HOUSE OF LORDS

Revised transcript of evidence taken before

The Select Committee on the Constitution

Inquiry on

THE OFFICE OF LORD CHANCELLOR

Evidence Session No. 4 *Heard in Public* *Questions 43 - 62*

WEDNESDAY 15 OCTOBER 2014

10.35 am

Witnesses: Rt Hon Chris Grayling MP and Rosemary Davies

USE OF THE TRANSCRIPT

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

Members present

Lord Lang of Monkton (Chairman)
Lord Crickhowell
Lord Cullen of Whitekirk
Baroness Dean of Thornton-le-Fylde
Baroness Falkner of Margravine
Lord Lexden
Baroness Taylor of Bolton
Baroness Wheatcroft

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Examination of Witnesses

Rt Hon Chris Grayling MP, Lord Chancellor and Secretary of State for Justice, and **Rosemary Davies**, Legal Director, Ministry of Justice

Q43 The Chairman: Lord Chancellor, may I welcome you to this sitting of our Committee and the inquiry we are carrying out into the Lord Chancellor's office? I stress to you—as I have to others and as the Committee has agreed among ourselves—that this is not an inquiry into the person of the Lord Chancellor. This is an inquiry into the office, and we intend to stick to that approach. I understand you do not feel the need to make an opening statement, so we will press on with the questions. First of all, how do you define the role of Lord Chancellor as distinct from the role of the Secretary of State for Justice?

Chris Grayling: I think the Lord Chancellor's role has two distinct facets to it. There are administrative functions, which I will come back to but, in terms of the overall, what is the role? First, I would describe it as having a stewardship role over the judiciary and over the justice system. The Lord Chancellor is no longer the most senior judge; no longer has a management role over the judiciary; no longer carries out judicial appointments; no longer has detailed responsibility for judicial discipline. The Lord Chancellor's role, in relation to the justice system, has the job of being the defender of the independence of the judiciary in government, and hence I talk about the stewardship role—a stewardship role over disciplinary matters whereby I am one of the co-signatories of disciplinary decisions but ultimately I would not seek to interfere. There are occasions when I might send something back and say, "Are you really sure?" but very rarely. Over judicial appointments likewise there is the ability to say, "Are you really sure?" but it is a stewardship role to make sure that the ship is sailing smoothly rather than a management role.

The second part is the role that the Lord Chancellor continues to play in relation to the Crown where, again, it is a ceremonial role, a stewardship role, with responsibility for Crown appointments, responsibility for a number of Crown orders and responsibility for legislation in the Channel Islands, for example. Ceremonial positions are not things you would normally seek to interfere in. You would not send back a royal charter and say, "No, I do not agree with this", but there is a ceremonial role as an officer of the Crown in performing a number of functions that continue to need to be performed. I think those are the things that are genuinely distinct in the role of Lord Chancellor.

Then the question obviously arises: how does that mesh in with the role of Secretary of State for Justice, and how do the functions that sit under the departmental umbrella divide

between the two? If you look back at the legal position, the Lord Chancellor has titular responsibility in primary legislation for the courts, for the legal aid system, for a number of parts of what the Ministry of Justice does. Equally, there are a number of ways in which the department has delivered economies of scale by having an integration of the different functions—one Permanent Secretary, for example—where the responsibilities move both sides of the divide of the job. But I think if you are saying, "What are the really distinctive features of the Lord Chancellor's role?" it is that stewardship role over the justice system and it is the ceremonial role performed on behalf of the Crown.

The Chairman: Could we not add to that a role as custodian of constitutional values?

Chris Grayling: Of course, to some extent the constitutional role of the department moved to the Cabinet Office, in fact I think in the last Parliament.[1] 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 proposed reforms to our constitutional arrangements, the debates about changing our voting system and the debates about the House of Lords sat within the Cabinet Office rather than within my department. The truth is today the constitutional role that the Lord Chancellor once performed, in a very practical sense, is not currently there.

In so far as there is an important element of our constitution, which is the relationship between Parliament, the Executive and the judiciary, yes, there is a role. That is where I talk about the stewardship role over the judiciary, the independence of the judiciary and the integrity of the justice system, which is a very important part of what I do. If you moved on to, say, the role of constitutional guardian, facilitator of change to our constitutional arrangements, that is really now with the Cabinet Office.

The Chairman: I was waiting in the hope of hearing you add to that list the upholding of the rule of law, your oath.

Chris Grayling: When I talk about stewardship of the independence of the judiciary and independence and integrity of our justice system, that is what I mean. What I would say though, Lord Lang, is that I regard the task of upholding the rule of law as not being something that simply resides with the Lord Chancellor. It is something that resides with every government Minister and I hope every Member of both Houses of Parliament. Yes, of course, it is an important part of what I do, but it is an important part of what all of us do, in my view.

Q44 Lord Cullen of Whitekirk: I would like to ask you about the rule of law. The written evidence from your department, the Ministry of Justice, states: "The rule of law plays an integral part in policy formation and operational management in the Ministry of Justice in practice". I would like to ask you by what means issues to do with the rule of law are identified and addressed within your department.

Chris Grayling: Well, really I think in the interaction between the policy teams, the ministerial team and the legal teams that we have working with us. We have long discussions about how best to shape what we do, but also discussions about how to ensure that we protect what I described earlier, the integrity of the justice system. For example, we

[1] The Lord Chancellor has pointed out that responsibility for a number of constitutional matters (including elections, party funding, relations with Parliament, devolution, House of Lords reform) was transferred by the current Prime Minister from the Secretary of State for Justice to the Deputy Prime Minister in June 2010.

have had long and difficult debates about judicial pensions in recent times. One of the important things that we had to ensure is that nothing in the changes that we had to make, because of financial pressure, could create a situation where the Executive or Parliament had the ability to exercise leverage upon the judiciary by saying, "If you do not do this, we will cut your pay or your pensions" or whatever. It is a difficult balance to find. One of the things you think through very carefully as you shape a reform, like the reforms we have put through to judicial pensions, is how we ensure that, in a time when there is less money to go around, we do not create the kind of levers that should never be there that enable a Minister to exercise pressure on a judge on an individual decision by using financial leverage.

Lord Cullen of Whitekirk: When it comes to formation of a particular policy, is there a routine search to see whether there is a rule of law issue, or does that surface only if somebody spots something that is, in fact, a rule of law issue?

Chris Grayling: It depends on your definition of a rule of law issue. We will make reference to all the different areas that we are obliged to follow. We do the various assessments required of us under equalities laws. We look at what is necessary under statute, custom and practice on consultations. We seek in the policies that we develop to ensure that we pursue a strategy that is consistent with the rule of law. Were we to bring forward a major change, we would clearly ask questions upfront about whether there was anything in what we were doing that was inconsistent with the rule of law.

Let me give you a practical example. We are embarking on what will be one of the biggest reforms to the court system in a very long time. The modernisation of the court system, with the generation of new technological systems to improve process, to improve access to the courts and to make it easier to launch and manage proceedings, will involve very substantial changes to the court estate, to court infrastructure, to court IT and to working practices. A central part of that will be to ensure that, nonetheless, what we shape protects the rule of law and protects access to justice in the way that you would want and hope.

Lord Cullen of Whitekirk: In practice in the past has there been any difficulty in identifying an issue that is an issue to do with the rule of law, or has it always been plain sailing?

Chris Grayling: If you take the example that I think was possibly on your list, we regularly have to take fine decisions about whether difficult decisions that we need to take are going to be judged by the courts to be lawful or not—and we sometimes lose judicial reviews—but we do so based on the best evidence that we have, the best legal advice that I have, and the best judgment of what is right and fair and what is not. Sometimes we are right and sometimes we are wrong. We are only human.

Q45 Lord Cullen of Whitekirk: One other question, if I may. Does your particular role enable you to convey to the Cabinet, or to Cabinet committees, any concerns that you have, as Lord Chancellor, in regard to matters to do with the rule of law?

Chris Grayling: Yes, it does. Let me give you an example of where that can and does apply. I think it is entirely fair for a government Minister involved in a case to say, "I disagree with what the court has ruled in that situation"—often prior to launching an appeal—and I think it is perfectly reasonable for the Attorney-General to say, "I am not happy that the sentence passed in a criminal court is adequate" and, therefore, to refer it back through the processes for unduly lenient sentences. But I do not regard it as acceptable for a government Minister to say, "That judge was bloody stupid. That was an idiotic decision". In such a situation, I

would always take the Minister concerned to one side and say, “That is not acceptable”. We have judges who—rightly—are independent. They have every right to reach the decisions that they reach, whether or not we disagree with those decisions. An integral part of the system that we have is that our judges are free and independent to take their decisions on the basis of the law in front of them. Sometimes the public and sometimes politicians will agree with them and sometimes we will not. That is all part of the way our system works, but, in my view, what we should never do is attack judges for reaching the decisions they have, in a way that denigrates the nature of the office they hold and the process they are part of. In a situation like that, I would have no compunction but to take a colleague to one side and say, “You should not do that”.

Q46 Baroness Dean of Thornton-le-Fylde: May I press that point a bit further with you, Secretary of State? You said you would take the Minister or the politician on one side and tell them. With your hat on as Lord Chancellor, would you not feel that that should be a public rebuttal? Then it would be clear that that was your position as Lord Chancellor, rather than taking them on one side and telling them privately, about which the world would never know.

Chris Grayling: I think it would depend on the situation. Fortunately, the situation has not arisen where I have had to take that kind of decision. Are there no circumstances in which the Lord Chancellor would have to publicly defend the independence of the judiciary? Of course there are circumstances in which that could happen and I would have no reticence in doing so. It is a matter of degree. Yes, of course, if the independence of the judiciary was seriously being questioned by a member of the Government, of which I am a part, I would have no compunction about saying publicly that that should not happen.

Baroness Dean of Thornton-le-Fylde: Secretary of State, since your appointment in September 2012, have you found it necessary to speak to any Ministers privately about public statements they have made?

Chris Grayling: I can think of one occasion when I did say something, but I do not think it would be appropriate for me in that situation to indicate when and how that was the case.

Q47 The Chairman: Before we go any further, I owe an apology to your colleague, Rosemary Davies, Legal Director at the Ministry of Justice. I should have welcomed you also. Would you like to add anything to what the Lord Chancellor has said so far?

Rosemary Davies: May I just add something in response to Lord Cullen’s question about how the rule of law issues are identified in practice? Looking at the wider rule of law issues, beyond the Lord Chancellor’s particular responsibilities about the independence of the judiciary, what we were getting at in that bit of our evidence is that the Ministry of Justice’s functions—almost everything we do—have a potential rule of law impact and an impact on access to justice in the broader sense. As a starting point for any conversation about new policy, questions will be asked about: what is the current law? Can we achieve our new policy objectives lawfully? If not, can we change the law and in what way? There is a presumption always that the law must be complied with and in that sense the rule of law is central. When we are considering contentious policies, like cuts to legal aid or changes to the judicial review system, access to justice concerns are obviously taken very seriously in the department.

Chris Grayling: It is worth just adding that that is not unique to my department at all.

Rosemary Davies: No.

Chris Grayling: It is really important to say that the rule of law is not something that is simply a matter for the Ministry of Justice. It is a matter for every government department, every Minister. Indeed, the ministerial code dictates that we should all be guided by upholding the rule of law. That does not mean we always have to agree with the law, because part of our role is to change it where we do not believe it is right for the job and it needs to be updated, modernised or changed. Upholding the rule of law, and upholding the independence of the judiciary, the courts and the integrity of our justice system, should be a function of every Minister regardless of which department they serve in.

Rosemary Davies: And every civil servant and government lawyer. It is in all our codes of conduct.

Q48 Lord Lexden: Lord Chancellor, in view of what you have just said, shall I take it that you think it could be advantageous to make it a specific duty on all Ministers to uphold the rule of law?

Chris Grayling: I think it is already. It is very clearly in the ministerial code so I think that is already there. I see that as an integral part. It is absolutely fundamental on any one of Her Majesty's Ministers to uphold the rule of law.

The Chairman: Were you going to ask the next question, Lord Lexden?

Lord Lexden: We are moving to question 4?

The Chairman: I was thinking of question 3, the specific duty, but do you feel that is covered?

Lord Lexden: The Lord Chancellor said that there is a duty at the moment, so the only issue that remains is whether it should be made more specific than it is at the moment under the ministerial code. Do you think it should be?

Chris Grayling: Every one of us is bound to adhere to the ministerial code so I would argue that that is there already. I think it is just a fundamental part of being a Minister and, indeed, has always been so in this country. One of the things that makes our democracy strong is that, unlike in some other parts of the world, we have always had Ministers who did believe in upholding the rule of law.

Lord Cullen of Whitekirk: I may be wrong in my recollection, Lord Chancellor, but I seem to recall that the ministerial code deals with compliance with the law, whereas the rule of law is a much wider concept covering a lot of other matters. I may be wrong about that, but that is my recollection. Perhaps that could be noted by you.

Rosemary Davies: It is to comply with the law, including international law and treaty obligations, and to uphold the administration of justice.

Q49 The Chairman: I think I should indicate that some of our witnesses have taken a slightly different view. I know that your oath obliges you to respect the rule of law. I think there is a view that there is a more custodial role in some quarters. The Bar Council in their evidence to us, for example, referred to the Lord Chancellor as the constitutional conscience of the Government. I think that implies a specific philosophical overview required of you. Is that something that you feel is part of your remit?

Chris Grayling: Yes, it is, but I do not think it is unique to me. The point I would make is that every one of us should be a custodian of the rule of law. Whether or not the Lord Chancellor has a distinctive position, I like to think every Minister should treat this as being of paramount importance. It is absolutely fundamental to our society. If you said to me, "Does the Lord Chancellor have a duty to say, 'Hang on, we are doing something here that is not consistent with the rule of law'?" yes, I would agree with that. But then I would say that the Prime Minister, the Deputy Prime Minister and all other Ministers have that same duty. Whether there is a constitutional extra, I would not disagree with that but I do not think that should downplay the importance of every Minister upholding the rule of law.

It is also the case that "rule of law" is a broad phrase. It can mean a number of different things. What do I mean by "the rule of law"? I think it is about 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—as I said earlier—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. To me, if you said to me, "What is the constitutional role of Lord Chancellor?" it is to make sure nothing impinges upon that.

Q50 Baroness Falkner of Margravine: Lord Chancellor, many years from now—when you are writing your memoirs and you look back on this anomalous period, where suddenly the Lib Dems are in government with you and the divvying up of jobs was rather more constrained than it might have been—when you reflect on this period in this role, with hindsight, do you think you will perhaps suggest to successors that they might want a lawyer in the job? Has there been a difficult and steep learning curve for you as a non-lawyer? Do you think there are perhaps advantages in having been from within the camp rather than from outside it?

Chris Grayling: My view is that it is a positive benefit for the Lord Chancellor not to be a lawyer. The reason I say that is, certainly at this moment in time, when we are having to take and would be taking difficult decisions regardless of the situation, if we had a distinguished member of the House of Lords occupying the traditional role of Lord Chancellor overseeing the courts today, there would still be the same financial pressures that my department and my team are currently facing. 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, not from the perspective of the Bar, not from the perspective of the solicitors' profession and not from the perspective of the legal executives. As long as you take very seriously the duty to uphold the principles I talked about earlier—uphold the independence of the judiciary, uphold the independence of our courts—I think there are benefits in not having a lawyer. It does not mean a lawyer cannot do the job, but it is really important to say I think there are benefits to having a non-lawyer in the job as well.

Baroness Falkner of Margravine: I can see your perspective in terms of vested interests. We have had a very interesting response from our interlocutors on this one. On the whole, people believe that the Lord Chancellor should have experience as a lawyer, "In order to have a deep understanding of the delicate balance on which our constitutional arrangements have been based, who can defend the values"—you have not said a word as yet about the values—"on which the Constitution is based, in particular the independence of the judiciary". You have said quite a bit about that.

Chris Grayling: I have talked about the independence of the judiciary—

Baroness Falkner of Margravine: I am emphasising the values.

Chris Grayling: Which values have I not talked about?

Baroness Falkner of Margravine: The values on which our constitution is based.

Chris Grayling: But which ones have I not talked about?

Baroness Falkner of Margravine: I think it is a more amorphous sense that someone who has trained as a lawyer has come through with very clear, full frontal experience of the balance of ethics as well as responsibilities in upholding the law. That is the sort of thing that lawyers are very concerned about—and others by the way, academics who are not lawyers, so it is not just vested interests. It is not directed towards you, as our Lord Chairman has already said. It is directed to the idea that this very particular role in our constitution of the guarantor, the guardian of our constitution, should not have come from a background where the emphasis on the ethical part and the values part is quite significant.

Chris Grayling: You talk about ethics. That is just what I have talked about. I have talked about the ability to have a system that cannot be influenced, cannot be corrupted, where judicial independence is sacrosanct, where there is no attempt or no ability to wield undue pressure on the decisions taken by judges. Which ethics are you talking about that I have not been talking about?

Q51 Baroness Falkner of Margravine: I do not think we have the time to go into this. I will leave that on the side, but I hear from you very clearly that you think it is perfectly fine for the officeholder not to be a lawyer. One final other thing that I would like to come in on is the diversity of the senior judiciary. Are you comfortable with the current levels of diversity in the senior judiciary?

Chris Grayling: The answer to that is, no, I am not. I want to see a much more diverse senior judiciary. What I am encouraged by is the Judicial Appointments Commission. I give full credit to all of those who work on that commission for the work they have done, and indeed to many of the women who hold more senior judicial positions and do a lot of mentoring themselves of young potential recruits for the future. We are now in a position where around half of the new appointments made in recent selection processes have been women and that is good. I want to see more people come forward from minority backgrounds as well, and work is being done on that. Of course, it takes time to work through the system. If I look ahead now, the next round of senior appointments will be in three, four or five years' time.

Baroness Falkner of Margravine: Three years, yes.

Chris Grayling: I think there are some good women now at the next level below. I hope some of those will emerge into the most senior positions. If you ask me if I am comfortable about having a senior judiciary dominated by men as it is now, no, and I want it to change.

Baroness Falkner of Margravine: White men.

Chris Grayling: Indeed, but I want it to change. I want it to change as soon as possible. At the same time, you cannot artificially promote people before they are ready for it. What I want is a properly managed succession planning system that has a whole diversity of candidates coming through who can fill those senior posts in the future. I would be very disappointed if

we were sitting in this Committee in four or five years' time and we still had the mix of people in the senior posts that we have today. I am cautiously optimistic that will not be the case.

Baroness Falkner of Margravine: But you would not go so far as to tell the JAC to go back and find someone else, "Try again"?

Chris Grayling: If I were to ever do that, it would be a matter of strict confidence between me and the JAC because to do so publicly would be for the Lord Chancellor to publicly undermine individual candidates, which I would not wish to do. I would not hesitate to do so, but I would never say so publicly if I was going to.

Baroness Falkner of Margravine: But the result of doing so would be evident in an appointment, so one would know whether—

Chris Grayling: It would not necessarily be because if a name was put to me and all I can do is refer back to think again, then nobody would know who had been put forward in the first place and nobody would know whether that was different from the person who was put forward in the second place.

Baroness Falkner of Margravine: No, but having seen the—

Chris Grayling: Forgive me, but I would have no compunction but to do that. In the final analysis, it will always be a matter for the Judicial Appointments Commission to say, "Do we really have this right?" but you would understand I could never make public if I had done that or if I were going to do that.

Baroness Falkner of Margravine: Yes, of course.

The Chairman: I think Lord Lexden wanted to come in behind Lady Falkner's earlier question.

Q52 Lord Lexden: Mr Grayling, you have spoken of the benefits of the post of Lord Chancellor not being held by a lawyer. What of the disadvantages?

Chris Grayling: Given the fact that the Lord Chancellor's role has changed significantly so there is no longer a judicial role in the way that there was, I do not think that the person holding my job suffers from not being a lawyer. I appreciate the constitutional difference, but we do not need a Health Secretary who is a doctor in order for them to understand how the health service should shape and deliver its services. I do not believe you need to be a practising lawyer and to understand the minutiae of individual parts of the law and have experience in court to understand the need to protect the values of our justice system. I do not think there are disadvantages. I am not saying it is not right for a lawyer to hold the job, but I think there are advantages in not being a lawyer, particularly in difficult times, which are not to my mind counterbalanced by the advantages of being a lawyer. I think it is fine to be a lawyer; you do not suffer a disadvantage. But in the job I do, particularly when I have a high-quality legal adviser sitting alongside me, I do not feel the lack of legal expertise makes my job more difficult.

Rosemary Davies: I certainly do not think lawyers could claim to have a monopoly on ethics.

The Chairman: Right, let us move along to the next question. You will find our questions tend to interlock quite a lot, so there may be an element of repetition. Lord Cullen, would you like to ask this?

Q53 Lord Cullen of Whitekirk: I think you just touched on that point a moment ago, that the written evidence from the ministry states that the holder of the office of Lord Chancellor always has access to specialist legal advice in respect of his or her functions. Some of the witnesses we have heard from have suggested there is a shortage of legal advice at a sufficiently senior level within the department so far as advising you as Lord Chancellor. There has been mention made of comparatively short lengths of tenure and possibly staff being taken off to other departments. Are you satisfied that you have adequate legal advice from the point of view of seniority and numbers?

Chris Grayling: I am. Basically I have an entire floor of lawyers. I have some very good lawyers. I get some pretty good advice from them. I also have access to the team of First Treasury counsel. I have access to legal advice from the government law officers. Indeed, I do have a lot of private conversations with senior people in the legal world and the justice system outside. I do not feel a lack of access to good advice. One thing we do not lack as a department is qualified lawyers.

What I would say is that, of course, in relation to some of the structures that would perhaps once have been apparent when the Lord Chancellor's office was here in the House of Lords, that expertise is still there. We have good teams of legal advisers in the Judicial Office, for example, as well as in my department. I am comfortable that I have access to good legal advice. As you know, if you put a certain number of lawyers in a room you will never come up with one single opinion, so whether that advice always gets it right is a different question. I do feel that I have a good team of lawyers and a good team of lawyers who will speak the truth. I do not feel that I am surrounded by people who are just saying, "Minister, that is fine, you can get away with it". If a part of a package is not going to work, the lawyers will tell me that.

Rosemary Davies: It does slightly worry me that there is a perception that the Lord Chancellor is not getting the quality of legal advice that he used to get and perhaps there is an issue about visibility that we should think about. There are 60 lawyers in the in-house public law advisory team, two legal directors and seven other senior Civil Service lawyers. For example, the lawyer responsible for the team advising on the judiciary and courts is about to retire, but he has been in the department and its predecessors for I think 38 years. Likewise, the lawyer responsible for the judicial review reforms has been in the department for something like 27 years. I am not quite sure where this perception has come from that everybody has gone. Obviously, there are lots of new people and people do move around—and generally that is a good thing—but there is no shortage of continuity. We are now part of the Treasury Solicitor's Department, so we have access to the Treasury Solicitor and to litigation, commercial and employment specialists.

Q54 Baroness Wheatcroft: No shortage of lawyers with experience in the department but, Lord Chancellor, you mentioned that you also have access to the law officers. I wonder if you could tell us a little bit about how often you consult with the law officers. Do they bring issues to your attention?

Chris Grayling: Very regularly. I have had very good relations with both Dominic Grieve previously and Jeremy Wright now all the way through. I talk to them regularly, seek advice regularly. If you take the example of the prisoner voting issue, I had very long conversations with the Attorney-General then trying to get thoughts together on how we should best respond. No, I have good relations with them and, indeed, with the Solicitor-General as

well—who I think is very good—and, indeed, his predecessor. I have close relations with them. We talk and work together regularly.

Baroness Wheatcroft: Are they active in bringing issues to your attention in advance of them becoming big issues?

Chris Grayling: If there was something, yes, they would certainly do that.

The Chairman: Of course you sit in Cabinet, Lord Chancellor. The law officers do not. Therefore, you might become more quickly aware of issues where the rule of law was at stake than the law officers might. Is that something that you have experienced?

Chris Grayling: Not necessarily. The Attorney does sit in Cabinet. I have yet to go to a Cabinet meeting where the Attorney has not been there.

The Chairman: Really?

Chris Grayling: Although he may not be designated as a full member of the Cabinet, he none the less attends Cabinet all the time. Indeed, he is a member of the National Security Council—which I am not—so some of the more challenging international legal issues he would get. They would not come to me; they would come to him first and foremost. I do not think you should feel concerned that the Attorney is somehow outwith the key issues that arise. He is not.

Q55 Baroness Taylor of Bolton: Lord Chancellor, you will be aware that there is quite a significant amount of concern about the fact that you wear these two hats as Lord Chancellor and as Secretary of State for a very important department. Why do you think there is that much concern?

Chris Grayling: I think it is misplaced concern. 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 and that somehow decisions that are being taken are being taken in order to protect the prisons, for example. That is simply not the case. I think if you were to try to create a departmental split, what you would be doing is duplicating infrastructure that would add cost rather than reduce it and put additional pressures on front-line services. We have one directorate. We have shared services. If we had two separate departments, we would be splitting all that apart and taking on extra costs and, therefore, have less money to spend on legal aid and the courts.

If you look at the things I have done in my current role, by far the biggest project in financial terms is on the Lord Chancellor side of things in the courts. We have just embarked on an enormous programme of modernisation of the court system, which is designed to improve access to justice, to improve the process of justice and to get rid of some of the things that frustrate, whether it is the barristers who find that days in court are lost because of misplaced documentation, whether it is police officers having to sit in court all day waiting for their case to come up because the defendant has not turned up, or whether it is the complexity of dealing with the court, sending paperwork to the court, the bundles of paper you still see in every courtroom. These are things that all need to be consigned to the past and what we need to have is a high-quality, digitised, modern, victim-friendly court system that is fit for the 21st century. I have secured the funding from the Treasury to do that. We are spending more in capital on doing that than we are on other parts of the department, so I do not see an inconsistency.

What I do think is that by pooling the expertise in areas like estates, in areas like IT, we get more bang for the buck across the department than we would otherwise have. I do not believe this is a problem. Yes, it is the case that every part of the department has faced pressures. It is certainly the case that we have had to take difficult decisions, though the irony is that some of those who look at me and say, "He is not a lawyer. He does not understand", can forget the fact that the biggest changes to legal aid and legal aid entitlement were carried out by my predecessor, a distinguished QC. I think it is a misjudgment to think that the current structure of the department somehow disadvantages the rule of law or disadvantages access to justice and that somehow we are kind of bunging all the money into the prisons. Seeing some of the pressures in the prisons over the last few months, with staff shortages, might give some reassurance that the pressures are not simply being felt in the courts and the legal aid system.

Q56 Baroness Taylor of Bolton: In your response to our questions about your wide responsibilities and budgeting, you give the impression that you regard the budget for both hats as one thing and that you regard cuts as across the border. You are now implying that you have given some priority to the Lord Chancellor's role. Do you see yourself having two totally different sets of priorities that you have to balance or that the Treasury balance?

Chris Grayling: What is important is that, in taking a decision about a financial change, yes, I have a duty to make sure that I do not believe that it inappropriately compromises the justice system. Take the example of judicial pensions—something I inherited from my predecessor but where I pushed through the changes. I thought long and hard about that, because I understand the issue around pensions and, indeed, the legal protections for judicial remuneration. It should never be the case that the Government of the day seek to use changes to pay as a way of putting pressure on the courts to behave differently. That would be an outrageous travesty of our constitution. At the same time, it was not realistic to say to the nation and to the public sector as a whole, "We are tightening up the public sector pension arrangements for everybody except the judges because they have a separate constitutional arrangement". I think that would have undermined credibility in the judges. I had to think very carefully about the package of change. I had to make sure in my own mind that I did not think it would do lasting damage to the independence of the judiciary. Now, I have sought to make sure that we have done that. I do not think it will. I think the package there is still one that is better than is on offer elsewhere and will still be attractive to people joining the judiciary, but that is a factor that I take into account before taking a difficult public spending decision.

On the legal aid front, likewise, I have not sought to withdraw entitlement to legal aid, with three exceptions. We have put in a net earnings limit beyond which you have to fund your own defence, but that is set at a level of a six-figure salary. People in our prisons have limited access to legal aid for matters related to their sentence, as opposed to the prison they are in, because we have a prisons ombudsman system to deal with complaints about the nature of the prison system itself. We have sought—and we are currently appealing on a lost decision—to impose a restriction on access to legal aid, which says that you have to have arrived in the country and made a contribution here before you can start to access our civil legal aid system. I still defend that. I think it is a principle that is right and proper. Some people disagree with me. We have made a number of exceptions to protect the most vulnerable people who arrive in this country—for example, asylum seekers—but my personal view is that it is not undermining the rule of law to say that we should not be

funding people who do not come from this country, and have only just arrived in it, to go to our courts at public expense to pursue cases unless the circumstances around their case are pretty exceptional. I do not think that undermines the rule of law. I think it is common sense about protecting confidence in our own system.

I have not talked about the other changes I have had to push through. I am afraid there have been difficult decisions about how much we pay the lawyers, and I am very sorry that we have had to do those. I have said to the legal profession that I am really sorry on more than one occasion. I would not have wished to come into this job to have to take that kind of decision. But the reality is, as you have seen, that the public sector continues to face some pretty big spending challenges.

Baroness Taylor of Bolton: I think that most Members of this Committee will have to restrain themselves from talking about policy issues at the moment because that is not our role. Therefore, can I change issues and talk about the Constitution?

The Chairman: Before we do that, Lady Taylor, I do not know if Lady Dean wants to come in on the earlier issue.

Q57 Baroness Dean of Thornton-le-Fylde: Yes, just very quickly about this duality of the role, Secretary of State. Do you think it is important that the public generally feel comfortable with the independence of the judicial system, the separation of the judicial system from the political system, that their perception of that is a positive one? Certainly, a lot of the evidence that we have had from some surprising quarters, in some cases, is that that has been endangered by the change that has taken place. Do you think it is important that the public—

Chris Grayling: By which change?

Baroness Dean of Thornton-le-Fylde: The change in the role of the Lord Chancellor also being held by a senior member of the Cabinet.

Chris Grayling: I do not think it has had any impact on it at all. I think the issue about the judiciary is the same issue that we all face as Members of our two Houses of Parliament. The reality is that, as we know, both Houses of Parliament are homes to some very smart, thoughtful, intelligent debate about the issues that face this nation. Both Houses of Parliament are made up of committed public servants who do this because they believe in the future of the country and the well-being of our citizens. Most of the time that gets no attention whatever. It is only when things go wrong or become controversial that somehow we are sprayed all over the media.

The truth is, in relation to our judiciary, up and down this country, day in, day out, week in, week out, we have judges taking wise and sensible decisions in difficult cases where they try to balance the interests of the victim with the nature of the offender—for example, somebody who comes from the most difficult and challenging background who has an addiction—and try to find the right balance and, in my view, do a pretty good job of it. They sometimes pop up in the papers because a judge says or does something daft, but we are all human and that happens. I think it is important that when that happens you defend the individual and say that judges are free to take the decisions they do, whether they get it right or wrong, but also that the judges up and down this country are taking wise and sensible decisions in the interests of everyone in this country. We should cherish and

support that. I do not believe anybody is out there saying, "I am not so sure about the judges these days because the role of the Lord Chancellor has changed".

Baroness Dean of Thornton-le-Fylde: With due respect, that was not my question. My question was about the dual role of the Secretary of State for Justice alongside the Lord Chancellor role. The people holding those positions have traditionally been not only very different but also—with all due respect to you, a very able politician, possibly mid-career path, going on to bigger things—in the past a Lord Chancellor would have succeeded in their career and that is it. They are not seeking any ambition of promotion. As to the two roles being brought together within the Cabinet, in the past there has been a feeling of comfort, I would suggest, among a lot of people outside the Cabinet that, while those two roles were there, the Lord Chancellor was fighting the corner to ensure the independence of the judiciary, whereas the Secretary of State was having to carry through the political decisions. Do you see any conflict in those two roles being held by the one person, yourself in this case?

Chris Grayling: I do not. I think now, given the constitutional changes that took place a decade ago, the role of the Lord Chancellor would be massively devalued if the roles were separated. It is not something I had fully understood until I took the job. But now I have truly understood in carrying out the role myself, I think it would be just the opposite. The danger would be that you would end up with the Secretary of State for Justice holding the Cabinet position. The Lord Chancellor's role is not what it used to be. It used to be Speaker of the House of Lords; it used to be the most senior judge, plus the other elements of the role. It was a very weighty role. If you take away parts of the current job you then end up with the situation the courts are in now: a semi-independent agency run between the Lord Chancellor and the Lord Chief Justice. So the Lord Chancellor does not have executive responsibility for the courts in quite the same way that would have been the case in the past. Are you going to have two people around the Cabinet table? I am not convinced. You might find that splitting the roles relegated the Lord Chancellor to a junior ministerial post in the House of Lords, which I do not think would be good for the role. You want the Lord Chancellor, in a role that is not what it used to be, to be at the top table heading a substantial department with weight around the Cabinet table. I think it would be a big mistake to move away from that.

Q58 Baroness Wheatcroft: Lord Chancellor, you mentioned the case of people with multiple problems finding themselves in court, addictions and so on. One might have hoped that having the roles combined might enable Government to take a more holistic approach to dealing with people in those sorts of situations. However, it is my understanding that the Liverpool court, for instance, was recently closed because of cost, whereas if one had looked at it in the round and over the longer term, there is a very strong body of opinion that says that this was a means of long-term savings and rebuilding lives. Can you explain how it is that that should happen when you have been talking about trying to modernise the justice system?

Chris Grayling: There is an interesting question in this area. The Liverpool court was being underused and we had two buildings within a mile of each other. Yes, there have been some difficult decisions taken. It was one that was in the planning I inherited when I took over the job. There is an interesting debate to have about whether this country should pick up some of the examples from the United States, drug courts being a case in point. I have had quite a lot of representations about it. I am not closed to the idea. It does place our judiciary into a

very different kind of role. In the States in the drug courts, they are almost case managers in some respects, "Come back in. I will find out next Monday how your rehab is going. If it is not going well, you can spend the night in jail". It is a very interesting model. It would involve a very massive shake-up to the way we operate. I have not sought to pursue that kind of shake-up up until now because my main focus in reform terms has been within the rehabilitation system—the changes that we have been rolling out to support for those people who get none at the moment, the short-sentence prisoners, delivering a proper through-the-gates service at the end of prison. Those reforms are coming to fruition in the latter part of this year. I do not rule out us then taking a serious look at whether there are lessons to learn from elsewhere.

It is a separate question to the modernisation of the courts, though, where the truth is that we have too many old buildings. We have towns with a Crown Court, a Magistrates' Court and a County Court, all with a security guard sitting on the front desk, often in an old-fashioned building with a lack of modern technology. What we are trying to do is to create something that is much more modern, much more fit-for-purpose, much more victim friendly, much more accessible, and improve access to justice that way. But I do not think you should assume that that reform automatically precludes the kind of things I have just been discussing.

Baroness Wheatcroft: That is reassuring, but in the short term one would have thought that bringing the responsibilities of Lord Chancellor under the Justice Department and making that obviously on a par with other Cabinet roles might enable departments to work together more closely on this sort of thing. Is that happening?

Chris Grayling: I think so, yes. I certainly think we do operate as a team. We work across departments. We have one single criminal justice system. For example, one of the programmes we have in development at the moment is called the common platform. It is designed to digitise in a single system police, courts, probation, the defence, the prosecution and CPS. The nirvana is a situation where if you want information about an individual you have one place to go for it. The case files are all there, the witness statements are all there, and things do not get lost in the system. The system works efficiently and the records are there, so that probation can look back and understand slightly more carefully what they are dealing with. I think there are huge benefits to gain. I do not think that we benefit from operating in silos and if we simply fragmented the department again I think we would end up in a poorer place and a more expensive place.

Baroness Wheatcroft: Can social services and welfare and education—in that nirvana you talked about—all work together to deal with these victims?

Chris Grayling: Yes.

Q59 Baroness Taylor of Bolton: I want to go back to the traditional role of the Lord Chancellor as the heavyweight in Cabinet, the person who was custodian of our constitutional values. When you were answering questions at the beginning, I think you said that the custodial role, in terms of constitutional values, had passed to the Cabinet Office and to the Deputy Prime Minister.

Chris Grayling: The constitutional structure; the values are a different question.

Baroness Taylor of Bolton: That is exactly the point.

Chris Grayling: It then becomes an interesting mix. For example, on the discussions at the moment about devolution and English votes for English laws, although being led by the Leader of the House in his capacity as First Secretary of State, that work has been driven from the Cabinet Office. The part of the department that was once the Department for Constitutional Affairs, the constitutional affairs bit has moved to the Cabinet Office. Then your question is: when you are talking about constitutional values, what are you talking about?

Baroness Taylor of Bolton: Yes. Can we just make a distinction between policy and overall—

Chris Grayling: Indeed.

Baroness Taylor of Bolton: Yes, because the examples you gave were voting systems and House of Lords reform and things like that. They are policies.

Chris Grayling: But then what you get back to the constitutional values, the principles, being what I described earlier. The most fundamental constitutional values are around the relationship between legislature, Executive, and judiciary and courts—which are the three legs of our constitutional arrangements—and in particular the relationship that exists between our independent judiciary and the two legs of the democratically elected part of our system. As I said earlier, I think protecting the independence and integrity of that relationship is a very important part of what I do.

Baroness Taylor of Bolton: Within Cabinet, if a big issue is coming up about, for example, where we are now post referendum, if this had happened 10 or 12 years ago, the Lord Chancellor would have had a very significant role. He would probably have chaired Cabinet committees on that. He would certainly have been expected to talk within Cabinet about the wider implications and looking at the constitution as a whole rather than just one narrow area of policy.

Chris Grayling: That is correct. But with the 2004-05 reforms and the structure that followed, creating the Department for Constitutional Affairs and then the changes at the time in the Ministry of Justice, the last Government moved those responsibilities into the Cabinet Office.[2]

Baroness Taylor of Bolton: Yes, but we are talking about who should have a constitutional overview looking at the actual values and the wider implications rather than some of the simplistic policy areas that can come out in—

Chris Grayling: I do not think they are very simplistic if you are talking about the constitutional structure of the United Kingdom. I do not think that is simplistic at all.

Baroness Taylor of Bolton: Absolutely, and that is the whole point. If you are talking about individual policies, which can be simplistic, who is responsible within Cabinet for making sure that we are not creating more problems by those individual policies and threatening and undermining the overall stability of our constitution? Let me just give you an example. When it comes to any spending department, the Chancellor of the Exchequer is always making sure that everything holds together. Who makes sure that our constitution holds together?

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[2] The Lord Chancellor has pointed out that responsibility for a number of constitutional matters (including elections, party funding, relations with Parliament, devolution, House of Lords reform) was transferred by the current Prime Minister from the Secretary of State for Justice to the Deputy Prime Minister in June 2010.

Chris Grayling: I think if you look back at recent history, the only answer to that can be the Prime Minister. If you look at what has happened over the last 20 years, I would take the view that the changes to the constitution put in place by the last Government were ill thought out and left some big unanswered questions. The biggest of those quite clearly is: what is the role of English MPs in relation to Scottish MPs, Welsh MPs and Northern Irish MPs? We have a situation in this country today with a number of policies and let us take the most obvious example. In the last Parliament, the then Administration trebled tuition fees in a vote that was carried by Scottish MPs voting, although English MPs had voted against, even though that measure did not apply in Scotland. We have a flawed constitutional settlement. That flawed constitutional settlement dates back to a time when the previous Lord Chancellor structure existed in the late 1990s, where you had Lord Irvine as Lord Chancellor, but that change was driven by the Prime Minister. If you said to me, "Has the Lord Chancellor ever been the guardian of the constitutional framework?" I would say it is not obviously apparent to me that that was the case. Absolutely, the guardian of the relationship and the independence of the judiciary, the court system, the justice system and the relationship between that and the legislature and the Executive—yes, absolutely. But in terms of the broader constitutional picture it is not clear to me that that role really existed because those reforms were not driven by the Lord Chancellor's Department at the time.

Baroness Taylor of Bolton: As someone who was in Cabinet at that time and attended those Cabinet meetings, I can assure you that the Lord Chancellor had a very significant role.

Chris Grayling: Okay. The current Lord Chancellor would have a significant role in arguing this case, but the then Lord Chancellor did not have responsibility for the constitutional settlement. If he did, well, I am not sure he got it right.

Q60 Baroness Falkner of Margravine: International treaties, international obligations—do you see those in that list you have just told us about?

Chris Grayling: The answer to that is we have a duty to uphold international treaty obligations. It does not mean that we cannot argue for changes to them and there is an important distinction between the two. When I made the statement I did in the House of Commons about the prisoner voting issue, I accepted that my duty to uphold the rule of law would probably preclude me and I would—as and when the circumstances arose—have taken the proper advice of Rosemary on my left. We had discussions about this at the time. I do not believe that I would be able to serve as Lord Chancellor and to vote against giving votes to prisoners because that is a decision of the European Court.

Baroness Falkner of Margravine: I was thinking about the European Convention on Human Rights where your former colleague—another law officer—clearly takes a very different position from you.

Chris Grayling: He disagrees with me. But as to the policies that the party announced as opposed to the Government announced—it is important to make that distinction—nobody has seriously questioned the legality of them. What we have effectively sought to set out is a process of renegotiating a treaty and then, if not successful in doing so, exercising our right under that treaty to withdraw from it. To my mind, the policies that we have put forward as a party are completely consistent with the rule of law. The original convention expressly allows members to denounce that treaty, to give notice and withdraw from it. We have indicated that, if we were not able to reach accommodation with the other members of the

Council of Europe on the kind of arrangements we have in place, we would exercise that right. There is nothing inconsistent with the rule of law in doing that.

The Chairman: I think we are getting into deep political water here and we are short of time, so perhaps we should move on to the last question, from Lord Lexden.

Q61 Lord Lexden: Lord Chancellor, could I ask you to summarise for us the extent and nature of your contacts with senior members of the judiciary, particularly in relation to the independence of the judges and the rule of law rather than the practical administration of justice?

Chris Grayling: I see them all the time—regular meetings with the Lord Chief Justice, regular meetings with other members of the senior judiciary. I hope and believe I have a good relationship with them. On occasion I have sought their advice. Clearly with the Lord Chief Justice I have a number of areas of common responsibility. I last met him yesterday to discuss many of those. I hope and believe that we have a good and constructive relationship, and I think that is important. I have that relationship with Lord Judge. I have that relationship with Lord Thomas, but also with other members of the senior judiciary.

Lord Lexden: The impression that we have from our evidence sessions, as far as senior judges are concerned, is that their interest lies primarily in their relations with Parliament perhaps to a greater extent than their relations with you. What is your view of the current arrangements by which a letter can be written? Under the arrangements of the last 10 years there has been very limited contact between the senior judiciary and Parliament, the House of Lords in particular. Do you think there is a case for change?

Chris Grayling: I do not. I think it is important that we keep the judges out of the political process. It is in their interests that that should happen. I think the Lord Chancellor can and should be a conduit if there is real concern about their independence being questioned. One of the reasons why there is not a lot more to say about this is that, fortunately, that has not happened in my time. Nothing has happened to give me cause to believe that changes elsewhere in government are impinging on the independence of the judiciary. I would certainly act if I thought that was the case, but I do not think so. There is nothing in sight to that effect.

I think there is a real danger in having more discussions between Parliament and the judges because inevitably they get into debates that are before this House. The judicial review reforms are a case in point. My personal view is that judicial reforms are necessary; they are proportionate; they are dealing with an area that I think is not working appropriately and is damaging the relationships between Parliament, the legislature and the judiciary, in a way that is unnecessary. I believe they uphold the principle of judicial review while putting some sensible parameters in place. That is a political discussion. I suspect we will have a lively debate when these matters come before your House again next week. I really do not think it is sensible to get the judiciary individually involved in that kind of discussion because, inevitably, it draws them into political debate in a way that I do not think is right and proper. I do not think it helps them. I do not think it is good for them. I think it undermines the independence and the integrity of our judiciary, so I very strongly believe that it would be a mistake to start having teams of judges sitting in front of Committees like this engaged in discussions about topical matters, because I think it would undermine their role.

Q62 Lord Crickhowell: I have not come in previously because I thought I might have to leave the Committee before the end, but as I am still here, I will. The fact is that Lord Chief Justices have expressed the view that it might be desirable on occasions to put their views to Parliament in some way. There was a feeling of one of them that it might be a nuclear option, but that has been rather overturned more recently in evidence. After all, the President of the Supreme Court comes and talks to this Committee every year. So the suggestion has been made that it would be possible for the Lord Chief Justice of the day—if he felt there was something he wanted to say to Parliament—to write to this Committee to say he would like to appear before it and say what he would like to say. This Committee could very quickly arrange a meeting so that he could express the view and we could question him about it. Then a report would be given to Parliament. Would that not be quite a sensible way of giving the ability to express concerns to Parliament if they were so severe that the Lord Chief Justice wanted to do so without getting too much into the political jungle of which you were speaking?

Chris Grayling: I would not be hostile to a route of last resort. I think it would be a mistake, though, to end up in something more than that where it started to become common for parliamentary Committees to summon judges before them, calling in the President of the Family Division to come and address the Education Committee, for example. I think that would be a big mistake. I am not opposed to the nuclear option, 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". I do not have a problem with that. I think my concern is doing something more than that.

The Chairman: If none of my colleagues has any further questions, let me thank you very much, Lord Chancellor. Is there anything else you would like to say, or Ms Davies, before you go that we have omitted from our questions?

Chris Grayling: No, I do not think so.

The Chairman: You have been very forthcoming and helpful to us and we are extremely grateful. Thank you very much.