

THE JUDICIAL FUNCTIONS OF THE HOUSE OF LORDS

Written Evidence to the Royal Commission on the Reform of the House of Lords by a JUSTICE Working Party

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Introduction

1. This report by a JUSTICE working party responds to the Royal Commission's request¹ for written evidence about the judicial functions of the House of Lords.
2. The Government's White Paper describes the present position as follows:

“It is a very important part of the House of Lords' work that it constitutes the highest court in the land. That function is carried out by the specially selected peers known colloquially as the Law Lords and does not involve other peers. However, the Law Lords' presence has a significant effect on the ethos and contribution of the House as a whole. They are full members of the House, even when not sitting in a judicial capacity, although by convention they do not become involved in politically contentious issues. The contemporary rationale for the Law Lords being life peers as opposed to ex officio members of the House is the major contribution they can make to the cross-bench element in the House. Thus they remain members, even after their retirement as Law Lords. The retired Law Lords play a particularly distinguished role in the examination of legislation, especially that with a highly technical or legal content. Most significant is their contribution to debates on the administration of justice, penal policy and civil liberties, where law and politics intersect.”²

“Whilst therefore the judicial system is kept quite separate from the political process, it is unusual, compared to most major democracies, to have judges sitting as members of the legislature in this way. It would therefore be legitimate to consider, when looking at fundamental reform of the purpose and nature of the House of Lords, whether the present arrangements should continue. But consideration would also have to be given to what this would do to the nature of Parliament as a whole, and how the supreme judicial authority could be reconstituted elsewhere in the system and where it could be suitably accommodated. Detailed proposals on this would fall outside the scope of the Royal Commission's terms of reference.”³

¹ Royal Commission, *Reform of the House of Lords: A consultation paper*, March 1999.

² *Modernising Parliament: Reforming the House of Lords*, Cm 4183, January 1999, Chapter 7, paragraph 19.

³ *Modernising Parliament: Reforming the House of Lords*, Cm 4183, January 1999, Chapter 7, paragraph 20.

3. The White Paper does not refer to the implications of the reform of judicial functions of the House of Lords for the office of the Lord Chancellor and, in particular, for his position as head of the judiciary of England and Wales. However, inevitably, any change in the relationship between the Law Lords and the House of Lords has important implications for the Lord Chancellor's office and for the relationship between the Government and the judiciary. These implications need to be addressed in making the changes necessary to adapt the existing arrangements to the needs of the changing British constitution.

Main Conclusions

4. For the reasons summarised below, we consider that:
 - (i) Senior full-time judges should not be members of the Upper House, because it is inappropriate that they should be able both to act as legislators and to perform judicial functions. Members of the Supreme Court should be full-time judges.
 - (ii) When they cease to hold judicial office, former judges should be eligible to be appointed to the Upper House (upon the assumption that the composition of the Upper House will remain, in part, appointed).
 - (iii) There is a pressing need, in the context of the changes to the British constitution and to the role of the judiciary, to create a supreme court of appeal (to which we will refer as the Supreme Court of the United Kingdom) composed of a fixed number of full-time judges. Although the precise form of the Supreme Court lies outside the Royal Commission's terms of reference, it would be of great public benefit for the Royal Commission to recommend the reasons for such a reform and the aims that need to be realised.
 - (iv) The Supreme Court should be housed in its own building with sufficient resources to enable it to maintain the highest standards in carrying out the judicial process.
 - (v) The functions of the Judicial Committee of the Privy Council in determining devolution issues should be transferred to the new Supreme Court, whose

composition should ensure that it reflects the legal systems of the United Kingdom as a whole.

- (vi) In the interests of the efficient use of resources, the Supreme Court building could also house the Judicial Committee of the Privy Council in dealing with Commonwealth appeals, etc.
 - (vii) The Lord Chancellor should not sit as a judge during the tenure of his office, and he should cease to be the head of the judiciary in England and Wales. As in Scotland and Northern Ireland, that function should be performed by the appropriate senior full-time judge, namely, the Lord Chief Justice of England and Wales.
 - (viii) The Lord Chancellor and other relevant Ministers should be advised about the appointment of senior judges by an independent statutory Judicial Commission. The Commission would deal with complaints about alleged judicial misconduct and disciplinary matters concerning members of the judiciary.
5. Before explaining our reasons for reaching these conclusions, we briefly summarise the present arrangements and their rationale.

THE PRESENT ARRANGEMENTS

The Judicial Committee of the House of Lords

6. The Judicial Committee of the House of Lords⁴ sits as the supreme court of appeal in the United Kingdom for England and Wales, Scotland, and Northern Ireland.⁵ Since 1887,⁶ the

⁴ The appellate jurisdiction belongs to the House of Lords. Judicial business is sometimes taken in the Chamber, in which event the Law Lords sit as the House and not in Committee. Until 1948 all appeals were held in the Chamber, but the practice is now for most appeals to be heard by an Appellate Committee on a reference by the House. There is another committee, known as the Appeal Committee, whose function is to consider petitions for leave to appeal. The Standing Orders provide that the House is to have two Appellate Committees and two Appeal Committees to consider any appeals or petitions for leave to appeal, as the case may be, that may be referred to them by the House.

⁵ No criminal appeals lie to the House of Lords from the High Court of Justiciary in Scotland: see *Criminal Procedure (Scotland) Act 1975*, ss 262 and 281.

⁶ By virtue of an amendment introduced by the *Appellate Jurisdiction Act 1887* to the *Appellate Jurisdiction Act 1876*, which originally made Lords of Appeal in Ordinary life peers for the length of their judicial service, as in the case of the Bishops. See further Robert Stevens in Brice Dickson and Paul Carmichael, eds, *The House of Lords: Its Parliamentary and Judicial Roles* (Oxford: Hart Publishing, 1999) at 112.

Law Lords⁷ have been made life peers upon their appointment as Lords of Appeal in Ordinary. As life peers they are entitled to sit as full members of the House of Lords in its legislative capacity.

7. The present limit on the number of serving Law Lords is twelve.⁸ They normally hear appeals sitting in Appellate Committees of five, but exceptionally in Committees of seven.⁹
8. Some Lords of Appeal when they retire are eligible to be appointed to hear particular appeals. They are asked to sit as members of Appellate Committees in order to make up numbers. This is especially so when, as at present, two serving Law Lords are occupied in chairing public inquiries, and two sit from time to time as members of the Final Court of Hong Kong, and when the demands made by Commonwealth appeals to the Privy Council are heavy. The workload has become so great that retired judges have often sat both in the Lords and in the Privy Council.
9. The Law Lords do not have their own premises. They occupy a corridor in the House of Lords and, except on Fridays, sit in the Committee Rooms to hear appeals. They deliver their judgments in the Chamber. They have limited secretarial assistance and no legal research staff.

The Judicial Committee of the Privy Council

10. The Law Lords sit as members of the Judicial Committee of the Privy Council, hearing appeals from the courts of those Commonwealth countries and British dependent territories that retain the Privy Council as their final court of appeal. In addition, judges from elsewhere in the Commonwealth who are Privy Councillors are eligible to sit as members of the Privy Council hearing Commonwealth appeals. The Lord Chancellor is also a member of the Judicial Committee and when he sits, he presides.

⁷ The correct expression, for which the term “Law Lords” is commonly used, is “Lords of Appeal”: see section 5 of the 1876 Act. They comprise two distinct judicial categories: (a) the Lords of Appeal in Ordinary; and (b) such Peers of Parliament as are for the time being holding or have held “high judicial office”, as defined in section 25 of the 1876 Act. Serving Law Lords fall into category (a). Everyone else falls into category (b).

⁸ *Maximum Number of Judges Order 1994*. This number may however be increased by affirmative instrument.

11. The Judicial Committee of the Privy Council includes other Lords of Appeal, who are not members of the House of Lords, namely, serving and retired members of the English Court of Appeal, certain members of the Scottish Court of Session,¹⁰ and the Northern Ireland Court of Appeal. The Judicial Committee may hear appeals from the courts of the Channel Islands and the Isle of Man, from committees of the General Medical Council and certain other professional bodies concerned with health, and in various ecclesiastical matters.¹¹ The Judicial Committee occupies premises at No. 1 Downing Street.

The Final Courts for Devolution Issues and Convention Rights

12. Under the *Scotland Act 1998*, the *Government of Wales Act 1998*, and the *Northern Ireland Act 1998*, the Judicial Committee of the Privy Council rather than the House of Lords is the final court of appeal for devolution issues arising under the legislation. Devolution issues determined by the Privy Council may include questions of compatibility with Convention rights under the *Human Rights Act 1998*. The House of Lords is the final court of appeal for determining other questions of compatibility with Convention rights.

13. It is understood that the main reason for using the Privy Council as the final court for devolution issues is because the House of Lords is considered to be too “English” in the sense of its connection to the Parliament at Westminster to satisfy the Scottish desire for a clear separation between the two Parliaments on matters that are devolved. However, the pool of potential members of the Judicial Committee is mainly drawn from the English judiciary and

⁹ For example, in *Pepper v Hart* [1993] AC 593, HL and in the second hearing of the *Pinochet* case: see *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex p. Pinochet Ugarte (No 3)* [1999] 2 All ER 97, HL.

¹⁰ The only members of the Court of Session who are made Privy Counsellors on appointment are the Lord President and the Lord Justice-Clerk. Some other members of the Court of Session are also Privy Counsellors by virtue of offices which they have held in government prior to their appointment to the bench. Nowadays this is confined exclusively to those who formerly held the office of Lord Advocate. At present two of the judges in the Court of Session fall into this category, but since one of them is the Lord President, the category provides only one extra member of the Judicial Committee. The pool from which members of the Judicial Committee are drawn is much smaller in Scotland than is the case in the other two countries. It is uncertain whether the office of Lord Advocate, which is being transferred to the Scottish Executive by the *Scotland Act 1998*, will continue to carry with it appointment as a Privy Counsellor, and, if it does, whether the practice whereby the Lord Advocate can recommend himself for appointment to the bench in the event of a suitable vacancy will continue after devolution. If these practices are to be discontinued, the pool will be even smaller.

¹¹ See eg. Halsbury's Laws, 4th ed., Vol. 8(2), paragraphs 311-350.

the devolution legislation does not specifically require judges from Scotland or Northern Ireland to sit in cases involving Scottish or Northern Irish devolution issues.

Law Lords as Legislators

14. The White Paper on Lords reform states that by convention serving Law Lords “do not become involved in politically contentious issues”.¹² It also refers to the fact that retired Law Lords make a significant contribution to debates on the administration of justice, penal policy and civil liberties, “where law and politics intersect.”¹³ Some Law Lords have taken the view that it is wrong in principle for them to contribute to debates while they are serving as judges.
15. The source and strength of the convention that serving Law Lords do not become involved in political issues is obscure; and it is difficult to draw a clear line between what are and are not political issues, where law and politics intersect.
16. Recent practice includes well-known examples where serving Law Lords became involved in politically contentious issues in the context of measures affecting the administration of justice, penal policy and civil liberties. When Lord Mackay of Clashfern introduced Green Papers designed to make the English courts and the legal profession more efficient and responsive to market forces, the retiring Lord Chief Justice, Lord Lane, implied that the Lord Chancellor had authoritarian tendencies and was threatening the independence of the judiciary. Lord Taylor of Gosforth, as Lord Chief Justice, supported a politically controversial Government measure which encroached upon the right of the accused to remain silent. On the other hand, he opposed the introduction of mandatory custodial sentences. Lord Browne-Wilkinson was strongly critical of a Government measure empowering the police to carry out electronic surveillance without a warrant. Several serving Law Lords, including Lord Woolf of Barnes and Lord Bingham of Cornhill supported a Private Member’s Bill to incorporate the *European Convention on Human Rights* into United Kingdom law. Lord Hoffmann introduced and moved a Government-sponsored amendment to the *Defamation Bill 1996* to enable Mr Neil Hamilton MP to maintain a libel action against *The Guardian*

¹² *Modernising Parliament: Reforming the House of Lords*, Cm 4183, January 1999, Chapter 7, paragraph 19.

¹³ *Modernising Parliament: Reforming the House of Lords*, Cm 4183, January 1999, Chapter 7, paragraph 19.

which might otherwise have breached parliamentary privilege. Several serving Law Lords criticised and voted against a Government measure which relied upon prerogative powers to amend the Criminal Injuries Compensation Scheme, in an attempt to circumvent statutory provisions which the Home Secretary had refused to bring into force. The attempt was subsequently judicially reviewed and held, by three out of five Law Lords (none of whom had participated in the Lords debates), to have exceeded the Home Secretary's powers.¹⁴ The present Master of the Rolls, Lord Woolf, opposed the provision in the *Criminal Justice Bill 1997* for mandatory sentences. The present Lord Chief Justice, Lord Bingham, supported the *Access to Justice Bill 1998*, but opposed the provisions in the *Youth Justice and Criminal Evidence Bill 1998* abolishing the right of someone accused of rape personally to cross-examine his alleged victim, and limiting the admissibility of evidence of the alleged victim's sexual history. Scottish Law Lords took an active part in the debates on aspects of the *Scotland Bill 1998* affecting the Scottish judiciary.

17. The merits of these politically controversial issues are irrelevant. What matters is that serving Law Lords have become involved as legislators in debating such matters, some of which have become, and may in future become, matters to be decided by the senior judges in their judicial capacity.

The Changed and Changing Role of the Judiciary

18. Since the middle of the century, and especially during the past thirty years, there has been a profound change in the nature of issues that British judges have been called upon to determine. A generation ago, the role of the judiciary was largely confined to traditional "lawyers' law": criminal trials, revenue and planning appeals, and matters of private law, such as contractual and property claims, tort claims for negligence, nuisance, defamation, and so on, and dealing with divorce and its consequences. The courts tended to construe Acts of Parliament literally. Judicial review of administrative action was a rarity and judges were, in Lord Devlin's words, "quite anxious not to tread on the executive toes".¹⁵ There was no legislation guaranteeing positive rights, such as the right to be treated equally without race or

¹⁴ *R v Secretary of State for the Home Department, ex p. Fire Brigades Union* [1995] 2 AC 513, HL.

¹⁵ Devlin, *Samples of Lawmaking* (1962) at 109.

sex discrimination. The United Kingdom was outside the European Community and because it had not been incorporated into domestic law, the courts refused to have regard to the *European Convention on Human Rights*.

19. Today, the courts construe Acts of Parliament in accordance with their object and purpose. Judicial review has been developed by the courts into a modern system of public law. The courts have frequently held the Executive to account where Ministers have exceeded their lawful powers. Civil rights legislation, forbidding a wide range of unfair discrimination, is interpreted and applied by courts and tribunals. The courts disapply Acts of Parliament if they are inconsistent with paramount Community law. Even though the European Convention has not been incorporated into domestic law, the courts have had regard to the Convention and its case law when interpreting ambiguous legislation, or declaring the common law, or fashioning effective remedies for breaches of human rights. Their decisions are often highly controversial. Indeed, Lord Irvine of Lairg has observed, under the previous Administration, there was “unprecedented antagonism between judiciary and the Government over judicial review of ministerial decisions. Some politicians even went so far as to call judicial review itself into question.”¹⁶

20. The nature of the judicial process in this country will change even more dramatically in the near future when the devolution legislation and the *Human Rights Act* are brought into force. The courts will have to adjudicate upon strongly contested disputes between the central Executive and the executive authorities in Scotland, Wales, and Northern Ireland about the scope and limits of their respective administrative powers.¹⁷ British judges will have to construe Acts of Parliament, so far as possible, to be compatible with the *European Convention on Human Rights*, even where this involves a strained interpretation of the words

¹⁶ Lord Irvine of Lairg, HL Hansard, 17 February 1999, volume 597, col. 734.

¹⁷ The courts cannot adjudicate on the scope of the legislative powers of the Westminster Parliament in view of the doctrine of sovereignty. The disputes about the Parliaments’ respective legislative powers will be between the promoters of legislation in the Scottish Parliament – in most cases these will be members of the Scottish Executive – and Ministers in Her Majesty’s Government: see section 33 of the *Scotland Act 1998*, which provides for a means of resolving such disputes. Ministers from both branches of the executive will be able to appear or to be represented in the event of such disputes having to be dealt with by the courts. The *Scotland Act* makes no provision for either Parliament to be represented. It may well be that the Scottish Parliament will object to legislation enacted at Westminster on the ground that Westminster has dealt with a devolved matter which should have been left to the Parliament at Holyrood. But there is no way in which such an issue could be adjudicated upon by the courts. The dispute will be a political one. The same applies, mutatis mutandis, to disputes in relation to devolved matters under the *Northern Ireland Act 1998*.

of the statute. Where they cannot possibly remove an apparent mismatch between a statutory provision and a Convention right, they will be empowered to declare the provision to be incompatible with the Convention, leaving it to Government and Parliament to take necessary remedial action. They will have to decide whether interference with Convention rights by any public authority is objectively justified, using the European principle of proportionality as their touchstone. They will have to weigh competing rights and interests, having regard to arguments based upon economic and social policy. In other words, our courts will have to perform a similar task of constitutional adjudication to the task performed by other Commonwealth courts in Australia, Canada, India, South Africa, and New Zealand.

21. The nature of much of the work of the judiciary increasingly interacts with political and legislative decisions, and has become higher in its public profile. It calls for a wider and clearer separation of the functions and powers of the judiciary from the other branches of government. Where judges have this greatly increased role it is surely wrong in principle that they should continue to serve as legislators.

The Lord Chancellor¹⁸

22. Similar considerations apply to the position of the Lord Chancellor, but in a different way. Just as Law Lords should not act legislatively because they are judges, so government ministers with an active legislative and executive role should not sit as judges while they are ministers.

23. As regards the Lord Chancellor's present judicial functions, he is the head of the judiciary of England and Wales, but not of the Scottish judiciary, nor of the Northern Ireland judiciary.

¹⁸ The relevant background is helpfully summarised by Professor Diana Woodhouse in her recent article on "The Office of Lord Chancellor" [1998] *Public Law* 617-632. See also: Lord Steyn's critique of the role of the Lord Chancellor as head of the English judiciary in his lecture on "The Weakest and Least Dangerous Department of Government" [1997] *Public Law* 84 at 89-91; Sir Nicolas Browne-Wilkinson, "The Independence of the Judiciary in the 1980s" [1988] *Public Law* 44; R Brazier, "Government and the Law: Ministerial Responsibility for Legal Affairs" [1989] *Public Law* 64; Lord Mackay of Clashfern, "The Chancellor in the 1990s" [1991] *Current Legal Problems* 241; Robert Stevens, *The Independence of the Judiciary: The View from the Lord Chancellor's Office* (1993); J A G Griffiths, *The Politics of the Judiciary* (5th ed., 1997); Gavin Drewry and Dawn Oliver, "Parliamentary accountability for the administration of justice" in Dawn Oliver and Gavin Drewry, eds, *The Law and Parliament* (Butterworths: London, 1998); and Robert Stevens, "A Loss of Innocence? Judicial Independence in England", to be published in the *University of Southern California Law Review*.

He is President of the Supreme Court of England and Wales, an *ex officio* judge of the Court of Appeal, and President of the Chancery Division. He is entitled to sit judicially in the House of Lords and in the Judicial Committee of the Privy Council. When he sits, he takes the chair as the presiding judge. The Lord Chancellor is ultimately responsible for arranging the judicial business in the House of Lords and the Privy Council,¹⁹ and makes procedural rules for the Supreme and Crown Courts. He delegates to the senior Law Lord the selection of Law Lords to sit as members of an Appellate or Appeal Committee in particular cases; but he can override the senior Law Lord as his delegate and can sit whenever he chooses.

24. The Lord Chancellor presides in the House of Lords. He is also a senior member of the Cabinet, and is subject to collective ministerial responsibility for Government policy. He is responsible to Parliament for a large spending department, employing some 11,000 civil servants.²⁰ Criminal justice remains the responsibility of the Home Secretary, but the Lord Chancellor has a wide range of responsibilities for the administration of justice, including supervision of magistrates' courts. Apart from some matters which remain the responsibility of the Home Secretary and the Attorney-General, the Lord Chancellor's Department has grown into a Department of Justice for England and Wales. The present Lord Chancellor performs a still wider pivotal role in implementing the Government's programme of constitutional reform, chairing several Cabinet Committees dealing with various elements in the programme. The Lord Chancellor is not, however, the Government's principal adviser on points of law. That function is performed by the Law Officers of the Crown.

25. The changes in the Lord Chancellor's role have been as great as the changes in the role of the judiciary; and there is a "a continuing shift in balance in the Lord Chancellor's responsibilities away from the judicial, towards the executive and political".²¹ On the other hand, the Lord Chancellor's judicial role is not as important as it was earlier in the century.²² The increase in his executive responsibilities, together with post-war changes in the sitting arrangements of the legislative chamber of the House of Lords, have ended the practice of

¹⁹ In practice these matters are attended to by the Judicial Office, which is an office of the House of Lords, and by the Registrar, who is a member of the Privy Council Office, in the Judicial Committee.

²⁰ Most of whom work in the Courts Service Executive Agency.

²¹ Woodhouse, *supra* note 18 at 619.

²² Woodhouse, *supra* note 18 at 620.

frequent sittings by Lords Chancellor. The practice of different Lords Chancellor in sitting judicially has been remarkably variable.²³

26. There has also been considerable variation in the kinds of appeals in which particular Lords Chancellor have chosen to sit. According to Professor Woodhouse, “Lord Chancellors are debarred from hearing an appeal to which the Government is a party or in which it has a strong political stake.”²⁴ However, subject to common law requirements of fairness, and the Convention right to an independent and impartial court, there is nothing to prevent the Lord Chancellor from sitting judicially if he wishes to do so.

27. Recent Lords Chancellor, like their predecessors, have sat in cases of constitutional importance, affecting the respective functions of the legislative, executive and judicial branches of government,²⁵ delineating the scope of judicial review,²⁶ and interpreting a politically controversial change made in 1994 to the *Public Order Act 1986* in the light of the Convention right to freedom of peaceful assembly.²⁷ However, objection was apparently taken by leading counsel to the Lord Chancellor sitting in a case where it was claimed that there might be an apparent conflict between his respective functions, and the Lord Chancellor decided not to sit in the hearing of the appeal.

28. Lord Irvine of Lairg has recently explained that the advantages of his sitting judicially are that it gives the Lord Chancellor “a practical awareness of the development of the common law at the highest level. It enables him to assess the quality of the most senior advocates. And ... the Lord Chancellor may himself have a contribution to make.”²⁸ Lord Irvine has recognised that he should not sit judicially in any appeal where the Government might reasonably appear to

²³ See the speech of Lord Irvine of Lairg in HL Debates, 17 February 1999, volume 597, cols 736-7. Lord Gardiner, who was Lord Chancellor from 1964 to 1970, sat for only four days. Lord Hailsham of St Marylebone, who was Lord Chancellor for two periods, sat for 28 days between 1970 and 1974, and for 53 days between 1979 and 1987. Lord Elwyn-Jones sat for eight days between 1974 and 1979 while Lord Mackay of Clashfern sat for 60 days between 1987 and 1997.

²⁴ Woodhouse, *supra* note 18 at 621.

²⁵ Lord Mackay of Clashfern presided in *Pepper v Hart* [1993] AC 593, dissenting from the other six members of the Appellate Committee who held that the courts could have recourse to ministerial statements to Parliament to resolve statutory ambiguities. Lord Mackay’s reasons for his dissent were partly based upon his ministerial concern about the implications for public finance of the relaxation of the traditional rule excluding judicial recourse to the parliamentary record as an extrinsic source of statutory interpretation.

²⁶ *Boddington v. British Transport Police* [1998] 2 WLR 639, HL.

²⁷ *Director of Public Prosecutions v Jones and Another*, [1999] 2 All ER 257, HL.

have a stake in a particular outcome.²⁹ However, he is otherwise unwilling to lay down any detailed rules on what he regards as a question of his own judgment in each particular case.³⁰

29. Lord Woolf of Barnes, the Master of the Rolls, has given the following justification for the combined executive and judicial roles of the Lord Chancellor:

“As a member of the Cabinet, he [the Lord Chancellor] can act as advocate on behalf of the courts and the justice system. He can explain to his colleagues in the Cabinet the proper significance of a decision which they regard as being distasteful in consequence of an application for judicial review. He can, as a member of the Government, ensure that the courts are properly resourced. On the other hand, on behalf of the Government, he can explain to the judiciary the realities of the political situation and the constraints on the resources which they must inevitably accept.”

“As long as the Lord Chancellor is punctillious in keeping his separate roles distinct, the separation of powers is not undermined and the justice system benefits immeasurably. The justice system is better served by having the head of the judiciary at the centre of government than it would be by having its interests represented by a Minister of Justice who would lack these other roles.”³¹

PROPOSALS FOR REFORM

30. The existing arrangements have served this country well. The Law Lords, at the apex of the judiciary, have been conspicuously independent and free of political interference by the Executive. Judgments of the House of Lords and of the Privy Council have great influence across the common law world. Serving and retired Law Lords play a valuable role in the work of the House - in scrutinising legislation, participating in committees, and taking part in debates. Successive Lords Chancellor have, in Lord Irvine’s words, “acted as a buffer

²⁸ Lord Irvine of Lairg, HL Hansard, 17 February 1999, volume 597, col. 736.

²⁹ *Ibid.*

³⁰ *Ibid.* See also HL Hansard, 20 October 1998, WA 137-8. If, as seems probable, the European Court of Human Rights upholds the Commission’s Report of 20 October 1998 in Application No. 28488/95, *McGonnell v United Kingdom*, the Lord Chancellor may well be precluded from sitting judicially, at least in cases in which the Government is directly or indirectly interested. In *McGonnell*, the Commission held that the Royal Court of Guernsey did not satisfy the requirements of an independent and impartial tribunal guaranteed by Article 6 of the *European Convention on Human Rights* because the Bailiff, who sat as the principal judicial officer, was not only a senior member of the judiciary of the island but also a senior member of the legislature and of the executive. The Commission considered that the fact that he has legislative and executive functions meant that his independence and impartiality were capable of appearing open to doubt.

³¹ Lord Woolf, “Judicial Review – the tensions between the executive and the judiciary”, Neill Lecture, All Souls, Oxford, November 1997. See also, Lord Irvine of Lairg, HL Debates, 17 February 1999, volume 597, cols 733-4.

between the judiciary and the Executive”³² protecting judicial independence. They have been conspicuously fair in making judicial appointments free from political bias.

31. However, as we have indicated, during the past thirty years since Lord Gardiner held office, there has been a vast change in the roles both of the Lord Chancellor and of the senior judiciary. The Lord Chancellor’s Department has grown into a major spending department, with major administrative responsibilities. The Lord Chancellor’s office has become much more politically significant. Its most senior administrator is no longer a lawyer and the Lord Chancellor employs a special political adviser. Lord Irvine of Lairg performs many of the functions of a Minister of Justice and he plays a pivotal role in the Government’s programme of constitutional reform.

32. The central question is whether the present arrangements at the apex of the British judicial system are adequate to meet the challenging needs called for by these changes, and to retain public confidence. We firmly believe that the present arrangements are inherently flawed, and that reform of the judicial functions of the Law Lords and of the Lord Chancellor is not a luxury but an urgent practical necessity. The profoundly changed role both of the judiciary and of the Lord Chancellor’s Department, together with the changes being brought about by the renewal of the British constitution, make it imperative that there should be a final court with sufficient authority, expertise and resources to maintain public confidence in the administration of justice at the highest level. We hope that the Royal Commission will endorse this view and will recommend the transfer of judicial functions from the House of Lords to an independent final court, presided over by a senior full-time judge.

An Independent Supreme Court of the United Kingdom

33. Unlike the other major jurisdictions of the Commonwealth, the United Kingdom lacks a Supreme Court whose judges are all full-time, housed in their own premises, and supported by a full complement of research and secretarial staff. Instead, as we have explained, there are now two final courts for the United Kingdom – the House of Lords and (for devolution issues) the Judicial Committee of the Privy Council. Those hearing appeals in either court

³² Lord Irvine of Lairg, HL Hansard, 17 February 1999, volume 597, col. 734.

may be retired judges. The manner in which judges are assigned by or on behalf of the senior Law Lord to hear particular appeals is shrouded in mystery; yet the composition of a closely divided Committee may be crucial to the outcome of an appeal. The support staff and facilities provided for the Law Lords compare unfavourably with those of the High Court of Australia, the Supreme Court of Canada, or the Constitutional Court of South Africa.

34. One principal reason for the lack of sufficient facilities is the fact that the Law Lords occupy over-crowded space in the House of Lords, rather than having a Supreme Court building of their own. The judicial functions vested in the Law Lords are as important and demanding as those of any final court of the Commonwealth, and require no less favourable facilities than those provided for comparable Commonwealth courts. We would expect the burdens imposed upon the Law Lords to increase significantly when the devolution legislation and the *Human Rights Act* are in force. Changes will have to be made to enable appeals to be dealt with speedily and in a manner which commands widespread public confidence.
35. We believe that there is a pressing need, in the context of the changes to the British constitution and to the role of the judiciary, to create a full-time Supreme Court of the United Kingdom. Each member of the Supreme Court should be a full-time judge of the Court. The form of Supreme Court is not an issue to be decided by the Royal Commission. However, a brief summary of the nature of the alternative to the present arrangements reinforces the case for change, since it shows that the judicial system at its apex can be made to work as effectively, or, as we believe, more effectively, with a Supreme Court.
36. The Court should be housed in its own building with sufficient resources to enable it to maintain the highest standards in carrying out the judicial process. The fact that the Court had its own building would mean that its timetable and working methods would no longer need to be harmonised with the timetable and working methods of the House of Lords. It could sit on Fridays and deliver its judgments to suit the convenience of the Court and of the parties.
37. The functions of the Judicial Committee of the Privy Council in determining devolution issues should be transferred to the new Supreme Court, whose composition should ensure that

it reflects the legal systems of the United Kingdom as a whole, by including at least two judges from Scotland and one judge from Northern Ireland.

38. The Supreme Court building could also house the Judicial Committee of the Privy Council in dealing with Commonwealth appeals, etc.
39. We consider that members of the Supreme Court should not be members of the Upper House while they perform judicial functions. We recognise the valuable contribution made to the cross-bench element of the House of Lords by serving and retired Law Lords. That contribution could continue to be made by retired judges of the Supreme Court who would be eligible to be appointed to the cross-bench element of the reformed Upper House. Serving judges of the Supreme Court could also continue to assist the work of the Upper House by giving evidence to Select Committees. However, we believe that the changing constitutional role of the senior judiciary makes it essential to secure the apparent independence and impartiality of serving members of the Supreme Court by excluding them from being members of the legislature.
40. As a necessary part of this reform, we recommend that the Lord Chancellor should cease to sit as a judge during his tenure of office, and he should cease to be the head of the judiciary in England and Wales. As in Scotland and Northern Ireland, that function should be performed by the appropriate senior full-time judge, namely, the Lord Chief Justice of England and Wales. We are confident that the Lord Chief Justice will be as effective in making known the views and interests of the English judiciary as are the Lord Chief Justice of Northern Ireland and the Lord President of the Scottish judiciary. We are also confident that the Lord Chancellor will be as effective in making those views known to his Cabinet colleagues as he is at present, even if he is no longer titular head of the judiciary in England and Wales. The Lord Chancellor's other functions would not be affected by our recommendations.
41. We do not doubt the personal independence and impartiality of the Lord Chancellor when he sits in a judicial capacity. However, in view of his powerful political role as Minister of Justice in charge of a large spending department, the appearance of independence and impartiality is reasonably open to doubt, particularly in the wide range of cases where the

Executive is directly or indirectly interested, such as cases involving devolution or human rights issues or judicial review of administrative action, or taxing powers. In any event, it would be plainly inappropriate for the Minister of Justice to act as the presiding judge of the Supreme Court.

42. If the Lord Chancellor no longer sat judicially, this would not deprive him of practical awareness of the development of the common law at the highest level. That awareness is at present acquired by him judicially only haphazardly in those appeals in which he chooses to sit. We do not consider it necessary for him to continue to sit as a judge for the purpose of acquiring this awareness.
43. As regards the Lord Chancellor's ability, through sitting judicially, to assess the quality of the senior advocates, this again is necessarily an incomplete assessment, since the Lord Chancellor sits judicially only comparatively rarely. In any event, we consider that the appointment of senior judges should not be significantly influenced by the fact that the Lord Chancellor happens to have had direct experience of the quality of those senior advocates who have appeared before him when he has sat judicially (or as professional colleagues, if and when he was a practising member of the English Bar).
44. We endorse the recommendations made by previous JUSTICE reports³³ for a more transparent system for judicial appointments in which the Lord Chancellor and other relevant Ministers would be advised about the appointment of members of the Supreme Court and of other senior judges by an independent statutory Judicial Commission, which would advertise, interview, select and recommend judicial candidates for appointment. The Commission would also deal with complaints about alleged judicial misconduct and disciplinary matters concerning members of the judiciary. This reform is desirable in its own right, but it would be made all the more desirable because of the other reforms we recommend. We would hope that the Lord Chancellor would initiate public consultation about the proposal in the near future since it does not depend upon the wider issues of Lords' reform.³⁴

³³ See *The Judiciary*, a 1972 report by a JUSTICE committee chaired by Peter Webster QC and *The Judiciary in England and Wales*, a 1992 report by a JUSTICE committee chaired by Robert Stevens.

³⁴ We note that the Lord Chancellor has not ruled out the possibility of initiating a public consultation on this issue: see HL Hansard, 31 March 1999, WA 69.

45. As we have already indicated, members of the Supreme Court should be full-time judges. When they cease to hold judicial office, we propose that members of the Supreme Court should be eligible to be appointed to the cross-benches of the Upper House (upon the assumption that the composition of the Upper House will remain, in part, appointed). This will enable full advantage to be taken of the particular knowledge and experience of eminent jurists in the scrutiny of legislation, committee work, and debates on the administration of justice, penal policy and civil liberties.

Conclusion

46. These proposals are designed to strengthen judicial independence, to enhance the efficient determination of appeals by a single supreme judicial authority of the United Kingdom, and to enable the Lord Chancellor's Department to continue to function as a strong and effective Ministry of Justice. The separation of serving Law Lords, as Supreme Court judges, from the reformed Upper House would not impair its ability to function effectively. We hope that our proposals will commend themselves to the Royal Commission, the public, Government, and Parliament.

19 May 1999