

## The role of the Lord Chancellor

The Lord Chancellor has two distinct roles as a member of Cabinet: Secretary of State for Justice, and Lord Chancellor.

Broadly speaking, as Secretary of State you are responsible for prisons and probation policy, sentencing and criminal law. As Lord Chancellor you are responsible for judicial policy, the courts, legal aid; and the UK's relationship with the Crown dependencies, legal services, the legal profession, and some Church appointments. You also have particular duties to the Crown, including some appointments and a role in determining the capacity of the Sovereign.

### Background to the office of Lord Chancellor

The Lord Chancellor is an ancient office. In its traditional form, the role was wide-ranging, straddling the three branches of the State. The Lord Chancellor was:

- Head of the judiciary, responsible for all judicial appointments and discipline, and eligible to sit as a "Law Lord" in the House of Lords (in its former judicial capacity);
- Speaker of the House of Lords;
- Cabinet Minister, responsible for the business of the Lord Chancellor's Department (mostly courts and the law) and then, very briefly, for the Department for Constitutional Affairs (the same portfolio, with the addition of human rights and devolution).

The modern version of the role stems from the 2003-5 constitutional reforms, which aimed to achieve a separation of powers by removing the Lord Chancellor's judicial and legislative functions. The Lord Chief Justice assumed leadership of the judiciary, and the House of Lords elected its own Speaker.

The resulting legislation (the Constitutional Reform Act 2005) modified rather than, as initially planned, abolished the office of Lord Chancellor, and contained several features seeking to preserve the principle of a "rule of law" Lord Chancellor. In particular, the Act:

- sets out the Oath that the Lord Chancellor takes on appointment: *"that 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"*;
- places a duty on the Lord Chancellor to have regard to the need to defend the independence of the judiciary;
- states that he must have regard to the need for the judiciary to have the support necessary to exercise their functions, and must have regard for the need for the public interest to be properly represented in decisions affecting the judiciary and the administration of justice;
- refers to, but does not define, the constitutional duty in respect of the rule of law.

Before the Act was passed, the executive and the judiciary reached a formal agreement in 2004 known as "the Concordat", which set out the respective roles of the Lord Chancellor and the Lord Chief Justice over areas like resourcing, courts administration, and judicial appointments, welfare, training and discipline. These measures were subsequently largely enacted in the 2005 Act but the Concordat remains an important point of reference.

### The role today

The office of Lord Chancellor still has numerous legal and ceremonial functions, deriving from the status as Keeper of the Queen's Conscience and Keeper of the Great Seal. These include attending the swearing in and valedictories of the most senior judges (the Lord Chief Justice, Heads of Division and the Justices of the Supreme Court); making a speech and raising the toast to the Lord Mayor at the annual Lord Mayor's dinner in July for HM Judges; and on the first working day in October, presiding at the ceremonial opening of the legal year. The Lord Chancellor may choose to attend

(although rarely has) the separate opening of the legal year ceremonies in Wales, Northern Ireland and Scotland.

The judicial and legal communities look to the Lord Chancellor to fulfil the oath as a vital guarantor of the rule of law and of access to justice, and defender of judicial independence.

## **The Oath**

*“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”*

Taking those elements in turn:

### Rule of law and judicial independence

All ministers have a duty to comply with the law, and to uphold judicial independence. The Lord Chancellor duty goes beyond that: the oath requires him to swear that he will defend judicial independence.

There is no definitive guide to what the Lord Chancellor must do to fulfil his duty. But here are some general points:

- The Lord Chancellor, is the ‘judicial’ voice within Cabinet – explaining, where necessary, that judicial independence must be respected, and dissuading colleagues from attacking judicial decisions in terms that call into question ministerial adherence to the rule of law.
- Successive Lord Chancellors have been tested on their ability to articulate clearly that they understand, and are willing to exercise, their duty.
- The judiciary sometimes regards itself as the weakest of the three branches of government, without the machinery and influence enjoyed by the executive and the legislature. Judges guard their independence fiercely but still feel that they need the support and voice of the Lord Chancellor to ensure their position and independence are understood and respected.

The unique constitutional role of the Lord Chancellor also plays a part in policy formulation. You have a statutory duty to take account of the need for the public interest to be properly represented in decisions affecting the judiciary and the administration of justice. The decisions that you make as the minister responsible for the justice system are therefore often tested against the duty to uphold and defend judicial independence, and the duty of ensuring access to justice.

### Provision of resources

The Lord Chancellor has a duty to ensure provision of resources for the efficient and effective support of the courts and tribunals. The senior judiciary will look to you to secure a spending review settlement which has adequate resource for running the justice system (including making inroads in to covid backlogs) including providing adequate resource to deal with the maintenance backlog in the court estate.

In practical terms, this means the Lord Chancellor needs to engage with the senior judiciary on resourcing, and seek to agree an approach to the allocation of resources. If agreement is not reached, the Concordat sets out that the Lord Chief Justice can go to Parliament to express his concerns. This has not happened to date.

## **Duties in relation to the judiciary**

The 2005 Act gave most functions relating to management of the judiciary to the Lord Chief Justice (the Senior President of Tribunals has similar functions for tribunals), including judicial deployment and case listings, judicial welfare and judicial training through the Judicial College. The Lord Chancellor has a carefully prescribed role in relation to judicial appointments and conduct and is also

ultimately responsible for ensuring there are sufficient judges and for judicial terms and conditions, and for remuneration. The LC and the LCJ have statutory responsibilities with respect to the diversity of the judiciary- this is likely to receive particular focus in the next few months with the passage of the Public Service Pensions and Judicial Offices Bill, which is raising the mandatory retirement ages of judges to 75.

### Judicial appointments

The Lord Chancellor has a role in appointments to the High Court and above, although the process is run by the independent Judicial Appointments Commission (JAC). He also has a role in the appointment of some Northern Ireland courts judges, although No10 has a direct role for appointments to the NI Court of Appeal and Lord Chief Justice for Northern Ireland (LCJ NI). Dame Siobhan Keegan was sworn in as the Lady Chief Justice of Northern Ireland on 2 September 2021 (she is the first female chief justice of a UK nation).

The Lord Chief Justice and Senior President of Tribunals are responsible for appointments below the High Court in England and Wales, also on the advice of the Judicial Appointments Commission, and for the deployment of all judges.

### Judicial conduct

Jointly with the Lord Chief Justice (or the Senior President of Tribunals), the Lord Chancellor is responsible for decisions on judicial conduct. The Judicial Conduct and Investigations Office and the Judicial Appointments and Conduct Ombudsman are independent statutory bodies which provide the Lord Chancellor and the Lord Chief Justice and Senior President of Tribunals with advice on conduct and discipline matters.

## **Extent of role and UK Supreme Court**

The role is Lord Chancellor of Great Britain. Most of your responsibilities relate to England and Wales, although parts of the tribunals system are UK-wide. You also have powers in relation to judicial pay for devolved judges in Scotland and Northern Ireland.

In addition, the Lord Chancellor has some limited responsibilities for the UK Supreme Court. This is the only court with a UK-wide jurisdiction. Your responsibilities here are to ensure the Court is adequately resourced and to take steps to fill vacancies, on the advice of the selection panel specifically set up to run the appointment process.

## **Legal services framework in England and Wales**

The legal profession in England and Wales is independent of Government. The Lord Chancellor has certain responsibilities for the regulation of the profession. The regulatory framework is set out in the Legal Services Act 2007.

The Legal Services Board is the independent oversight regulator of the sector, funded by levy but accountable to Parliament through this department. The Lord Chancellor appoints its chair. You also have responsibility for approving or declining the Board's recommendations for regulatory changes, and for making any subordinate legislation to implement these.

You approve the annual recommendations for appointments to Queen's Counsel and honorary Queen's Counsel.

The Lord Chancellor's relationship with the profession goes far beyond regulation: they are key partners and stakeholders on court reform, legal aid and are a key part of the UK Government trade agenda.