



The role of the Lord Chancellor

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This note summarises the history and development of the office of Lord Chancellor and examines the reforms that were made to the role following the enactment of the *Constitutional Reform Act 2005*. It also notes the further changes to office that took place in 2007, with the creation of the Ministry for Justice.

On 11 June 2003, the then Prime Minister, Tony Blair, announced a ministerial reshuffle and significant machinery of government changes. A new Department of Constitutional Affairs was established under Lord Falconer of Thoroton QC, replacing the Lord Chancellor's Department. The proposed changes were also intended to abolish the historic role of the Lord Chancellor. It almost immediately became apparent that this could not be done by way of a ministerial reshuffle. Accordingly, a consultation paper was published in September 2003, which gave more detail of the legislative changes that would have been required to abolish the office.

The consultation took place at the same time as proposed reforms to the judicial appointments process and the establishment of a new Supreme Court. All these proposals were subject to significant scrutiny, both by the House of Commons Constitutional Affairs Select Committee and a separate Committee in the House of Lords. **In the event, the role was not abolished**, but it was subject to substantial change under the *Constitutional Reform Act 2005*. Prior to the reforms, the Lord Chancellor had a hybrid role: he acted as a senior judge (and was head of the judiciary); he was responsible for judicial appointments; yet he was also a member of the Cabinet and he presided over the House of Lords.

On 3 July 2014, the House of Lords Constitution Committee announced that it would be conducting an inquiry into the office of Lord Chancellor. The Committee reported on the 11 December 2014. It concluded that the Lord Chancellor's duty to the rule of law requires him to seek to uphold judicial independence and the rule of law across Government. It recommended, amongst other things, that the Lord Chancellor's oath of office be amended to reflect this duty both to respect and uphold the rule of law.

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1 Introduction

Prior to the introduction of the *Constitutional Reform Act 2005*, the Lord Chancellor had a unique and hybrid role. The complex range of responsibilities had been acquired over an extended period of time and is arguable that they arose “as much from historical accident as from strategic logic.”¹

The Lord Chancellor acted as a senior judge and was head of the judiciary in England, Wales and Northern Ireland; he was a member of the Cabinet; and he also presided over the House of Lords. He was bound by collective responsibility as a member of the Cabinet and yet, as a senior judge, could sit (*inter alia*) on the Appellate Committee of the House of Lords (what is now the Supreme Court).

Lord Irvine of Lairg (the Lord Chancellor in place immediately before the reforms) had staunchly defended the office, claiming that it allowed for a “natural conduit for communications between the judiciary and the executive, so that each fully understands the legitimate objectives of the other.”²

Theoretically, the Lord Chancellor was answerable to Parliament for matters such as the administration of justice and judicial appointments, although Professor Andrew Le Sueur has questioned the effectiveness of this form of accountability, particularly since the “Lord Chancellor’s Department was the last of the major government departments to become shadowed by a House of Commons select committee.”³

Professor Gavin Drewry has argued that historically, Lord Chancellors had “fiercely resisted any hint of parliamentary intrusion into judicial territory” founding this “claim to immunity” on a “very literal interpretation of the principles of separation of powers and judicial independence.”⁴

On 11 June 2003, the then Prime Minister, Tony Blair, announced a ministerial reshuffle and significant machinery of government changes.⁵ A new Department of Constitutional Affairs was established under Lord Falconer of Thoroton QC, replacing the Lord Chancellor’s Department (LCD). The proposed changes were also intended to abolish the historic role of the Lord Chancellor and controversially this took place almost entirely without consultation.⁶

Lord Irvine did not comment at the time, but subsequently, in a submission to the House of Lords Select Committee on the Constitution, he said (amongst other things) that:

¹ Constitutional Affairs Select Committee, *Judicial appointments and a Supreme Court (court of final appeal)*, First Report of Session 2003–04, HC 48-I, para 10. See also Oliver, D. *Constitutionalism and the abolition of the office of Lord Chancellor* (2004) 57 *Parliamentary Affairs* 754

² HL Deb 25 November 1997 col 934. See also Stevens, R. *Reform in haste and repent at leisure: Iolanthe, the Lord High Executioner and Brave New World*, (2004) 24 *Legal Studies* 1

³ Le Sueur, A. *Parliamentary accountability and the judicial system* in Bamforth, N and Leyland, P (eds), *Accountability in the Contemporary Constitution* (Oxford University Press, 2013)

⁴ Drewry, G. *Parliamentary Accountability for the Administration of Justice*, in Horne, A. Drewry, G. and Oliver, D. (eds) *Parliament and the Law* (Oxford, Hart Publishing, 2013)

⁵ See: e.g. *The Times*, ‘Emergency surgery on the Cabinet’, 13 June 2013

⁶ At a seminar in 2013, organized by the *Politics of Judicial Independence Project* (a project led by academics at UCL, Queen Mary, University of London and Birmingham University) entitled *The Abolition of the Lord Chancellor 10 years on*, it emerged that the senior judiciary had been at an away day at a country house with civil servants when the changes were announced and that “the changes were explained to them while they huddled, very annoyed, around a single telephone in a pub” It is also suggested that the Prime Minister did not consult with the Leader of the House of Lords or the Queen. (see: e.g. Seldon, A. and Snowden, P. Blair Unbound, (London, Simon & Schuster, 2007)

7. In early June 2003 there were press rumours that the office of Lord Chancellor was to be abolished. I had had no intimation of this, but when the *Times* and the *Telegraph* carried the rumour I determined to see the Prime Minister. That happened in the afternoon of Thursday, 5 June, 2003 in his office at Number 10. I asked him directly if there was any truth in the press rumours that the office of Lord Chancellor was to be abolished and transferred to a new Secretary of State in the Commons. He hesitated and then said it was being considered, but nothing had as yet been decided. I asked him how a decision of this magnitude could be made without prior consultation with me, with Hayden (i.e. my Permanent Secretary, Sir Hayden Phillips), within government, with the judiciary, with the authorities of the House of Lords which would lose its Speaker and with the Palace. The Prime Minister appeared mystified and said that these machinery of government changes always had to be carried into office in a way that precluded such discussion because of the risk of leaks. We agreed to meet the next Monday morning, 9 June 2003, to continue our discussions.

8. I left our meeting of 5 June 2003 surprised (a) that the Prime Minister thought the abolition of the office of Lord Chancellor was of the same order as any machinery of government changes by which ministerial responsibilities could be transferred from one department to another; and (b) that the Prime Minister had no appreciation that the abolition of this office of State, with a critical role in our unwritten constitution affecting a House of Parliament, the judiciary, of which the Lord Chancellor was by statute Head and by constitutional convention guarantor of its independence, required extensive consultation, most careful preparation and primary legislation. I determined when I next met the Prime Minister on Monday morning, 9 June 2003, to try to do better.

9. We started with my complaint that he had not discussed with me in advance such far reaching plans for the abolition of the office. He repeated that it was impossible to do so because if machinery of government changes were discussed in that way they would leak all over the press. It then strongly bore in on me that the Prime Minister had not received any or any proper advice and was completely unaware that complex primary legislation was required. It almost immediately became apparent that the statutory nature and powers of the office of Lord Chancellor meant that it could not simply be abolished via a ministerial reshuffle.⁷

Once these difficulties became apparent, a consultation paper was published in September 2003, which gave more detail of the legislative changes that would be required to abolish the office.

The consultation took place at the same time as proposed reforms to the judicial appointments process and the establishment of a new Supreme Court.⁸ All these proposals were subject to significant scrutiny, both by the recently established Constitutional Affairs Select Committee and a separate Committee in the House of Lords (for more on this see: Constitutional Affairs Select Committee, *Judicial appointments and a Supreme Court (court of final appeal)*, First Report of Session 2003–04; Constitutional Affairs Select Committee, *Constitutional Reform Bill [Lords]: the Government's proposals*, Third Report of Session

⁷ House of Lords Constitution Committee, *The Cabinet Office and the Centre of Government*, 4th Report of Session 2009–10, HL 30, Ev 82. See also, paras 188-217

⁸ See: Department for Constitutional Affairs, *Constitutional reform: A Supreme Court for the United Kingdom*, CP11/03 and *Constitutional Reform: a new way of appointing judges* CP 10/03

2004–05 and Select Committee on the Constitutional Reform Bill, *Constitutional Reform Bill [HL]*; Report of Session 2003–04)

Ultimately, under reforms instituted via the *Constitutional Reform Act 2005*, the office was retained, but stripped of most of its original functions: the Lord Chancellor, amongst other things, **ceased to be the head of the judiciary (or even a judge)**; and was replaced as presiding officer in the Lords by the new Lord Speaker. **The creation of the Judicial Appointments Commission for England and Wales limited severely his once wide-ranging powers in relation to judicial appointments.**

These changes to the role also led to changes to the eligibility requirements: **the Lord Chancellor no longer had to be a lawyer or a member of the House of Lords.** Instead, section 2 of the 2005 Act provided that the Lord Chancellor was to be “qualified by experience”, which could include experience as a Minister of the Crown, an MP or Peer, or “other experience that the Prime Minister considers relevant.”

Under section 1 of the 2005 Act, the Lord Chancellor remained effectively bound to uphold the “rule of law”: a term which remains resolutely undefined.⁹

All of this led the Constitutional Affairs Committee to warn that:

There is a radical difference between on the one hand a Lord Chancellor, who as a judge is bound by a judicial oath, who has a special constitutional importance enjoyed by no other member of the Cabinet and who is usually at the end of his career (and thus without temptations associated with positive advancement) and on the other hand a minister who is a full-time politician, who is not bound by any judicial oath and who may be a middle-ranking or junior member of the Cabinet with hopes of future promotion.¹⁰

Further changes to the role of Lord Chancellor took place in 2007, with the creation of the new Ministry for Justice. The new role of Secretary of State for Justice and Lord Chancellor took responsibility for prisons and other matters which had previously been under the purview of the Home Office. **These machinery of government changes were again controversial.** The House of Lords Constitution Committee concluded that the Government seemed “to have learnt little or nothing from the debacle surrounding the constitutional reforms initiated in 2003” and expressed the hope that “constitutional affairs remain central to the Ministry of Justice’s responsibilities and are not downgraded in importance compared to the other duties of the Ministry.”¹¹

2 The history and development of the role of the Lord Chancellor and the Lord Chancellor’s Department (LCD)

The post of Lord Chancellor (or to give it its full title: Lord High Chancellor of Great Britain) dates back to medieval times when the holder acted as secretary to the King. The September 2003 consultation paper, issued by the then Department for Constitutional Affairs, summarised the history as follows:

⁹ For a useful discussion of what is meant by the rule of law, see: e.g. Bingham, T. *The Rule of Law* (London, Allen Lane, 2010)

¹⁰ Constitutional Affairs Select Committee, *Judicial Appointments and a Supreme Court* (court of final appeal), First Report of Session 2003–04, HC 48-I, para 13

¹¹ House of Lords Select Committee on the Constitution, *Relations between the executive, the judiciary and Parliament*, Sixth Report of Session 2006–07, HL 151, paras 67 and 74. See also: Constitutional Affairs Select Committee, *The Creation of the Ministry of Justice*, Sixth Report of Session 2006–07, HC 466

The origin of the office of the Lord Chancellor was as secretary to the medieval Kings of England. In this role the Chancellor was responsible for the supervision, preparation and dispatch of the King's letters, which entailed the use of the Sovereign's seal. In due course the Chancellor took on further administrative functions on behalf of the Sovereign. Although the Lord Chancellor has fulfilled a variety of different roles throughout history, it has consistently been his duty to hold the Great Seal of the Realm, which has come to symbolise his office. In view of his importance in the King's Council the Lord Chancellor came to preside over Parliament when the Monarch was not personally available. The Lord Chancellor also came to exercise a judicial role as the source of equity in the Court of Chancery (for redress when common law or precedent did not apply or produced an unfair outcome) on the King's behalf. Therefore, the Lord Chancellor was described as 'Keeper of the Royal Conscience'. When the Court of Chancery was combined with the common law courts to become part of the single court system, this separate identifiable role ceased to exist.

In addition, as Speaker of the House of Lords, the Lord Chancellor also came to exercise the jurisdiction of that House. For more information on this see the Consultation Paper, *A Supreme Court for the United Kingdom*, paragraph 10.

By the end of the 19th century, the office of Lord Chancellor also began to acquire a permanent administrative staff, which in time has developed into a government department. The office of the Lord Chancellor acquired a significant range of new responsibilities for the higher courts in England and Wales when the Courts Act 1971 came into force in 1972. Other responsibilities have been added progressively over the decades, including those for criminal legal aid and the administration of a number of tribunals.

Further detail on the development of the office is contained in the book *The Office of Lord Chancellor* by Professor Diana Woodhouse.¹²

In addition to his judicial role, the Lord Chancellor acted as presiding officer in the House of Lords. Standing orders 18 and 19, dating from 1621 and 1660 respectively, described the arrangements for the Lord Chancellor to preside over the Lords' Chamber. Following the proposed reforms, a Select Committee on the Speakership was established to consider the future arrangements for the Speakership of the House of Lords.

The role also entailed a wide and complex list of ecclesiastical duties including ecclesiastical patronage; acting as an *ex officio* member of the Church Commissioners; responsibilities for Royal Peculiars (places of worship outside the normal structure of the ecclesiastical jurisdiction) and a variety of duties in relation to appointments to certain charities and to the election of members of governing bodies of certain public schools.¹³

There were eleven Lord Chancellors between 1945 and 2003, holding the office for an average of just over five years, or roughly twice the average tenure of other Cabinet Ministers. Thus "appointment to the old-style office was often viewed as the pinnacle of a successful political or legal career, with its office-holder presumed not to share the political ambitions of their ministerial colleagues."¹⁴

¹² (Oxford, Hart, 2001). See also Underhill, N. *The Lord Chancellor* (Dalton, 1978) and Griffith, J. (Review) *Lives of the Lord Chancellors 1940–1970* by R.F.V. Heuston (1988) 51(2) *Modern Law Review* 268

¹³ The Lord Chancellor's role relating to ecclesiastical duties was considered by the Constitutional Affairs Committee in 2004. See: Constitutional Affairs Committee, *The reform of the Office of Lord Chancellor: ecclesiastical patronage*, HC 300-i, 29 January 2004

¹⁴ Gee, G. *What are Lord Chancellors for?* [2014] *Public Law* 11

As noted above, the responsibilities of the LCD changed over time. On its abolition in June 2003 the LCD comprised the Lord Chancellor's Department itself (including the Court Service and the Public Guardianship Office), the Northern Ireland Court Service, the Public Record Office and HM Land Registry. Its main responsibilities were established in June 2001 with some further changes resulting from the reorganisation of the Office of Deputy Prime Minister and of the Department of Transport, Local Government, and the Regions in May 2002. The Department's remit covered the courts, freedom of information/data protection, human rights, Lords and other constitutional reform, judicial appointments, party funding, electoral law and policy, civil and criminal law, legal aid, royal, church and hereditary issues. In March 2003 the Lord Irvine announced that a new tribunals system would be a distinct part of the justice system, accountable to him.

In his 2001-02 Departmental Report, Lord Irvine had signalled a "new era" for the LCD. It set out the strategic objectives, and specific PSA (Public Service Agreement) targets. The LCD thus in its language and presentation reflected firmly the Public Service Reform ethos of the Cabinet Office, led by Sir Andrew Turnbull. It was described as "a resource-hungry department at the centre of government, which operates under the same management and value-for-money regime as other ministries".¹⁵

3 Reasons for reform

It is suggested that although a "fundamental change" to the position of Lord Chancellor "had been in the air since 1997" (as it was not considered sustainable to have the Lord Chancellor heading both the judiciary and acting effectively as Speaker in the Lords, as well as wearing his numerous other hats), the initial plan to give "direct administrative control of the courts to the Home Office" had been scuppered by Lord Irvine, who was said to have argued forcibly "that to separate the courts from the judges would undermine judicial independence."¹⁶

In March 2001, the Institute for Public Policy research published a paper, entitled *Future of the Home Office and the Lord Chancellor's Department*, which argued the case for a reformed Lord Chancellor's Department. It suggested that judicial appointments should be transferred from the Lord Chancellor to an independent commission; that the Lord Chancellor should cease to be Speaker of the House of Lords; but that the LCD should assume additional powers over freedom of information, human rights and race and immigration issues, while a much reformed Home Office concentrated on crime reduction, prisons and national security. It suggested the new department could be renamed the Ministry of Justice and Equality.

In a journal article, published in 2002, Professor Woodhouse argued that the LCD had become a significant government department and the balance in the Lord Chancellor's functions had "moved away from the judicial, towards the executive and political, a shift which means that increasingly executive responsibilities are being carried out by an unelected minister whose territorial boundaries are imprecise and subject to adjustment at his and the Prime Minister's dictate."¹⁷

She argued that it was:

¹⁵ Woodhouse, D. *The office of Lord Chancellor: time to abandon the judicial role – the rest will follow*, Legal Studies, March 2002

¹⁶ Seldon, A. and Snowden, P. *Blair Unbound*, (London, Simon & Schuster, 2007), p215

¹⁷ Woodhouse, D. *The office of Lord Chancellor: time to abandon the judicial role – the rest will follow*, Legal Studies, March 2002

[T]ime to abandon the pretence that the position of the Lord Chancellor, as currently understood, is fundamental to our constitutional arrangements, particularly as those arrangements are themselves undergoing change through, among other things, the incorporation of the Convention of Human Rights and the reform of the House of Lords, both of which will make the position of the Lord Chancellor even more questionable.¹⁸

Lord Alexander of Weedon, giving the Denning Society lecture in 2001, claimed that the conflict of roles had become more acute under Lord Irvine than under previous incumbents over the past 100 years:

...the present Lord Chancellor, more than any other for a century, plays a central role in executive government and policy formation....Tensions between political pressures and what is good for the legal system are bound to exist – and perhaps more so the perception of a conflict of interest. What would strengthen government and open accountability would be to transfer the overtly political functions of the Lord Chancellor to other departments, leaving him the still-large role of court administration with responsibility for non-political law reform and appointing judges.

Concerns had arisen about the role of the Lord Chancellor following the case of *McGonnell v United Kingdom*¹⁹ in which objections had been raised to the Bailiff of Guernsey acting as both principal judge and speaker of the island's legislature (given the potential similarities of the post to that of the Lord Chancellor).²⁰ **The case, which was heard by the European Court of Human Rights, concerned a Guernsey flower grower refused planning consent. His appeal had been heard by a judge who also presided over the island's legislature.**

This factor may have been aggravated by the fact that then Lord Chancellor, Lord Irvine, had continued to sit as a judge in the House of Lords until 2001, in spite of criticism.²¹ That said, even in March 2003, the Government had argued that the role was not compromised by human rights concerns provided that the Lord Chancellor did not sit as a judge "in a case in which it would be inappropriate."²²

4 The Constitutional Reform Act 2005

As noted above, the *Constitutional Reform Act 2005* stripped the role of Lord Chancellor from its duties as presiding officer in the House of Lords²³, and as head of the judiciary in England Wales and Northern Ireland.²⁴ A concordat between the Lord Chancellor and the Lord Chief Justice was agreed.²⁵ The Explanatory Notes to the Bill explained that:

Parts 2 and 4 are intended to give substantial effect to the agreement between the Lord Chief Justice of England and Wales and the Lord Chancellor on the proposals relating to the transfer of the Lord Chancellor's judiciary-related functions. This was set out in a document called "Constitutional Reform. The Lord Chancellor's judiciary-related functions: Proposals" (usually referred to as the 'Concordat'). This was placed

¹⁸ *Ibid*

¹⁹ (2000) 30 EHRR 289

²⁰ See, for example, Prince, S. *The Law and Politics, Upsetting the Applecart*, Parliamentary Affairs, 57(2) (2004), pp288–300 at 291

²¹ See: e.g. *BBC Online*, "Irvine defends role as judge", 5 July 1999 and *Daily Telegraph*, "Irvine withdraws from sitting as judge in the Lords", 21 February 2001

²² HL Deb 7 March 2003, c1086

²³ For details about the creation of the office of Lord Speaker, see: Sandford M, *Lord Speaker*, House of Commons Library Standard Note SN/PC/3999

²⁴ The Lord Chief Justice of England and Wales and the Lord Chief Justice of Northern Ireland now occupy these roles.

²⁵ See: e.g. Lord Woolf, *Judges, Parliament and the Government—the new relationship*, 8 February 2006

in the libraries of both Houses of Parliament at the time of the Oral Statement made to the House of Lords by the Lord Chancellor, and repeated in the House of Commons, on 26th January 2004. The text was also printed as Appendix 6 to the House of Lords Select Committee's Report on the Bill.

The Lord Chancellor's role in the judicial appointments process was reduced following the establishment of the Judicial Appointments Commission (a separate process is used to appoint judges to the Supreme Court due to the need to take account of devolution issues). The judicial appointments process was also subject to further reform under the *Tribunals, Courts and Enforcement Act 2007* and the *Crime and Courts Act 2013*, which made some significant further changes.²⁶ **New rules relating to judicial conduct and discipline have also been introduced.**²⁷

The changes to the eligibility requirements for the office of Lord Chancellor are described in part 1 of this note. The text of the 2005 Act reads as follows:

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-**

(a) **experience as a Minister of the Crown;**

(b) **experience as a member of either House of Parliament;**

(c) **experience as a qualifying practitioner;**

(d) **experience as a teacher of law in a university;**

(e) **other experience that the Prime Minister considers relevant.**

(3) In this section "qualifying practitioner" means any of these-

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

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

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

In addition, section 3 of the 2005 Act introduced a statutory duty for the Lord Chancellor (and other Ministers of the Crown) to **"uphold the continued independence of the judiciary."**

There are specific duties under s 3(6) as follows:

²⁶ For details, see: e.g. O'Brien, P. *Changes to judicial appointments in the Crime and Courts Act 2013* [2014] Public Law 179; Horne, A. *Is there a case for greater legislative involvement in the judicial appointments process*, Study of Parliament Group Paper 3, 2014 (available at: <http://www.studyofparliament.org.uk/spg-paper-3.pdf>); Gee, G. and Malleson, K. *Judicial Appointments, Diversity and the Equal Merit Provision* U.K. Const. L. Blog (6th May 2014) (available at: <http://ukconstitutionallaw.org>) and Malleson, K. and Gee, G., *Who should have the final say in lower level judicial appointments?* UK Const. L. Blog (30th January 2013) (available at <http://ukconstitutionallaw.org>)

²⁷ For details, see the website of the Judicial Conduct and Investigations Office: <http://judicialconduct.judiciary.gov.uk/>

The Lord Chancellor must have regard to-

(a) the need to defend that independence;

(b) the need for the judiciary to have the support necessary to enable them to exercise their functions;

(c) 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.

The Explanatory Notes stated that the section should be read in conjunction with Part 1 of the *Courts Act 2003*, which sets out the duty of the Lord Chancellor to ensure that there is an efficient and effective system to support the carrying on of the business of the courts of England and Wales.

Section 14 amends the text of the Lord Chancellor's oath as follows:

I, ... 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.

The modification was necessary, as the Lord Chancellor will no longer be a judge and so subject to the judicial oath.

The Explanatory Notes also summarised a series of protected functions:

Schedule 7 lists various protected functions of the Lord Chancellor which may not be transferred to other Ministers by a Transfer of Functions Order under the Ministers of the Crown Act. These include functions relating to the custody or use of the Great Seal; functions conferred on the Lord Chancellor by the Constitutional Reform Act or modified by that Act; other listed functions; and listed functions in relation to Northern Ireland.

Concerns have been raised that due to the fact that the Lord Chancellor no longer has to be legally qualified, an office holder might "not have been brought up understanding the way the system works."²⁸

Graham Gee, an academic at the University of Birmingham, has noted in a recent article in *Public Law* that since 2005, three Lord Chancellors have been legally qualified; three of the four Lord Chancellors have sat in the Commons, while all four held ministerial office prior to appointment. He also observed that the 'new-style' Lord Chancellors "may be more easily reshuffled than old Lord Chancellors, with the first three in office for an average of three years, closer to the average length of ministerial tenure."²⁹

That the last three officeholders have each been MPs is perhaps recognition that the extensive responsibilities of Lord Chancellor and Secretary of State for Justice should be carried out by an elected politician in order to secure appropriate accountability for legal services.

²⁸ Gee, G. *What are Lord Chancellors for?* [2014] Public Law 11

²⁹ Gee, G. *What are Lord Chancellors for?* [2014] Public Law 11

Academics are divided on the impact of the reforms have changed the formal role of the Lord Chancellor. For example, Dr Patrick O'Brien argues that:

There is something called 'the Lord Chancellor' but, shorn of the judicial functions and the speakership of the Lords that characterised the old office, **the new office is a sort of vestigial organ attached to the Justice Secretary, to be exercised in wig and gown at state occasions but with little more substance than that ... The two remaining functions of significance to the judiciary that the Lord Chancellor retains are the protection of judicial independence and the appointment and discipline of judges (and the passage of the Crime and Courts Act [2013] has made his involvement in appointments less significant).**³⁰

By contrast, Graham Gee, has argued that while the new role is "a much pared down post" and is, in effect, a "conventional ministerial office", nonetheless:

There is no definite divide between the old and new Lord Chancellors, with several officeholders before and after the Constitutional Reform Act embracing elements of both the old and the new.³¹

He goes on to note that:

Today, the Lord Chancellor is for developing and delivering government policy on the administration of justice. The priority of policy that runs through the new-style office will encourage some to assume that the Lord Chancellor cannot serve as effective guardians of judicial independence. However, I have sought to show that Lord Chancellors can and do promote and protect judicial independence inside government, albeit in a manner consistent with the political character of the new-style office.³²

5 Recent developments

In September 2012, David Cameron appointed Chris Grayling as the new Secretary of State for Justice (oddly in the original press notice, the title of Lord Chancellor was omitted).³³ He is the first non-lawyer to have held the post since the seventeenth century.

Following Mr Grayling's appointment, there has been some further consideration of the maintenance of the office of Lord Chancellor, in part stemming from a seminar held at Queen Mary, University of London in June 2013 (as part of an AHRC³⁴ funded project on *The Politics of Judicial Independence in Britain's Changing Constitution*). The event was held on a Chatham House basis, but involved senior public servants with relevant experience. Entitled *The Abolition of the Role of Lord Chancellor: 10 Years On*, participants discussed the changes to the role – both real and perceived. A published summary of the discussion notes that:

The reforms of 2003-5 were not simply about personality – about the deteriorating personal relationship between Tony Blair and Lord Irvine – or even about changes to the office of Lord Chancellor but about wider government policy.

The judiciary have always seen the changes of 2003-5 as being about the courts and judicial independence but for the government they were about departmental structure

³⁰ O'Brien, P. *Does the Lord Chancellor really exist?*, UK Const. L. Blog (26th June 2013) (available at <http://ukconstitutionallaw.org>)

³¹ Gee, G. *What are Lord Chancellors for?* [2014] Public Law 11

³² *Ibid*

³³ See: Ministry of Justice, *New Secretary of State Announced*, 4 September 2012

³⁴ Arts and Humanities Research Council

and policy delivery. There was growing frustration with the Lord Chancellor's Department as a large department with a big budget but poor management. Lord Irvine was asked at one point during the discussions prior to the announcement how often he visited Selbourne House (the home of his Department). His response was 'never'.

This would not have been unusual for past Lord Chancellors, who traditionally based themselves in the House of Lords, but it had become unacceptable from the Prime Minister's perspective the most important aspect of the change was that the Lord Chancellor's Department should be replaced with a normal and fully functioning government department that could bring in the reforms that the government was looking for. The real change to the office of Lord Chancellor has not been that the office has ceased to be held by a judge or lawyer, but that it is no longer held by a senior politician at the end of his or her career. Because the role now combines responsibility for prisons with that of the courts, new-style Lord Chancellors are increasingly likely to be ambitious mid-career politicians. However, although judges often lament the loss of the old Lord Chancellor who fought the judges' corner in Cabinet and hark back to a 'golden past', several non-judicial speakers were anxious to point out that they felt that this view mythologised the old Lord Chancellor. Whilst some Lord Chancellors in recent decades have been powerful figures, this has largely been due to their own personal standing rather than the office itself. **Even a respected Lord Chancellor like Lord Mackay from a judicial background still enraged the judiciary with his reforms to pensions and the legal profession, with Lord Lane comparing him at the time to Hitler.**³⁵

Some speakers argued that:

Despite appearances, the office of Lord Chancellor was to all intents and purposes abolished in the changes of 2003-5. There is an official that remains called the Lord Chancellor, but it is nothing like what went **before and has no judicial role.** The retention of the name owes much to the House of Lords which, outraged by the manner in which the change was announced without consultation, was determined to have its pound of flesh and to retain the name 'Lord Chancellor'. Often ignored is the effect that the removal of the Lord Chancellor's role as speaker of the House of Lords has had on that institution.³⁶

This discussion has been taken up by a number of academics, including Graham Gee and Patrick O'Brien (see section 4 above).³⁷

The Joint Committee on Human Rights has also raised issues about the continuing role of the Lord Chancellor. In its report, *The implications for access to justice of the Government's proposals to reform judicial review*, the Committee said:

In our view, the Government's proposals on judicial review expose the conflict inherent in the combined roles of the Lord Chancellor and Secretary of State for Justice. This raises issues which should be considered by a number of parliamentary committees, including the Commons Justice Committee and the Lords Constitution Committee. We think the time is approaching for there to be a thoroughgoing review of the effect of combining in one person the roles of Lord Chancellor and Secretary of State for

³⁵ University College London, *The Abolition of the Role of Lord Chancellor: 10 Years On* (Note of seminar Held at Queen Mary, University of London 12th June 2013)

³⁶ Ibid

³⁷ See e.g. Gee, G. *What are Lord Chancellors for?* [2014] Public Law 11 and O'Brien, P. *Does the Lord Chancellor really exist?*, UK Const. L. Blog (26th June 2013) (available at <http://ukconstitutionalaw.org>)

Justice, and of the restructuring of departmental responsibilities between the Home Office and the Ministry of Justice that followed the creation of the new merged office.³⁸

6 House of Lords Constitution Committee Inquiry

On 3 July 2014, the House of Lords Constitution Committee announced an inquiry into the office of Lord Chancellor. The call for evidence indicated that: “written evidence is sought by 29 August 2014. Public hearings are expected to be held in July and early October 2014.”

The call for evidence went on to indicate that:

The committee seeks clarity on what the current role is, whether changes to it are needed and what criteria (if any) should apply when appointing future holders of the office. First, the committee will explore what the role and responsibilities of the Lord Chancellor are, as distinct from those of the Secretary of State for Justice. With the establishment of the Judicial Appointments Commission and the Judicial Appointments and Conduct Ombudsman, and with the Lord Chief Justice now the head of the judiciary, **we are interested in the extent to which real powers are still wielded by the Lord Chancellor.** The committee is interested in the combined roles of Lord Chancellor and Secretary of State for Justice and the advantages and disadvantages of that combination. It has recently been described as creating an inherent conflict in some policy areas, but can also be viewed as adding weight to the position.

The committee will consider the criteria for appointment as Lord Chancellor. Comments are invited on the effectiveness of the current criteria (in section 2 of the CRA). Two criteria that were emphasised following the changes to the office were that the Lord Chancellor should be a lawyer and should be towards the end of his or her political career, although neither is specified in the CRA.

Finally, the committee will explore whether further reforms to the office are desirable, including whether it is still necessary to have a Lord Chancellor. It may be that the extant functions could be divided between other posts. Or it may be that the office remains a vital part of the relationship between the executive, Parliament and the judiciary.

The committee would welcome written submissions on any aspect of this topic, and particularly on the following questions:

The office of Lord Chancellor

1. What are the current functions of the Lord Chancellor, as distinct from those of the Secretary of State for Justice?
2. To what extent are those functions genuine powers, and to what extent are they nominal powers?
3. How in practice does the Lord Chancellor uphold the rule of law and judicial independence?

The combination of the office with Secretary of State for Justice

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

³⁸ Joint Committee on Human Rights, *The implications for access to justice of the Government's proposals to reform judicial review*, 13th Report of Session, HL 174, para 23

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?

Criteria for appointment as Lord Chancellor

6. How effective have the criteria for appointment as Lord Chancellor in section 2 of the Constitutional Reform Act 2005 been? What does it mean for an appointee to be “qualified by experience”?

7. Should there be statutory criteria for the appointment?

8. What are the advantages and disadvantages of the office of Lord Chancellor being held by a lawyer?

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?

The future of the office

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

The Committee reported on the 11 December 2014.³⁹ **It concluded that the Lord Chancellor’s duty to the rule of law requires him to seek to uphold judicial independence and the rule of law across Government. It recommended, amongst other things, that the Lord Chancellor’s oath of office be amended to reflect this duty both to respect and uphold the rule of law.**

It also concluded that on balance it is not essential for the Lord Chancellor to be a qualified lawyer; but that a legal or constitutional background is a distinct advantage. Given that neither the Lord Chancellor nor the Permanent Secretary in the Ministry of Justice are currently required to be legally qualified, the Committee recommended that either the Permanent Secretary at the Ministry of Justice should be legally qualified or the department’s top legal adviser be appointed at permanent secretary level.

Commenting on the publication of the report, the Chairman of the Committee, Lord Lang of Monkton, said:

The principle of the rule of law is a cornerstone of the United Kingdom constitution. As regards the Government, this means governing in a way that goes beyond simple adherence to the letter of the law—particularly in the UK where the Government of the day can, through Parliament, generally change the law as they judge appropriate. The Lord Chancellor has a key duty to ensure that we are governed according to the rule of law and in accordance with certain established and fundamental principles.

We are concerned that there is currently no one in Government tasked with a clear responsibility for overseeing the operation of the constitution. We feel that a senior Cabinet Minister should have this responsibility; in our view most appropriately the Lord Chancellor. We were surprised that neither the Deputy Prime Minister, who has had responsibility for specific constitutional reforms, nor the Lord Chancellor sit on the new Devolution Committee, which considers matters relating to the devolution of powers within the United Kingdom.

³⁹ House of Lords Constitution Committee, *The office of Lord Chancellor*, Sixth Report of Session 2014/15, HL Paper 75

The Committee recognised concerns that the combination of the office of Lord Chancellor with that of the Secretary of State for Justice could create the risk of a conflict of interest. We concluded, however, that this should not present an insuperable problem. Upholding the rule of law remains a central aspect of the Lord Chancellor's role and in practice the office is given additional authority by its combination with a significant department of state.

The Government responded to the Committee's report by way of a letter on 26 February 2015. The Government did not accept all of the Committee's recommendations. In particular, it stated that there was no need to clarify the duties of the Lord Chancellor or amend the Lord Chancellor's oath:

The Government believes that the Ministerial Code, Cabinet Manual and Oath of Office already accurately reflect ministerial responsibilities in relation to the rule of law. In particular, both the Ministerial Code and the Cabinet Manual note the role of the Law Officers in "helping ministers to act lawfully and in accordance with the rule of law". The Government does not agree that there should be specific requirement on the Lord Chancellor in this respect, nor that the Code, Manual or Oath require amendment.⁴⁰

In relation to the question of having a senior lawyer at the Ministry of Justice, the Government said:

The Government does not agree that the Permanent Secretary at the Ministry of Justice need be legally qualified, nor that the department's top legal adviser need be appointed at permanent secretary level. The Lord Chancellor and Permanent Secretary have access to high quality legal services provided by the Treasury Solicitor's Department including direct access to the Treasury Solicitor and one of his Deputies at Director General level, should it be needed.

⁴⁰ Ministry of Justice, *The Office of Lord Chancellor*, 26 February 2015