



HOUSE OF LORDS

Select Committee on the Constitution

6th Report of Session 2014–15

The office of Lord Chancellor

Ordered to be printed 3 December 2014 and published 11 December 2014

Published by the Authority of the House of Lords

London : The Stationery Office Limited

HL Paper 75

Select Committee on the Constitution

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Q in footnotes refers to a question in oral evidence

SUMMARY

The rule of law is a fundamental tenet of the United Kingdom constitution. In the context of the Government, it means more than simple compliance with the letter of the law: it means governing in accordance with constitutional principles. The Lord Chancellor has traditionally had a key role to play, both by defending the independence of the judiciary and by ensuring that the rule of law is respected within Government.

The Constitutional Reform Act 2005 substantially changed the office of Lord Chancellor. The Lord Chancellor is no longer the head of the judiciary or speaker of the House of Lords, and since 2007 the office has been combined with that of the Secretary of State for Justice. Yet the duty of the Lord Chancellor in relation to the rule of law remains unchanged. This duty extends beyond the work of the Ministry of Justice and requires the Lord Chancellor to ensure that the rule of law is upheld within Cabinet and across Government.

It has become more difficult for post-reform Lord Chancellors with their wider policy responsibilities, more overtly political positions as Secretaries of State for Justice and their reduced role in relation to the judiciary to carry out this duty in relation to the rule of law. The effectiveness of Lord Chancellors in this regard is more directly dependent on the personal authority and effectiveness of the individual holding the office.

Other guardians of the rule of law have become more significant as a result. In particular, the importance of the Law Officers has increased. As such, we recommend that they should receive the resources necessary to carry out this duty and that the Attorney General should continue to attend all Cabinet meetings. The Government should make clear the respective responsibilities of those charged with upholding the rule of law within Government and ensure that they receive the support necessary to fulfil those duties. In addition, Parliament must be aware of its importance as a guardian of the rule of law and scrutinise the actions and policies of Government to ensure it governs in accordance with the rule of law.

We recognise concerns raised about the combination of the office of Lord Chancellor with that of the Secretary of State for Justice. However, the combination of the office of Lord Chancellor with a major department of state confers additional authority which assists the Lord Chancellor in his or her vital duties in relation to the rule of law.

The Lord Chancellor has traditionally performed an important oversight role in relation to the United Kingdom constitution as a whole. Whilst responsibility for constitutional change passed to the Deputy Prime Minister in 2010, we have heard no evidence that he, or any other minister, currently takes responsibility for the state of the constitution as a whole. A senior Cabinet minister should be tasked with this responsibility; in our view most appropriately the Lord Chancellor.

We conclude that, despite significant changes to the office of Lord Chancellor, it still retains important constitutional duties and responsibilities that go beyond those of other ministers. We recommend that the office and its associated responsibilities be retained and strengthened with an amended oath. The Lord Chancellor should be a politician with significant ministerial or other experience to ensure that they have sufficient authority and seniority to uphold the rule of law in Cabinet, and in dealings with ministerial colleagues.

The office of Lord Chancellor

CHAPTER 1: INTRODUCTION

1. The office of Lord Chancellor has existed for over 900 years and evolved substantially throughout the 19th and 20th centuries,¹ but the most radical modern reforms came in 2003–05. Nearly 10 years on from those reforms, controversies surrounding Government policy on judicial review, legal aid and the European Court of Human Rights have focused attention on the role of the post-reform Lord Chancellor, and the combination in 2007 of the office with that of the Secretary of State for Justice with its added responsibilities for politically contentious areas of public policy.²
2. In response to these concerns, and in accordance with our role of keeping the operation of the constitution under review, we decided to undertake an inquiry into the office of Lord Chancellor. Our inquiry did not seek to assess the performance of holders of the office—past or present—but rather to understand the constitutional position of modern Lord Chancellors, how they perform their functions, and whether any changes were needed to enable the officeholder to fulfil their duties. This work continues previous scrutiny of the office by this Committee in a 2007 report on relations between the executive, the judiciary and Parliament, and a follow-up report in 2008.³
3. We received a wide range of evidence, including from academics, former permanent secretaries, former Lord Chancellors, former senior members of the judiciary, former Attorneys General, and the current Lord Chancellor. We are grateful to all those who gave evidence.

The Lord Chancellor in the twenty-first century

The pre-reform office of Lord Chancellor

4. The office of Lord Chancellor (more formally the Lord High Chancellor of Great Britain) is an ancient one. It developed from a role as secretary to the King of England to one that spanned Parliament, government and the judiciary. It is a sign of the age and prestige of the office that the Lord Chancellor ranks higher than the Prime Minister as an officer of state in the order of precedence.⁴

¹ The first Lord Chancellor is said to have held the office in the eleventh century, although some date the role as far back as the seventh century. Diana Woodhouse, *The Office of Lord Chancellor* (Oxford, 2001), pp 1–2.

² Written evidence from Bindmans LLP ([OLC0023](#)); Written evidence from Colin Murray ([OLC0021](#)); see Joint Committee on Draft Voting Eligibility (Prisoners) Bill, *Draft Voting Eligibility (Prisoners) Bill* (Report of Session 2012–13, HL Paper 103, HC 924), paras 233–234; Joint Committee on Human Rights, *The implications for access to justice of the Government's proposals to reform judicial review* (13th Report, Session 2013–14, HL Paper 174, HC 868), paras 22–23

³ Constitution Committee, *Relations between the executive, the judiciary and Parliament* (6th Report of Session 2006–07, HL Paper 151); Constitution Committee, *Relations between the executive, the judiciary and Parliament: Follow-up report* (11th Report, Session 2007–08, HL Paper 177)

⁴ Only the Archbishop of Canterbury comes above the Lord Chancellor, after the Royal Family.

5. During the 20th century, the Lord Chancellor's role expanded significantly. By 2003 the Lord Chancellor was an important parliamentarian, Cabinet minister, and judge. He was entitled to preside as Chairman of the Appellate Committee of the House of Lords (the Law Lords)⁵ and of the Judicial Committee of the Privy Council. As head of the judiciary,⁶ he was responsible, directly or by making recommendations, for a large number of judicial appointments, and for judicial discipline.
6. In Government, the Lord Chancellor was a member of the Cabinet and the head of a department with a wide range of responsibilities, including for criminal legal aid and the administration of certain tribunals, over constitutional affairs and for the Crown Dependencies. In addition, the Lord Chancellor was Speaker of the House of Lords, as well as speaking and voting in the House as a member of the Government. As a figure spanning Parliament, the executive and the judiciary, the Lord Chancellor had a vital role in upholding the rule of law and the independence of the judiciary.
7. The Lord Chancellor was also responsible for the Great Seal of the Realm,⁷ as well as for the Land Registry, the Official Receiver and Public Records. The office also included considerable ecclesiastical patronage.⁸
8. Post-reform Lord Chancellor the Rt Hon. Kenneth Clarke QC MP described the pre-2003 office as a "bizarre combination of roles" that "worked well ... because of the personal qualities of the people who had held the post" but "it was something you could not defend to the outside world."⁹

Changes to the office since 2003

9. In June 2003, the Government announced its intention to abolish the office of Lord Chancellor. The then Permanent Secretary of the Lord Chancellor's Department Sir Hayden Phillips told us that "little detailed work had been done on what would be the consequences for the observance of the rule of law and for a good focus in Government on constitutional issues" of abolishing the post.¹⁰ The eventual reforms, which required legislation in the form of the Constitutional Reform Act 2005, did not abolish the post, but did change it considerably. A new Supreme Court replaced the Law Lords (without the Lord Chancellor as a member) and an independent commission now makes recommendations on judicial appointments (with a veto power retained for the Lord Chancellor over certain appointments¹¹). The Lord Chief Justice replaced the Lord Chancellor as the head of the judiciary in England and Wales and an elected Lord Speaker now sits on the Woolsack in the House of Lords.

⁵ Lord Irvine of Lairg was the last Lord Chancellor to sit as a judge, although he did so rarely.

⁶ A de facto role, rather than one assigned in statute (Explanatory Notes to the Constitutional Reform Act: [Background](#))

⁷ The Great Seal is used to signify the sovereign's assent on important documents, the Lord Chancellor has been its custodian (with the brief exception of a period after the 1688 Glorious Revolution) since the early thirteenth century (Woodhouse, *Office of Lord Chancellor*, pp 2–3. 5).

⁸ Woodhouse, *Office of Lord Chancellor*, p 8; see also Department for Constitutional Affairs, Constitutional reform: reforming the office of the Lord Chancellor, September 2003, CP/03.

⁹ [Q 76](#)

¹⁰ Written evidence from Sir Hayden Phillips ([OLC0029](#))

¹¹ The Lord Chancellor's veto has been recently restricted to appointments at High Court level and above, under the Crime and Courts Act 2013, [Schedule 13](#)

10. A further significant change occurred in 2007, when the Ministry of Justice was created, combining the Department of Constitutional Affairs (which had replaced the Lord Chancellor's Department in 2003) with functions transferred from the Home Office—primarily responsibility for prisons and the probation service.
11. Shortly after the creation of the Ministry of Justice and the combination of the Lord Chancellor's role with that of Secretary of State for Justice, the Rt Hon. Jack Straw MP (a former criminal law barrister) became the first Lord Chancellor in modern times to sit in the House of Commons. In 2010 the new Deputy Prime Minister took over responsibility for political and constitutional reform from the Ministry of Justice, which had inherited it from the Department for Constitutional Affairs. A reshuffle in 2012 saw the appointment of the first non-lawyer Lord Chancellor in modern times, the Rt Hon. Chris Grayling MP.

The role of the post-reform Lord Chancellor

12. Although the posts of Lord Chancellor and Secretary of State for Justice have been combined, they each have distinct areas of responsibility. The functions and duties of the post-reform Lord Chancellor are:
 - (a) Respecting the rule of law and defending judicial independence in accordance with the oath of office (see Box 1): these are the core duties that this report addresses, and are the focus of Chapter 2.
 - (b) Oversight of the judiciary: although no longer the head of the judiciary, the Lord Chancellor remains the minister responsible for pay and conditions for judges. He or she has a role in judicial appointments and disciplinary proceedings, including having a veto over senior appointments and acting as co-signatory (with the Lord Chief Justice) of disciplinary decisions. Mr Grayling told us that “it is a stewardship role to make sure that the ship is sailing smoothly rather than a management role.”¹²
 - (c) Responsibility for the courts and tribunal service: the Lord Chancellor has a duty under the Courts Act 2003 to ensure an efficient and effective courts system.
 - (d) Responsibility for the provision of legal aid and for the regulation of the legal profession through appointments and resourcing for the Legal Services Board.¹³
 - (e) Responsibility for the process of civil, family and administrative law.
 - (f) Other miscellaneous functions: these include the core historic role of the Lord Chancellor as Keeper of the Great Seal of the Realm, and the ceremonial roles of presenting The Queen with Her speech at the state opening of Parliament and taking part in the formal opening of the legal year. There are also other roles and responsibilities remaining from the

¹² See written evidence from the Judicial Appointments Committee ([OLC0020](#)) and [Q 43](#) (Chris Grayling MP). On judicial appointments see also Constitution Committee, *Judicial Appointments* (25th Report, Session 2010–12, HL Paper 272)

¹³ Written evidence from the Bar Council ([OLC0026](#))

old office, including over official records,¹⁴ a position as a Church Commissioner, and other ecclesiastical functions.

13. Separately, as Secretary of State for Justice, the officeholder has responsibility for prisons and the probation service, criminal law, sentencing policy, human rights, data protection and freedom of information.¹⁵
14. The Rt Hon. the Lord Falconer of Thoroton QC, who as Lord Chancellor steered the Constitutional Reform Act 2005 through Parliament, told us that the reforms “were intended to make the Lord Chancellor both a Cabinet Minister responsible for [the] courts and the departmental responsibilities that the Lord Chancellor had, but also to retain and entrench his or her role as being a defender of the rule of law and the justice system.”¹⁶ During the course of this inquiry, this key duty as a defender of the rule of law emerged as central to our investigation. It is to this that we first turn.

¹⁴ Written evidence from the Archives and Records Association ([OLC0024](#)) and Dr Clive Field and Professor Michael Moss ([OLC0013](#))

¹⁵ Written evidence from the Ministry of Justice ([OLC0028](#))

¹⁶ [Q.76](#)

CHAPTER 2: THE RULE OF LAW AND JUDICIAL INDEPENDENCE

15. As we stated in our 2007 report, “the role of Lord Chancellor is of central importance to the maintenance of judicial independence and the rule of law”.¹⁷ The Lord Chancellor’s duties and responsibilities with respect to the rule of law and judicial independence are set out in sections 1 and 3 of the Constitutional Reform Act 2005, and combined in the oath of office, in section 17 (see Box 1). The oath is unique to the Lord Chancellor and is made in addition to the privy councillor’s oath of allegiance taken by other Cabinet Ministers.

What is the rule of law?

16. The Constitutional Reform Act 2005 does not define the “existing constitutional principle of the rule of law”, nor “the Lord Chancellor’s existing constitutional role in relation to that principle”. If the officeholder is to carry out that role, he or she must have a sense of what both the principle and the role mean in practice.
17. Yet the rule of law “is not readily defined or readily understood.”¹⁸ Not all lawyers will agree on what the rule of law entails; differences of opinion will undoubtedly also occur between different Lord Chancellors. As this Committee has previously stated, “the rule of law remains a complex and in some respects uncertain concept”.¹⁹
18. Mr Grayling told us that the rule of law meant “an independent justice system, free from interference from outside, free from corruption, free from influence, that is respected and treated as independent by those in Government and those in Parliament, and that ultimately ... we respect the ability of the courts and the responsibility of the courts to take decisions according to their best judgment about what the law of the land requires”.²⁰
19. That judicial independence is a core feature of the rule of law is not contested. Likewise, compliance with the law as it stands is a key element, ensuring a stable and predictable, rather than arbitrary, exercise of powers. These two elements alone, however, comprise too narrow a definition. The rule of law goes beyond judicial independence and compliance with extant law, particularly as regards the Government which can, through Parliament, change the law.

¹⁷ Constitution Committee, *Relations between the executive, the judiciary and Parliament*, para 71

¹⁸ [Q 19](#) (Lord Phillips of Worth Matravers)

¹⁹ Constitution Committee, *Relations between the executive, the judiciary and Parliament*, para 24

²⁰ [Q 49](#)

Box 1: Key provisions of the Constitutional Reform Act 2005

Section 1, ‘The rule of law’, states:

“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.”

Section 3, ‘Guarantee of continued judicial independence’, includes the following provisions:

- (1) “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 ...
- (4) The following particular duties are imposed for the purpose of upholding that independence.
- (5) The Lord Chancellor and other Ministers of the Crown must not seek to influence particular judicial decisions through any special access to the judiciary.
- (6) The Lord Chancellor 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;
 - (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.”

The Lord Chancellor’s oath, inserted into the Promissory Oaths Act 1868 by section 17(2) of the Constitutional Reform Act, is:

“I, _____, do swear that in the office of Lord High Chancellor of Great Britain I will respect the rule of law, defend the independence of the judiciary and discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for which I am responsible. So help me God.”

20. During our 2007 inquiry into relations between the executive, the judiciary and Parliament, Professor Paul Craig, Professor of English Law at the University of Oxford, set out the complexity of the principle of the rule of law. In our report we summarised and quoted from his submission as follows:

“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. ... 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’.”²¹

21. The late Lord Bingham of Cornhill, Lord Chief Justice from 1996–2000 and senior Law Lord from 2000–08, set out eight principles of the rule of law in his book on the subject; these are the most recent widely accepted articulation of it (see Box 2). When we asked Former Attorneys General the Rt Hon. Dominic Grieve QC MP and the Rt Hon. the Baroness Scotland of Asthal QC for their view, they endorsed the Bingham principles, as did former Lord Chancellor Mr Straw.²²

Box 2: Lord Bingham of Cornhill’s eight principles of the rule of law

1. **The Accessibility of the Law:** The law must be accessible and so far as possible intelligible, clear and predictable.
2. **Law not Discretion:** Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.
3. **Equality before the Law:** The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.
4. **The Exercise of Power:** Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably.
5. **Human Rights:** The law must afford adequate protection of fundamental human rights.
6. **Dispute Resolution:** Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.
7. **A Fair Trial:** Adjudicative procedures provided by the state should be fair.
8. **The Rule of Law in the International Legal Order:** The rule of law requires compliance by the state with its obligations in international law as in national law.

Source: Tom Bingham, The Rule of Law (Allen Lane, London, 2010)

22. Lord Bingham of Cornhill argued in his book that observance of current statute law was not necessarily the same as governing in accordance with the rule of law. He stated that “a state which savagely represses or persecutes sections of its people cannot in my view be regarded as observing the rule of law” even if these transgressions were “the subject of detailed laws duly enacted and scrupulously observed.”²³

²¹ Constitution Committee, *Relations between the executive, the judiciary and Parliament*, para 24

²² [Q 91](#) (Dominic Grieve MP and Baroness Scotland of Asthal) and [Q 96](#) (Jack Straw MP)

²³ Tom Bingham, *The Rule of Law* (Allen Lane, London, 2010), p 67

23. In many countries, the principles underlying the rule of law are provided by a written constitution. In the UK, domestic statutes such as the English Bill of Rights and Scottish Claim of Right of 1689 and international obligations such as the European Convention on Human Rights²⁴ play a part, but the roots of the rule of law lie in common law principles.²⁵ Lord Falconer told this Committee during an earlier inquiry that “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.”²⁶ This has now been recognised in case law at the highest level. In *AXA General Insurance v Lord Advocate* in 2011, the Rt Hon. the Lord Hope of Craighead, then Deputy President of the Supreme Court, said in a powerful statement that “the rule of law requires that judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise”.²⁷
24. It is particularly important that there is an understanding in Government of this wider conception of the rule of law, including common law. This provides a constitutional constraint on their power, through Parliament, to change laws in any ways they see fit. This is an important balance in a country where the Government usually has a majority in the House of Commons and can, through the use of the Parliament Acts, legislate without the consent of Parliament as a whole.²⁸ As Lord Bingham of Cornhill noted: “it is on the observance of the rule of law that the quality of government depends.”²⁹
25. It is clear to us that the rule of law goes beyond “simply ... complying with the law”³⁰ as set out in statute. We are reluctant to attempt to define the rule of law, although we note that Lord Bingham of Cornhill’s principles are a useful articulation of core constitutional principles. **We invite the Government to agree that the rule of law extends beyond judicial independence and compliance with domestic and international law. It includes the tenet that the Government should seek to govern in accordance with constitutional principles, as well as the letter of the law.**

The Lord Chancellor’s responsibilities in relation to the rule of law

Judicial independence

26. The independence of the judiciary is a core element of the rule of law and of the United Kingdom constitution more broadly. All ministers are required, under section 3(1) of the Constitutional Reform Act to “uphold the

²⁴ The Convention was ratified by the United Kingdom in 1951.

²⁵ Written evidence from the Charter Institute of Legal Executives ([OLC0017](#))

²⁶ Constitution Committee, *Relations between the executive, the judiciary and Parliament*, para 25

²⁷ *AXA General Insurance v Lord Advocate* (2011) UKSC 46, para 51. The case concerned an Act of the Scottish Parliament, not an Act of the UK Parliament, but Lord Hope expressed his remarks about the rule of law as though they may apply to all legislation.

²⁸ Thus by-passing the House of Lords which some witnesses referred to as one of the key guardians of the United Kingdom’s constitution. See, for example, written evidence from Lord Woolf ([OLC0009](#)).

²⁹ Bingham, *The Rule of Law*, p 173

³⁰ [Q 78](#) (Lord Falconer of Thoroton,)

continued independence of the judiciary.” The Lord Chancellor has an additional duty, expressed in the oath of office, to “defend” that independence. As the rest of section 3 sets out (see Box 1), this defence includes preventing undue Government influence on judicial decisions (including undue ministerial criticism of judicial decisions), ensuring adequate resources for the judiciary to exercise their functions and having regard to the public interest.

27. Former Lord Chief Justice and President of the Supreme Court the Rt Hon. the Lord Phillips of Worth Matravers told us that “judicial independence describes the position of a judge upon whom no outside influences are brought to bear, direct or indirect, in relation to the performance of his judicial duties”. Former Lord Chancellor the Rt Hon. the Lord Mackay of Clashfern added that it “also implies respect for the authority of the judge exercising his responsibility as a judge in court. That respect has to be both in word and in action ... the idea of respecting independence also carries with it the responsibility of carrying out the judgment [of both domestic and international courts], subject to appeal.”³¹
28. The requirement for the Lord Chancellor to have regard to the public interest reflects a tension between judicial independence and the need for proper scrutiny. It also requires efficient use of public funds in supporting the justice system, which highlights the need for judicial independence to be balanced with accountability. As Professor Andrew Le Sueur, Professor of Constitutional Justice at the University of Essex, told us, “On the one hand you want public accountability for the expenditure of public money and public interest in the administration of justice, while on the other hand you want a system that acknowledges the importance of judicial independence and the autonomy of the judiciary.”³² The public interest provision, Graham Gee, Senior Lecturer in Law at the University of Birmingham, told us, allows the Lord Chancellor “to challenge the senior judiciary on the robustness of the arguments that may be made with regard to judicial independence”, for example on grounds of value for money and efficiency, or “to disentangle legitimate concerns about judicial independence from more spurious claims driven by judicial self-interest”.³³
29. The result is a Lord Chancellor as the minister responsible for the judiciary, with an “intricate network of institutions” designed to maintain the balance of these competing demands.³⁴ This role entails a number of duties, powers and responsibilities as set out in Chapter 1, many of them performed in conjunction with the Lord Chief Justice as the head of the judiciary.
30. The Lord Chancellor’s position is often described as that of a ‘link’ or ‘buffer’ between the judiciary and the executive.³⁵ While the pre-reform Lord Chancellor, as a judge and a member of the Cabinet, had a foot in each camp, the post-reform officeholder is likely to maintain less close but still frequent contact with the judiciary. However, the Lord Chancellor remains a

³¹ [Q 16](#)

³² [Q 4](#)

³³ [Q 5](#) and written evidence from Graham Gee ([OLC0006](#))

³⁴ Written evidence from Professor Andrew Le Sueur ([OLC0005](#))

³⁵ See [Q 94](#) (Dominic Grieve MP) and written evidence from Prof Dawn Oliver ([OLC0001](#)) and the Bar Council ([OLC0026](#)).

“conduit” for the concerns of the judiciary and has regular meetings with the senior judiciary.³⁶

31. It is clear from the evidence of the current Lord Chancellor and of the Ministry of Justice, as well as of former Lord Chancellors, that the importance of judicial independence and the Lord Chancellor’s central role in upholding it are well understood in Government.³⁷
32. **Judicial independence is a vital element of the United Kingdom’s uncodified constitution. That its defence is a core part of the Lord Chancellor’s role is uncontested. The Lord Chancellor must ensure that the judiciary are free to act without undue pressure from the executive, that the executive respects the outcome of court judgments, and that the legal system is adequately resourced.**

Beyond judicial independence

33. Like the precise meaning of the rule of law, the Lord Chancellor’s statutory duty in respect of it is contested and ill-defined. Section 1 of the Constitutional Reform Act simply states that the “existing constitutional principle” of the rule of law and the Lord Chancellor’s “existing constitutional role” are not “adversely affected” by the Act.³⁸ A key element of this role is defending the independence of the judiciary and in this respect the Lord Chancellor’s duties are clear; they are articulated in Section 3 of the Act. Beyond a defence of judicial independence, however, it is unclear what is covered by the Lord Chancellor’s duty regarding the rule of law.
34. Mr Grayling told us that he had “a stewardship role over the judiciary and over the justice system.” Beyond that, he regarded the “task of upholding the rule of law as not being something that simply resides with the Lord Chancellor,” but with every minister and parliamentarian.³⁹ He argued that under the Ministerial Code “it is absolutely fundamental on any one of Her Majesty’s Ministers to uphold the rule of law”.⁴⁰ The Code states “the overarching duty on [all] Ministers to comply with the law including international law and treaty obligations”.⁴¹
35. Mr Grayling’s description of his role differs from that of pre-reform Lord Chancellors, who acted as what Dr Patrick O’Brien, Research Associate at University College London, called a “special constitutional guardian of the principles of judicial independence and the rule of law within cabinet.”⁴² Sir Hayden Phillips stated that debates in Parliament during the passage of the Constitutional Reform Act reflected “a view that the Lord Chancellor had a special responsibility in Government to encourage and underpin the rule of law, to uphold the independence of the judiciary and to be a focus for

³⁶ [Q 61](#) (Chris Grayling MP), written evidence from the Ministry of Justice ([OLC0028](#))

³⁷ Written evidence from the Ministry of Justice ([OLC0028](#)), [Q 43](#) (Chris Grayling MP), [Q 77](#) (Lord Falconer and Ken Clarke MP).

³⁸ Similarly, the Explanatory Notes do not expand on either the principle or the role (Explanatory Memorandum, Constitutional Reform Act 2005: [Overview](#))

³⁹ [Q 43](#)

⁴⁰ [QQ 47–48](#)

⁴¹ Cabinet Office, *Ministerial Code*, (2010), para 1.2

⁴² Written evidence from Dr Patrick O’Brien ([OLC0012](#))

the resolution of constitutional issues more broadly.”⁴³ It was this role that the Constitutional Reform Act sought to maintain in section 1.

36. Yet some witnesses felt that the post has already evolved to the point where the Lord Chancellor could no longer claim any such role. Dr O’Brien told us that “it seems clear that post-2003 Lord Chancellors are not ‘special’ guardians in this sense. Since 2003 the office has gradually come to mean little more than the name that is given to the Secretary of State for Justice when he exercises his functions in relation to courts and the judiciary”.⁴⁴ As a result, he argued that the Lord Chancellor’s role in relation to the rule of law was not, nor should be, unique:

“It is ... possible that the continuing existence of the Lord Chancellor distracts ministers from their own responsibility to respect judicial independence and the rule of law ... Making the duty to defend judicial independence and the rule of law common to all ministers, through amendments to the ministerial code or to section 3 of the Constitutional Reform Act 2005, would enhance general awareness amongst ministers of the importance of these principles.”⁴⁵

37. Similarly, Colin Murray, Senior Lecturer in Law at Newcastle University, told us that placing a specific duty on the Lord Chancellor was not effective. He suggested that the rule of law would be better served by placing increased emphasis on the existing ministerial duty to comply with the law and uphold judicial independence, to inculcate a wider appreciation of the rule of law.⁴⁶ Mr Grayling’s predecessor as Lord Chancellor, Mr Clarke, stated that while he hoped he had upheld the rule of law while in office, he had never felt that a “statutory duty was compelling me to do this”.⁴⁷
38. The majority of our witnesses, however, felt that notwithstanding the changes to the role, the Lord Chancellor still had a particular duty to the rule of law which went beyond an obligation under the Ministerial Code to “comply with the law”. Former Attorney General Mr Grieve stated that “if any Lord Chancellor were to ask me whether his oath of office is merely compliance with the ministerial code, I would tell him that I think it goes beyond that”.⁴⁸ Lord Falconer firmly disagreed with Mr Grayling’s assertion that the Lord Chancellor did not have a wider rule of law guardianship role beyond that of other ministers. He argued that the Lord Chancellor had a “special role” to protect the rule of law, and that to think otherwise was “to undermine what the Constitutional Reform Act had sought to do.”⁴⁹
39. Sir Thomas Legg QC, former Permanent Secretary of the Lord Chancellor’s Department, told us that “of course, every person holding public office in our democracy has a responsibility to uphold the rule of law. Of course that must be right. But ... some Ministers and officials perhaps have a greater

⁴³ Written evidence from Sir Hayden Phillips ([OLC0029](#))

⁴⁴ Written evidence from Dr Patrick O’Brien ([OLC0012](#))

⁴⁵ Written evidence from Dr Patrick O’Brien ([OLC0012](#))

⁴⁶ Written evidence from Colin Murray ([OLC0021](#))

⁴⁷ [Q 77](#)

⁴⁸ [Q 92](#)

⁴⁹ [Q 77](#)

responsibility, because that is an inevitable result of the distribution of functions.”⁵⁰

40. The Law Officers are clearly among those who have a greater responsibility to uphold the rule of law. We discuss their role in more detail later in this chapter (paragraphs 69–77). While it is clear that they have a role supporting the Lord Chancellor in his duty, they do not duplicate or supplant it.
41. The Constitutional Reform Act explicitly refers to the Lord Chancellor’s “existing constitutional role” regarding the rule of law. It does not clarify what this duty is, but in the oath of office the Lord Chancellor promises specifically to “respect the rule of law”.
42. **All ministers have a duty, reflected in the Ministerial Code, to comply with the law. The Lord Chancellor continues to have an additional responsibility in this regard.**

The scope of the Lord Chancellor’s duty to the rule of law

43. Our witnesses were divided as to whether the Lord Chancellor’s oath applied simply to his dealings with the justice system in the discharge of his departmental duties, or whether it required him to play a wider role, as a guardian of the rule of law across Government.
44. As we have noted, the current Lord Chancellor does not believe that he has a wider guardianship role in Government beyond upholding the independence of the judiciary and the integrity of the justice system.⁵¹ Mr Grieve said that the Lord Chancellor’s duty was currently considered to relate to his or her department, rather than an overarching guardianship role. Whereas the pre-reform Lord Chancellors “might have been a second focus within Cabinet for general guidance [on the rule of law], now it is much more specific to his own departmental responsibilities but it is going to vary from one Lord Chancellor to another according to their interests and according, probably, to their legal qualifications.”⁵² The implication is that it is up to individual Lord Chancellors, depending on their interests and expertise, to decide the extent to which they pursue their duty in relation to the rule of law beyond their department.
45. There are certainly aspects of the rule of law that are centred upon the Ministry of Justice. The public interest in the administration of justice, set out in section 3(6)(c) of the Constitutional Reform Act, includes adequate resourcing of the justice system, having regard both to the use of public funds and to access to justice. This is an important part of the rule of law: as Lord Bingham’s principle puts it (see Box 2), dispute resolution through the courts should be available “without prohibitive cost or inordinate delay”, where such resolution is necessary. The Lord Chancellor’s responsibility for legal aid means that he or she will have to take significant decisions about the funding of the justice system that could affect access to justice.⁵³

⁵⁰ [Q 67](#)

⁵¹ [QQ 47–48](#)

⁵² [Q 89](#)

⁵³ See [Q 47](#) (Rosemary Davies), [Q 56](#) (Chris Grayling MP) and [Q 103](#) (Jack Straw MP)

46. Other witnesses were clear that the Lord Chancellor’s duty should not be restricted to the work or interests of his or her department. Sir Hayden Phillips said that the office of Lord Chancellor was retained “to provide singular leadership in relation to the rule of law, the protection of judicial independence, and in taking responsibility for constitutional issues in the broadest sense”.⁵⁴ Although the wording of the Constitutional Reform Act is not clear in this respect, Lord Falconer’s assertion “there was absolutely no doubt”⁵⁵ that this wider function was intended by Parliament is borne out by the House of Commons Constitutional Affairs Committee’s assessment that the Lord Chancellor was marked out as distinct from other ministers and “will continue to be the ‘constitutional conscience’ of Government”, in respect of both judicial independence and the rule of law.⁵⁶
47. Dr Gabrielle Appleby, Deputy Director of the Public Law and Policy Research Unit at the University of Adelaide, described the Lord Chancellor’s obligations to the rule of law “as ‘responsibilities’ to warn and advise on how proposed policies and actions may impact on the different aspects of the rule of law.”⁵⁷ Sir Alex Allan, former Permanent Secretary of the Department for Constitutional Affairs, while recognising that it was “the responsibility of all Ministers to uphold the law and not to do things that are illegal,” noted, that beyond that general duty, the Lord Chancellor has “a general fallback, oversight role.”⁵⁸
48. Lord Phillips of Worth Matravers, giving evidence to this Committee as Lord Chief Justice in 2006, thought “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.”⁵⁹
49. It is regrettable that the Ministerial Code and the *Cabinet Manual* do not address the Lord Chancellor’s role in respect of the rule of law, beyond judicial independence. The *Cabinet Manual* refers to the Law Officers’ role in “helping ministers to act lawfully and in accordance with the rule of law”,⁶⁰ which we explore further in paragraphs 69–77, but makes no mention of the Lord Chancellor’s duty in this respect.⁶¹ The only mention of the Lord Chancellor in the Ministerial Code relates to the appointment of judges and legal officers to Royal Commissions and inquiries.⁶² Mr Straw told us

⁵⁴ Written evidence from Sir Hayden Phillips ([OLC0029](#)), see also written evidence from Dr Gabrielle Appleby ([OLC0018](#))

⁵⁵ [Q 76](#)

⁵⁶ [Q 76](#) and House of Commons Constitutional Affairs Committee, *Constitutional Reform Bill [Lords]: the Government’s proposals* (3rd Report, Session 2004–05, HC 275–I), paras 24 and 28

⁵⁷ Written evidence from Dr Gabrielle Appleby ([OLC0018](#))

⁵⁸ [Q 63](#)

⁵⁹ Constitution Committee, *Relations between the executive, the judiciary and Parliament*, Appendix 8: Evidence by the Lord Chief Justice, 3 May 2006, [Q 7](#)

⁶⁰ *The Cabinet Manual: A guide to laws, conventions and rules on the operation of government* (October 2011), para 6.4

⁶¹ [Q 10](#) (Andrew Le Sueur)

⁶² *Ministerial Code*, para 4.10

that the two documents “have not caught up with” the changed role of the Lord Chancellor.⁶³

50. **The Lord Chancellor’s duty to respect of the rule of law extends beyond the policy remit of his or her department; it requires him or her to seek to ensure that the rule of law is upheld within Cabinet and across Government. We recommend that the Ministerial Code and the *Cabinet Manual* be revised accordingly.**
51. The Lord Chancellor therefore has an oversight role with respect to the rule of law that is not adequately reflected in the current oath which requires him or her simply to “respect the rule of law”. **To clarify the scope of the Lord Chancellor’s duty in relation to the rule of law, we recommend that the oath to “respect the rule of law” be amended to a promise to “respect and uphold the rule of law”.**

Upholding the rule of law and judicial independence in practice

52. The Lord Chancellor’s duty to the rule of law predates the Constitutional Reform Act, which states that that duty is not “adversely affected” by the changes to the role. The changed nature of the role has inevitably, however, affected how Lord Chancellors since 2005 have performed this duty compared with their predecessors.
53. There have always been limitations on the capacity of a Lord Chancellor to be a guardian of the rule of law across Government.⁶⁴ In large part the Lord Chancellor’s ability to uphold the rule of law across Government has depended on his or her membership of the Cabinet, of which the Lord Chancellor is a permanent member,⁶⁵ and its committees.⁶⁶ These provide a Lord Chancellor with the opportunity to monitor policy developments and proposals across Government for potential rule of law issues. Through Cabinet meetings and committee membership the Lord Chancellor (like other ministers) is able to monitor colleagues’ policy proposals.
54. Yet Professor Le Sueur told us that fulfilment of the duty is “premised on the idea that matters are discussed fully at Cabinet meetings or in Cabinet committees where the Lord Chancellor is present. If the Lord Chancellor does not know about issues because he is not at the relevant meetings or if key issues are not put on to the relevant agendas, that constitutional conscience role cannot operate effectively.”⁶⁷ The Lord Chancellor cannot sit on all Cabinet committees, although he or she will be aided by the Law Officers who sit on many of the relevant committees (see paragraph 73). Even if the Lord Chancellor received all committee papers, this does not cover all the activities of Government. Cabinet committee clearance is not

⁶³ [Q 96](#)

⁶⁴ Written evidence from Professor Andrew Le Sueur ([OLC0005](#))

⁶⁵ The Lord Chancellor’s salary is specifically listed in Section 1 of the Ministerial and other Salaries Act 1975, whereas other ministers are dealt with in Schedule 1.

⁶⁶ Written evidence from the Bar Council ([OLC0026](#))

⁶⁷ [Q 14](#)

required for “Matters wholly within the responsibility of a single Minister and which do not significantly engage collective responsibility”.⁶⁸

55. This limitation is even more acute for Lord Chancellors since 2010 because, unlike their predecessors, they have not been members of the Parliamentary Business and Legislation Committee.⁶⁹ All legislation must be cleared by this committee, and it represented an important route through which Lord Chancellors were kept informed about the Government’s legislative and policy agenda.
56. Different Lord Chancellors may also take different views on what constitutes a rule of law issue. Lord Falconer disagreed with many commentators who felt that the Asylum and Immigration (Treatment of Claimants, etc) Bill was “constitutionally problematic”.⁷⁰ Mr Murray told us that, “differences in interpretation of the concept of the rule of law have seen opponents of various policies advanced by Chris Grayling level the charge against him that he is in breach of his duty regarding the rule of law.”⁷¹ Given the ill-defined nature of the rule of law, discussed above, it should not be surprising that different Lord Chancellors, and their critics, have differing views of what constitutes a threat.
57. As a result, Professor Le Sueur told us that Lord Chancellors probably provided only, “at very best ... sporadic and peripheral direction to the government’s agenda” on constitutional propriety.⁷² Dr O’Brien and Mr Murray both noted inconsistency in pre-reform Lord Chancellors’ understanding and performance of this role.⁷³ Lord Phillips of Worth Matravers acknowledged that this may indeed be the reality of the situation, but argued that ideally “it should be a fundamental part of a minister’s duty to look out for constitutional impropriety and draw attention to it.”⁷⁴
58. Although pre-reform Lord Chancellors may have performed this duty in a variety of ways,⁷⁵ their actions were still valued. Lord Falconer stated that the Lord Chancellor’s role did not “require him proactively to police every act of government”.⁷⁶ ‘Sporadic’ intervention could still be effective: the Chartered Institute of Legal Executives told us “the evidence suggests that Lord Mackay [of Clashfern] spoke little but when he did speak, the Cabinet listened”.⁷⁷ Yet many witnesses felt that post-reform Lord Chancellors were even more limited in their ability to play a cross-government guardianship role than their predecessors. In part, this was because the holder of the post

⁶⁸ Cabinet Office, *Guide to Cabinet and Cabinet Committees* (nd, [2010]), p 6

⁶⁹ Cabinet Committee Membership List (February 2014):
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/279220/Cabinet_Committee_Membership_Lists_12_Feb_2014.pdf

⁷⁰ Written evidence from Professor Andrew Le Sueur ([OLC0005](#)); the Bill became the [Asylum and Immigration \(Treatment of Claimants, etc\) Act 2004](#).

⁷¹ Written evidence from Colin Murray ([OLC0021](#))

⁷² Written evidence from Professor Andrew Le Sueur ([OLC0005](#))

⁷³ Written evidence from Dr Patrick O’Brien ([OLC0012](#)) and Colin Murray ([OLC0021](#))

⁷⁴ [Q 21](#)

⁷⁵ Written evidence from Colin Murray ([OLC0021](#))

⁷⁶ HL Deb, 20 Dec 2004, [Column 1538](#)

⁷⁷ Written evidence from the Chartered Institute of Legal Executives ([OLC0017](#))

no longer wields the authority that the Lord Chancellor once enjoyed as a senior lawyer and head of the judiciary.

59. The pre-reform Lord Chancellors were, Lord Mackay of Clashfern told us, “quite high in the Cabinet hierarchy right back as far as I can remember just by virtue of being the Lord Chancellor and because of the importance then attached to the responsibilities that he carried.”⁷⁸ Without the inherent status that the pre-reform post carried, it is vital that the modern post is filled by someone with the personal authority to defend the rule of law in Government. We address this issue in more detail in Chapter 4.
60. The combination of the post with that of Secretary of State for Justice in 2007 has resulted in the office becoming more political in nature. While a pre-reform Lord Chancellor, such as Lord Mackay of Clashfern (Lord Chancellor from 1988–1997), could stay out of “the nitty-gritty of party politics”,⁷⁹ a modern Lord Chancellor and Secretary of State cannot stay outside the political fray, particularly when holding responsibility for a contentious area of public policy such as the prison system. Whether the Lord Chancellor should also be a Secretary of State is something we address in Chapter 4, but it is undeniably the case that while holding such offices, the Lord Chancellor will be a more political figure.⁸⁰ It is true that a more political figure may be privy to policy ideas earlier in their formulation and so be able to monitor threats to the rule of law during policy development. However, he or she may also be more likely to prioritise the political objectives of their party over any rule of law issues that arise (and equally, not consider the latter to be serious issues if they conflict with political objectives).⁸¹ As former Lord Chief Justice the Rt Hon. the Lord Woolf told us, “whereas a [pre-reform] Lord Chancellor could position himself outside the normal ministerial role in relation to political issues that are deeply contested, it is much more difficult for someone who is both Lord Chancellor and Minister of Justice.”⁸²
61. In addition, although pre-reform Lord Chancellors could be (and were on occasion) dismissed from office,⁸³ it is felt to be a significantly greater risk for holders of the modern office with their more political position as Secretaries of State,⁸⁴ and who will, it seems likely, continue to be drawn from the House of Commons.⁸⁵ This may affect their ability or willingness to act independently and to stand up to Cabinet colleagues or the Prime Minister when necessary.⁸⁶
62. As a result of these changes, Mr Gee argued that post-reform Lord Chancellors were likely to be more ‘reactive’ guardians than their

⁷⁸ [Q 22](#), see also [Q 76](#) (Ken Clarke MP)

⁷⁹ [Q 23](#) and [Q 76](#) (Ken Clarke MP), see also [Q 35](#) (Lord Woolf)

⁸⁰ [Q 1](#) (Graham Gee) and [Q 9](#) (Dr Patrick O’Brien)

⁸¹ Written evidence from Dr Gabrielle Appleby ([OLC0018](#))

⁸² [Q 39](#)

⁸³ [Q 9](#) (Andrew Le Sueur)

⁸⁴ [Q 8](#) (Graham Gee) and written evidence from the Bar Council ([OLC0026](#))

⁸⁵ [Q 82](#) (Ken Clarke MP) and [Q 7](#) (Professor Andrew Le Sueur), and written evidence from Graham Gee ([OLC0006](#)), Lord Woolf ([OLC0009](#)), the Bar Council ([OLC0026](#)) and the Law Society of England and Wales ([OLC0025](#))

⁸⁶ [Q 9](#) (Graham Gee) and written evidence from the Bar Council ([OLC0026](#))

predecessors: “proactive guardianship is less likely to occur with Lord Chancellors today, but they can be effective reactive guardians.” Pre-reform Lord Chancellors were senior lawyers or judges, closely attuned to issues of concern to the senior judiciary. The post-reform officeholder is the head of a substantial spending department, and less closely attuned to the judiciary’s concerns. Mr Gee argued that a modern Lord Chancellor may spend “much less of his or her time on judiciary-related issues, which presumably makes it much more difficult to grasp the full weight of and respond proactively to judicial concerns. To exaggerate the point somewhat: the post-2003 [Lord Chancellor] might do ‘the right thing’ only after exhausting all other possibilities. Though messy and unedifying, this can still be effective.”⁸⁷

63. In an ideal world, Lord Chancellors would pursue their duty to uphold the rule of law proactively across Government, scrutinising policy proposals for threats to the rule of law. That has never been the reality. Pre-reform Lord Chancellors faced many of the same practical and political limitations their successors face today. Yet current Lord Chancellors, with their wider policy responsibilities, their political position as Secretaries of State, and their reduced role in relation to the judiciary, have to contend with restrictions and obstacles that their predecessors did not. Whilst still central to the maintenance of the rule of law, they have become more reactive guardians. As a result, the roles of other individuals and institutions have taken on a greater importance in this respect.

Other guardians

64. As the Lord Chancellor’s ability to act as a guardian of the rule of law has diminished, the role of other guardians has increased in importance. Professor Robert Hazell, Professor of British Politics and Government at University College London, noted that the Lord Chancellor “is not the only guardian of judicial independence and the rule of law,” and “should not be viewed in isolation”.⁸⁸

Within Government

65. All ministers are required to uphold judicial independence and consult the Law Officers on legal issues. Alongside the Lord Chancellor, the Law Officers thus have a key role in upholding the rule of law. We consider their role in more detail below.
66. Civil servants also play an important role in upholding the rule of law.⁸⁹ We were told the civil service code includes a duty to “comply with the law and uphold the administration of justice”.⁹⁰ Rosemary Davies, Legal Director at the Ministry of Justice, told us that in the department “there is a presumption always that the law must be complied with and in that sense the rule of law is central.”⁹¹ Mr Grayling added that this was true of all

⁸⁷ [Q 1](#) and written evidence from Graham Gee ([OLC0006](#))

⁸⁸ Written evidence from Professor Robert Hazell ([OLC0014](#)), see also written evidence from the Bingham Centre for the Rule of Law ([OLC0022](#))

⁸⁹ Written evidence from Professor Andrew Le Sueur ([OLC0005](#)) and the Bar Council ([OLC0026](#))

⁹⁰ The Civil Service Code, published 30 November 2010 <https://www.gov.uk/government/publications/civil-service-code/the-civil-service-code> [accessed 20 November 2014]

⁹¹ [Q 47](#)

government departments.⁹² Sir Alex Allen told us that issues of the rule of law were discussed at a permanent secretary level when appropriate, and that it was the role of the Permanent Secretary of the Ministry of Justice, as well as the Treasury Solicitor or First Parliamentary Counsel, to speak up on those issues.⁹³

67. Government lawyers have a particular role to play.⁹⁴ The Government Legal Service employs 2,000 lawyers,⁹⁵ including the Treasury Solicitor's Department and departmental lawyers. Along with the Attorney General, Parliamentary Counsel (Government lawyers specialising in drafting legislation) scrutinise draft Government bills to ensure that they comply with the Human Rights Act 1998 and "look at issues of propriety, [such as] unusual use of powers".⁹⁶ Government lawyers have a duty not only to their department but to the Law Officers,⁹⁷ to whom concerns over the rule of law can be referred (see paragraph 72).
68. Former Lord Chief Justices the Rt Hon. the Lord Judge and Lord Woolf raised concerns about the level and expertise of legal support for the Lord Chancellor inside the Ministry of Justice.⁹⁸ Mr Gee and Sir Hayden Phillips referred to a loss of expertise as staff were transferred to organisations in the justice system outside the department.⁹⁹ Ms Davies assured the Committee that there was substantial and experienced legal support for the Lord Chancellor; Mr Grayling agreed with this, as did his predecessor Lord Falconer.¹⁰⁰ Some of the arm's-length bodies to which legal expertise from the Department might have gone (such as HM Courts and Tribunals Service, the Judicial Appointments Commission or the Judicial Office) are also organisations that can highlight rule of law concerns to the Lord Chancellor.¹⁰¹

The Law Officers' role

69. The Law Officers have always played a key role upholding the rule of law within Government. Mr Grieve stated that "the law officers are there to make sure that the ministerial code is observed ... [that] the United Kingdom, its Ministers, its civil servants, ... obey the law, the rule of law and act in accordance with our international legal obligations."¹⁰² As we stated in our 2008 report on the office of Attorney General, "the provision of legal

⁹² [Q 47](#)

⁹³ [Q 69](#)

⁹⁴ [Q 9](#) (Graham Gee)

⁹⁵ [Q 86](#)

⁹⁶ [QQ 86](#) and [89](#)

⁹⁷ [Q 86](#) (Baroness Scotland)

⁹⁸ [Q 35](#) and written evidence from Lord Woolf ([OLC0009](#))

⁹⁹ [Q 5](#) and written evidence from Sir Hayden Phillips ([OLC00029](#))

¹⁰⁰ [Q 53](#) (Chris Grayling MP and Rosemary Davies) and [Q 84](#) (Lord Falconer). Former permanent secretary Sir Alex Allan also said that he was content with the legal support during his time working for the Lord Chancellor ([Q 68](#)).

¹⁰¹ [Q 9](#) (Graham Gee) and written evidence from Professor Andrew Le Sueur ([OLC0005](#)), Graham Gee ([OLC0006](#)), Dr Gabrielle Appleby ([OLC0018](#)) and Professor Robert Hazell ([OLC0014](#))

¹⁰² [Q 86](#)

advice to the Government is important in giving practical effect to the constitutional principle of the rule of law.”¹⁰³

70. The Attorney General is the Government’s principal adviser on legal matters, and the Solicitor General is his or her deputy. The Advocate General advises the UK Government on Scots law.¹⁰⁴ The Law Officers act as legal advisers to ministerial colleagues when potential rule of law issues arise. Lord Mackay of Clashfern referred to the Lord Chancellor’s role in this respect which “is to ensure that, if there is a legal and constitutional issue on which it is necessary to take the Attorney General’s advice, that is done.”¹⁰⁵
71. While the Constitutional Reform Act 2005 dealt with the Lord Chancellor’s ongoing, if undefined, role in relation to the rule of law, it did not address the position of others with a significant role, particularly the Law Officers.¹⁰⁶ Instead it is left to non-legislative documents to set out the position. The Ministerial Code requires all ministers to consult the Law Officers “in good time ... [on] critical decisions involving legal considerations.”¹⁰⁷ The *Cabinet Manual*, which does not mention the rule of law in relation to the Lord Chancellor, describes the Law Officers’ role more explicitly as “helping ministers to act lawfully and in accordance with the rule of law.”¹⁰⁸
72. The Attorney General is also the head of the Government Legal Service. Mr Grieve said that when issues arise that need the Law Officers’ attention, he was confident that they were brought to his attention appropriately. Lady Scotland described Government lawyers as having a duty both to their own department and to the Attorney General, to whom they can and do refer issues of particular importance or complexity.¹⁰⁹
73. The Attorney General is a member of key Cabinet Committees at which rule of law issues may arise (and on which the Lord Chancellor does not sit).¹¹⁰ These include the Parliamentary Business and Legislation Committee and the National Security Council.¹¹¹ These are important avenues through which potential rule of law issues can be noted and raised at an early stage. In addition, the Attorney General scrutinises all Government bills for their compliance with human rights law and legal propriety.¹¹²
74. Sir Thomas Legg told us that the Law Officers have “an obligation to draw the attention of their fellow Ministers to substantial issues of legal values, as

¹⁰³ Constitution Committee, *Reform of the Office of Attorney General* (7th Report, Session 2007–08, HL Paper 93), para 4

¹⁰⁴ Under the Justice (Northern Ireland) Act 2002, [section 27](#), the Attorney-General of England and Wales also holds the office of Advocate General for Northern Ireland.

¹⁰⁵ [Q 86](#) (Dominic Grieve MP) and [Q 28](#) (Lord Mackay of Clashfern)

¹⁰⁶ Written evidence from the Chartered Institute of Legal Executives ([OLC0017](#))

¹⁰⁷ Cabinet Office, *Ministerial Code* (May 2010), para 2.10

¹⁰⁸ *Cabinet Manual*, para 6.4

¹⁰⁹ [Q 86](#)

¹¹⁰ [Q 54](#) (Chris Grayling MP)

¹¹¹ [Q 54](#) (Chris Grayling MP) and [Q 93](#) (Dominic Grieve MP). The Attorney’s attendance at National Security Council meetings is not acknowledged in the most recent (February 2014) list of Cabinet Committees and their membership.

¹¹² For the Attorney General’s wider role, see Constitution Committee, *Reform of the Office of Attorney General* (7th Report, Session 2007–08, HL Paper 93).

well as the precise law”.¹¹³ Mr Grieve stressed that Government lawyers were not, however, “spies in government departments telling me when ministerial colleagues might be on the point of going off the rails”. With only a small number of staff in the Attorney General’s Office, the Law Officers are “certainly not in a position to be overseers of the rule of law”.¹¹⁴

75. Another limit on the Attorney General’s capacity to be a guardian of the rule of law is that he or she, although of cabinet rank, is not a full member of the Cabinet.¹¹⁵ In recent years it has become standard practice for the Attorney General to attend all Cabinet meetings,¹¹⁶ but unlike the Lord Chancellor they do so at the invitation of the Prime Minister, not as of right. Moreover, as the Government’s legal adviser rather than a minister (as Lady Scotland described it “in government but not of government”),¹¹⁷ the Attorney General may be privy to less of the policy discussions in which rule of law issues could arise.
76. It is clear that the Law Officers have an important role as guardians of the rule of law, alongside the Lord Chancellor. To some extent they are complementary, upholding the rule of law in different ways. While the more political post-reform Lord Chancellor is in a better position to observe and intervene in the development of wider policy decisions that could affect the rule of law, the Law Officers scrutinise legislation for rule of law issues and can act when potential infringements arise—for example inappropriate Henry VIII clauses or retrospective legislation.
77. With the post-reform Lord Chancellors playing a more limited and reactive guardianship role, the Law Officers have become ever more important in this respect. Although the Law Officers are not, as Mr Grieve told us, in a position to oversee the rule of law more generally across government, they do have a significant role supporting the Lord Chancellor in his duty to do so. This includes alerting the Lord Chancellor to potential rule of law issues, and working with him or her in Cabinet in uphold the rule of law, including defending judicial independence. As Lord Falconer told us: “the Attorney and the Lord Chancellor acting together are quite a powerful force in government.”¹¹⁸
78. **The duty of Lord Chancellors to ensure that the rule of law is respected across Government has not changed as a result of the Constitutional Reform Act. Carrying out this duty has, however, become more difficult for post-reform Lord Chancellors and more directly dependent on the personal authority and attitude of the individual holding the office.**
79. **The Law Officers’ role in upholding the rule of law has always been important. The changes to the office of Lord Chancellor over the last decade have made it even more so. As a result, we consider that it is imperative the Attorney General continues to attend all Cabinet**

¹¹³ [Q 72](#)

¹¹⁴ [Q 86](#), see also written evidence from the Bar Council ([OLC0026](#))

¹¹⁵ Written evidence from Dr Gabrielle Appleby ([OLC0018](#))

¹¹⁶ See [Q 54](#) (Chris Grayling MP)

¹¹⁷ [Q 87](#) (Baroness Scotland of Asthal)

¹¹⁸ [Q 80](#)

meetings, and that they are adequately resourced not only in their role as legal advisers to the Government, but in their capacity as guardians of the rule of law.

80. **We recommend that the Law Officers give due consideration to the more reactive role of modern Lord Chancellors and ensure that the holder of that office is kept informed of potential issues within Government relating to the rule of law.**
81. **A commitment to the rule of law is an essential component of good government. The Government should ensure that the responsibilities of those charged with upholding the rule of law are clear and widely understood, and that they receive the support necessary to fulfil those duties.**

Outside Government

82. Outside Government, the judiciary play a pivotal role in upholding the rule of law. As Lord Phillips of Worth Matravers told us in 2006, “It is the role of the judiciary, in practice, to uphold the rule of law”.¹¹⁹ Judicial review provides an avenue through which the actions of the executive can be directly challenged and assessed in the light of the rule of law. In addition, the senior judiciary have a more direct role in ensuring that the Government is aware of concerns about the rule of law through discussions with the Lord Chancellor. The Lord Chancellor has monthly meetings with the Lord Chief Justice,¹²⁰ as well as less frequent but regular meetings with the President of the Supreme Court.¹²¹ The Lord Chief Justice also has biannual meetings with the Prime Minister.¹²² Judges are able to express their views publicly in extra-judicial speeches, although discretion is of course important in making speeches on controversial subjects.¹²³
83. Parliament’s role in upholding the rule of law and judicial independence was stressed by witnesses.¹²⁴ Threats to the rule of law can be identified through legislative scrutiny and holding the Government to account for their actions. The work of parliamentary select committees was particularly noted, both in their scrutiny of policy and legislation and as a forum in which members of the senior judiciary might express any concerns they had.¹²⁵
84. The Constitutional Reform Act 2005 removed one channel of communication between the judiciary and Parliament by disqualifying

¹¹⁹ Constitution Committee, *Relations between the executive, the judiciary and Parliament*, Appendix 8: [Evidence by the Lord Chief Justice](#), 3 May 2006, [Q 7](#). This is echoed in Dr O’Brien’s evidence for this inquiry ([Q 8](#)).

¹²⁰ The regularity appears to vary: Lord Judge told us that he had monthly meetings with the Lord Chancellor, but Lord Woolf said that he did not have such regular meetings ([Q 33](#)).

¹²¹ Constitution Committee [annual oral evidence from the President and Deputy President of the Supreme Court](#), 25 June 2014, [Q 2](#) (Lord Neuberger of Abbotsbury)

¹²² Graham Gee, ‘The Lord Chief Justice and Section 5 of the Constitutional Reform Act’, U.K. Constitutional Law Blog, 14th April 2014: <http://ukconstitutionallaw.org/2014/04/14/graham-gee-the-lord-chief-justice-and-section-5-of-the-constitutional-reform-act/> [accessed 9 July 2014]

¹²³ Lord Neuberger Of Abbotsbury, ‘Where Angels Fear To Tread’ Holdsworth Club 2012 Presidential Address, 2 March 2012: <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/mr-speech-holdsworth-lecture-2012.pdf> [accessed 7 November 2014] paras 53–54

¹²⁴ [Q 1](#) (Graham Gee) and [Q 14](#) (Patrick O’Brien)

¹²⁵ For example, written evidence from Professor Andrew Le Sueur ([OLC0005](#)), the Bar Council ([OLC0026](#)) and Colin Murray ([OLC0021](#))

holders of senior judicial office from membership of the House of Lords.¹²⁶ Former judges still take part in debates, but new Justices of the Supreme Court no longer automatically receive life peerages. Lord Woolf told us that as a result the need for judicial representation in Parliament would increase with time.¹²⁷

85. Without the right to take part in debates in the House of Lords, the Lord Chief Justice is restricted to making written representations to Parliament and speaking to select committees.¹²⁸ Lord Judge referred to making a written representation as a “nuclear option,” but even so felt that it did not give the Lord Chief Justice “sufficient authority, in an age when the Lord Chancellor is no longer the head of the judiciary, to convey the views of the judiciary”.¹²⁹ Other former judges were more relaxed about the use of written representations,¹³⁰ although Lord Hope of Craighead agreed that “one should exercise restraint in exercising the right.”¹³¹
86. While witnesses did not feel that serving judges should be able to speak in the House of Lords Chamber,¹³² there was general agreement that addressing select committees was useful. There are several committees to which senior judges can and do give evidence, including this Committee and the House of Commons Justice Committee.¹³³ Lord Judge suggested that, as well as the regular evidence sessions already undertaken with senior judges, the Lord Chief Justice “should be able to say to [the Constitution Committee] or another committee, ‘I would like to come and address you on these issues, which have been raised about pending legislation and whether the judges would be upset.’”¹³⁴ The current Lord Chancellor, Mr Grayling, told us that “I would not be hostile to a route of last resort ... [for senior judges] if something is going badly wrong—the Government of the day are misbehaving, the Lord Chancellor is paying no attention—to have the ability to say to Parliament, ‘Help’.”¹³⁵ Both Lord Judge and Mr Grayling stressed that such action should be taken sparingly so as to avoid the judiciary being seen to take sides in political debates;¹³⁶ similarly, former Lord Chancellors Lord Falconer and Mr Clarke felt that it would be appropriate if used sparingly.¹³⁷

¹²⁶ Constitutional Reform Act 2005, [section 137](#). The Lord Chief Justice is still made a life peer, but is disqualified from membership while in office.

¹²⁷ [Q 37](#). To date, all Justices who have left the court (other than to other disqualifying judicial offices) have been former Law Lords and been able to return to the House of Lords.

¹²⁸ Constitutional Reform Act 2005, [section 5](#), permits the Lord Chief Justices of England and Wales, or Northern Ireland, and the Lord President of the Court of Session in Scotland to make written representations to Parliament. This is due to be extended to the President of the Supreme Court under the Criminal Justice and Courts Bill.

¹²⁹ [Q 37](#)

¹³⁰ For example written evidence from Lord Hamilton ([OLC0016](#))

¹³¹ [Q 37](#)

¹³² Written evidence from Professor Robert Hazell ([OLC0014](#))

¹³³ [QQ 24, 36](#) and [85](#), see also written evidence from Professor Robert Hazell ([OLC0014](#))

¹³⁴ [Q 36](#)

¹³⁵ [Q 62](#)

¹³⁶ [Q 36](#) (Lord Judge)

¹³⁷ [Q 85](#)

87. While the Lord Chancellor may “no longer [be] the pre-eminent guardian of constitutional values that pre-2003 Lord Chancellors might have been”,¹³⁸ they still play a central role in this wider group of guardians of the rule of law. Professor Hazell told us that

“The Lord Chancellor is no longer the sole defender of the rule of law. He is buttressed by all these other bodies, who can provide advice and support, and scrutiny. The institutional landscape may seem more complex and more fragmented; but reliance on multiple guardians rather than a single guardian is also more robust.”¹³⁹

88. **The Lord Chancellor has never been the sole guardian of the rule of law, either within Government or more broadly. The importance of other guardians has, however, increased in the light of the changes to the role since 2003. Parliament in particular should be aware of its crucial role as a body that can hold the Government to account to ensure that it governs in accordance with the rule of law.**

¹³⁸ [Q1](#) (Graham Gee)

¹³⁹ Written evidence from Professor Robert Hazell ([OLC0014](#))

CHAPTER 3: A CONSTITUTIONAL GUARDIAN IN GOVERNMENT?

89. As the evidence we have quoted demonstrates,¹⁴⁰ the traditional role of the Lord Chancellor included a broader guardianship or stewardship role in relation to the constitution more generally. This role included ensuring that the Government acted with propriety when dealing with constitutional matters. As with the rule of law, we are reluctant to attempt to define precisely what constitutes a constitutional matter, but we draw attention to what we consider to be the five basic tenets of the United Kingdom constitution, as set out in this Committee’s first report in 2001:
- “Sovereignty of the Crown in Parliament
 - The Rule of Law, encompassing the rights of the individual
 - Union State
 - Representative Government
 - Membership of the Commonwealth, the European Union, and other international organisations.”¹⁴¹

The role of Lord Chancellors before 2010

90. The involvement of pre-reform Lord Chancellors in wider constitutional matters appears to have varied depending on the officeholder. The Rt Hon. the Lord Irvine of Lairg played a leading role in the constitutional reforms undertaken by the Government in which he was Lord Chancellor from 1997. He chaired Cabinet sub-committees on devolution, freedom of information, the incorporation of the European Convention on Human Rights into UK law, and reform of the House of Lords, and described his role as “pivotal” to the reform programme.¹⁴²
91. Sir Alex Allen told the Committee that Lord Irvine’s position chairing the relevant committees “was partly personal, rather than necessarily attaching to the office of Lord Chancellor”.¹⁴³ His predecessor as Lord Chancellor, Lord Mackay of Clashfern, was less keen to have a proactive role in constitutional matters in Government,¹⁴⁴ although Sir Thomas Legg told us that “in my day, the Lord Chancellor would have been regarded and was regarded—and regarded himself—whichever party in Government he was serving, as having a special role” in relation to the constitution.¹⁴⁵
92. After the 2001 election, further constitutional functions were transferred to the Lord Chancellor’s Department under Lord Irvine in an attempt to group all constitutional matters into one department. The then permanent secretary

¹⁴⁰ Written evidence from Sir Hayden Phillips ([OLC0029](#)), [Q 14](#) (Professor Andrew Le Sueur)

¹⁴¹ Constitution Committee, *Reviewing the Constitution: Terms of Reference and Method of Working* (1st Report, Session 2001–02, HL Paper 11), para 21

¹⁴² Woodhouse, *Office of Lord Chancellor*, p 80

¹⁴³ [Q 66](#)

¹⁴⁴ [Q 26](#)

¹⁴⁵ [Q 64](#)

Sir Hayden Phillips told us that, although this partly “reflected the role that Lord Irvine had personally played in many of these policy developments I believe it went further than that in reflecting a widely held view at the time that, given the history of the role of the office of Lord Chancellor, his department was the natural home for responsibility for such issues.”¹⁴⁶

93. The grouping together of responsibility for constitutional matters was more overtly recognised when the Department for Constitutional Affairs was created in 2003 with the new Lord Chancellor, Lord Falconer, as its Secretary of State. Its functions were transferred to the Ministry of Justice when that department was created in May 2007. The Lord Chancellor was then described as being responsible for “major constitutional issues”.¹⁴⁷ In 2009, the Lord Chancellor was described as responsible for “constitutional renewal”,¹⁴⁸ with a Minister of State responsible for “democracy, constitution and law”.¹⁴⁹

Current ministerial responsibility for the constitution

94. In our view, there should be a single individual in Government with a responsibility to oversee the constitution as a whole. When we questioned the current Lord Chancellor, he told us that: “The traditional role of the Lord Chancellor in, for example, shaping constitutional settlements or constitutional reforms in this country has now passed to the Deputy Prime Minister of the current Government ... The truth is today the constitutional role that the Lord Chancellor once performed, in a very practical sense, is not currently there.”¹⁵⁰
95. Since 2010, the Deputy Prime Minister and a junior minister in the Cabinet Office have had responsibility for “political and constitutional reform”, in relation to which they have appeared regularly before this Committee. At present the junior minister is also a Parliamentary Under-Secretary of State at the Department for Education.¹⁵¹ The Deputy Prime Minister’s Office in the Cabinet Office includes the Constitution Group, the component parts of which were transferred from the Ministry of Justice.¹⁵²
96. In 2010, the Deputy Prime Minister and the junior minister (then the Minister for Political and Constitutional Reform) provided this Committee with a memorandum that included a “rationale” for the division of responsibilities between them and the Ministry of Justice. They stated that:

¹⁴⁶ Written evidence from Sir Hayden Phillips ([OLC0029](#))

¹⁴⁷ Ministry of Justice, About Us, Lord Falconer of Thoroton: <http://webarchive.nationalarchives.gov.uk/20070513230000/http://www.justice.gov.uk/about/falconer.htm>

¹⁴⁸ Ministry of Justice, About Us, Jack Straw: <http://webarchive.nationalarchives.gov.uk/20090215180422/http://www.justice.gov.uk/about/straw.htm>; Mr Straw also told the Committee that he chaired the Cabinet committee on constitutional change ([Q 99](#)).

¹⁴⁹ Ministry of Justice, About Us, Michael Wills: <http://webarchive.nationalarchives.gov.uk/20090215180422/http://www.justice.gov.uk/about/wills.htm>. The minister also had responsibility for the Lord Chancellor’s functions in relation to the Land Registry and the National Archives.

¹⁵⁰ [Q 44](#)

¹⁵¹ Ministerial role: Parliamentary Secretary (Minister for the Constitution) <https://www.gov.uk/government/ministers/parliamentary-secretary-minister-for-the-constitution>

¹⁵² See departmental organisation chart: National Audit Office, *Departmental Overview: The performance of the Cabinet Office 2012–13* (December 2013), figure 4.

“[The] Deputy Prime Minister has taken responsibility for all those matters which directly affect Parliament and elections. This includes the business as usual aspects of those policy areas as well as reform proposals.

Matters which are more closely related to the Justice system, such as the Courts and judiciary, human rights and the dossiers of the Justice and Home Affairs Council remain with the Justice Secretary. However, in his role as Deputy Prime Minister and Chair of the Home Affairs Cabinet Committee the Deputy Prime Minister has oversight of the whole range of domestic policy.”¹⁵³

97. This describes the responsibilities of the Deputy Prime Minister for certain ongoing elements of the constitution, as well as for reforms. The reference to the Home Affairs Cabinet Committee suggests that he has a wider perspective on constitutional affairs, among other areas of domestic policy. The division of responsibilities, however, omits elements of the constitution beyond Parliament, elections, the courts and judiciary and human rights. Nor is there any minister charged with ensuring both overall balance in the constitution and that reforms to one aspect of it do not have unintended consequences in other areas. Such a role is important under a delicate uncodified constitution such as that of the United Kingdom.
98. There is an important distinction between ministerial responsibility for particular constitutional reform policies, and a more general constitutional oversight or stewardship role. As Mr Grayling stated, this more general role is clearly not currently assigned to the Lord Chancellor.¹⁵⁴ This is particularly unfortunate given that in 2007 this Committee, in our report on relations between the executive, the judiciary and Parliament, noted that “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”.¹⁵⁵ This focus was clearly lost when responsibility for constitutional matters was transferred from the Ministry of Justice.
99. Whilst he has been responsible for specific constitutional changes since the transfer of functions to his office from the Ministry of Justice, we have heard no evidence to suggest that the Deputy Prime Minister has this wider constitutional oversight role. For example, neither he nor the Lord Chancellor are members of the Devolution Committee, formed to look at “matters relating to the devolution of powers within the United Kingdom” following the Scottish independence referendum and the creation of the Smith Commission on further devolution to Scotland.¹⁵⁶ Neither is a member of the Parliamentary Business and Legislation Committee, which one might expect a minister with responsibility for the constitution to be.

¹⁵³ [Memorandum by the Deputy Prime Minister and the Minister for Political and Constitutional Reform](#), published in Constitution Committee, *The Government’s Constitutional Reform Programme* (5th Report, Session 2010–12, HL Paper 43)

¹⁵⁴ Graham Gee made a similar point ([Q 14](#))

¹⁵⁵ Constitution Committee, *Relations between the executive, the judiciary and Parliament*, para 74.

¹⁵⁶ Devolution Committee membership list:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/363683/devolution_committee.pdf

100. Mr Grayling told us that “the only answer” to the question of who has responsibility for the constitution as a whole was the Prime Minister.¹⁵⁷ This interpretation had not been put forward by previous witnesses; when put to former permanent secretaries, Sir Thomas Legg said that he could understand it in the sense that “the Prime Minister has to set the tone for the whole team”.¹⁵⁸ While the Prime Minister may have responsibility for the overall conduct of his or her Government, in this as in all areas, it should be more clearly articulated where responsibility lies in relation to all aspects of the constitution and for oversight of it.
101. **There is no clear focus within Government for oversight of the constitution. We invite the Government to agree that a senior Cabinet minister should have responsibility for oversight of the constitution as a whole, even if other ministers have responsibility for specific constitutional reforms. In the light of the Lord Chancellor’s existing responsibility for the important constitutional principle of the rule of law, we consider that the Lord Chancellor is best placed to carry out this duty.**

¹⁵⁷ [Q 59](#)

¹⁵⁸ [Q 64](#)

CHAPTER 4: THE FUTURE OF THE OFFICE

102. As set out in chapter 1, the duties of the Lord Chancellor are separate and distinct from those of the Secretary of State for Justice. The appointment of the Lord Chancellor is also unlike any other ministerial position. First, under Section 2 of the Constitutional Reform Act 2005, there are specific criteria to which the Prime Minister must have regard when appointing the Lord Chancellor (see Box 3). Secondly, the Lord Chancellor must take an oath upon assuming the office (see Box 1).

Box 3: Criteria for appointment of the Lord Chancellor

Constitutional Reform Act 2005, section 2: ‘Lord Chancellor to be qualified by experience’.

1. “A person may not be recommended for appointment as Lord Chancellor unless he appears to the Prime Minister to be qualified by experience.
2. The Prime Minister may take into account any of these—
 - (a) experience as a Minister of the Crown;
 - (b) experience as a member of either House of Parliament;
 - (c) experience as a qualifying practitioner;
 - (d) experience as a teacher of law in a university;
 - (e) other experience that the Prime Minister considers relevant.
3. In this section “qualifying practitioner” means any of these—
 - (a) a person who has a Senior Courts qualification, within the meaning of section 71 of the Courts and Legal Services Act 1990 (c. 41);
 - (b) an advocate in Scotland or a solicitor entitled to appear in the Court of Session and the High Court of Justiciary;
 - (c) a member of the Bar of Northern Ireland or a solicitor of the Court of Judicature of Northern Ireland.”

103. Lord Falconer explained that these criteria were added because “Parliament envisaged the role of the Lord Chancellor as being a departmental Minister but with these special added responsibilities and, therefore, these special qualities”.¹⁵⁹ He set out what he thought those qualities were:

“First of all, it involves understanding what the rule of law means in a way broader than simply what everybody understands the rule of law means, which means complying with the law. Secondly, it means having personal qualities that mean that you will actually stand up for the rule of law. Thirdly, it means understanding that there will be occasions where your obligation requires you to do something other than simply comply with the collective responsibility”.¹⁶⁰

¹⁵⁹ [Q.76](#)

¹⁶⁰ [Q.78](#)

Are special qualities required of a Lord Chancellor?

104. In Chapter 2, we discussed the critical role the Lord Chancellor plays in upholding the rule of law and judicial independence. Does the person exercising this duty need to have special qualities beyond those of other ministers? Some of our witnesses thought not. Mr Gee, for example, told us that all “Ministers should be intelligent and industrious, they should have the ability to master a brief, and they should have the ability to command the confidence of their ministerial and parliamentary colleagues and stakeholders in whatever systems and networks with which they have to engage. Ought there to be specific criteria for the Lord Chancellor? I do not think so.”¹⁶¹ Mr Clarke also considered that those criteria should be applied in the appointment of all members of the Cabinet, noting that “you are not assuming that in every other post you are appointing people who do not understand the application of the rule of law”.¹⁶² In general, however, it was felt that the Lord Chancellor’s role in relation to the judiciary and rule of law put the officeholder in a unique position.

Legal qualification

105. Witnesses agreed that it was essential that the Lord Chancellor understood the rule of law, with many stating that it would be an advantage to have a lawyer or constitutional expert in the post.¹⁶³ Bindmans LLP echoed others when they stated that “we consider there to be clear and significant benefits in the office holder being a lawyer (or legal academic).” The legal system, they told us, “is best defended by someone with a developed knowledge of that system. Although we acknowledge that such knowledge is not the sole preserve of lawyers, it is much more likely to be found in lawyers than elsewhere.”¹⁶⁴ While some submissions went so far as to say that it should be mandatory for the Lord Chancellor to have a legal background,¹⁶⁵ the majority view was put succinctly by Mr Grieve who noted that “there are advantages of having a Lord Chancellor who is a lawyer ... but it is not essential”.¹⁶⁶ Sir Hayden Phillips, the first Permanent Secretary of the Lord Chancellor’s Department not to be a lawyer, stated “I can say with confidence ... that you do not have to be a lawyer to understand the importance of the rule of law, of the independence of the judiciary, or of constitutional matters, or to have a strong motivation to seek to protect them.”¹⁶⁷

106. The current Lord Chancellor went further: “My view is that it is a positive benefit for the Lord Chancellor not to be a lawyer. ... I think that not being a lawyer gives you the ability to take a dispassionate view: not from one side of the legal profession or the other”.¹⁶⁸ He was not alone in this view. Mr Gee

¹⁶¹ [Q 6](#)

¹⁶² [Q 79](#)

¹⁶³ [Q 41](#) (Lord Judge and Lord Hope of Craighead) and written evidence from Professor Dawn Oliver ([OLC0001](#)), the Bar Council ([OLC0026](#)) and Dr Gabrielle Appleby ([OLC0018](#))

¹⁶⁴ Written evidence from Bindmans LLP ([OLC0023](#))

¹⁶⁵ Written evidence from the Association of Personal Injury Lawyers ([OLC0015](#)); surveyed members of the Chartered Institute of Legal Executives “were of the opinion that future Lord Chancellors should be lawyers” (written evidence, [OLC0017](#)).

¹⁶⁶ [Q 94](#)

¹⁶⁷ Written evidence from Sir Hayden Phillips ([OLC0029](#))

¹⁶⁸ [Q 50](#)

told us that “post-2003 Lord Chancellors might be better placed than their predecessors to disentangle legitimate concerns about judicial independence from more spurious claims driven by judicial self-interest.”¹⁶⁹

107. Dr O’Brien told us pragmatically that “the fact [is] that the Justice Secretary and the Lord Chancellor have to be the same person for political reasons ... To say that the Lord Chancellor has to be a lawyer is to say that the Justice Secretary has to be a lawyer, which would limit application to a major government department for quite a lot of entrants”.¹⁷⁰ This is closely connected to the question of the combination of roles, which we address below.
108. Professor Le Sueur also noted a consequence of reducing the pool of potential Lord Chancellors: the relative paucity of lawyers in the House of Commons would mean curtailing “the Prime Minister’s scope for choosing a person with all the characteristics that are needed”.¹⁷¹
109. **We recognise the advantages to appointing a Lord Chancellor with a legal or constitutional background. We do not consider that it is essential but, given the importance of the Lord Chancellor’s duties to the rule of law, these benefits should be given due consideration.**
110. We note, however, the concerns raised by Sir Hayden Phillips, who told us that when legislation was passed to allow a non-lawyer to be appointed as Permanent Secretary of the Lord Chancellor’s Office, “it was assumed that the Lord Chancellor would be a lawyer but his principal official adviser would not. It is, in my view, this *balance* of experience and expertise which mattered to all those involved, and particularly to the Judiciary. That balance has now gone. In my view that is potentially damaging.”¹⁷² He proposed the following solution:
- “I would suggest that the post of Legal Adviser in the Ministry should be held at Second Permanent Secretary level, thus giving much greater weight to his/her position in the Whitehall legal hierarchy and ensuring that at the very top of the Department there was a senior figure who also had responsibility for advising any Secretary of State for Justice on his/her responsibilities as Lord Chancellor and also take the lead, at official level, in relations between the Ministry and the Judiciary.”
111. His concerns were echoed by the Bar Council who told us there was a “weakness” in the current position when the “Lord Chancellor has no legal experience ... and the Lord Chancellor’s Permanent Secretary is no longer required to be legally qualified”.¹⁷³
112. Another former permanent secretary was not persuaded: Sir Alex Allen told us that “in my time ... the legal advisers to the Lord Chancellor were extremely able ... I think it is important that there is a strong legal team in

¹⁶⁹ Written evidence from Graham Gee ([OLC0006](#))

¹⁷⁰ [Q 7](#)

¹⁷¹ [Q 6](#), see also [Q 38](#) (Lord Woolf)

¹⁷² Written evidence from Sir Hayden Phillips ([OLC0029](#)). The legislation was the Supreme Court (Offices) Act 1997

¹⁷³ Written evidence from the Bar Council ([OLC0026](#))

the Ministry of Justice but whether you need somebody right at the top who is legally qualified I am not convinced about.”¹⁷⁴

113. At present, neither the Lord Chancellor nor the Permanent Secretary are required to be legally qualified. In a department responsible for the legal system and responsibility of the maintenance of the rule of law, this is undesirable. **We recommend that the Government either ensure that the Permanent Secretary supporting the Lord Chancellor at the Ministry of Justice is legally qualified, or appoint the top legal adviser in that department at permanent secretary level.**

Authority and seniority

114. Beyond an understanding of the rule of law, most of our witnesses argued that the Lord Chancellor had to be both influential within cabinet, and willing to stand up to Cabinet colleagues and the Prime Minister on matters involving the rule of law and judicial independence. In our 2007 and 2008 reports on relations between the executive, judiciary and Parliament, this Committee stressed the need for the office to be held by individuals with “sufficient status and seniority”,¹⁷⁵ and “the authority necessary to fulfil their duties.”¹⁷⁶
115. Lady Scotland told us that “there should be a clear responsibility on any Government in choosing the person to discharge that onerous, senior duty to ensure that the Minister chosen holds the confidence of the other ministerial colleagues and the ability and strength to be listened to in Government to uphold the rule of law”.¹⁷⁷ Lord Falconer echoed this view: “because the role involves standing out against your colleagues and separating yourself from collective responsibility, it will from time to time involve damaging your relations, maybe with the Prime Minister and maybe with other people in the Cabinet, which may have adverse consequences for your career. That is why Section 2 is so important: the Prime Minister has to appoint somebody who is willing to do that”.¹⁷⁸ Mr Straw called it an “issue of seniority”,¹⁷⁹ while Lord Phillips of Worth Matravers spoke for many of our witnesses when he told us: “What matters is that you should understand it [the rule of law], you should respect it and that you should have the clout in Cabinet to carry weight when you raise a rule of law issue”.¹⁸⁰
116. Lord Phillips also noted that, as it was the Prime Minister’s choice, “If you have a Prime Minister who believes in the importance of the rule of law, when he appoints someone to the position of Lord Chancellor, one would hope that he would appoint someone who already has standing and is likely to perform the role of guardian of the rule of law and judicial independence.”¹⁸¹

¹⁷⁴ [Q 75](#)

¹⁷⁵ Constitution Committee, *Relations between the executive, the judiciary and Parliament*, para 12

¹⁷⁶ Constitution Committee, *Relations between the executive, the judiciary and Parliament: Follow-up report*, para 17

¹⁷⁷ [Q 94](#)

¹⁷⁸ [Q 81](#)

¹⁷⁹ [Q 97](#)

¹⁸⁰ [Q 20](#)

¹⁸¹ [Q 22](#), see also written evidence from the Chartered Institute of Legal Executives ([OLC0017](#))

117. **Given the importance of the Lord Chancellor’s duty to uphold the rule of law, the Lord Chancellor should have a high rank in Cabinet and sufficient authority and seniority amongst his or her ministerial colleagues to carry out this duty effectively and impartially.**
118. Some witnesses suggested that it might help ensure the independence of the Lord Chancellor if the position were filled by someone towards the end of his or her political career. The Chartered Institute of Legal Executives, among others,¹⁸² noted that “conflict will arise if a middle ranking Cabinet member is Lord Chancellor with further career aspirations, who may feel that standing up to proposed policy changes may block career advancement.”¹⁸³ Dr O’Brien argued that the influence of the Lord Chancellor was now dependent on the personality of the person holding the office, rather than being inherent in the post and that “it will depend on who is occupying the office ... a mid-ranking politician will perhaps have less authority over other ministries than a senior politician at the end of his or her career.”¹⁸⁴
119. Mr Grieve, however, thought that if the holder of the office understood their role and duties, “it does not matter whether they may have other ambitions”.¹⁸⁵ Mr Straw agreed, noting that “I think it is better if it is held by a senior figure although I can certainly think of people who could do it as their first appointment to a Cabinet and do it perfectly well.”¹⁸⁶ He added that it was a matter of age and experience rather than ambition. He told us that “as I walked into the Ministry of Justice I did not abandon all ambition, but if you are at the top end of the age range of the Cabinet and you have been in the Cabinet ... you are less likely to be gagging for further high office than if you have only just arrived.”¹⁸⁷
120. Another suggestion put to us was that the Lord Chancellor should once again be a member of the House of Lords,¹⁸⁸ or a figure entirely independent of government. This would not be practicable while the post is combined with Secretary of State for Justice (an issue which is dealt with in more depth later in this chapter). As Mr Clarke noted “It would be very difficult for a Commons Minister to act as the spokesman for a Lords Minister on some of the very hot-potato, tabloid-newspaper issues that day to day the Secretary of State for Justice is handling.” He concluded “that it is more likely, I think, that in future it [the post of Lord Chancellor and Secretary of State for Justice] is going to be in the Commons than the Lords”.¹⁸⁹
121. We have discussed the qualities necessary for the Lord Chancellor. The criteria in Section 2 of the Constitutional Reform Act 2005, designed to ensure that a person with these qualities will be appointed by the Prime

¹⁸² [Q 1](#) (Andrew Le Sueur and Patrick O’Brien), and written evidence from Dr Gabrielle Appleby ([OLC0018](#)), Bindmans LLP ([OLC0023](#)), the Association of Personal Injury Lawyers ([OLC0015](#)) and the Chartered Institute of Legal Executives ([OLC0017](#))

¹⁸³ Written evidence from the Chartered Institute of Legal Executives ([OLC0017](#))

¹⁸⁴ [Q 1](#)

¹⁸⁵ [Q 94](#)

¹⁸⁶ [Q 101](#)

¹⁸⁷ [Q 101](#)

¹⁸⁸ For example, written evidence from Professor Dawn Oliver ([OLC0001](#)) and Rauri Hipkin ([OLC0008](#))

¹⁸⁹ [Q 82](#)

Minister, were widely regarded as ineffective.¹⁹⁰ As the Bar Council stated “Section 2 is so widely drawn as to be virtually meaningless”.¹⁹¹

122. Lord Hope of Craighead said that, although the senior judiciary were concerned by the inclusion of ‘any other experience’, “the presence of the criteria is valuable. Presumably someone reads down the list, and you come to the let-out paragraph at the end—paragraph (e). I do not think politically that it is possible to change that now, but at least the list is there.”¹⁹² Lord Falconer told us that the criteria were inserted “in order that a signal should be given to the Prime Minister that you need somebody of special quality”.¹⁹³
123. Lord Woolf suggested that the Prime Minister should be required to state the basis on which the appointee satisfies the criteria under section 2.¹⁹⁴ Lord Judge disagreed: “I think that the Prime Minister giving reasons sounds effective, but what if they are daft reasons? What if they do not stand up to analysis? Is there going to be a judicial review of the Prime Minister’s reasons for appointing the Lord Chancellor?”¹⁹⁵ We do not consider that such a statement by the Prime Minister would address the perceived weaknesses of the appointment criteria.
124. There is general agreement that the statutory criteria for appointing a Lord Chancellor are ineffective. However, any criteria set out in statute will either be so widely drawn as to be ineffective, or so tightly drafted as to restrict the Prime Minister’s discretion to an unreasonable degree.
125. **The Lord Chancellor should be a politician with significant ministerial or other relevant experience to ensure that the rule of law is defended in Cabinet by someone with sufficient authority and seniority. It is not necessary to be prescriptive: more important than age or lack of ambition is that the person appointed has a clear understanding of his or her duties in relation to the rule of law and a willingness to speak up for that principle in dealings with ministerial colleagues, including the Prime Minister.**
126. **We urge Prime Ministers, when appointing Lord Chancellors, to give weight to the need for the qualities we have outlined in this report, and above all to consider the importance of the Lord Chancellor’s duty to uphold the rule of law across Government.**

The combination of the offices of Lord Chancellor and Secretary of State for Justice

127. The post of Lord Chancellor has, since 2007, been combined with that of Secretary of State for Justice. Shortly after this combination, we concluded that “the posts of Lord Chancellor and Secretary of State for Justice should

¹⁹⁰ [Q 6](#) (Graham Gee) and written evidence from Professor Dawn Oliver ([OLC0001](#)) and Colin Murray ([OLC0021](#))

¹⁹¹ Written evidence from the Bar Council ([OLC0026](#))

¹⁹² [QQ 31](#) and [41](#), see also written evidence from the Law Society of England and Wales ([OLC0025](#))

¹⁹³ [Q 79](#)

¹⁹⁴ [Q 31](#) and written evidence from Lord Woolf ([OLC0009](#))

¹⁹⁵ [Q 31](#)

continue to be combined in future.”¹⁹⁶ Since then, concerns have been raised about the combination of these two roles, perhaps most notably by the Joint Committee on Human Rights which noted that “the Secretary of State for Justice is a political minister in a Government which has collective responsibility for its political views, while the Lord Chancellor, historically, had the different role of standing up within Government for the interests of the justice system.” It concluded: “in our view, the Government’s proposals on judicial review expose the conflict inherent in the combined roles of the Lord Chancellor and Secretary of State for Justice.”¹⁹⁷

128. This view—that there was an inherent conflict of interest between the duties of the Lord Chancellor and the responsibilities of the Secretary of State for Justice—was a common theme in our evidence.¹⁹⁸ Lord Woolf noted that “it is a problem, because whereas a [pre-reform] Lord Chancellor could position himself outside the normal ministerial role in relation to political issues that are deeply contested, it is much more difficult for someone who is both Lord Chancellor and Minister of Justice.”¹⁹⁹ Of particular concern to critics of the combination of roles is the responsibility for prisons.²⁰⁰
129. The Howard League for Penal Reform stated bluntly that “it is plain to us that decisions concerning policy and budget cuts which will affect access to justice, be it through the provision of legal aid or changes to court fees, will inevitably present a very real problem for any Secretary of State for Justice who also holds the office of Lord Chancellor,”²⁰¹ while Bindmans LLP noted that “at the very least, there is a risk of a perception that the Lord Chancellor’s responsibilities cannot be properly fulfilled, where they come into conflict with the political responsibilities of the Secretary of State for Justice.”
130. These fears were dismissed by the current Lord Chancellor as “misplaced concern”²⁰². He noted that “there is perhaps a belief out there that, if we still had a separate Lord Chancellor’s Department looking after legal aid and the courts, the difficult financial decisions would not have had to be taken ... That is simply not the case”.²⁰³ Mr Straw noted that conflicting priorities could arise “within a particular portfolio”²⁰⁴, and that some of the areas about which concern had been raised, such as legal aid, had always been the responsibility of the Lord Chancellor, rather than the Secretary of State for Justice.
131. Indeed, several of our witnesses pointed to the advantages of combining the two posts. The Law Society felt there was a “clear synergy” between the two

¹⁹⁶ Constitution Committee, *Relations between the executive, the judiciary and Parliament: Follow-up report*, para 17

¹⁹⁷ Joint Committee on Human Rights, *The implications for access to justice of the Government’s proposals to reform judicial review*, paras 22–23

¹⁹⁸ Written evidence from Bindmans LLP ([OLC0023](#)), the Chartered Institute of Legal Executives ([OLC0017](#)), the Association of Personal Injury Lawyers ([OLC0015](#)), and the Howard League for Penal Reform ([OLC0019](#))

¹⁹⁹ [Q 39](#)

²⁰⁰ Written evidence from Professor Dawn Oliver ([OLC0001](#))

²⁰¹ Written evidence from the Howard League for Penal Reform ([OLC0019](#))

²⁰² [Q 55](#)

²⁰³ [Q 55](#)

²⁰⁴ [Q 103](#)

roles.²⁰⁵ They noted that the responsibilities of the Secretary of State for Justice were likely to be held by “heavy-weight, high calibre, career politicians”; it would be beneficial for the duties of the Lord Chancellor in relation to the rule of law to be held by someone of that seniority, while those same duties would also assist the Secretary of State for Justice in administering the justice system.²⁰⁶ Lord Phillips of Worth Matravers agreed: “if any minister is going to have the overriding obligation to uphold the rule of law and the independence of the judiciary, I think it should be the Secretary of State for Justice. If you divorced all his administrative functions so his only job was to uphold the rule of law, his word would not carry much weight.”²⁰⁷

132. The important advantage that combining the two roles will have in ensuring a Cabinet minister of sufficient seniority holds the post of Lord Chancellor also illustrates the danger of separating the posts. Mr Grayling told us that “you might find that splitting the roles relegated the Lord Chancellor to a junior ministerial post in the House of Lords.”²⁰⁸ Dr O’Brien was blunt: he doubted whether a Lord Chancellor who was not also Secretary of State for Justice, “whether resident in the Commons or the Lords, would have sufficient political power to perform that role. He or she would simply be the annoying fly buzzing in other ministers’ ears telling them things they do not want to hear and will end up doing anyway.”²⁰⁹ This disadvantage of splitting the roles would also apply to the creation of a Lord Chancellorship independent of Government, as suggested in some of our written evidence.²¹⁰
133. **We recognise concerns that the combination of the office of Lord Chancellor with that of the Secretary of State for Justice could create a conflict of interests at the heart of the Ministry of Justice. However, upholding the rule of law remains central to the Lord Chancellor’s role and in practice the office is given additional authority by being combined with a significant department of state.**

Continuation of the office

134. As we noted in Chapter 1, the office of Lord Chancellor has been in existence for centuries. Some of our witnesses questioned whether, now that the office has been combined with that of the Secretary of State for Justice, a separate office of Lord Chancellor is still needed. It seems clear that the ceremonial functions of the post could be performed by another minister.²¹¹ Some witnesses told us that it was already simply a Secretary of State role like any other: Dr O’Brien told us that, “Since 2003 the office has gradually come to mean little more than the name that is given to the Secretary of State for Justice when he exercises his functions in relation to courts and the judiciary. The Justice Secretary/Lord Chancellor does not behave

²⁰⁵ Written evidence from the Law Society of England and Wales ([OLC0025](#)); similarly the Archives and Records Association saw advantages in the combination as regards the Lord Chancellor’s duties relating to official records (written evidence, [OLC0024](#)).

²⁰⁶ Written evidence from the Law Society of England and Wales ([OLC0025](#))

²⁰⁷ [Q 26](#)

²⁰⁸ [Q 57](#), see also written evidence from the Bar Council ([OLC0026](#))

²⁰⁹ [Q 8](#)

²¹⁰ Written evidence from Terence Ewing ([OLC0007](#)) and Ruairi Hipkin ([OLC0008](#))

²¹¹ [Q 65](#) (Sir Thomas Legg)

substantially differently to conventional Justice Ministers that exist in other countries.”²¹²

135. There is a practical reason why the office should be retained. Unlike most other secretaries of state, who occupy a single post in statute (so that their functions may be transferred without primary legislation), the Lord Chancellor’s role is specifically assigned to the Lord Chancellor in statute.²¹³ This is not confined to the Constitutional Reform Act; as Mr Murray told us:

“The office of Lord Chancellor carries with it many roles beyond those addressed in the CRA 2005 ... specific mention of the office could be found in fully 347 Acts of Parliament ... In the course of the 2005 reforms it was considered to be too difficult to unpick all of these roles, long exercised by Lord Chancellor as a ‘great office’ of state. These often ceremonial or esoteric functions, scattered across the statute books, made it prohibitively difficult to simply abolish the office of Lord Chancellor as first intended.”²¹⁴

136. Our witnesses were clear that, beyond the practical difficulties of abolishing the position, the value of the office of Lord Chancellor lay in those aspects of the role that set it aside from other ministerial positions: the oath of office and related duties regarding the rule of law and judicial independence. Lord Phillips of Worth Matravers told us that, in considering whether the term Lord Chancellor was needed in the title, alongside that of Secretary of State for Justice, “I would say that it is not necessary any more. But that does not mean that that particular minister should not have precisely the same responsibility and duty to take the particular oath to uphold the rule of law and the independence of the judiciary. The Lord Chancellor’s office is important at the moment because that is an oath that the Lord Chancellor takes in that capacity.”²¹⁵
137. The Judicial Appointments Commission gave us a similar reason for retaining the post: “the ministerial functions which relate to the appointment of judges should continue to be exercised by the Lord Chancellor rather than the Secretary of State for Justice. In large part this is because the Lord Chancellor (unlike any other Minister of the Crown) is required by legislation to swear an oath of office in which he undertakes to respect the rule of law, defend the independence of the judiciary and ensure the provision of resources for the efficient and effective support of the courts.”²¹⁶
138. Mr Straw argued that, if the post was entirely subsumed into the role of Secretary of State for Justice, then “it is just another Secretary of State job, you could not then have these oaths and so on. I know people can be cynical about tradition and so on, but there is a reason why this post has survived for such a long time, albeit through various transformations, which is to have a

²¹² Written evidence from Dr Patrick O’Brien ([OLC0012](#))

²¹³ Written evidence from Professor Andrew Le Sueur ([OLC0005](#))

²¹⁴ Written evidence from Colin Murray ([OLC0021](#))

²¹⁵ [Q 29](#), see also written evidence from the Chartered Institute of Legal Executives ([OLC0017](#))

²¹⁶ Written evidence from Judicial Appointments Commission ([OLC0020](#))

bulwark within the Executive against interference in the judiciary. I think that is a very important feature of a democracy to defend.”²¹⁷

139. **The office of Lord Chancellor still includes important constitutional duties and responsibilities that go beyond those of other ministers, as reflected in the Constitutional Reform Act 2005. We recommend that the office and responsibilities of Lord Chancellor be retained.**
140. **The maintenance of the rule of law is as vital now as it has ever been. Within Government, the Lord Chancellor retains a central role in ensuring that Government acts in accordance with the rule of law. Yet those guardians of the rule of law outside Government, and Parliament in particular, must remember their own duty in this regard—to scrutinise the actions and policies of Government to ensure it governs in accordance with the rule of law.**

²¹⁷ [Q 105](#)

CHAPTER 5: SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

Chapter 2: The rule of law and judicial independence

141. We invite the Government to agree that the rule of law extends beyond judicial independence and compliance with domestic and international law. It includes the tenet that the Government should seek to govern in accordance with constitutional principles, as well as the letter of the law. (Paragraph 25)
142. Judicial independence is a vital element of the United Kingdom's uncodified constitution. That its defence is a core part of the Lord Chancellor's role is uncontested. The Lord Chancellor must ensure that the judiciary are free to act without undue pressure from the executive, that the executive respects the outcome of court judgments, and that the legal system is adequately resourced (Paragraph 32)
143. All ministers have a duty, reflected in the Ministerial Code, to comply with the law. The Lord Chancellor continues to have an additional responsibility in this regard. (Paragraph 42)
144. The Lord Chancellor's duty to respect of the rule of law extends beyond the policy remit of his or her department; it requires him or her to seek to ensure that the rule of law is upheld within Cabinet and across Government. We recommend that the Ministerial Code and the *Cabinet Manual* be revised accordingly. (Paragraph 50)
145. To clarify the scope of the Lord Chancellor's duty in relation to the rule of law, we recommend that the oath to "respect the rule of law" be amended to a promise to "respect and uphold the rule of law". (Paragraph 51)
146. The duty of Lord Chancellors to ensure that the rule of law is respected across Government has not changed as a result of the Constitutional Reform Act. Carrying out this duty has, however, become more difficult for post-reform Lord Chancellors and more directly dependent on the personal authority and attitude of the individual holding the office. (Paragraph 78)
147. The Law Officers' role in upholding the rule of law has always been important. The changes to the office of Lord Chancellor over the last decade have made it even more so. As a result, we consider that it is imperative the Attorney General continues to attend all Cabinet meetings, and that they are adequately resourced not only in their role as legal advisers to the Government, but in their capacity as guardians of the rule of law. (Paragraph 79)
148. We recommend that the Law Officers give due consideration to the more reactive role of modern Lord Chancellors and ensure that the holder of that office is kept informed of potential issues within Government relating to the rule of law. (Paragraph 80)
149. A commitment to the rule of law is an essential component of good government. The Government should ensure that the responsibilities of those charged with upholding the rule of law are clear and widely

understood, and that they receive the support necessary to fulfil those duties. (Paragraph 81)

150. The Lord Chancellor has never been the sole guardian of the rule of law, either within Government or more broadly. The importance of other guardians has, however, increased in the light of the changes to the role since 2003. Parliament in particular should be aware of its crucial role as a body that can hold the Government to account to ensure that it governs in accordance with the rule of law. (Paragraph 88)

Chapter 3: A constitutional guardian in Government

151. There is no clear focus within Government for oversight of the constitution. We invite the Government to agree that a senior Cabinet minister should have responsibility for oversight of the constitution as a whole, even if other ministers have responsibility for specific constitutional reforms. In the light of the Lord Chancellor's existing responsibility for the important constitutional principle of the rule of law, we consider that the Lord Chancellor is best placed to carry out this duty. (Paragraph 101)

Chapter 4: The future of the office

152. We recognise the advantages to appointing a Lord Chancellor with a legal or constitutional background. We do not consider that it is essential but, given the importance of the Lord Chancellor's duties to the rule of law, these benefits should be given due consideration. (Paragraph 109)
153. We recommend that the Government either ensure that the Permanent Secretary supporting the Lord Chancellor at the Ministry of Justice is legally qualified, or appoint the top legal adviser in that department at permanent secretary level. (Paragraph 113)
154. Given the importance of the Lord Chancellor's duty to uphold the rule of law, the Lord Chancellor should have a high rank in Cabinet and sufficient authority and seniority amongst his or her ministerial colleagues to carry out this duty effectively and impartially. (Paragraph 117)
155. The Lord Chancellor should be a politician with significant ministerial or other relevant experience to ensure that the rule of law is defended in Cabinet by someone with sufficient authority and seniority. It is not necessary to be prescriptive: more important than age or lack of ambition is that the person appointed has a clear understanding of his or her duties in relation to the rule of law and a willingness to speak up for that principle in dealings with ministerial colleagues, including the Prime Minister. (Paragraph 125)
156. We urge Prime Ministers, when appointing Lord Chancellors, to give weight to the need for the qualities we have outlined in this report, and above all to consider the importance of the Lord Chancellor's duty to uphold the rule of law across Government. (Paragraph 126)
157. We recognise concerns that the combination of the office of Lord Chancellor with that of the Secretary of State for Justice could create a conflict of interests at the heart of the Ministry of Justice. However, upholding the rule of law remains central to the Lord Chancellor's role and in practice the office

is given additional authority by being combined with a significant department of state. (Paragraph 133)

158. The office of Lord Chancellor still includes important constitutional duties and responsibilities that go beyond those of other ministers, as reflected in the Constitutional Reform Act 2005. We recommend that the office and responsibilities of Lord Chancellor be retained. (Paragraph 139)

159. The maintenance of the rule of law is as vital now as it has ever been. Within Government, the Lord Chancellor retains a central role in ensuring that Government acts in accordance with the rule of law. Yet those guardians of the rule of law outside Government, and Parliament in particular, must remember their own duty in this regard—to scrutinise the actions and policies of Government to ensure it governs in accordance with the rule of law. (Paragraph 140)

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

Lord Brennan
 Lord Crickhowell
 Lord Cullen of Whitekirk
 Baroness Dean of Thornton-le-Fylde
 Baroness Falkner of Margravine
 Lord Goldsmith
 Lord Lang of Monkton (Chairman)
 Lord Lester of Herne Hill
 Lord Lexden
 Lord Powell of Bayswater
 Baroness Taylor of Bolton
 Baroness Wheatcroft

Declarations of interest

Lord Brennan
No relevant interests declared

Lord Crickhowell
No relevant interests declared

Lord Cullen of Whitekirk
No relevant interests declared

Baroness Dean of Thornton-Le-Fylde
No relevant interests declared

Baroness Falkner of Margravine
No relevant interests declared

Lord Goldsmith
Co-managing partner, Debevoise & Plimpton LLP London (international law firm)
Bencher, Honourable Society of Gray's Inn
Chairman, Board of Trustees, Access to Justice Foundation
Board Member, American Bar Association Rule of Law Initiative
President, Bar Pro Bono Unit
International Council Member, Central European and Eurasian Law Initiative
Vice-Chairman, Hong Kong International Arbitration Centre

Lord Lang of Monkton
No relevant interests declared

Lord Lester of Herne Hill
No relevant interests declared

Lord Lexden
No relevant interests declared

Lord Powell of Bayswater
No relevant interests declared

Baroness Taylor of Bolton
No relevant interests declared

Baroness Wheatcroft
Business Consultant, DLA Piper (legal services)

A full list of members' interests can be found in the Register of Lords' Interests: <http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests>

Professor Adam Tomkins, John Millar professor of Public Law at the University of Glasgow, acted as legal adviser for the inquiry. He declared no relevant interests.

APPENDIX 2: LIST OF WITNESSES

Evidence is published online at <http://www.parliament.uk/office-of-lord-chancellor> and available for inspection at the Parliamentary Archives (020 7219 5314)

Evidence received by the Committee is listed below in chronological order of oral evidence session and in alphabetical order. Those witnesses marked with ** gave both oral evidence and written evidence. Those marked with * gave oral evidence and did not submit any written evidence. All other witnesses submitted written evidence only.

Oral evidence in chronological order

- ** Mr Graham Gee, Birmingham Law School, University of Birmingham [QQ 1–15](#)
- ** Professor Andrew Le Sueur, University of Essex
- ** Dr Patrick O’Brien, University College London
- * Lord Mackay of Clashfern, Lord Chancellor, 1987–97 [QQ 16–29](#)
- * Lord Phillips of Worth Matravers, Master of the Rolls, 2000–05, Lord Chief Justice, 2005–08, Senior Law Lord then President of the Supreme Court, 2008–12
- * Lord Hope of Craighead, Second Senior Law Lord then Deputy President of the Supreme Court, 2009–13 [QQ 30–42](#)
- * Lord Judge, Lord Chief Justice of England and Wales, 2008–13
- ** Lord Woolf, Master of the Rolls, 1996–2000, Lord Chief Justice of England and Wales, 2000–05
- * Rt Hon. the Chris Grayling MP, Lord Chancellor and Secretary of State for Justice [QQ 43–62](#)
- * Ms Rosemary Davies, Legal Director, Ministry of Justice
- * Sir Alex Allan, Permanent Secretary, Department for Constitutional Affairs and then Ministry of Justice, 2004–07 [QQ 63–85](#)
- * Sir Thomas Legg, Permanent Secretary, Lord Chancellor’s Department, 1989–98
- * Rt Hon. Kenneth Clarke MP, Lord Chancellor and Secretary of State for Justice, 2010–12
- * Lord Falconer of Thoroton, Lord Chancellor and Secretary of State for Constitutional Affairs, 2003–07
- * Rt Hon. Dominic Grieve QC MP, Attorney General, 2010–14 [QQ 86–105](#)
- * Rt Hon. Baroness Scotland of Asthal QC, Attorney General, 2007–10
- * Rt Hon. Jack Straw MP, Lord Chancellor and Secretary of State for Justice, 2007–10

Alphabetical list of all witnesses

- * Sir Alex Allan, Permanent Secretary, Department for Constitutional Affairs and then Ministry of Justice 2004–07 (QQ 63–85)
- Dr Gabrielle Appleby, University of Adelaide [OLC0018](#)
- Archives and Records Association [OLC0024](#)
- Association of Personal Injury Lawyers [OLC0015](#)
- The Bar Council [OLC0026](#)
- Bindmans LLP [OLC0023](#)
- The Bingham Centre for the Rule of Law [OLC0022](#)
- Chartered Institute of Legal Executives [OLC0017](#)
- * Rt Hon. Kenneth Clarke MP, Lord Chancellor and Secretary of State for Justice 2010–12 (QQ 63–85)
- * Ms Rosemary Davies, Legal Director, Ministry of Justice (QQ 43–62) [OLC0028](#)
- Mr Terence Ewing [OLC0008](#)
- * Lord Falconer of Thoroton, Lord Chancellor and Secretary of State for Constitutional Affairs 2003–07 (QQ 63–85)
- Dr Clive Field, University of Birmingham [OLC0013](#)
- ** Mr Graham Gee, Birmingham Law School, University of Birmingham (QQ 1–15) [OLC0006](#)
- * Rt Hon. Chris Grayling MP, Lord Chancellor and Secretary of State for Justice (QQ 43–62) [OLC0028](#)
- * Rt Hon. Dominic Grieve QC MP, Attorney General 2010–14 (QQ 86–105)
- Rt Hon. the Lord Hamilton, former Lord Justice General of Scotland and Lord President of the Court of Session 2005–12 [OLC0016](#)
- Professor Robert Hazell, University College London [OLC0014](#)
- Mr Ruairi Hipkin [OLC0008](#)
- * Lord Hope of Craighead, Second Senior Law Lord then Deputy President of the Supreme Court 2009–13 (QQ 30–42)
- The Howard League for Penal Reform [OLC0019](#)
- * Lord Judge, Lord Chief Justice of England and Wales 2008–13 (QQ 30–42)
- Judicial Appointments Commission [OLC0020](#)
- The Law Society of England and Wales [OLC0025](#)
- * Sir Thomas Legg, Permanent Secretary, Lord Chancellor’s Department 1989–98 (QQ 63–85)

- * Lord Mackay of Clashfern, Lord Chancellor 1987–97
(QQ 16–29)
- Mr Colin Mardell [OLC0004](#)
- Professor Michael Moss, Northumbria University [OLC0013](#)
- Mr Colin Murray, Newcastle Law School [OLC0021](#)
- ** Dr Patrick O’Brien, University College London (QQ 1–15) [OLC0012](#)
- Professor Dawn Oliver, University College London [OLC0001](#)
- * Lord Phillips of Worth Matravers, Master of the Rolls 2000–05, Lord Chief Justice 2005–08, Senior Law Lord then President of the Supreme Court 2008–12 (QQ 16–29)
- Sir Hayden Phillips, Permanent Secretary to the Lord Chancellor’s Department the Department for Constitutional Affairs 1998–2004 [OLC0029](#)
- * Rt Hon. Baroness Scotland of Asthal QC, Attorney General 2007–10 (QQ 86–105)
- * Rt Hon. Jack Straw MP, Lord Chancellor and Secretary of State for Justice, 2007–10 (QQ 86–105)
- ** Professor Andrew Le Sueur, University of Essex (QQ 1–15) [OLC0005](#)
- ** Lord Woolf, Master of the Rolls, 1996–2000, Lord Chief Justice of England and Wales, 2000–05 (QQ 30–42) [OLC0009](#)

APPENDIX 3: CALL FOR EVIDENCE

The House of Lords Select Committee on the Constitution, chaired by Lord Lang of Monkton, is beginning an inquiry into the office of Lord Chancellor. The committee invites interested organisations and individuals to submit written evidence to the inquiry.

Written evidence is sought by 29 August 2014. Public hearings are expected to be held in July and early October 2014. The committee aims to report to the House in autumn 2014. The report will receive a response from the Government and is expected to be debated in the House of Lords.

The office of Lord Chancellor has existed in some form since the 11th century, if not before.²¹⁸ Reforms announced in 2003 and legislated for in the Constitutional Reform Act (CRA) 2005 changed the role significantly, so that the Lord Chancellor is no longer the head of the judiciary nor the presiding officer of the House of Lords. However, the Lord Chancellor retains a role in judicial appointments and has statutory duties to uphold judicial independence and the rule of law.

Since the creation of the Ministry of Justice in 2007 Lord Chancellors have also been Secretaries of State for Justice. In 2008 the Constitution Committee concluded that the two roles should continue to be combined and that “Lord Chancellors in the future, with their responsibilities for the rule of law and the judiciary, should continue to have the authority necessary to fulfil their duties”.²¹⁹ Six years later, and approaching ten years on from the CRA, the new inquiry revisits the office of Lord Chancellor. The committee seeks clarity on what the current role is, whether changes to it are needed and what criteria (if any) should apply when appointing future holders of the office.

First, the committee will explore what the role and responsibilities of the Lord Chancellor are, as distinct from those of the Secretary of State for Justice. With the establishment of the Judicial Appointments Commission and the Judicial Appointments and Conduct Ombudsman, and with the Lord Chief Justice now the head of the judiciary, we are interested in the extent to which real powers are still wielded by the Lord Chancellor. The committee is interested in the combined roles of Lord Chancellor and Secretary of State for Justice and the advantages and disadvantages of that combination. It has recently been described as creating an inherent conflict in some policy areas,²²⁰ but can also be viewed as adding weight to the position.

The committee will consider the criteria for appointment as Lord Chancellor. Comments are invited on the effectiveness of the current criteria (in section 2 of the CRA). Two criteria that were emphasised following the changes to the office were that the Lord Chancellor should be a lawyer and should be towards the end of his or her political career, although neither is specified in the CRA.

²¹⁸ Nicholas Underhill, *The Lord Chancellor* (1978)

²¹⁹ Constitution Committee, *Relations between the executive, the judiciary and Parliament: Follow-up Report* (11th Report, Session 2007–08, HL Paper 177), paragraph 17

²²⁰ Notably judicial review: see Joint Committee on Human Rights, *The implications for access to justice of the Government's proposals to reform judicial review* (13th Report, Session 2013–14, HL Paper 174, HC 868), paragraph 23

Finally, the committee will explore whether further reforms to the office are desirable, including whether it is still necessary to have a Lord Chancellor. It may be that the extant functions could be divided between other posts. Or it may be that the office remains a vital part of the relationship between the executive, Parliament and the judiciary.

The committee would welcome written submissions on any aspect of this topic, and particularly on the following questions:

The office of Lord Chancellor

- (1) What are the current functions of the Lord Chancellor, as distinct from those of the Secretary of State for Justice?
- (2) To what extent are those functions genuine powers, and to what extent are they nominal powers?
- (3) How in practice does the Lord Chancellor uphold the rule of law and judicial independence?

The combination of the office with Secretary of State for Justice

- (4) Are the offices of Lord Chancellor and Secretary of State for Justice best performed by the same person?
- (5) Can judicial independence and the rule of law be defended in Cabinet by a minister responsible for wider departmental policies and budgets, which may point to different priorities? Is an independent voice required?

Criteria for appointment as Lord Chancellor

- (6) How effective have the criteria for appointment as Lord Chancellor in section 2 of the Constitutional Reform Act 2005 been? What does it mean for an appointee to be “qualified by experience”?
- (7) Should there be statutory criteria for the appointment?
- (8) What are the advantages and disadvantages of the office of Lord Chancellor being held by a lawyer?
- (9) Should the Lord Chancellor be someone who when appointed does not seek further ministerial advancement? Should he or she be a member of the House of Lords?

The future of the office

- (10) Should there be a Lord Chancellor? If so, what should be his or her functions? If not, who should perform those functions?

You need not address all the questions. The committee would welcome other relevant views of which you think the committee should be aware.

This inquiry will focus on the office itself rather than current or former office-holders. Submissions are invited on the constitutional aspects of the office; personal comments should be avoided.