office into two component parts. I know, Professor Hazell, you were kind enough to prepare an introductory statement and we have had a chance to look at it but if you would like to speak to it briefly and make the highlights from it, we would be happy to hear that.

Professor Hazell: Thank you. I essentially want to make three or four points, which I hope will only take three or four minutes at most. The first is the most important, I think, and that is to suggest to the Committee that the gradual separation between the executive and the judiciary, which started in 2005 following the Constitutional Reform Act of that year, was always going to be a process and not a single event. I believe that it was bound in time to lead to demands from the judiciary for further separation, and those demands are now beginning to emerge, so although the Ministry of Justice has provided the occasion for those demands to be formulated by the judiciary, I do not myself believe that the Ministry of Justice is itself the cause. The second point, and flowing from the first, is that the Concordat between the Lord Chancellor and the Lord Chief Justice, which was finalised in 2005 in association with the passage of the Constitutional Reform Act, would have been extraordinary if it had got everything perfectly right first time, and I would like to suggest again that as the new arrangements settle in, it will almost certainly need revisiting. There are several issues which I think the judiciary may want to reopen on their side, including the arrangements for complaints and discipline, for the administration of the courts, and for settling the budget of the courts. And the third general point, if I may—and I will stop after this one—is that the UK is not alone in considering greater autonomy for the judicial branch. It is not alone of course in having what you might call in shorthand an executive model for managing the courts. The executive branch of government manages the courts service in Canada, in New Zealand and in most of the Australian states, and in eight countries in Europe, including Austria, the Czech Republic, Finland and Germany. Interestingly, there is a recent trend throughout Northern Europe to introduce greater separation of powers between the executive and the judiciary, and as part of that to give the judges greater responsibility and control for managing the court service, and that is all very helpfully evidenced in the further material submitted by the Lord Chief Justice to this inquiry, which you in turn very helpfully published on your website so I need not take you through any of the details of that. That is all I would like to say by way of introduction.

Q473 Chairman: Very helpful. Could I just ask you a quick supplementary? It has been represented to us, and one can see the force of this, that the Concordat has a quasi constitutional status, that it is a keystone of the arch as it were of the new dispensation and it is not just any other clause from any other bill, it has a special significance. If that was so, how easy is it to update it, to adumbrate it, to change it? Is it possible for it both to have this locking constitutional status and at the same time be an amendable updatable bit of practical mechanics?

Professor Hazell: Professor Daintith and Professor Page may well want to comment on this also, I hope they will. To my mind it has the status of a constitutional convention, and all constitutional
conventions are liable to evolve over time in the light of experience and new circumstances, and I would be very surprised if the Concordat did not itself evolve partly in its interpretation, as other conventions have evolved, but partly it could be revisited, and I hope at some point it will be revisited, and possibly this inquiry could provide the trigger for that. I do not think myself it is written in tablets of stone.

Q474 Chairman: Can I just get an answer from your other two colleagues? Professor Daintith?
Professor Daintith: Yes, I quite agree with that. I would expect the Concordat to be developed and modified over time and that process to my mind in no way impairs its constitutional significance. Indeed it is part of the genius of the British constitution to evolve in this way and I would expect that to happen in this instance.

Q475 Chairman: Thank you very much. Professor, do you want to add anything?
Professor Page: The only thing that I would add is that the Concordat is, as I understand it, given statutory effect to a greater or lesser extent in the Constitutional Reform Act which in turn has consequences for the process of amending the Concordat. We are not simply talking about revising a convention; we are actually talking about changing legislation.

Chairman: That is very helpful.

Q476 Viscount Bledisloe: Taking the parts of the Concordat that are not in the statute, do you consider that they are amendable by the two parties to the Concordat or does Parliament have some role in blessing an amendment because Parliament may say, “Well, the Lord Chief Justice has given way on this but we would not have passed the Bill if the Concordat had been weakened to that extent?”
Professor Hazell: That is of course a matter for Parliament. If this Committee were to recommend that the Concordat at some point be revisited, the Committee might like to add the rider that the Concordat having been revised by the two originating parties Parliament might want to scrutinise that revised draft. It is a matter for yourselves, if I may suggest.

Q477 Chairman: But it is a matter for three parties?
Professor Hazell: Yes.

Q478 Viscount Bledisloe: That is really the question, is it a matter for two parties or three parties? Can the two parties just come along and say, “We have amended it, bad luck?”
Professor Page: Ideally it should be a matter for the three parties. One of the ironies of this process is that the third party makes fleeting appearances from time to time but it does not have an established role in the process, which I would have thought, without any question, it should have on matters as fundamental as this.

Professor Daintith: We are not perhaps very familiar with purely judicial/executive arrangements in this country for reasons which are rooted in the constitution, and for that reason I think the Concordat does confront Parliament with a rather new kind of issue.

Q479 Chairman: Indeed, the three party/two party question. I would like to move the focus back more widely to the question of the reforms that have been instituted today, the introduction of the Ministry of Justice. The question which is exercising the Committee is is this purely a machinery of government sort of change led in the traditional way that governments change departments’ responsibilities, or should it be regarded as having at least elements of significant constitutional change about it, and if it is the case that it is at least constitutionally tinged, if not more, then the question would be what would be the proper process in a more ideal world of prior consultation both with the judiciary and Parliament? Professor Daintith, perhaps you would care to start off on that?

Professor Daintith: There is certainly a way of looking at this which says this is another example of machinery of government changes, it is a further accretion to the range of responsibilities of DCA, the Lord Chancellor, and as such it fits firmly within a structure with which we are familiar which we have been using for 60 years now; so be it. My view would be that even though it continues to have these formal characteristics—seen against the background of the changes which culminated in 2005 it takes on a different complexion, and I think your wording of “constitutional tinge” is very much the way that I would see it. That does, I think, bring us again to uncharted territory in the sense first that we cannot quite see how Parliament should be involved in a matter which involves both of the other arms of the constitution and, secondly, provision was not explicitly made in the Concordat for any kind of discussion in this sort of area, and we have therefore seen government, move ahead as if it was simply in a pre-2003 situation and nothing more needed to be done other than to tell people what it was going to do. Having said those things, I must say I do not immediately have a proposal to make to the Committee as to the precise machinery which should have been applied in this particular case. Clearly if prior consultation with the judiciary did not take place before the announcement was made, or before the proposal was fixed in the mind of government, then I think that is very unfortunate, and one would hope that in any future case bearing on the
administrative structure relating to the discharge of judicial functions that omission would not occur. To go beyond that, to suggest a specific machinery in this case is a step I would not yet be able to take.

Q480 Chairman: Thank you. Do either of the other witnesses care to add anything? Professor Page: Could I make two points? One is a brief historical point, if I can make it briefly, which is this idea that changes to the machinery of government are a matter for the executive and the executive alone is actually relatively recent. It was the case in the not-too-recent past that new departments were established by statute which did in the normal process provide opportunities for deliberation and consultation, and you could say that the setting up of a Ministry of Justice is the kind of change that would have benefited from that process. That is one point that I would like to make. The second point that I would like to make is to pick up what Professor Daintith was saying about the constitutional complexion of this. It is not just a machinery of justice change because it does have a very real constitutional significance, which is the point that Professor Hazell raised, namely the consequences for the relationship between the funding of the judicial system and judicial independence. I think that is the key constitutional issue which is raised by this machinery of government change.

Professor Hazell: I agree that the change has constitutional implications in terms of a better process to follow. The Committee may already be aware that the Public Administration Committee in the House of Commons has held an evidence-taking session on precisely this point. The witnesses were Lord Butler, the former Cabinet Secretary, and Professor Christopher Hood from Oxford, and from memory they made two main points, that there should have been proper consultation, but they made a further point which was a warning especially from Lord Butler that in his experience of other similar changes in Whitehall, be it merging or demerging major departments, the changes absorb a huge amount of senior management time, often much more than is initially anticipated, and it can take not months but years for a new department to bed down. Chairman: That no doubt is true managerially but quite how significant constitutionally it is is a different matter. Baroness Quin?

Q481 Baroness Quin: You were saying, Professor Page, that it was relatively recent. Can you put a date on that and whether there was a big discussion when the system changed?

Professor Page: The early 1960s. In 1964 the first Wilson Government set up three departments by statute. However, at the end of the Second World War there was discussion about it. That was when the transfer of functions legislation was first introduced and statements were made at the time that when they were talking about not just minor transfers of functions but the setting up whole new departments then, as in the past, that would continue to be done by way of statute, by way of primary legislation. Of course, that was just quietly forgotten about because it is enormously convenient from the point of view of the executive to be able to do this with the minimum amount of legislative encumbrance.

Q482 Lord Rowlands: The Welsh Office was never created by statute.

Professor Page: But the Welsh Office was, what, 1969?

Q483 Lord Rowlands: 1964.

Professor Page: That was one of the first examples then of the new dispensation.

Q484 Lord Goodlad: In terms of the capacity within government to deal with “rule of law” issues and to defend the independence of the judiciary what are the implications of combining the responsibilities of the Lord Chancellor and Secretary of State for Constitutional Affairs with new responsibilities for criminal law, sentencing policy, prisons and probation?

Professor Page: I think it raises the fears that we have already referred to and which have been expressed by the judiciary throughout this process. I think that is the main implication. I do not think there is anything objectionable itself in this combination of responsibilities. I say that coming from a part of the United Kingdom which has a Ministry of Justice which combines not only these functions but also responsibility for policing as well, but I think to repeat what I said earlier, that is the constitutional significance of the change.

Professor Daintith: Yes, I would say if you take that factor away, it is not easy to see exactly what new problems will arise. If one tries to imagine how these functions might interfere with one another, that seems quite difficult, looking at the way in which a department would be structured with its separate agencies, for example, within the department—prisons, say, and Her Majesty’s Court Service—with an appropriate range of junior ministers each of whom will have commitment to a particular part of the department. If we take away the financial considerations, which we may talk about further, I would feel relatively comfortable with this particular grouping.

Q485 Chairman: Perhaps this is an over-theoretical issue but it is one I would like your perception of, which is in this context the Lord Chancellor, as it were, policing himself. He is responsible within Cabinet for seeing that the rule of law is respected
and that the judiciary are independent, that is clearly his responsibility, but to what extent is he then, which I think is objectionable in the law, a judge in his own cause because he is at the same time theoretically responsible for ultimately blowing the whistle on himself? Is there an intellectual problem there?

Professor Hazell: I think that problem already existed in the Department for Constitutional Affairs and before that in the Lord Chancellor’s Department because both those departments were responsible, for example, for the Legal Aid Fund, and policy on Legal Aid is sometimes the subject of challenges by way of judicial review, which may lead to spending implications, and so there is a conflict of interest at least to that extent built in in the old arrangements.

Q486 Chairman: Yes, so it is nothing new?
Professor Hazell: No.

Professor Daintith: We might say that the Lord Chancellor perhaps is less likely to yield to irritations of the moment and criticise judges in his position as Lord Chancellor than would the Home Secretary in his position.

Q487 Chairman: Make it more sympathetic.
Professor Daintith: Yes, it may actually produce the “Caesar’s wife” syndrome.

Q488 Baroness Quin: I think this question is a variation on a theme. Do you have any concerns about the same government department being responsible for the Human Rights Act and its emphasis on the rights of the individual and prisons, probation, criminal law and sentencing policy which obviously are related to the curtailment of liberty?

Professor Daintith: I think I would have to imagine a fairly remarkable scenario to get concerned about that and the sort of scenario would be in which, say, one part of the department put pressure on another part of the department to somehow go easy on human rights. Given that the Department in this case has a role of promotion and monitoring and general oversight of human rights policy rather than, as it were, some kind of core responsibility for making sure that everybody behaves themselves in terms of human rights, it does not seem to me that even that pressure would be very important and I cannot really imagine it being exercised. The other scenario you could try to imagine would be if, for example, the Home Office responded to a DCA circular or MoJ circular saying, “What are you doing about human rights?” by saying, “Well, what are you doing, you don’t seem to be doing very well recently?” I can just about imagine that but I cannot really see it as a significant constitutional danger.

Q489 Baroness Quin: Given your experience of other jurisdictions, has this ever been a problem elsewhere or is it not something that causes difficulties?

Professor Hazell: May I respond briefly to that because it is helpful that there are real live ministries of justice amongst our close Commonwealth constitutional cousins in Australia, Canada and New Zealand, and we will benefit in a moment from hearing from Professor Matthew Palmer from New Zealand. My understanding is that in Canada and New Zealand, where they both have a bill of rights, the Ministry of Justice in New Zealand and the Department of Justice in Canada are also both responsible for criminal law and criminal justice amongst their functions, and I do not think that has given rise to any difficulty in practice.

Chairman: Thank you. We will move on to Lord Smith.

Q490 Lord Smith of Clifton: Gentlemen, in terms of workload, is it realistic to expect one person to take overall charge of all the responsibilities of the Lord Chancellor and Secretary of State for Constitutional Affairs as well as a significant proportion of the Home Secretary’s responsibilities? Is there any possible danger that constitutional and legal matters will be neglected in favour of issues such as prisons?

Professor Page: I would have said simply in response to that that is entirely a matter and comes down to a matter of the organisation of the department, the way in which the Ministry is actually organised, and if it is organised in a way which ensures that due prominence is given to the various aspects of its responsibilities for which organisation the Minister and Secretary of State is ultimately responsible, so, no, I do not have any real concerns.

Q491 Lord Smith of Clifton: So you put your faith in some sort of Chinese walls?

Professor Page: No, I just put my faith in departmental organisation. I would have thought Chinese walls would be in some sense highly undesirable.

Q492 Chairman: It is a matter clearly of legitimate opinion but I suppose the division of the Home Office to some extent—and this has appeared in the newspapers—is a reflection of the view that that was too big a workload for one department, so however well organised it was too much so I suppose the implication of Lord Smith’s question is is this new constellation prima facie too much or just a matter of getting on with it?

Professor Page: Has clarity of focus in one part of the system been achieved at the expense of loss of clarity and focus in another? It is a danger.
Professor Hazell: May I respond partly drawing on my own experience as a civil servant for 14 years in the old Home Office. It depends enormously on how much the Secretary of State as head of the department is willing to share the workload with his junior ministers, and that in turn depends to some extent on how much the Prime Minister encourages members of the Cabinet to share their workloads with junior ministers. It depends also on the political interests of the Secretary of State himself or herself. It happens that the present Lord Chancellor is keenly interested in constitutional matters and they get his close attention. Perhaps this Committee also can help to ensure that any future Lord Chancellor will continue to take a close interest in constitutional matters through the kinds of issues which you choose to take an interest in.

Q493 Chairman: I expect we will do our best but would you think that within this new constellation that constitutional affairs, for instance, might find themselves hived off to a junior minister?
Professor Hazell: I would be surprised if that were the case.
Professor Daintith: But it could be. It is interesting to notice how difficult it is to find constitutional affairs within the organisation chart of the department. You have to look very hard for it and when you find it, you realise that it includes a number of other things which could be seen as being of serious significance such as electoral matters. Although it is very important, in terms of personnel it is a pretty small part of what the Department does and it is dwarfed obviously by HMCS, it is dwarfed by the Prison Service, but I do not think that is necessarily the way in which we should think about this issue of overload. It is worth remembering that the Lord Chancellor was always thought to be overloaded at a time when the size of the Department was far, far smaller. The Lord Chancellor would be in court in the morning, on the Woolsack in the afternoon, and doing his departmental business in the middle of the night.

Q494 Lord Lyell of Markyate: The judiciary, who were before this Committee last week, you have probably seen what they said, seemed to have their feet pretty much on the ground in the same territory that they have had them on the ground for the last 20 years, and probably much longer, in that they have called for safeguards in the form of an open and transparent process for setting and amending the annual budget for running the courts (with Parliament as an arbiter if the judiciary and the executive disagree). They also called for greater autonomy from ministers for Her Majesty’s Court Service. In terms of constitutional principle, how do you see the pros and cons of moving in that direction and is it realistic to suggest that Parliament could have a role when disputes arise?
Professor Daintith: There are two or three questions there I think which one would not necessarily want to answer in the same general sense. One question is the question of autonomy from ministers, and it seems to me perfectly feasible within British constitutional practice to imagine a more autonomous Her Majesty’s Court Service. Executive agencies have different degrees of autonomy. I know that the Government have ruled out legislation but it is clearly not impossible to put an executive agency on a legislative footing and effectively make it into a non-ministerial department. That would give you a great deal more autonomy. It would create, however, the sorts of difficulties to which the judges themselves drew attention in their evidence, that is to say difficulties of judicial accountability to Parliament, how to manage that particular problem. If you make the service more independent of ministers and more dependent upon decisions by judges, how then do you answer for the consequences of those decisions to the department? That is a serious issue. In terms of the financial question I do find it quite hard to put a framework around what the judges have asked for, in terms of an open and transparent process of fixing a budget in which Parliament would in some way be involved, presumably at a fairly early stage, in order that it could arbitrate at some point down the road. Given that I would have expected judges always to be saying they wanted more money for the Courts Service than the department or the Treasury were prepared ab initio to give, I would have thought that you would always tend to be in a situation where there was at least an odour of disagreement floating around. I do not quite see how an open and transparent process can go on, therefore, without risking the production of considerable disagreements and a quite difficult constitutional situation, year by year, in relation to the fixing of this budget. That is if judges are significantly involved in the process. If they can stay out of it somehow and achieve this autonomy, that would be perhaps the best way through, but my understanding is that they do not really want to stay out of it.

Q495 Lord Lyell of Markyate: I think the reality, going back again to my experience on Legal Aid and on the general costings of the Courts Service in the late 1980s, and the way that budgeting was done in the Attorney General’s department, they would like to set out their stall in a pretty clear way—and I think this is what they would call transparent—as to why they needed more money; and then they would like to get the money that they were awarded ring-fenced because, as they told this Committee—and one can understand it—when the pressure for money on, for example, building more prison places is heaving very...
strongly, they can see the Legal Aid budget, or particularly the Courts Service’s budget, getting squeezed, and that is what they are frightened about. Of course, now quite a number of them are spending a lot of their time doing administration, and it will be quite a serious problem for the really top-quality judicial power—being deflected on to admin. 

Professor Daintith: Yes, but I think that is the price that has to be paid for serious input into the process of determining the appropriate level of servicing for the judicial function. Unless judges are prepared to say, as they were at some points prepared to in the past, “We will trust the Lord Chancellor to provide the services we need”, there will need to be that kind of organised input from the judiciary. So far as the notion of putting out your stall is concerned, again the question in my mind is who exactly is going to set out the stall? Is it HMCS and, if it is HMCS, is the judiciary going to be satisfied with the degree of input it has into that process? So far as the ring-fencing of the amount is concerned, it seems to me difficult to move in this direction unless HMCS has its own vote. It is also perhaps a thought that one could best move in this direction by modifying the terms of the concordat, so as to offer some input not just into the process of planning within HMCS but also in the process of departmental reconsideration of the allocation of funds within the year, which I think is one of the concerns the judiciary have.

Q496 Lord Rowlands: Last week, Lord Justice Thomas seemed quite enamoured by the Irish, Netherlands and Danish arrangements. As Lord Lyell says, we have read the appendices, and they have gone for some kind of councils of the judiciary. However, I am not at all clear—and perhaps our expert witness could advise us—whether this has achieved ring-fenced budgets for the court administrations in these three cases.

Professor Daintith: I am not able to say whether it has. 

Professor Hazell: I do not know either, and further enquiries would need to be made of those three jurisdictions, because the very helpful evidence submitted by the judiciary runs out at that point; but it is a very apposite question. In recent times, I think that the Courts Service have been more concerned about adjustments to their budget mid-year, in particular because of overspends on the Legal Aid Fund, than the process for settling the budget in the first place. There are therefore two separate issues to be addressed. One is how the budget is settled in the first place and, secondly, whether or not it can be ring-fenced. May I make two other points? One is that I think that the argument about the greater risk to the Courts Service inside a larger Ministry of Justice potentially cuts both ways. The budget for the Courts Service itself is relatively small. It is smaller than the Legal Aid Fund; it is quite a lot smaller than the Prison Service budget. Forgive me, I do not know the exact numbers, but suppose for the sake of argument that the budget for the Courts Service is £1 billion and the old DCA had a budget of £5 billion in toto, and that has now increased following the creation of a Ministry of Justice to £10 billion. One could say it is easier to protect the budget of £1 billion within a total budget of £10 billion, because there are more other votes or lines within the budget from which savings can be sought. I therefore do not see the arguments as necessarily all one way or potentially negative.

Q497 Chairman: There are moments when you remind us that you have the cloven hoof of a former senior civil servant. That is very impressive!

Professor Hazell: May I make one further point? This is on the wider constitutional issues of the difficulty of setting a budget for one of the other branches of government: a branch which is not the executive. It might be useful to look, as a broad analogy, at how the budget is set for Parliament—also a separate branch of government. It is not terribly instructive, however, because Parliament offers two examples. The Commons lays its own estimate, as I understand it; while for the Lords the Treasury lays an estimate for the budget of this House. There are two possible precedents that might be looked at in seeking for a new model for settling a budget for the judiciary, if in future that is to be regarded as an increasingly separate branch.

Chairman: I think that the commonsensical question which you have implied is what are the alternative models within the British polity of funding something not simply by the straightforward process of negotiation with the Treasury, and then intra-departmental negotiation to fund the various functions, and what examples are there in toto outside that normal, Treasury-driven cycle?

Lord Lyell of Markyate: Could I interpose, while you are thinking about Denmark in particular but also other countries, that their judicial systems are very different from our own. I would just highlight that the previous position of Ole Due, the distinguished former President of the European Court of Justice, was the equivalent of Permanent Secretary in the Lord Chancellor’s Department. That certainly would have been, and I think still would be, pretty unthinkable in this country.

Q498 Lord Rowlands: The reason I raised it was not because I am rather enamoured by the Irish, Danish or the Netherlands’ model, but because it looks to me as if the judiciary are either clutching at a straw in this case, or is there a matter of substance for us to debate? The other issue that arises is not only the issue of finance but also of accountability, in these systems where you make autonomous councils for
the judiciary and boards. In our present system, as a Member of Parliament one could get up and ask about the state of your court; you could actually nag the Minister about the expenditure on your court. Presumably this would take that whole area of parliamentary accountability out of it.

**Professor Page:** I suppose that is the con. When the question was asked in terms of pros and cons, the con is that you lose ministerial responsibility, ministerial accountability to Parliament; but the question is whether that is a bad thing or is it impossible to conceive of any alternatives to it? My own sense is that the existing model, to use the language that Professor Hazell used earlier—the executive model—is simply unsustainable, because the risk is of this kind of dispute running on and on, until you do find a model which is sustainable; which will involve some form of limited autonomy. I do not think that it is beyond the wit of man, or woman for that matter, to come up with such a model and to address the perfectly legitimate concerns that you have about how accountability will be secured within such a system.

**Professor Daintith:** I wonder whether we should not be taking a slightly wider view than the HMCS view, because it is quite clear that part of the driver for the change here is this notion of seamless management of justice. I notice the objections that the Lord Chief Justice had to that notion, in that he did not want judges to be a part of a seamless anything and that independence was very important; but, at the same time, one is looking both at the provision of premises and facilities for the courts and also at the issue of Legal Aid for litigants. Both seem to me to be an important part of the question of access to justice, and it is really on access to justice that the issue of the relationship between finance and independence is based. There seems to me to be an argument which might well be made, to the effect that there must be some authority—and in our constitution it will be the executive under responsibility to Parliament—which can look at the whole of the justice budget and, for example, take a view on that relationship between provision for Legal Aid and provision for judicial services. The two things may, if they get seriously out of balance, as by protecting judicial services but not protecting Legal Aid, have a more deleterious effect on the provision of justice than might be the case now. This is therefore something that we should take into account in deciding just what it is that ought to be ring-fenced, if anything, and to what extent there should be some permeability between these justice functions which currently we have placed within particular executive departments.

**Chairman:** If I may say so, I think that is extremely well said. There is a lot of concern in this House at the moment about the potential decimation of Legal Aid, and it is part of the same piece of access to justice. I think that you are right to draw our attention to that.

**Q499 Lord Rowlands:** We have talked about the Irish, the Danes and the Dutch. What about the Scots, Professor Page? Do you have any experience? How transportable is it?

**Professor Page:** We are not there yet, because we too had the executive model but we are now talking about replacing it. Interestingly, that conclusion—if it is indeed a conclusion—has been arrived at by separate routes. One is an internal review of the Courts Service, which raised the question of the relationship with the judiciary, and the unsatisfactoriness, if you like, of the lack of any connection between the judiciary and the Courts Service. There was therefore a feeling that it was falling short in many respects. Also, separately from that, an exercise which to a large degree has been a catch-up exercise on the Constitutional Reform Act 2005, addressing some of the issues that were addressed here three years ago, including this question of judicial independence and the relationship between that, the budgets and the money that they need to do the job.

**Q500 Lord Rowlands:** Is the future in Scotland to go for some kind of autonomous executive agency?

**Professor Page:** Yes, I think it is almost certain. To answer, or try to answer the question you raised earlier about accountability, what they are talking about is a revised Courts Service, which should operate within a policy framework—to use the language of agencies working within a policy resources framework agreed with Ministers—which would be agreed between the agency and the executive and which the executive would then fund.

**Chairman:** That is most helpful. Could I thank all three of you? It has been of very great assistance to us. If you do find any arrière-pensées that you feel you should share with us, we would be grateful to have them. Meanwhile, thank you very much indeed.

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**Examination of Witness**

**Witness:** DR MATTHEW PALMER, examined.

**Q501 Chairman:** It is very good of you to come, Dr Palmer, and I think that we will benefit greatly from getting some of your comparative insights from your work in and around the Ministry of Justice in New Zealand. May I kick off by a very straightforward question? What can we learn in England and Wales from the New Zealand experience of a Ministry of Justice? What are your lessons for us?
Dr Palmer: I would like to start by thanking the Committee very much for inviting me to appear. It is an honour and a privilege for me. Perhaps I should say that there are two areas in which it is possible that I may be able to be of assistance. One is the relatively abstract question of constitutional dialogue between different branches of government. The other is with respect to New Zealand’s experience of a seemingly integrated and then a non-integrated Ministry of Justice. I am happy to talk about either of those.

Q502 Chairman: I think that the first one, given the subject of our inquiry, might be particularly interesting, so why not start with that?

Dr Palmer: The work that I am currently doing comes out of the Canadian experience where, in their academic literature and law over the last 10 years, they have had a significant debate about what constitutional dialogue is between branches of government. What they conceive that to be is, where Parliament passes legislation and the Canadian Supreme Court is able to strike it down, they have argued that what is going on there is not the ultimate question of whether one branch of government is supreme over another. They have characterised it as an iterative process, where Parliament passes a law, the courts interpret it, and then Parliament can revisit that; and in 60 per cent of the cases they do revisit it. So there is a great amount of literature on constitutional dialogue in Canada, but what I should say about that is this. This term is there applied to that very formal exercise of the conventional functions of each branch of government: passing legislation, interpreting law, and making policy in terms of the executive. I guess this is one of the two points that I would like to leave you with on my own behalf. That is, it is possible to talk about constitutional dialogue in two senses. One is that very formal sense, and the other—especially given the other topic that you are considering today—is that informal sense of people from the judiciary and the executive branches of government sitting down and talking to each other. My suggestion, I suppose, is that there is a value in confining, as far as possible, the interaction between branches of government to the formal exercise of their constitutional function. For example, when we are discussing the budgeting process—and you were discussing that with my predecessors at this table—in New Zealand, which I can talk about shortly, if it were to occur that insufficient funding were devoted to the court administration services, there is a conventional tool that the judiciary would have to make clear the consequences of that position; that is, by finding that so doing breaches the human rights of those litigants, perhaps those criminal defendants, whose rights are at issue. If a criminal trial is delayed for too long, it can become a matter of human rights. In the ordinary course of the judicial function, that can be brought fairly strongly and clearly to the attention of executive government by a finding of illegality. I wonder whether I might stop there.

Q503 Chairman: Pause for a second, because it seems to me that what you are positing is what we might call capital-D dialogue and lower case-D dialogue. It has been represented to us by a number of witnesses, and there was an interesting intervention by Lady Scotland, saying “Look, we talk all the time between the executive and the judiciary. The talk goes on all the time”—and I am quite prepared to accept that. I think that is what you are calling lower-case dialogue—people talking to each other—always a good thing; no problem; “Let’s get on with it”. However, you are positing here something more formal in terms of a process, which is a capital-D dialogue. I still want to understand, if you can help us, what are the characteristics of that formal conversation and its uses and limits, because it sounds very interesting.

Dr Palmer: I suppose that the characteristics of the capital-D dialogue that I am describing are simply the ordinary characteristics of each of the branches of government fulfilling its function. Parliament passes legislation; the courts interpret that legislation. In so doing, both branches of government are coming to a view about what the law is and what it should be. To the extent that each of those branches of government considers what the other has said, that does take the form of a big-D dialogue, in my view. The difficulty with it—and also, if I may suggest, the difficulty with the small-D dialogue, which inhibits understanding between branches of government—is that they are speaking in different languages. Each of those languages represents a mindset or a culture which has certain inbuilt biases and can have difficulty in understanding where the other languages are coming from. This makes for difficulty, therefore, in both levels of dialogue. That would be my suggestion.

Q504 Chairman: If we go beyond cultural empathy and trying to understand each other’s languages, which is clearly difficult, are you saying that in New Zealand there is a clear set of processes for this capital-D dialogue, which you could tell us about and which would inform our way of thinking? This is very interesting territory but, beyond the fact that we should listen to each other’s languages, I am still not quite clear how one could say of New Zealand, “Here is a useful set of capital-D dialogue which might be helpful to us”.

Dr Palmer: It sounds very interesting.
Dr Palmer: I do not consider that New Zealand has any better a set of that sort of dialogue than does the United Kingdom, I am afraid.

Q505 Chairman: That is disappointing.
Dr Palmer: I could outline the ways in which it works there, if the Committee would be interested.
Chairman: I think that Lady Quin has a question, but if there were a paper or something on that, it would be of great interest to us.

Q506 Baroness Quin: I was just thinking of what you were saying about the human rights being invoked as a decisive factor in budget discussions. Can you give examples of how that has changed a government decision as a result?
Dr Palmer: There is an example I am familiar with in New Zealand—and I should say at this point that possibly I should apologise for having worked in the New Zealand Treasury at one point! The area of the Treasury I was in charge of included vote justice. In any budget-setting, priority-setting exercise, officials in the department, in the Treasury, and the Ministers respectively would come to a view about what expenditure has greater priority. There was a particular point in one budget process in which I participated where there was a legal argument made in court that the Crown Law Office had to defend against, which was that a particular trial had been delayed for so long that it had essentially become a violation of human rights, and that the criminal ought to be let go for that reason—that the trial should be discontinued. The point was not taken by the court, but the court took the opportunity to observe that it was possible that it could be if it went on for very much longer. At that point, what you saw within the budget-setting machinery was Ministers deciding that perhaps they did need to allocate significantly more resources to the courts for that purpose than they previously had; because what they did not want was criminals on the streets. That is an illustration, therefore.

Q507 Chairman: The human rights was the prism through which this meaningful exchange was happening.
Dr Palmer: Yes, in the ordinary course of a court delivering a judgment in a case.

Q508 Chairman: Going on for a moment to the other half of the proposition of telling us about how the Ministry of Justice experience in New Zealand works, are there any lessons that you think might be relevant for us?
Dr Palmer: The New Zealand organisation of Justice has gone through different phases. For a long period of time, ending in 1994, we had an integrated Department of Justice which included responsibility for policy advice, correction services and court administration services, as well as electoral services and some others. It was therefore an integrated model. In 1994–95 that model was split up. There was a management fashion in favour of the split of policy and operational functions within departments. It should also be acknowledged that the judiciary were pushing for a separate department for courts. There was a review process with consultation of all relevant stakeholders—as I suppose they are called now—and that review process yielded the splitting up of the department into a Ministry of Justice concerned only with policy and electoral matters, a Department for Courts, and a Department of Corrections. That situation lasted from 1995, when it was implemented, to 2003. In 2003 there was another change of fashion, and the Department for Courts was reintegrated back into the Ministry of Justice—putting it back together with the policy function.

Q509 Chairman: So then we are back to two?
Dr Palmer: To two. There is currently underway a review about whether the Department of Corrections should also be added back in.

Q510 Baroness O’Cathain: Bringing them back to where they were.
Dr Palmer: Yes.

Q511 Chairman: Is there anything we should learn from that?
Dr Palmer: I suppose what I would take from it is that fashions in organisational management design do change. The other thing, I suppose, is that in some ways the main purpose of those sorts of organisational changes—the main legitimate purpose, in my view—is to effect a change in the management and organisational culture, which you can do if you have a large-scale organisational restructuring but is otherwise quite difficult to achieve. You tend to find that these things come in cycles, perhaps because in the life of any organisation it reaches a point where a change in organisational culture and management is needed more comprehensively than otherwise: in which case you have one of these restructurings. It has always been treated as a part of the function of executive government in New Zealand for these changes to be managed as a matter of machinery of government. In the 1994 change there was significant consultation with the judiciary. In the 2003 change I understand there was not significant consultation, but I do not think that there was any particular constitutional principle that was breached or at issue in either change. Whatever organisational boundaries you have around the various divisions that make up these organisations, the major determinant of effectiveness is the competence of the people involved and their
relationship and management skills, and whatever organisational structure you have is no guarantee that either that will work or it will not.

Chairman: I am sure that is very wise.

Q512 Lord Windlesham: You are extremely well informed, I can see, on matters which cover our own inquiry. What you have had to say has been of real value, and I think that especially the secretariat will want to study very carefully what you have said in answer to the Chairman’s opening questions to you. Just to pick up one or two more—and to some extent they are very detailed indeed—you are writing about constitutional dialogue between the executive, the judiciary and the legislature and the Westminster systems. Are you able to tell us, even in a preliminary way at this stage, what conclusions you have drawn about what arrangements work well and what arrangements work less well?

Dr Palmer: I think the primary conclusion that I have drawn in this regard is the one which I perhaps hinted at before, which is that it is constitutionally desirable for each of the branches of government to stick to their knitting, if you like: to do what it is that constitutes their function and to interact with other branches of government through that formal function. This, I think, derives from the fact that it is important that there be a dialogue between branches of the government. It is important that those branches are different, because that is how we get different perspectives being brought to bear on constitutional issues; but because they are speaking of different branches of government they are very detailed indeed—you are writing about constitutional dialogue between the executive, the judiciary and the legislature and the Westminster systems. Are you able to tell us, even in a preliminary way at this stage, what conclusions you have drawn about what arrangements work well and what arrangements work less well?

Dr Palmer: Yes.

Q513 Chairman: So now we have to offer interpretation services, have we?

Dr Palmer: Sometimes there is value in simply bringing people together and asking them to listen more carefully to what each other is saying.

Q514 Lord Windlesham: In what fields would you think that England and Wales should draw on experience in New Zealand, particularly the experience of a Ministry of Justice?

Dr Palmer: Again, the most important mechanism for small-D dialogue between judicial and executive government in New Zealand has been the creation of the Courts Executive Council, which was established when the new Department for Courts was created. It was a mechanism for dialogue at a formal level, on the record transparently between judicial officers and officials, and in my view that has been of use. The other thing I would say in respect of finance is that the one of the things which occurred with the splitting up of our Ministry of Justice was that you suddenly had, for the first time, different votes. Instead of having one vote justice with different output classes, you had vote justice, vote courts and vote corrections. That distinction has been preserved in the reintegration of courts and justice functions, because you still have different Ministers. We still have a Minister of Justice and a Minister for Courts separately. While one can talk about ring fences, the question is always how high is the fence and how easy is it to get over. In any system of public appropriations, there are fences at different heights. In the New Zealand system, if you have a separate vote that is a significantly more effective fence than if you have a separate output class within the vote. I would suggest that might be worth thinking about, therefore.

Q515 Lord Smith of Clifton: May I ask for elucidation, My Lord Chairman? When you say “Ministers”, are these of Cabinet rank—

Dr Palmer: Yes.

Q516 Lord Smith of Clifton: . . . or are they junior Ministers? It would relate to what Professor Hazell said about the degree of ministerial devolution within a large, giant department.

Dr Palmer: Perhaps I should say that they are of Cabinet rank, but the Ministers for Courts do tend to be more junior. From the judiciary’s point of view, therefore, there is a trade-off here between having access to a more senior Minister, who may be more distracted and less focused, and access to a more junior Minister who is more focused. It is not necessarily clear to me which of those is preferable from the judiciary’s point of view.

Q517 Lord Windlesham: Having been here, having studied and having brought yourself up to date, I imagine you are already very familiar with the essentials of the British system. As you can see, there have been some fundamental changes which either have taken place or are in the process of taking place in our judicial system, in the courts, and in the relationship between the Ministers and the courts. If you had to carry away one image, one personal lesson to remind yourself about, to think about on the plane going back, what would it be? The good and the bad—in the sense of encouraging and the opposite?

Dr Palmer: This is my view of what is happening here?
Q518 Lord Windlesham: Entirely your view, yes, and to what extent it might help to illuminate your own approach to similar work at a senior level in New Zealand.

Dr Palmer: There is a similar issue occurring in New Zealand in the last few years and I see significant parallels between them. We established a new Supreme Court two or three years ago. In both processes, both jurisdictions, what I see is new institutions jockeying for position and taking a little bit of time to settle down as to what their relationship is likely to be on an ongoing basis. To some extent, I suspect that is inherent in the nature of new institutions being created that have a relationship with other institutions. We might perhaps consider that it would be possible for it to be a lot worse—and I am sure that it could be—certainly here and in New Zealand. I suppose I would personally tend to have faith that, in the slightly longer term, once these institutional arrangements have settled down, the relationships will be on a relatively more even keel in future.

Q519 Lord Rowlands: This is a completely separate question. Has New Zealand any experience of the courts giving advisory declarations on the law?

Dr Palmer: Some limited experience. Not as much as there is in Canada, where they have quite a significant degree of experience in that regard. There will be occasions when the Government in particular will state a case to a court for an answer to several questions. The most recent instance of that, dating back to 2003, yielded an answer by the court that the Government was particularly unhappy with. So whether or not they will do it again in a hurry, I am not sure!

Q520 Lord Rowlands: And the Canadian experience?

Dr Palmer: The Canadian experience, particularly in terms of constitutional questions, is much more extensive; in references being given to the Supreme Court of Canada, for example, to determine or declare what the constitutional conventions might be with respect to secession by Quebec, or similar sorts of things.

Q521 Lord Rowlands: The territorial constitutional side?

Dr Palmer: Yes.

Q522 Lord Goodlad: The New Zealand Cabinet Manual contains guidance to Ministers on the proper limits of comments on judicial decisions. We have heard some conflicting evidence during this inquiry on revising this country’s Ministerial Code to include similar guidance. Do you think that would be desirable?

Dr Palmer: From a New Zealand point of view, I think it is very desirable that those rules are in the Cabinet Manual, but it should not be thought that the existence of the rules guarantee that the behaviour follows. The Cabinet Manual is interpreted by the Prime Minister rather than any court or any other body, so it is essentially interpreted politically; and if the political will is not there at the highest level to support the judiciary, then those rules would not be followed.

Q523 Lord Goodlad: What has been the experience of their being followed or not followed?

Dr Palmer: I would say that the experience has been mixed. There have been increasing instances of some negative comment by Ministers about courts and court decisions, which are clearly in breach of the manual; but I would suggest that it is better to have the statements there than not have them at all.

Q524 Baroness O’Cathain: Do you know about our communications and the recent judicial communications set-up that we have here?

Dr Palmer: I have heard something of it.

Q525 Baroness O’Cathain: Which is supposed to take the steam out of off-the-cuff comments by Ministers on judges, about sentences, et cetera. So you do not really know what it is all about. I was wondering whether you had a similar sort of thing, to try to take the heat out of situations which might arise, if there is a ministerial comment which, despite the fact that you have your Cabinet Manual, could cause a bit of a ruckus with the judges.

Dr Palmer: No, we really do not have a system that polices that, or that tries to limit it significantly.

Q526 Baroness O’Cathain: Do you have a voracious media which hangs on every word that the judges say about sentencing, and take comments out of context?

Dr Palmer: They can do, yes.

Q527 Baroness O’Cathain: How do you deal with that?

Dr Palmer: It is dealt with mainly as a matter of self-restraint between the branches of government. Usually it is for the Attorney General, who is a member of the Cabinet and possibly our equivalent to your Lord Chancellor—I am not sure—to defend the judiciary. The Attorney will do that to a greater or lesser extent, depending on the political circumstances of the time. If criticism gets too severe, then the Chief Justice herself may issue a statement; however, that would be fairly unusual. I suppose that at the moment the situation is simply reliant on goodwill.
Chairman: With that, I think we have to stop, but I am most grateful to you. If you can give us any further evidence on how the capital-D dialogue works between the branches, that would be of very great interest to the Committee. Thank you very much indeed for coming.