



JUDICIARY OF
ENGLAND AND WALES

1 May 2007

Statement from Lord Justice Thomas on the creation of the Ministry of Justice

This statement was prepared to be given in evidence to the Constitution Committee of the House of Lords on 1 May 2007

- 1 The creation of a Ministry of Justice is not simply a machinery of Government change (which would ordinarily be solely for the executive to determine), but one that involves significant constitutional change. Unlike the reform of the office of Lord Chancellor, it appears possible for this change to be effected without legislation. However, its constitutional importance is undiminished. Our constitution, as the committee will appreciate, is based both on statute law and on constitutional understandings and conventions. These understandings and conventions include reliance upon full and appropriate respect for the different positions occupied by the legislature, the executive and the judiciary.
- 2 In the view of the judiciary the proposal to create a Ministry necessitates:
 - (i) a clear examination of the best way to achieve the necessary changes. The complexity of this task has become increasingly evident as work has progressed, just as it did after the decision was made to reform the office of Lord Chancellor.
 - (ii) the creation of a different relationship between the new Ministry, the judiciary and the court administration. This is necessary to ensure the independence of the judiciary in performing their duties to uphold the rule of law and deliver the proper administration of justice.
- 3 An examination by the judiciary of the implications of the proposed Ministry of Justice began immediately after the possibility of the immediate creation of such a Ministry was raised in the media on Sunday 22 January 2007. The judiciary pressed for detailed information: an outline paper detailing possible models for the Ministry was provided by the DCA. On 7 February 2007 a memorandum was sent to the Permanent Secretary of the DCA with two working papers, one on resources and HMCS, and another on sentencing. The judiciary asked in those papers for a thorough examination of the issues prior to the creation of the Ministry.

- 4 Discussions followed with the Permanent Secretary of the DCA and the Lord Chancellor. On 19 March 2007, some 10 days before the announcement by the Prime Minister, at the invitation of the Lord Chancellor, the Lord Chancellor and the Lord Chief Justice agreed to set up a working party which would report to both of them jointly. The terms of reference of that working party were limited by the Lord Chancellor's position that the working party must proceed on the basis of a number of specified parameters and in particular should not involve legislative change.
- 5 The judiciary agreed to participate to see if the necessary constitutional safeguards could be effected within these parameters, but made it clear that the parameters would have to be revisited if appropriate constitutional safeguards could not be provided within them.
- 6 The judiciary is of the view that three substantial issues must be addressed:
 - (i) **Finances:** Drawing on the experience of other countries where these problems have been addressed, the judiciary have taken the view that there must be appropriate and transparent mechanisms to ensure the necessary resources are provided for the courts. First, there must be a fixed mechanism to set the budget and operating plan with provision for capital expenditure; and, in the event of a dispute between the judicial and executive branches of government as to the resources necessary, the arbiter must be the legislature which ultimately votes the budget in accordance with its view as to priorities. It is also necessary to ensure that, if adjustments are proposed to the budget during the year (for various reasons), there is a similar open and transparent mechanism which must be followed before a change is made. The necessity for such mechanisms both for setting the budget and for any changes is self evident within a Ministry of Justice: in order to be independent and to be seen to be independent, the courts must be properly resourced and must also be protected from the adverse effects on the financial assumptions or planning of other parts of the Ministry which may result from any decisions which the judges may make in applying the law.
 - (ii) **Court administration and the position of HMCS:** The administrative infrastructure of a court system is integral to the independent administration of justice. The judiciary are drawing on the experience of other countries with Ministries of Justice, and in particular Ireland, the Netherlands and Denmark, where autonomous court administration with a greater degree of judicial participation has been very successful. It has underpinned the independence of the judiciary, improved the relationship between the judiciary and the court administration and improved the delivery of justice for the public. A new structure akin to these models is, in the view of the judiciary, a

constitutional safeguard made necessary by the creation of the Ministry of Justice.

- (iii) **Relations between the judiciary and the executive:** The relationships established just over a year ago through the Concordat and Constitutional Reform Act 2005 are complex. In addition, an equally complex set of relationships have been developed to improve the working arrangements between the executive and the judiciary, some of which are set out in the papers sent to you. Relations with the Lord Chancellor and a Ministry whose principal function relates to the courts cannot simply be transposed into a relationship with a Ministry with wide-ranging responsibilities for criminal justice and prisons and penal policy. The judiciary is very anxious, within proper constitutional principles, to continue to develop the relationship with the executive. However, working out the principles on which this is to be done and the effect on the operation of the Concordat and the Constitutional Reform Act 2005 is far from straightforward. For example, judicial representation on the board of the DCA, one of the important safeguards in the Concordat, is no longer appropriate for the board of the Ministry of Justice, given the conflicts of interest to which it will give rise. A great deal of thought is needed to ensure that the constructive and beneficial work done so far is not de-railed.

- 7 These are, in our view, the three main issues which the working party have begun to address within its terms of reference. Our meetings so far have been constructive in identifying all the issues. We are making progress, but difficult issues of principle still remain between those involved. These require thought, discussion and careful evaluation: they cannot be rushed. The working party will report to the Lord Chief Justice and to the Lord Chancellor as soon as it can. However, it is at this stage impossible to tell whether the working party will reach agreement on what should be done or whether the work will reveal that (at least in the view of the judiciary) the necessary changes cannot be made without legislation.
- 8 The papers provided by the judiciary in February 2007 and the memorandum sent by the Lord Chief Justice to all judges and magistrates on 29 March 2007 (when the creation of the Ministry was announced) made it clear that the judiciary considered that the Ministry of Justice should not be brought into existence until the necessary safeguards had been agreed, given the constitutional importance of the issues. The judiciary's view was not accepted.
- 9 Since its creation on 19 March 2007, the working party has therefore been endeavouring to work as quickly as possible. The pressure of time is imposing a significant burden on all members of the working party. We are particularly grateful to the officials who are supporting us and who bear the principal weight of this burden.

- 10 The completion of our work is urgent in the light of the fact that:
- (i) The Ministry will come into existence in a week;
 - (ii) There are already issues which highlight the constitutional difficulties which the creation of the Ministry will bring about. There are pending judicial reviews in two main areas – legal aid reforms and prisons. These are two areas of the Ministry’s budget which are demand-led but where the financial provision is already fixed. The potential conflicts of interest are already evident.
- 11 The problem in relation to legal aid is well understood, but possibly the problems in relation to the prisons need a word of explanation. It is a subject of particular public interest.
- 12 Under the present legislative framework it is the duty of the judiciary to sentence in accordance with legislation, decisions of the appellate courts and guidelines issued by the Sentencing Guidelines Council. It is the duty of the executive to provide the necessary prison places or funding for community sentences to give effect to decisions of the courts. The Minister in charge of penal policy must as a matter of law implement the decisions of the courts and find the resources to do so, but his resources are limited by what is provided by HM Treasury. Without new legislation, there is simply no Parliamentary mandate for the judiciary or the Sentencing Guidelines Council to take resources into account in their decisions or in formulating their guidelines. It is for Parliament to decide whether it is appropriate for them to do so.
- 13 One illustration of the problem is the pending judicial reviews in relation to prisons (and, in particular, the pressure on the parole system) which involve issues that, on one view, could have a material adverse effect on prison resources. There is a potential conflict of interest in a situation where the financial position of the courts may be perceived to be at risk from the effect of adverse financial consequences that judicial decisions may have on other parts of the same Ministry’s budget.
- 14 The present position is that the constitutional implications of the Ministry seem now to be clear. The working party are attempting to find an acceptable solution within the parameters laid down. However, we cannot predict whether we will be successful. Difficult issues of principle remain outstanding.
- 15 In any event, if we are to reach agreement, it will also be necessary to make amendments to the HMCS framework document, any changes to which are subject to HM Treasury consent. Furthermore, as the issues are of concern to the judiciary as a whole, the Lord Chief Justice has agreed that there will be appropriate consultation through the Judges’ Council. Finally, it will be necessary to embody the terms of any solution in a detailed constitutional instrument.

- 16 Clearly further debate and scrutiny of the issues and the possible solutions is essential both for the short and longer term. We would hope that the Committee would also permit us to update it when the position is clearer.

Lord Justice Thomas