

Ministry of Justice – written evidence (RLC0014)

Submitted by Mr Ian Brunton, Senior Policy Manager, Ministry of Justice

House of Lords Constitution Committee inquiry into the Role of the Lord Chancellor and the Law Officers

1. The Ministry of Justice is pleased to submit evidence to the Constitution Committee and confines its remarks to the role of the Lord Chancellor. Although the Lord Chancellor and the Law Officers will have a common interest in justice matters, the Law Officers act independently of the Lord Chancellor, and it is not the role of the Lord Chancellor to give the Government legal advice.

Overview of changes to the role

2. The Constitutional Reform Act 2005 made substantial changes to the role of Lord Chancellor. These changes included removing the ability to sit judicially (in the former Appellate Committee and other courts), removing the right to preside over proceedings in the House of Lords, and creating the Judicial Appointments Commission (JAC), thereby ending the Lord Chancellor's extensive patronage in appointing judges.
3. This new system of appointing judges has brought greater transparency. The system is well established and works smoothly: the JAC, Judicial Office and the Lord Chancellor have discrete responsibilities but work closely together to make processes efficient. The UK Supreme Court has also been a success: it rightly enjoys its prestige on the international legal stage.
4. Nonetheless, the 2005 Act was to some extent an evolution in the role of Lord Chancellor. The creation of the JAC, for example, followed earlier steps to increase transparency and move away from the old system in which the Lord Chancellor personally selected senior judges. In 1986, Lord Hailsham published *Judicial Appointments: The Lord Chancellor's Practices and Procedures*, which for the first time set out the criteria for appointment. It stated that the policy of the then Lord Chancellor's Department was to appoint on merit. Under Lord Mackay, the Courts and Legal Services Act 1990 reduced the time that barristers had to have practised to qualify for appointment and it extended qualification to others with rights of audience. Lord Irvine commissioned Sir Leonard Peach to report on the operation and procedures of appointments. Following Sir Leonard's report in 1999,¹ the Commission for Judicial Appointments was created in 2001 to provide oversight of the appointments process. The Lord Chancellor today retains a limited role in judicial appointments at the level of High Court and above, as well as a broader role in deciding the scale of judicial recruitment.

Appointment to office

5. The exercise of the Lord Chancellor's role changed with the creation of the Ministry of Justice in 2007. Since then, the office of Lord Chancellor has

¹ *Independent Scrutiny of the Appointment Processes of Judges and Queen's Counsel in England and Wales.*

always been held in combination with the office of Secretary of State for Justice. For nearly all that time, these offices have been held by members of the House of Commons. Such arrangements are a matter for the Prime Minister.

6. Lord Chancellors have constitutional (and policy) responsibilities that are distinct from their responsibilities as Secretaries of State. These distinctions are partly the result of statute and partly the result of machinery-of-government changes. The Lord Chancellor and Secretary of State for Justice and officials in the department give this proper recognition in their day-to-day work. The Ministry of Justice has not seen any practical disadvantages to having one person hold both offices within the same department.
7. The office of Lord Chancellor has unique criteria for appointment,² which replaced the convention of a senior lawyer (or judge) holding the office. The Committee in 2014 heard differing views on whether these criteria should be more prescriptive, with a view to giving assurance about the calibre of office-holders.³ The era of post-reform Lord Chancellors is today twice as long as it was when the Committee took evidence, and we can now note that all nine Lord Chancellors appointed since the 2005 Act had previous experience either as a Cabinet Minister or as a Law Officer. Five of them had a legal qualification, three having practised as barristers (one of them also having sat judicially as a recorder) and two as solicitors. The current Lord Chancellor is also, of course, Deputy Prime Minister.

Lord Chancellor's Oath, rule of law and judicial independence

8. Since the Constitutional Reform Act 2005, Lord Chancellors no longer swear the judicial oath but swear the Lord Chancellor's Oath, which binds them to "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".⁴
9. The Oath was created by the 2005 Act. This Act put the Lord Chancellor's duty to defend the independence of the judiciary on a statutory footing.⁵ The Oath also reflects the Lord Chancellor's general duty to resource the courts.⁶
10. All Lord Chancellors swearing this new Oath have made clear their determination to discharge their obligations. Last year, the Lord Chancellor spoke of his commitment to "be unflinching in upholding the long-held principles of the rule of law and the independence of the judiciary", adding that "this is not just a matter of legal form, but a pledge to safeguard the fairness and freedoms which in our society are safeguarded under the umbrella of the rule of law and access to justice".⁷

² S.2 Constitutional Reform Act 2005.

³ House of Lords Constitution Committee, *The Office of Lord Chancellor*, HL Paper 75, 6th Report of Session 2014–15, 11 December 2014.

⁴ S.6A(2) Promissory Oaths Act 1868.

⁵ S.3(6)(a) Constitutional Reform Act 2005.

⁶ S.1(1) Courts Act 2003.

⁷ Speech at the swearing-in of the Lord Chancellor, 23 September 2021.

<https://www.gov.uk/government/speeches/lord-chancellor-swearing-in-ceremony-lord-chancellors-speech--2>.

11. Though it is the Lord Chancellor alone who is under a statutory duty to “defend” the continued independence of the judiciary, all Ministers of the Crown are under a statutory duty to “uphold” it.⁸ This duty also applies to “all with responsibility for matters relating to the judiciary or otherwise to the administration of justice”. Lord Chancellors therefore continue to have a leading role in safeguarding the justice system, but they do not act alone. The integrity of the system is also protected by others who discharge this duty, such as the JAC, HMCTS (HM Courts and Tribunals Service), Government lawyers and Parliamentary drafters, who will all routinely consider rule-of-law or judicial independence matters.
12. The Government continues to believe that the Lord Chancellor’s duties relating to the rule of law and the independence of the judiciary have practical value as well as symbolising the centrality of these tenets in our constitution. The role of Lord Chancellor, the Lord Chief Justice has said, “remains central in the constitutional firmament of this country, despite the changes in the role which were brought about by the 2005 Constitutional Reform Act”.⁹

Government, the judiciary and the courts and tribunals

13. It is now the Lord Chief Justice who is Head of the Judiciary (and President of the Courts) of England and Wales, meaning that responsibilities for the administration of justice are now shared between Lord Chancellors and Lord Chief Justices, who have worked closely together to achieve and maintain a practical partnership. The detail of this partnership is set out in the Concordat, agreed in 2004.
14. The appointment of judges is in general a shared area of responsibility, though the Lord Chancellor and Lord Chief Justice have different roles at different levels of the judiciary. Below the High Court, the Lord Chief Justice or the Senior President of Tribunals is generally the person who decides on selections made by the JAC.
15. Many of the principles agreed in the Concordat were enacted in the 2005 Act, which transferred a number of judiciary-related functions to the Lord Chief Justice. The Lord Chancellor remains responsible for resourcing and accountable to Parliament and is under a general duty “to ensure that there is an efficient and effective system to support the carrying on of the business of” the courts.¹⁰
16. In 2007, the then Department for Constitutional Affairs acquired responsibility for prisons and probation and became the Ministry of Justice. Following this change, the HMCTS¹¹ Framework Document was agreed in 2008 between the Lord Chancellor and Lord Chief Justice on how the courts service would be governed. The Framework Document provides that the Lord

⁸ S.3(1) Constitutional Reform Act 2005.

⁹ Speech at the swearing-in of the Lord Chancellor, 23 September 2021.
<https://www.judiciary.uk/wp-content/uploads/2021/09/LCJ-speech-swearing-in-ceremony.pdf>.

¹⁰ S.1 Courts Act 2003. S.39 Tribunals, Courts and Enforcement Act 2007 replicates this general duty in respect of tribunals.

¹¹ The agency was then HMCS (Her Majesty’s Courts Service).

Chancellor and the Lord Chief Justice jointly set aims and objectives for HMCTS, but it is the chief executive who is responsible for day-to-day operations and administration, working under the general direction of the HMCTS Board. The Senior President of Tribunals became a party to the Framework Document in 2011 when tribunals were included and the agency became HMCTS, and he has a similar governance role to the Lord Chief Justice in relation to tribunals.

17. Because our constitution depends both on statute and on conventions that arise, the Government keeps constitutional matters under review. It is not a current priority to assess whether further legislative changes might be necessary, and the Lord Chancellor remains committed to maintaining an effective partnership with the judiciary within the existing legal framework.

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