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The roles of the Lord Chancellor and the Law Officers

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SUMMARY

The Lord Chancellor and the Law Officers are ministers with particular responsibility for the law. As such they are among the chief guardians of the rule of law in our constitution.

Since our last report on the Lord Chancellor in 2014, the Government's commitment to the rule of law has been called into question. The bills for the United Kingdom Internal Market Act 2020 and the Overseas Operations (Service Personnel and Veterans) Act 2021 contained provision which would have contravened the UK's international obligations, as does the Northern Ireland Protocol Bill in the current session. The then Lord Chancellor's lacklustre defence of the judiciary in the wake of the Daily Mail's 'Enemies of the People' headline was heavily criticised.

More generally, authoritarianism is on the rise globally. The world is facing the challenges of a digital revolution and its impact on democracy, while the actions of Russia in Ukraine and the economic emergence of China have threatened a rules-based global order in which democracy is sacrosanct. In this context, the protection of the rule of law in the UK—and in its interactions with the world—is ever more important.

All ministers have a responsibility to the rule of law but the Lord Chancellor and the Law Officers have special duties, and it is in this context that we examine the development of, and interaction between, their roles since the constitutional changes of the mid-2000s fundamentally altered that of the Lord Chancellor.

The rule of law

It is fundamental to our constitution that the Government acts according to the rule of law. While the concept is difficult to define, its fundamental tenets, as set out by Lord Bingham, are well understood. It is critical that ministers act in a way that is suffused with the concept and consider it to have primacy over political expediency. This applies to a greater degree to the Lord Chancellor and the Law Officers.

In introducing the United Kingdom Internal Market Bill and the Northern Ireland Protocol Bill the Government has twice knowingly invited Parliament to endorse a breach of the UK's international obligations. While parliamentary sovereignty means that Parliament is able to legislate in this way, this does not alter the Government's responsibility, as the state's international representative, to ensure to the best of its ability that international obligations are adhered to. As part of this, it should refrain from knowingly inviting Parliament to legislate contrary to the UK's obligations.

There is an overarching duty on ministers to comply with the law, including international law and treaty obligations. This is reflected in the Ministerial Code (despite the removal of "international law" from its more recent iterations). The Code elides collective and individual ministerial responsibility but nonetheless acts as a lens through which the collective actions of ministers can be judged—as such ministers should be held to account by Parliament and the public for acting in a way that would breach the UK's international obligations.

Lord Chancellors have a special role in ensuring that their colleagues adhere to this. Their responsibility for the rule of law, as set out in the Constitutional

Reform Act 2005 and their oath, is not limited to the maintenance of the justice system and the independence of the judiciary. They have a role, which as a full member of the Cabinet goes beyond that of the Attorney General, to ensure that rule of law issues are defended and understood by the Government as a whole.

The defence of the judiciary remains fundamental. The judiciary is unable to defend itself against unfair, personal or threatening abuse. The Lord Chancellor must always intervene promptly and publicly to defend the judiciary against targeted personal criticism unfairly impugning their impartiality or inflaming public sentiment against them. The 'Enemies of the People' incident caused alarm in the judiciary: for the judiciary to perform its duty to decide cases without fear or favour it needs a Lord Chancellor willing to defend it, and with sufficient authority to do so.

The Law Officers have a different role, primarily in ensuring that government actions are lawful and in fulfilling their public interest functions in support of the rule of law: but all those with legal authority in the Government must work alongside the Lord Chancellor to defend the rule of law.

In the specific area of the lawfulness of government action, government lawyers—including the Law Officers—currently operate on the basis that action may be justified if a "respectable legal argument" can be found that it is lawful. While there will be times that the Government has to pursue policies of genuine legal uncertainty—which can normally ultimately be tested in the courts—we find the concept troubling. The risk is that in some circumstances it might set such a low threshold that it could be used purely for the convenience of the Government, undermining public confidence in its commitment to the rule of law. This is especially true in situations where the legality of an action is unlikely to be tested in the courts—a clear example is the use of armed force. In such circumstances we consider there should be a presumption that publication of the Law Officers' advice would be in the public interest—but acknowledge that generally the advice should remain private.

Reforms

The changes to the role of the Lord Chancellor as a result of the Constitutional Reform Act 2005 have been criticised in some quarters, with many proposing their reversal in part, or further reform. The Law Officers' roles have evolved slowly in recent years, with the fundamental reforms proposed in the Governance of Britain White Paper in 2007 remaining largely unimplemented.

Our findings on whether the roles should be reformed are rooted in the ability of those offices to perform their rule of law functions.

We find that a Lord Chancellor must possess character, intellect and a commitment to the rule of law—qualities that are often found in senior legal figures. We do not recommend amending the Constitutional Reform Act 2005 to require the Lord Chancellor to be a lawyer, but expect them normally to be so, and to command the respect of the legal community and Parliament. The Lord Chancellor should have the political authority to stand up to his or her colleagues, including the Prime Minister, and we invite Prime Ministers to give weight to this consideration in their appointment. Authority and experience are enhanced by tenure and for this reason we also encourage Prime Ministers to consider the benefits of tenure when conducting reshuffles.

The creation of the Ministry of Justice in 2007 resulted in the Lord Chancellor's role being combined with that of Secretary of State for Justice. Many commentators have suggested that this has undermined the Lord Chancellor's ability to fulfil their core responsibilities for the rule of law and the justice system, by giving them the distracting and perhaps conflicting responsibility for prisons. At this time, we do not see clear advantages in separating those responsibilities, particularly in light of the disruption caused by machinery of government changes—but we recommend that a new Prime Minister, embarking on a more comprehensive reorganisation of government, might consider separation at that point. If the Lord Chancellor no longer had responsibility for a major spending department, there would a less compelling argument for their appointment from the House of Commons. We also see clear benefits in the Lord Chancellor becoming the senior individual in the Government with responsibility for the constitution.

The Law Officers are at the same time politicians and lawyers, acting on the one hand as political members of the Government and on the other as impartial lawyers, giving advice and acting in the public interest. Some have suggested that this model is untenable and recommend the creation of non-political Law Officers. We disagree. Their position as politicians provides them with an understanding of the political context in which their legal roles take place, and bolsters their clout with ministers. They should continue to be members of one of the Houses of Parliament—given the diminishing number of suitably qualified candidates in the House of Commons it may be necessary for them to be appointed more often from the House of Lords. Those appointed as Law Officers must be legally qualified and of relevant experience but we do not support codifying this requirement. As with the Lord Chancellor, character and independence of mind is as important as formal qualifications—we encourage Prime Ministers to appoint only those with the independence of mind, autonomy and strength of character to deliver impartial legal advice.

The thread running through this report is that the rule of law is vitally important to the health of our democracy. Whatever formal reforms might be contemplated, appointing those with the correct character, authority, intellect and independence is the best way to ensure that the Lord Chancellor and the Law Officers are able to defend it.

The roles of the Lord Chancellor and the Law Officers

CHAPTER 1: INTRODUCTION

This inquiry

1. This report covers the evolution of the role of the Lord Chancellor following changes to the role in the mid-2000s, how those changes might have affected the complementary role of the Law Officers and ideas for reform of both. It does not consider, except incidentally, two other major changes brought about by the 2005 Act and related reforms: the speakership of the House of Lords and the creation of the Supreme Court.

2. This Committee has considered the roles of the Law Officers and the Lord Chancellor before. In 2007 the Committee set out the arguments for and against the proposed reforms to the role of Attorney General in the report *Reform of the Office of Attorney General*.[1] In 2014 the Committee published *The Office of Lord Chancellor*.[2]

3. It is now eight years since the Committee last examined these issues. We were interested in how the roles had developed since and how they now interact, especially in light of a changing political culture. Since 2014 the world has gone through enormous changes, with a digital revolution facilitating populism and authoritarianism, and the rule of law appearing increasingly fragile. Controversies, including the compliance with international law of Part 5 of the United Kingdom Internal Market Bill in 2020 and the Northern Ireland Protocol Bill in 2022, and the Government response to the *Daily Mail*'s 'Enemies of the People' headline, have brought the responsibilities of the *Law* Officers and Lord Chancellor into focus. Questions have been raised about the support provided to the judiciary, the interaction of the constitution and politics and adherence to international law—we examine the roles of the Lord Chancellor and the Law Officers in this context.

Background

4. The Lord Chancellor and the Law Officers—the Attorney General, Solicitor General and Advocate General for Scotland—are, in different ways, the minsters of the UK Government with particular responsibility for the law.[3] As the Lord Chief Justice recently said, the offices are "central to the administration of justice in England and Wales and of great antiquity."[4]

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

2 Constitution Committee, *The Office of Lord Chancellor* (6th Report, Session 2014–15, HL Paper 75)

3 The UK law officers advise the UK Government. There are separate law officers to advise the devolved administrations: the Lord Advocate and the Solicitor General for Scotland, the Counsel General for Wales and the Attorney General for Northern Ireland. This report does not consider those offices. The UK Attorney General also holds the separate office of Advocate General for Northern Ireland, advising the UK Government on Northern Irish law.

4 Lord Chief Justice Lord Burnett of Maldon, Speech at the Swearing-in Ceremony of the Lord Chancellor of Great Britain, His Majesty's Attorney General and His Majesty's Solicitor General, 29 September 2022: https://www.judiciary.uk/wp-content/uploads/2022/09/LCJ-speech-on-Lord-Chancellor-AG-SG-1.pdf [accessed 13 October 2022]

The office of Lord Chancellor dates to at least the 11th century[5] and that of Attorney General to the 13th century.[6] The office of Solicitor General, only slightly less ancient, can be traced to the 15th century.[7]

5. Early Lord Chancellors had considerable administrative responsibility and influence, deriving in part from their position as Keeper of the Great Seal, and became the chief ministers of the Crown. Over time, the office gained judicial responsibility, the balance between administrative and judicial work varying through the centuries. Until the beginning of the 21st century the Lord Chancellor was a government minister and member of the Cabinet, a senior judge and head of the judiciary, and the presiding officer of the House of Lords. They had special responsibility in the Government for the maintenance of the rule of law and the independence of the judiciary, and latterly for constitutional affairs.

6. The office of Attorney General, having begun as a representative of the Crown in litigation, became, by the 17th century, the chief legal adviser to the Crown. By the early 20th century the Law Officers' Department had been established, the Attorney's rights to undertake private practice had been restricted and Attorneys General were often members of the Cabinet. No Attorney General has been a member of the Cabinet since 1928, though they were often—now routinely—invited to attend. The Law Officers Act 1997 enabled the Solicitor General to undertake all the functions of the Attorney.

7. The offices are different from other ministerial posts and their holders take special oaths.[8] Their responsibilities for the law—and particularly the upholding of the rule of law—while also being ministers, place them in a special constitutional position.

Constitutional Reform Act 2005 and creation of the Ministry of Justice

8. In 2003 the then prime minister announced that the office of Lord Chancellor was to be abolished. The proposal was subject to significant political opposition, and significant practical problems. Although provision to abolish the office was included in the Constitutional Reform Bill in 2004, the bill was amended to preserve it. The resulting Constitutional Reform Act 2005 ("the CRA") altered the office, alongside other reforms trailed in 2003. A Department for Constitutional Affairs was also established, replacing the Lord Chancellor's Department.

9. The CRA fundamentally altered the role of Lord Chancellor, and the constitutional framework surrounding it, by:

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5 Some trace the office back to Angmendus, appointed in 605 AD under the reign of King Aethelbert of Kent. See Diana Woodhouse, *The Office of Lord Chancellor* (Oxford: Hart Publishing, 2001), pp 1–12, which discussed the evolution of the role in greater detail.

6 Attorney General's Office, *The Governance of Britain: A Consultation on the Role of the Attorney General*, Cm 7192 (July 2007), para 1.1: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/243193/7192.pdf

7 The office of Advocate General for Scotland was created in 1999 to replace the office of Lord Advocate as chief adviser to the UK Government on Scots law, when the office of Lord Advocate became part of the Scottish Government following devolution. The office of Lord Advocate dates to the 15th century in Scotland.

8 The Lord Chancellor's oath is set out in the Constitutional Reform Act 2005. Pre-2005 Lord Chancellors took the judicial oath in addition to those taken by other ministers. The Attorney General and Solicitor General take an oath unique to the Law Officers. We discuss oaths more fully in chapter 6.

- Replacing the Lord Chancellor as head of the judiciary in England and Wales with the Lord Chief Justice
- Enabling the Lord Chancellor to be replaced as Speaker of the House of Lords by a new office of Lord Speaker
- Creating a new Supreme Court, replacing the Appellate Committee of the House of Lords and removing the Lord Chancellor's right to sit as its presiding judge
- Establishing the Judicial Appointments Commission and thereby restricting the Lord Chancellor's role in the appointment of judges.

10. The CRA also put into statute the Lord Chancellor's "existing constitutional role in relation to" the rule of law[9] and their responsibility to uphold the independence of the judiciary.[10] It created a new oath, that the Lord Chancellor would "respect the rule of law, defend the independence of the judiciary and discharge [their] duty to ensure the provision of resources for the efficient and effective support of the courts for which [they are] responsible."[11]

11. Section 2 of the CRA sets out the qualifications for the office. Previously, Lord Chancellors were, by convention and through the nature of the role, qualified lawyers.[12] The new Act restricted the appointment to a person who "appears to the Prime Minister to be qualified by experience," setting out examples of relevant experience including legal experience, but also listing as a criterion "other experience that the Prime Minister considers relevant."[13] In removing the judicial aspects of the Lord Chancellor's role the Act diminished the requirement for the office to be held by a lawyer, while section 2 did not restrict the appointment to lawyers. The first non-lawyer Lord Chancellor since 1672 was appointed in 2012: four of the 12 post-2005 Lord Chancellors were not legally qualified.[14]

12. A further major change took place in 2007, with the replacement of the Department for Constitutional Affairs with the Ministry of Justice. The new Ministry of Justice retained most of the responsibilities of the Department for Constitutional Affairs, while taking on the National Offender Management Service (i.e. prisons and probation) and lead responsibility for criminal law and sentencing policy from the Home Office.[15] The offices of Lord Chancellor and Secretary of State for Justice have been combined ever since.

Office of Attorney General

13. The reforms of the mid-2000s did not formally alter the role of Attorney General.[16] The Attorney General's main functions were, and remain, as follows.

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9 Constitutional Reform Act 2005, section 1
10 Constitutional Reform Act 2005, section 3
11 Constitutional Reform Act 2005, section 17
12 Pre-2005, the last non-lawyer appointed Lord Chancellor was the 1st Earl of Shaftesbury in 1672. See Diana Woodhouse, *The Office of Lord Chancellor* (Oxford: Hart Publishing, 2001), p 9
13 Constitutional Reform Act 2005, section 2
14 Lord Falconer of Thoroton, Jack Straw, Kenneth Clarke (now Lord Clarke of Nottingham), David Gauke, Sir Robert Buckland, Dominic Raab and Brandon Lewis are qualified lawyers. Chris Grayling, Michael Gove, Elizabeth Truss and David Lidington are not.
15 HC Deb, 29 March 2007, cols 133–135WS
16 There was some evolution in the role, discussed below.

Legal advice and representation

14. The Attorney General is the chief legal adviser to the Crown, alongside the Advocate General for Scotland in relation to Scots law. This involves providing advice to the Government and on occasion to the monarch and Parliament. The Attorney sits at the apex of a large team of government legal advisers, including the Government Legal Department headed by the Treasury Solicitor, departmental lawyers and independent members of the Bar.

15. The Law Officers provide advice in the formation of policy and when specific issues arise. They are members of, or attend, Cabinet committees or sub-committees,[17] including the Parliamentary Business and Legislation Committee, which considers legislation before its introduction in Parliament.[18] Dr Conor Casey, Lecturer in Law, School of Social Justice, University of Liverpool, described the role of Government lawyers, including the Law Officers, as upholding the rule of law within Government by scrutinising policy decisions and draft legislation to ensure compliance with statutory vires, the Human Rights Act 1998 and international law, and also the avoidance of retrospective legislation.[19]

16. Routine legal advice is provided to the Government by in-house lawyers from the relevant department or the Government Legal Department, or commissioned elsewhere. The Attorney General's Office referred to the criteria on when a Law Officer's advice is sought put forward in 1953 by Sir Hartley Shawcross, Attorney General from 1945 to 1951: "legal difficulty, considerations of policy or public relations, or there being a large amount at stake."[20] The Ministerial Code says that "The Law Officers must be consulted in good time before the Government is committed to critical decisions involving legal considerations."[21] The original version of the Code from 1997 gave more elaboration, adding:

> "It will normally be appropriate to consult the Law Officers in cases where:
>
> (a) The legal consequences of action by the Government might have important repercussions in the foreign, European Union or domestic field;
>
> (b) A Departmental Legal Adviser is in doubt concerning
>
> (i) the legality or constitutional propriety of legislation which Government proposes to introduce; or

17 Written evidence from the Attorney General's Office (RLC0019), para 13

18 HM Government, *List of Cabinet Committees and their membership* (November 2022): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1115314/November_2022_Cabinet_Committee_List.pdf [accessed 10 January 2023]

19 Written evidence from Dr Conor Casey (RLC0003), Summary, para 2

20 Written evidence from the Attorney General's Office (RLC0019), para 16. Sir Hartley Shawcross became Lord Shawcross in 1959.

21 HM Government, *Ministerial Code* (May 2022), para 2.10: https://web.archive.org/web/20221209172145/https:/assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1079310/Ministerial_Code.pdf [accessed 10 January 2023]. A new version of the Code was published on 22 December 2022, after this report had been agreed. It can be found at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1126632/Ministerial_Code.pdf [accessed 10 January 2023]. In this report, references to the "current" Ministerial Code refer to the May 2022 version.

(ii) the vires of proposed subordinate legislation; or

(iii) the legality of proposed administrative action, particularly where that action might be subject to challenge in the courts by means of application for judicial review;

(c) Ministers, or their officials, wish to have the advice of the Law Officer on questions involving legal considerations, which are likely to come before the Cabinet or Cabinet Committee;

(d) There is a particular legal difficulty which may raise political aspects of policy;

(e) Two or more Departments disagree on legal questions and wish to seek the view of the Law Officers."[22]

17. In 2007, under Prime Minister Gordon Brown, the Code was "tightened" and this extra detail was removed.[23]

18. The Law Officers occasionally represent the Government in litigation. For example, Rt Hon Jeremy Wright KC MP (then Attorney General) and Rt Hon Lord Keen of Elie KC (then Advocate General) appeared for the Government in the first *Miller* case.[24] The Attorney and Solicitor have also continued to appear in unduly lenient sentence appeals.

Superintendence

19. The Attorney General "superintends" the Crown Prosecution Service, Serious Fraud Office and His Majesty's Crown Prosecution Service Inspectorate.[25] The Attorney appoints the heads of those bodies and has ministerial accountability to Parliament for them, but they operate largely independently, in accordance with framework agreements between the Law Officers and the respective heads.[26]

20. As expressed in written evidence from the Attorney General's Office, the relationship between the Attorney and the Government Legal Department is different from that with the prosecution services. The evidence submitted in March 2022 when Rt Hon Suella Braverman KC MP was Attorney General, argued that the difference was that the "GLD's functions do not

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22 Cabinet Office, *Ministerial Code* (July 1997), para 22: https://webarchive.nationalarchives.gov.uk/ukOgwa/20100510134500/http:/www.cabinetoffice.gov.uk/propriety_and_ethics/ministers/ministerial_code.aspx [accessed 21 December 2022]

23 Cabinet Office, *Ministerial Code* (July 2007): https://webarchive.nationalarchives.gov.uk/ukgwa/+/http:/www.cabinetoffice.gov.uk/propriety_and_ethics/publications/pdf/ministerial_code_current.pdf [accessed 21 December 2022], Ministry of Justice, *The Governance of Britain*, Cm 7170 (July 2007), para 121: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228834/7170.pdf

24 Supreme Court, *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)*, [2017] UKSC 5

25 "Superintendence" is the term used in the Prosecution of Offences Act 1985, section 3 and the Criminal Justice Act 1987, section 1. The Attorney General also superintends the Service Prosecution Authority.

26 Attorney General's Office and Crown Prosecution Service, *Framework agreement between the Law Officers and the Director of Public Prosecution*, (December 2020): https://www.cps.gov.uk/sites/default/files/documents/publications/Framework_agreement_between_the_Law_Officers_and_the_Director_of_Public_Prosecutions__CPS.pdf [accessed 21 December 2022], Attorney General's Office and Serious Fraud Office, *Framework agreement between the Law Officers and the Director of the Serious Fraud Office* (January 2019): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/772685/SFO_Framework_Agreement.pdf [accessed 21 December 2022]

necessarily require independence from departmental or ministerial control" and though there was a need for "legal advice to be objective and impartial in the sense of meeting both lawyers' professional obligations and their obligations under the *Civil Service Code*" independence was not necessary as the function ultimately "exists solely to support the responsibilities of [instructing] ministers."[27]

Other functions

21. The Attorney General has duties under the devolution legislation, primarily to consider whether bills passed by devolved legislatures are within devolved competence and to refer those they consider outside competence to the Supreme Court.

22. The Attorney also has several public interest functions, which the Attorney General's Office described as:

> "too numerous to list in full; the most significant are: considering whether to refer sentences to the Court of Appeal as unduly lenient; giving consent to prosecute certain offences; giving consent for an application to the High Court for a fresh inquest; and deciding whether to institute contempt proceedings."[28]

23. The Attorney is, as a minister, accountable to Parliament for the work of the agencies under their superintendence. The ministerial function also encompasses shared responsibility for justice policy alongside the Lord Chancellor and the Home Secretary and sets general prosecutorial policy. These ministerial functions are distinct from the Attorney's role in respect of legal advice and individual prosecutions.

Attempts at reform

24. Reform of the Attorney's role was proposed as part of the 2007 *Governance of Britain* consultation.[29] That consultation invited responses on whether the Attorney General should remain both a minister and the Government's chief legal adviser; whether they should remain superintending minister for the prosecution authorities; whether their legal advice should be published; whether they should attend Cabinet; and whether their oath should be updated. These are all areas we explore in this report.

25. The consultation was followed by the Draft Constitutional Renewal Bill,[30] which included provision restricting the Attorney General's role in prosecutions and requiring them to produce an annual report. In an accompanying White Paper,[31] the Government proposed that the oath of

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27 Written evidence from the Attorney General's Office (RLC0019), para 24

28 Written evidence from the Attorney General's Office (RLC0019), para 28

29 Ministry of Justice, *The Governance of Britain*, Cm 7170 (July 2007): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228834/7170.pdf, Attorney General's Office, *The Governance of Britain: A Consultation on the Role of the Attorney General*, Cm 7192 (July 2007): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/243193/7192.pdf

30 Ministry of Justice, *The Governance of Britain—Draft Constitutional Renewal Bill*, Cm 7342–II (March 2008): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/250805/7342_ii.pdf

31 Ministry of Justice, *The Governance of Britain—Constitutional Renewal*, Cm 7342–I (March 2008): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/250803/7342_i.pdf

office should be reformed "to require the Attorney to respect the rule of law", but not by statute.[32]

26. In the event, the resulting Constitutional Reform and Governance Act 2010[33] did not include any provision about the Attorney General. In a Written Ministerial Statement accompanying the Bill's introduction, Rt Hon Jack Straw MP, then Lord Chancellor, stated:

> "In the event, the significant, necessary reforms to the role of the Attorney-General are being achieved without the need for legislation. For example, the Attorney has reached a new settlement with the Directors of Public Prosecutions, the Serious Fraud Office and Revenue and Customs Prosecutions to improve relationships, guarantee prosecutorial independence while ensuring an appropriate degree of accountability and to improve transparency about the relationship, as reflected in the new protocol setting out the respective responsibilities of the Attorney and the Directors".[34]

27. The protocol restricted the Attorney's role in decisions whether to prosecute to those instances required by law and set out certain cases (involving parliamentarians, political parties and where the Law Officers had a conflict of interest) in which the Attorney would not be consulted. It also restricted the Attorney's power to issue directions in respect of individual cases to those where there was a national security consideration.[35] The protocol has since been superseded by the framework agreements mentioned above, which retain the key elements of the protocol and expand on them.

28. The then Lord Chancellor's statement said that "the Attorney-General now only attends Cabinet when matters affecting her responsibilities are on the agenda."[36] This arrangement does not appear to have persisted: subsequent Attorneys General have said that they attended every Cabinet meeting.[37]

Evidence

29. We would like to thank all those who assisted our work by providing oral or written evidence. We heard from many witnesses, including several former Lord Chancellors and Law Officers. We would have liked to have heard in person from the incumbent Lord Chancellor and Attorney General but it proved impossible to arrange those sessions. In the case of the Lord Chancellor, sessions were scheduled on three occasions but, for understandable reasons each time, cancelled. It has not been possible to hear from the Lord Chancellor in time for the publication of this report, but

32 Ministry of Justice, *The Governance of Britain—Constitutional Renewal*, Cm 7342–I (March 2008): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/250803/7342_i.pdf

33 Constitutional Reform and Governance Act 2010

34 HC Deb, 20 July 2009, col 106WS

35 Attorney General's Office, Crown Prosecution Service, Serious Fraud Office and Revenue and Customs Prosecutions Office, *Protocol between the Attorney General and the Prosecuting Departments* (July 2009): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/825219/_WITHDRAWN__Protocol_between_the_Attorney_General_and_the_Prosecuting_Departments.pdf [accessed 21 December 2022)

36 HC Deb 20 July 2009, col 106WS

37 See, for instance oral evidence taken before the House of Commons' Justice Committee, inquiry on the Work of the Attorney General, 15 September 2015 (Session 2015–16), Q 6 (Jeremy Wright MP); inquiry on the work of the Attorney General, 23 January 2019 (Session 2018–19), Q 5 (Sir Geoffrey Cox MP); inquiry on the work of the Law Officers, 25 January 2022 (Session 2021–22), Q 1 (Suella Braverman MP)

we are grateful for his supplementary written evidence and look forward to hearing from him in person soon.

30. We also understand why it has not been possible for the current Attorney General, Rt Hon Victoria Prentis KC MP, to speak to the Committee in time for this report. Nonetheless there was ample time for her predecessor, Rt Hon Suella Braverman KC MP, to appear before us. We regret that the difficulty in securing the then Attorney General's appearance led to its being scheduled so late in our inquiry that it was overtaken by events and cancelled following her appointment as Home Secretary. We remind the Government of the importance for accountability and scrutiny of ministers appearing before select committees in a reasonable timeframe.

CHAPTER 2: THE RULE OF LAW

31. The rule of law is a bedrock of constitutional democracy. It is essential to promote good and stable governance and to protect the citizen from an overmighty state. So central is the rule of law to the operation of the UK constitution that the first report of this Committee identified it as one of its five basic tenets.[38] Indeed, the rule of law should be a central feature of Cabinet government. It is the only constitutional concept with a presence in Cabinet consideration supported by statute, courtesy of the Lord Chancellor's duties under the CRA.

32. It became clear during our inquiry that the rule of law was the common thread that linked the distinct constitutional positions of the Lord Chancellor and the Law Officers. Those offices have a special responsibility for its maintenance, and perform complementary and overlapping roles to that end.

What is the rule of law?

33. The CRA put into statute the Lord Chancellor's "existing constitutional role in relation to" the rule of law and required the Lord Chancellor to swear an oath to "respect" it. Those provisions, added to the Bill by amendment, were subject to extensive discussion during the Bill's passage. The select committee to which the Bill was committed concluded that "it was desirable for the bill to make reference to the rule of law" and that the Lord Chancellor "has and should continue to have a special role in relation to the rule of law within the Cabinet."[39] What is now section 1 of the Act was added by Government amendment at third reading in the House of Lords.

34. The resulting Act does not define the principle and the level of discussion needed to arrive at a suitable wording for section 1 perhaps hints at difficulties with the concept. Lord Falconer of Thoroton, then Lord Chancellor and the minister in charge of the bill, expressed the Government's basis for concern over certain proposed amendments:

> "[T]he rule of law denotes a state of affairs in which, in the event of conflict, the law has paramount force and effect in relation to any persons, institutions, interests, values, customs, practices, and so forth. It is not a directly applicable legal principle but a description of the status that the law as a whole should be accorded within our constitutional system."[40]

And:

> "the content of the principle of the rule of law is controversial, with opposing views having been expressed over time by judges, academics, politicians, and practitioners."[41]

38 Constitution Committee, *Reviewing the Constitution: Terms of Reference and Method of Working* (1st Report, Session 2001–02, HL Paper 11), para 51. The other four tenets were: sovereignty of the Crown in Parliament, union state, representative government, and membership of the Commonwealth, European Union and other international organisations.

39 Select Committee on the Constitutional Reform Bill, *Constitutional Reform Bill [HL]* (1st Report, Session 2003–04, HL Paper 123-I), para 73

40 HL Deb, 13 July 2004, col 1232. Lord Falconer of Thoroton is a member of this Committee.

41 HL Deb, 13 July 2004, col 1232

35. The Lord Chancellor, Rt Hon Dominic Raab MP, thought the concept not "reducible to a simple test or to a description of a duty" and that it was understandable that it was not defined in the CRA.[42]

36. One short expression of the concept is that provided by Lord Denning in *Gouriet*: "Be you ever so high, the law is above you."[43] We asked our witnesses whether they could succinctly define the rule of law. Some described the concept as "a contested and uncertain notion"[44] or a "protean"[45] or "somewhat nebulous concept".[46] A selection of their suggested definitions is shown in the box below, but many of our witnesses cited the work of Lord Bingham of Cornhill as the best recent expression of the concept.[47]

Box 1: Suggested definitions of "the rule of law"

Rt Hon Dominic Grieve KC, Attorney General 2010–14:

"the system of rules that we have in our country to ensure that the decisions we make and the way the Executive and, ultimately, individuals, organisations and institutions behave are subject to the law—both our own domestic law and international law—and that the processes by which the law can be applied work.[48]

Rt Hon David Gauke, Lord Chancellor 2018–19:

"the … sense that the law applies equally to everyone, that no one is above the law and, in particular, that the Government must comply with the law."[49]

Lord Keen of Elie KC, Advocate General for Scotland 2015–20:

"that all institutions and parties should be equal before the law and subject to the law, that the law should be publicly available, and they should be capable of ascertaining what their rights and obligations are thereunder … It extends not just to domestic law but to the sphere of international law."[50]

Lord Mackay of Clashfern, Lord Advocate 1979–84, Lord of Appeal in Ordinary 1985–87, Lord Chancellor 1987–97:

"if an Act applies to a person, in the circumstances that prevail he or she is obliged to follow that rule, whatever it is, but if there is no such rule the person is free to do what he or she likes."[51]

Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales 2013–17:

"fundamental to the rule of law is the complete constitutional independence of the judiciary."[52]

42 Written evidence from Dominic Raab MP (RLC0021)
43 Court of Appeal (Civil Division), *Gouriet v Union of Post Office Workers*, [1977] EWCA Civ J012-2
44 Q 1 (Prof Graham Gee)
45 Oral evidence taken before the Constitution Committee, Annual evidence session with the Lord Chief Justice, 18 May 2022 (Session 2022–23), Q 15 (Lord Burnett of Maldon)
46 Q 58 (Lord Keen of Elie)
47 Oral evidence taken before the Constitution Committee, Annual evidence session with the Lord Chief Justice, 18 May 2022 (Session 2022–23), Q 16 (Lord Burnett of Maldon), Q 68 (Lord Mackay of Clashfern), Q 102 (Dominic Grieve, Lord Garnier), Q 80 (Lord Clarke of Nottingham, David Gauke)
48 Q 102 (Dominic Grieve)
49 Q 80 (David Gauke)
50 Q 50 (Lord Keen of Elie)
51 Q 68 (Lord Mackay of Clashfern)
52 Q 60 (Lord Thomas of Cwmgiedd)

Lord Bingham's definition

37. In a 2006 lecture, prompted by the reference to the rule of law in the 2005 Act, Lord Bingham sought to define the concept, while acknowledging that "the meaning of the concept has to some extent evolved over time and is no doubt likely to continue to do so."[53] His formulation was that:

> "all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts."[54]

38. Lord Bingham expanded on this definition with eight principles, which he discussed in greater length in his subsequent book, *The Rule of Law*.[55]

Box 2: Lord Bingham's eight principles

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

Source: Lord Bingham of Cornhill, Speech on the Rule of Law at the Sixth Sir David Williams Lecture, 16 November 2006: https://www.cpl.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.cpl.law.cam.ac.uk/legacy/Media/THE%20RULE%20OF%20LAW%202006.pdf *[accessed 21 December 2022].*

53 Lord Bingham of Cornhill, Speech on the Rule of Law at the Sixth Sir David Williams Lecture, 16 November 2006, p 4: https://www.cpl.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.cpl.law.cam.ac.uk/legacy/Media/THE%20RULE%20OF%20LAW%202006.pdf [accessed 21 December 2022]

54 Lord Bingham of Cornhill, Speech on the Rule of Law at the Sixth Sir David Williams Lecture, 16 November 2006, p 5: https://www.cpl.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.cpl.law.cam.ac.uk/legacy/Media/THE%20RULE%20OF%20LAW%202006.pdf [accessed 21 December 2022]. Lord Judge provided the Committee with his own "amplification" of this definition: Lord Judge, Lord Chief Justice: "All persons and authorities within the State, whether public or private, should be equally bound by and entitled to the benefit of laws publicly made and prospectively promulgated by an assembly elected on the basis of universal suffrage, taking effect (generally) in the future, publicly administered in the independent courts." Definition provided following Lord Judge's appearance before the Committee. See Q 60 (Lord Judge)

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

39. Principles 3 and 5 in particular point to an important element of the rule of law: that it is not simply rule *by* law. The law itself must conform with a fundamental concept of justice. As Lord Bingham acknowledged, it would be difficult to regard plainly unjust actions, even in accordance with "detailed laws duly enacted and scrupulously observed"[56] as within the rule of law. In his evidence to us, Lord Judge, former Lord Chief Justice and Head of the Judiciary of England and Wales (2008–13), suggested that "Apartheid South Africa was ruled by law. It was perfectly constitutional and perfectly normal. I do not think any of us would think that that was the rule of law."[57]

40. Our Committee's 2014 report concluded that "the rule of law extends beyond judicial independence and compliance with domestic and international law. It includes the tenet that the Government should seek to govern in accordance with constitutional principles, as well as the letter of the law."[58] The Government agreed.[59] In our view the rule of law is fundamental to the exercise of democratic state power.

41. **It is fundamental to our constitution that the Government acts according to the rule of law. While there is no concise, enduring and conclusive definition of the concept, its fundamental tenets are well understood and set out in Lord Bingham's exposition. What is critical is that ministers are mindful of the concept, understand its key principles and act in accordance with them, and consider the rule of law to have primacy over political expediency. This is especially relevant to those with distinct rule of law functions such as the Lord Chancellor and the Law Officers.**

International law

42. As discussed above, adherence to the rule of law includes compliance by the state with its international law obligations. This conception of the rule of law has been politically resonant in recent years in the context of the Government's attempts to renegotiate the Northern Ireland Protocol.[60] Part 5 of the United Kingdom Internal Market Bill in session 2019–21 sought, and the Northern Ireland Protocol Bill in session 2022–23 seeks, to change UK domestic law in order to alter the operation of the Protocol. In respect of the former bill, the then Secretary of State for Northern Ireland (and briefly Lord Chancellor in 2022), Rt Hon Brandon Lewis MP, told the House of Commons that the bill broke "international law in a very specific and limited way."[61] We reported on that bill in 2020 and criticised the Government's

56 Lord Bingham of Cornhill, Speech on the Rule of Law at the Sixth Sir David Williams Lecture, 16 November 2006, p 18: https://www.cpl.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.cpl.law.cam.ac.uk/legacy/Media/THE%20RULE%20OF%20LAW%202006.pdf [accessed 21 December 2022]

57 Q 60 (Lord Judge)

58 Constitution Committee, *The Office of Lord Chancellor*, (6th Report, Session 2014–15, HL Paper 75), para 25

59 Government response to the Committee's 6th Report of Session 2014–15 on *the Office of Lord Chancellor*, 26 February 2015

60 HM Government, *Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, presented to Parliament pursuant to Section 1 of the European Union (Withdrawal) Act (No. 2) 2019 and Section 13 of the European Union Withdrawal) Act 2018* (19 October 2019): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840655/Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf [accessed 21 December 2022]. The Protocol on Ireland/Northern Ireland begins at p 292.

61 HC Deb, 8 September 2020, col 509

approach in inviting Parliament to legislate to authorise a breach of international obligations, the constitutionality of Parliament doing so and the Government's justification in terms of the United Kingdom's "dualist" system of implementing international law. We concluded:

> "Adherence to the rule of law is not negotiable. The Government's assurances do not alter the fact that the Bill authorises conscious and deliberate breaches of the UK's obligations under international law. A government that brandishes the threat of breaching its international obligations, even in 'specific and limited' circumstances, is one that undermines the rule of law."[62]

43. The United Kingdom Internal Market Bill was significant not only because it would have allowed the Government to breach international law but because the Government acknowledged the fact. The current Northern Ireland Protocol Bill has similar aims in that it would "disapply elements of the Northern Ireland Protocol, and provide delegated powers to Ministers to make new law in connection with the Northern Ireland Protocol"[63] but the Government has not in this case acknowledged any breach of international law. Instead, the Government's legal position is that the actions envisaged in the bill are legally justified through the international law "doctrine of necessity".[64]

44. We reported on the Northern Ireland Protocol Bill in October 2022. We concluded:

- the Bill clearly breached the UK's international obligations;[65]
- the Government's reliance on the doctrine of necessity was no justification for introducing legislation that disapplies those obligations;[66]
- "Legislation that puts the UK in breach of international law undermines the rule of law and trust in the UK in fulfilling future treaty commitments";[67] and
- enabling ministers to make secondary legislation in breach of the UK's international obligations is even less constitutionally acceptable than doing so through primary legislation.[68]

45. **The Government has now twice knowingly introduced legislation in Parliament which would breach the UK's international obligations, contravening Lord Bingham's principle that "the rule of law requires compliance by the state with its obligations in international law."**

62 Constitution Committee, *United Kingdom Internal Market Bill* (17th Report, Session 2019–21, HL Paper 151), para 181

63 Explanatory Notes to the Northern Ireland Protocol Bill [HL Bill 52 (2022–23)-EN], para 2

64 Foreign, Commonwealth & Development Office, 'Policy Paper on the Northern Ireland Protocol Bill: UK government legal position' (13 June 2022): https://www.gov.uk/government/publications/northern-ireland-protocol-bill-uk-government-legal-position/northern-ireland-protocol-bill-uk-government-legal-position [accessed 21 December 2022]

65 Constitution Committee, *Northern Ireland Protocol Bill* (6th Report, Session 2022–23, HL Paper 78), para 14

66 Constitution Committee, *Northern Ireland Protocol Bill* (6th Report, Session 2022–23, HL Paper 78), para 15

67 Constitution Committee, *Northern Ireland Protocol Bill* (6th Report, Session 2022–23, HL Paper 78), para 18

68 Constitution Committee, *Northern Ireland Protocol Bill*, (6th Report, Session 2022–23, HL Paper 78), para 24

In the case of Part 5 of the United Kingdom Internal Market Bill it admitted doing so. In the case of the Northern Ireland Protocol Bill, the Government has failed to produce a credible legal justification for doing so.

46. These are not the only examples. In addition to the two bills discussed above, the bill for the Overseas Operations (Service Personnel and Veterans) Act 2021 included provision which would have created a presumption against prosecution of service veterans for offences under international law including war crimes and genocide. The bill was amended in the House of Lords and the resulting Act did not include this provision.

47. Below, we explore the relationship between domestic and international law, and the scope for states to depart from their international obligations, in order to map the meaning of "rule of law" and the Lord Chancellor's and Law Officers' responsibilities toward it.

Domestic v international law

48. The rule of law requires governments to comply with domestic and international law. The situation with domestic law is relatively straightforward: the legality of government actions can be tested in the courts and a government wishing to pursue policies clearly not in accordance with domestic law can introduce legislation to change it. We examine in chapter 3 the extent to which ministers can justifiably pursue legally uncertain courses of action.

49. The nature and application of international law is less clear. Lord Keen of Elie described it as "more fluid and complex than the operation of domestic law."[69] It comprises rules established by custom, treaties or other agreements, some of which are incorporated into UK domestic law and some of which are not. The manner in which international law applies to individuals, organisations, public authorities and states is therefore complicated, though, as noted by Lord Bingham, the state must comply with its international obligations.[70]

50. In its legal analysis of the United Kingdom Internal Market Bill, the Government argued that the dualist nature of UK law meant "treaty obligations only become binding to the extent that they are enshrined in domestic legislation" and, citing parliamentary sovereignty, stated that as a matter of domestic law there was nothing unlawful in Parliament passing legislation that was in breach of the UK's obligations under international law.[71] In our report on the Bill, we agreed that, purely as a statement of domestic law, Parliament was able to enact legislation which violated the UK's international obligations, but disagreed that it was constitutionally desirable or appropriate to do so. We also disagreed with the Government's contention that treaties became binding on it only when incorporated as part of domestic law.[72] Whatever Parliament decides to do does not affect whether the state is in breach of international law.

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69 Q 58 (Lord Keen of Elie)

70 Lord Bingham of Cornhill, Speech on the Rule of Law at the Sixth Sir David Williams Lecture, 16 November 2006, p 29: https://www.cpl.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.cpl.law.cam.ac.uk/legacy/Media/THE%20RULE%20OF%20LAW%202006.pdf [accessed 21 December 2022]

71 Cabinet Office, *HMG Legal Position: UKIM Bill and Northern Ireland Protocol* (10 September 2020): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/916702/UKIM_Legal_Statement.pdf [accessed 21 December 2022]

72 Constitution Committee, *United Kingdom Internal Market Bill* (17th Report, Session 2019–21, HL Paper 151), paras 169, 170, 173, 176

51. The Supreme Court's judgment in the first *Miller* case, which was cited by the Government in its legal position on the United Kingdom Internal Market Bill, considered the place of parliamentary sovereignty in the dualist system.[73] The lead judgment said: "It can thus fairly be said that the dualist system is a necessary corollary of Parliamentary sovereignty, or, to put the point another way, it exists to protect Parliament not ministers."[74] The judgment quoted Professor Campbell McLachlan's summary of the position:

> "If treaties have no effect within domestic law, Parliament's legislative supremacy within its own polity is secure. If the executive must always seek the sanction of Parliament in the event that a proposed action on the international plane will require domestic implementation, parliamentary sovereignty is reinforced at the very point at which the legislative power is engaged."[75]

52. Parliamentary sovereignty under the dualist system ensures that individual rights and responsibilities cannot be affected by treaties without the agreement of Parliament. The courts are bound to apply the law as it exists domestically until any treaty is incorporated into domestic law. Certain treaties, which apply solely on the international plane, require ratification following the procedures in the Constitutional Reform and Governance Act 2010 (CRAG).[76]

53. It is therefore possible for UK domestic law to diverge from obligations agreed by the Government under an international treaty, and ratified following the CRAG procedures. Some treaties will have been ratified but not incorporated into domestic law. And parliamentary sovereignty means that Parliament could legislate to ensure that domestic law differed from the requirements of a treaty.

54. Parliament having enacted legislation that is not compliant with the UK's international obligations, the courts are bound to apply that law. Lord Reed of Allermuir, President of the Supreme Court, told us in 2021 that, in the case of the proposed provisions in Part 5 of the United Kingdom Internal Market Bill that would have breached the protocol, "the constitutional rule is that the later statute prevails over the earlier one, so we would not be able to give effect to the Northern Ireland Protocol in breach of a statute that deprived it of effect."[77]

55. He expanded on this in evidence to us in 2022, citing the Supreme Court's July 2021 judgment on the application of the 'two-child' limit on tax credit.[78] Part of that case concerned whether the 'two-child' policy breached the

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73 Cabinet Office, *HMG Legal Position: UKIM Bill and Northern Ireland Protocol* (10 September 2020): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/916702/UKIM_Legal_Statement.pdf [accessed 21 December 2022]

74 Supreme Court, *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)*, [2017] UKSC 5, para 57

75 Supreme Court, *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)*, [2017] UKSC 5, para 57, quoting Prof Campbell McLachlan, *Foreign Relations Law* (Cambridge: Cambridge University Press, 2014), para 5.20

76 Constitutional Reform and Governance Act 2010, Part 2. See also European Union Committee, *Treaty scrutiny: working practices* (11th Report, Session 2019–21, HL Paper 97) for further discussion

77 Oral evidence taken before the Constitution Committee, Annual evidence session with the President and Deputy President of the Supreme Court, 17 March 2021 (Session 2020–21), Q 11 (Lord Reed of Allermuir)

78 Supreme Court, *R (on the application of SC, CB and 8 children) (Appellants) v Secretary of State for Work and Pensions and others (Respondents)*, [2021] UKSC 26

UK's obligations under the United Nations Convention on the Rights of the Child, a convention that has been ratified by the UK but not incorporated by Parliament into domestic law. Lord Reed explained:

> "We laid down in our judgment very clear guidance on how we apply Acts of Parliament. It is an aspect of parliamentary supremacy. It is the Government, of course, who enter into treaties; the Government make international law by agreeing with other Governments. According to parliamentary sovereignty, the Government cannot alter domestic rights and obligations at their own hand. The Government has to go through Parliament and get Parliament to legislate, and that is why the Act of Parliament is essential and the treaty does not, by itself, [with limited exceptions] alter the law at all."[79]

56. Lord Thomas of Cwmgiedd agreed that the courts had a duty wholly to have regard for what Parliament has agreed in bringing a treaty into domestic law, but drew a distinction between "the obligations of the state when treaties are made, which are the responsibility of Parliament and the Executive, and the obligations of the courts."[80] Lord Mackay of Clashfern made a similar point: "a treaty that has been signed by Her Majesty's Government and has come into force will be binding on Her Majesty's Government. It does not follow that it will be a law in our country, unless and until it has been made a statute in some shape or form here."[81]

57. The courts will apply the law that Parliament has made, but as Lord Thomas and Lord Mackay suggest, the duty created by a treaty rests on the Government, which must ensure as far as it is able that domestic law matches international obligations. Dominic Grieve expressed this pithily: "the duty is not on what Parliament does; the duty is on the Executive, and if the Executive connive to use Parliament in that way, they are breaching their international treaty obligations from the moment they publish the offensive Bill that is going to do that."[82]

58. **Parliamentary sovereignty means that Parliament can legislate contrary to the UK's obligations under international law. It ensures that rights and obligations in domestic law are not created or altered through Government action in agreeing a treaty without parliamentary approval.**

59. **A treaty, once agreed, binds the state. It is the responsibility of the Government, as the state's international representative, to ensure that agreements entered into internationally are respected. While it is conceivable that Parliament would decline to give effect to an attempt by the executive to apply a treaty, a Government commanding the confidence of the House of Commons should normally be able to ensure that any necessary domestic legislation is passed. Nonetheless the responsibility of the Government to honour the state's international obligations requires it to refrain from inviting Parliament to legislate knowingly contrary to the UK's international obligations.**

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79 Oral evidence taken before the Constitution Committee, Annual evidence session with the President and Deputy President of the Supreme Court, 6 April 2022 (Session 2021–22), Q 9 (Lord Reed of Allermuir)

80 Q 60 (Lord Thomas of Cwmgiedd)

81 Q 68 (Lord Mackay of Clashfern)

82 Q 105 (Dominic Grieve)

Is it ever permissible for states to ignore international obligations?

60. Some witnesses drew attention to earlier occasions on which the UK had breached its international obligations. Mr Yuan Yi Zhu, Associate Member, Pembroke College, University of Oxford, and DPhil candidate in International Relations, Nuffield College, University of Oxford, cited, among other examples, Prime Minister Asquith's comments to the House of Commons in 1914 in the context of a legally dubious blockade of German shipping that "we are not going to allow our efforts to be strangled in a network of juridical niceties."[83] Others discussed the controversy over the legal advice on the Suez invasion in 1956.[84] In evidence to us on the United Kingdom Internal Market Bill, Sir Stephen Laws KC, First Parliamentary Counsel 2006–12, drew attention to two occasions on which a minister had been unable to give a statement under section 19(1)(a) of the Human Rights Act 1998.[85]

61. The first two examples above were considered by Lord Bingham in his analysis. He considered, by comparing procedures followed in preparation for the UK's military involvement in Iraq in 2003 and those followed at the time of Suez that "over that period the rule of law has gained ground in this country and the law of the jungle lost it."[86] When we put the Asquith quotation to Sir Jonathan Jones, former Treasury Solicitor, and Senior Consultant on Public and Constitutional Law, Linklaters LLP, he countered that "one person's legal nicety is another person's rule of law."[87]

Section 19 of the Human Rights Act 1998

62. One of the two examples of section 19 statements cited by Sir Stephen Laws was on the House of Lords Reform Bill in 2012. Then Deputy Prime Minister, Nick Clegg MP, was unable to provide a section 19(1)(a) statement because provision in the bill on the franchise for elections to the House of Lords might have contravened the European Court of Human Rights' (ECtHR) finding in the *Hirst* case.[88]

63. The *Hirst* situation was an example of incompatibility between domestic UK law and the state's international obligation to enforce a finding of the ECtHR—one which was unresolved through successive Labour, coalition and Conservative administrations between 2005 and 2017. Parliament has never voted on legislation to bring the UK into compliance with the *Hirst* ruling,[89] but in 2011 the House of Commons agreed a resolution that:

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83 Written evidence from Mr Yuan Yi Zhu (RLC0016), para 17

84 See, for instance, Q 107 (Dominic Grieve), Q 126 (Jack Straw), written evidence from Professor Robert Hazell and Professor Kate Malleson (RLC0006)

85 See Constitution Committee, *United Kingdom Internal Market Bill* (17th Report, Session 2019–21, HL Paper 151), para 154. The two examples were the Communications Bill in 2003 and the House of Lords Reform Bill in 2012.

86 Lord Bingham of Cornhill, Speech on the Rule of Law at the Sir David Williams Lecture, 16 November 2006, p 31: https://www.cpl.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.cpl.law.cam.ac.uk/legacy/Media/THE%20RULE%20OF%20LAW%202006.pdf [accessed 21 December 2022]

87 Q 45 (Sir Jonathan Jones)

88 European Court of Human Rights, *Hirst v UK (No 2)*, [2006] 42 EHRR 41. See Explanatory Notes to the House of Lords Reform Bill [HC Bill 52 (2012–13)-EN], paras 272–279.

89 Although the House of Commons did give the House of Lords Reform Bill a second reading, it would be a stretch to interpret that vote as an endorsement of maintaining the status quo on prisoner voting. The only mention of ECHR compliance in the debate appears to be about women bishops. HC Deb, 9 July 2012, col 122,HC Deb, 10 July 2012, col 275

> "this House notes the ruling of the European Court of Human Rights in *Hirst v the United Kingdom* in which it held that there had been no substantive debate by members of the legislature on the continued justification for maintaining a general restriction on the right of prisoners to vote; acknowledges the treaty obligations of the UK; is of the opinion that legislative decisions of this nature should be a matter for democratically-elected lawmakers; and supports the current situation in which no prisoner is able to vote except those imprisoned for contempt, default or on remand."[90]

64. The motion was agreed by 234 votes to 22. Dominic Grieve, Attorney General at the time, told us "I took the view that [the resolution] was actually rather helpful, because the European Court of Human Rights kept insisting that the UK Parliament had never considered this". In light of the outstanding judgment against the UK, he advised the Prime Minister that the Government "could not be seen to be supporting that Motion, and indeed they abstained on it."[91] Government backbenchers were also not subject to a whip.[92]

65. This highlights the interrelation between international obligations on the state, the sovereignty of Parliament and the role of the executive. The House of Commons had expressed opposition to fulfilling the UK's obligations (to an extent asserting Parliament's sovereignty on the matter) but the Government had not, formally,[93] taken any position in breach of its obligations. In debate on the 2011 resolution, Dominic Grieve summarised the Government's then understanding of its position:

> "The Queen in Parliament is sovereign, and that includes the ability of both Chambers to legislate and to enact primary legislation. We are dealing with an international treaty. That international treaty was signed by the United Kingdom Government under the royal prerogative and was laid before both Houses of Parliament for their consideration. The rule that has been long established in this country is that once a treaty has been ratified by the United Kingdom Government through that process, the Government and their Ministers consider themselves to be bound by its terms … the ministerial code specifically says that that is the case".[94]

66. It was never tested but, conceivably, Parliament could have asserted its sovereignty further by rejecting any proposed legislation to rectify the divergence on prisoner voting. In such a situation the Government would have done its best to fulfil the state's obligations, but the UK would nonetheless have remained in breach. The situation was uncomfortable for successive Governments. Rt Hon Jack Straw, Lord Chancellor 2007–2010, told us of the "difficulty that all of us who were Minister in charge of the prison service

90 HC Deb, 10 February 2011, cols 493–587. The motion was moved by David Davies MP and was supported by, among others, former Labour Lord Chancellor Jack Straw MP and future (and current) Conservative Lord Chancellor Dominic Raab MP.

91 Q 91 (Dominic Grieve)

92 See Dominic Grieve's comments in the debate itself. HC Deb, 10 February 2011, col 510

93 Although the Government's position had been made clear in other ways. For instance, then Prime Minister David Cameron MP said at Prime Minister's Questions: "The House of Commons has voted against prisoners having the vote. I do not want prisoners to have the vote, and they should not get the vote—I am very clear about that … no one should be in any doubt: prisoners are not getting the vote under this Government." HC Deb, 24 October 2012, col 923

94 HC Deb, 10 February 2011, col 510

faced in respect of the *Hirst* decision" and suggested that the duty under the Ministerial Code to comply with international law should be tempered where there were "serious practical obstacles to following a specific obligation."[95] Asked if there were any circumstances that justified a breach of obligations, Lord Clarke of Nottingham KC, former Lord Chancellor and Secretary of State for Justice (2010–12), replied:

> "No, there are not, really, but prisoner voting was a particular political issue. When we talk about the European Union and the European court, at any given time you will find that there are quite a number of member states that have not got round to trying to produce, back home, an extremely unpopular statute that they are not likely to get passed".[96]

67. In the event, Rt Hon David Lidington MP, as Lord Chancellor in 2017, was able to resolve the issue administratively, without requiring a vote in Parliament.[97]

68. In our report on the United Kingdom Internal Market Bill we rejected the arguments that past breaches of the UK's international obligations justified current or future ones, or that "a ministerial refusal, due to legal uncertainty" to issue a statement under section 19(a) of the Human Rights Act 1998 was analogous to the acknowledged breach in the case of Part 5 of the United Kingdom Internal Market Bill.[98]

69. The wording of section 19 crystallises the constitutional principle that Parliament can legislate in contravention of international law, but that theoretical position is not in doubt. While Jack Straw, who as Home Secretary took the Human Rights Bill through the House of Commons, told us that "we were very clear in agreeing that we should not say every piece of legislation has to be compliant in advance,"[99] the Government's *Guide to Making Legislation* explains that making a statement under section 19(1)(b) does not constitute "a positive statement that the bill is incompatible."[100] During debate on the Human Rights Bill both Jack Straw and Lord Williams of Mostyn, the minister in the Lords, described the process under section 19 as intended to enhance scrutiny of the human rights implications of a bill.[101]

70. **The Human Rights Act 1998 balances adherence to the European Convention on Human Rights and parliamentary freedom to legislate (or not). While accommodating parliamentary sovereignty, the Act includes remedies for potential breaches. Section 3 of the Act requires the courts to interpret legislation compatibly with Convention rights so far as it is possible to do so. Section 4 enables the courts to make a**

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95 Q 119 (Jack Straw)
96 Q 82 (Lord Clarke of Nottingham)
97 The issue was resolved through measures to make it clear during sentencing that prisoners may not vote and to allow those released on temporary licence to vote. See HC Deb, 2 November 2017, col 1007
98 Constitution Committee, *United Kingdom Internal Market Bill* (17th Report, Session 2019–21, HL Paper 151), para 162
99 Q 119 (Jack Straw)
100 Cabinet Office, *Guide to Making Legislation* (2022), para 11.15: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1099024/2022-08_Guide_to_Making_Legislation_-_master_version__4_.pdf [accessed 21 December 2022]. The Explanatory Notes to the Communications Act 2003 (2003), state that "The fact that the Minister made a statement under section 19(1)(b) of that Act does not, however, mean that the Government believes the ban [on political advertising] would necessarily be found to be incompatible if the ban were to be challenged in the United Kingdom courts or to be considered by the European Court of Human Rights." (para 680)
101 HL Deb, 3 November 1997, col 1233 (Lord Williams of Mostyn), HC Deb, 16 February 1998, col 779

declaration of incompatibility in cases where it is unable to interpret legislation as being compatible. Section 10 provides a procedure for a minister to make, and Parliament if it so wishes to approve, a remedial order rectifying the incompatibility. The Act does not justify the wilful introduction of legislation known to be in breach of international law.

Ministerial Code and international law

71. The Ministerial Code places a duty on ministers to comply with the law.[102] As we noted in our 2020 report, pre-2015 versions of the Ministerial Code explicitly included an "overarching duty on ministers to comply with the law including international law and treaty obligations and to uphold the administration of justice."[103] We also noted a statement by Lord Faulks KC, then Minister of State in the Ministry of Justice, that despite the omission of explicit reference to international law, ministers were obliged to follow it[104] and a subsequent case in 2018 in which the Court of Appeal found that the new wording "involved no change in substance" to the requirement for ministers to comply with international law and treaty obligations.[105]

72. In our report on the United Kingdom Internal Market Bill, we concluded that the use of the proposed ministerial powers under that bill to modify or disapply the Northern Ireland Protocol would "represent a breach by Ministers of their duty to comply with the law, as set out in the Cabinet Manual and the Ministerial Code."[106] We also concluded:

> "The Government should set out how, if at all, it plans to amend the Ministerial Code to clarify ministers' duties regarding the rule of law and adherence to international law and treaty obligations."[107]

73. We made similar conclusions in our report on the Northern Ireland Protocol Bill:

> "Legislation which puts the UK in breach of international law undermines the rule of law and trust in the UK in fulfilling future treaty commitments. The Government's reliance on the doctrine of necessity does not justify introducing this Bill. This raises the question of whether ministers might be thought to have contravened their obligation under the Ministerial Code to comply with the law, including international law."[108]

And:

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102 Cabinet Office, *Ministerial Code* (May 2022), para 1.3: https://web.archive.org/web/20221209172145/https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1079310/Ministerial_Code.pdf [accessed 10 January 2023]

103 Cabinet Office, *Ministerial Code* (May 2010), para 1.2: https://web.archive.org/web/20141117105632/https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61402/ministerial-code-may-2010.pdf [accessed 21 December 2022]

104 HL Deb, 28 October 2015, cols 1170–71. Lord Faulks is a member of the Constitution Committee.

105 Court of Appeal, *R (Gulf Centre for Human Rights) vs The Prime Minister and the Chancellor of the Duchy of Lancaster*, [2018] EWCA Civ 1855

106 Constitution Committee, *United Kingdom Internal Market Bill* (17th Report, Session 2019–21, HL Paper 151), para 201

107 Constitution Committee, *United Kingdom Internal Market Bill*, (17th Report, Session 2019–21, HL Paper 151), para 207

108 Constitution Committee, *Northern Ireland Protocol Bill* (6th Report, Session 2022–23, HL Paper 78), para 18

> "the exercise of a regulation-making power, such as that in clause 15(2), which empowers the minister to use delegated legislation to disapply international law, risks placing ministers in breach of their obligation under the Ministerial Code to comply with the law, including international law."[109]

74. The conclusions cover three separate scenarios:

- the ministerial use of a power in a way that the Government had acknowledged would breach international law;
- the introduction of a bill where either its introduction or its enactment potentially breached international law (but this had not been acknowledged); and
- the use of ministerial powers in a way that potentially breached international law (also unacknowledged by the Government).

75. We thought it was important to explore the wider context of the duties under the Code and how ministers might be held accountable for them.

76. The Government's response to our 2020 report stated that the Ministerial Code "sets guidance for Ministers about how the Prime Minister expects them to conduct themselves. It does not itself create legal obligations but refers to the overarching duty on Ministers to comply with the law." [110] This reflects the Court of Appeal's finding in the *GHRC* case:

> "the 2010 Code neither set out nor imposed any separate or free-standing duty on Ministers in relation to compliance with the law, domestic or international. It referred to the 'overarching duty' which Ministers already owed, against which the Code is to be read. The Code did not create new or different duties; it simply referenced existing duties outside the Code."[111]

77. The Code is therefore not itself a source of law, nor is it the source of the duty on ministers to comply with the law. But it is an important constitutional document expressing the sitting Prime Minister's requirements of his or her ministers. The Court of Appeal's judgment affirmed that the overarching duty on ministers—having its source beyond the Code—persisted irrespective of the change in wording in the 2015 version. The Code itself states that it is to be read not just against the duty to comply with the law but with a duty to "protect the integrity of public life" and an expectation to observe the Nolan principles.[112]

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109 Constitution Committee, *Northern Ireland Protocol Bill* (6th Report, Session 2022–23, HL Paper 78), para 25

110 Government response to the Committee's 17th Report of Session 2019–21 on *the United Kingdom Internal Market Bill*, 23 December 2022, p 22

111 Court of Appeal of England and Wales, *R (Gulf Centre for Human Rights) v The Prime Minister and the Chancellor of the Duchy of Lancaster*, [2018] EWCA Civ 1855, para 19

112 Cabinet Office, *Ministerial Code* (May 2022), para 1.3: https://web.archive.org/web/20221209172145/https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1079310/Ministerial_Code.pdf [accessed 10 January 2023]

78. The Code is issued in the name of the Prime Minister, who is solely responsible for its enforcement.[113] Nonetheless, as the foreword to the 2022 Code states, the Prime Minister's "accountability is to Parliament and, via the ballot box, to the British people"[114]—the Code is therefore a distillation of the duties of ministers, including the Prime Minister, against which parliamentarians and the general public are able to judge their conduct, independently of any formal adjudication from the Prime Minister.

79. The Code clearly applies to the personal conduct of ministers, including the Prime Minister. As the then Independent Adviser on Ministerial Interests, Lord Geidt, told the House of Commons Public Administration and Constitutional Affairs Committee: "it's reasonable to say that, perhaps a fixed penalty notice and a prime minister paying for it, may have constituted not meeting the overarching duty under the ministerial code, of complying with the law."[115] Likewise, the Code applies to irregularities in the general conduct of ministers in performing their official functions, as was exemplified by the departure of Suella Braverman from the office of Home Secretary on 19 October 2022.[116] What is less clear is how it should apply to the formulation and agreement of policy, including proposed legislation, where the content of the policy itself is at issue.

80. In our reports on the United Kingdom Internal Market Bill and the Northern Ireland Protocol Bill we noted the argument that merely making[117] each of those bills could itself be a breach of article 5 of the Withdrawal Agreement. In the former, we concluded that it was "an open question of public international law" whether that was the case.[118] Nonetheless, the potential that making a bill could constitute a breach raises a question about how ministerial duties under the Code are to apply in such a situation.

81. Collective Cabinet responsibility requires that much policy, including the form of proposed legislation, is agreed by the Government as a whole. The Government's *Guide to Making Legislation states*:

> "Collective agreement for legislation must be obtained from the [Parliamentary Business and Legislation] Committee and other relevant Cabinet committees. Agreement is needed to announce the intention to

113 The Prime Minister "is the ultimate judge of the standards of behaviour expected of a Minister and the appropriate consequences of a breach of those standards." Cabinet Office, *Ministerial Code* (May 2022), para 1.6: https://web.archive.org/web/20221209172145/https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1079310/Ministerial_Code.pdf [accessed 10 January 2023] The Independent Adviser on Minister's Interests has a role in advising the Prime Minister (see para 1.4). There was no Independent Adviser between the resignation of Lord Geidt on 15 June 2022 and the appointment of Sir Laurie Magnus on 22 December 2022.

114 Cabinet Office, *Ministerial Code* (May 2022), Foreword by the Prime Minister: https://web.archive.org/web/20221209172145/https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1079310/Ministerial_Code.pdf [accessed 10 January 2023]

115 Oral evidence taken before the House of Commons Public Administration and Constitutional Affairs Committee, inquiry on the Independent Adviser on Ministerial Interests, 14 June 2022, Q 76 (Lord Geidt)

116 Ellen O'Dwyer, iNews, 'Why did Suella Braverman resign? Rules of Ministerial Code explained as Rishi Sunak brings her back to Cabinet', *iNews* (26 October 2022): https://inews.co.uk/news/suella-braverman-why-resign-home-secretary-what-did-cabinet-security-breach-1934794 [accessed 21 December 2022]

117 The report used the word "making" in this context as it was unclear at what point in the preparation and agreement of the bill any breach would occur.

118 Constitution Committee, *United Kingdom Internal Market Bill* (17th Report, Session 2019–21, HL Paper 151), paras 149–152, Constitution Committee, *Northern Ireland Protocol Bill* (6th Report, Session 2022–23, HL Paper 78), para 6.

> legislate to a certain timescale or in a specific vehicle, for the detailed legislative proposals and bills before introduction and for government tabled or supported amendments during parliamentary passage."[119]

82. A system of "triage" exists by which a sub-group of the Parliamentary Business and Legislation Committee clears statutory instruments to be laid before Parliament.[120]

83. The introduction of a bill, or the laying of a statutory instrument, can therefore be seen as a collective action of the Government as a whole. It is difficult to envisage how, in strict terms, an individual minister can be held accountable by the Prime Minister under the terms of the Code for such an action. In its response to our 2020 report, the Government argued: "The Ministerial Code does not prevent Ministers from introducing legislation for MPs and Peers to debate."[121]

84. Nonetheless, many witnesses thought the duty under the Code was significant.

85. Dr Conor Casey thought that the Ministerial Code "provides that the Government has an 'overarching duty … to comply with the law and to protect the integrity of public life' when pursuing their policy goals and exercising their powers."[122] Dr Conor McCormick, Lecturer and Director of the Human Rights Centre, School of law, Queen's University Belfast, held a similar view: the United Kingdom Internal Market Bill should not have been introduced "under any respectable law officer's watch because I think it is a problem to be indifferent to your international obligations as a member of the Executive. That view stems from the Ministerial Code … which sets out the Government's acceptance of its obligations under international law."[123]

86. In discussing the introduction of the United Kingdom Internal Market Bill, Sir Jonathan Jones described it as "about the relevance of international law as part of the rule of law." He added:

> "There had always been a specific reference to international law in the Ministerial Code, for example, so it was clear that the duty of Ministers to comply with the law included international law … That has always been the position and it was said not to have changed.
>
> But it then changed in 2020 with the Internal Market Bill, when the Government took the position that they were free to promote legislation and Parliament was free to enact legislation that contravened the UK's international law obligations under the withdrawal agreement."[124]

87. Lord Keen of Elie thought that "before the Government can deliberately implement legislative policy, they have to have at least a respectable argument

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119 Cabinet Office, *Guide to Making Legislation* (2022), p 44: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1099024/2022-08_Guide_to_Making_Legislation_-_master_version__4_.pdf [accessed 21 December 2022]

120 Cabinet Office, *Guide to Making Legislation* (2022), paras 15.38–15.41: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1099024/2022-08_Guide_to_Making_Legislation_-_master_version__4_.pdf [accessed 21 December 2022]

121 Government response to the Committee's 17th Report of Session 201921 on *the United Kingdom Internal Market Bill*, 23 December 2022, p. 22

122 Written evidence from Dr Conor Casey (RLC0003)

123 Q 20 (Dr Conor McCormick)

124 Q 30 (Sir Jonathan Jones)

that it will be consistent with the rule of law … [including] international law." Departure from this would require "a rewriting of the Ministerial Code and the Civil Service Code."[125]

88. **The Ministerial Code elides the duties of individual ministers with the duties of the Government as a whole. In most cases it would seem that the original (and implicitly current) duty to comply with "international law and treaty obligations" must apply collectively. Even so, the Government's contention that the Code "does not prevent Ministers from introducing legislation for MPs and Peers to debate" appears to be shifting responsibility for any potential breach of international obligations to Parliament. While Parliament is ultimately responsible for the form of any legislation passed, the preparation and introduction of government legislation is an executive action for which ministers, collectively, are accountable. Parliamentarians and others can hold a Government to account for such action, under the terms of a Ministerial Code which distils, rather than prescribes, the duties of ministers under the rule of law.**

89. **The proper exercise by a minister of a power granted by Parliament would be lawful under domestic law. But where domestic and international law diverge, the duty reflected in the Ministerial Code to comply with international law still applies. This presents ministers with a dilemma which they should not be expected to face, and this uncomfortable situation reaffirms our previously expressed disquiet about the constitutional desirability of Parliament legislating in violation of the UK's international obligations.**[126]

125 Q 52 (Lord Keen of Elie)

126 Constitution Committee, *United Kingdom Internal Market Bill* (17th Report, Session 2019–21, HL Paper 151), para 171

CHAPTER 3: THE RULE OF LAW—GOVERNMENT ACTORS

90. There are many in the Government with a responsibility for the rule of law. Dr Klearchos A. Kyriakides, Senior Visiting Fellow, School of Law, Cyprus Campus, University of Central Lancashire, described as a "phalanx of guardians":

- HM the King[127]
- the Prime Minister
- the Lord Chancellor
- the Law Officers
- the Treasury Solicitor, plus the other government lawyers
- First Parliamentary Counsel
- the Director General, Propriety and Ethics, Cabinet Office
- the Chair of the Committee on Standards in Public Life.[128]

91. Additionally, as discussed in chapter 2, all ministers have a duty to comply with the law under the Ministerial Code. Those who are regulated lawyers are also bound by their relevant professional ethical standards.[129]

92. Sir Richard Heaton former Permanent Secretary, Ministry of Justice, and Warden, Robinson College, University of Cambridge expanded on this list:

> "It is not just the job of Ministers to protect the rule of law … If it is down to one person to heroically defend the rule of law, you are in deep trouble. It is the job of everyone to mainstream the rule of law."[130]

93. While the duty to uphold the rule of law in Government is widespread, the Lord Chancellor and the Law Officer have special responsibilities.

Lord Chancellor: rule of law duties

A narrow or wide conception?

94. In addition to the Lord Chancellor's rather gnomic "existing constitutional role in relation to" the rule of law, which they must "respect", they have specific duties under the Lord Chancellor's statutory oath to "defend the independence of the judiciary" and "ensure the provision of resources for the efficient and effective support of the courts."[131] The duty to uphold the independence of the judiciary is shared with all other ministers and "all with responsibility for matters relating to the judiciary or otherwise to the

127 N.B. Dr Kyriakides's evidence was supplied before the death of Her late Majesty and referred to HM the Queen.
128 Written evidence from Dr Klearchos A. Kyriakides (RLC0009), paras 4–11
129 It was reported that the Law Officers had been reported to the Bar Standards Board in relation to their conduct in respect of the United Kingdom Internal Market Bill. Nothing seems to have come of those reports. Jemma Slingo, 'Reports against barristers have doubled, says regulator', *Law Society Gazette* (01 June 2021): https://www.lawgazette.co.uk/news/reports-against-barristers-have-doubled-says-regulator-/5108674.article [accessed 21 December 2022]
130 Q 29 (Sir Richard Heaton), Dr Patrick O'Brien made a similar point, Q 1 (Dr Patrick O'Brien)
131 Constitutional Reform Act 2005, section 1 and section 17

administration of justice," according to section 3 of the CRA.[132] The Ministry of Justice drew attention to the distinction between the Lord Chancellor's duty to "defend" the independence of the judiciary and that of others to "uphold" it.[133] So what is the Lord Chancellor's actual role?

95. Professor Graham Gee, Head of School and Professor of Public Law, School of Law, University of Sheffield, described two rival views of the Lord Chancellor's responsibilities: a "departmental" and a "cross-government" view. The first saw the responsibility as "largely co-extensive with the office's statutory duties to defend judicial independence and to ensure an efficient and effective court system." The second encompassed a duty to ensure the rule of law was upheld in the Cabinet and across the Government. The second view included a duty to advise ministers on the rule of law implications of policies, with the implication that the Lord Chancellor should intervene (and if necessary, resign) if ministers pursued action inconsistent with the rule of law. This view might include a responsibility to uphold constitutional principles, beyond simply the rule of law.[134] Professor Gee favoured the first view, arguing that the post-2005 office was not set up to fulfil such a function.

96. Dr Patrick O'Brien, Senior Lecturer in Law, School of Law, Oxford Brookes University, raised difficulties a Lord Chancellor would have, under an expansive view of both the rule of law and the Lord Chancellor's role, in reconciling that with their responsibility to support party policy. He warned that, if the Lord Chancellor became the "bad news fairy for everything" their role would be "eviscerated".[135]

97. Sir Richard Heaton thought the Lord Chancellor's "main" rule of law duty was to maintain a functioning justice system, including defending judicial independence. His view was that ensuring Government compliance with the law was more the responsibility of the Attorney General.[136]

98. Others took a more expansive view. Lord Judge thought that the main responsibility of the Lord Chancellor was to express concerns to Cabinet colleagues when the rule of law was threatened.[137] Lord Thomas of Cwmgiedd described this as the "very essence of the role".[138] The current Lord Chief Justice, Lord Burnett of Maldon, also thought there was an obligation on the Lord Chancellor sometimes to "say no to colleagues in Cabinet."[139]

99. The former Lord Chancellors we heard from also favoured a more expansive conception. Jack Straw argued that the Lord Chancellor should "educate his or her colleagues about the importance of the rule of law" and explain to them that, although ministers might find certain court rulings frustrating, "that is not a reason to attack the judges".[140] David Gauke and Lord Clarke of Nottingham thought that understanding that the law applied equally

132 Constitutional Reform Act 2005, section 3
133 Written evidence from the Ministry of Justice (RLC0014), para 11
134 Written evidence from Prof Graham Gee (RLC0004), paras 13, 14, Q 9 (Prof Graham Gee)
135 Q 15 (Dr Patrick O'Brien)
136 Q 29 (Sir Richard Heaton)
137 Q 60 (Lord Judge)
138 Q 64 (Lord Thomas of Cwmgiedd)
139 Oral evidence taken before the Constitution Committee, Annual evidence session with the Lord Chief Justice, 18 May 2022 (Session 2019–21), Q 15 (Lord Burnett of Maldon)
140 Q 118 (Jack Straw)

to everyone and that "the Government must comply with the law" were important aspects of the role. [141]

100. Lord Mackay of Clashfern drew a distinction between the roles of the Lord Chancellor and the Attorney General:

> "the Lord Chancellor has the responsibility of bringing to the notice of the Cabinet any question that he knows of in the Administration that is a question of law. Whether or not it is a breach of the rule of law will certainly be such a question. If it is raised, it is not his business to advise on it. It is his business to advise the Cabinet to take the legal advice … from the Attorney-General."[142]

101. In our 2014 report we concluded that the Lord Chancellor had a special role beyond the policy remit of his or her department, which required them to "seek to ensure that the rule of law is upheld with Cabinet and across Government," and that the Cabinet Manual and Ministerial Code should be revised accordingly.[143]

102. **The Lord Chancellor should fulfil a wider, cross-departmental, role in defending the rule of law and educating his or her colleagues on its importance. Historically, the office has fulfilled that role, there is already a statutory duty and, unlike the Law Officers, the Lord Chancellor is a full member of the Cabinet. We note that none of the former Lord Chancellors we spoke to expressed any qualms about performing a wider role.**

103. Options for enhancing this role are discussed elsewhere in this report.

Lord Chancellor: protection of the judiciary

104. We have previously concluded that judicial independence is "a vital element of the United Kingdom's uncodified constitution."[144] The responsibility of the Lord Chancellor in respect of the judiciary is uncontested. Partly, this stems from their ministerial functions as head of the government department with responsibility for the courts. In this function, as set out in the Lord Chancellor's oath,[145] there is a responsibility to make sure the courts and judiciary are properly funded and well-run.

105. Section 3 of the CRA elaborates on the Lord Chancellor's duty. The Lord Chancellor must have regard to:

- the need to defend judicial independence,
- the need for the judiciary to have the support necessary to enable them to exercise their functions, and

141 Q 80 (David Gauke, Lord Clarke of Nottingham)
142 Q 68 (Lord Mackay of Clashfern)
143 Constitution Committee, *The Office of Lord Chancellor* (6th Report, Session 2014–15, HL Paper 75), para 50
144 Constitution Committee, *The Office of Lord Chancellor,* (6th Report, Session 2014–15, HL Paper 75), para 32
145 See also, Courts Act 2003, section 1

- the need for the public interest in regard to matters relating to the judiciary or otherwise to the administration of justice to be properly represented in decisions affecting those matters.[146]

106. We discuss some aspects of this duty—funding and judicial appointments—in chapter 4. Here, we look more generally at judicial independence and at the Lord Chancellor's specific role in defending the judiciary.

107. In general, our witnesses thought judicial independence had increased following the CRA. Professor Robert Hazell, Professor of Government and the Constitution, The Constitution Unit, University College London, and Professor Kate Malleson, Professor of Law, Queen Mary University of London, considered, on the basis of research conducted between 2011 and 2014, that both judicial accountability and independence had emerged stronger following the reforms. They argued that there were now more leadership roles in the judiciary, that the senior judiciary was more "media wise" than before and that rather than relying solely on the Lord Chancellor as the "buckle between the judiciary and the Government" there were now multiple channels of communication, including the Attorney General. They warned against "selective memories" from the judiciary about the role played by pre-2005 Lord Chancellors. They thought that judicial scepticism about the protection received from post-2005 Lord Chancellors stemmed as much from funding cuts following the 2007 financial crisis as from the 2005 constitutional changes.[147]

108. Dr O'Brien thought it was part of the design of the CRA that the guardians of judicial independence were "diffuse and multiple". He thought culture and practice were more important than rules for sustaining independence.[148] He described the core indicators of judicial independence—apolitical appointments, transfer of personnel and security of tenure—as "rock solid".[149] Professor Gee made a similar point and thought judicial decision-making remained robust.[150]

109. Lord Burnett of Maldon noted that the wording of section 3, to "defend" the independence of the judiciary, "is something that suggests activity; it is not a passive word."[151] He told us that he had occasionally raised issues relating to judicial independence with the various Lord Chancellors with whom he had worked and had regular meetings with others, including the Prime Minister and the Cabinet Secretary.[152] Lord Judge and Lord Thomas of Cwmgiedd described a similar arrangement from their time as Lord Chief Justice.[153]

110. Lord Chief Justices are able to raise concerns, both directly to the Lord Chancellor and publicly, including through comment to this Committee. But, as Lord Burnett alluded to, what is important is what the Government—primarily the Lord Chancellor—does about it. One recent incident, in particular, concerned many witnesses.

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146 Constitutional Reform Act 2005, section 3
147 Written evidence from Prof Robert Hazell and Prof Kate Malleson (RLC0006)
148 Written evidence from Dr Patrick O'Brien (RLC0013), para 8
149 Q 3 (Dr Patrick O'Brien)
150 Q 3 (Prof Graham Gee)
151 Oral evidence taken before the Constitution Committee, Annual evidence session with the Lord Chief Justice, 18 May 2022 (Session 2022–23), Q 1 (Lord Burnett of Maldon)
152 Oral evidence taken before the Constitution Committee, Annual evidence session with the Lord Chief Justice, 18 May 2022 (Session 2022–23), Q 1 (Lord Burnett of Maldon)
153 Q 65 (Lord Judge, Lord Thomas of Cwmgiedd)

'Enemies of the People'

111. On 4 November 2016, following a High Court judgment requiring the Government to obtain an Act of Parliament to trigger the UK's withdrawal from the European Union,[154] the *Daily Mail* published an article personally criticising the judges involved, bearing the headline 'Enemies of the People'.[155] The slow response of the then Lord Chancellor, Rt Hon Elizabeth Truss MP, was criticised by many at the time.

112. Lord Judge told us of his disquiet:

> "when the newspapers decided that the judges were the enemy of the people, I think an old-fashioned Lord Chancellor would have been on the television news, or certainly in Parliament, asserting what it took a very long time for the new Lord Chancellor to do: namely, saying this was a totally inappropriate observation about the judges who were doing their duties."[156]

113. In 2017 we asked Elizabeth Truss about her response. She argued that senior judges were able to speak publicly about what they did and appeared to criticise their reticence to do so. She added:

> "Where perhaps I might respectfully disagree with some who have asked me to condemn what the press are writing, is that I think it is dangerous for a government Minister to say this is an acceptable headline and this is not. I am a huge believer in the independence of the judiciary; I am also a very strong believer in a free press and the value it has in our society."[157]

114. A few weeks after that session we heard from Lord Thomas of Cwmgiedd, then Lord Chief Justice and one of the three judges criticised in the *Daily Mail* article. He accepted the importance of press freedom and that criticism of judicial findings was "very healthy", but drew a distinction between criticism and abuse. He questioned the then Lord Chancellor's suggestion that judges should speak out:

> "It cannot be right for us to have entered into a discussion at that time. How could I? I had made the judgment. Lord Neuberger could not say anything as he was going to hear the appeal, so there was nothing a judge could do. Moreover, we had fought hard, as I just said, to keep out of Brexit and I cannot see how we could have said anything without immediately plunging ourselves into a political controversy."[158]

115. He concluded:

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154 High Court of England and Wales, *R (Miller) v Secretary of State for Exiting the European Union*, [2016] EWHC 2768 (Admin), commonly referred to as "*Miller 1*".

155 James Slack, 'Enemies of the People: Fury over "out of touch" judges who have "declared war on democracy" by defying 17.4m Brexit voters and who could trigger constitutional crisis', *Daily Mail* (4 November 2016): https://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html [accessed 8 November 2022]. The three judges concerned were Lord Thomas of Cwmgiedd, then Lord Chief Justice, Sir Terence Etherton (now Lord Etherton), then Master of the Rolls, and Sir Philip Sales (now Lord Sales).

156 Q 67 (Lord Judge)

157 Oral evidence taken before the Constitution Committee, Annual evidence session with the Lord Chancellor, 1 March 2017 (Session 2016–17), Q 3 (Elizabeth Truss MP)

158 Oral evidence taken before the Constitution Committee, Annual evidence session with the Lord Chief Justice, 22 March 2017 (Session 2016–17), Q 4 (Lord Thomas of Cwmgiedd)

> "I regret to have to criticise her as severely as I have, but to my mind she is completely and absolutely wrong about this, as I have said, and I am very disappointed. I understand what the pressures were in November [2016], but she has taken a position that is constitutionally absolutely wrong."[159]

116. We asked Sir Richard Heaton, Permanent Secretary of the Ministry of Justice at the time, about the incident. He described it as "a rather spectacular example of the general duty" to defend independence, which was to "make sure that the judges are understood, defended, looked after and not roundly abused" and that their needs and vulnerabilities are understood within the Government. Where judges suffer abuse, rather than criticism, the Lord Chancellor's job was to ensure they were properly defended and looked after.[160] He added that, whether or not the response was appropriate, the perceived failure to act was damaging.[161]

117. Dr O'Brien argued that the judiciary did not need protection from criticism and that those who were sensitive to criticism were not well suited to being a judge. Nonetheless he thought the 'Enemies of the People' incident was a threat to judicial independence because there was a reasonable chance that some judges might have "felt unable to conduct themselves and conduct their jobs without fear or favour if people were showing up in courtrooms and calling them enemies of the people."[162] Professor Gee was more sympathetic to the Lord Chancellor, suggesting that the article did not trigger the section 3 duty and that a press release defending the judiciary on the day of the article was unnecessary.[163]

118. Dr O'Brien noted that the subsequent reactions to the Supreme Court judgments in *Miller 1* and *Miller 2*[164] were more muted.[165] Indeed, Elizabeth Truss published a statement very shortly after the Supreme Court's judgment in *Miller 1* was issued, calling the justices "people of integrity and impartiality."[166]

119. Lord Reed of Allermuir, President of the Supreme Court, accepted that judges need to be resilient, and noted that resilience was one of the criteria for appointment as President or Deputy President of the Supreme Court (though not for other members of the court).[167] He added that he had made an effort recently to provide more explanation in judgments and "to spell

159 Oral evidence taken before the Constitution Committee, Annual evidence session with the Lord Chief Justice, 22 March 2017 (Session 2016–17), Q 4 (Lord Thomas of Cwmgiedd)
160 Q 30 (Sir Richard Heaton)
161 Q 33 (Sir Richard Heaton)
162 Q 2 (Dr Patrick O'Brien)
163 Q 13 (Prof Graham Gee)
164 Supreme Court, *R (on the application of Miller) (Appellant) v The Prime Minister (Respondent); Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland)*, [2019] UKSC 41
165 Q 2 (Dr Patrick O'Brien)
166 Ministry of Justice, 'Press release: Lord Chancellor response to Supreme Court judgment' (24 January 2017): https://www.gov.uk/government/news/lord-chancellor-response-to-supreme-court-judgment [accessed 15 November 2022]
167 Oral evidence taken before the Constitution Committee, Annual evidence session with the President and Deputy President of the Supreme Court, 6 April 2022 (Session 2021–22), Q 21 (Lord Reed of Allermuir)

out what the constitutional relationships are … That has been a response to criticism, because it was evident that people did not understand our role."[168]

120. In the same exchange, Lord Hodge, Deputy President of the Supreme Court, added "it is very important that we do not enter the fray in the face of political criticism, and we leave it to the Lord Chancellor, if necessary, to defend us in the context of defending the rule of law."[169]

121. **Defending the judiciary against unfair, personal or threatening abuse is a core part of the Lord Chancellor's role. While criticism of the content of a judgment is acceptable, targeted personal criticism which unfairly impugns a judge's impartiality or inflames public sentiment against the judiciary is not. In such cases, a Lord Chancellor must intervene promptly and publicly.**

122. **The 'Enemies of the People' incident, and the then Lord Chancellor's response to it, at the very least caused alarm within the judiciary and damaged trust. For the judiciary to feel secure in its independence, and the performance of its duty to decide cases without fear or favour, it needs the support of a Lord Chancellor who is willing to defend it. This incident illustrates the importance of a Lord Chancellor having sufficient authority within the Government to perform their role.**

123. **The Lord Chief Justice and other senior members of the judiciary have a part to play in explaining to the public, in general terms, their role and constitutional position. It would not be appropriate, however, for them directly to address criticism, made in the heat of political controversy, of their judgments on the application of the law. That is the Lord Chancellor's responsibility.**

Law Officers

124. The responsibilities of the Law Officers—the Attorney General, the Solicitor General and the Advocate General for Scotland—touch on the rule of law in various ways. For instance, superintendence of the prosecution services or bringing contempt of court proceedings can ensure that the legal system operates fairly and in an orderly way. However, this section focuses on their role as legal advisers to, and lawyers in, the Government. Dominic Raab described this role as a "core function that supports all ministers to act lawfully and in accordance with the rule of law."[170]

125. The Ministerial Code requires ministers to consult the Law Officers "in good time before the Government is committed to critical decisions involving legal considerations."[171] Therefore, on any issue of importance, the Law Officers ought to have had an opportunity to assert the importance of the rule of law through advice given on that issue. As we stated in our 2008 report on the office of Attorney General, "the provision of legal advice to the Government

168 Oral evidence taken Before the Constitution Committee, Annual evidence session with the President and Deputy President of the Supreme Court, 6 April 2022 (Session 2021–22), Q 21 (Lord Reed of Allermuir)

169 Oral evidence taken before the Constitution Committee, Annual evidence session with the President and Deputy President of the Supreme Court, 6 April 2022 (Session 2021–22), Q 21 (Lord Hodge)

170 Written evidence from Dominic Raab MP (RLC0021)

171 Cabinet Office, *Ministerial Code* (May 2022): https://web.archive.org/web/20221209172145/https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1079310/Ministerial_Code.pdf [accessed 10 January 2023]

is important in giving practical effect to the constitutional principle of the rule of law."[172]

126. The Government's *Guide to Making Legislation* explains that the Attorney General's Office and the Legal Secretariat to the Advocate General for Scotland:

> "advise the Law Officers where bills raise issues of particular legal difficulty, disagreement or importance. The also advise on retrospectivity, early commencement, Crown immunity, devolution or ECHR compatibility and will work with departments and relevant centres of excellence when considering such legal issues. They advise on legal issues memorandum and will consider draft memorandums before consideration by PBL Committee ahead of introduction."[173]

127. The Attorney General and Advocate General, as members of the Parliamentary Business and Legislation Committee, are well-placed to ensure that the rule of law is considered before a bill is introduced. Additionally, at the time of writing, the Attorney General attends the National Security Council, the National Security Council (Europe) and the Home Affairs Committee. The current Lord Chancellor also attends those Committees, but possibly in his capacity as Deputy Prime Minister.[174]

Law Officers: a wider rule of law function?

128. The 2005 changes removed the need for the Lord Chancellor to be legally qualified. The Law Officers are therefore the only members of the Government who are necessarily lawyers. It might be expected that they would take a more prominent role in general rule of law issues.

129. Lord Thomas of Cwmgiedd wondered whether a non-lawyer Lord Chancellor would be listened to on rule of law issues and thought that "the position of the Attorney General becomes much more critical"[175] while Dr McCormick thought the Law Officers were now potentially the "only formal bridge between the Executive and the judiciary."[176]

130. Generally, though, we heard little evidence to suggest that the Law Officers had taken on significantly wider responsibility. Lord Mackay of Clashfern (quoted above), perhaps relying on his experience as a pre-2005 Lord Chancellor, contended that the role of Lord Chancellor was to raise issues in Cabinet about the rule of law, but that it was then the role of the Law Officers to advise on the matter,[177] while Dominic Grieve told us:

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

173 Cabinet Office, *Guide to Making Legislation* (2022), para 4.7: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1099024/2022-08_Guide_to_Making_Legislation_-_master_version__4_.pdf [accessed 21 December 2022]

174 HM Government, *Cabinet Committees List* (3 November 2022): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1115314/November_2022_Cabinet_Committee_List.pdf [accessed 21 December 2022]. In a previous report (in 2014) we noted that the Attorney General attended the National Security Council but the Lord Chancellor did not. Constitution Committee, The Office of Lord Chancellor (6th Report, Session 2014–15, HL Paper 75), para 73

175 Q 67 (Lord Thomas of Cwmgiedd)

176 Q 21 (Dr Conor McCormick)

177 Q 68 (Lord Mackay of Clashfern)

> "The role of the law officers has historically been to ensure that the Government get legal advice so that they can pursue their policies lawfully. It has not historically been the role of the law officers to be the guardians of the rule of law within government."[178]

131. But he added: "it may be right to say that that responsibility has at times fallen more on law officers, if the Lord Chancellor has been unable or unwilling to understand the issues."[179]

132. Sir Jonathan Jones was also equivocal: "Maybe if the Lord Chancellor is not a lawyer and the Attorney-General is the only legal Minister, as it were, that makes a difference, but you would have to ask them. I do not think that of itself is a huge factor."[180]

133. Though the evidence was unclear on the role performed by recent Law Officers on wider rule of law issues, it seems helpful for any member of the Government with gravitas and legal authority to raise concerns when they arise. In our 2014 report we concluded that the changes to the Lord Chancellor's role had made the Law Officers' more important and recommended that the Attorney General should attend Cabinet and be properly resourced in order to fulfil this enhanced function.[181]

134. **All those in Government have a duty to defend the rule of law and should be mindful of the fundamental tenets on which it rests, as described in paragraph 41. This applies especially to those with legal authority. In our view, the Law Officers have a wider role in defending the rule of law when issues arise, alongside the Lord Chancellor.**

A respectable legal argument?

135. We concluded in earlier chapters that the Government should not knowingly pursue an unlawful course of action. In some cases the lawfulness of an action is not clear in advance and the Government must rely on the advice of Government lawyers, including the Law Officers, in deciding whether to proceed. In doing so, the Government must weigh the desirability of its proposed policy against the likelihood of legal challenge (successful or unsuccessful).

136. Lord Keen of Elie referred to the concept of a "respectable" legal argument. He said that the role of the Law Officers was to ensure that the Government's policy could be implemented, while reminding their colleagues of "their obligations to adhere to the rule of law." He noted that, in doing so, there were "times when we come very close to the boundaries … when the Law Officers will advise that a particular course of action is 'respectable'. I have to observe that that is a fairly low standard."[182]

137. When discussing his position on the United Kingdom Internal Market Bill, Lord Keen explained that he had felt there was a respectable argument that Part 5 of the Bill merely had the potential to breach international law, one

178 Q 102 (Dominic Grieve)
179 Q 102 (Dominic Grieve)
180 Q 35 (Sir Jonathan Jones)
181 Constitution Committee, *The Office of Lord Chancellor* (6th Report, Session 2014–15, HL Paper 75), paras 79, 80
182 Q 50 (Lord Keen of Elie)

which could not be sustained once Brandon Lewis had stated that the Bill did breach international law.[183]

138. The concept of a 'respectable legal argument' is found in the Government Legal Department's guidance to government lawyers on legal risk. A version of this guidance, in operation during preparation of the United Kingdom Internal Market Bill and when Lord Keen spoke to us in April 2022, was published in 2018 following a request under the Freedom of Information Act 2000.[184]

139. The 2015 guidance stated that risk should be considered against:

- the likelihood of a legal challenge being brought
- the likelihood of that challenge being successful, and
- the impact and consequences of that challenge, whether successful or not, including possible mitigations to reduce risks and impacts.

140. The guidance set out a 'traffic light' system, accompanied by percentages, for indicating the risk for each of the bullets above and stated both that "Ministers may legitimately decide to proceed with a proposal even if it carries a high risk (70 per cent +)" and:

> "If there is no respectable legal argument that we could put to the Court, then you will need to advise that the proposed action is unlawful. This is likely to be highly exceptional and if you are in this territory you should refer the matter to your line manager and the Legal Director before you advise (a respectable legal argument is a credible argument the Government could properly run in court)."[185]

141. An updated version was published on 2 August 2022.[186] There was speculation at the time that the revised guidance would forbid Government lawyers from advising a course of action was unlawful.[187] The new guidance does not go as far as that but expands upon the need for lawyers to provide solutions to legal obstacles. The then Attorney General, Suella Braverman, elaborated in a series of tweets that Government lawyers were "too cautious in their advice and this has hampered ministerial policy objectives needlessly," the change was intended to move away from the "'computer says no' approach", to encourage a "solutions-based approach and use innovative legal thinking" and to "instil a 'private sector' approach to client service."[188] It is unclear

183 Q 51 (Lord Keen of Elie)
184 Government Legal Department, *Guidance Note on Legal Risk* (July 2015): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/736503/Legal_Risk_Guidance_-_Amended_July_2015.pdf [accessed 21 December 2022]
185 Government Legal Department, *Guidance Note on Legal Risk* (July 2015): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/736503/Legal_Risk_Guidance_-_Amended_July_2015.pdf [accessed 21 December 2022]
186 Attorney General's Office, *Attorney General's Guidance on Legal Risk* (2 August 2022): https://www.gov.uk/government/publications/attorney-generals-guidance-on-legal-risk [accessed 21 December 2022]
187 Miranda Bryant, 'Braverman orders government lawyers to offer solutions to legal challenges', *The Guardian* (30 July 2022): https://www.theguardian.com/politics/2022/jul/30/braverman-orders-government-lawyers-to-offer-solutions-to-legal-challenges [accessed 21 December 2022], Tevye Markson, 'Attorney general accuses "overcautious" government lawyers of "hampering ministers"', *Civil Service World* (2 August 2022): https://www.civilserviceworld.com/news/article/government-lawyers-too-cautious-says-attorney-general [accessed 21 December 2022]
188 Suella Braverman MP (@SuellaBraverman), tweet on 1 August 2022: https://twitter.com/suellabraverman/status/1554065968489529344 [accessed 21 December 2022]

whether the guidance has had a chilling effect on the willingness of Government lawyers to advise that a course of action is unlawful.

142. Witnesses such as David Gauke, Dominic Grieve and Lord Garnier, former Solicitor General for England and Wales, Attorney General's Office (2010–12), thought the 'respectable legal argument threshold' was appropriate, if adhered to.[189] Lord Mackay thought otherwise:

> "the law officers' job is to be convinced about what the law is: what is the right answer to this legal question? You know as well as I do that lawyers do not always agree with one another, but I think that it is the job of the Attorney-General to formulate, with help, if necessary, the correct view of what the present law is on the subject."[190]

143. Dr Ben Yong has considered this issue in a paper published by the Constitution Society. He noted that lawyers were, in 2013 when his paper was published, involved in policy development at an earlier stage than previously, and took a more proactive approach.[191] This shift in practice has been accompanied by a change in the way advice is provided, from the sort of 'judgment' described by Lord Mackay, delivered when policy was fairly well developed, to the risk-based approached reflected in the guidance described above.[192] Part of the reason was the pervasiveness of law in Government business. He concluded:

> "law is now so much a part of the business of government that lawyers must be involved. However, the pervasiveness of law also means that—perhaps paradoxically—government business becomes more problematic and uncertain; and so government lawyers in advising clients now see themselves as managing risk."[193]

144. A risk-based approach may be appropriate when a legally uncertain course of action can be tested in the courts. The impact of an adverse judgment, or merely the need to defend a case, can be weighed against the expected benefits of a proposed policy. Where legal action is unlikely or impossible, as in the case of a decision to authorise the use of armed force, the practical legal risk is less tangible, but the political and moral impact of the decision is great. The Attorney General's guidance envisages that considerations other than strict legal risk will be taken into account when ministers decide upon a course of action:

> "Legal risk is one, but not the only, type of risk that [ministers] will want to consider. The fact that something is judged to involve high legal risk does not mean it cannot or should not be taken. For example, something that is very high risk may have little or no impact and, equally, something low risk could have a major impact. Only if no respectable legal argument

189 Q 86 (David Gauke), Q 107 (Lord Garnier), Q 108 (Dominic Grieve)
190 Q 68 (Lord Mackay of Clashfern)
191 Dr Ben Yong, '*Risk Management Government Lawyers and the Provision of Legal Advice within Whitehall*', *Constitution Society*, (2013), para 3.5ff: https://consoc.org.uk/wp-content/uploads/2013/11/J1336_GovernmentLawyers_WEB.pdf [accessed 21 December 2022]
192 Dr Ben Yong, '*Risk Management Government Lawyers and the Provision of Legal Advice within Whitehall*', *Constitution Society*, (2013), para 3.14ff: https://consoc.org.uk/wp-content/uploads/2013/11/J1336_GovernmentLawyers_WEB.pdf [accessed 21 December 2022]
193 Dr Ben Yong, '*Risk Management Government Lawyers and the Provision of Legal Advice within Whitehall*', *Constitution Society*, (2013), para 3.19ff: https://consoc.org.uk/wp-content/uploads/2013/11/J1336_GovernmentLawyers_WEB.pdf [accessed 21 December 2022]

> can be put to a court should it be advised as being unlawful. This will be rare."[194]

145. Nonetheless, in the case of armed conflict, legal certainty is important for the public and the military. Lord Mackay, speaking about the publication of legal advice, said:

> "Certainly in relation to the question of conflict, it is important because, apart from anything else, senior military people have to know that what they are doing is lawful; otherwise, they might be in serious trouble, so they are entitled to insist."[195]

146. In an earlier inquiry, Rt Hon Lord Goldsmith KC, then Attorney General, discussing his advice on the legality of the 2003 invasion of Iraq, told us:

> "[the armed services] need clarity about whether what we are asking them to do is lawful, yes or no. You said a moment ago that some of these questions are difficult. Sometimes, it is absolutely right, they are difficult. We have to reach a judgment. Something cannot be a little bit lawful, any more than you can be a little bit pregnant; it has to be yes or no, and the Armed Services are entitled to a clear answer to that question and they do not need to read long, legal advices and then decide as they are, as it were, metaphorically being asked to go over the top of the trenches whether they agree with this advice or that advice."[196]

147. **The existence of a "respectable legal argument" as set out in the guidance and elaborated by the then Attorney General, Rt Hon Suella Braverman KC MP, could sometimes represent a very low threshold for authorising legally uncertain action. While it may be conceptually correct that an action is not "unlawful" until tested by the courts or where no legal justification can be found, acting on such an uncertain basis is dubious practice and contrary to the rule of law. The concept may provide a helpful framework for the provision of advice by Government lawyers but a decision by ministers to act must not be based solely on a calculation of legal inconvenience. An alternative framework for assessing legal risk might be to do so in terms of a "necessary degree of confidence", as recently exemplified in the Lord Advocate's reference to the Supreme Court on a Scottish Independence Referendum Bill.**[197]

148. **The validity of the "respectable legal argument" threshold itself depends on an uncertain threshold in the Attorney General's guidance: the level at which an argument becomes "respectable". The guidance explains that this is an argument that can be properly put before a court, but this may be a subjective judgement. It also refers to an absence of such arguments as being "rare" or "exceptional": it is**

194 Attorney General's Office, *Attorney General's Guidance on Legal Risk* (2 August 2022), para 2: https://www.gov.uk/government/publications/attorney-generals-guidance-on-legal-risk [accessed 21 December 2022]. We note in passing that arguments put to the court by the then Attorney General, Suella Braverman in *R v Long, Bowes and Cole*, were described in the judgment as "unusual" and "regrettable". Court of Appeal of England and Wales, *R v Long, Bowes and Cole,* [2020] EWCA Crim 1729, para 84

195 Q 76 (Lord Mackay of Clashfern)

196 Oral evidence taken before the Constitution Committee, inquiry on Waging war: Parliament's role and responsibility, 22 March 2006 (Session 2005–06), Q 243 (Lord Goldsmith)

197 Supreme Court, *Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998*, [2022] UKSC 31

unclear whether this suggests the threshold is so low that an argument will almost always be found or whether the Government would not expect frequently to be contemplating legally dubious action. While the "respectable legal argument" threshold may be justified in some circumstances of genuine legal uncertainty we are concerned that the threshold as currently set out in the guidance could sometimes be used purely for the convenience of the Government. Public confidence in the Government's commitment to the rule of law demands that any threshold is meaningful and aligns with an ethos of genuinely seeking to comply with the law.

149. **In the case of decisions to authorise armed conflict, greater certainty is required. The existence of a merely "respectable" argument in this context is a fig leaf, and risks undermining the trust of the public and the military.**

Publication of advice

150. Law Officers' advice is covered by legal professional privilege and, as such, is not normally disclosed. This is often referred to as the "Law Officers convention."

151. The Ministerial Code states:

> "The fact that the Law Officers have advised or have not advised and the content of their advice must not be disclosed outside Government without their authority."[198]

152. Nonetheless, advice has occasionally been published. Notable examples are Lord Goldsmith's advice on the legality of the Iraq War in 2003 and the advice of Rt Hon Sir Geoffrey Cox KC MP on the legal effects of the Northern Ireland Protocol in 2018.[199] The former was released on 28 April 2005 following a leak and a series of requests under the Freedom of Information Act 2000. An earlier draft of the advice was subsequently declassified and published as part of the Iraq Inquiry, chaired by Sir John Chilcot.[200] The latter was published following the agreement of motions in the House of Commons on 13 November 2018 and 4 December 2018.[201]

153. Some witnesses favoured more routine publication of Law Officers' advice. Lord Mackay thought the public should be trusted with the information, particularly in relation to military conflict.[202] Dr Kyriakides also thought

198 Cabinet Office, *Ministerial Code* (May 2022), para 2.13: https://web.archive.org/web/20221209172145/https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1079310/Ministerial_Code.pdf [accessed 10 January 2023]

199 Letter from Sir Geoffrey Cox MP, Attorney General, to Theresa May MP, Prime Minister, on the Legal Effect of the Protocol on Ireland/Northern Ireland, 13 November 2018: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/761852/05_December-_EU_Exit_Attorney_General_s_legal_advice_to_Cabinet_on_the_Withdrawal_Agreement_and_the_Protocol_on_Ireland-Northern_Ireland.pdf [accessed 21 December 2022]

200 See Iraq Inquiry and Cabinet Office, *The Report of the Iraq Inquiry—Volume 1*, HC 265–I (6 July 2016), para 73ff: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/535409/The_Report_of_the_Iraq_Inquiry_-_Volume_I.pdf [accessed 21 December 2022]. The draft advice is available on the National Archives website: Attorney General's Office, *Lord Goldsmith's draft advice on Iraq: Interpretation of Resolution 1441* (14 January 2003): https://webarchive.nationalarchives.gov.uk/ukgwa/20171123123237/http://www.iraqinquiry.org.uk//media/46493/Goldsmith-draft-advice-14January2003.pdf [accessed 21 December 2022]

201 HC Deb, 4 December 2018, col 667

202 Q 76 (Lord Mackay of Clashfern)

"the Law Officers convention and [legal professional privilege] should be automatically waived to enable the Law Officers to enlighten the people, to advise Parliament and to enable Parliamentarians to reach informed decisions."[203] But in general witnesses were cautious.[204]

154. Dr McCormick referred to the work of Professor Gabrielle Appleby, who suggested, in an Australian context, that advice should be disclosed when a law officer is unsure of the constitutional validity of a bill or where Parliament has to hold the Government to account on a matter of national importance.[205] Dr Casey thought a threshold for publication could be set and that it was justified in "premiership-wrecking" cases, where "the decisions involve issues of import to nearly everyone on the island."[206]

155. Sir Jonathan Jones and Sir Richard Heaton opposed routinely publishing the full advice but supported publishing a statement setting out the legal arguments and the legal basis on which the Government was acting. Sir Jonathan noted that in doing so it would be necessary "that the explanation being given is an honest assessment and is consistent with the advice that is being given."[207] Both he and Sir Richard thought that military conflict might be a case where fuller publication was warranted. They both thought it was important that the Government could rely on confidential advice when litigation was a prospect. Sir Richard noted: "if it is not a case likely to be litigated, that might be a factor contributing to waiver of privilege."[208]

156. **On balance, we do not favour the routine publication of Law Officers' advice. Doing so would infringe on legal professional privilege and risk undermining the Government's position should a matter reach court. This is consistent with the rule of law as fairness in legal proceedings is a fundamental part of it. In exceptional cases of national importance, especially where litigation is unlikely, there is a stronger case for publishing advice, either in full or in summary. Doing so would enhance Parliament's ability to scrutinise the Government's proposed actions and public trust in its adherence to the rule of law. It is difficult to codify the situations when there should be a presumption of publication but decisions to use armed force are perhaps the clearest area where publication is in the public interest. *The Government should consider amending the Ministerial Code accordingly.***

203 Written evidence from Dr Klearchos A Kyriakides (RLC0009)
204 See, for instance, Q 56 (Lord Keen of Elie), Q 61 (Lord Judge), Q 114 (Lord Garnier; Dominic Grieve)
205 Q 25 (Dr Conor McCormick)
206 Q 25 (Dr Conor Casey)
207 Q 45 (Sir Jonathan Jones)
208 Q 46 (Sir Richard Heaton)

CHAPTER 4: REFORM OF THE ROLE OF LORD CHANCELLOR

Lord Chancellor's status

Qualification by experience

157. The office of Lord Chancellor is the only ministerial position with statutory criteria for appointment.[209] The criteria are in section 2 of the Constitutional Reform Act 2005 (see Box 3).

Box 3: Constitutional Reform Act 2005, section 2

Lord Chancellor to be qualified by experience

1. A person may not be recommended for appointment as Lord Chancellor unless he appears to the Prime Minister to be qualified by experience.

2. The Prime Minister may take into account any of these—

   (c) experience as a Minister of the Crown;

   (d) experience as a Member of either House of Parliament;

   (e) experience as a qualifying practitioner;

   (f) experience as a teacher of law in a university;

   (g) other experience that the Prime Minister considers relevant.

8. In this section "qualifying practitioner" means any of these—

   (i) A person who has a Senior Courts qualification, within the meaning of section 71 of the Courts and Legal Services Act 1990 (c. 41);

   (j) an advocate in Scotland or a solicitor entitled to appear in the Court of Session and the High Court of Justiciary;

   (k) a member of the Bar of Northern Ireland or a solicitor of the Court of Judicature of Northern Ireland.

Source: Constitutional Reform Act 2005, section 2

158. When the Constitutional Reform Bill was passing through Parliament in 2004–05 there was considerable debate on whether the Lord Chancellor should be required to have a legal background. Members of the Select Committee on the Constitutional Reform Bill were divided on the matter and, accordingly, the Committee made no recommendation.[210] Though an amendment was tabled to require a legal qualification it was withdrawn[211] and the Constitutional Reform Act 2005 was passed without such a requirement. Nonetheless, six of the 11 Lord Chancellors appointed since the Act came into force have had a legal qualification.[212]

209 Constitution Committee, *The Office of Lord Chancellor* (6th Report, Session 2014–15, HL Paper 75), para 102, Lord Chief Justice Lord Thomas of Cwmgiedd, Speech on the judiciary within the state—the relationship between the branches of the state at the Michael Ryle Memorial Lecture, 15 June 2017, para 54: https://www.judiciary.uk/wp-content/uploads/2022/07/lcj-michael-ryle-memorial-lecture-20170616.pdf [accessed 15 December 2022]

210 Select Committee on the Constitutional Reform Bill, *First Report* (1st Report, Session 2003–04, HL Paper 125–I), para 425

211 HL Deb, 11 October 2004, col 45

212 Written evidence from the Ministry of Justice (RLC0014), para 7. Since we received written evidence from the Ministry of Justice Brandon Lewis MP was briefly appointed Lord Chancellor in September 2022, and Dominic Raab MP was re-appointed Lord Chancellor in October 2022. Both are legally qualified.

159. The debate continued during our inquiry. Some witnesses thought the Lord Chancellor should ideally be a lawyer[213] or should have a "constitutional background".[214] More positive relationships with senior judges and lawyers, a greater understanding of the legal and judicial system and greater appreciation for the rule of law were all cited as reasons.[215] Lord Reed considered it helpful that all the Lord Chancellors he had worked alongside during his time as President or Deputy President of the Supreme Court had "a legal background and some legal experience".[216] However, others acknowledged that the law was complex and expertise in one area would not necessarily translate to expertise in another.[217]

160. Some witnesses thought non-lawyers were capable of performing the role of Lord Chancellor.[218] The individual personality and competence of the office holder was considered key,[219] and some argued that this mattered more than specific qualifications.[220] Lord Keen described the Lord Chancellor as "more of an administrative than a legal role" and considered a number of office holders to have been "outstanding" despite lacking a legal qualification.[221] David Gauke echoed others when he said:

> "A good Minister with a good attitude towards the rule of law, but without a legal background, will always be preferable to a bad Minister with a half-hearted approach to the rule of law but with legal qualifications."[222]

161. The current Lord Chancellor, Dominic Raab, considered a legal background helpful but not imperative. His own legal background meant he was familiar "with constitutional and justice matters on day one". However, he said that "the fundamental matter for any Lord Chancellor is to understand the position of the judiciary as a separate branch of the constitution."[223]

162. We asked if section 2 of the Constitutional Reform Act should be amended to require Lord Chancellors to have a legal or constitutional background. Lord Mackay cautioned that this would confine the Prime Minister's search for a candidate and might be a "hindrance".[224] The same concern was voiced when the Constitutional Reform Bill was passing through Parliament.[225] During the committee stage debate Lord Falconer, then Lord Chancellor and the Minister in charge of the bill, stated:

> "[I]t is to overstate the qualities of the lawyer to say that the Lord Chancellor, who is the protector of the rule of law and the independence of the judiciary, has to be a lawyer. Rather, the right course is to say that the person with the right qualities for the job should be appointed. To

213 Written evidence from Dr Klearchos A. Kyriakides (RLC0009), para 7, Dr Mark Ryan (RLC0012), para 4, Society of Labour Lawyers (RLC0017), para 3.3, Q 98 (Lord Clarke of Nottingham, David Gauke)
214 Q 61 (Lord Judge), Q 73 (Lord Mackay of Clashfern)
215 Q 98 (Lord Clarke of Nottingham), Q 127 (Jack Straw), Written evidence from Jack Straw (RLC0020), p 6, Q 73 (Lord Mackay of Clashfern)
216 Q 17 (Lord Reed of Allermuir)
217 Q 20 (Dr Conor Casey), Q 98 (David Gauke), Q 112 (Lord Garnier)
218 Q 36 (Sir Richard Heaton), Q 61 (Lord Judge), Q 73 (Lord Mackay of Clashfern)
219 Q 66 (Lord Thomas of Cwmgiedd), Q 61 (Lord Judge), Q 2 (Prof Graham Gee)
220 Q 55 (Lord Keen of Elie)
221 Q 55 (Lord Keen of Elie)
222 Q 98 (David Gauke)
223 Written evidence from Dominic Raab MP (RLC0021)
224 Q 73 (Lord Mackay of Clashfern)
225 HL Deb, 11 October 2004, col 35

> restrict the Prime Minister's choice might well on occasion deprive the nation of the person who is right for the job."[226]

163. The combination of the offices of Lord Chancellor and Secretary of State for Justice in 2007 means that a requirement for the Lord Chancellor have a legal background would require the Secretary of State for Justice to have the same. This would limit potential appointees to a major government department. Whether the roles should remain combined is discussed below.

164. The 'political clout' of post-reform Lord Chancellors has also been a subject of discussion for several years.[227] Prior to the reforms introduced by the CRA, the Lord Chancellor was head of the judiciary, Speaker of the House of Lords, a member of the Government, a judge and directly or indirectly responsible for a significant number of judicial appointments.[228] The pre-2005 Lord Chancellor was described as "a big beast around Cabinet … at the end of their career"[229] and, in the words of Lord Kingsland, former Shadow Lord Chancellor, "a great inconvenience to the executive".[230]

165. While the post-reform Lord Chancellor remains a Cabinet minister, many of the office's former high-profile responsibilities now rest with other actors.[231] This led some witnesses to question the stature and clout of the office, pointing out that modern Lord Chancellors were more likely to be mid-career politicians. As such, they may be less inclined to stand up to the rest of the Cabinet, including the Prime Minister,[232] and may be less able to protect the budget needed for a functioning judiciary.[233] Lord Judge described the Lord Chancellor as a "minor Minister" who "does not carry the weight that a former Lord Chancellor did".[234] Lord Thomas raised concerns about having a Lord Chancellor who still had political ambitions because they may be reluctant to say to their colleagues "you can't do that, it's unlawful".[235] The mid-career nature of the post-2005 Lord Chancellor is perhaps illustrated by office-holder's careers following their time as Lord Chancellor: six of eleven have gone on to hold other ministerial roles.[236]

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226 HL Deb, 11 October 2004, col 41

227 Jake Richards, 'The Fall of the Lord Chancellor', *Prospect* (15 May 2020): https://www.prospectmagazine.co.uk/politics/the-fall-of-the-lord-chancellor-government-law-constitution-truss-grayling-buckland [accessed 21 December 2022]

228 Constitution Committee, *The Office of Lord Chancellor* (6th Report, Session 2014–15, HL Paper 75), paras 5–7

229 Q 4 (Dr Patrick O'Brien)

230 HL Deb, 13 July 2004, col 1146

231 For example, the Constitutional Reform Act 2005 replaced the Lord Chancellor as head of the judiciary in England and Wales with the Lord Chief Justice and enabled the Lord Chancellor to be replaced as Speaker of the House of Lords with a new office of Lord Speaker.

232 QQ 4, 9 (Dr Patrick O'Brien), Written evidence from Yuan Yi Zhu (RLC0016), para 38. An account of the 'Enemies of the People' incident by then Lord Chancellor's special adviser at the time, Kirsty Buchanan, describes the choice faced by Elizabeth Truss: "Issuing a rapid and robust defence of the judges would have incurred the wrath of Downing Street and the popular press but failure to defend their independence at all would have been a breach of her constitutional duty as lord chancellor." Kristy Buchanan, 'Unashamed ambition put my rottweiler ex-boss Liz Truss on the trail to No 10', *The Sunday Times* (19 December 2021): https://www.thetimes.co.uk/article/unashamed-ambition-put-my-rottweiler-ex-boss-liz-truss-on-the-trail-to-no-10-bdm8cm2fn [accessed 21 December 2022]

233 Q 9 (Dr Patrick O'Brien), Q 66 (Lord Thomas of Cwmgiedd)

234 Q 60 (Lord Judge)

235 Q 64 (Lord Thomas of Cwmgiedd)

236 At the time of writing Lord Falconer of Thoroton, Jack Straw, David Gauke and Brandon Lewis MP had not gone on to hold ministerial roles following their time as Lord Chancellor. Dominic Raab MP was removed as Lord Chancellor in September 2022 and reappointed in October 2022.

166. The Committee's reports on the relationship between the executive, judiciary and Parliament emphasised that the office of Lord Chancellor should be held by individuals with "sufficient status and seniority",[237] and "the authority necessary to fulfil their duties."[238] We reiterated this sentiment in our 2014 report *The office of the Lord Chancellor*:

> "Given the importance of the Lord Chancellor's duty to uphold the rule of law, the Lord Chancellor should have a high rank in Cabinet and sufficient authority and seniority amongst his or her ministerial colleagues to carry out this duty effectively and impartially."[239]

167. **In the final analysis, character, intellect and a commitment to the rule of law are the most important attributes for a Lord Chancellor to possess. *Whilst we do not consider it necessary to amend the criteria for appointment in section 2 of the Constitutional Reform Act 2005 so as to make it a specific requirement that Lord Chancellors should have a legal qualification, we would expect a Lord Chancellor normally to be a senior legal figure. They should be respected both in the legal community and in Parliament, well equipped with the necessary qualities and knowledge successfully to uphold the rule of law and defend the independence of the judiciary in government.***

168. **In fulfilling their duties Lord Chancellors must be willing and able, where necessary, to stand up to Cabinet colleagues and the Prime Minister. *We invite Prime Ministers, when appointing Lord Chancellors, to give weight to candidates with the authority and political clout necessary successfully to speak up for and defend the rule of law in Government, even where this may conflict with political priorities.***

Tenure in office

169. The past five Lord Chancellors have spent an average of less than 14 months in office.[240] Some witnesses considered that the short average tenure of recent Lord Chancellors may have had negative implications.[241] For instance, Dr O'Brien suggested that shortness of tenure meant that there was a disincentive to carry out the role in a way that might damage the Lord Chancellor's relationship with the Prime Minister and therefore their future career prospects.[242] Lord Mackay reflected on his almost 10 years in post and told us: "So long as the Lord Chancellor is doing a reasonable job, the longer he is in it, generally speaking, the better."[243]

170. However, no witness suggested any mechanism to ensure increased tenure. Sir Richard Heaton noted that it was difficult to conceive of how tenure

237 Constitution Committee, *Relations between the executive, the judiciary and Parliament* (6th Report, Session 2006–07, HL Paper 151), para 12

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

239 Constitution Committee, *The Office of Lord Chancellor* (6th Report, Session 2014–15, HL Paper 75), para 117

240 David Lidington (June 2017–January 2018), David Gauke (January 2018–July 2019), Sir Robert Buckland MP (July 2019–September 2021), Dominic Raab MP (September 2021–September 2022), Brandon Lewis MP (September 2021–October 2022). We have not included Dominic Raab's second term.

241 QQ 36, 38 (Sir Richard Heaton), Q 4 (Dr Patrick O'Brien), Q 70 (Lord Mackay of Clashfern)

242 Q 4 (Dr Patrick O'Brien)

243 Q 70 (Lord Mackay of Clashfern)

in office could be improved while preserving the principle that the Prime Minister should have unfettered discretion in ministerial appointments.[244] Lord Mackay similarly considered this issue a matter for the Prime Minister to judge.[245] Several witnesses pointed out that this was not an issue unique to the post of Lord Chancellor, and increased tenure in office would be beneficial to all Cabinet ministers.[246]

171. **Tenure in office increases the legal and constitutional experience and knowledge of a Lord Chancellor. The Lord Chancellor's role is a unique appointment with specific responsibilities that are fundamental to the rule of law. *We recommend that Prime Ministers, when undertaking Government reshuffles, consider the benefits of Lord Chancellors remaining in office for longer in order to maintain confidence in the status and effectiveness of the office.***

Lord Chancellor as Secretary of State for Justice and Deputy Prime Minister

Secretary of State for Justice

172. In 2007 the then Prime Minister, Tony Blair, announced the creation of a new Ministry of Justice led by the Lord Chancellor as Secretary of State for Justice.[247] The criminal justice functions of the Home Office were transferred to the new Ministry of Justice, along with most of the responsibilities of the now defunct Department for Constitutional Affairs.[248] Constitutional affairs remained the responsibility of the Ministry of Justice until 2010, when they were transferred to the office of the then Deputy Prime Minister, Nick Clegg.[249] Nowadays, the Ministry of Justice administers courts and tribunals (alongside the independent judiciary), has responsibility for prison and probation services, and provides services for victims of crime, children, vulnerable people and those seeking access to justice.[250]

173. During our inquiry the respective functions of Lord Chancellor and Secretary of State for Justice were defined by Sir Richard Heaton. He considered functions that have a public interest character or a rule of law character (such as "looking after judges and legal aid") to be "Lord Chancellor functions". He deemed other, more political functions, such as administration of the prison service, to be Secretary of State for Justice functions.[251]

174. This arrangement has been criticised. A common theme in evidence collected for our 2014 report *The office of the Lord Chancellor* was that a conflict of interest arises between the duties of the Lord Chancellor and

244 Q 36 (Sir Richard Heaton)
245 Q 70 (Lord Mackay of Clashfern)
246 Q 12 (Prof Graham Gee, Dr Patrick O'Brien), Written evidence from Jack Straw (RLC0020), p 5
247 HC Deb, 29 March 2007, cols 133–135WS, Constitution Committee, *Relations between the executive, the judiciary and Parliament* (6th Report, Session 2006–07, HL Paper 151), para 20
248 Constitutional Affairs Committee, *The Creation of the Ministry of Justice* (Sixth Report, Session 2006–07, HC 466), para 1
249 YouTube video on Should the role of Lord Chancellor be reformed?, added by Institute of Government: https://youtu.be/rz5Kpe7p4Xs [accessed 15 December 2022]
250 Ministry of Justice, *Annual Report and Accounts 2020–21*, HC 788 (16 December 2021), p 2: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1041825/moj-annual-report-and-accounts-2020–21-accessible-version.pdf
251 Q 36 (Sir Richard Heaton)

the Secretary of State for Justice.[252] In 2014 the Joint Committee on Human Rights summarised the issue as follows:

> "The Secretary of State for Justice is a political minister in a Government which has collective responsibility for its political views, while the Lord Chancellor, historically, had the different role of standing up within Government for the interests of the justice system."[253]

175. Witnesses to our current inquiry also raised concerns about potential conflicts of interests arising from the combination of the two roles.[254] This was particularly acute when it came to the office-holder's responsibility to reach an adequate funding settlement with the Treasury to fulfil their statutory duty as Lord Chancellor to fund an "efficient and effective court service."[255] A conflict of interest could arise, for example, if a policy of fiscal restraint were adopted by the Government. The Lord Chancellor, as Secretary of State for Justice, would find themselves with a conflict between their duty as Lord Chancellor to make sure the courts functioned adequately and their collective responsibility as Secretary of State for Justice to adhere to the policy of fiscal restraint.

176. Witnesses also made arguments in favour of the dual role of Lord Chancellor and Secretary of State for Justice. Some suggested that the combined role elevated the status of the Lord Chancellor in Government. Lord Garnier thought modern "large-spending" Lord Chancellors likely had more clout than the Lord Chancellors of the 20th century,[256] while Jack Straw considered that to separate the role of Lord Chancellor from that of Secretary of State for Justice would "make the position of [Lord Chancellor] a shell."

177. Sir Richard Heaton highlighted practical advantages to combining the roles, including "quite a compelling argument for a big, effective, joined-up delivery department that understands justice at is core and the links between parts of the justice system."[257] This was echoed by Dominic Raab, who said he had found value in holding both offices: "Combined, they allow me a strategic and holistic oversight of the justice system beyond the courts and tribunals."[258]

178. Professor Graham Gee believed that statements from various office holders suggested that they were aware of the differences between their roles as Lord Chancellor and as Secretary of State for Justice. He suggested that the Lord Chancellor's oath helped impress on Lord Chancellors the special responsibilities they had which are distinct from their duties as Secretary of State for Justice.[259] This was reflected in evidence from Dominic Raab who said he was "careful to treat [his] Lord Chancellor responsibilities appropriately, as are officials across the Ministry of Justice."[260]

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252 Constitution Committee, *The Office of Lord Chancellor* (6th Report, Session 2014–15, HL Paper 75), para 128

253 Joint Committee on Human Rights, *The implications for access to justice of the Government's proposals to reform judicial review* (Thirteenth Report, Session 2013–14, HC 868, HL Paper 174), para 18

254 Q 69 (Lord Mackay of Clashfern), Q 50 (Lord Keen of Elie), Written evidence from Yuan Yi Zhu (RLC0016), para 48, Q 103 (Lord Garnier)

255 Oral evidence taken before the Constitution Committee, Annual evidence session with the Lord Chief Justice, 18 May 2022 (Session 2022–23), Q 7 (Lord Burnett of Maldon)

256 Q 103 (Lord Garnier)

257 Q 35 (Sir Richard Heaton)

258 Written evidence from Dominic Raab MP (RLC0021)

259 Q 4 (Prof Graham Gee)

260 Written evidence from Dominic Raab MP (RLC0021)

179. Those concerned about combining the role of Lord Chancellor with that of Secretary of State for Justice often cite the office holder's responsibility for the prison service. This was reflected in our evidence. Lord Mackay considered it "incompatible" to have a Lord Chancellor with responsibility for prisons due to the potential for conflict of interest. For example, he suggested that if the Lord Chancellor were seeking to reduce the prison population, he or she might choose to raise legal aid to ensure people were properly represented and less likely to be convicted.[261]

180. Other witnesses thought that the office holder would inevitably prioritise the prison service—including when it came to funding—over their other duties as Lord Chancellor.[262] Lord Judge said the prison service was costly due to the regularity with which problems arose and described it as a higher priority for the public compared with the Lord Chancellor's other responsibilities.[263] Sir Richard Heaton noted that responsibility for prisons brought with it the "political noise … of prison riots, deaths in prison and prison escapes."[264]

181. Lord Judge, Lord Garnier and Sir Richard Heaton suggested that prisons could be removed from the remit of the Ministry of Justice. Sir Richard did, however, note that the disruption of a major machinery of government change made the idea less attractive.[265] Jack Straw was of a similar view.[266] While Lord Clarke described it as "illogical" to have given responsibility for prisons to the Lord Chancellor, which took up a high proportion of his or her time, he cautioned that reorganisation of Government departments should be "embarked upon only if you have the clearest reason for doing so."[267]

182. Some witnesses considered that removing the prison service from the Lord Chancellor's remit might reduce the office-holder's political clout and, on balance, it was preferable to "live with" the current arrangements.[268] Dominic Grieve cautioned that unless the Prime Minister of the day particularly valued the role of the Lord Chancellor, removing prisons from the Lord Chancellor's remit risked causing the office-holder to:

> "[D]escend even lower in the pecking order of Cabinet hierarchy and become a decorative extra, without much say in policy-making of any kind at all."[269]

183. Jack Straw disagreed, arguing that a Lord Chancellor's ability to secure funding from the Treasury depended on their negotiating skills, rather than whether they were also responsible for prisons.[270]

184. David Gauke suggested that some "useful synergies" arise from the Lord Chancellor also holding the position of Secretary of State for Justice, including responsibility for prisons.[271]

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261 QQ 69, 71 (Lord Mackay of Clashfern)
262 Q 103 (Dominic Grieve)
263 Q 68 (Lord Judge)
264 Q 35 (Sir Richard Heaton)
265 Q 68 (Lord Judge), QQ 35, 39 (Sir Richard Heaton), Q 103 (Lord Garnier)
266 Written evidence from Jack Straw (RLC0020), p 5
267 Q 94 (Lord Clarke of Nottingham)
268 QQ 94, 95 (Lord Clarke of Nottingham)
269 Q 103 (Dominic Grieve)
270 Q 127 (Jack Straw)
271 Q 94 (David Gauke)

185. **As Secretary of State for Justice the Lord Chancellor has responsibility for a wide range of policy areas in addition to his or her duties as regards the rule of law and the independence of the judiciary. The arguments for and against the status quo are finely balanced. While we recognise the risk that a conflict of interest could arise between some of these functions, it is also reasonable to suggest that the Lord Chancellor's budgetary responsibility for the Ministry of Justice, including the prison service, increases his or her status and authority in Government. Arguably, this better equips the office holder to make an effective bid for funding for all the policy areas falling within their remit.**

186. ***Given that the advantages of separating the role of Lord Chancellor from that of Secretary of State for Justice are not clear, we are not in favour of doing so at this time, especially considering the burdens inherent in any major machinery of Government change. However, a new Prime Minister embarking on a reorganisation of government as a whole may wish to consider whether the role of Lord Chancellor should be separated from that of Secretary of State for Justice. Alternatively, a new Prime Minister may contemplate removing responsibility for prisons from the Lord Chancellor's remit.***

Deputy Prime Minister

187. The current Lord Chancellor, Dominic Raab, has also held the position of Deputy Prime Minister during both his terms in office.

188. Some witnesses considered it problematic for the Lord Chancellor to hold a position so close to the heart of Government.[272] Lord Judge thought that a Deputy Prime Minister would have an enhanced commitment to Government policy and this made it more difficult for the office holder to fulfil his responsibility as Lord Chancellor to defend the rule of law in Government.[273] Lord Mackay expressed concern about the amount of responsibility one individual could carry, noting that Mr Raab was Lord Chancellor, Secretary of State for Justice and Deputy Prime Minister, and therefore responsible for a variety of policy areas.[274]

189. Lord Clarke and David Gauke were more open to the Lord Chancellor holding the role of Deputy Prime Minister. David Gauke suggested that a Lord Chancellor who was Deputy Prime Minister could carry more influence, achieve more and obtain more money due to their "status and position within the Cabinet". However, he conceded that it could be a distraction if there was a big issue "where there was a divergence between the political interests or objectives of the Government and the rule of law."[275] Dominic Raab considered that the "additional coordinating or convening power or influence that comes with the role of Deputy Prime Minister" was helpful "across the wider criminal justice system."[276]

190. **We have heard no compelling evidence to suggest that the role of Deputy Prime Minister may pose a risk to the Lord Chancellor's independence and willingness to defend the rule of law in Government.**

272 Q 64 (Lord Thomas of Cwmgiedd)
273 Q 63 (Lord Judge)
274 Q 69 (Lord Mackay of Clashfern)
275 Q 94 (David Gauke, Lord Clarke of Nottingham)
276 Written evidence from Dominic Raab MP (RLC0021)

However, we reiterate that the Lord Chancellor's duty in Cabinet to raise rule of law issues must not be diluted by his role as Deputy Prime Minister.

Lord Chancellor as Minister for the Constitution

191. It is not clear which senior minister, if any, has overall responsibility for constitutional affairs in the Government, including responsibility for upholding the constitution. At the time of writing, "Constitution" is listed under the responsibilities of Lord Bellamy, the Parliamentary Under Secretary of State for the Ministry of Justice, but no further information is provided as to what this entails.[277] The Parliamentary Under Secretary of State (Minister for Levelling Up), Dehenna Davison MP, is responsible for the Union and constitution, and local government engagement in Scotland, Wales and Northern Ireland within the Department for Levelling-Up, Housing and Communities.[278]

192. In our 2014 report on *The office of the Lord Chancellor* we recommended that the Government identify a senior Cabinet minister with "responsibility for oversight of the constitution as a whole" and argued in favour of the Lord Chancellor taking on this responsibility, given the office-holder's existing responsibility in relation to the rule of law.[279] This had been the case previously. For example, following the decision to transfer the functions of the Department of Constitutional Affairs to the Ministry of Justice in 2007, the then Lord Chancellor, Lord Falconer, was described as being responsible for "major constitutional issues".[280]

193. The desire to reform the Lord Chancellor's role to give the office-holder strategic overview of constitutional affairs was echoed by witnesses to our current inquiry.[281] Lord Judge commented that it was previously "thought necessary to have somebody available as a Minister to discuss the constitution, and to take responsibility for dealing with constitutional questions" but there is currently nobody filling this role.[282] Lord Keen was of the view that the Lord Chancellor would generally be well qualified for this duty.[283]

194. **It is unclear whether there is currently a senior Cabinet minister in Government with overall responsibility for and oversight of constitutional affairs, including responsibility for upholding the constitution. This is highly regrettable. We see clear benefits in having the Lord Chancellor, who already has statutory responsibilities**

277 Ministry of Justice, '*Ministerial Role: Parliamentary Under Secretary of State*': https://www.gov.uk/government/ministers/parliamentary-under-secretary-of-state--145 [accessed 21 December 2022]

278 Department for Levelling Up, Housing and Communities, '*Ministerial role: Parliamentary Under Secretary of State (Minister for Levelling Up)*': https://www.gov.uk/government/ministers/parliamentary-under-secretary-of-state--151 [accessed 21 December 2022]

279 Constitution Committee, *The office of the Lord Chancellor* (6th Report, Session 2014–15, HL Paper 75), para 101

280 Ministry of Justice, '*About us: Lord Falconer of Thoroton*': https://webarchive.nationalarchives.gov.uk/ukgwa/20070513230000/http:/www.justice.gov.uk/about/falconer.htm [accessed 21 December 2022], Constitution Committee, *The office of the Lord Chancellor* (6th Report, Session 2014–15, HL Paper 75), para 93

281 Written evidence from Society of Labour Lawyers (RLC0017), paras 3.1–3.2, Q 39 (Sir Richard Heaton), Q 67 (Lord Judge), QQ 94, 96 (David Gauke), Q 50 (Lord Keen of Elie), Q 103 (Lord Garnier, Dominic Grieve)

282 Q 67 (Lord Judge)

283 Q 50 (Lord Keen of Elie)

regarding the rule of law, as the individual in Government fulfilling this role.

Judicial appointments

195. Prior to the CRA, judicial appointments were one of the Lord Chancellor's major functions. Lords of Appeal in Ordinary, the Heads of Division of the Supreme Court of England and Wales and Lord Justices of Appeal were appointed by the Queen on the recommendation of the Prime Minister, who based his or her recommendation on the advice of the Lord Chancellor. The monarch appointed High Court judges, Circuit judges, Recorders, District judges (in magistrates' courts), Social Security Commissioners, the Judge Advocate General and the Judge Advocate of Her Majesty's Fleet on the recommendation of the Lord Chancellor. The Lord Chancellor directly appointed a broad range of members of the judiciary, including Deputy District judges and members of tribunals.[284]

196. The modern Lord Chancellor's role in the judicial appointments process is more limited. In our 2012 report *Judicial Appointments* we set out in detail the Lord Chancellor's role in this process following the CRA. We have updated this in Box 4.

197. The office-holder's role is underpinned by his or her statutory duty under section 3(1) of the CRA to uphold the independence of the judiciary and the commitment in the oath of office to "defend" that independence.[285]

Box 4: The Lord Chancellor's power to reject or request reconsideration of nomination for judicial appointments

When asked by the Lord Chancellor to make a nomination to fill a judicial vacancy at the High Court and above, the Judicial Appointments Commission (JAC) must appoint a selection panel.[286] The panel must have an odd number of members not less than five. It must include at least two members who are non-legally-qualified; at least two judicial members; and at least two members of the JAC. The same panel member may contribute to meeting more than one of these requirements.[287]

The selection panel recommends a single candidate to the Lord Chancellor.[288]

284 Constitutional Affairs Committee, *Judicial appointments and a Supreme Court (court of final appeal)* (First report, Session 2003–04, HC 48–1), paras 115–116

285 Constitutional Reform Act 2005, section 3(1) and section 17

286 The process for appointing a selection panel is set out in the Constitutional Reform Act 2005 and elaborated on in the Judicial Appointments Regulations 2013. It varies depending on the vacancy. For example, for the selection of the Lord Chief Justice the selection panel must consist of five members. The first member is the chairman of the JAC (the chairman of the JAC and the Commissioners are appointed by the monarch on the recommendation of the Lord Chancellor) and he or she is chairman of the selection panel, the second member is the most senior England and Wales Supreme Court judge or that judge's nominee, the third member is a lay member of the JAC designated by the first member, the fourth member is a member of the JAC designated by the first member and the fifth member is a person designated by the Lord Chief Justice (providing there is a Lord Chief Justice and they are not incapacitated). The Judicial Appointments Regulations 2013, section 5

287 Constitutional Reform Act 2005, sections 67–70

288 Since the Crime and Courts Act 2013 came into effect, the power to request reconsideration or reject nominations in relation to appointments below the High Court has been transferred from the Lord Chancellor to the Lord Chief Justice. See Crime and Courts Act 2013, Schedule 13, Part 4

The Lord Chancellor then has three options: he may accept the recommendation, in which case the candidate's name is put to His Majesty for appointment; he may reject the nomination if he considers that the candidate is unsuitable for appointment; or he may ask the JAC to reconsider the nomination if he considers that there is either insufficient evidence that the candidate is suitable or evidence that the person is not the best candidate on merit. If the Lord Chancellor rejects a candidate or asks the JAC to reconsider he must provide the JAC with written reasons.

If the Lord Chancellor either rejects or asks the JAC to reconsider its first nomination, the JAC will then propose a second name to the Lord Chancellor. If the first candidate was rejected, that candidate may not be proposed again. However, if the JAC was asked to reconsider, it may either re-recommend the first candidate or nominate a new candidate. The Lord Chancellor again has three options: accept the candidate; reject, but only if the candidate was nominated following a reconsideration; or ask for reconsideration, but only if the nomination was made following a rejection. If the Lord Chancellor rejects or asks for reconsideration during the second round, the JAC must make a third nomination: again, a candidate previously rejected by the Lord Chancellor for this vacancy may not be re-nominated. On receipt of the third nomination, the Lord Chancellor must either accept the third nomination or accept an earlier nomination which he had asked to be reconsidered and where the candidate had not subsequently been renominated. Effectively, at this stage the Lord Chancellor may select any candidate proposed by the JAC during the process, as long as he or she has not rejected that candidate at any stage.

The process for appointments to the Supreme Court is similar to that outlined above; though in the case of such vacancies the Lord Chancellor is obliged to consult certain senior judges, as well as the First Ministers of Scotland and Wales and the Northern Ireland Judicial Appointments Commission.

198. Reflecting on this process, Dominic Raab told us that in addition to his role in judicial appointments as set out in the CRA, he also works "closely with the Lord Chief Justice, the chair of the Judicial Appointments Commission and others on recruitment matters as a whole and on particular priorities such as judicial diversity."[289]

199. Some witnesses told us that since the CRA judicial independence may have strengthened.[290] The Ministry of Justice said that the post-2005 judicial appointments system was "well established and works smoothly" and had "brought greater transparency".[291] The Lord Chief Justice agreed, arguing that the judicial appointments process under the old-style Lord Chancellor "was not transparent and transparency in judicial appointments is important to garner public confidence."[292]

200. A 2021 Policy Exchange report *Reforming the Lord Chancellor's role in Senior Judicial Appointments* argued that "senior judges now exercise excessive influence over individual appointment decisions" due to the diminished role of the Lord Chancellor and made the case for increased ministerial input

289 Written evidence from Dominic Raab MP (RLC0021)
290 Written evidence from Prof Robert Hazell and Prof Kate Malleson (RLC0006), paras 1, 3.2–3.4, 4.3–4.4, 4.7, 5.2, 5.4, Q 5 (Prof Graham Gee)
291 Written evidence from Ministry of Justice (RLC0014), paras 3–4 and 14
292 Oral evidence taken before the Constitution Committee, Annual evidence session with the Lord Chief Justice, 18 May 2022 (Session 2022–23), Q 14 (Lord Burnett of Maldon)

in the judicial selection process.[293] The report argued that, among other things, this would help increase judicial diversity.[294] The authors suggested an enhanced role for the Lord Chancellor whereby an independent selection commission would compile a shortlist of three to five qualified candidates for a judicial vacancy, from which the Lord Chancellor could select the successful candidate.[295]

201. Former Lord Chancellor Jack Straw wrote the foreword to the Policy Exchange report, expressing discontent about the judicial appointments process and supporting the argument for an enhanced role for the Lord Chancellor.[296] He expanded on this in oral evidence to this Committee, and, when asked, Mr Straw agreed with the assessment that the judiciary "now selects itself" but, though supporting Policy Exchange's overall conclusions, described some of the arguments employed as "overembroidered."[297] Mr Straw also drew attention to the judicial appointments arrangements in several other countries, but we did not take further evidence on this point.

202. Lord Judge, however, thought that under the current system Lord Chancellors had an appropriate degree of influence over the process. The system avoided political interference with the independence of the Judicial Appointments Commission, while providing the Lord Chancellor with a veto provided he or she justifies his or her decision. Lord Chancellors were entitled to, and should, write to the Judicial Appointments Commission and express their priorities for the judicial system and urge the Commission to appoint somebody with the ability to address these priorities.[298] Lord Judge said Lord Chancellors were free to express concerns about candidates and could reject the Commission's recommendation if they wished. This view was shared by Lord Reed.[299]

203. We put to some witnesses the possibility of the shortlist system. Several were against the idea. Some suggested that modern Lord Chancellors were less likely to understand the law and the requirements of a judge, which made them disinclined to enhance the Lord Chancellor's role.[300] Lord Hodge noted that there would not necessarily always be enough appointable candidates

293 Richard Ekins and Graham Gee, 'Reforming the Lord Chancellor's Role in Senior Judicial Appointment', *Policy Exchange*, (9 February 2021), pp 9 and 17–18: https://policyexchange.org.uk/wp-content/uploads/2021/02/Reforming-the-Lord-Chancellor%E2%80%99s-Role-in-Senior-Judicial-Appointments.pdf [accessed 21 December 2022]

294 This view was shared by some of our witnesses. See: Q 7 (Dr Patrick O'Brien and Prof Graham Gee)

295 Richard Ekins and Graham Gee, 'Reforming the Lord Chancellor's Role in Senior Judicial Appointments', Policy Exchange, (9 February 2021), pp 27–29: https://policyexchange.org.uk/wp-content/uploads/2021/02/Reforming-the-Lord-Chancellor%E2%80%99s-Role-in-Senior-Judicial-Appointments.pdf [accessed 21 December 2022]

296 Richard Ekins and Graham Gee, 'Reforming the Lord Chancellor's Role in Senior Judicial Appointments', Policy Exchange, (9 February 2021), p 7: https://policyexchange.org.uk/wp-content/uploads/2021/02/Reforming-the-Lord-Chancellor%E2%80%99s-Role-in-Senior-Judicial-Appointments.pdf [accessed 21 December 2022]

297 Q 125 (Jack Straw)

298 For example, in March 2017 then Lord Chancellor Elizabeth Truss told us that she had met with appointment panel members and communicated to them what she thought were important considerations for the vacancies they were seeking to fill. Oral evidence taken before the Constitution Committee, Annual evidence session with the Lord Chancellor and Secretary of State for Justice, 1 March 2017 (Session 2016–17), Q 5 (Elizabeth Truss MP)

299 Oral evidence taken before the Constitution Committee, Annual evidence session with the President and Deputy President of the Supreme Court, 6 April 2022 (Session 2021–22), Q 12 (Lord Reed of Allermuir)

300 Q 59 (Lord Judge), Q 93 (David Gauke, Lord Clarke of Nottingham)

for senior posts to present the Lord Chancellor with a list of options.[301] Lord Judge thought that presenting the Lord Chancellor with a shortlist would be a "great mistake" and would reintroduce a strong political element into the process. The Lord Chancellor's role in the judicial appointments process should not be enhanced given that, in Lord Judge's view, post-CRA Lord Chancellors were less politically independent.[302] David Gauke also cautioned that greater discretion for the Lord Chancellor could lead to political appointments, or at least the perception of political appointments.[303] Lord Thomas of Cwmgiedd and Lord Clarke were keen to avoid anything that resembled the political appointments process in the United States, where Lord Thomas said "you have no prospect of promotion to a federal judge or in the federal system … unless you have a strong party political affiliation."[304]

204. Jack Straw disagreed, and argued that a shortlist system would not lead to partisan appointments by the Lord Chancellor.[305] Professor Gee thought that an enhanced role for the Lord Chancellor in judicial appointments would "furnish [his or her] interests in the courts" and help overcome political indifference to the judiciary which was, in his view, the greatest threat to judicial independence.[306]

205. In our 2012 report *Judicial Appointments* we cautioned against the over-politicisation of the judicial appointments process:

> "Many of our witnesses stressed the primary importance of judicial independence, and none dissented. There was widespread agreement that the appointments process must be designed in such a way as to reinforce judicial independence. Judges in the United Kingdom should not be appointed through political patronage."[307]

In the same report we emphasised the importance of accountability, noting that "[j]udicial independence does not require that no-one be held accountable for the operation of the appointments process". The Lord Chancellor's limited role in the judicial appointments process was therefore justified as necessary to ensure accountability to Parliament.[308]

206. In written evidence the current Lord Chancellor told us: "It is not a current priority to consider further legislative changes to the [judicial appointments] system created by the [Constitutional Reform] Act."[309]

207. **The Lord Chancellor's limited role in judicial appointments has been settled since the enactment of the CRA in 2005. The current system enables political oversight of the process through the Lord Chancellor's ability to reject or request reconsideration of the candidate recommended to them. In our 2012 report *Judicial Appointments* we cautioned against the over-politicisation of the**

301 Oral evidence taken before the Constitution Committee, Annual evidence session with the President and Deputy President of the Supreme Court, 6 April 2022 (Session 2021–22), Q 11 (Lord Hodge)
302 Q 59 (Lord Judge)
303 Q 93 (David Gauke)
304 Q 59 (Lord Thomas of Cwmgiedd), Q 93 (Lord Clarke of Nottingham)
305 Q 125 (Jack Straw)
306 Q 7 (Prof Graham Gee)
307 Constitution Committee, *Judicial Appointments* (25th Report, Session 2010–12, HL Paper 272), para 4
308 Constitution Committee, *Judicial Appointments* (25th Report, Session 2010–12, HL Paper 272), para 18
309 Written evidence from Dominic Raab MP (RLC0021)

process. Nonetheless, since then arguments have been made for more accountability and transparency in the process. Any change to the current system would need very carefully to balance political accountability with the essential need to avoid political interference with judicial independence.

The Lord Chancellor as a member of the House of Lords

208. Jack Straw was the first Lord Chancellor in modern times to occupy the office while an MP. All ensuing Lord Chancellors have been MPs.[310]

209. Several witnesses favoured the Lord Chancellor being a member of the House of Lords.[311] Lord Judge said he would have no objection to having someone in the House of Lords in the role of Lord Chancellor as this would maintain parliamentary accountability. He was particularly in favour if the role was concentrated solely on constitutional issues, in which case somebody in the House of Lords might be better placed than "somebody who was hoping to move up" in their career.[312] Lord Thomas agreed.[313] Dr Mark Ryan argued that the CRA should be amended to stipulate that the Lord Chancellor must be a member of the House of Lords and not "an MP with a constituency basis and responsibilities".[314]

210. However, Jack Straw pointed out that so long as the Lord Chancellor was in charge of a major spending department such as the Ministry of Justice "they have to be in the House of Commons".[315]

211. **While the Lord Chancellor remains in charge of a major spending department the office is likely to be filled by an MP. However, if the office of Lord Chancellor were to be separated from that of Secretary of State for Justice then perhaps it could more frequently be filled by a member of the House of Lords.**

310 The last Lord Chancellor to be a member of the House of Lords was Lord Falconer of Thoroton, who was Lord Chancellor between 12 June 2003 and 28 June 2007.
311 Written evidence from Yuan Yi Zhu (RLC0016), para 57, Society of Labour Lawyers (RLC0017), paras 3.1–3.2
312 QQ 61, 68 (Lord Judge)
313 Q 61 (Lord Thomas of Cwmgiedd)
314 Written evidence from Dr Mark Ryan (RLC0012), para 4
315 Q 126 (Jack Straw)

CHAPTER 5: REFORM OF THE ROLE OF THE LAW OFFICERS

Law Officers as politicians

212. The Law Officers are senior legal advisers to the UK Government, ministers in the Government and members of Parliament. As legal advisers and politicians they perform several functions. Depending on the function being performed, varying degrees of independence are required.[316]

Legal advice

213. The Law Officers' main duty is as senior legal advisers to the UK Government.[317] By its nature, this function requires a high degree of independence from the executive. This was reflected in our 2008 report *Reform of the Office of Attorney General*, in which we concluded that although the Attorney General is a minister:

> "[I]t is important to note that the Attorney's responsibilities for legal advice and individual prosecutions are non-ministerial. In these roles, he or she is not subject to collective responsibility and must act independently of Government."[318]

214. Nonetheless, most witnesses viewed it as an advantage in providing legal advice to Government that the Law Officers are politicians. The Attorney General's Office said:

> "The political aspect [of the role] equips the Law Officers with intimate knowledge of the policy goals and pressures on ministerial colleagues, which in turn aids the credibility and influence of the Attorney General when undertaking the legal task of offering constructive advice about both the legal constraints and possible lawful and proper alternatives of proposals. The political role gives the Attorney General insight and traction, whereas the legal role offers professional judgement but also obligations to her profession as a barrister."[319]

215. This has been echoed by others. Dr McCormick has written that it is "generally expected" that the Law Officers' advice "takes account of the various policy objectives of the government in so far as acceptable interpretations of the law fused with political judgement will allow".[320] Lord Keen told us that the Law Officers' primary role was to consider the legal position in a particular situation and determine to what extent they could still advance the Government's policy. If the Law Officers were not members of the Government they would not be in a position to do this.[321]

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316 House of Commons Library, The Law Officers: a Constitutional and Functional Overview, Briefing Paper, CBP 8919, 28 May 2020, p 4, Oral evidence taken before the House of Commons' Justice Committee, inquiry on the work of the Attorney General, 21 July 2020 (Session 2019–2021), Q 6 (Suella Braverman MP)

317 Q 22 (Dr Conor Casey), Oral evidence taken before the Constitution Committee, Annual evidence session with the President and Deputy President of the Supreme Court, 6 April 2022 (Session 2021–22), Q 18 (Lord Reed of Allermuir)

318 Constitution Committee, *Reform of the Office of Attorney General* (7th Report, Session 2007–08, HL Paper 93), para 9

319 Written evidence from the Attorney General's Office (RLC0019), para 7

320 Dr Conor McCormick, *The Constitutional Legitimacy of Law Officers in the United Kingdom,* (Oxford: Bloomsbury Publishing Plc, 2022), p 51, Q 24 (Dr Conor Casey)

321 Q 53 (Lord Keen of Elie), Q 74 (Lord Mackay of Clashfern)

216. Witnesses cautioned that non-political legal advisers would lack authority in Government.[322] Sir Jonathan Jones thought there were benefits to the Government's most senior legal adviser being a politician. It was important that the office holder was "capable of giving independent advice, including sometimes unwelcome advice", and suggested that being part of the "inner political team" and "somebody who is completely trusted to be part of the most sensitive councils of the Government" helped facilitate this.[323] Sir Richard Heaton agreed, arguing that "[a] political Attorney-General is more likely to deliver rule of law compliance than a pure hired hand."[324] Lord Garnier thought that as "an outsider" a civil servant Law Officer would not have the same clout as a politician Law Officer and "there would always be the appearance of a Minister–civil servant relationship."[325]

217. As politicians the Law Officers are accountable to Parliament, which was emphasised by some witnesses as important,[326] especially given the gravity of the issues on which they advise.[327] Dr Casey warned that there would be "democratic costs" to having apolitical Law Officers. He told us that it would "inevitably allow unelected legal advisers to wield considerable influence and power over the policymaking process".[328] He cautioned that non-political external legal advisers were not immune to politicisation and, in some cases, non-political models adopted in other jurisdictions had led to very risk-averse advice, which amounted almost to a veto over policy.[329] Sir Jonathan Jones similarly cautioned that there was always a risk of any lawyer becoming "too close to a client" and "skewing their advice".[330]

Individual decisions to prosecute

218. The Attorney General also consents to the prosecution of certain offences—for example, offences under the Official Secrets Acts 1911 to 1989, some criminal offences and some terrorist offences.[331]

219. Our witnesses were not concerned by the Attorney General being involved in what was described as "a fairly limited class of prosecution decisions",[332] providing that the office-holder fulfilled the duty independently of Government.[333] The framework agreements decided between the Law Officers and the Director of the Crown Prosecution Service and the Director of the Serious Fraud Office both reflect this:

> "It is a constitutional principle that when taking a decision whether to consent to a prosecution, the Attorney General acts quasi-judicially and

322 Q 53 (Lord Keen of Elie)
323 QQ 42, 43 (Sir Jonathan Jones)
324 Q 42 (Sir Richard Heaton)
325 Q 110 (Lord Garnier)
326 Written evidence from Lord Morris of Aberavon (RLC0008), para 5, Dr Klearchos A. Kyriakides (RLC0009), para 5, Q 43 (Sir Jonathan Jones), Q 24 (Dr Conor Casey), Q 63 (Lord Judge and Lord Thomas of Cwmgiedd)
327 Q 24 (Dr Conor Casey), Q 63 (Lord Judge), Q 110 (Dominic Grieve)
328 Written evidence from Dr Conor Casey (RLC0003), para 49, Q 53 (Lord Keen of Elie)
329 Q 24 (Dr Conor Casey)
330 Q 45 (Sir Jonathan Jones)
331 Crown Prosecution Service, '*Legal Guidance on Consents to Prosecute*' (31 October 2018, updated 11 December 2018, 9 September 2022): https://www.cps.gov.uk/legal-guidance/consents-prosecute [accessed 21 December 2022]
332 Written evidence from Dr McCormick (RLC0005), para 30, Written evidence from the Society of Labour Lawyers (RLC0017), paras 5.1–5.2, Q 26 (Dr Conor McCormick, Dr Conor Casey), Q 47 (Sir Jonathan Jones)
333 Q 47 (Sir Jonathan Jones), Written evidence from Dr Conor McCormick (RLC0005), para 30

independently of government, applying well established prosecution principles of evidential sufficiency and public interest."[334]

220. Dr McCormick told the Committee: "[T]he Attorney-General can consult Ministers in the Cabinet only in very exceptional circumstances about whether to prosecute … and even then it is up to the Attorney-General at the end of the day to decide what weight to give to those representations."[335]

221. There are good reasons for the Attorney General's consent being required for some prosecutions. Sir Jonathan Jones described the arrangement as "a convenient way of adding in an extra filter for categories of offence of perhaps the most serious or sensitive kind."[336]

Superintendence

222. As detailed in chapter 1, the Attorney General superintends the Crown Prosecution Service, Serious Fraud Office and Her Majesty's Crown Prosecution Service Inspectorate.[337] These bodies operate independently in accordance with framework agreements between the Law Officers and the respective directors[338] but the Attorney General is answerable to Parliament for them.[339] The Attorney General's superintendence duties are ministerial in nature.

223. Witnesses generally supported this arrangement.[340] Sir Jonathan Jones pointed out that there has to be somebody in Government with oversight responsibility for the prosecution authorities and thought it beneficial that the person responsible for superintending the prosecution services was accountable to Parliament.[341] Dr Casey thought the political relationship between the prosecution services and the Attorney General was advantageous because it helped to maintain the independence of the prosecution services by, among other things, ensuring they were properly resourced.[342] This view was shared by the Attorney General's office.[343]

224. Several witnesses told us the framework agreements drawn up between the Attorney General's Office and the prosecution services in 2009, and updated in 2019 and 2020, made the superintendence relationship clearer and more

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334 Attorney General's Office, *Framework agreement between the Law Officers and the Director of Public Prosecutions* (18 December 2020), para 51: https://www.cps.gov.uk/sites/default/files/documents/publications/Framework_agreement_between_the_Law_Officers_and_the_Director_of_Public_Prosecutions__CPS.pdf [accessed 21 December 2022], Attorney General's Office, *Framework agreement between the Law Officers and the Director of the Serious Fraud Office* (21 January 2019), para 47: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/772685/SFO_Framework_Agreement.pdf [accessed 21 December 2022]

335 Q 20 (Dr Conor McCormick)

336 Q 47 (Sir Jonathan Jones)

337 House of Commons Library, The Law Officers: a Constitutional and Functional Overview, Briefing Paper, CBP 8919, 28 May 2020, p 12

338 Attorney General's Office, *Framework agreement between the Law Officers and the Director of Public Prosecutions* (18 December 2020): https://www.cps.gov.uk/sites/default/files/documents/publications/Framework_agreement_between_the_Law_Officers_and_the_Director_of_Public_Prosecutions__CPS.pdf [accessed 21 December 2022], Attorney General's Office, *Framework agreement between the Law Officers and the Director of the Serious Fraud Office* (21 January 2019): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/772685/SFO_Framework_Agreement.pdf [accessed 21 December 2022]

339 Written evidence from the Attorney General's Office (RLC0019), para 18

340 Q 26 (Dr Conor McCormick, Dr Conor Casey), Q 47 (Sir Jonathan Jones)

341 QQ 47, 48 (Sir Jonathan Jones)

342 Q 26 (Dr Conor Casey), Q 47 (Sir Jonathan Jones)

343 Written evidence from the Attorney General's Office (RLC0019), para 18

defined.[344] This included making it clear that the Crown Prosecution Service and Serious Fraud Office had "operational independence and autonomy, particularly of casework, save in a very small subset of cases pertaining to national security" and that "the Attorney General is responsible for safeguarding the independent decision-making of the CPS"[345]

Public interest

225. The Law Officers perform numerous duties commonly referred to as "public interest functions". They occasionally represent the Government in court, particularly on matters of constitutional significance.[346] This includes ensuring the United Kingdom's case is properly argued at international arbitration mechanisms such as the European Court of Human Rights.[347] The Attorney General's Office considered this an important function "because the political role provides the opportunity for the Government to signal the importance it attaches to a particular issue." They thought there was value in the judiciary having "the opportunity to express their interpretation of the issue in question directly to a Government minister."[348] By virtue of representing the Government position, these cases fall in the category of Law Officer tasks that can be considered political in nature.

226. It is important to distinguish between, on the one hand, cases in which the Law Officers represent the Government and, on the other hand, action taken by the Law Officers to enforce the law on behalf of the public. As described in chapter 1, the latter includes functions such as being the guardian of charitable interests; considering whether to refer some sentences to the Court of Appeal as unduly lenient; giving consent for an application to the High Court for a fresh inquest; and deciding whether to institute contempt proceedings. These functions should be carried out entirely independently of Government.[349]

The political model

227. During our inquiry, opinion was largely in favour of the existing, political Law Officer model.[350] However, there was recognition of the need carefully to balance the Law Officers' political status with their rule of law functions. Dominic Grieve summarised the position as follows:

> "[A]lthough the law officers are an appointment made by the Prime Minister and within his gift, and they are MPs and they are treated

344 Q 20 (Dr Conor Casey), Q 26 (Dr Conor McCormick), Q 47 (Sir Jonathan Jones)

345 Q 20 (Dr Conor Casey), Q 48 (Sir Jonathan Jones), Attorney General's Office, *Framework agreement between the Law Officers and the Director of Public Prosecutions* (18 December 2020), paras 6, 13, 20, 46: https://www.cps.gov.uk/sites/default/files/documents/publications/Framework_agreement_between_the_Law_Officers_and_the_Director_of_Public_Prosecutions__CPS.pdf, Attorney General's Office, *Framework agreement between the Law Officers and the Director of the Serious Fraud Office* (21 January 2019), paras 13, 19, 42: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/772685/SFO_Framework_Agreement.pdf, Oral evidence taken before the House of Commons' Justice Committee, inquiry on the Work of the Law Officers, 25 January 2022 (Session 2021–22), Q 47 (Suella Braverman MP)

346 Q 55 (Lord Keen of Elie)

347 Q 105 (Dominic Grieve)

348 Written evidence from the Attorney General's Office (RLC0019), para 29

349 Dr Conor McCormick, *The Constitutional Legitimacy of Law Officers in the United Kingdom*, (Oxford: Bloomsbury Publishing Plc, 2022), p 67, Q 102 (Dominic Grieve). For example, referring unduly lenient sentences requires compliance with statutory criteria and guidelines Q 21 (Dr Conor Casey)

350 Q 24 (Dr Conor Casey), Q 43 (Sir Jonathan Jones)

> as members of the Government, they have, to an extent, a separate existence; they are to serve the rule of law."[351]

228. Former Attorney General Suella Braverman confirmed this view when she told the House of Commons Justice Committee in 2020 that the officer-holder's primary duty lay with the rule of law above party interests.[352]

229. Other former Law Officers have sought to define where the balance should lie. In 2006 former Solicitor General and Attorney General Lord Mayhew of Twysden told this Committee that the Attorney General owed "loyalty first to the … Crown … (he is Her Majesty's Attorney General), secondly to the law and thirdly to his colleagues in government."[353] Lord Rawlinson's autobiography recalls a similar position being taken by then Prime Minister Harold Macmillan when appointing Lord Rawlinson Solicitor General in 1962. Harold Macmillan said the first priority of a Law Officer was to the Crown, the second priority was accountability to Parliament and the third duty was to the Macmillan administration. In evidence to this inquiry Lord Garnier told us he had sought to operate under these principles during his time as Solicitor General. He considered them helpful in that they take the Law Officers "out of the general political sphere in which other appointed Ministers operate."[354]

230. There are some indicators that there may have been a shift in recent years towards Attorneys General with more overtly political backgrounds. Dr James Hand, Reader in Law at the University of Portsmouth, examined the earlier ministerial careers of recent Attorneys General and concluded that some had had a "more political past":

> "It is, perhaps, one thing for a Law Officer to have worked in the Home Office given the legal link, or other less glamorous or politically heated role, but another to have been in a highly-charged role such as Minister for Brexit (in the case of Suella Braverman) or a whip (as with Jeremy Wright and Michael Ellis). This could exemplify a shift in the politico-legal role toward the political."[355]

231. Several witnesses were concerned by recent examples of Law Officers making overtly political statements in public and thought that officer-holders should exercise judgement when it came to talking in political terms. Lord Judge cautioned that the more public statements they made about political issues "the less weight is attached to them in relation to the rule of law because they become … mere politicians."[356] Dr Casey suggested that reforms could be made to address public perception of Law Officers' partiality without fundamentally reforming the office, such as codifying the independent

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351 Q 106 (Dominic Grieve)

352 Oral evidence taken before the House of Commons' Justice Committee, inquiry on the work of the Attorney General, 21 July 2020 (Session 2019–21), Q 6 (Suella Braverman MP)

353 Oral evidence taken before the Constitution Committee, inquiry on Waging war: Parliament's role and responsibility, 8 February 2006 (Session 2005–06), Q 206 (Lord Mayhew of Twysden)

354 Peter Rawlinson, *A Price too High* (London: George Weidenfeld and Nicolson Ltd, 1989) p 4

355 James Hand, 'The Attorney-General, politics and logistics—a fork in the road?', *Legal Studies*, vol. 42, (11 January 2022), pp 425–445: https://www.cambridge.org/core/services/aop-cambridge-core/content/view/6BF022913D569B6F8F4183D584DB3821/S0261387521000556a.pdf/the-attorney-general-politics-and-logistics-a-fork-in-the-road.pdf [accessed 21 December 2022]

356 Q 64 (Lord Judge), QQ 69, 74 (Lord Mackay of Clashfern), Q 58 (Lord Keen of Elie), Q 106 (Dominic Grieve), Q 111 (Lord Garnier, Dominic Grieve)

functions of the Attorney General.[357] This is discussed further in the next chapter.

232. **There is great value in the Law Officers being politicians as it provides them with a strong understanding of the political context in which they operate and bolsters the authority of their advice. As members of Parliament the Law Officers are accountable for their decisions, which is welcome.**

233. **It is nonetheless vital that Law Officers recognise that they are different from other ministers in that key aspects of their role require independence from party politics and Government priorities. It is key to retaining public confidence in the Law Officers' impartiality that they place their duty to the rule of law above party political considerations. *Law Officers should refrain from making public statements which could damage public perception of their impartiality.***

Law Officers' qualifications

234. Although not required by statute, it is recognised that an individual must be legally qualified to be appointed a Law Officer.[358] There is, however, no minimum qualification or experience required to take up the post.[359] It has been observed that in recent years Attorneys General have been appointed with less legal experience than was previously the case.[360] Of the six Attorneys General appointed since 2010, four were appointed Queen's Counsel or King's Counsel contemporaneously with being appointed a Law Officer.[361] This contrasts with Attorneys General of the 20th century, who were QCs for an average of 10 years before taking the role.[362]

235. Some witnesses thought criteria could be set for the appointment of a Law Officer, potentially including a minimum legal qualification.[363] In Northern Ireland, where the Attorney General is not a political appointee,[364] qualifications for the role are in statute:

> "A person is not qualified for appointment as Attorney General for Northern Ireland unless he is—
>
> (a) a member of the Bar of Northern Ireland of at least ten years' standing, or
>
> (b) a solicitor of the Court of Judicature of at least ten years' standing."[365]

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357 Q 24 (Dr Conor Casey)
358 Q 112 (Dominic Grieve)
359 Q 55 (Lord Keen of Elie)
360 Q 20 (Dr Conor McCormick)
361 Jeremy Wright MP, Suella Braverman MP, Michael Ellis MP and Victoria Prentis MP
362 James Hand, 'The Attorney-General, politics and logistics—a fork in the road?', *Legal Studies*, vol. 42, (11 January 2022), pp 425–445: https://www.cambridge.org/core/services/aop-cambridge-core/content/view/6BF022913D569B6F8F4183D584DB3821/S0261387521000556a.pdf/the-attorney-general-politics-and-logistics-a-fork-in-the-road.pdf [accessed 21 December 2022]
363 Q 28 (Dr Conor Casey), Q 44 (Sir Jonathan Jones), Q 62 (Lord Thomas of Cwmgiedd), Q 112 (Dominic Grieve)
364 Conor McCormick, *The Constitutional Legitimacy of Law Officers in the United Kingdom* (Oxford: Bloomsbury Publishing Plc, 2022), pp 143–144
365 Justice (Northern Ireland) Act 2002, section 22

236. Other witnesses agreed that particular legal skills and experience were desirable in a Law Officer but did not think it was possible to set out minimum criteria similar to those provided by the CRA for Lord Chancellors. Lord Judge told us that, even with the criteria set out in CRA "[y]ou have good Lord Chancellors and bad Lord Chancellors, and some in between." Lord Keen did not think it was appropriate to set out minimum criteria because it was for the Prime Minister to choose whom to appoint, in the same manner that he or she appointed all ministers.[366]

237. Several witnesses thought that a key quality in a Law Officer was the independence of mind to present impartial advice to the Government, even if the Government did not like it. If the Government proceeded with the policy regardless, the Law Officer should be someone who was in a position to resign.[367] Lord Garnier told us that as a Law Officer one must "make decisions and do it dispassionately, and … shut out irrelevancies or biases or prejudices."[368] However, Lord Thomas did not think these qualities could be set out in writing, arguing that "ultimately you have to rely upon the judgement of the person who appoints the person."[369] Dominic Grieve thought respect within the legal profession was also key to success as a Law Officer.[370]

238. **It is essential that those appointed to Law Officer roles continue to be legally qualified, with relevant experience. Of equal importance to formal qualifications is the character and independence of mind of the Law Officers, which cannot be easily defined in statute. *We recommend Prime Ministers appoint only Law Officers with the independence of mind, autonomy and strength of character to deliver impartial legal advice to the Government, even where it is unwelcome.***

Membership of the House of Commons or the House of Lords

239. The Law Officers are normally members of the House of Commons, though they are occasionally drawn from the Lords.[371] Research suggests that the number of MPs who are either barristers or solicitors may have diminished over time. Between 1951 and 1974 an average of approximately 19.5 percent of MPs were barristers or solicitors. Between 1979 and 2015 the average percentage had fallen to approximately 13.4.[372] [373] Lord Keen put this down

366 Q 55 (Lord Keen of Elie)
367 Q 62 (Lord Thomas of Cwmgiedd), Q 74 (Lord Mackay of Clashfern), Q 112 (Lord Garnier)
368 Q 113 (Lord Garnier)
369 Q 62 (Lord Thomas of Cwmgiedd)
370 Q 112 (Dominic Grieve)
371 Conor McCormick, *The Constitutional Legitimacy of Law Officers in the United Kingdom* (Oxford: Bloomsbury Publishing Plc, 2022), p 59. For example, the current Advocate General for Scotland, Lord Stewart of Dirleton, is a member of the House of Lords.
372 House of Commons Library, UK Election Statistics: 1918–2021: A century of Elections, Research Briefing, Number CBP7529, 18 August 2021, p 40 [accessed 8 August 2022]
373 Figures relate only to Conservative, Labour, Liberal Democrat and, since 2015, Scottish National Party MPs. Data were collected differently following the 2017 and 2019 general elections—figures for these elections are restricted to newly elected MPs' occupations immediately before the election and therefore do not take account of any earlier experience in the legal profession. As such, the figures available for 2017 and 2019 are not directly comparable to the data collected between 1951 and 2015. Nonetheless, for completeness, 10.5 percent of MPs elected in 2017 and 7.5 percent of MPs elected in 2019 had been members of the legal profession immediately prior to their election. See House of Commons Library, UK Election Statistics: 1918–2021: A century of Elections, Research Briefing, Number CBP7529, 18 August 2021, p 43 [accessed 8 August 2022], Robert Ford et al, *The British General Election of 2019* (Cham: Palgrave Macmillan, 2021), p 411.

to the demands of modern practice making it difficult to maintain a private practice while serving as an MP.[374]

240. Reflecting on the decrease in the number of MPs with legal experience, several witnesses noted that this had diminished the pool of possible Law Officer appointees from the House of Commons.[375] As a solution to this issue Law Officers could be appointed from the House of Lords,[376] though Lord Garnier considered it "second best" to appointments being made from the House of Commons.[377] Both Lord Thomas and Lord Keen suggested that there could be one Law Officer in each House.[378]

241. Lord Mackay noted that it was easier to appoint a Law Officer from outside Parliament and "plant" him or her in the House of Lords than it was to place an external candidate in the House of Commons.[379] Such an approach would widen the pool of potential Law Officer candidates.

242. **It is important that the Law Officers are members of a House of Parliament, so bringing an understanding of the political context in which they have to operate. There is a credible argument that they should be drawn, not only from the House of Commons, but from the House of Lords. If the best candidate is not already a member of either House we would support appointing individuals to the Lords for the purpose of their becoming Law Officers. Doing so would widen the pool of suitably qualified candidates.**

374 Q 55 (Lord Keen of Elie)
375 Written evidence from Lord Morris of Aberavon (RLC0008), para 6, Q 68 (Lord Mackay of Clashfern), Q 44 (Sir Richard Heaton), QQ 54, 55 (Lord Keen of Elie), Q 129 (Jack Straw)
376 Q 54 (Lord Keen of Elie), QQ 68, 74, 75 (Lord Mackay of Clashfern), Q 24 (Dr Conor McCormick), Q 44 (Sir Richard Heaton)
377 Q 110 (Lord Garnier)
378 Q 54 (Lord Keen of Elie), Q 63 (Lord Thomas of Cwmgiedd)
379 Q 75 (Lord Mackay of Clashfern)

CHAPTER 6: CODIFICATION, GUIDANCE AND ACCOUNTABILITY

Amendments to the Ministerial Code and Cabinet Manual

243. If the Law Officers are to carry out their roles effectively, with appropriate independence from Government, it is important that their duties are set out clearly, particularly in relation to the rule of law, public interest, independent judgment and accountability to Parliament.[380]

244. Dr Casey suggested that this could be done through codification "in something akin to ministerial guidelines", while Sir Jonathan Jones thought there could be a statutory framework for the Attorney General's role, similar to that which exists for the Lord Chancellor.[381] Lord Keen said there may be "some merit" in including a section in the Ministerial Code that sets out "the particular role and obligations of the law officers in the context of their being part of the Executive."[382]

245. As noted in chapter 1, the original Ministerial Code from 1997 provided detail about the role of the Law Officers which has not been included in subsequent editions. This includes the specification that:

> "In criminal proceedings the Law Officers act wholly independently of the Government. In civil proceedings a distinction is to be drawn between proceedings in which the Law Officers are involved in a representative capacity on behalf of the Government, and action undertaken by them on behalf of the general community to enforce the law as an end in itself."[383]

246. The delineation between when the Law Officers are expected to act independently of Government and when they are not is helpful, particularly given the multifaceted nature of the Law Officers' roles (discussed in chapter 5).

247. **Codification of the Law Officers' duties would improve public understanding of the various aspects of their role, including which functions should be carried out independently of Government.** ***The Ministerial Code and the Cabinet Manual should be amended to define clearly the duties of the Law Officers. This should include:***

- ***commitment to the existing constitutional principle of the rule of law as the Law Officers' principal duty;***
- ***a definition of which of the Law Officers' duties are ministerial in nature, and subject to collective responsibility, and which should be conducted independently of Government. Where there is overlap, this should be clearly stated;***

380 Written evidence from the Society of Labour Lawyers (RLC0017), para 4.6, Q 43 (Sir Jonathan Jones)
381 Q 27 (Dr Conor Casey), Q 43 (Sir Jonathan Jones)
382 Q 58 (Lord Keen of Elie)
383 Cabinet Office, *Ministerial Code* (July 1997), para 26: https://webarchive.nationalarchives.gov.uk/ukOgwa/20100510134500/http:/www.cabinetoffice.gov.uk/propriety_and_ethics/ministers/ministerial_code.aspx [accessed 21 December 2022]

- ***the principle of parliamentary accountability, which applies to the Law Officers by virtue of their membership of one of either House of Parliament.***

Placing the Ministerial Code on a statutory footing

248. It became clear during our inquiry that Government adherence to the rule of law was considered a "centrepiece" of the constitution,[384] and the Ministerial Code was deemed significant in that that it required ministerial compliance with the law.[385]

249. In 1995 the first Chair of the Committee on Standards in Public Life published the Seven Principles of Public Life ('the Nolan Principles') outlining the ethical standards to which those working in the public sector should adhere.[386] The Nolan Principles influenced the content of the Civil Service Code, first published in 1996,[387] the Ministerial Code, first published in 1997,[388] and the Code of Conduct for Special Advisers, first published in 2001.[389] While these codes are not source documents for the rule of law, they do require adherence to the law and include enforcement mechanisms should a breach occur. However, these tend to be 'soft' rather than 'hard' remedies.[390]

250. The Ministerial Code sets out the ethical standards expected of ministers.[391] In our 2021 report *Revision of the Cabinet Manual* we concluded:

> "Documents such as the Cabinet Manual, Ministerial Code and Civil Service Code are an important part of the United Kingdom's constitutional framework. Together with the Nolan Principles, respect for the Manual and Codes is essential for upholding principles of good governance, including adherence to constitutional conventions and the proper conduct of public and political life. They are crucial to the wider national wellbeing as well as to the public's trust in government. They

384 Q 80 (Lord Clarke of Nottingham, David Gauke), Q 102 (Dominic Grieve)

385 Cabinet Office, *Ministerial Code* (May 2022), para 1.3: https://web.archive.org/web/20221209172145/https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1079310/Ministerial_Code.pdf [accessed 10 January 2023], Q 1 (Prof Graham Gee), Q 29 (Sir Jonathan Jones)

386 Committee on Standards in Public Life, 'Guidance on Seven Principles of Public Life' (31 May 1995): https://www.gov.uk/government/publications/the-7-principles-of-public-life/the-7-principles-of-public-life--2 [accessed 21 December 2022]

387 Civil Service, 'Statutory guidance on the Civil Service Code' (16 March 2015): https://www.gov.uk/government/publications/civil-service-code/the-civil-service-code [accessed 21 December 2022]

388 Cabinet Office, *Ministerial Code* (May 2022): https://web.archive.org/web/20221209172145/https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1079310/Ministerial_Code.pdf [accessed 10 January 2023]. The Ministerial Code was preceded by *Questions of Procedure for Ministers*, which was first published in 1992.

389 Cabinet Office, *Code of Conduct for Special Advisers* (December 2016): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/832599/201612_Code_of_Conduct_for_Special_Advisers.pdf [accessed 21 December 2022]

390 Constitution Committee, *Revision of the Cabinet Manual* (6th Report, Session 2021–22, HL Paper 34), para 6. For example, if the Prime Minister determines that a breach of the Ministerial Code has occurred the decision over what is an appropriate sanction is his or hers to make, and may include, for example, making a public apology. See Cabinet Office, *Ministerial Code* (May 2022), para 1.7: https://web.archive.org/web/20221209172145/https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1079310/Ministerial_Code.pdf [accessed 10 January 2023]

391 Committee on Standards in Public Life, *Upholding Standards in Public Life: Final report of the Standards Matter 2 review* (November 2021), para 3.1: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1029944/Upholding_Standards_in_Public_Life_-_Web_Accessible.pdf [accessed 21 December 2022]

must never be treated as optional extras to be swept aside or ignored to suit the convenience of the executive."[392]

251. We asked witnesses whether there was a case for placing the Ministerial Code on a statutory footing, as a means of strengthening enforcement mechanisms for ministerial adherence to the rule of law. Most witnesses were cautious about the idea. David Gauke described himself as "nervous", pointing out that it would "draw the judiciary into very difficult political controversies and, to some extent, politicise the judiciary in a most unfortunate way."[393] Lord Judge also did not think judges should be involved in determining whether a breach of the Ministerial Code had taken place, arguing that it was a matter for Parliament.[394] It is important to note that tensions exist between different constitutional principles and there is not always a clear solution to these tensions. Placing the Ministerial Code on a statutory footing might lead to a dilution of its provisions in order to make the Code justiciable.

252. Lord Clarke was more open to the possibility of placing the Ministerial Code on a statutory footing and suggested that it could help address public cynicism about the political system and the Government.[395] However, he warned against a "mass of political cases" in the courts and the risk "political opponents routinely making allegations of breaches".[396]

253. Jack Straw thought the Ministerial Code should be placed on a statutory footing[397] and that subjecting it to judicial review might have some merit, arguing that it would "certainly concentrate the mind of the Prime Minister."[398]

254. **Placing the Ministerial Code on a statutory footing would risk politicising the judiciary. Breaches of the Ministerial Code are a matter for the Prime Minister. If the Prime Minister fails in his or her duty to uphold the Code, it is the responsibility of Parliament to hold the Prime Minster to account for that.**

Should the Attorney General be a member of Cabinet?

255. As noted in chapter 1, recent Attorneys General have indicated that they attend every Cabinet meeting, despite not being formal Cabinet members.

256. The question of whether the Attorney General should be a member of Cabinet or should simply attend when required has been the subject of debate for several years. This difference of opinion was reflected in evidence to our inquiry.[399] Dr Conor McCormick thought that the Attorney General should be considered a member of Cabinet but cautioned that the office-holder should not be bound by collective responsibility if he or she has advised the Government not to take a particular course of action but they do so anyway.[400] However, former Attorney General Suella Braverman told

392 Constitution Committee, *Revision of the Cabinet Manual* (6th Report, Session 2021–22, HL Paper 34), para 58
393 Q 88 (David Gauke)
394 Q 62 (Lord Judge)
395 Q 88 (Lord Clarke of Nottingham)
396 Q 89 (Lord Clarke of Nottingham)
397 Written evidence from Jack Straw (RLC0020), p 4
398 Q 121 (Jack Straw)
399 Q 27 (Dr Conor Casey, Dr Conor McCormick), Written evidence from Dr Conor McCormick (RLC0005), para 36
400 Q 27 (Dr Conor McCormick)

the House of Commons Justice Committee in 2022 that she subscribed to collective responsibility.[401]

257. **We do not have a strong view as to whether the Attorney General should be a member of Cabinet. What is important is that the office-holder prioritises adherence to the rule of law over Government priorities and is willing and able to operate independently of Government where required.**

Reform of the Lord Chancellor and Law Officers' oaths

Lord Chancellor

258. The antiquity of the office of the Lord Chancellor makes it difficult to trace the customs associated with it. It is not clear what kind of oath the Lord Chancellor took prior to the 19th century. However, with the introduction of the Promissory Oaths Act 1868 the Lord Chancellor was required to take three oaths, none of which was unique to the role. These oaths were:

- **Oath of allegiance**: "I do swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, her heirs and successors, according to law. So help me God."
- **The official oath**: "I do swear that I will well and truly serve Her Majesty Queen Victoria in the office of […]. So help me God."
- **The judicial oath**: "I do swear that I will well and truly serve our Sovereign Lady Queen Victoria in the office of […], and I will do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will. So help me God."[402]

259. The CRA changed the Lord Chancellor's oath to reflect the role as then defined. This new oath, unique to the office of the Lord Chancellor, was inserted into the Promissory Oaths Act 1868:

> "I [name] do swear that in the office of Lord High Chancellor of Great Britain I will respect the rule of law, defend the independence of the judiciary and discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for which I am responsible. So help me God."[403]

260. Witnesses to our inquiry considered the Lord Chancellor's oath to be significant and of value.[404] Sir Richard Heaton said: "If [Lord Chancellors] do not read any briefing they will stand up and make this oath, and they will want to know what it means." He thought it valuable that the oath was taken in public in the Royal Courts of Justice. [405] David Gauke similarly argued that the process of swearing an oath to uphold the rule of law "emphasised its importance and how intrinsic it was to the post of Lord Chancellor."[406]

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401 Oral evidence taken before the House of Commons' Justice Committee, inquiry on the work of the Law Officers, 25 January 2022 (Session 2021–22), QQ 7, 20 (Suella Braverman MP)
402 Promissory Oaths Act 1868, section 2, section 3 and section 4
403 Promissory Oaths Act 1868, section 6A (as inserted by the Constitutional Reform Act 2005, section 17)
404 Q 4 (Prof Graham Gee)
405 Q 49 (Sir Richard Heaton, Sir Jonathan Jones)
406 Q 98 (David Gauke)

261. In our 2014 report *The office of Lord Chancellor* we concluded that the Lord Chancellor's oversight role with respect to the rule of law was not adequately reflected in the current oath. We said:

> "To clarify the scope of the Lord Chancellor's duty in relation to the rule of law, we recommend that the oath to "respect the rule of law" be amended to a promise to "respect and uphold the rule of law."[407]

We have discussed the Lord Chancellor's role as a guardian of the rule of law in detail in chapter 3.

262. **The Lord Chancellor's oath is well-written and easily understood by a lay reader. We nonetheless reiterate this Committee's earlier concern that the oath does not adequately reflect the Lord Chancellor's role in overseeing respect for the rule of law in Government. *We recommend the oath be amended to include the Lord Chancellor's duty to uphold the rule of law.***

Law Officers

263. The then Law Officers' oath was cited in a 1800 report published by the House of Commons select committee appointed to inquire into the state of the public records of the kingdom.[408] The wording of the oath was:

> "Ye shall swear, that well and truly ye shall serve the King as his [Attorney General / Solicitor General], in all his courts of record, within the Kingdom of Great Britain, and truly counsel the King in his matters when ye shall be called, and duly and truly minster the King's matters, and sue the King's process after the course of the law, and after your cunning; ye shall take not wages nor fee of any man for any matter against the King, where the King is party; ye shall duely, in convenient time, speed such matters as any person shall have to do in the law against the King, as ye may lawfully do without long delay, tracting or tarrying the party of his lawful process in that, that to you belongeth; ye shall be attendant to the King's matters when ye shall be called thereto; as God help you, and by the contents of this book."[409]

The committee report stated that this oath was taken from the book of oaths in the Crown Office in Chancery and administered by the Deputy Clerk of the Crown.[410]

264. The current oath is very similar:

> "I do declare that well and truly I will serve the King as his [Attorney General / Solicitor-General] in all his courts of record within Great Britain and truly counsel the King in his matters when I shall be called and duly and truly minister the King's matters and sue the King's

407 Constitution Committee, *The office of Lord Chancellor* (6th report, Session 2014–15, HL Paper 75), para 51

408 House of Commons Papers, *Reports from the select committee: appointed to inquire into the state of the public records of the kingdom*, 18th Century House of Commons Sessional Papers, vol. 133, 4 July 1800 (Session 1799–1800), p 218

409 House of Commons Papers, *Reports from the select committee: appointed to inquire into the state of the public records of the kingdom*, 18th Century House of Commons Sessional Papers, vol. 133, 4 July 1800 (Session 1799–1800), p 218

410 House of Commons Papers, *Reports from the select committee: appointed to inquire into the state of the public records of the kingdom*, 18th Century House of Commons Sessional Papers, vol. 133, 4 July 1800 (Session 1799–1800), p 216

> process after the course of the law and after my cunning. For any matter against the King where the King is a party, I will take no wages or fee of any man. I will duly in convenient time speed such matters as any person shall have to do in the law against the King, as I may lawfully do, without long delay, tracting or tarrying the Party of his lawful process in that that to me belongeth, and I will be attendant to the King's matters when I shall be called thereto".[411]

265. In 2007 the Government proposed several statutory and non-statutory reforms to the role of Attorney General. This included a suggestion that the Attorney General's (and Solicitor General's) oaths should be modified to require office holders to respect the rule of law. The then Government said that this would:

> "re-emphasise one of the strengths of the role of Attorney General, namely the ability of the Attorney General to act as a champion for the rule of law at the heart of Government".

As the oath is not specified by statute, the then Government considered that it could be amended by non-statutory means.[412] However, this was never implemented.[413]

266. During our inquiry several witnesses suggested that the Law Officers could be required to swear an updated oath with an express duty to respect the rule of law and public interest functions.[414] Dr Conor Casey suggested that the Law Officers' oath should clarify that when fulfilling public interest and rule of law functions the Law Officers should "give advice … consistent with the ethics of the profession and the traditions of the office", making it clear that they put their political affiliation to one side when fulfilling these functions.[415]

267. Lord Thomas told the Committee: "[i]f an oath is to be meaningful, it has to be in language that the ordinary person understands as relevant to the 21st century."[416] While Dominic Grieve and Lord Garnier were both fond of the 16th century Attorney General's oath, which Dominic Grieve described as "highly relevant", neither were opposed to it being updated.[417]

268. ***The Law Officers' oaths should be updated to make reference to the primacy of their duty to uphold the rule of law and fulfil public interest functions. Language used in the oath should be understood by the general public.***

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411 Q 115 (Lord Garnier)

412 Ministry of Justice, *The Government of Britain—Constitutional Renewal: Part 1 of 3*, Cm 7342-I (March 2008), paras 55–56: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/250803/7342_i.pdf

413 Q 49 (Sir Jonathan Jones)

414 Written evidence from Dr Conor McCormick (RLC0005) paras 37–38, QQ 27, 28 (Dr Conor Casey), QQ 44, 49 (Sir Jonathan Jones), Q 65 (Lord Thomas of Cwmgiedd, Lord Judge)

415 Q 28 (Dr Conor Casey)

416 Q 65 (Lord Thomas of Cwmgiedd)

417 Q 115 (Dominic Grieve, Lord Garnier)

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

The rule of law

1. It is fundamental to our constitution that the Government acts according to the rule of law. While there is no concise, enduring and conclusive definition of the concept, its fundamental tenets are well understood and set out in Lord Bingham's exposition. What is critical is that ministers are mindful of the concept, understand its key principles and act in accordance with them, and consider the rule of law to have primacy over political expediency. This is especially relevant to those with distinct rule of law functions such as the Lord Chancellor and the Law Officers. (Paragraph 41)

2. The Government has now twice knowingly introduced legislation in Parliament which would breach the UK's international obligations, contravening Lord Bingham's principle that "the rule of law requires compliance by the state with its obligations in international law." In the case of Part 5 of the United Kingdom Internal Market Bill it admitted doing so. In the case of the Northern Ireland Protocol Bill, the Government has failed to produce a credible legal justification for doing so. (Paragraph 45)

3. Parliamentary sovereignty means that Parliament can legislate contrary to the UK's obligations under international law. It ensures that rights and obligations in domestic law are not created or altered through Government action in agreeing a treaty without parliamentary approval. (Paragraph 58)

4. A treaty, once agreed, binds the state. It is the responsibility of the Government, as the state's international representative, to ensure that agreements entered into internationally are respected. While it is conceivable that Parliament would decline to give effect to an attempt by the executive to apply a treaty, a Government commanding the confidence of the House of Commons should normally be able to ensure that any necessary domestic legislation is passed. Nonetheless the responsibility of the Government to honour the state's international obligations requires it to refrain from inviting Parliament to legislate knowingly contrary to the UK's international obligations. (Paragraph 59)

5. The Human Rights Act 1998 balances adherence to the European Convention on Human Rights and parliamentary freedom to legislate (or not). While accommodating parliamentary sovereignty, the Act includes remedies for potential breaches. Section 3 of the Act requires the courts to interpret legislation compatibly with Convention rights so far as it is possible to do so. Section 4 enables the courts to make a declaration of incompatibility in cases where it is unable to interpret legislation as being compatible. Section 10 provides a procedure for a minister to make, and Parliament if it so wishes to approve, a remedial order rectifying the incompatibility. The Act does not justify the wilful introduction of legislation known to be in breach of international law. (Paragraph 70)

6. The Ministerial Code elides the duties of individual ministers with the duties of the Government as a whole. In most cases it would seem that the original (and implicitly current) duty to comply with "international law and treaty obligations" must apply collectively. Even so, the Government's contention that the Code "does not prevent Ministers from introducing legislation for MPs and Peers to debate" appears to be shifting responsibility for any potential breach of international obligations to Parliament. While

Parliament is ultimately responsible for the form of any legislation passed, the preparation and introduction of government legislation is an executive action for which ministers, collectively, are accountable. Parliamentarians and others can hold a Government to account for such action, under the terms of a Ministerial Code which distils, rather than prescribes, the duties of ministers under the rule of law. (Paragraph 88)

7. The proper exercise by a minister of a power granted by Parliament would be lawful under domestic law. But where domestic and international law diverge, the duty reflected in the Ministerial Code to comply with international law still applies. This presents ministers with a dilemma which they should not be expected to face, and this uncomfortable situation reaffirms our previously expressed disquiet about the constitutional desirability of Parliament legislating in violation of the UK's international obligations. (Paragraph 89)

The rule of law—Government actors

8. The Lord Chancellor should fulfil a wider, cross-departmental, role in defending the rule of law and educating his or her colleagues on its importance. Historically, the office has fulfilled that role, there is already a statutory duty and, unlike the Law Officers, the Lord Chancellor is a full member of the Cabinet. We note that none of the former Lord Chancellors we spoke to expressed any qualms about performing a wider role. (Paragraph 102)

9. Defending the judiciary against unfair, personal or threatening abuse is a core part of the Lord Chancellor's role. While criticism of the content of a judgment is acceptable, targeted personal criticism which unfairly impugns a judge's impartiality or inflames public sentiment against the judiciary is not. In such cases, a Lord Chancellor must intervene promptly and publicly. (Paragraph 121)

10. The 'Enemies of the People' incident, and the then Lord Chancellor's response to it, at the very least caused alarm within the judiciary and damaged trust. For the judiciary to feel secure in its independence, and the performance of its duty to decide cases without fear or favour, it needs the support of a Lord Chancellor who is willing to defend it. This incident illustrates the importance of a Lord Chancellor having sufficient authority within the Government to perform their role. (Paragraph 122)

11. The Lord Chief Justice and other senior members of the judiciary have a part to play in explaining to the public, in general terms, their role and constitutional position. It would not be appropriate, however, for them directly to address criticism, made in the heat of political controversy, of their judgments on the application of the law. That is the Lord Chancellor's responsibility. (Paragraph 123)

12. All those in Government have a duty to defend the rule of law and should be mindful of the fundamental tenets on which it rests, as described in paragraph 41. This applies especially to those with legal authority. In our view, the Law Officers have a wider role in defending the rule of law when issues arise, alongside the Lord Chancellor. (Paragraph 134)

13. The existence of a "respectable legal argument" as set out in the guidance and elaborated by the then Attorney General, Rt Hon Suella Braverman KC MP, could sometimes represent a very low threshold for authorising legally uncertain action. While it may be conceptually correct that an action is not

"unlawful" until tested by the courts or where no legal justification can be found, acting on such an uncertain basis is dubious practice and contrary to the rule of law. The concept may provide a helpful framework for the provision of advice by Government lawyers but a decision by ministers to act must not be based solely on a calculation of legal inconvenience. An alternative framework for assessing legal risk might be to do so in terms of a "necessary degree of confidence", as recently exemplified in the Lord Advocate's reference to the Supreme Court on a Scottish Independence Referendum Bill. (Paragraph 147)

14. The validity of the "respectable legal argument" threshold itself depends on an uncertain threshold in the Attorney General's guidance: the level at which an argument becomes "respectable". The guidance explains that this is an argument that can be properly put before a court, but this may be a subjective judgement. It also refers to an absence of such arguments as being "rare" or "exceptional": it is unclear whether this suggests the threshold is so low that an argument will almost always be found or whether the Government would not expect frequently to be contemplating legally dubious action. While the "respectable legal argument" threshold may be justified in some circumstances of genuine legal uncertainty we are concerned that the threshold as currently set out in the guidance could sometimes be used purely for the convenience of the Government. Public confidence in the Government's commitment to the rule of law demands that any threshold is meaningful and aligns with an ethos of genuinely seeking to comply with the law. (Paragraph 148)

15. In the case of decisions to authorise armed conflict, greater certainty is required. The existence of a merely "respectable" argument in this context is a fig leaf, and risks undermining the trust of the public and the military. (Paragraph 149)

16. On balance, we do not favour the routine publication of Law Officers' advice. Doing so would infringe on legal professional privilege and risk undermining the Government's position should a matter reach court. This is consistent with the rule of law as fairness in legal proceedings is a fundamental part of it. In exceptional cases of national importance, especially where litigation is unlikely, there is a stronger case for publishing advice, either in full or in summary. Doing so would enhance Parliament's ability to scrutinise the Government's proposed actions and public trust in its adherence to the rule of law. It is difficult to codify the situations when there should be a presumption of publication but decisions to use armed force are perhaps the clearest area where publication is in the public interest. *The Government should consider amending the Ministerial Code accordingly.* (Paragraph 156)

Reform of the role of Lord Chancellor

17. In the final analysis, character, intellect and a commitment to the rule of law are the most important attributes for a Lord Chancellor to possess. *Whilst we do not consider it necessary to amend the criteria for appointment in section 2 of the Constitutional Reform Act 2005 so as to make it a specific requirement that Lord Chancellors should have a legal qualification, we would expect a Lord Chancellor normally to be a senior legal figure. They should be respected both in the legal community and in Parliament, well equipped with the necessary qualities and knowledge successfully to uphold the rule of law and defend the independence of the judiciary in government.* (Paragraph 167)

18. In fulfilling their duties Lord Chancellors must be willing and able, where necessary, to stand up to Cabinet colleagues and the Prime Minister. *We invite Prime Ministers, when appointing Lord Chancellors, to give weight to candidates with the authority and political clout necessary successfully to speak up for and defend the rule of law in Government, even where this may conflict with political priorities.* (Paragraph 168)

19. Tenure in office increases the legal and constitutional experience and knowledge of a Lord Chancellor. The Lord Chancellor's role is a unique appointment with specific responsibilities that are fundamental to the rule of law. *We recommend that Prime Ministers, when undertaking Government reshuffles, consider the benefits of Lord Chancellors remaining in office for longer in order to maintain confidence in the status and effectiveness of the office.* (Paragraph 171)

20. As Secretary of State for Justice the Lord Chancellor has responsibility for a wide range of policy areas in addition to his or her duties as regards the rule of law and the independence of the judiciary. The arguments for and against the status quo are finely balanced. While we recognise the risk that a conflict of interest could arise between some of these functions, it is also reasonable to suggest that the Lord Chancellor's budgetary responsibility for the Ministry of Justice, including the prison service, increases his or her status and authority in Government. Arguably, this better equips the office holder to make an effective bid for funding for all the policy areas falling within their remit. (Paragraph 185)

21. *Given that the advantages of separating the role of Lord Chancellor from that of Secretary of State for Justice are not clear, we are not in favour of doing so at this time, especially considering the burdens inherent in any major machinery of Government change. However, a new Prime Minister embarking on a reorganisation of government as a whole may wish to consider whether the role of Lord Chancellor should be separated from that of Secretary of State for Justice. Alternatively, a new Prime Minister may contemplate removing responsibility for prisons from the Lord Chancellor's remit.* (Paragraph 186)

22. We have heard no compelling evidence to suggest that the role of Deputy Prime Minister may pose a risk to the Lord Chancellor's independence and willingness to defend the rule of law in Government. However, we reiterate that the Lord Chancellor's duty in Cabinet to raise rule of law issues must not be diluted by his role as Deputy Prime Minister. (Paragraph 190)

23. It is unclear whether there is currently a senior Cabinet minister in Government with overall responsibility for and oversight of constitutional affairs, including responsibility for upholding the constitution. This is highly regrettable. We see clear benefits in having the Lord Chancellor, who already has statutory responsibilities regarding the rule of law, as the individual in Government fulfilling this role. (Paragraph 194)

24. The Lord Chancellor's limited role in judicial appointments has been settled since the enactment of the CRA in 2005. The current system enables political oversight of the process through the Lord Chancellor's ability to reject or request reconsideration of the candidate recommended to them. In our 2012 report Judicial Appointments we cautioned against the over-politicisation of the process. Nonetheless, since then arguments have been made for more accountability and transparency in the process. Any change to the current system would need very carefully to balance political accountability with

the essential need to avoid political interference with judicial independence. (Paragraph 207)

25. While the Lord Chancellor remains in charge of a major spending department the office is likely to be filled by an MP. However, if the office of Lord Chancellor were to be separated from that of Secretary of State for Justice then perhaps it could more frequently be filled by a member of the House of Lords. (Paragraph 211)

Reform of the role of the Law Officers

26. There is great value in the Law Officers being politicians as it provides them with a strong understanding of the political context in which they operate and bolsters the authority of their advice. As members of Parliament the Law Officers are accountable for their decisions, which is welcome. (Paragraph 232)

27. It is nonetheless vital that Law Officers recognise that they are different from other ministers in that key aspects of their role require independence from party politics and Government priorities. It is key to retaining public confidence in the Law Officers' impartiality that they place their duty to the rule of law above party political considerations. *Law Officers should refrain from making public statements which could damage public perception of their impartiality.* (Paragraph 233)

28. It is essential that those appointed to Law Officer roles continue to be legally qualified, with relevant experience. Of equal importance to formal qualifications is the character and independence of mind of the Law Officers, which cannot be easily defined in statute. *We recommend Prime Ministers appoint only Law Officers with the independence of mind, autonomy and strength of character to deliver impartial legal advice to the Government, even where it is unwelcome.* (Paragraph 238)

29. It is important that the Law Officers are members of a House of Parliament, so bringing an understanding of the political context in which they have to operate. There is a credible argument that they should be drawn, not only from the House of Commons, but from the House of Lords. If the best candidate is not already a member of either House we would support appointing individuals to the Lords for the purpose of their becoming Law Officers. Doing so would widen the pool of suitably qualified candidates. (Paragraph 242)

Codification, guidance and accountability

30. Codification of the Law Officers' duties would improve public understanding of the various aspects of their role, including which functions should be carried out independently of Government. *The Ministerial Code and the Cabinet Manual should be amended to define clearly the duties of the Law Officers. This should include:*

- *commitment to the existing constitutional principle of the rule of law as the Law Officers' principal duty;*
- *a definition of which of the Law Officers' duties are ministerial in nature, and subject to collective responsibility, and which should be conducted independently of Government. Where there is overlap, this should be clearly stated;*

- *the principle of parliamentary accountability, which applies to the Law Officers by virtue of their membership of one of either House of Parliament.* (Paragraph 247)

31. Placing the Ministerial Code on a statutory footing would risk politicising the judiciary. Breaches of the Ministerial Code are a matter for the Prime Minister. If the Prime Minister fails in his or her duty to uphold the Code, it is the responsibility of Parliament to hold the Prime Minster to account for that. (Paragraph 254)

32. We do not have a strong view as to whether the Attorney General should be a member of Cabinet. What is important is that the office-holder prioritises adherence to the rule of law over Government priorities and is willing and able to operate independently of Government where required. (Paragraph 257)

33. The Lord Chancellor's oath is well-written and easily understood by a lay reader. We nonetheless reiterate this Committee's earlier concern that the oath does not adequately reflect the Lord Chancellor's role in overseeing respect for the rule of law in Government. *We recommend the oath be amended to include the Lord Chancellor's duty to uphold the rule of law.* (Paragraph 262)

34. *The Law Officers' oaths should be updated to make reference to the primacy of their duty to uphold the rule of law and fulfil public interest functions. Language used in the oath should be understood by the general public.* (Paragraph 268)

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

Members

Baroness Drake (Chair)
Lord Falconer of Thoroton
Lord Faulks
Baroness Fookes
Lord Hennessy of Nympsfield
Lord Hope of Craighead
Lord Howard of Lympne (from 31 March 2022)
Lord Howarth of Newport
Lord Howell of Guildford
Lord King of Bridgwater (until 31 March 2022)
Lord Robertson of Port Ellen
Lord Sherbourne of Didsbury
Baroness Suttie
Lord Thomas of Gresford (from 31 March 2022)

Declarations of Interest

Baroness Drake
No relevant interests
Lord Falconer of Thoroton
Former Lord Chancellor and Solicitor General
Wife is a judge
Lord Faulks
Judge of the Astana International Financial Centre, Kazakhstan
Former minister, Ministry of Justice
Former Recorder of the Crown Court, 1996–2010
Baroness Fookes
No relevant interests
Lord Hennessy of Nympsfield
No relevant interests
Lord Hope of Craighead
Former Deputy President of the UK Supreme Court
Lord Howard of Lympne (from 31 March 2022)
No relevant interests
Lord Howarth of Newport
No relevant interests
Lord Howell of Guildford
No relevant interests
Lord King of Bridgwater (until 31 March 2022)
No relevant interests
Lord Robertson of Port Ellen
No relevant interests
Lord Sherbourne of Didsbury
No relevant interests
Baroness Suttie
No relevant interests

Lord Thomas of Gresford (from 31 March 2022)
Liberal Democrat shadow Attorney General

A full list of members' interests can be found in the Register of Lords' Interests https://members.parliament.uk/members/lords/interests/register-of-lords-interests

Professor Stephen Tierney, University of Edinburgh, and Professor Alison Young, University of Cambridge, acted as legal advisers to the Committee. They declared the following interests:

Professor Tierney
Board member of the Judicial Appointments Board for Scotland
Professor Young
Fellow of Robinson College, Cambridge, whose Warden, Sir Richard Heaton, was a witness to the inquiry

APPENDIX 2: LIST OF WITNESSES

Evidence is published online at https://committees.parliament.uk/work/6540/role-of-the-lord-chancellor-and-the-law-officers/ and available for inspection at the Parliamentary Archives (020 7219 3074)

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

Oral evidence in chronological order

*	Professor Graham Gee, Head of School and Professor of Public Law, School of Law, University of Sheffield, and Dr Patrick O'Brien, Senior Lecturer in Law, School of Law, Oxford Brookes University	QQ 1–19
*	Dr Conor Casey, Lecturer in Law, School of Law and Social Justice, University of Liverpool, and Dr Conor McCormick, Lecturer and Director of the Human Rights Centre, School of Law, Queen's University Belfast	QQ 20–28
**	Sir Jonathan Jones KC (Hon), former Treasury Solicitor and Permanent Secretary (2014–20), Government Legal Department and Senior Consultant on Public and Constitutional Law, Linklaters LLP, and Sir Richard Heaton, former Permanent Secretary (2015–20), Ministry of Justice, former Permanent Secretary (2012–15), Cabinet Office and Warden, Robinson College, University of Cambridge	QQ 29–49
**	The Rt Hon the Lord Reed of Allermuir, President, The Supreme Court of the United Kingdom, and The Rt Hon Lord Hodge, Deputy President, The Supreme Court of the United Kingdom (Annual Evidence Session)	QQ 1–23
**	Lord Keen of Elie KC, former Advocate General of Scotland (2015–20), Office of the Advocate General for Scotland, and former Lords Spokesperson, Ministry of Justice (2016–20) and Home Office (2016)	QQ 50–58
**	The Rt Hon the Lord Burnett of Maldon, Lord Chief Justice and Head, Judiciary of England and Wales, and President, Courts of England and Wales (Annual Evidence Session)	QQ 1–16

**	Lord Judge, former Lord Chief Justice and Head (2008–13), Judiciary of England and Wales, and Lord Thomas of Cwmgiedd, former Lord Chief Justice and Head (2013–17), Judiciary of England and Wales	QQ 59–69 N.B. The numbering on this transcript is out of sequence and overlaps with the following transcript.
**	Lord Mackay of Clashfern, former Lord Chancellor (1987–97), Lord Chancellor's Department, former Lord of Appeal in Ordinary (1985–87), House of Lords, former Judge (1984–85), Supreme Court of Scotland, former Lord Advocate (1979–84), Crown Office and Procurator Fiscal Service, and Lord Clerk Register of Scotland and Keeper of the Signet, National Records of Scotland and Registers of Scotland	QQ 67–79 N.B. The numbering of this transcript overlaps with the previous transcript.
**	The Rt Hon the Lord Clarke of Nottingham KC, former Lord Chancellor and Secretary of State for Justice (2010–12), and The Rt Hon David Gauke, former Lord Chancellor and Secretary of State for Justice (2018–19)	QQ 80–101
**	The Rt Hon the Lord Garnier KC, former Solicitor-General for England and Wales, Attorney-General's Office (2010–12); The Rt Hon Dominic Grieve QC, former Attorney-General for England and Wales, and Advocate-General for Northern Ireland, Attorney-General's Office (2010–14)	QQ 102–117
*	The Rt Hon Jack Straw, former Lord Chancellor and Secretary of State for Justice (2007–10)	QQ 118–129

Alphabetical list of all witnesses

	Attorney General's Office	RLC0019
	The Bar Council	RLC0018
**	The Rt Hon the Lord Burnett of Maldon, Lord Chief Justice and Head, Judiciary of England and Wales, and President, Courts of England and Wales (Annual Evidence Session QQ 1–16)	
*	Dr Conor Casey, Lecturer in Law, School of Law and Social Justice, University of Liverpool (QQ 20–28)	RLC0003
**	The Rt Hon the Lord Clarke of Nottingham KC, former Lord Chancellor and Secretary of State for Justice (2010–12) (QQ 80–101)	

**	The Rt Hon the Lord Garnier KC, former Solicitor-General for England and Wales, Attorney-General's Office (2010–12) (QQ 102–117)	
**	The Rt Hon David Gauke, former Lord Chancellor and Secretary of State for Justice (2018–19) (QQ 80–101)	
*	Professor Graham Gee, Head of School and Professor of Public Law, School of Law, University of Sheffield (QQ 1–19)	RLC0004
**	The Rt Hon Dominic Grieve KC, former Attorney-General for England and Wales, and Advocate-General for Northern Ireland, Attorney-General's Office (2010–14) (QQ 102–117)	
	Professor Robert Hazell, Professor of Government and the Constitution, The Constitution Unit, University College London	RLC0006
**	Sir Richard Heaton, former Permanent Secretary (2015–20), Ministry of Justice, former Permanent Secretary (2012–15), Cabinet Office and Warden, Robinson College, University of Cambridge (QQ 29–49)	
**	The Rt Hon Lord Hodge, Deputy President, The Supreme Court of the United Kingdom (Annual Evidence Session QQ 1–23)	
**	Sir Jonathan Jones KC (Hon), former Treasury Solicitor and Permanent Secretary (2014–20), Government Legal Department and Senior Consultant on Public and Constitutional Law, Linklaters LLP (QQ 29–49)	
**	Lord Judge, former Lord Chief Justice and Head (2008–13), Judiciary of England and Wales (QQ 59–66)	
**	Lord Keen of Elie KC, former Advocate General of Scotland (2015–20), Office of the Advocate General for Scotland, and former Lords Spokesperson, Ministry of Justice (2016–20) and Home Office (2016) (QQ 50–58)	
	Dr Klearchos A Kyriakides, Senior Visiting Fellow, School of Law, Cyprus Campus, University of Central Lancashire	RLC0009 RLC0015
**	Lord Mackay of Clashfern, former Lord Chancellor (1987–97), Lord Chancellor's Department, former Lord of Appeal in Ordinary (1985–87), House of Lords, former Judge (1984–85), Supreme Court of Scotland, former Lord Advocate (1979–84), Crown Office and Procurator Fiscal Service, and Lord Clerk Register of Scotland and Keeper of the Signet, National Records of Scotland and Registers of Scotland (QQ 67–79)	

	Professor Kate Malleson, Professor of Law, Queen Mary University of London	RLC0006
*	Dr Conor McCormick, Lecturer and Director of the Human Rights Centre, School of Law, Queen's University Belfast (QQ 20–28)	RLC0005
	Dr John McGarry, Senior Lecturer in Law, Department of Law and Centre for Crime Justice and Security, Staffordshire University	RLC0010
	Ministry of Justice	RLC0014
	The Rt Hon the Lord Morris of Aberavon KC, former Attorney General for England and Wales and Attorney General for Northern Ireland, Attorney General's Office (1997–99)	RLC0008
*	Dr Patrick O'Brien, Senior Lecturer in Law, School of Law, Oxford Brookes University (QQ 1–19)	RLC0013
	The Rt Hon Dominic Raab MP, Lord Chancellor, Secretary of State for Justice and Deputy Prime Minister, Ministry of Justice	RLC0021
**	The Rt Hon the Lord Reed of Allermuir, President, The Supreme Court of the United Kingdom (Annual Evidence Session (QQ 1–23)	
	Mr Mark Ryan, Assistant Professor of Law, Coventry University	RLC0012
	The Society of Labour Lawyers	RLC0017
*	The Rt Hon Jack Straw, former Lord Chancellor and Secretary of State for Justice (2007–10) (QQ 118–129)	RLC0020
**	Lord Thomas of Cwmgiedd, former Lord Chief Justice and Head (2013–17), Judiciary of England and Wales (QQ 59–66)	
	Mr Yuan Yi Zhu, Associate Member, Pembroke College, University of Oxford, and DPhil candidate in International Relations, Nuffield College, University of Oxford	RLC0016

APPENDIX 3: CALL FOR EVIDENCE

The House of Lords Constitution Committee, chaired by Baroness Drake, is conducting an inquiry into the role of the Lord Chancellor and the Law Officers. The inquiry will focus on how these roles currently operate and how they have evolved since the CRA. In particular it will examine the extent to which these office holders are able to remain impartial given their position in the executive branch of Government, and whether their ability to uphold the rule of law and defend the independence of the judiciary is affected.

The Committee invites interested organisations and individuals to submit written evidence to the inquiry.

The deadline for written evidence submissions is 5pm on Friday 18 March. Public hearings will be held from March 2022. The Committee will report to the House later in 2022.

Background

The Lord Chancellor is a senior member of the Cabinet appointed by the Monarch on the advice of the Prime Minister. Section 2 of the Constitutional Reform Act 2005 requires the Prime Minister to recommend a person who appears to the Prime Minister to be "qualified by experience".

He or she has a duty to ensure the rule of law is respected within Cabinet and across Government. The office holder has a responsibility to uphold the independence of the judiciary and consider the public interest in respect of matters relating to the judiciary. The Lord Chancellor is also responsible for ensuring an efficient and effective justice system. After an individual is appointed to the role of Lord Chancellor they must take the following oath:

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

There are three UK Government Law Officers: the Attorney General for England and Wales, the Solicitor General for England and Wales and the Advocate General for Scotland. The Attorney General also holds the separate office of Advocate General for Northern Ireland. The Law Officers are politicians and government ministers who are also expected to act as independent guardians of the rule of law and provide impartial legal advice to ministers and government departments.

The Attorney General has non-ministerial responsibilities including the provision of legal advice to the Government and powers related to individual prosecutions. He or she also has ministerial roles, including shared responsibility for criminal justice policy and responsibility for agencies that fall under the superintendence of the Office of the Attorney General. The Attorney General may be invited by the Prime Minister to attend Cabinet.

The Constitutional Reform Act 2005 introduced substantial changes to the role of Lord Chancellor, including removing its functions as head of the judiciary and the presiding officer in the House of Lords. This put an end to the role's previous constitutional status as the crossroads of the three branches of state. While the Constitutional Reform Act 2005 did not address the position of the Law Officers,

they became more significant guardians of the rule of law as a result of reforms made to the role of Lord Chancellor.

It is now timely to revisit these topics and consider how these roles currently operate and how they have evolved since the Constitutional Reform Act 2005.

Questions

The Committee welcomes written submissions on any aspect of this topic, and particularly on the following questions:

1. How is the rule of law being protected within the Government, and how do the Lord Chancellor and the Law Officers ensure this?

    - Have recent events demonstrated a shift in how the duty to protect the rule of law is being performed? How should the duty be applied in respect of international law? Could more be done to uphold the independent position of the judiciary?

2. How have the roles of the Lord Chancellor and the Law Officers evolved since the initial adjustments following the passing of the Constitutional Reform Act 2005?

3. Has the amendment of the role of the Lord Chancellor by the Constitutional Reform Act 2005, and the resulting separation of powers between the judiciary and the Government, been successful?

    - Is it now more difficult for Lord Chancellors, with their more overtly political position as Secretary of State for Justice, to carry out their duty in relation to ensuring respect for the rule of law across Government? Has the status of the Lord Chancellor altered since the Constitutional Reform Act 2005 and if so what are the consequences?

4. Is further reform of the role of Lord Chancellor necessary?

    - Is the relationship between the Lord Chancellor and the Lord Chief Justice functioning effectively? Is it desirable for Lord Chancellors to have a legal or constitutional background in order to carry out their role effectively (the Constitutional Reform Act 2005 specifies in section 2 the qualifications necessary for the office of Lord Chancellor.)? Would it be preferable for Lord Chancellors to remain in post for longer periods and, if so, how could this be achieved? Are there any additional functions that the Lord Chancellor should take on?

5. Is it appropriate or helpful for the Law Officers, as Government legal advisers, to be politicians serving in Government?

    - Would it be preferable for the Law Officers' role in advising the Government to be separated from that of political Government ministers, i.e. independent roles unaffiliated to a political party? Would the separation of these roles improve public perception of the Law Officers as being capable of providing impartial legal advice to the Government? Would independent Law Officers command the same authority as Government ministers or would they risk being side lined by Government? Do the Law Officers need to be members of either the House of Commons or House of Lords in order to be accountable to Parliament? Do the changes to the role of Lord Chancellor brought about by the Constitutional Reform Act 2005 make it more important that the Law Officers be a member of the Government? Should the Law Officers'

legal advice to the Government be made public more routinely–if so, under what circumstances?

6. Is it appropriate for the Attorney General as a member of the Government to be involved in some decisions about whether to prosecute?

   - Is the division of responsibility between the Attorney General and the Directors of the prosecution agencies clear?

7. Are any reforms necessary to the Attorney General's ministerial responsibilities?

   - Should the Attorney General regularly attend Cabinet? Should the Attorney General maintain his or her role in superintending the prosecution services? What aspects of the Attorney General's role require them to be accountable to Parliament?

8. What are the constitutional boundaries that constrain the Law Officers and the Lord Chancellor?

   - How could those boundaries best be clarified and maintained? Are their oaths useful or significant? Could the roles of the Lord Chancellor and Attorney General be realigned to improve maintenance of the rule of law?