HOUSE OF LORDS

Constitution Committee

Corrected oral evidence: The role of the Lord Chancellor and the law officers

Wednesday 27 April 2022

10.15 am

Watch the meeting

Members present: Baroness Drake (The Chair); Lord Falconer of Thoroton; Baroness Fookes; Lord Hennessy of Nympsfield; Lord Hope of Craighead; Lord Howard of Lympne; Lord Howarth of Newport; Lord Howell of Guildford; Lord Robertson of Port Ellen; Lord Sherbourne of Didsbury; Baroness Suttie; Lord Thomas of Gresford.

Evidence Session No. 4 Heard in Public Questions 50 – 58

Witness

I: The Rt Hon the Lord Keen of Elie QC, former Advocate-General for Scotland (2015-20), former Lords Spokesperson for the Ministry of Justice (2016-20) and Home Office (2016).

USE OF THE TRANSCRIPT

1. This is a corrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.

Examination of witness

Lord Keen.

Q50 **The Chair:** Good morning, Lord Keen. This is the House of Lords Select Committee on the Constitution. Welcome and thank you for joining us today. The committee has a range of questions that we would like to put to you, flowing from our inquiry into the role of the Lord Chancellor and the law officers. Thank you very much for agreeing to come.

I will open with a question and then invite my colleagues to put other questions, unless you want to say something first by way of introductory comment.

Lord Keen: Not at all.

The Chair: I open with a broad question, but I invite you to focus on what you think are the key issues. How is the rule of law protected within government, and what role do the law officers play in delivering that protection?

Lord Keen: We have to begin by considering what we mean by the rule of law. First, it requires that all institutions and parties should be equal before the law and subject to the law, that the law should be publicly available, and they should be capable of ascertaining what their rights and obligations are thereunder.

I think it extends further. The rule of law is there to maintain stability in society in a variety of ways. It extends not just to domestic law but to the sphere of international law. There again we look for stability not only in our relations with each other but in our relations with other nations and societies. Indeed, I noticed this morning that the Foreign Office put out a briefing on the Russian Federation's incursions in Ukraine referring to "the rules" that determine the relationship of nations and societies, and quoting the UN charter.

The role of the law officers is to advise government. My particular role related to advising the Government with regard to Scots law, monitoring the divorce settlement and Scottish legislative operations, and conducting the UK Government's litigation in Scotland.

The role of the law officers is to try to ensure that the policy of the Government can be implemented in so far as the Government wish that policy to be implemented, but reminding the Government of their obligations to adhere to the rule of law, the constitutional principles and policy that we will adhere to those obligations in both the sphere of domestic law and of international law.

There are times when we come very close to the boundaries. There are times when the law officers will advise that a particular course of action is "respectable". I have to observe that that is a fairly low standard.

Those of you who have sat in judgment in courts will know that counsel are concerned to ensure that they have at least a stateable argument. It

may be little more than that and they may be given short shrift once they have stated it, but it is necessary that the law officers are able to advise government that there is a respectable argument for the implementation of a policy and that it can, therefore, in theory fall within the bounds of the rule of law. Where they cannot do that, the advice of the law officers must be that the Government should not proceed.

The Government can from time to time, perhaps not infrequently, find themselves on the wrong side of the boundary. They may find that their legislative proposals are challenged as in some way being unlawful. They may implement legislation and then find that it is successfully challenged in the courts. That is a risk that all Governments have to take. However, the object of the law officers is to try to ensure that the Government never deliberately cross those boundaries.

The Chair: Your comments on international law are pertinent, and we want to come back to that issue of the rule of law in relation to international law. Following on from what you have said, one of the issues that we are interested in is the extent to which, if at all, the changes to the Lord Chancellor's role introduced by the 2005 Act enhanced the role of the law officers as guardians of the law. Your views would be welcome.

Lord Keen: I do not believe that the changes in 2005 enhanced the role of the law officers, but I believe that in a sense they diminished or constrained the role of the Lord Chancellor, which is equally pertinent. I am looking directly at Lord Falconer.

The Chair: Yes, he is coming in with a supplementary.

Lord Keen: No doubt. I have misgivings about the 2005 Act, I must confess. There was, of course, a concern that, in principle, you had an individual who was head of the judiciary and a senior member of the Executive, and there was room for conflict. I am not aware of any major conflict having arisen during the 100 years before the 2005 Act. Nevertheless, there was, in theory, a constitutional reason for addressing the matter.

The problem, as I see it, is that the Lord Chancellor is now the Secretary of State of a major spending department. He undertakes to protect the independence of the judiciary but has his hand on the purse that enables it to maintain that independence and to discharge its functions properly. So I do think that is a difficulty.

My view is that it would be better to remove the Lord Chancellor's role from such a major spending department, which is engaged with prisons, courts, legal aid and everything else, and to have a situation in which the Lord Chancellor is also Secretary of State for Constitutional Affairs, for which he would be—usually—quite well qualified. Remove that from the Cabinet Office and have a Lord Chancellor's department as was, but that is a purely personal opinion.

The Chair: It is not a unique point of view. It is the sort of view that has been expressed to us, and it might be interrogated a little in our questioning. It is a view that we will consider in writing the report. Lord Falconer, do you want to put your supplementary?

Lord Falconer of Thoroton: Yes. Good morning, Lord Keen. First, I have a technical question. You have identified what your responsibilities were as the Advocate-General: dealing with Scots law, monitoring devolution and conducting litigation in the Scots courts for the Westminster Government. Although there are those sorts of differences, broadly, is the role of the Advocate-General in overall constitutional terms the same as that of the Attorney-General, subject to those changes because it is Scotland?

Lord Keen: No, because, of course, the Advocate-General for Scotland has no responsibility in regard to the matter of criminal prosecution in Scotland, for which the Attorney-General has ultimate responsibility as the Minister who answers to Parliament for these matters and has some control over the policy of criminal prosecution. That lies with the Lord Advocate in Scotland. To that extent there is a difference.

However, there are close similarities between the two roles, and I would go further. My experience as Advocate-General was that, where advice was given to the Government on major issues, it was given by the Attorney-General and the Advocate-General jointly, whether it was a matter of Scots law or more broadly. They act in conjunction; there is no doubt about that when it comes to advising the Government. The Government normally, but not exclusively, receive advice jointly formulated by the Attorney-General and the Advocate-General.

Lord Falconer of Thoroton: What you have just described was my experience when I was Solicitor-General. In matters of any grave importance to the nation, the Lord Advocate, as it then was, would be called on to advise along with the Attorney-General. My question was directed to the duty of trying to keep the Government within the rule of law in which the roles of the Advocate-General and the Attorney-General were similar, if not identical.

Lord Keen: I would say they are identical. We both have an obligation to direct the Government as to when they can and cannot proceed with a policy that falls within a respectable and identifiable boundary of propriety and principle having regard to the rule of law.

Lord Falconer of Thoroton: Your description of respectability resonates strongly in relation to the way that the law officers operate and the sense that they are trying to help the Government as much as possible in finding respectable ways in which policy can be delivered. What is the correct course of action for the law officers if a respectable course to justify the implementation of policy cannot be found?

Lord Keen: It is to advise that that policy should not be implemented. I should add that the Advocate-General and the Attorney-General,

sometimes with the alternate of the Solicitor-General, attend each week the Parliamentary Business and Legislation Committee, chaired by the President of the Council and attended by the Chief Whips in both Houses. That is where a Minister is required to present their legislative proposals and where they are examined. In those instances, there are political issues to be discussed.

In addition, both the Attorney-General and the Advocate-General are invited to express their view as to the propriety of such legislative proposals. That, in my experience, is always taken account of and acknowledged. I am not aware of an instance during my five years as a law officer where the Government decided to proceed in the face of express advice that there was no respectable argument to support a particular policy proposal. There may be one exception to that, which we will come back to.

Lord Falconer of Thoroton: If the Government proceed, whether by legislation or in taking executive action, and there is no respectable argument that it is legal, then, assuming that the advice has been given by the law officers and it is rejected, presumably the law officers would have to resign.

Lord Keen: The question of whether a Minister resigns is a matter for the Minister. I would not speculate as to the circumstances in which that might occur.

Lord Falconer of Thoroton: Are there any other sanctions beyond resignation?

Lord Keen: One could express concern to the Government, but I have never had to experience that situation, so I cannot really elaborate.

Q51 **Lord Howell of Guildford:** Good morning, Lord Keen. You mentioned international law in your opening comments. Under what sorts of circumstances, if any, do you see it as permissible for the Government to invite Parliament to legislate in breach of international law?

Lord Keen: I find it very difficult to identify such circumstances, having regard to the well-established constitutional principle and policy that we adhere to our international law obligations. I suppose there could be emergency circumstances. Certainly, it is no answer for people to cite, as they sometimes do, the somewhat specious argument about the supremacy or sovereignty of Parliament. In theory, the Government can invite Parliament to legislate for the reintroduction of slavery. Under our dualist system, that domestic law would be effective and enforceable but would place us in breach of all sorts of international charters, obligations and treaties.

It seems to me that a responsible Government will always respect their obligations not only under domestic law but in the sphere of international law; to do otherwise is to invite a situation in which we become compromised. How can we speak to China or Russia about their conduct if, in fact, we are quite deliberately willing to breach our own treaty

obligations or international obligations? We would lose our standing in the world. I have no experience of a Government being prepared to do that.

I would add only this. What I refer to as constitutional principle or policy is reflected in both the Ministerial Code and, equally importantly, the Civil Service Code.

Lord Howell of Guildford: In the rather dramatic case of the internal market Bill, you found it increasingly difficult to reconcile your obligations as a law officer with your policy intentions with respect to the Bill. You were particularly worried about two clauses that popped up—Clauses 42 and 45. Did it occur to you that it was the Government playing a political game, trying to put pressure on Brussels to reinterpret the Irish protocol in a less rigid way, that these clauses were put in and they might be taken out, and you should wait and see until the outcome occurred in that respect?

Lord Keen: I certainly had the impression that there was such a course of action in contemplation, without any doubt whatever. I did not think it was my role to see whether or not they were taken out. My perception, if I might put it this way, is this.

These provisions were mooted. A Secretary of State was asked a double question by Bob Neill—I should refer to him as the honourable Member. He said, "Do these proposals breach international law, or do they have the potential to breach international law?" I felt there was a respectable argument that the latter question was correct and not the former, because the provisions allowed for the making of regulations that could be employed by a Minister to carry out such a task.

However, when the Secretary of State answered the question, he said that the provisions did breach international law in what he termed "a limited way". My perception was that, in the background, there was a belief among those who were going to negotiate in Brussels that if they waved a big stick saying, "We are willing to breach international law and we are willing to breach the treaty obligations that we entered into just a short time ago when we signed the protocol", that would be an effective negotiating tactic. I do not believe for one minute that it would have been an effective negotiating tactic, and I do not consider that it was proper because, as a matter of constitutional principle and propriety, we do not do that.

Lord Howell of Guildford: You are saying that it was the potential of putting these proposals or clauses in the Bill as intentions of government that you felt was most offensive?

Lord Keen: I felt it was offensive that the Government, as they expressed the position in the House of Commons, were saying they were going to breach international law.

Lord Howell of Guildford: I have one final question on treaty law generally. I notice that the American Supreme Court tends to refer to

things such as the Vienna convention on treaties as being a situation in which some treaties arising from some international institutions and agreements can be altered or challenged if there is a huge change of circumstances or if the other parties change their stance and do not act in good faith and so on. Did that aspect get any attention from you? Is there any relevance there?

Lord Keen: You are referring to Article 68 of the Vienna convention on treaties. First, the Vienna convention on treaties does not, strictly speaking, apply to the treaty between the United Kingdom and the EU; it applies to state-to-state treaties, so it has no application there. There is a further Vienna convention that would apply, but it has not yet been fully put into force. Nevertheless, the relevant provision is regarded as reflecting a principle of international law in any event. You are talking about a fundamental change of circumstances. That did not apply in this case, by any stretch of the imagination.

I will give one simple example. Following the break-up of the Soviet Union, a number of state parties attempted to resile from various treaty obligations on the grounds that they were no longer part of the eastern or Soviet bloc, and even that was held not to be such a fundamental change in circumstance as to enable them to do so. We were many, many miles from that situation.

Lord Howell of Guildford: Thank you very much.

Q52 **Lord Robertson of Port Ellen:** Lord Keen, you said that you sat on the committee that looked at legislation before the legislation came to Parliament.

Lord Keen: That is correct.

Lord Robertson of Port Ellen: And that you had a co-equality with the Attorney-General.

Lord Keen: Yes, I see no reason to suppose otherwise. We were both consulted on legislative proposals. Quite often, the Solicitor-General would appear instead of the Attorney-General, but normally there would be two law officers present.

Lord Robertson of Port Ellen: I appreciate that in the case of the internal market Bill it was the clarification by the Secretary of State in the House of Commons that tipped you over the edge from the argument that you deployed on 15 September to your resignation on 16 September. That was the case.

Lord Keen: If the Government, as a matter of policy, were not prepared to adhere to what I thought was a respectable argument and were prepared to proceed in a way that they thought was an intentional breach of international law, I did not regard that as acceptable.

Lord Robertson of Port Ellen: You must have been on the committee that considered the overseas services Bill before it came to Parliament.

Lord Keen: Among others. I have no immediate recollection of it.

Lord Robertson of Port Ellen: I know, but it quite clearly would have breached not only international law but international humanitarian law in a pretty fundamental way. Had it not been for the fact that the House of Lords changed it, we would have found ourselves in breach of the Geneva convention, the convention on torture and all the rest of it. I am trying to work out in my own mind how it was that the law officers, seeing that Bill in its raw form, could not have seen that a presumption against prosecution for crimes against humanity would not have conformed to what you said was a breach of international law that would have wrecked our reputation abroad.

Lord Keen: I can say only, without immediately recollecting the circumstances, that there must have been what was perceived to be a respectable basis for allowing that to proceed.

Lord Robertson of Port Ellen: Could you give me an estimation of what any possible respectable argument there could be—

Lord Keen: Not at this time.

Lord Robertson of Port Ellen: —of breaching international humanitarian law?

Lord Keen: I am not saying there was a respectable argument that it would not.

Lord Robertson of Port Ellen: We heard it, and eventually Parliament, both the Lords and the Commons, decided that it would.

Lord Keen: Sometimes, the Government find themselves on the wrong side of the boundary, but if there is a respectable argument to suggest that their policy intentions will not breach international law, they may proceed.

Lord Robertson of Port Ellen: You cannot think of any such argument off the top of your head at the moment.

Lord Keen: No, not at this time.

Lord Robertson of Port Ellen: But you would have at the time, would you?

Lord Keen: I have no immediate recollection of what happened with regard to that piece of legislation, and I have no access to the records.

Lord Robertson of Port Ellen: Thank you.

Lord Howard of Lympne: Lord Keen, I just want to make sure I understand the import of your answers to Lord Howell. I am probably being very stupid. Are you in effect saying that, if the Secretary of State for Northern Ireland in the House of Commons had said, "These measures give rise to a potential breach of international law", rather than

what he did say, you would not have found it necessary to resign?

Lord Keen: I would not have found myself in a position where I considered that the Government were intending to implement a policy that deliberately breached international law. What I would have done in those circumstances is another matter. You are quite right. Had they adopted what I regarded as a respectable line of argument but some people regarded as relatively weak, I would have been satisfied with that, but they were not prepared to do so. They wanted, as it were, to be black and white about it and say, "We are quite deliberately breaching international law. We are quite deliberately breaching the treaty obligations we entered into 12 months ago". I did not regard that as consistent with the constitutional principle and propriety that we maintain.

Lord Falconer of Thoroton: Could I come in with one follow-up in relation to that?

The Chair: Briefly.

Lord Falconer of Thoroton: Lord Keen, it follows from what you are saying that, if there was no respectable argument in the proposals in relation to the Human Rights Act that they did not breach the European Convention on Human Rights, the law officers would not support changes to the Human Rights Act legislation. I put that in a rather jumbled way, but it means that there has to be a respectable argument that it does not breach the convention before the Government can properly put such legislative proposals before the House in relation to human rights.

Lord Keen: Generally, that is correct. One has to bear in mind one point. Section 19(1)(a) of the Human Rights Act requires that a Minister certifies that legislation is consistent with the convention, but Section 19(1)(b) allows them to certify that it is not convention-compliant. Nobody can really explain why Section 19(1)(b) is there. My experience is that it was only ever used once, and it transpired that the legislation was convention-compliant anyway.

Subject to that, I go back to the general proposition that, before the Government can deliberately implement legislative policy, they have to have at least a respectable argument that it will be consistent with the rule of law. That, in my opinion, includes not just the rule of law in the sphere of domestic law but the rule of law in the sphere of international law. The fallout from our being prepared to depart from those constitutional principles would be considerable and would require, among other things, a rewriting of the Ministerial Code and the Civil Service Code.

Lord Falconer of Thoroton: Thank you.

The Chair: On that last point about the Civil Service Code, which is an area we will obviously look at, can you elaborate on why you think it would require an alteration to that code?

Lord Keen: I do not claim to be conversant with the Civil Service Code, but I understand it reflects the terms of the Ministerial Code, which is such as to pose a duty on Ministers to comply with the rule of law. The code was amended in 2015 to refer just to the rule of law rather than to international law or treaty obligations. However, as soon as that happened, there was a judicial review at the instance of the Gulf Centre for Human Rights, and the Government issued a public statement saying that the reference to the rule of law included international law and their international treaty obligations. They then made the same submission to the High Court, which made a finding that that was the proper interpretation of the Ministerial Code. I understand that that is also reflected in the terms of the Civil Service Code, but I will not claim equal familiarity with its terms.

The Chair: Thank you very much.

Q53 **Lord Hope of Craighead:** A change of topic: is there value in having the law officers as serving members of the Government as opposed to being non-political legal advisers outside government? There are two aspects to that question.

The first one is public perception. It is easy to say that a law officer is a member of the Government and, therefore, to some extent that may influence the advice that is given. Rightly or wrongly, that may be the perception. The other aspect is whether, if you were outside government, you would command the same authority as you did from within it. Perhaps you can assess that question from your experience having come into the House of Lords without having sat as a Member of the House of Commons.

Lord Keen: In my view, it is important that the law officers are members of the Government. I will come on to elaborate why in a moment. First of all, I would point out that the Government have available to them a wide range of extremely well-qualified and skilful lawyers. The Treasury Solicitor heads up the Government Legal Department, which is full of eminent lawyers. The head of legal at the Foreign Office has a body of very well-qualified lawyers. The director of legal affairs at the MoJ has a body of very well-qualified lawyers. All of these, together with the legal support staff of the Attorney-General's Office and the Advocate-General's Office, are able to provide legal advice.

The role of the law officers is to receive that advice, to analyse it and to examine it, and to see to what extent they can ensure that in light of the legal position they can still advance the Government's policy intentions. We are there to try to ensure that the Government can implement their policies. That is why it is important that the law officers are part of the Government.

In addition, we would lose authority in the eyes of government if we were no longer members of the Government. We would then be seen as simply being an add-on to the Treasury Solicitor. That is not to demean in any sense the important position that the Treasury Solicitor occupies, but it is

a very distinct position. His primary role is not to implement government policy, but that is the primary role of the law officers.

Lord Hope of Craighead: Can I drill down a bit more into it? Is it that you have access to more information as a member of the Government because you serve on the committees, as you have explained, than the other legal advisers to whom you have referred? You are in a different position because of access to different information.

Lord Keen: That is true. I would also emphasise the need for the law officers to ensure, in so far as they can, the implementation of government policy. That is not the primary role of the Civil Service lawyers. That is the role of the law officers.

Lord Hope of Craighead: That influences the question that you ask yourself then, does it not? Maybe it is a different question from that which the others are asking themselves.

Lord Keen: If you are an independent lawyer, you ask yourself, "Is this position probably right, or is it not?" That is not the question that I have to address as a law officer. I have to ask whether it is possible for me to find a way in which I can go to the Government—the Executive—and say, "Yes, it is possible to implement this policy. It may be hazardous. We may find ourselves on the wrong side of the line, but, be that as it may, I have found a possible way through, and, therefore, you may proceed". That is not the way in which, in general, an independent lawyer would address the matter.

Lord Hope of Craighead: Just to understand that, could you address that question if you were not a member of the Government?

Lord Keen: I do not believe you could do it so effectively. I do not believe that you would have access to the sort of detailed information about policy intentions that the law officers have. Furthermore, it would be far more difficult for you to be answerable to Parliament about the decisions that were being made.

Lord Hope of Craighead: If you were to be answerable to Parliament, that suggests you would have to be within Parliament, would you not? That raises the next question, which is for somebody else to put to you, as to where you should be in Parliament, but I will leave that aside. Thank you very much.

Q54 **Baroness Fookes:** Could you say what aspects of the law officers' role require them to be accountable to Parliament?

Lord Keen: The law officers have to be in a position where they can explain to Parliament the policies that have been implemented in some areas. Take the example of the Attorney-General. They are better qualified to address this point than I am, obviously. They have a supervisory role with regard to criminal prosecution, even though there is a Director of Public Prosecutions. The Attorney-General has to be in a position to come to Parliament and explain why a particular policy has

been adopted with regard to certain areas of the criminal law; for example, the desire to emphasise particular crimes and pursue them. It is important from that aspect that they are there to answer for that.

In addition, questions do arise. A point was made about legislation being introduced that appears to be contrary to our obligations under international law. The law officers have to be there to explain why they considered that that is not the case, and why they considered that there is a respectable argument for the Government to pursue a particular policy position. They are best equipped to do that.

I notice that the Lord Advocate is not a Member of the Scottish Parliament, but he has a right of audience before the Scottish Parliament, which I regard as rather peculiar. He is there but he is not there.

Baroness Fookes: That leads on to my second question. Is it important, necessary and essential that law officers should be a Member of at least one House?

Lord Keen: In my opinion, yes, it is most important that they are answerable to Parliament by virtue of their membership of one or other House. The late Lord Stott was Lord Advocate and not a Member of the House of Commons or the House of Lords, but that is the only instance I can recall in which a law officer was not a Member of either House.

Baroness Fookes: You would not advocate the right of audience that you mentioned.

Lord Keen: Such as the Lord Advocate appearing to speak? No, I would not regard that as appropriate.

Baroness Fookes: You would not want that imported into our system.

Lord Keen: No. I believe that in Canada the Attorney-General is not a member of the federal Parliament.

Lord Hope of Craighead: I think you are quite right about Lord Stott, but there was another Scottish law officer who was a Member of Parliament at the time, was there not—the Solicitor-General?

Lord Keen: You are quite right. There was at least one there, yes.

Lord Hope of Craighead: That has always been maintained, in my experience.

Lord Keen: Yes.

Lord Hope of Craighead: To follow up on what Baroness Fookes asked you, does it matter which House the law officer is in? In your case, it is the House of Lords. Would it have been better if you were in the House of Commons, or do you think there are some instances where it is better that the Attorney-General should be in the House of Lords rather than the House of Commons?

Lord Keen: If I was to answer from a personal point of view, I would prefer not to be in the House of Commons. Putting that aside, it is important that there should be a law officer in each House. As Advocate-General, I would speak for the Attorney-General in the upper House, and, likewise, they would speak for me in the House of Commons. It is very important that there should be a law officer in each House.

Lord Hope of Craighead: It affects where the law officer comes from. To be in the House of Commons you have to be an elected Member of Parliament, whereas you could come in, as you did, from private practice.

Lord Keen: Indeed.

Lord Hope of Craighead: You could go back to private practice. That affects the pool from which you can draw the candidate.

Lord Keen: That is true. There was a time when there was an abundance of well-qualified barristers in the House of Commons and an abundance of choice for the appointment of the law officers, but times have moved on and that is no longer the position that it was at one time. I think it was Iain Macleod who once said, "If you want to become a Government Minister, you should be a Scottish lawyer because they always need a Lord Advocate and a Solicitor-General".

The Chair: We have some more supplementaries on this: Lord Howarth and then Lord Robertson.

Lord Howarth of Newport: Lord Hope has asked the question I was going to ask.

Lord Robertson of Port Ellen: Briefly, what is your commentary on the Scottish situation where the Lord Advocate is not in the Scottish Parliament but is in the Scottish Cabinet?

Lord Keen: I believe that since 2007 the Lord Advocate has not participated fully in the Scottish Cabinet—that was a decision made by the former First Minister—but is there by invitation from time to time. Although, in terms of the Scotland Act, they are a full member of the Scottish Cabinet, that in practice has not occurred. It is partly because Elish Angiolini, who was the Lord Advocate under the Labour-Liberal Administration, continued in office after the SNP Government came into office, and it was then thought that if there was that continuum it might not be appropriate for her to be a full member of the Cabinet. In like ways, the Attorney-General is never a full member of the Cabinet but attends Cabinet, but not necessarily on all occasions.

Lord Robertson of Port Ellen: Thank you.

The Chair: Lord Sherbourne, I think you want to go on to qualifications.

Q55 **Lord Sherbourne of Didsbury:** Lord Keen, you mentioned a moment ago that there are now fewer and fewer qualified lawyers in the House of Commons, which means that the pool for these law officers is shrinking.

When a Prime Minister appoints an Education Minister or a Health Minister, he does not expect them to be a professional expert in those fields, but that does not apply, I assume, to those who are given the job of being a law officer. We have had recent experience of Lord Chancellors who are not so qualified. What is the problem, first, in not having a Lord Chancellor with those qualifications? Secondly, in appointing the law officers, are there minimum criteria that need to be fulfilled?

Lord Keen: Regarding the Lord Chancellor, because of the change and the nature of that appointment, it seems to me that it is more of an administrative than a legal role. My experience—because I was a Lords Minister in the Ministry of Justice—is that we have had a number of quite outstanding Ministers as Lord Chancellor even though they were not qualified lawyers because they were able to discharge what were essentially the administrative functions of that office.

It is different with regard to law officers. They have to be qualified lawyers. In fact, ex officio, they have rights of audience in all the courts in the United Kingdom. There is provision for that. You do not have to be a practising member of the Bar of England and Wales to appear in the High Court of England and Wales. There is a provision in statute whereby the law officers have that right of audience in any event. Whether they would exercise it without the relevant qualifications and experience is another matter. It might be wiser not to.

The law officers do not always appear in litigation for the Government. Normally, if you have a matter of some constitutional significance in the Supreme Court the law officers will appear, and therefore you would expect them to be qualified to appear for these matters.

In general, the law officer has to be capable of ingathering the legal advice that he receives in order to distil it and determine what advice he is going to give to government. I would equate it in many ways to the role of senior counsel in litigation, where solicitors prepare all the material, junior counsel input their advice, and you then have to analyse it and make a judgment as to how best you are going to arrive at a conclusion and how you are going to present it; so you do require those skills.

Lord Sherbourne of Didsbury: If a Prime Minister was short of a qualified lawyer but an extremely clever lay person could fulfil that job—because you talked about the advice they get from their legal advisers—leaving aside the appearance in court, could that be done by a non-lawyer?

Lord Keen: I suppose in theory, but it seems to me that it would be fraught with difficulty. The challenges of being a law officer are rather different from the challenges of being a Minister in other departments. Without that background experience, it would be extremely difficult to make the sort of judgments that are required of a law officer. It is always open to the Government, as they have done in the past, to identify a suitable lawyer and appoint them to the Lords.

Lord Falconer of Thoroton: Should there be a minimum requirement of practical legal experience for the law officers? In particular, what difficulty does it cause if people are appointed to be law officers without very much practical experience as lawyers in some sort of private practice or practices—for example, a lawyer to the Government or a private individual?

Lord Keen: I suppose it can create difficulties, but it can create difficulties in other ministries as well if you appoint someone without experience of a particular area. It is perhaps more difficult to accommodate in the context of the law officers, but it happens.

Lord Falconer of Thoroton: But is it a good thing? If your role is to defend the rule of law, having somebody not experienced in practical lawyering means you are a weakened champion of the rule of law.

Lord Keen: It is for the Prime Minister to make the appointments that he thinks appropriate to all ministries, and that includes the appointment of the law officers. Clearly, it would be preferable to have lawyers of skill and experience appointed to those offices, but I do not think you can set out minimum criteria there any more than you can elsewhere in the Executive.

Lord Falconer of Thoroton: Why not? The law officers are in a very different position from other Ministers. Why can you not set minimum criteria—for example, reasonable skill and experience in being a lawyer, independence of mind, and willingness to stand up to government under pressure?

Lord Keen: First of all, I do not know how you would judge those things in advance.

Lord Howell of Guildford: I wonder whether all our assessments of the qualifications for law officers are affected by the fact that the broader context has changed, and is changing, at a revolutionary pace, and will change a lot more. You have reminded us about the vast importance of international law. It is a fact that, since 2012, the number of treaties we have entered into with institutions where there are legal implications on domestic citizens has just about doubled, and it is probably going to double again. That is the world we are moving into. Despite all the rubbish written about globalisation ending, in this area it is increasing. That is one thing.

Secondly, this is the digital age, and the whole legal system is under much greater strain than ever before. We heard this morning on the radio that there are huge delays in the whole system, and huge technical and logistical difficulties in the administration of justice.

Thirdly, Ministers are talking about revising human rights law and a Bill of Rights. This is a totally new context from 2005. Here we are, 17 years later. Does that not affect your judgment about what the character and qualifications should be of these key characters?

Lord Keen: No, I do not believe it does because we retain the touchstone of the rule of law. We know where the boundary lies, and we know that the law officers' responsibility is to ensure that the Government are aware of those boundaries and adhere to them. I quite understand the point you make about the pace of change as regards developments, particularly in the sphere of international law, although it only becomes immediately effective under our dualist system if it is drawn down into domestic law, but I do not think it materially alters the role or the functions of the law officers.

Lord Howell of Guildford: Thank you.

Lord Howarth of Newport: Can we go back to the interesting question you raised, Lord Keen, about the diminishing presence in the House of Commons of lawyers? In my view, historically, it has been a great benefit to have a considerable element of lawyers in the House of Commons. It has not only enlarged the pool of suitable recruits for appointment to be law officers, it has benefited the quality of debate and advocacy. Many lawyers have been extremely distinguished MPs and Ministers. Why is it now so difficult to find the lawyers who have been so beneficial? Why are they not going into the House of Commons, and how much does it matter?

Lord Keen: First, I think the demands of modern practice at the Bar make it extremely difficult to engage in private practice and also be an MP. There is of course one distinguished former Attorney-General who has managed to maintain private practice while an MP, but it is extremely demanding, and he is an exception. That is just a simple development of the way in which we work at the Bar and the way in which the demands of Parliament have changed. You cannot reconcile the two very easily.

Is it a loss to the House of Commons? I might be inclined to say it is, but I look around the table and wonder whether there are many who would agree with me. I think diversity is very important. Background, qualifications and experience all matter. A preponderance of lawyers is not necessarily a good thing, but the presence of skilled and qualified lawyers in the Commons is, in general, a good thing.

Lord Howarth of Newport: May we get to a point where we cannot find suitable recruits to be Attorney-General or Solicitor-General? Do you worry about that?

Lord Keen: I am not aware of us having reached that point.

Lord Thomas of Gresford: Since the Lord Chancellor's role changed and it became more administrative, the length of office of each successive Lord Chancellor is very limited; it is under two years. It would not be desirable, would it, for an Attorney-General to have a very limited role, with a view to moving on to another department and so on? What is your view on that?

Lord Keen: It is less likely to happen. Regarding the position of Lord Chancellor, we have had a series of very able and skilful Ministers who have then generally been promoted elsewhere, as needs must. But, in general, although it may be changing, those who are appointed as law officers tend to remain as law officers. I was a law officer for five and a half years, and I did not anticipate that I would be going anywhere else. I spent a very short time as Lords Minister for the Home Office, and then spent four years as Lords Minister for the Ministry of Justice. In general, you find that law officers remain in post for rather longer, but that may be changing, I agree. It is not necessarily a good thing.

Lord Thomas of Gresford: Besides experience of some area of the law, which may not appertain to the duties of an Attorney-General, being trained as a lawyer brings you up within a framework of values and principles that are not available to people who have not been through that experience.

Lord Keen: There is a certain degree of professional discipline that you are very conscious of as a lawyer that you could lose sight of if you were not a lawyer but merely a politician. I should not say "merely"—solely a politician. There are certain standards, which we all adhere to but which are driven home to the professional lawyer in a way that they are not elsewhere perhaps.

Lord Thomas of Gresford: In particular, independence of thought. Would you agree?

Lord Keen: I agree with that.

Lord Thomas of Gresford: I declare my interests.

The Chair: I think non-lawyers are capable of objective thinking.

Q56 **Baroness Suttie:** Good morning. Could I move on to the question of publication of legal advice? Should the law officers' legal advice to the Government be published and made public on a regular basis, and, if so, under what circumstances?

Lord Keen: I do not consider that it should be. The general principle is that the Government, like any party, should be able to take legal advice on a confidential basis, which they can then consider. To put that into the public domain would in many ways compromise the Government in exploring policy options and deciding whether to implement them.

The position in private practice is that legal advice is generally regarded as confidential. There, the confidentiality lies with the client. It is rather different in government because, strictly speaking, the Government or the Prime Minister can disclose only the receipt of legal advice, or what it is, with the consent of the law officer who gave it—a rule that is perhaps more honoured in the breach than some others. Nevertheless, it is very important that the Government should be able to take their legal advice on a confidential basis. There are exceptional cases where such legal advice may be disclosed, but they should remain wholly exceptional

cases. It would compromise the functioning of government if they had to disclose legal advice time and time again.

Baroness Suttie: Could you give an example of those exceptional circumstances?

Lord Keen: For example, the advice given in 2003 over the Iraq war was made public. That is a wholly exceptional circumstance.

Lord Thomas of Gresford: You have told us that it is the duty of the law officers to present a respectable argument for a new law, but it may not be, in their advice, the best option for doing it. So your opinion would perhaps contain, "Well, I think you should do this. You can do that, but I advise against it". Is that the sort of situation we are in?

Lord Keen: That is very much the situation you find yourself in. You may go through a series of propositions saying, "If we do this, there will be no difficulty whatever. If we do that, we may be open to challenge. If we do the third thing, I think we will almost certainly be open to challenge and we will be struggling in court". Nevertheless, if your policy intentions require you to take the third route, so be it; there is a respectable basis for doing so.

To throw that sort of advice into the public domain would confuse and make far more difficult the implementation of government policy. You would have people saying that the better advice is that you do not it. But that is not the test; it is whether or not you are entitled to do it. That is why I emphasise that the law officers are there and one of their primary duties when they are there is to try to ensure that government policy can be implemented.

Lord Thomas of Gresford: You referred to the Iraq war. I was very much involved in attempts to have that advice disclosed. If the Attorney-General has advised that a course of action is illegal, surely that should be disclosed.

Lord Keen: I do not consider that it necessarily requires to be disclosed. I consider that it is only in the most exceptional circumstances that there should be any disclosure of legal advice given to government, even in circumstances where a law officer has said, "You should not do this".

Lord Robertson of Port Ellen: I do not know whether you have seen today's *Scotsman* newspaper.

Lord Keen: Yes, I saw it briefly.

Lord Robertson of Port Ellen: It says, "Scottish Government told to release indyref2 legal advice". The information commissioner, Mr Daren Fitzhenry, has said that the Government would have to publish this. Could you comment on that?

Lord Keen: No.

Lord Robertson of Port Ellen: These would not, in your view, be the exceptional circumstances that would dictate that it should be published.

Lord Keen: It does not appear to me to fall into that category, but I do not know the full circumstances. I saw the headline in passing, and it alerted me to the idea that this was actually related to a freedom of information request and the way in which it had been handled by the Scottish Government. I know no more than that, and I would not want to hazard any opinion on the matter.

Lord Robertson of Port Ellen: All right.

Lord Falconer of Thoroton: Lord Keen, you said a few moments ago that one of the reasons why the law officers should be in Parliament, in so far as they were English law officers, is so that they can deal with prosecution issues and generally in order to explain the position that the Government might take in relation to international law. I broadly agree with that. How does that sit with the confidentiality of law officers' advice, particularly in relation to international law issues?

Lord Keen: It does not require the law officers to say that they have given specific advice to the Government, and it does not require them to disclose what that advice is, but they can indicate, for example, that they consider that there is a respectable line of argument that could be adopted for the implementation of certain policies, or that there is not. The fundamental issue is whether the actual advice given to government should be disclosed, and I believe very strongly that it should not be; nor indeed should the very fact that advice has been given be disclosed.

Lord Falconer of Thoroton: That would envisage that in an international law issue—for example, Iraq or the internal market Bill issue—the law officers should be willing to debate whether or not it is in breach of international law and indicate to both Houses of Parliament what the argument is for it not being in breach.

Lord Keen: Provided they do not intrude upon the advice that has actually been given to government.

Lord Falconer of Thoroton: That is a bit unrealistic, is it not?

Lord Keen: You have to maintain that. You can be asked, "Do you consider that there is a means by which we could proceed in this fashion?", and the law officers can say, "It appears to us that there is a means by which this could be done". It is quite different from the question: "What advice have you given to the Government about this?", to which the response might be, "This is an extremely risky course of action, but you are entitled to do it". That is not what you are going to stand up and say in Parliament.

Lord Falconer of Thoroton: Do you owe any duties to Parliament? Obviously, there is honesty and straightforwardness. Are the law officers advisers in any shape or form to Parliament as opposed to the Executive?

Lord Keen: No; the law officers are advisers to the Crown and the Executive rather than to Parliament. That is my perception of the position.

The Chair: I would like to put a precise point because it was put to us in other evidence, which is the proposition that one codifies when it is appropriate to disclose advice, but the Government still retain the right not to disclose it but provide an explanation why they do not believe, under that codification, in a particular circumstance that they should release it. What would be the tolerability or downside of such an approach?

Lord Keen: I do not consider that that would be an appropriate approach because there are two elements to legal advice: first, the disclosure that it has been taken; and, secondly, the content of the advice. In my opinion, the Government should not be required to disclose either.

The Chair: They are content in the fact that they have taken it. In your view, that is the argument for keeping it confidential. Thank you.

Q57 **Lord Falconer of Thoroton:** Do you think any reforms are necessary to the law officers' ministerial responsibilities, Lord Keen?

Lord Keen: It does not immediately occur to me that there is a need for any reforms. I encountered a slight difficulty some years ago when I was, on the face of it, appointed Minister of State at the MoJ, and Sue Gray, who was then head of propriety and ethics in the Cabinet Office, came round to Dover House very quickly and said, "No, you are not, because you cannot be a law officer and a Minister of State". I got the same job under the designation of "Lords Minister", as far as I could see.

One has to take care about the scope of responsibilities of the law officer. They should not spill over into other areas even though they may be spokespersons for certain departments. I see no immediate need for further definition of the roles. They are, as I say, subject to observation by the Cabinet Office, and that is quite adequate.

Lord Falconer of Thoroton: Are law officers bound by a collective responsibility?

Lord Keen: I am sure they must be.

Lord Falconer of Thoroton: I think you were Advocate-General at the point that the Attorney-General gave a view about what the effect of a particular change in a negotiated deal with the European Union was, which on one view might be said to be unfavourable to the Government but, nevertheless, was his genuine view as to what the effect of certain changes was. Geoffrey Cox was then the Attorney-General, and he gave a report to Parliament about the effect of certain changes in the withdrawal deal.

When one is performing a role like that, presumably one is not seeking to put the best spin on it for the Government. One simply has to disclose

what the position is in a way that reflects one's genuine view, which is different from other Ministers.

Lord Keen: Yes, that is true. That was an exceptional case because the advice came only from the Attorney-General and not from the other law officers, but nevertheless—

Lord Falconer of Thoroton: Okay, that is fine. Those are my only questions on that.

Q58 **The Chair:** This is a question we have often asked. Could you capture what are the constitutional boundaries that constrain the law officers?

Lord Keen: The constitutional principles and policy require not just the law officers but the Executive as a whole to remain within the boundaries of the rule of law and not to cross them. I do not think there is any distinction between the position of the law officers and the position of the Executive as a whole.

Lord Robertson of Port Ellen: I am wondering about the whole question of the law officers being not just Members of the House of Commons but politicians. Recently, the Attorney-General appeared on "Question Time" on the BBC answering questions on a wide range of issues, including some that clearly bordered on the quasi-judicial. In fact, one of the questions was about Russian donations to the Conservative Party. Would you have gone on a Scottish television programme as Advocate-General and expressed views about a wide range of political subjects?

Lord Keen: I can say only that I have always declined such invitations.

Lord Robertson of Port Ellen: There are boundaries for law officers?

Lord Keen: One must be careful about the role of the law officer as distinct from the role of other politicians. One has to be careful not to compromise the perception that you are there to give objective legal advice to the Executive by suggesting that there are other means by which particular policies might be implemented, or other reasons for doing so.

Lord Robertson of Port Ellen: Do you think the same Ms Sue Gray might have popped up to say to the Attorney-General, "You can't be a Minister and a law officer at the same time"?

Lord Keen: You cannot be a Minister of State and a law officer at the same time, according to the advice I was given. You can be another Minister because, for example, Alistair Darling was both a Secretary of State and Advocate-General for a period. The argument that was presented to me was directed to the position of a Minister of State, so it may be rather technical. Law officers should be conscious of their role and careful as to what they say in public about wider policy issues of the Government.

Lord Robertson of Port Ellen: Thank you.

The Chair: That exchange has triggered a series of supplementaries, but before I come to them, which I will, Lord Hennessy, are you happy to wait to put your question after the supplementaries, or do you want to put it now?

Lord Hennessy of Nympsfield: I am quite happy to wait.

Lord Howard of Lympne: You have said, Lord Keen, that it is desirable for a law officer to be a Member of the House of Commons.

Lord Keen: Or the Lords.

Lord Howard of Lympne: Or the Lords. Members of the House of Commons at any rate are elected politicians, and they, invariably, are elected on the ticket of a political party. Why would it not be appropriate for an elected politician on a party ticket to appear on a programme such as "Question Time", notwithstanding the fact that they are also a law officer? They are not going to be asked, or if they are asked they will certainly not answer, any question about any advice they give the Government in their capacity as a law officer, but surely they are entitled to express their views in a public arena on matters of political significance because they are elected politicians.

Lord Keen: I do not disagree at all. My concern would be that in those circumstances the law officer should not indulge in speculation as to what their role as a law officer might be. There was a rather stark example. Someone in that position should not seek to publicly justify a particular course of action that they know, as a law officer, is inconsistent with the rule of law. That would compromise their position as a law officer, but otherwise I entirely agree with you.

Lord Hope of Craighead: You have mentioned the Ministerial Code. Do you think there should be a section in the code that deals particularly with law officers, setting out their duties and responsibilities?

Lord Keen: I do not feel able to answer that, I must confess, Lord Hope.

Lord Hope of Craighead: I put it because some witnesses have suggested to us that there should be, and obviously we have to reflect on the issue.

Lord Keen: At the end of the day, it is the Prime Minister's code, so it is for him to decide what he feels should be there to direct the conduct of Ministers. There may be some merit in doing that in order to spell out the particular role and obligations of the law officers in the context of their being part of the Executive.

Lord Thomas of Gresford: You said without hesitation, slightly to my surprise, that the Attorney-General was bound by Cabinet responsibility, but the Attorney-General is only invited to attend Cabinet. Do you think they are bound by Cabinet responsibilities and by Cabinet decisions?

Lord Keen: Subject to constitutional experts saying the contrary, I would say that anyone who attends Cabinet in these circumstances as a member of the Executive is bound by collective responsibility. I know that since 1928 the Attorney-General has not been a full member of the Cabinet, but it is usual for the Attorney-General to attend all Cabinet meetings, as I understand it.

Lord Howard of Lympne: Any Minister is bound, not just a Cabinet Minister.

Lord Keen: I would agree.

Lord Howarth of Newport: In answer to the question about what constitutional boundaries constrain the law officers, you said that it was primarily the principle of respect for the rule of law. If respect for the rule of law has become attenuated in government and within the House of Commons, what are the implications for the law officers?

Lord Keen: By implication, it makes their task a little more difficult. Be that as it may, it is their responsibility to remind government where those boundaries lie and that they have to be respected.

Lord Howarth of Newport: Do you think the political culture has become less supportive in this respect?

Lord Keen: No, I do not believe so in general. There are occasions where some policymakers believe that they have to go a step further than, strictly speaking, they should, and they press the matter.

To give an example, it is not unknown for some senior Government Ministers to seek independent legal advice on an issue and present it to the law officers of their departments and say, "Do you agree with this?" You sometimes find that they have three different opinions that they have cut up with scissors and glued back together again to get the answer they thought they wanted. One has to be conscious of that. At the end of the day, they respect the fact—and it is reflected in the Ministerial Code—that, where there is a legal issue, they have to take and accept the advice of the law officers.

Lord Hennessy of Nympsfield: Richard, you have mentioned several times in your evidence the special qualities that the law officers need to bring to the table of knowing where the boundaries lie. Do you think, in following up Lord Hope's question about the Ministerial Code, that they could, with benefit to all, have a recognised and special position alongside the Prime Minister for the overall sustenance of the Ministerial Code—a kind of inbuilt conscience against those, including the Prime Minister if need be, who are prepared to wobble on these matters?

Lord Keen: In general, the law officers are qualified lawyers, and in taking their oath when they join the Bar they undertake to respect what is essentially referred to as the rule of law, so they are conscious of that obligation. Would it be helpful to have it reiterated in the Ministerial

Code? Possibly, as I indicated, but I am not sure that I see it as being essential at the present time.

Lord Hennessy of Nympsfield: If it is not essential at the present time, when could it be?

Lord Keen: That I do not know.

The Chair: Is the existing statutory framework sufficient for setting that constitutional boundary for the law officers in relation to the rule of law?

Lord Keen: I believe it is. The rule of law is, in a sense, a somewhat nebulous concept. I have seen opinions in the past that say it is a matter of constitutional principle and constitutional propriety that we adhere to the rule of law in the sphere of domestic law, but there is no such requirement in the sphere of international law. There is nothing in black and white that says that is right or wrong, but, given the way in which our constitution works and develops, I would find that position very hard to justify.

It does not take you very long to understand why we identify the importance of these boundaries both at the level of domestic law and of international law. They are not hard. They are not fast. Dare I say that sometimes common sense comes into play? You know what is right and you know what is wrong. You know what a treaty says and you know what it does not say. You know what your obligations are and you know what the potential consequences are of you breaching your obligations, whether in domestic law or international law. You lose certainty, reliability and credibility. I am afraid it is at a somewhat general level. I accept that.

Lord Howell of Guildford: You mentioned again, and you are so right, the international law aspect. International law, with the world being what it is, is constantly being pushed and pulled, negatived, undermined and reinforced in vast areas. Our law officers obviously need to be au fait with that. Obviously, international law gets reviewed when we go to war with a country. Let us take Ukraine and the Russians now. As Russia breaks law after law—international, national and human rights—are we justified in changing our international law, abrogating, withdrawing and so on? Are those areas where international law is quite different from domestic law in the way one applies judgment to it?

Lord Keen: The operation of international law is perhaps more fluid and complex than the operation of domestic law. We have certainty because of our ability to legislate in a domestic sphere. In the area of international law, you have principles of international law; you have charters, such as the UN charter; and you have international treaties, all of which carry with them particular rights and obligations between nation states. You also have exceptions.

You mentioned Article 68 of the Vienna convention earlier, which applies between states where there is a fundamental change of circumstances.

You also have cases where a particular nation will abrogate its obligations under a treaty. It might be frowned upon by others, but it happens from time to time. It is not unknown. It is a question of how we as a nation state perceive our obligations in international law. As a matter of practice and precedent, we have always applied the constitutional principle that we will adhere to our international law obligations. Others may not.

A relatively trivial example is when Canada legalised cannabis, which on one view is contrary to some international charter obligations with regard to certain drugs and other substances, and nobody was particularly upset by that. It happens. It was inconvenient for it to adhere to its international obligations when it wanted to make that domestic change, and it happened.

However, if you have the Russian Federation entering Ukraine, it will tell you that it is adhering to international law in all that it is doing because it is simply a preventive measure. Everybody has to interpret their international law obligations. It is very difficult to hold a nation state to account regarding its international law obligations. You have the ICC and so on, but it is very difficult.

Some nation states are more cavalier about their international obligations than others, but, as I say, as a matter of principle and precedent we have always adhered very fiercely, I believe, to the notion that we will step up and be a reliable partner to other nation states, whether it be charter obligations, international obligations of a wider kind or our treaty obligations. We do not renege.

The Chair: Thank you, Lord Keen. Thank you for your courtesy in coming and talking to us today. I know you have a time constraint of 11.30 am, so I hope we have not abused your courtesy because it is precisely 11.30 am. Thank you very much indeed. Your thoughts were really interesting. They are very helpful and they are going to inform our consideration of this inquiry.

Lord Keen: Thank you.