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THE OFFICE OF THE LORD CHANCELLOR

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10.25 am

Witnesses: Sir Alex Allan KCB and Sir Thomas Legg KCB

Rt Hon Kenneth Clarke MP and Rt Hon Lord Falconer of Thoroton

USE OF THE TRANSCRIPT

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Members present

Lord Lang of Monkton (Chairman)
Lord Brennan
Lord Crickhowell
Baroness Falkner of Margravine
Lord Goldsmith
Lord Powell of Bayswater
Baroness Taylor of Bolton
Baroness Wheatcroft

Examination of Witnesses

Sir Alex Allan KCB, Permanent Secretary, Department of Constitutional Affairs then Ministry of Justice, 2004-07, and **Sir Thomas Legg KCB**, Permanent Secretary of the Lord Chancellor's Department, 1989-98

Q63 The Chairman: Welcome, gentlemen. We are very pleased to see two of you here today. We would have liked to have seen three, but unfortunately Sir Hayden Phillips is unwell. We thought we would get in touch with him after this session and give him an opportunity to comment on anything he felt he would like to say to us. We will probably send him a copy of the transcript of what has been said. I hope you will be content with that. You are aware that we are investigating the role and position of the Lord Chancellor, reviewing progress or otherwise since 2005. We are not in any way contemplating the personality of the present Lord Chancellor. It is a matter of the constitutional role and how it is evolving. We are extremely grateful to the pair of you for being here today, because you both have enormous experience. You have been at the coalface, so to speak, during the evolutionary process. Can I ask, to start with, a rather general question? What role do you think the Lord Chancellor plays in upholding the rule of law across government? Sir Thomas, would you like to start?

Sir Thomas Legg: Lord Chairman, I speak of course from a distant past, although I think there are still some continuities from what I can see of what is happening now. It is true that, certainly in my day, the Lord Chancellor did have a vague, unformulated, but reasonably understood position in Cabinet, as the guardian of certain constitutional proprieties, particularly those relating to relations with the judicial branch of government. I am not sure how far it extended beyond that, and that depended a lot on personalities and circumstances. But certainly, in anything to do with relations with the judiciary, the Lord Chancellor—together to some extent with the law officers, but particularly the Lord Chancellor—had a role, and it is pretty clear that that was accepted at the time of the Constitutional Reform Act, because Section 1 refers to it without saying precisely what it was, which was probably wise.

The Chairman: I was tempted to ask you at some stage if you would like to give us a definition of how you thought the rule of law could be defined, but perhaps it is too soon in the discussion to do that just now. Perhaps you would like to think about it, and we may come back to it. Sir Alex, would you like to comment on that?

Sir Alex Allan: I was involved during the transition period, in that I took over from Sir Hayden Phillips after Lord Falconer had taken over from Lord Irvine as Lord Chancellor, and while what was then the Constitutional Reform Bill was going through Parliament, and I then was involved through the transition to the new regime. I agree very much with Sir Thomas's comments about the rule of law. One thing that is clear is that it is the law officers who are responsible for legal advice to the Government, not the Lord Chancellor. But the Lord Chancellor does have this role, particularly in respect to issues involving the judiciary, and a general oversight of constitutional issues.

The Chairman: We gained the impression, talking to the Lord Chancellor, that he regarded the maintenance of the rule of law as something that applied equally to all Ministers, and indeed, all organisations and people involved in government. Do you think that is an accurate definition, and do you think it is a sensible definition?

Sir Alex Allan: Certainly, the ministerial code that, wearing another hat, I have an involvement in, does require Ministers to uphold the law, to follow the law. To that extent, certainly, it is the responsibility of all Ministers to uphold the law and not to do things that are illegal. So, yes, to that extent it applies. The Lord Chancellor has, as Sir Thomas and I have been saying, a general fallback, oversight role, rather than being involved in, very often, any specific cases.

The Chairman: The legal profession, in their evidence to us, or some aspects of the legal profession, have indicated that they regard the Lord Chancellor's role as above those of other people, as being the constitutional conscience of perhaps the Government or of the rule of law. Do you think that is a defensible position?

Sir Thomas Legg: I think myself that is putting it a bit high. Plainly, the Minister of Justice, who has responsibility for constitutional as well as legal matters, must be accorded a special responsibility and role in maintaining the culture of the rule of law. The problem about the rule of law, returning to your speculation before, is that it is of course a phrase that can have a very broad or focused meaning. In a broad sense, it importantly means that we shall have a government of laws and not of men and that is to do with attitudes almost as much, at some levels, as precise details and rules. On the other hand, at the other end of the scale, it can mean very precise things about, particularly, the relationship between the Executive and the legislature on the one hand, and the judiciary on the other. I broadly would agree with the

evidence of the legal profession. Conscience is a tricky concept in this context, but I certainly would agree that the Justice Minister must be given a special responsibility in this field.

Q64 Lord Crickhowell: The present Lord Chancellor said that he doubted the Lord Chancellor had ever been the Government's constitutional guardian or conscience, and that he felt the overall guardianship role was held by the Prime Minister. I must say, that made me sit up and question it. In the days when I was in Cabinet the Lord Chancellor might at times have wanted to say, and did say, things to the then Prime Minister that might have made us think again. We certainly have had the case of Lord Falconer having to say some quite firm things to the Prime Minister of the day about public comments that had been made about a decision taken by a judge. So it does not seem to me that the Prime Minister can be held to be the principal guardian. What is your comment about that?

Sir Thomas Legg: Perhaps Sir Alex and I speak from different eras to a certain extent. I know what the present Lord Chancellor might have been driving at, in the sense that I suppose the Prime Minister has to set the tone for the whole team. But certainly in my day, the Lord Chancellor would have been regarded and was regarded—and regarded himself—whichever party in government he was serving, as having a special role in this respect.

Sir Alex Allan: I think there is a particular issue about relations with the judiciary and comments about the judiciary, where it seems to me that the Lord Chancellor has an acknowledged role in commenting on and addressing colleagues who he may feel are making inappropriate comments about the judiciary or about judicial decisions. So there is that role. More generally, as Sir Thomas said, clearly the Prime Minister has overall responsibility for the conduct of the Government and to that extent I can understand the current Lord Chancellor's comment.

Q65 Lord Powell of Bayswater: The old Lord Chancellors were, in a sense, a three-legged stool. They had their role in relation to the judiciary, they had their role as Speaker of the House of Lords, and they had their role as the conscience of the Government. They lost one role at least with losing the speakership of the Lords. Do you think there is a certain amount of scrambling around for arguments to justify continuing to have a Lord Chancellor in the light of the, in practical terms, diminished role?

Sir Alex Allan: Of course, the Lord Chancellor is now also the Secretary of State for Justice, and has taken on considerable additional responsibilities. So I do not think there is any question that the current balance of portfolios would leave the incumbent short of issues or actions to deal with. The Lord Chancellor was always also, of course, responsible not just for the issues you mentioned but, linked to them, legal aid and the management of the court service, both of which are pretty substantial issues.

Lord Powell of Bayswater: No, I accept that. I meant the effort to argue that there has to be a separate Lord Chancellor and the office should be preserved. As you say, the Lord Chancellor and the Secretary of State for Justice are merged. But does he still need to be called Lord Chancellor?

Sir Thomas Legg: My own answer to that is that it is not absolutely necessary, no. Stripped of all the accretions over the centuries, the formal position of what Lord Chancellor means is that you hold the Great Seal. For about the last six centuries, not before that, that role has been increasingly connected with justice functions of government. It does not have to be, it is not logically necessary, but it just has been. It may not be an accident that the same result has happened in France, where the Minister of Justice is also the Garde des Sceaux and he keeps the seal of France. The world would not come to an end if the Minister of Justice was not also the Keeper of the Seal, but it has for many centuries been connected with that.

Somebody has to hold the Great Seal and operate it. It is right, in my opinion, that it should be a senior Minister. That does make a certain amount of cultural and constitutional sense, but it does not go further than that, I agree.

Sir Alex Allan: It was an issue, obviously, during the passage of the Constitutional Reform Bill, whether the office should remain, and the Government's initial proposal was that it should not. During the passage through Parliament there was a lot of discussion of this issue and it was decided to maintain the title and the office. Of course, there are a large number of functions attached to the office of the Lord Chancellor including, for example, public records and a number of other ones. As we discovered during the passage of the Bill, abolishing the office is extremely complicated.

Q66 Baroness Taylor of Bolton: I wanted to follow up on what was being said about "conscience of the Government", and I accept perhaps "conscience" is not quite the right word. But you were talking about it in terms of rule of law and the relationship with other Ministers. Some of us who have worked with Lord Chancellors in the past have seen the constitutional role as being extremely important. We have had a lot of constitutional reform in the last decade or so and there seems to be an impression—at least to some of us who were there—that the Lord Chancellor had a sort of overview of all of that and acted, in a way, as a custodian of the constitution in terms of looking at change and making sure that things held together. Do you think that that is a role for the Lord Chancellor? Do you think that somebody needs to perform that role within government?

Sir Alex Allan: There are a lot of issues lumped under "constitution" as a whole. When I was first in the department it had been renamed the Department for Constitutional Affairs before it subsequently became the Ministry of Justice. There are a huge number of issues relating to the constitution, which I do not think need in any sense to be under the Lord

Chancellor. Indeed, under this Government, they have largely been put under the Deputy Prime Minister, and the functions supporting them transferred to the Cabinet Office. While there may be, in terms of the top-level issues about the rule of law and the judiciary, a function that is necessarily tied to the Lord Chancellor or whatever office includes that role, a lot of the constitutional issues do not necessarily need to be there at all. If you look at party funding, for example, there is no particular reason why that is anything to do with the Lord Chancellor.

Sir Thomas Legg: If I may just add to what Sir Alex has said, thinking about the way it worked in my era, I would be uncomfortable about the idea that the Lord Chancellor was then understood in any very broad sense to be the conscience of the Government in constitutional matters. I do not think it was seen as broadly as that. The Lord Chancellor had a certain position in the Cabinet because he was then a senior lawyer, and something went with that. But if he was wise, he would keep his powder dry for a very few occasions to speak about constitutional issues, and would reserve it usually for occasions when it involved more or less identifiable legal issues. I think the definition that you were employing then would certainly not have been the case in my day. I think it would be going too far. The Lord Chancellor did have a certain position, but it was not generally the conscience of the Government.

For my part, I think it is a wise provision that has been made in the new arrangements that the Ministry of Justice has a certain responsibility as a department for constitutional matters, because we need a department of government—perhaps we need it more than in my day—that has knowledge and experience in these things. The present temporary arrangements may or may not last. It is good that there should be a department of state that is responsible for them. That must give the Ministry of Justice a degree of oversight in such

matters, but I still would not go quite so far as to say that he or any other Minister, other than perhaps the Prime Minister, can have oversight of the whole field of government in these things.

Baroness Taylor of Bolton: Are you making a distinction there between very specific policy changes, be it on voting age or party-political funding, as was mentioned, as opposed the very broad impact of a multitude of constitutional changes that might not fit together? I am thinking of the present situation where a lot of ideas are being thrown up that are individual pieces of policy, but who is going to make sure that the show is kept on the road and that other unintended consequences do not come from what are quite fundamental changes? Somebody needs to have an overview of all those things, going back to when we were doing devolution in the late 1990s, in the way that the Lord Chancellor did then.

Sir Thomas Legg: I am making that distinction, yes. I recall, for what it is worth, that as a very junior official I was responsible for the Bill that lowered the age of majority from 21 to 18, but by doing that we did not lower the voting age. Another bit of government did that.

Sir Alex Allan: You obviously would know very well, Lady Taylor, the fact that it was the then Lord Chancellor, Lord Irvine, who chaired the committees of Cabinet dealing with all the constitutional issues was partly personal, rather than necessarily attaching to the office of Lord Chancellor. His personal position, his relations with the Prime Minister, contributed to that arrangement, I think.

Q67 Lord Goldsmith: If I could come back to the central question, if I may, to get the benefit of your views from your considerable experience—as Sir Alex said, from slightly different eras, and I think that is helpful—which is what we mean by the rule of law, because it is inherent in the discussion that we are having. Would you recognise the distinction between the rule of law and rule by law? The fact that the Government must abide by the law, and all

Ministers must abide by the law, is in the ministerial code. As has been said, it is the Attorney-General's job to advise the Government what the law is so that people can do that. But there is more than that, is there? This is the question I am putting to you, even if we cannot encapsulate what we mean by it, which comes out most clearly when there are proposals to change the law. If one reads the evidence of the Lord Chancellor last week, there is a sort of hint—I may be reading too much into it—of, “Well, of course, we can change the law and then we will be sticking to the rule of law”.

We have seen some examples of this in previous Governments—for example, the proposal to increase the time that you could hold somebody pre-charged to 90 days, which I personally, in office, opposed. If the law had been changed, it would have been in accordance with the law to have done that, but I would have said at the time it was against the rule of law to allow that degree of detention of someone who had not been subject to trial. Identifying this may be very difficult to do. I just wonder, from your experience, whether you see that distinction, and whether it was something that your Lord Chancellors would have recognised as something that they should be taking an interest in or advising on.

Sir Thomas Legg: I suppose this is where one gets into the difference between a formal approach to legislation and law on the one hand and a values-based approach on the other. I am sure there is such a distinction, but it is extraordinarily difficult and subjective to apply it in individual cases. That, of course, is one of the difficulties that Ministers have in government. I do think that the Lord Chancellor and—I hardly need to say this to you, Lord Goldsmith—but the law officers also have an important role in that. If I remember rightly, in my day, the Attorney-General was usually a member of the Legislation Committee, and there was a reason for that. So it is not just the Lord Chancellor, it is the trio, or it used to be said and I expect it still is.

It is perhaps relevant to this, although I am not claiming to know exactly how, that all during my career in the public service, which was entirely in the Lord Chancellor's Department, unlike Sir Alex, the role of law in government seemed to grow and grow. Whether that is a good thing or a bad thing is for discussion, but, in the 1960s, when I first joined the department legal issues were not very important in government. By the 1990s, when I retired, they had grown in importance and since then even more so. So this has become more of an issue in our time.

Lord Goldsmith: But if you are right that there is a values-based approach to the rule of law, not just a technical approach to what the law is, that may lead to questions as to whether it is right that every single Member of Parliament and every single Minister has the same responsibility for upholding the law, which is what this Committee was told by the Lord Chancellor last week. I wonder whether you have a view on that.

Sir Thomas Legg: With great respect to the Lord Chancellor, if that was his view, I do not think I agree with it. Of course, every person holding public office in our democracy has a responsibility to uphold the rule of law. Of course that must be right. But I personally agree with you that some Ministers and officials perhaps have a greater responsibility, because that is an inevitable result of the distribution of functions.

The Chairman: The rule of law is going to be a drumbeat throughout our session, so we will move on to the next question, of which we have given you advance notice.

Q68 Lord Crickhowell: A number of our witnesses, including some very distinguished judges, questioned the adequacy of the legal advice available to the Lord Chancellor in the Ministry of Justice. Last week, Mr Grayling and the Ministry of Justice Legal Director, Rosemary Davies, assured us that there were a very large number of lawyers there, they were all of the highest possible quality and the advice was extremely good. But the Lord

Chief Justice, Lord Judge, told the Committee, “I think that the Lord Chancellor’s Department is short of lawyers at the top. I am not going to give any specific examples, but sometimes proposals come down the road to the Lord Chief Justice about which you would say to yourself, ‘Did anybody not tell the Lord Chancellor that this problem, that problem, or the other problem, might arise?’” He went on, “I make that point about both of the first two Lord Chancellors that I was talking about and the present Lord Chancellor. This is not directed at Mr Grayling; it is the same with any Lord Chancellor. He needs good legal advisers. I do not think that the Ministry of Justice is filled with lawyers who understand the constitutional subtleties.” Have you any comment on those conflicting views?

Sir Alex Allan: I would not want to comment on the current position in the Ministry of Justice, which I do not know about. But certainly, in my experience, the Lord Chancellor has been supported by excellent lawyers from the government service. When I was there we had Richard Heaton, who is now the First Parliamentary Counsel; we had Rowena Collins-Rice, who is now the legal secretary to the law officers—both very distinguished government lawyers. I certainly would not have said that the Lord Chancellor was short of good or indeed excellent legal advice. There is also of course the issue that, as I said earlier and as Lord Goldsmith acknowledged, it is the law officers who are responsible for legal advice to the Government as a whole and so you would expect them to have a significant role in some of these issues.

Q69 Lord Powell of Bayswater: We have so far been looking at this mostly in terms of Ministers and their role, but we are told, rightly so, that civil servants also have a substantial responsibility for upholding the rule of law. This may apply perhaps more to the Allan era than the Legg era, but at meetings of Permanent Secretaries were rule of law and judicial issues much discussed?

Sir Alex Allan: Yes, when they were relevant. I would have sat there and would have, if these sorts of issues emerged, certainly spoken up on them. The Treasury Solicitor and First Parliamentary Counsel would also both be there. I would have seen my role particularly in relation to speaking up about relations with the judiciary, and occasionally those sorts of issues did emerge and I would speak up. There certainly was the opportunity to raise them at Permanent Secretary level, which I and the First Parliamentary Counsel and the Treasury Solicitor would have done.

Lord Powell of Bayswater: You would have agreed how they might then be pursued with Ministers, as appropriate—

Sir Alex Allan: Yes.

Lord Powell of Bayswater:—and who would do it?

Sir Alex Allan: Exactly. Yes.

Sir Thomas Legg: For what it is worth, the same was true in my day as well. I think I recall, although I could not exactly say when, that we had a fairly lively discussion about the use of judges for public inquiries at one of those meetings. So it did and could come up in the way that Sir Alex described.

Lord Powell of Bayswater: I thought that regular meetings of Permanent Secretaries were not so frequent in your time, perhaps, as in Sir Alex's.

Sir Thomas Legg: No. They happened every Wednesday just as they do now.

Sir Alex Allan: The same as they do now.

Q70 Lord Goldsmith: I wanted to ask you a little bit about the relationship in your day between Lord Chancellors and the law officers. To some extent, you have dealt with this already, but it might just be helpful to have, if you could, a little bit more of a picture of the regularity of meetings between the Lord Chancellor and the law officers, and the sort of

topics, without going into confidential details, that were discussed, so we have a picture of how it operated.

Sir Thomas Legg: In my day, they were always close, not least because very often Lord Chancellors were former law officers. But for functional reasons also, they had close relations. In my day as Permanent Secretary, anyway, we did not have a regular slot every week or every month for a meeting with the law officers, as we did with the senior judges, but there was constant toing and froing between them and the Lord Chancellor. Indeed, a daily or more than daily discussion with the Lord Chancellor might often begin, “The Attorney-General has just told me X. What are we going to do about it?” So it was a very close relationship.

Sir Alex Allan: Yes. As you will know, Lord Goldsmith, they were very close relationships, with lots of meetings. As Sir Thomas Legg says, we did not necessarily have a regular, scheduled slot each week or whenever, but there were certainly a lot of meetings ad hoc. Following up Lord Powell, I would have meetings with the Treasury Solicitor, Legal Secretary to the law officers and others whenever issues arose and, similarly, right down the department, so there was a lot of contact.

Q71 Lord Crickhowell: Can I take from that that the position of the Attorney, his presence in Cabinet, is a reference to the role of the former Lord Chancellor in Cabinet? In my day the Attorney only attended Cabinet by invitation; nowadays we have a huge gathering around the Cabinet table and we are told that the Attorney is always there in attendance at Cabinet meetings. That struck me thinking about it since. The great many of the major issues come up in Cabinet committees—you have already referred to the very important Legislation Committee, which I sat on at one time—and there is the question of the importance of the presence there of someone who raised these issues. Do you think there is a difference in the

situation where the Lord Chancellor was a Member of the Cabinet and of the key Cabinet committees? It may be the Attorney is not always there at the critical moments.

Sir Alex Allan: In some ways the Cabinet committee system relies on making sure that the relevant advice is produced for the committee and the whole network of official committees. Discussion beforehand should identify issues so that, if the Attorney-General was not a member of a particular committee but an important legal issue had been raised when this was being discussed at official level, the Attorney-General would be invited to attend. The process would work through that way. I find it hard to envisage a situation where you would have an important legal issue being discussed without proper informed legal input around the table at a Cabinet committee.

Sir Thomas Legg: Certainly, the system is not working properly if the law officers are not involved when anything of that sort comes up. In a sense, I suppose this is an issue that is linked to your Committee's project, but it is separate from the position of the Lord Chancellor. That is because, as Sir Alex was saying—and, of course, I do not need to repeat it to you—it is the law officers who advise the Government on law, not the Lord Chancellor. Certainly, all through my time that distinction was carefully maintained. It is a problem of government—perhaps for the people at the centre of government—to ensure that the law officers, who are, in some ways, the most unsung but among the most important people in the system, are involved across the board in ways in which the Lord Chancellor cannot be in anything that may involve legal advice to the Government.

Q72 The Chairman: Do you see the law officers' obligation as being to speak out whenever they sense any issue affecting the rule of law or should they only wait until they are asked? Sitting in a Cabinet room with about 30 ministerial colleagues, it takes a brave law officer to

speaking out unasked when the Lord Chancellor is there as well. Is there a potential problem there?

Sir Thomas Legg: I suspect there is an actual problem there. That must be one of the difficult and challenging things about being a law officer. It probably is very difficult but, again—if I were advising law officers, of whom you have several on your Committee—they need to keep their powder dry. If you ask whether the Attorney-General and the Solicitor-General have an obligation to draw the attention of their fellow Ministers to substantial issues of legal values, as well as the precise law, my answer would be yes. That goes with the job.

Lord Goldsmith: I am just going to give a disclosure here because people keep on talking about the fact that there was a time when Attorney-Generals did not attend Cabinet very often but they do now. This changed, I believe, in my time and it changed in my time because what had happened was that I would read Cabinet discussions—because we always got the minutes of Cabinet—and I would say, “Why on earth was I not there, because there is an important issue?” You cannot tell from the agenda that the issue is going to arise because the agenda only has two items on it, domestic issues and international issues, and you have no idea what they are going to be. I then said—I cannot remember whether Sir Alex was present at that time—“I think it is better if the Attorney-General turns up because then if something does arise at least we can put up a flag, ideally so that we look at it and give formal advice afterwards, rather than allow things to go by default”. That is simply the historical reason, which is prosaic and not very romantic.

The Chairman: We have all had problems with government agendas that do not indicate what is going to be discussed.

Q73 Baroness Wheatcroft: There are concerns that by combining the role of Lord Chancellor and the Justice Department relations between the Lord Chancellor and the

judiciary have become more remote. Lord Irvine has told the House that in his day it was very important that the Permanent Secretary maintained very close relationships with the judiciary and that helped him a great deal. I wonder if you could tell us quite how you, Sir Thomas, as a legal gentleman, as well as a law officer, had your relationships with the judiciary and how both of you feel that works now between the officials and the judiciary.

Sir Thomas Legg: I cannot speak with much detailed knowledge about how exactly it is now, though, of course, I hear things from judges and lawyers and colleagues and so on. Certainly, in my day, it was a very close high-priority relationship that one had with the judges, as Permanent Secretary to the Lord Chancellor. You were pretty constantly meeting senior judges and going to see them about one thing or another. We had regular meetings, as well as ad hoc ones. The Lord Chancellor had a regular monthly meeting with the most senior judges. He often had interstitial meetings with the Lord Chief Justice. I would also go and see the Lord Chief Justice in practice about once a week, although we did not formally have a weekly slot, and other more senior judges, too, such as what we then called the Senior Law Lord. I would go and see other judges pretty often. Even that was regarded by the standards of previous eras as not as frequent as it had been. At least according to legend, my predecessor, Sir George Coldstream, went to see the Lord Chief Justice every morning before he went on from his flat in Lincoln's Inn to see the Lord Chancellor. It was not like that in my day but it was still very close.

Sir Alex Allan: One point to note about the Lord Chancellor's relationships with the judiciary is that it has, of course, changed with the Constitutional Reform Act because the Lord Chancellor used to be head of the judiciary in Sir Thomas's day and was responsible for appointing judges. Now you have the Judicial Appointments Commission. I also used to have very frequent meetings with the Lord Chief Justice and other senior judges and it is a very

important part of the role of the Permanent Secretary, both before and after the reforms, because even though the role of the Lord Chancellor has changed formally in relation to the judiciary the main point of contact between the judiciary and the government machine is through the Ministry of Justice/Lord Chancellor's Department. The Permanent Secretary has a very important role and certainly needs to be well informed on what the issues are to be able to discuss them with the senior judiciary. That continued both before and after the reforms, and it is important that it does.

Baroness Wheatcroft: Just as the role of Minister has now changed dramatically, the role of the Permanent Secretary or the job specification obviously has. Do you think that it is going to be possible for those relations to be continued as healthily as they were?

Sir Alex Allan: It has certainly changed partly because, obviously, the Permanent Secretary supports the Lord Chancellor and the Lord Chancellor's role has changed. Of course, now the Permanent Secretary is responsible for the Prison Service, as well as the functions that were previously in the Lord Chancellor's Department. As I said, I think that it is very important that the relations with the judiciary are maintained and there are a host of issues where it is important that there are discussions and close relations with the judiciary. While the relationship may, in a formal way, change, the necessity to maintain a close dialogue with the judiciary is maintained.

Baroness Wheatcroft: But it sounds as if the dialogue was often on a fairly informal basis. Do you think there might be a need to formalise it?

Sir Alex Allan: I am agnostic about that. So long as the contact and the relationship is there, whether there is a formal set of meetings with some title or whether it is done through simply ad hoc meetings, I do not think that makes a huge difference.

The Chairman: We have only a few minutes left but there are a couple more topics that we would like to touch on, so we will move straight on.

Q74 Baroness Taylor of Bolton: Some of this has been covered because all these questions are interrelated, but when the Constitutional Reform Act was passed in 2007 and when the position of the Lord Chancellor was not abolished, how did people think that the role would develop? What did you think would happen to the role of the Lord Chancellor and could you compare that with what has happened?

Sir Alex Allan: At the time there was a huge amount of work in bringing in all the changes. The Act was formally passed and then there were a whole lot of issues around setting up a Judicial Appointments Commission and a number in setting up the Supreme Court and so on. I do not think there was any shortage of issues around. Then, of course, probably before we had had time to think about what the long-term position might be, there was the famous not-fit-for-purpose comments by the then Home Secretary and the decisions to change the allocation of portfolios. The Lord Chancellor, as Secretary of State for Justice, became responsible for the Prison Service and so the issue about the nature of the role changed dramatically.

Baroness Taylor of Bolton: Does that surprise you or was it just so much up in the air that it was—

Sir Alex Allan: It would be quite a light ministerial portfolio if you had split it out again and took just the Lord Chancellor functions as a single ministerial portfolio. That would be a fairly light load for a Minister and that would obviously have implications for the holder in the seniority of the position. Clearly, the full portfolio, as it exists at the moment, is a heavy ministerial portfolio.

Baroness Taylor of Bolton: Too heavy?

Sir Alex Allan: I do not know. Not as far as I am aware.

Q75 Lord Brennan: The Committee in this inquiry is going to be concerned to be satisfied from the public interest that there is a legal framework within the Lord Chancellor's Department that satisfies the obligations on the rule of law, the judiciary, the role in Cabinet and general constitutional advice. The concern that many of the public will have, as well as some of us, is that if you have a Lord Chancellor who is not a lawyer, a Permanent Secretary who is not a lawyer and, by circumstance, law officers, one or both who have limited professional experience, how does the framework survive that kind of situation? How can you reassure us that it can? I understand that you are not a lawyer, Sir Alex, but the department has got even bigger since you left because of prisons. What framework is there? You have told us about First Parliamentary Counsel, the Treasury Solicitor and experienced lawyers, but it gives the impression of a system that is reactive rather than proactive in terms of these issues. In particular, apart from a general framework of legal advice, do you think that the Clerk of the Crown in Chancery, for example, should be separately given the obligation to act as the legal adviser's secretary to the Lord Chancellor in the Lord Chancellor's role, whereas the Permanent Secretary will be principally concerned with all the other parts of the ministry?

Sir Alex Allan: The Clerk of the Crown in Chancery is a rather strange role. Sir Thomas may have different views about this, but in some ways—and I do not mean to be disrespectful to this House—I always saw it as slightly peripheral to my role as Permanent Secretary. It involved a number of functions here, including carrying the writs through the corridors for the new Parliament, a role in the Chamber at prorogation and a few technical roles, and things went out in your name, but it did not seem to me to be a particularly significant role.

The point that you raise, though, is a different one about whether there should be a very senior source of legal advice to the Lord Chancellor. As I indicated, I felt in my time that the legal advisers to the Lord Chancellor were extremely able; their subsequent careers have demonstrated that. I think it is important that there is a strong legal team in the Ministry of Justice but whether you need somebody right at the top who is legally qualified I am not convinced about. Indeed, it is a slight shame that Sir Hayden is not here because he was the one for whom there had to be a change in the law to enable him to become the Permanent Secretary, because previously it was a requirement that he be legally qualified.

Sir Thomas Legg: It was indeed and we did change the law to allow Hayden and other successors to take office. The former Permanent Secretaries, of whom I was the last, also had the advantage—rather unique to civil servants—of holding office “during good behaviour”, and it was probably right to abolish that. If I may say so, Lord Brennan, I am agreeing with Sir Alex. The post of Clerk of the Crown does not have a lot to do with what you are concerned with. The Clerk of the Crown is very much to do with the office of the Great Seal and whoever is the Clerk of the Crown should, I am sure, be close to whoever is the Lord Chancellor, as holder of the Great Seal. The two offices were only combined as a result of cuts in 1880 when Mr Gladstone founded the office of Permanent Secretary with a view to creating a Ministry of Justice. He saw an opportunity to save a salary by putting together the posts of Clerk of the Crown and Permanent Secretary. It is a bit of an oddity constitutionally because as Clerk of the Crown one is a servant of Parliament, as Sir Alex has said, and as Permanent Secretary one is a part of the Executive. We have to have a Clerk of the Crown and, although, as Sir Alex says, it is not a post perhaps of enormous importance, there are risks connected with it that mean that someone reasonably senior ought to hold the job. You are responsible for an important part of the holding of general elections and

somebody needs to be accountable for that. But it does not have a lot to do with what you are concerned with Lord Brennan, which is the legal framework. There is a real problem about this, which applies to the ministerial as well as the official level, because the career paths of lawyers and politicians have diverged so much in our time that it is now difficult for Governments, who do not have a big pool of first-class lawyers from which to draw Lord Chancellors, law officers and, in another sense, legal officials. I am afraid there is no easy answer to that.

I would offer one final comment or suggestion. Like Sir Alex, I have no reason to be concerned about the quality of legal advice available to Lord Chancellors. What I think the former Lord Chief Justice, who has given evidence to you, may have really had in mind is that the culture of the Ministry of Justice is less legal than before. There are simply fewer lawyers than there used to be and those that there are do not see the judges as often as they did. If I were responsible for human resources in the Ministry of Justice I would probably try to adopt a policy of recruiting a fair number of lawyers, not just as legal advisers but simply as administrators, and particularly to use as the people who form the interface with the judiciary. Although lawyers are not necessarily particularly better experts on constitutional matters than others, they are very much better at getting on with the judges. The judges feel much more comfortable with them and can unbend more easily with them. That is worth bearing in mind in staffing the Ministry of Justice.

The Chairman: Thank you very much. On that note we will draw things to a close. Can I thank you both very much for coming? I hope we may hear from Sir Hayden on the question asked by Lord Brennan and, indeed, on others in due course. But you have been an excellent, forthcoming and effective interacting double act, if I may say so, and the Committee is most grateful to you. Thank you.

Examination of Witnesses

Rt Hon Kenneth Clarke MP, Lord Chancellor and Secretary of State for Justice, 2010-12, and

Rt Hon Lord Falconer of Thoroton, Lord Chancellor and Secretary of State for Constitutional Affairs, 2003-07

Q76 The Chairman: I welcome Lord Falconer and Mr Clarke. We are very grateful to both of you, as you are both extremely busy. Thank you for coming to talk to us about our inquiry into the role of the Lord Chancellor. It occurs to me that you are both new-breed ex-Lord Chancellors but you would, equally, have qualified under the old category as well and we are very grateful for you coming to share your experiences with us. I would like to start the questions by asking you how the role of Lord Chancellor was envisaged at the time when the changes were introduced and then how you think it has developed over the period since. Perhaps we should start chronologically with you, Lord Falconer.

Lord Falconer of Thoroton: The changes were intended to make the Lord Chancellor both a Cabinet Minister responsible for courts and the departmental responsibilities that the Lord Chancellor had, but also to retain and entrench his or her role as being a defender of the rule of law and the justice system. If you look at the structure of the Constitutional Reform Act, it starts off with a provision that says, “The Lord Chancellor’s role of being the guardian of the rule of law is not affected by this”. I do not want to sound self-aggrandising, but it says, “The person that is appointed as Lord Chancellor has got to be a special sort of a person”—that is at Section 2—and then Section 17 says, “He or she has to swear an oath saying, ‘I am going to protect the rule of law, the independence of the judiciary and the justice system’”. It says specifically in relation to that oath, “He or she has to do it by reference, among other things, to the resources by the justice system”. Parliament envisaged the role of the Lord Chancellor

as being a departmental Minister but with these special added responsibilities and, therefore, these special qualities.

The Chairman: But if I may just interrupt you there, the wordings that you quoted are fairly neutral. It does not indicate whether he changes from a high status in terms of responsibility for the rule of law or a status that is equivalent to everyone else in the Government and—

Lord Falconer of Thoroton: I do not think the words are neutral at all. It said, first, that it does not affect the Lord Chancellor's role in relation to the rule of law; secondly, it says specifically, "Unlike any other Cabinet Minister there are certain qualities he or she has got to have", and, thirdly, there is the wording of the oath in Section 17: "Uphold the rule of law, the independence of the judiciary and ensure there is a properly resourced justice system". What is neutral about that, I ask rhetorically?

The Chairman: The phrase was, "Respect the rule of law".

Lord Falconer of Thoroton: Yes.

The Chairman: But every government Minister, and the ministerial code, has that obligation.

Lord Falconer of Thoroton: But it starts with Section 2 which says, "It does not change the role of the Lord Chancellor in respect of the rule of law".

The Chairman: Does it spell out what the role of the Chancellor was before that note came into—

Lord Falconer of Thoroton: If you looked at the debates that went on in Parliament at the time there was absolutely no doubt that the function of the Lord Chancellor was to be a guardian of the rule of law.

The Chairman: Thank you. Sorry, I interrupted you, please carry on.

Lord Falconer of Thoroton: No, I had reached the conclusion.

The Chairman: All right, we will come back to how it is being developed then. Mr Clarke, would you like to comment?

Mr Clarke: I was just an observer. I was also obviously an opposition MP at the time but a former lawyer who became a politician. I hear what Lord Falconer says. My recollection is that the whole thing was a bit of a shambles. I did think the Lord Chancellor's post would eventually be changed because it was something you could not defend to the outside world. To try to explain to a foreign politician that we had someone in the Cabinet who was the senior judge responsible for appointing all the other judges, who was a politically appointed Cabinet Minister and sat in the legislature, that sounded like something you had made up. If any African dictatorship adopted a similar role for anybody in its Government, we would have said that it was impossible.

I did not expect it to be reformed—it came as a surprise to everybody, simply because it worked well and it did work well, if I may say so, because of the personal qualities of the people who had held the post. I had never known a Lord Chancellor abuse in the slightest the constitutional possibilities of this bizarre combination of roles. Lord Mackay was one of the most respected members of the Government. He was genuinely a Lord Chancellor. He was not very party political. He was, undoubtedly, a formidable presence in the Cabinet. He was trusted by both the lawyers and the politicians. He was the epitome of somebody who would do the job.

I do not remember one ever annoying me, as a lawyer or a politician, including Lord Irvine. They were fine. They understood. They did respect the rule of law. They understood what the constitution was about but sooner or later it was going to go. This reform was produced as a slightly back-of-the-envelope job and there was slight chaos on the first day when it was obvious that nobody had thought through the legislative consequences and so on. The actual

content of the legislation that emerged was, as I recall, a matter of compromise to try to calm down the infuriated judiciary and legal profession, who had reacted rather badly to all this.

The Lord Chancellor has become a departmental Minister because he has responsibility across a wide range of things. The original proposal, I recall, was that Lord Chancellor was going to be abolished. We were not going to have a Lord Chancellor any more; we were going to have a Secretary of State for Justice. They had to put the title of Lord Chancellor back in to reassure people that he was, in some vague way, going to carry out his former constitutional role.

When I was appointed I was surprised to be appointed—very pleased to be appointed. The Prime Minister, who could not make me Business Secretary, which is what we had agreed before the election, was very delighted to find that I was rather pleased to be asked to be Secretary of State for Justice. I was reliving my youth, going back to my days at the Bar—the only surviving members of the Bar I know are all judges now. I was thrilled to have a couple of years, I thought, in this particular role. He asked me what I thought of the division of responsibilities in this new set-up, when you had blown up the old department and suddenly then produced this Justice Department out of it. I said that I thought it was pretty ropy. I thought it a very odd combination to have the Prison Service alongside the Courts Service and so on, but my strong opinion was to stop reorganising departments. Forming new departments and giving them silly names has not got anybody anywhere. One day, I said, “Try doing a rational change of responsibilities but wait for a very quiet time in politics before you do that because for six months the reorganised departments will not be able to do anything. Then it will settle down and you will not be clear quite what you have achieved by moving things about”.

I just took it up and I was delighted to find my responsibilities were for criminal justice, the Courts Service, the Probation Service and the Prison Service, which I very much wanted to reform, and set about my task. I had excellent relationships with everybody in the justice system, which is really what my role there depended on. I have an extremely high regard for the rule of law and an extremely high regard for the independence of the judiciary, which I think needs to be reinforced ever more and more, and a great interest in the subject matter I was doing.

But I do not think any of these constitutional issues actually arose in my time. I never found I had to go back to the Act to see what my particular role was. I just behaved as Secretary of State for Justice in the Cabinet and got on with facing the radical problems we faced. I agreed a huge reduction in my budget that I had drawn up myself with my excellent ex-Treasury Permanent Secretary, Suma Chakrabarti. This was the first time anybody had tried to take 30% out of anything to do with law and order, so it was quite a tall order, but it was a figure that we arrived at ourselves. The thing I concentrated most on, and what I really wanted to do, was the reform of the prison system and to reverse this tabloid newspaper-run sentencing policy that had gone on for some years and had caused a crisis in the prison system. It seemed to me obvious that one had to reduce the prison population and introduce a new focus on rehabilitation, dealing with the waifs and strays in the Prison Service, making sure that prison was the right punishment for serious offenders, which it most undoubtedly is, I agree, but not driving money out of the justice system by seeing it all swallowed up by an ever-burgeoning Prison Service.

The Chairman: Thank you very much. I now understand why on the “Today” programme interviewers occasionally interrupt their interviewees.

Mr Clarke: John Humphrys has stopped asking me to give short answers.

The Chairman: I am tempted to give Lord Falconer right of reply but I did not want—

Mr Clarke: I have given Lord Falconer perhaps a little that he would like to respond to.

The Chairman: Yes, but I would like also to hear how he sees the development of the position and the role since the changes came into being.

Lord Falconer of Thoroton: I think the role has broadly developed in the way that was envisaged. I can think of no more appropriate people to be Lord Chancellor defending the rule of law and being effective departmental Ministers than Jack Straw and Ken Clarke. Also Ken describes what he did as Lord Chancellor exactly as you would have wanted: somebody who instinctively understood the constitution and the importance of defending the rule of law. Let me give a very good example of that. I do not know if you remember, but the Home Secretary at one stage said that some judge had refused to deport somebody because they were too much in love with their cats to be deported, which was a completely and typically ridiculous thing for a Minister to say about a judge. Ken instinctively, I am quite sure, without reference to Section 1, 2, 3, 4 or 5 of the Constitutional Reform Act, told the next 53 journalists whom he saw that that was probably the most ridiculous thing he had ever heard in relation to anybody saying it and that it was undermining the judges.

If you end up in a situation where there is not a cat's chance in hell that the person holding the office of Lord Chancellor will defend the judges in the way that Ken did, then you have a problem in relation to the position, because the judges do not instinctively think they have somebody in government, irrespective of collective responsibility, who will stand up for them. The judges are, in one sense, the weakest part of the constitution. They cannot defend themselves. They are always vulnerable to the Government being cross about them and being rude to them. They need somebody like Ken Clarke to defend them. That is why Section 2 was put into the Act.

I have real anxieties at the moment that there is not that sense that there is a figure big enough within the Government to defend the rule of law, which is one of the two pillars of our constitution—the rule of law and democracy. I think Jack and Ken were utterly brilliant. I completely agree with Ken that the start of the reforms may have been a bit shambolic, but do not be distracted by that from analysing the importance of the changes. As Ken says, there was a need for the changes and making sure that they work in the future, and the key thing to making them work is that the person doing it has to be both a member of a Cabinet with collective responsibility but also somebody, just as the Lord Chancellor in the past, just as the Attorney-General, with responsibility to something higher than simply party politics. The structure of the Act makes that clear. I would like to repudiate again, if I may, your suggestion that it is neutral about that. It is not neutral about it.

The Chairman: That is very helpful.

Lord Falconer of Thoroton: That is why, when you look and see the way that the job is performed, you have to see the person doing these twin things. It has developed well but, as I say, I have anxieties about how it is going at the moment.

The Chairman: Thank you very much. You have raised a number of topics that the Committee would be keen to pursue. I will bring in Lady Wheatcroft, if I may.

Q77 Baroness Wheatcroft: Lord Falconer, you have made it very clear that the upholding of the rule of law is something that is particularly, in statute, the responsibility of the Lord Chancellor. You will have seen the evidence that we had from Chris Grayling last week.

Lord Falconer of Thoroton: Yes.

Baroness Wheatcroft: He is equally clear that upholding the rule of law is the responsibility of every Cabinet Member and he would not, despite being asked repeatedly, say that it was in particular the responsibility of the Lord Chancellor. Now, maybe this is because of a

different interpretation of what we are talking about. Is the rule of law simply standing up for the judges and the independence of the judiciary, in which case, whatever Mr Grayling said last week, it clearly is the responsibility of the Lord Chancellor, or is the rule of law something more than that?

Lord Falconer of Thoroton: It is, I think, three things. First, it is making sure that the judges are properly protected within the Government, which means proper terms and conditions, no unjustified attacks and no undue pressure put on them. Secondly, it is to ensure that the Government complies with the law and that the way the Government operates means it obeys court orders, obeys both domestic and international law and does not deliberately either flout court orders or break the law. Thirdly, it is to ensure that there is a functioning justice system that means that people's legal rights can be vindicated. Those are the three things that constitute, in my view, the rule of law and respecting it.

I did read Grayling's evidence. I thought it was horrific. I thought that the way he had absolutely no understanding of the fact that his role was a special role to protect those three things was appalling and he appeared to see himself as being no different from the Health Secretary or the Education Secretary in respect of the rule of law. It seemed to me completely to undermine what the Constitutional Reform Act had sought to do and it was heartbreaking and disappointing. It indicated to me, I am sure unwittingly, that the Prime Minister had failed to comply with the obligation placed upon him by Section 2 of the Act to appoint somebody to the job with special qualities that would suit him to performing the job.

Baroness Wheatcroft: That is pretty clear. Thank you. Mr Clarke.

Mr Clarke: I agree absolutely 110% with the way Lord Falconer describes the rule of law. It is more than just the independence of the judges. It is the fact that everybody is subject to the

law, including the Government and the Executive, which, in a modern state, is extremely important. It gets ever more important because the modern state is complex, bureaucratic and now actually goes into just about every feature of the daily lives of the ordinary citizen. Anyway, I will not compete with Lord Falconer's, if I may say so, excellent definition of what the rule of law complies.

I apologise that I did not read Chris Grayling's evidence; I obviously should have done, but I cannot comment on it. I have to say that, although I hope I complied with the very high standards Lord Falconer laid down, there was no incident in my tenure of the office when I felt my statutory duty was compelling me to do this. There were often occasions when I felt compelled to intervene, but that was usually alongside the Attorney-General, who I see as in the position of giving independent legal advice to the Government. There were occasions when I—probably Dominic Grieve would agree—weighed in as well to help the Attorney-General with his difficult task of just pointing out what the rule of law implied.

On the much smaller and narrower matter, which is important, of the criticism of judges, in new Governments—I can play the old veteran now, of course—you always get very inexperienced Ministers and there were occasions when I did step in with colleagues and say, "This is not conducive to good order and discipline if every time an unpopular decision is made by a judge some Cabinet Minister starts denouncing it". I persuaded my colleagues at least to leave British judges alone. Foreign judges they seemed to regard as fair game. I did just occasionally step in because, as you say, they cannot reply for themselves. Although, in fact, on the infamous cat occasion—it was a Nigel Farage speech that had been taken word for word by one of my colleagues and was complete nonsense—the Judicial Office felt compelled to put out a statement pointing out that this was fictional.

Q78 Baroness Wheatcroft: You mentioned the special qualities that the Prime Minister should have looked for in appointing the Lord Chancellor. What are those qualities above and beyond those that we might want to see in any Cabinet Minister and does it involve being a lawyer?

Lord Falconer of Thoroton: First of all, it involves understanding what the rule of law means in a way broader than simply what everybody understands the rule of law means, which means complying with the law. Secondly, it means having personal qualities that mean that you will actually stand up for the rule of law. Thirdly, it means understanding that there will be occasions where your obligation requires you to do something other than simply comply with the collective responsibility. Now, the Act explicitly envisages that the person holding the job does not need to be a lawyer. My belief, and I believe the belief of Parliament at the time, is that a person who has the qualities that I have described does not necessarily need to be a lawyer. If you think about people like Roy Jenkins, Merlyn Rees, Willie Whitelaw, William Hague, people like that, you have no difficulty about them doing it. I am worried that we now find ourselves in a position where it might be that the person does not necessarily have those qualities. Should we think that one does now need to have a lawyer to do the job? Many, many lawyers would be hopeless at the job but, if we have ended up in the situation we have ended up with, saying it has to be a lawyer does not mean you guarantee you will get somebody who will be good at it, but it may mean that you have a better chance of getting somebody who understands some of the role. I do not know. I throw that out for consideration.

Baroness Wheatcroft: Thank you.

The Chairman: Thank you. We will bring in Lord Goldsmith now.

Q79 Lord Goldsmith: Just looking at Section 2, it does not say a great deal though, does it, Lord Falconer? It says that the Prime Minister must not appoint someone who does not appear to him to be qualified by experience, but then the categories of experience are very broad, including the wonderful catchall at the end, “Other experience that the Prime Minister considers relevant”. Would you, in the light of experience, because you were the one who piloted this—I am not criticising you for that—now amend the Act so as to make clearer what you have now described as what you think the qualities of the Lord Chancellor ought to be?

Lord Falconer of Thoroton: We drafted it in the way that we did, or that Parliament decided upon, in order that a signal should be given to the Prime Minister that you need somebody of special quality, but obviously you do not want to be too prescriptive in relation to the sort of person whom the Prime Minister can appoint. You might be right that it is just too general. Maybe the way to draft it, if one had another shot at it, would be to go through the particular qualities: understanding the constitution, understanding the importance of the rule of law, being willing to stand up against party-political consideration, recognising that the responsibility in Section 1 and Section 17 involved departing from collective responsibility where appropriate to do so. Those are the qualities you are looking for. I am not averse to the idea of redrafting it, but I honestly would not have thought that it was necessary until I saw the position that we now find ourselves in.

Mr Clarke: If I may say so, it is very difficult to draft this. I do not think there is much difference of opinion between any of us from what you said before. As for the ideal qualities that have been set out, in an ideal world one assumes and trusts that you are trying to appoint every Member of the Cabinet who has most of those qualities. You are not assuming that in every other post you are appointing people who do not understand the application of

the rule of law and they need to be told all the time what they are doing. It is still complicated by this strange British paradox. In the old system, both Lord Chancellors and the Attorney—I think the Attorney in giving legal advice is very independent and is very important—were always party politicians. They have been party politicians for centuries, practically, and they always are bound by collective responsibility. This is about those underlying rules that the British Government always applied to them and apply to them now and sometimes the lawyers—it does not have to be the lawyers; other people were very concerned about international law or something—can have a real row with their colleagues inside the Government about what is or is not happening. In British politics they do not go out giving interviews about it and they do not go out and say they disagree or anything. On key things, the way it has always worked in every Government, and I think still does, is that the Prime Minister and the Cabinet simply will not sail on doing something that the legal advice says to them is not lawful. In my experience, when I was on the National Security Council, the Army are as keen as the legal profession to make sure they are not ordered to do things that are illegal.

Q80 Lord Goldsmith: I am taking the role of John Humphrys now. We wanted to move on to respective responsibility of Lord Chancellor and law officers, which you touched on. I just want to pick you up on one point to see whether you see any merit in this and to know what you think it actually says about the role of the Lord Chancellor. You identified the position of the law officers, Lord Chancellor, party politicians, all of that and said that they are “bound by collective responsibility”. One area, I would suggest, in which collective responsibility does not apply is in relation to legal advice. If the Attorney-General at the Cabinet table or the Cabinet Committee table says, “You cannot do this; this is wrong”, if it was a policy discussion, and everyone else took a different view, he or she would have to follow that

view, but if he took the view that it was legally wrong he would have to continue to say that, whatever consequences there would be. Is that a difference?

Mr Clarke: I agree. The Attorney-General is a tough and important role. If the Attorney-General sits there and says, "This is unlawful", the fact is you cannot do it. You require a good Attorney-General—and I do not think we have not had one—to sit there and just say, "You cannot do that". Frankly, Ministers may complain but they are not going to do it. The Attorney would resign. The only one I can ever remember threatening to resign was Michael Havers, who killed off the career of another Cabinet Minister by just making it clear that he was not putting up with this.

Lord Goldsmith: He was not around in my time.

Lord Falconer of Thoroton: I completely agree with Lord Goldsmith that the issues of legal advice are not issues of collective responsibility. They are simply issues about the view that the Attorney-General ultimately forms and his or her view is not a position about which the Government can form a collective view. It is only the Attorney's view, ultimately, that prevails.

The Chairman: He has the right, indeed, an obligation to be proactive rather than reactive in promoting it?

Lord Falconer of Thoroton: Yes, absolutely. But I think that the problems, with respect, are not generally on, as it were, what is legal and what is not. It is what is pushing things to a limit, which then undermines the functioning of the justice system. So what is the point that is reached in relation to, for example, the funding of a justice system where you get to a point where there is not adequate access to justice? What, in relation to a criminal justice policy, is pushing something so far as to be beyond what are appropriate limits, that are not generally black-letter law issues but are much more about the functioning of a justice

system? My experience was that if the Attorney and the Lord Chancellor were both people who had an instinctive feel, as Ken has an instinctive feel, for the limits of the justice system and what it can withstand, that is an incredibly important instinct to have in both these roles. Both the Attorney and the Lord Chancellor acting together are quite a powerful force in government.

Mr Clarke: An Attorney is a good lawyer and has to do what good lawyers have to do, to try to find and suggest some solutions to the problem and not just keep pointing out the problem. That is fine. Within the Government, the Attorney, I think, would normally expect the Lord Chancellor to help him out and weigh in and just, presuming he agrees, reinforce the necessary advice.

Q81 Baroness Taylor of Bolton: When you were talking about the 2007 Act a few moments ago, the word “shambolic” was used. There was an acknowledgement by you, Lord Falconer, that everything was not absolutely smooth in the passage of that or indeed in the development of policy. Was one of the reasons for that and was the feeling at the time that these changes were announced a fear that civil servants would act in a sort of “Yes Minister” way and block the changes if there was too much consultation in advance, and might that be one of the reasons why some of these details were not thought through?

Lord Falconer of Thoroton: No, I do not think there was any fear that civil servants would block the changes or not help—

Baroness Taylor of Bolton: Or the establishment?

Lord Falconer of Thoroton: Well, I do not know whether this is what was thought of in advance. The effect of announcing that it was going to happen, in retrospect I am sure, is what ultimately made it happen.

Baroness Taylor of Bolton: Yes.

Lord Falconer of Thoroton: Had there been a more gradual process, although that would have led to many, many more of the lacunae of the problems coming out, it would probably have led as well to the whole thing running into the sand because it is not a reform that has electoral leverage and there are other things to get into parliamentary rows about. The announcement, having been made, gave it a huge degree of impetus that it would not otherwise have had. The judges were absolutely furious about what had happened and were, for understandable reasons, resistant to the change because they got no warning. If you speak to the judges now, with the idea of going back to an old-style Lord Chancellor, the idea of the Lord Chancellor appointing all the judges, the idea of there not being a Supreme Court, they would reject that as being a very retrograde step. I can completely understand why they felt so angry, because they should have been consulted, but once the announcement had been made it had political oomph. It meant that the Prime Minister was behind it and the Prime Minister, like many Prime Ministers, had no interest in constitutional reform to speak of and therefore to have given his support to this particular reform meant that it happened. I am very glad that it did.

Baroness Taylor of Bolton: When you were saying that, were you drafting it now, you might have had some extra words in there about the nature of the role and the kind of person, what you are saying is that having responsibility for being Lord Chancellor is not just another Cabinet position—

Lord Falconer of Thoroton: Correct.

Baroness Taylor of Bolton: It has an extra dimension and there is some concern among some people that it is being treated just as another Cabinet position and indeed potentially as a stepping stone to other offices. At the time the Bill was going through there was discussion about whether it should be the last position. I think that is quite difficult to

legislate for, but certainly in the past the Lord Chancellors have been at the peak of their career rather than on the way up. As for this business of defending judges, if you are a politician on the way up, it is actually quite difficult on occasions to say things that could politically be damaging to your own reputation.

Lord Falconer of Thoroton: Yes. First of all, I agree with you that the role of the Lord Chancellor has responsibilities in addition to that which all the other Cabinet Members have. Secondly, because the role involves standing out against your colleagues and separating yourself from collective responsibility, it will from time to time involve damaging your relations, maybe with the Prime Minister and maybe with other people in the Cabinet, which may have maybe adverse consequences for your career. That is why Section 2 is so important: the Prime Minister has to appoint somebody who is willing to do that. I would not want to rule out further advancement for a Lord Chancellor who deserved further advancement. Interestingly enough, in the 20th century, one Lord Chancellor became Foreign Secretary, one became Secretary of State for India—this is before the Second World War—and I would not want to stop people's careers being advanced, particularly if a Lord Chancellor performs well and bravely in the rule of law role. It might well be that he or she looks the most appropriate person to do a difficult job, but if and in so far as what underlies your question is whether the middle-ranking Cabinet Minister finds that trying to climb the greasy pole to get another job is something that might undermine his or her willingness to stand up for the important constitutional values that the Lord Chancellor has to stand up for, I think that is something that the Prime Minister has to take into account in applying Section 2.

Q82 Baroness Taylor of Bolton: Although this is not a big issue, do you think it matters which House the law officers are in, the Commons or the Lords?

Lord Falconer of Thoroton: No, I do not. It is the personal qualities of the Lord Chancellor and the law officers that matter and whether they are in the Commons or the Lords does not matter. They have to be accountable to Parliament, but I do not think it matters which House that is in. At the point that some of the Home Office's responsibilities came to the Lord Chancellor's Department—prisons and probation—the Prime Minister said to me, "Look, if that happens, the job will obviously have to be in the Commons because it is a job engaged in day-to-day politics". I think generally most of those sorts of jobs do have to be in the Commons but, as long as the Prime Minister today does not have too many of those jobs in the Lords, it is possible to have one or two of those jobs in the Lords. Andrew Adonis did transport; Peter Mandelson did a whole range of responsibilities that would not normally be in the Lords. I do not think that the issue generally for Cabinet posts is, "Should it be in the Commons?" It is, "Are there enough in the Commons to make one or two in the Lords justifiable?"

Baroness Taylor of Bolton: Okay.

The Chairman: Lord Brennan.

Mr Clarke: If I may, very briefly because Lord Falconer has said it all, I think you have to accept that in practice it has become another Cabinet post. It is the Secretary of State for Justice. I assumed that it was the last post that I was going to ever hold in government when I was appointed, so I am in a good position to comment, but you are not going to have some elder statesman every time who is not expecting to go on. It is a senior Cabinet post but it is another Cabinet post now and it is one of those that is more likely to be in the Commons than the Lords. Things connected to the criminal justice system, to sentencing, to the nature of the criminal law combined with the Prison Service, which is always a political hot potato, or can be, mean that it is more likely, I think, that in future it is going to be in the Commons

than the Lords. It would be very difficult for a Commons Minister to act as the spokesman for a Lords Minister on some of the very hot-potato, tabloid-newspaper issues that day to day the Secretary of State for Justice is handling.

The Chairman: Thank you. I think we must move on. I am conscious of the time. Lord Brennan.

Q83 Lord Brennan: At present neither the Minister nor the Permanent Secretary are lawyers in the Ministry of Justice. This may continue in time to come. If they are not lawyers, bearing in mind the Lord Chancellor's specific responsibilities that we have been discussing, it is obvious that that Minister and the Permanent Secretary should be able to rely on knowledge and experience of the law from some source within the Ministry and not just the important advice they can obtain from the law officers. So at the top end of the Ministry if there is not a lawyer, how do we ensure that there is an adequate corpus of knowledge and that there is an adequate continuity of experience that will assist non-lawyer Ministers in the future?

The Chairman: A short answer is allowed.

Lord Falconer of Thoroton: First of all, the key thing, and law is an important element of this, is that the person at the head of the department has an understanding of the importance of the rule of law and the constitution—not necessarily detailed provisions of the law but those basic points. Section 2, by ensuring that you have such a person, should provide you with the first protection in relation to that. When I was Lord Chancellor, there was never a lawyer who was the Permanent Secretary and I do not think, though you have just had some Permanent Secretaries in front of you, generally they were qualified lawyers; they were civil servants. Hayden Phillips, Alex Allan, Suma Chakrabarti, Ursula Brennan—they are all non-lawyers and I am not sure what was the case even before that. Was Denis Dobson a lawyer?

I do not think he was. Ricketts? I do not think they were lawyers. But the point is basically that, if you do not have to have a qualified lawyer as the head of the department, what do you do? Well, I say you have a person who understands the constitutional situation. There was a legal department within the Lord Chancellor's Department—I found this when I was the Lord Chancellor—that was peopled by pretty heavy-duty lawyers. When I was there, there was a man called Mr Richard Heaton. Before that, there had been a man called Mr Paul Jenkins, who became the Treasury Solicitor. You have also access and close relations with the Attorney-General, so you have always access to good-quality legal advice. But I think the key thing is the quality of the person at the top.

Mr Clarke: The department was a very good department when I was there. I was pleasantly surprised by the very high-quality people I had working with me. I greatly enjoyed it. I did have a legal department. There was one lady, whose name I cannot remember, who I thought was quite an outstanding lawyer, and it did not help me that much being a lawyer. I used to give legal opinions, of course, but I did preface them and kept in my own mind and I would always begin by saying, "I have not practised for more than 30 years myself" or, on international law, "I last looked at this when I was a graduate student. I have not actually ever been involved since then". I did not take my own legal advice although I had access to legal advice. I think it has always been like that. The contact with the judges is quite important. The most important part was pretty regular contact and in my case it was very easy and I was on excellent terms with the Lord Chief Justice—and the rest of the judiciary—and the President of the Supreme Court, both of whom I got on with very well. The Lord Chief Justice is an old friend of mine. I was not cut off from pretty heavyweight legal advice if anything came up. Any Lord Chancellor, I think, is going to be seeing those two pretty well all

the time. You are not somehow completely obliviously unaware or cut off from those who are very much the heavyweight lawyers of the day.

The Chairman: Thank you. I think we will move quickly on. I am conscious we will soon be into injury time. Lord Powell.

Q84 Lord Powell of Bayswater: My question has been answered, but you might resolve a conflict of evidence. On the question of legal support in the Ministry of Justice for the Lord Chancellor, we were told by a former Lord Chief Justice, “The department is short of lawyers at the top; it is a pity that the Lord Chancellor does not have more qualified lawyers”. On the other hand, Mr Grayling apparently told us that he was perfectly happy with the legal support; indeed he reportedly said that he had a whole floor of lawyers. Like Mr Clarke, I have not read his evidence. I did read the Maastricht Treaty but I have not read his evidence. Which is it? Are there enough lawyers or not?

Lord Falconer of Thoroton: Well, there are enough lawyers to deal with the detail of the legal questions that they have. There is no judge or Lord Chief Justice I have ever met who does not think that every department that they are dealing with is inadequately supplied with lawyers, because the nature of what is happening inevitably is that what they are seeing is the very many sort of legal disasters that strike Governments all the time and end up in court. I am not sure that there is necessarily a conflict of evidence in the sense that I never felt short of the detailed advice that I needed on the law, but it may well be that what the ex-Lord Chief is referring to is, in effect, “The person I am talking to from time to time did not seem to understand the bigger constitutional and legal issues”. I am not sure that that is going to be resolved, whether you have a floor of lawyers or two floors of lawyers.

The Chairman: Thank you. Contact with the judiciary has already been touched on but I think Lord Crickhowell might have a supplementary.

Q85 Lord Crickhowell: Yes. We have heard that the present Lord Chancellor and Permanent Secretary have very regular meetings with the Lord Chief Justice. One of the consequences of the Constitutional Reform Act, of course, was that senior judges no longer sit in the House of Lords. That means that the contribution that they often did make has disappeared and their ability to make representations or to make comments has disappeared. We have had changing opinions, I think, from the Lord Chief Justice and the President of the Supreme Court about the circumstances in which they would wish to go beyond the laid-down rules under Section 5 of the Act to make written representations to Parliament. Mr Grayling was strongly opposed to allowing senior judges to make regular representations to Parliament, as this would risk politicising the judiciary. He asserted that normally the Lord Chancellor should be the conduit for concerns coming from the judiciary. In the light of some of the things that have been said at the Committee this morning, it seems to me that if, as has been suggested to us, the Lord Chief Justice or indeed the Lord President were concerned about what was being done in any way and they wanted to make representations to Parliament, the appropriate thing to do would be to say to this Committee—it would be an appropriate Committee—that they would like to come and give evidence and this Committee would almost undoubtedly immediately convene a meeting where they could do so. That might be a suitable way, if circumstances arose where they felt they needed to put a view to Parliament, of doing so without taking the action that Mr Grayling thought was politicising the whole business too much. Have you any comments about that?

Lord Falconer of Thoroton: Yes, I agree with that. I agree with the proposition that if the Lord Chief Justice or a senior member of the judiciary, the Lord President or the Chief Justice of Northern Ireland, was very concerned about something, there would not be very much difficulty to find an appropriate place for one of the Chief Justices to give evidence. I think it

is inappropriate for there to be a row on the Floor of the House of Lords between the Lord Chancellor, if he is in the Lords at the time, and the Lord Chief Justice. It has happened in the past. I do not know if you remember, but Lord Lane gave a speech when Lord Mackay was seeking to introduce rights of audience in higher courts for solicitors, which Lord Lane very strongly opposed. He made an intemperate speech, saying words to the effect that totalitarianism does not necessarily turn up at the front door with a toothbrush moustache and an upraised right arm. It is hard to imagine more inappropriate language to use when facing the issue of whether solicitors should have rights of audience in the higher court. Ultimately that is demeaning for the judiciary and it politicises the judiciary, so I do not think that is the appropriate way to do it. I very strongly would embrace the idea that Lord Crickhowell has put that judges, as they indeed are doing, give evidence appropriately to Select Committees and talk about policy issues not individual cases. They are doing it and they are being treated with great deference by the Committees. Some would say, maybe even some of the judges would say, with too much deference. I do not mean that they should be challenged for their decisions but there are some policy choices for the judges to make, such as whether we should focus our effort to ensuring that childcare cases are dealt with at such a speed that there is not so much money for civil justice, which are decisions that the judges are making. I just take that as an example. Those are issues that I think the judges should be willing to debate with Select Committees in an uncharged way, unlike what would happen if one went back to the old system.

Mr Clarke: They have to be careful. They should not do it too often. It is more effective and magisterial if you have occasional interventions by the judges, whether giving evidence or otherwise. Lord Neuberger does say things now when he is concerned about things. I think he gets it right. He does not overdo it but I have read comments that seemed to me to have

slight policy implications. It may arise more as a problem. There is a growing fashion among politicians of all parties to think that unelected judges are somehow people who ought to defer in the end to elected politicians so long as they command a majority in the House of Commons. So this whole tricky issue could well start arising. You do get, certainly at our end of the House, the most extraordinary opinions expressed occasionally to someone, a more traditionalist person like me, who does not think that unelected judges have a duty to respect the current political campaigning position of some Minister.

The Chairman: Thank you very much. I think it was always optimistic to assume that within 45 minutes we could contain two such experienced and eloquent talents. I wish we could have gone on, because we could have gone on for quite a long time, but I know that you have other commitments, as indeed we do. You have been extraordinarily helpful, very clear and lucid in your expositions and you have given us quite a lot to think about so I am most grateful. On behalf of the Committee, thank you both very much.

Lord Falconer of Thoroton: Thank you.

Mr Clarke: Thank you.