



Government's Response to the House of Lords Select Committee on the Constitution's Report: Relations between the executive, the judiciary and Parliament

**Presented to Parliament
by Lord Chancellor and the Secretary of State for Justice**

**By Command of Her Majesty
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Introduction

The Government is grateful to the House of Lords Select Committee on the Constitution and to all those who gave evidence on a broad, involved and complex series of matters.

The Committee's report examined constitutional relationships between the judiciary, the executive and Parliament. The inquiry focused its attentions on enforcement of the Human Rights Act since 2000, the passage of the Constitutional Reform Act 2005 and the related Concordat developed between the Lord Chief Justice and the Lord Chancellor, and on the recent creation of the Ministry of Justice. Conclusions and recommendations have been reached as to how a changing relationship between the three branches of government has affected, or might affect, core constitutional principles such as the rule of law and the independence of the judiciary.

The Government's response to the report is below.

Summary

The Committee's report separated its conclusions and recommendations into three parts: Executive and Judiciary; Parliament and Judiciary; and Judiciary, Media and Public. The Government's response focuses predominantly on the first of these.

The Government welcomes the Committee's confirmation of the rule of law's core importance in governing the relationships between the judiciary, the executive and Parliament. Similarly the Government commends the emphasis placed by the Committee on protecting the independence of the judiciary – a principle fundamental to the just treatment of all members of the community.

The Government also welcomes the Committee's call for the former Department for Constitutional Affairs' responsibilities for constitutional affairs to continue to receive the attention they merit. The Green Paper, *The Governance of Britain*, was published in July, outlining the Government's vision and proposals for constitutional renewal. In exploring these, the Government is eager to engage the Committee and others on the rights and responsibilities which shape peoples' relationships with each other and with the institutions of the state.

The Government has given careful consideration to the Committee's conclusions and recommendations. Whilst respecting the thoroughness of the Committee's investigations and the strength of the reservations it raises, the Government remains convinced that the creation of the Ministry of Justice affects neither the Lord Chancellor's statutory obligation to uphold the continued independence of the judiciary, nor his obligation to provide adequate funding to ensure the effective and efficient functioning of the courts.

A more detailed response to the Committee's conclusions and recommendations can be found below.

Executive and Judiciary

Managing the Tensions

Recommendation 1. The Sweeney case was the first big test of whether the new relationship between the Lord Chancellor and the judiciary was working properly, and it is clear that there was a systemic failure. Ensuring that ministers do not impugn individual judges, and restraining and reprimanding those who do, is one of the most important duties of the Lord Chancellor. In this case, Lord Falconer did not fulfil this duty in a satisfactory manner. The senior judiciary could also have acted more quickly to head off the inflammatory and unfair press coverage which followed the sentencing decision. (Paragraph 49)

1. The Government does not agree with the Committee's conclusion.
2. Lord Falconer had a personal role in putting the independence of the judiciary on a statutory footing for the first time, and he spoke out fully and forcibly in public in defence of the Judge in the Sweeney case.
3. Throughout the period of the criticism Lord Falconer kept in close contact with the Lord Chief Justice and with Sir Igor Judge, The President of the Queen's Bench Division in the High Court.
4. The current Lord Chancellor is equally committed to upholding the independence of the judiciary and will intervene as necessary in future having fully considered the individual circumstances in which any criticism arises. He will not shirk his responsibility in reminding Ministers that they need to be extremely careful not to attack judges.

Recommendation 2. The key to harmonious relations between the judiciary and the executive is ensuring that ministers do not violate the independence of the judiciary in the first place. To this end, we recommend that when the Ministerial Code is next revised the Prime Minister should insert strongly worded guidelines setting out the principles governing public comment by ministers on individual judges. (Paragraph 51)

5. The Government is committed to upholding the independence of the judiciary. The decision to establish the Supreme Court and the Judicial Appointments Commission is evidence of this commitment. The new Ministerial

Code, which was published in July 2007, sets out the principles and practices expected of Ministers. Section 1 of the Code sets out the following 'The Ministerial Code should be read against the background of the overarching duty on Ministers to comply with the law including international law and treaty obligations and to uphold the administration of justice and to protect the integrity of public life'.

6. The Government will further consider the Committee's recommendations when the Code is next updated.

Constitutional Change

Recommendation 3. We agree that the advent of the Ministry of Justice, whilst obviously a machinery of government change, has significant constitutional implications. (Paragraph 60)

7. We understand the sentiment behind the recommendation but would suggest that it was the major changes introduced in the Constitutional Reform Act 2005, including the end of the role of the Lord Chancellor as head of the judiciary, which can rightly be said to have had "significant constitutional implications"; the establishment of the Ministry of Justice less so.

Recommendation 4. We are disappointed that the Government seem to have learnt little or nothing from the debacle surrounding the constitutional reforms initiated in 2003. The creation of the Ministry of Justice clearly has important implications for the judiciary. The new dispensation created by the Constitutional Reform Act and the Concordat requires the Government to treat the judiciary as partners, not merely as subjects of change. By omitting to consult the judiciary at a sufficiently early stage, by drawing the parameters of the negotiations too tightly and by proceeding with the creation of the new Ministry before important aspects had been resolved, the Government failed to do this. Furthermore, the subsequent request made by the judiciary for a fundamental review of the position in the light of the creation of the Ministry of Justice was in our view a reasonable one to which the Government should have acceded in a spirit of partnership. (Paragraph 67)

8. I understand that my predecessor as Lord Chancellor discussed the possibility of a Ministry of Justice with the Lord Chief Justice as soon as he judged appropriate. On 29 March 2007 the Lord Chief Justice ended a statement on the announcement of a Ministry of Justice by saying "the senior judges have already made it plain that structural safeguards must be put in place to protect the due and independent administration of justice. These concerns must be addressed. Provided that they are, there would be no objection in principle to the creation of a

new Ministry with responsibility for both offender management and the court service." We continue to discuss with the Judiciary the best way of dealing with the issues they have raised. We have broadened the parameters for discussion since the Committee's report and are reviewing a range of options.

Recommendation 5. We believe that the role of Lord Chancellor is of central importance to the maintenance of judicial independence and the rule of law. Prime Ministers must therefore ensure that they continue to appoint to the post candidates of sufficient status and seniority. (Paragraph 71)

9. The Government agrees.

Recommendation 6. We sincerely 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. (Paragraph 74)

10. We share the sentiment; constitutional affairs have a very high priority.

Recommendation 7. The integrity of the legal system depends on it being properly funded. We consider it one of the vital tasks of the Lord Chancellor to ensure that the Courts Service and Legal Aid budgets uphold that integrity. Whilst it is not for us to suggest how the courts budget should be agreed in future, we do urge the Lord Chancellor to ensure that it receives maximum protection from short-term budgetary pressures upon and within the new Ministry. Moreover, the budget-setting process must be transparent and the judiciary must be fully involved, both in determining the process and in its implementation. (Paragraph 83)

11. The Government agrees that the integrity of the legal system depends on proper funding.

12. We agree that the budget setting process for the courts must be transparent and that there should be appropriate judicial involvement.

Recommendation 8. We are not convinced by the judiciary's claims that the creation of the Ministry of Justice lends any additional urgency to their desire for an autonomous court administration. However, the status of Her Majesty's Courts Service is of central importance to the administration of justice, and we urge the Government to engage meaningfully with the judiciary on this issue in order to find a mutually acceptable way forward. (Paragraph 87)

13. The Government accepts the recommendation. We agree that the creation of the Ministry of Justice does not of itself create a need for an autonomous courts

administration. We are working with the judiciary on this issue with the aim of finding a mutually acceptable way forward.

Human Rights Act

Ministerial Compatibility Statements and Parliamentary Scrutiny

Recommendation 9. Where a department has any doubt about compatibility of a bill with Convention rights, ministers should seek the involvement of the Law Officers at a formative stage of policy-making and legislative drafting. (Paragraph 90)

14. It is already the practice of Government to consult the Law Officers formally where legislative proposals may be incompatible with the Convention rights, and particularly where there is any possibility that a statement under section 19(1)(b) of the Human Rights Act 1998 may need to be made in respect of any Bill.

Greater Guidance from the Executive to the Courts?

Recommendation 10. Whilst we have sympathy with the difficulties outlined by Charles Clarke in relation to the Human Rights Act, his call for meetings between the Law Lords and the Home Secretary risks an unacceptable breach of the principle of judicial independence. It is essential that the Law Lords, as the court of last resort, should not even be perceived to have prejudged an issue as a result of communications with the executive. (Paragraph 97)

15. The Government agrees with the Committee's conclusion.

Should there be a System of Abstract Review?

Recommendation 11. Whilst a system of "abstract review" of legislation might seem attractive in some respects, we believe that it could compromise the impartiality of the senior judiciary and that it would not in any case prevent successful challenges under the Human Rights Act to ministerial exercise of statutory powers. (Paragraph 106)

16. The Government agrees. Even when a declaration of incompatibility is sought under the Human Rights Act, the Government believes that it is important that the courts are presented with a real and substantial factual situation in the light of which to consider the compatibility of the legislation.

Review of Bills by a Committee of Distinguished Lawyers

Recommendation 12. We do not believe that a committee of distinguished lawyers tasked with scrutinising legislation for compatibility with Convention rights is desirable at this time. If, however, at some future time the composition of the House of Lords changes, this is an idea that may well merit further consideration. (Paragraph 108)

17. The Government agrees.

Advisory Declarations

Recommendation 13. We recommend that the Government and the judiciary give further consideration to how advisory declarations might be used to provide guidance on questions relating to Convention rights. (Paragraph 111)

18. The Government is not convinced of the utility of this idea. As previously noted, the Government attaches considerable importance to the grounding of cases before the courts in real and substantial factual situations: this assists the courts in considering the compatibility of the law with the Convention rights by enabling them to consider not only the strict words of any given statute, but also the legal and practical framework and context in which it is given effect. It is significant to note that even the European Court of Human Rights would not consider the compatibility of a State's legal framework in the absence of an actual complaint that the Convention rights of a person or organisation (within the scope of Article 34 of the Convention) have been or will be breached. It is already possible to bring a specific issue of genuine practical importance before the courts by means of so-called "friendly" litigation, and the Government would be wary of introducing any greater degree of abstraction than this into the judicial process.

Parliament and Judiciary

Laying Written Representations before Parliament

Recommendation 14. We recommend that any written representations received from the Lord Chief Justice under section 5 of the Constitutional Reform Act 2005 should be published in Hansard; that the business managers should find time for the issue to be debated in the House at the earliest possible opportunity; and that the Government should respond to such representations in good time before either House has finished considering the bill or initiative in question. Further, this Committee will endeavour to scrutinise any such representations in time to inform deliberations in the House. (Paragraph 119)

19. The Government will endeavour to respond in good time to such representations, should they be made.

The Question of Accountability

The Role of Select Committees

Recommendation 15. We believe that select committees can play a central part in enabling the role and proper concerns of the judiciary to be better understood by the public at large, and in helping the judiciary to remain accountable to the people via their representatives in Parliament. Not only should senior judges be questioned on the administration of the justice system, they might also be encouraged to discuss their views on key legal issues in the cause of transparency and better understanding of such issues amongst both parliamentarians and the public. However, under no circumstances must committees ask judges to comment on the pros and cons of individual judgements. (Paragraph 126)

20. The Government will pay close attention to any proposals in this area, and consult the Lord Chief Justice and his colleagues about it.

A Parliamentary Committee on the Judiciary

Recommendation 16. We are not currently convinced of the need for a joint committee on the judiciary, but we shall keep the situation under review, not least in evaluating our Committee's effectiveness in providing the necessary oversight and contact. The Constitutional Affairs Select Committee in the House of Commons also has an important role to play. (Paragraph 129)

21. The Government will pay close attention to any proposals in this area.

Post Legislative Scrutiny

Recommendation 17. We repeat our earlier conclusion that post-legislative scrutiny is highly desirable and should be undertaken far more generally. This would boost the level of constructive dialogue between Parliament and the courts. (Paragraph 130)

22. The Government is currently giving careful consideration to its response to the Law Commission's report on post-legislative scrutiny. This response is being informed by a number of factors. These include, firstly, the Government's recognition of the potential benefits of more post-legislative scrutiny than currently takes place. Secondly that, as the Law Commission noted, post-legislative scrutiny can be narrowly or widely interpreted, ranging from simple examination of whether there have been drafting difficulties or whether specific provisions have not been brought into effect, to a much wider examination of how the effects of the Act are achieving its objectives. Thirdly that, as the Law Commission observed, and the Government broadly agrees, there cannot be a 'one-size-fits-all' approach to post-legislative scrutiny, because of the wide variety of legislation.

23. In relation to parliamentary post-legislative scrutiny, it is important to note that any commentary by Parliament on judicial interpretation is not binding on the courts, and there is no obligation on the courts to consider a select committee's views in relation to interpretation. This reflects the fact that interpretation of legislation is a function of the courts and the courts alone. The Government considers this to be essential for the proper maintenance of the separation of powers. This does not of course affect Parliament's ability to legislate specifically to correct what it considers is a mistaken development in judicial interpretation of the law and to restate its intention.

Confirmation Hearings

Recommendation 18. We urge the Government to clarify their position on the introduction of appointment hearings for judges at the earliest opportunity, since this would be an innovation with very profound implications for the independence of the judiciary and the new judicial appointments system. (Paragraph 135)

24. *The Governance of Britain* Green Paper said that: "The Government is willing to look at the future of its role in judicial appointments: to consider going further than the present arrangement, including conceivably a role for Parliament

itself, after consultation with the judiciary, Parliament and the public, if it is felt there is a need."

25. We will shortly be consulting on judicial appointments, including on whether the role of the executive should be altered. Any role for Parliament needs to be considered very carefully and there are a range of options that could be considered. As the Lord Chancellor has said, US-style confirmation hearings may be appropriate for the United States but he does not believe they would work for us.

An Annual Report on the Judiciary

Recommendation 19. We welcome the Judicial Executive Board's decision that the Lord Chief Justice should lay an annual report before Parliament, an innovation which this Committee had discussed with the Lord Chief Justice and other senior judges in the course of our deliberations. We suggest that the annual report should be formally laid under section 5 of the Constitutional Reform Act. We further suggest that the report might encompass administrative issues and—where appropriate—areas of concern about the justice system, provided that there is no discussion of individual cases. We believe that the report will provide a useful opportunity for both Houses of Parliament to debate these matters on an annual basis, and for the Lord Chief Justice to engage effectively with parliamentarians and the public. (Paragraph 139)

26. The Government is happy to discuss this with the Lord Chief Justice.

Judiciary, Media and Public

Public Perceptions

Recommendation 20. We believe that the media, especially the popular tabloid press, all too often indulge in distorted and irresponsible coverage of the judiciary, treating judges as "fair game". A responsible press should show greater restraint and desist from blaming judges for their interpretation of legislation which has been promulgated by politicians. If the media object to a judgment or sentencing decision, we suggest they focus their efforts on persuading the Government to rectify the legal and policy framework. In order to ensure more responsible reporting, we recommend that the Editors' Code of Practice, which is enforced by the Press Complaints Commission, be regularly updated to reflect these principles. (Paragraph 146)

27. We agree, and have passed this recommendation to the Press Complaints Commission and the Secretary of State for Culture, Media and Sport.

The Role of Individual Judges

Recommendation 21. Whilst judges should never be asked to justify their decisions outside the courtroom, it is desirable for them to communicate with the public and the media on appropriate issues. We therefore strongly encourage the occasional use of media releases alongside judgements, as for example in the Charlotte Wyatt case. Further, we cannot see any reason why judges should not co-operate with the media on features about their activities outside the courtroom, if they so wish. However, we are strongly of the opinion that whatever the media pressure, judges should not give off-the-record briefings. (Paragraph 155)

28. This is a recommendation for the Lord Chief Justice and his colleagues.

The Role of the Lord Chief Justice

Recommendation 22. It is wholly within the discretion of the Lord Chief Justice to determine how he can most effectively communicate with the media and the public. However, we suggest that he may from time to time need to re-appraise his strategy in light of the new constitutional relationship between the judiciary, the executive and Parliament. We believe that, in these days of greater separation of powers, it is highly desirable for him to ensure that the views of the judiciary are effectively conveyed to the public. (Paragraph 160)

29. This is a recommendation for the Lord Chief Justice and his colleagues.

The Role of the Judicial Communications Office

Recommendation 23. We conclude that the judges should consider making the Judicial Communications Office more active and assertive in its dealings with the media in order to represent the judiciary effectively. We suggest that consideration be given to appointing one or more spokesmen with appropriate qualifications and legal experience who would be permitted to speak to the media with the aim of securing coverage which accurately reflects the judgment or sentencing decision. However, under no circumstances should such spokesmen seek to justify decisions as opposed to explaining them. (Paragraph 171)

30. This is a recommendation for the Lord Chief Justice and his colleagues.

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