



Ministry
of Justice

Baroness Drake CBE
Chair, Constitution Committee
House of Lords
London
SW1A 0PW

The Right Honourable
Dominic Raab MP
Deputy Prime Minister
Lord Chancellor & Secretary
of State for Justice

MoJ ref: 104095

16 March 2023

Dear Baroness Drake,

THE ROLES OF THE LORD CHANCELLOR AND THE LAW OFFICERS

I would like to thank the Committee for its work in producing the report *The Roles of the Lord Chancellor and the Law Officers*. The Committee has gathered a wide range of evidence to inform its report, which is a useful addition to the literature on the constitutional landscape. I was pleased to have the opportunity to appear before you on 1 March to discuss some of the matters in the report. I understand the Attorney General will also be appearing before you.

I enclose the Government's response to the Committee's report. Though the Government has no current plans to review the existing arrangements for the offices of Lord Chancellor and the Law Officers, we will continue to reflect on the report's findings.

I am copying this letter to the Prime Minister, the Attorney General and the chair of the Justice Select Committee.

Yours sincerely,

RT HON DOMINIC RAAB MP

The Roles of the Lord Chancellor and the Law Officers

Government response to the HL Constitution Committee

Ninth Report of Session 2022–23

1. The Government thanks the Constitution Committee for its report *The Roles of the Lord Chancellor and the Law Officers*, published on 18 January 2023. We welcome the Committee’s continuing interest in these roles within the modern constitutional settlement, and particularly in the role of the Lord Chancellor following the Constitutional Reform Act 2005 and the creation of the Ministry of Justice in 2007. We have considered the Committee’s findings and set out our response in this memorandum.

The rule of law: Government actors

2. This Government agrees with the Committee that the rule of law is fundamental to our constitution. The Lord Chancellor and the Law Officers have particular roles in safeguarding the rule of law, but all Ministers are bound to act within it. We note the Committee’s views that the Lord Chancellor should fulfil a wider cross-departmental role in defending the rule of law and educating colleagues on its importance (paragraph 102). As the Lord Chancellor said when he appeared before the Committee, we do not believe there is a statutory gap. There was, of course, no statutory obligation of this nature on Lord Chancellors before the 2005 reforms. Although the office changed substantially in 2005, Lord Chancellors continue to be mindful of their role and take an active interest at Cabinet level regardless of the absence of a specific statutory duty.
3. The Government agrees with the Committee that “defending the judiciary against unfair, personal or threatening abuse is a core part of the Lord Chancellor’s role” (paragraph 121). The oath, customarily sworn in the presence of the most senior judiciary, makes this very clear to any new Lord Chancellor.
4. We respectfully disagree, however, with the Committee and others who have said that “a Lord Chancellor must intervene [...] publicly” (paragraph 121). There will be occasions where the most effective course of action is for a Lord Chancellor to resolve matters behind the scenes. We therefore believe that an expectation that intervention will be public might prove counterproductive. The Committee has noted that criticism of judgments can be “made in the heat of political controversy” (paragraph 123). In discharging the duty to defend the judiciary against such criticism, how best to do so can therefore also be a political call. As the Lord Chancellor said when he appeared before the Committee this March, there will be no reservation about intervening publicly where this is necessary.
5. The Committee states that the “respectable legal argument” threshold may be justified in some circumstances of genuine legal uncertainty (paragraph 148). The Law Officers note that this threshold is founded in the professional obligations incumbent on lawyers across all jurisdictions in the United Kingdom and that any government will from time to time need to be able to test legal thinking or make decisions in untested areas of law. We would agree

with the Committee that 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.

Reform of the role of Lord Chancellor

6. The Committee has made various findings about the role of the Lord Chancellor within Government and about appointment to the office itself. It has not recommended any changes to the statutory provisions governing the office. The Government agrees that the effective exercise of the Lord Chancellor's responsibilities does not require legislative change.

Qualification for appointment

7. The Government notes the value the Committee places on Lord Chancellors being legally qualified, though the Committee does not consider it necessary to amend the current qualifying criteria for appointment set out in the 2005 Act to mandate a legal qualification (paragraph 167). The Committee has heard a range of views on this point, which we expect will continue to resist consensus for some time.
8. As the Constitution Committee has noted here and in its previous reports (*Relations Between the Executive, the Judiciary and Parliament* in 2007 and *The Office of Lord Chancellor* in 2014), the practice of the Lord Chancellor also being Secretary of State for Justice is also a factor in appointment. Prime Ministers must therefore weigh up the qualities needed to fulfil both roles.
9. Ministerial appointments are a matter for the Prime Minister. Prime Ministers are guided by the requirements in the Constitutional Reform Act 2005 in considering whom to appoint. Indeed, the matter is also bound up with the suggestions the Committee has made about the responsibilities of the Ministry of Justice, the House in which the Lord Chancellor sits (paragraph 211), and the personal political authority of the office-holder (paragraph 168). These, along with tenure (paragraph 171), are all matters for the Prime Minister.

Responsibilities of the Lord Chancellor and Secretary of State for Justice

10. The Government agrees with the Committee that there are no clear advantages in separating the responsibilities of the Lord Chancellor from those of the Secretary of State for Justice at a departmental level (paragraph 186). As the Committee has heard in evidence and has reported, any machinery-of-Government changes to this effect would be a major undertaking.
11. The Government believes that the current responsibilities of the Ministry of Justice – including courts, tribunals, prisons, probation services – give a single office-holder a greater strategic oversight of the wider justice system than Lord Chancellors had before the creation of the department in 2007. The resulting policy join-up is also very effective at official level within the department. While the Government understands the arguments for returning to a model along the lines of the Department for Constitutional Affairs or even the Lord Chancellor's Department, we are sure that any Prime Minister considering such a change

would also wish to think through what might be lost in reconfiguring the department's responsibilities. The Committee's present and previous reports have summarised a wealth of evidence on which a Prime Minister might draw in such a consideration.

General responsibilities for the constitution

12. The Committee has proposed "a senior Cabinet minister in Government with overall responsibility for and oversight of constitutional affairs, including responsibility for upholding the constitution" and has suggested this should be the Lord Chancellor (paragraph 194). The Government believes there is greater strength in having a number of senior Ministerial leads on discrete constitutional matters, all answerable to the Prime Minister. We do not think that any aspect of this current arrangement detracts from the Lord Chancellor's own responsibilities in respect of the rule of law and the defence of the continued independence of the judiciary.
13. It is ultimately the Prime Minister who has overall responsibility for the constitution. The current Prime Minister and his immediate predecessors have also held the office of Minister for the Union. The Secretaries of State for Scotland, for Wales and for Northern Ireland also have distinct constitutional responsibilities within the Union. The Lord Chancellor and other Ministers, most obviously in the Cabinet Office, have their own constitutional responsibilities.
14. Outside the particular responsibilities that the Lord Chancellor must carry by statute, it is entirely for the Prime Minister to determine where constitutional responsibilities should sit. As the Committee appreciates, constitutional matters run much wider than those with a direct connection to the judiciary and to the courts and tribunals.

Reform of the role of the Law Officers

15. The Government agrees with the Committee on the value of Law Officers being politicians. Dr Conor Casey summarised it well in his evidence to the Committee when he said that "a good Attorney is not simply an excellent legal mind. It [the role] should combine competence in the technical aspects of legal analysis and reasoning with having a political antenna." As the Attorney General recently said in debate, the report "highlights some very important points about how the Law Officers work in combination, as politicians and lawyers".¹
16. Decisions around Law Officer appointments are for the Prime Minister and, as discussed throughout the report (in particular, paragraphs 232 and 238), these are unique and difficult roles that require the officeholder to exercise some functions independently and in the public interest, give objective legal advice and act as a politician.
17. The Committee has recommended that Law Officers should be able to be drawn from the House of Lords as well as from the House of Commons, and it said it would "support appointing individuals to the Lords for the purpose of their becoming Law Officers" (paragraph 242). There is no bar to the Prime Minister appointing Law Officers from the House of Lords or making appointments to the House of Lords for that purpose. The Advocate General for Scotland, Lord Stewart of Dirlerton KC, was appointed to the Lords

¹ HC Deb 1 February 2023 vol 727 c328.

directly in advance of his appointment as a Law Officer.

The rule of law

18. As the Committee has found, reaching consensus on the precise components of the concept of the rule of law is elusive, and perceptions will therefore differ. It is in this context that the Committee has made a number of criticisms concerning passage of the United Kingdom Internal Market Act 2020 and the Northern Ireland Protocol Bill (paragraphs 41, 45, 58, 59, 70, 88 and 89 of the report).
19. The Government published summaries of its legal position during the introduction of both these Bills, and the Law Officers have nothing further to add at this time.

Codification, guidance, and accountability

20. The Committee clearly outlines in the report why it would not ordinarily be appropriate to publish Law Officers' advice. There may be very exceptional circumstances (such as outlined by the Committee) where it is conceivable that departure from the principle could be sanctioned without detriment to the overall principle. The Government believes that the current wording of the *Ministerial Code* – “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”² – allows enough scope for an exceptional case to be considered without a need to alter the wording.
21. The Committee has recommended that the *Ministerial Code* and the *Cabinet Manual* should be amended to define clearly the duties of the Law Officers. The Committee states that the codification of the Law Officers' duties would improve public understanding of the role and distinguish which functions should be carried out independently.
22. Amendment of the *Ministerial Code* (paragraph 247) is a matter for the Prime Minister. In respect of updating the *Ministerial Code* and the *Cabinet Manual*, we are always open to looking at whether updates or amendments are needed. The Government remains committed to producing an updated edition of the *Cabinet Manual* before the end of the current Parliament. The *Cabinet Manual* is intended to reflect the laws, conventions and rules on the operation of government, rather than being a source of any rule. As the Committee highlights, the rule of law is something that is not easily defined or a single entity. There may be a danger that codification, in an attempt at clarity, is reductive.
23. The Committee recommended updating the Law Officers' oaths “to make reference to the primacy of their duty to uphold the rule of law and fulfil public interest functions”, adding that the language of the oaths should be readily understandable (paragraph 268).
24. The historic oaths of the Law Officers reflect the weight of history and uniqueness of the roles. At the swearing-in of the current Attorney General, the opportunity was given for the Attorney to speak and add her own personal commitment to upholding the rule of law. This personalisation allowed for reflection on the role and reaffirmed the centrality of the rule of

² Cabinet Office, *Ministerial Code* (December 2022), paragraph 2.13.

law to the office. It also allowed engagement with the principles in a way that still retained the historic wording.

25. The Committee recommended in its 2014 report that the Lord Chancellor's oath should be reworded to refer to upholding as well as respecting the rule of law. It does so again (paragraph 262 of the present report). The Government remains unpersuaded that this proposal would have an effect on the discharge of the duty or, indeed, that it would give clear boundaries to the responsibilities the additional wording might imply. In the Government's view, such a change would not improve on the default position that Lord Chancellors, by virtue of their office, will routinely take a cross-departmental outlook.
26. "In the final analysis," the Committee has said in the chapter on reform of the office, "character, intellect and a commitment to the rule of law are the most important attributes for a Lord Chancellor to possess" (paragraph 167). We are happy to agree.

March 2023