

—THE OFFICE OF LORD CHANCELLOR—

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In this evidence, I draw on research conducted between 2011-2014 with Robert Hazell (UCL), Kate Malleson (Queen Mary) and Patrick O'Brien (UCL) as part of an AHRC-funded project on *The Politics of Judicial Independence in the UK's Changing Constitution*. This included 150 confidential interviews with judges, politicians, officials and others involved in the administration of justice in the UK. Although drawing on research conducted jointly with Hazell, Malleson and O'Brien, this evidence is my own interpretation of our findings.

1. What are the current functions of the Lord Chancellor (as distinct from those of the Secretary of State for Justice)?

1.1 There are eight main functions of the new-style Lord Chancellors:

- (i) to ensure that there is an efficient and effective court system, including by providing the necessary resources and accounting to Parliament for their efficient and proper use;¹
- (ii) to decide the framework for the organization of the court system, including determining the total number of judges after consulting with the LCJ;²
- (iii) to determine the pay, pensions and conditions of judicial service, taking into account recommendations of the Senior Salaries Review Body;³
- (iv) to determine (with the LCJ) the aims of HMCTS, to endeavour to agree its budget with the LCJ, and to supply sufficient staff and resources;⁴
- (v) a shared responsibility (with the LCJ) for complaints, supported by the Judicial Conduct and Investigations Office, and accounting to Parliament for the operation of the complaints system as a whole;⁵
- (vi) to accept, reject or request reconsideration of the individual selections made either by the JAC for vacancies in the High Court or by ad hoc panels for the most senior appointments (i.e. Court of Appeal, Heads of Division, LCJ and the UK Supreme Court);⁶
- (vii) an overarching responsibility for the judicial appointments system as a whole, including approval of the JAC's objectives, supplying it with resources and accounting to Parliament for its activities. In this, the Lord Chancellor must

¹ Courts Act 2003, s1; and Tribunals, Courts and Enforcement Act 2007, s39.

² The Concordat, para 29.

³ The Concordat, para 29

⁴ HMCTS Framework Document paras 2.1 and 7.2.

⁵ The Concordat, paras 80-84 and Constitutional Reform Act 2005, ss109-119.

⁶ Constitutional Reform Act 2005, Part 4, as amended by the Crime and Courts Act 2013, Schedule 13.

take such steps as he or she considers appropriate “for the purpose of encouraging judicial diversity”;⁷ and

(viii) to defend judicial independence inside government.⁸

Most of the Lord Chancellor’s responsibilities apply to the courts in England and Wales, with some broadly equivalent responsibilities vis-à-vis the UK Supreme Court (e.g. the Lord Chancellor is under a statutory duty to provide such resources as he or she thinks appropriate for the Court to carry out its business⁹).

2. To what extent are those functions genuine powers, and to what extent are they nominal powers?

2.1 Post-2003 Lord Chancellors continue to exercise an extensive range of judiciary-related responsibilities. They are much less involved than their pre-CRA’05 predecessors in the nitty-gritty of everyday decision-making on matters relating to the courts and the judiciary, and have much less contact with the senior judiciary as a result. The LCJ and independent bodies (e.g. JAC) also now exercise a wide range of important functions. But the Lord Chancellor still retains significant systemic responsibilities.

2.2 It is commonplace to describe the Lord Chancellor’s role in judicial appointments as “nominal”. At one level, there is some truth in this. Prior to the changes introduced under the Crime and Courts Act 2013, the Lord Chancellor retained the final say over all appointments, yet successive office-holders accepted almost all of the recommendations made to them. Between 2006-2014, the JAC made almost 4,300 recommendations, with Lord Chancellors refusing only 5 of them; in other words, Lord Chancellors accepted the JAC’s recommendations—literally—99.9% of the time!

2.3 At another level, Lord Chancellors still exercise an important role in appointments, over and above their role in shaping the JAC’s strategic objectives. For example, before instructing the JAC to fill a vacancy, the Lord Chancellor can issue additional criteria that stipulate minimum eligibility requirements for appointment to the specific vacancy over and above any criteria set by statute. This is often influential in shaping—and, alas, often limiting—the diversity of the pool of potential applicants. For senior leadership positions (e.g. the LCJ), the Lord Chancellor not only has the final say whether or not to accept the recommendation made by the selection panel, but is also consulted as part of the selection process.

3. How in practice do Lord Chancellors uphold the rule of law and judicial independence?

3.1 There are three main levels at which Lord Chancellors contribute to the rule of law and judicial independence. The first is at the level of *cabinet relations*. One part of the customary (and now statutory) duty on Lord Chancellors to defend judicial independence requires the office-holder to encourage his or her colleagues to respect the convention that ministers do not criticize in public judicial decisions or the judges who deliver them, and to reprimand colleagues if they fail to respect this convention. The Lord Chancellor

⁷ Constitutional Reform Act 2005, s137A.

⁸ Constitutional Reform Act 2005, s3.

⁹ Constitutional Reform Act 2005, s50.

must also caution colleagues from pursuing policies that might undermine the rule of law and judicial independence.

3.2 The second is the level of *executive-judicial relations*. The Lord Chancellor must maintain good working relations with the senior judiciary, and the LCJ in particular, and through this nurture the confidence of the judiciary as a whole. Lord Chancellors must listen to judicial concerns and take these into account when framing policy.

3.3 The third level is that of the *system as a whole*, with the Lord Chancellor primarily responsible for funding, supervising and remedying problems in the court system, the discipline system and the appointments system.

3.4 It is difficult to know with any certainty how effectively or energetically this or that Lord Chancellor has defended the rule of law and judicial independence. This is true for both pre-2003 and post-2003 Lord Chancellors, since collective cabinet responsibility and the confidentiality of exchanges between Lord Chancellors and senior judges mean that outsiders seldom have a full picture of what has occurred behind closed doors. That said, there are examples of post-2003 Lord Chancellors endeavouring to uphold judicial independence at each of the levels identified above.¹⁰

4. Are the offices of Lord Chancellor and Secretary of State for Justice best performed by the same person?

4.1 On the basis of the current division of ministerial roles, it is better that the two are twinned, rather than a separate Secretary of State for Justice with responsibility for criminal justice, prisons and probations and a rump office of Lord Chancellor with responsibility for the courts and the judiciary. The twinned roles give the officeholder more political clout, and arguably goes some (albeit not all the) way to compensating for the loss of the unique prestige and influence that attached to the unreformed office of Lord Chancellor.

5. Can judicial independence and the rule of law be defended in Cabinet by a minister responsible for wider departmental policies and budgets, which may point to different priorities? Is an independent voice required?

5.1 Yes. There are examples of post-2003 Lord Chancellors doing so, even though they head a large department with a wide policy remit and sizable budget.

5.2 When assessing whether the new-style Lord Chancellors can serve as effective guardians of judicial independence, five points should be kept in mind.

- *First*, it is unrealistic to expect Lord Chancellors to act as the preeminent guardian of the rule of law and judicial independence in the same way and with the same sort of success rate as their pre-2003 predecessors. The post-03 Lord Chancellors might be less effective and less reliable guardians than their predecessors (e.g. less assiduous in reprimanding colleagues and, when they do so, their rebuke might carry less weight). But this does not mean that their role is without value.

¹⁰ Examples are given in G. Gee, R. Hazell, K. Malleon and P. O'Brien, *The Politics of Judicial Independence in the UK's Changing Constitution* (Cambridge: CUP, 2015).

- *Second*, pre-2003 Lord Chancellors were more *proactive* guardians: i.e. insofar as they had a better grasp of issues that encroach upon the rule of law and judicial independence, and because they met more regularly with senior judges, they were better able to articulate judicial concerns to their ministerial colleagues, and hence stave off ill-advised government policies. Post-2003 Lord Chancellors seem more *reactive*, at times responding to legitimate concerns only after senior judges speak out publicly or where there is sustained political opposition to a policy (e.g. from a select committee). One consequence of leading a department with a wide policy remit is that a Lord Chancellors inevitably spends much less of his or her time on judiciary-related issues, which presumably makes it much more difficult to grasp the full weight of and respond proactively to judicial concerns. To exaggerate the point somewhat: the post-2003 Lord Chancellors might do “the right thing” only after exhausting all other possibilities. Though messy and unedifying, this can still be effective.
- *Third*, on certain issues post-2003 Lord Chancellors might be better placed than their predecessors to disentangle legitimate concerns about judicial independence from more spurious claims driven by judicial self-interest (e.g. on pay/pensions). Indeed, statute now makes clear that Lord Chancellors must have regard to “the public interest” in matters relating to the judiciary.¹¹
- *Fourth*, other actors help to foster the rule of law and judicial independence inside government. From time to time the Attorney General has reminded ministerial and parliamentary colleagues not to criticize judges. The Treasury Solicitor and other government lawyers have also had occasion to remind ministers of the importance of constitutional principles.
- *Fifth*, there are other actors on the institutional landscape who promote the rule of law and judicial independence. Some have a clear responsibility to do so (e.g. the LCJ; the Constitution Committee, the JAC). Others do so indirectly through their day-to-day work (e.g. clerks in the Table Office). The Lord Chancellor is now only one part—albeit an important part—of the institutional arrangements designed to safeguard judicial independence.

5.3 It would be wrong to assume that pre-2003 Lord Chancellors would have been more successful in insulating judges from the effect of cuts in public spending. Similarly, the challenges confronting HMCTS would likely have been the same irrespective of whether aligned with today’s very large Ministry of Justice of 2014 or the smaller (albeit still large) Lord Chancellor’s Department of the late 1990s. The department would still have been required to secure cuts of around 20%. Indeed, although expected to cut its expenditure significantly in 2010–11 and 2013–14, HMCTS experienced less severe cuts than other parts of the Ministry.

5.4 Some commentators question post-2003 Lord Chancellors’ understanding of as well as their willingness to attach due weight to constitutional issues. However, in confidential interviews, several senior judges in leadership roles who had interacted closely with the Ministry of Justice commended the recent Lord Chancellors, albeit while conceding that they had not always seen eye-to-eye with them on issues of importance to the judiciary. For example, one senior judge said that Jack Straw and Ken Clarke both understood the

¹¹ Constitutional Reform Act 2005, s3(6)(c).

rule of law and judicial independence. A senior official in the Ministry also said that both had “taken very seriously” their duty to defend judicial independence. A second senior judge said that he had been “quite impressed” by Chris Grayling, a view echoed by a third judge who said that Grayling had “worked very hard” to inform himself on relevant issues.

5.5 The duty to “uphold” judicial independence in s3 of the Constitutional Reform Act applies to all ministers (with a special duty on the Lord Chancellor to have regard to the need to “defend” judicial independence). It seems that the Attorney General has from time to time sought to defend judicial independence. It might be worthwhile articulating expressly (in a report of the Constitution Committee; the Ministerial Code; the Cabinet Manual etc) the expectation that the Attorney General as well as the Lord Chancellor has a special duty to defend judicial independence inside government.

6. How effective have the criteria for appointment as Lord Chancellor in s2 of the Constitutional Reform Act been? What does it mean for an appointee to be qualified by “experience”?

6.1 The criteria are essentially meaningless. Section 2(2) provides that the PM may take into account ministerial and parliamentary experience, which in effect gives the PM a free hand in making the appointment. If this was in doubt, it is removed by s2(2)(e) which permits the PM to take into account “any other experience that [he or she] considers relevant”.

7. Should there be statutory criteria for the appointment?

7.1 No. The office of Lord Chancellor is a conventional ministerial office, albeit one to which important constitutional functions are attached. There is no need to have special criteria. The only meaningful function served by s2 is to signal the office’s constitutional importance, but even this is redundant in light of the duty on the Lord Chancellor [s3(6)] and the requirement to swear a special oath [s17].

8. What are the advantages/disadvantages of the office being held by a lawyer?

8.1 “Lawyer” covers a lot of possibilities: someone who read law at university, but never practiced; someone who was in practice, but only for a couple of years; a person who practiced for longer, but many years ago; someone who practiced, but without excelling etc.

8.2. Possible advantages include: an understanding of the meaning, content and limits of principles such as the rule of law and judicial independence; a broad familiarity with the challenges confronting the courts and the judiciary; and long-standing professional and personal relationships with senior judges.

8.3 Disadvantages might include: long-standing professional and personal relationships that make the officeholder too easily swayed by the arguments advanced on behalf of the judiciary; an outdated understanding of the challenges confronting the courts; potential to adopt an overly legalistic and expansive understanding of judicial independence; and a possible reluctance to initiate necessary change in the judicial system.

8.4 The most important question is what are the essential qualities required of the Lord Chancellor? To my mind, these include ability to run a large department and that she or he is sufficiently strong to defend judicial independence, where appropriate, including by standing up to ministerial colleagues who ride roughshod over constitutional niceties and also to senior judges if they make unreasonable demands. Broadly speaking, this requires the same skill-set as any other ministerial role (i.e. intelligence; industriousness; an ability to master a complex brief; an ability to delegate; the ability to command the confidence of ministerial and parliamentary colleagues and stakeholders).

9. Should the Lord Chancellor be someone who when appointed does not seek further ministerial advancement? Should he or she be a member of the House of Lords?

9.1. A Lord Chancellor in the Commons secures an important measure of democratic accountability, but is more likely to be swayed by short-term and partisan considerations. The opposite is true for someone who sits in the Lords. In reality, the twinning of the office of Secretary of State for Justice (with its responsibility for issues of considerable political salience and large budget) with the office of Lord Chancellor makes it likely that future occupants will tend to come from the House of Commons. True, there are recent examples of peers heading large departments with politically sensitive policy portfolios (e.g. Lord Adonis at Transport; Lord Mandelson at BIS). However, assuming the offices remain twinned, it seems more likely that any peers who serve as Lord Chancellor will do so only very exceptionally.

9.2 Lord Chancellors with realistic ambitions for future ministerial advancement might find it difficult to confront more senior cabinet colleagues, and to the Prime Minister in particular, on whose patronage they depend. The possibility that a political “lightweight” might be appointed is a very real weakness in the current arrangements. However, it is worth repeating that the Lord Chancellor is only part of the more elaborate way in which judicial independence is defended in the UK’s contemporary constitution. It is possible, for example, for the LCJ to request a meeting with the PM to articulate in person judicial concerns about a government policy. An example of this succeeding was in 2001, when the LCJ and a delegation of very senior judges met with Tony Blair and persuaded him to abandon a proposal to shift responsibility for the court system to the Home Office.

9.3. On balance, given the choice between candidates of comparable abilities, it would be preferable to appoint a political “heavyweight” at the end of their career who has the clout to stand up to the Home Secretary and the PM.¹² But the most important thing is that a capable and thoughtful politician is appointed, who can show policy leadership in ways that benefit the judiciary (e.g. on issues like judicial diversity and on securing more efficient use of public monies in the court system), whilst also having the courage to take on the Treasury, where appropriate.

10. Should there be a Lord Chancellor? If so, what should be his or her functions? If not, who should perform those functions?

10.1 Yes, there should continue to be an office of Lord Chancellor. Some argue that the office should be abolished since the functions currently attached to it can be exercised by

¹² Thought by many to be in his last ministerial role, Jack Straw was nevertheless the centre of leadership speculation during his time as Lord Chancellor. See J. Straw, *Last Man Standing*.

the Secretary of State for Justice, and that judges need no longer shelter behind the Lord Chancellor's robes when interacting with the government. In my view, this is mistaken for two main reasons.

10.2 First, there is value in identifying certain unique constitutional functions as attached to the office of Lord Chancellor as distinct from, even if occupied by the same person, as the Secretary of State for Justice. On appointment, this might be helpful to civil servants who have to brief the new minister to explain the special responsibility to defend judicial independence, especially if the minister is not legally qualified. It might also be helpful to the officeholder when reprimanding ministerial colleagues if he or she can point to their special duty as Lord Chancellor, and possibly even if standing up to the PM.

10.3 Second, it would be imprudent to inject additional uncertainty into the courts and judicial systems by scrapping the office. Obviously, the office changed considerably since 2003, as indeed was intended. The relationship between the office and the judiciary has also changed, as was also sought by those who initiated the changes. It has continued to change in the ten or so years since, and might also do so for some time yet as the full implications of more recent changes become clear (e.g. changes to HMCTS in 2011; and further changes to appointments in 2013). What is required is a period of relative stability to allow new practices to solidify, leadership roles to become more clearly defined and for the relationships between various actors to mature.

10.4 As I see it, to ask whether it should be retained is to ask the wrong question. Better questions include:

- How can we ensure that Lord Chancellors—and, as significantly, their official—have an appropriate appreciation of, and attach due weight to, the rule of law and judicial independence?
- How can we ensure that there remains scope for Lord Chancellors to exercise appropriate political leadership on judiciary-related matters (e.g. by helping the judiciary to make quicker and more visible progress on diversity)?
- How can we ensure that Lord Chancellors—and, indeed, the political class more generally—never forget that we all have a shared interest in well-resourced courts staffed with independent, well-respected and high calibre judges?
- How can we ensure the Ministry is attuned to judicial concerns, especially in light of significant staff turn-over (including the transfer of fairly large numbers of staff to the Judicial Office)?
- How can we secure sufficient accountability across the judicial system as whole, especially in light of the increasing power of senior judicial leaders, and the LCJ in particular?
- Given that the institutional landscape relating to the judiciary and the courts is increasingly fragmented, with important functions exercised by a wide range of different actors (e.g. Lord Chancellor, LCJ, HMCTS, JAC, JACO, JCIO), how can we ensure that there is sufficient coordination and shared strategic objectives between them?

10.5 These questions are not easily answered, and are also probably best not rushed. But it is important that they are answered in ways that preserve meaningful involvement of future Lord Chancellors in judiciary-related matters.