

House of Commons Constitutional Affairs Committee

The creation of the Ministry of Justice

Sixth Report of Session 2006-07

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Sixth Report of Session 2006-07

Report, together with formal minutes, oral and written evidence

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The Constitutional Affairs Committee

The Constitutional Affairs Committee is appointed by the House of Commons to examine the expenditure, administration and policy of the Department for Constitutional Affairs (on 9 May the Department was renamed the Ministry of Justice) and associated public bodies.

Current membership

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The Reports and evidence of the Committee are published by The Stationery Office by Order of the House.

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Committee staff

The current staff of the Committee are Roger Phillips (Clerk), Dr Rebecca Davies (Second Clerk), Kate Akester (Adviser (Sentencing Guidelines)), Maik Martin (Committee Legal Specialist), Ian Thomson (Committee Assistant), Jane Trew (Committee Assistant - EDRM), Chryssa Poupard (Secretary), Henry Ayi-Hyde (Senior Office Clerk) and Jessica Bridges-Palmer (Committee Media Officer).

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1 Introduction

Our inquiry

1. Following more than two months of intense press speculation, the then Prime Minister, Rt Hon Tony Blair MP, announced on 29 March 2007 a major Machinery of Government change, affecting the Home Office and the Department for Constitutional Affairs (DCA).¹ The Home Office's responsibilities would be concentrated on counter-terrorism, policing and asylum and immigration and a new Ministry of Justice (MoJ) would be created to take on the responsibilities of the DCA and the criminal justice functions of the Home Office and its agencies — mainly the National Offender Management Service (which includes HM Prison Service and the Probation Service). The new MoJ would now have responsibility not only for constitutional matters, civil and administrative justice, the courts and legal aid, but also become the lead department for criminal justice policy and as such would 'house' the Office for Criminal Justice Reform, reporting trilaterally to the Secretary of State for Justice, the Home Secretary and the Attorney General.² It would be led by the Lord Chancellor as Secretary of State for Justice. A detailed explanation of the Machinery of Government change was provided in a Cabinet Office paper accompanying the Prime Minister's announcement.³

2. The Prime Minister's announcement prompted the Lord Chief Justice, Rt Hon Lord Phillips of Worth Matravers, to make a public statement on the same day, declaring that the announcement raised "important issues of principle".⁴ The Lord Chief Justice stated that "structures are required which will prevent the additional responsibilities taken over by the new ministry [of Justice] interfering with or damaging the independent administration and proper funding of the court service".⁵ According to the Lord Chief Justice, "the continuing problems of prison overcrowding and the availability of resources to provide the sentences imposed by the courts necessitate public debate" as, on account of the strains on the prisons' budget, judges might feel under pressure to impose sentences they did not believe to be appropriate. His view was that "structural safeguards must be put in place to protect the due and independent administration of justice".⁶ Provided that these concerns were addressed, he concluded that "there would be no objection in principle to the creation of a new ministry with responsibility for both offender management and the court service."

3. Immediately following the Prime Minister's announcement and the Lord Chief Justice's statement, we decided to explore the matters raised by the senior judiciary with Lord Falconer of Thoroton QC, the then Lord Chancellor and, initially, by inviting the Lord Chief Justice to submit more detailed comments to the Committee. The Lord Chief Justice

2 Ibid

5 Ibid

6 Ibid

¹ HC Deb, 29 March 2007, cols 133-5WS

³ Cabinet Office, Machinery of Government: Security and Counter-Terrorism, and the Criminal Justice System, 29 March 2007, www.cabinetoffice.gov.uk

⁴ Announcement of a Ministry of Justice – Statement by the Lord Chief Justice, 29 March 2007, www.judiciary.gov.uk

submitted the documents printed in the written evidence.⁷ On 17 April 2007, the Lord Chancellor gave oral evidence to us on the creation of the MoJ. On 9 May 2007, the new MoJ started its work, yet many of the issues raised by the Lord Chief Justice remained unresolved. On 22 May 2007, the Lord Chief Justice and the then Lord Chancellor appeared before us. The startling account both witnesses gave of the way they had learned of the plans to create the MoJ and the obvious lack of sensitivity for the judiciary's concerns relating to the Machinery of Government changes led us to issue this report. It addresses primarily matters of process and communication and is not intended to assess in substance the concerns raised by the senior judges.

Other inquiries and reports

4. The general issue of the process of Machinery of Government changes was the subject of a recent report by the Public Administration Select Committee, *Machinery of Government Changes.*⁸ This report not only provides a detailed analysis of the legal and procedural issues relating to Machinery of Government changes, but also comments on the process leading to the creation of the MoJ, with which we are in full agreement and which we commend.⁹

5. Throughout this session of Parliament, the House of Lords Select Committee on the Constitution, under the chairmanship of the Rt Hon Lord Holme of Cheltenham CBE, has conducted a wide-ranging inquiry into the relations between the executive, judiciary and legislature. Part of this inquiry has focused on matters germane to issues raised by the creation of the MoJ and the effective change in the political role of the Lord Chancellor; the Committee has taken substantial evidence on this issue.

⁷ Ev 24-27

⁸ Public Administration Select Committee, *Machinery of Government Changes,* Seventh Report of Session 2006-07, HC 672

⁹ E.g. in paras 1, 5, 25, 27, 33, 39 and 41.

2 Preparing the new Ministry of Justice

The Prime Minister's announcement and the Sunday Telegraph

6. The first authoritative report of proposals for splitting up the Home Office and creating a justice ministry appeared in the *Sunday Telegraph* on 21 January 2007. The then Home Secretary, Rt Hon John Reid MP, wrote in an article in that paper that "there must not be sacred cows when it comes to protecting security and administering justice—the two fundamental roles demanded of the Home Office and of the Home Secretary" and noted that "more radical changes" than short-term organisational measures within the existing Home Office might be unavoidable.¹⁰ While Dr Reid stopped short of directly proposing a radical shake up of his department, the paper reported on the same day that "sources close to the Home Secretary confirmed that one serious proposal was to split up the Home Office".¹¹

7. In our evidence session with the Lord Chief Justice and Lord Falconer on 22 May 2007, Lord Phillips told us that "he [the then Lord Chancellor] and I learned together, first of all of the possibility that there would be a Ministry of Justice when we read the *Sunday Telegraph*" on 21 January 2007.¹² When we put this statement to Lord Falconer, he confirmed that he "did not hear about it much longer before" the *Sunday Telegraph* article of 21 January.¹³ With reference to the newspaper article, he insisted that "it had to start somewhere and it did not start much before...".¹⁴ It was only after these press reports that the then Lord Chancellor and the Lord Chief Justice entered into discussions about the creation of the MoJ and the potential implications for the judiciary.¹⁵

8. The Prime Minister's announcement of the creation of the MoJ came on the day Parliament rose for Easter. The fact that neither House was given an opportunity properly to discuss the Government's plan prior to its taking effect led to considerable criticism by MPs and peers alike on the day of the announcement.¹⁶ Indeed, the Government did not publicly invite comments or consult on the creation of the MoJ, which had been a project Governments had considered on several occasions before 2007, as Lord Falconer confirmed in his oral evidence to us.¹⁷ The creation of the MoJ was a *fait accompli*. We note that not even the then Lord Chancellor appeared to have been informed of the previous Home Secretary's proposals for splitting the responsibilities of the Home Office.

15 Q 62

^{10 &#}x27;I can fix the problems, but I need three years' (Rt Hon John Reid MP), Sunday Telegraph, 21 January 2007, p 20

^{11 &#}x27;Reid wants to split the Home Office in two' (Patrick Hennessy), Sunday Telegraph, 21 January 2007, p 1

¹² Qq 62, 64

¹³ Q 160

¹⁴ Q 159

¹⁶ HC Deb, 29 March 2007, col 1640; HL Deb, 29 March 2007, col 1798

A matter of constitutional importance

9. Outside Parliament, the announcement of the creation of the MoJ received a largely warm welcome. Paul Cavadino, Chief Executive of the crime reduction charity NACRO, greeted the news as "an important step towards achieving a more coherent criminal justice system. Most European countries have long recognised the benefits of bringing responsibility for courts, prosecution, probation and prisons together in a single justice ministry".¹⁸ These comments were echoed by the Prison Reform Trust, stating that the establishment of the MoJ "could mark the start of a fairer, more balanced criminal justice system".¹⁹

10. However, the law reform organization JUSTICE, in its written evidence, considered that the combination of responsibilities hitherto divided between the Home Office and the DCA might raise concerns for the real and perceived independence of the judiciary in relation to the executive and the Lord Chancellor's role as guardian of the rule of law and judicial independence:

"The constitutional issue is whether there is any conflict possible between the duty to uphold the rule of law and the independence of the judiciary, on the one hand, and the taking of lead responsibility for criminal justice, on the other, by the new Secretary of State. There is a political element to this question: whether the enhanced criminal justice responsibilities will practically detract from the department's ability to obtain funds and attention for issues relating to the administration of justice and including the judiciary, courts and legal aid."²⁰

11. These comments reflect the concerns raised by the Lord Chief Justice in his statement of 27 March 2007 on the Machinery of Government changes as cited above. These centred on the exercise by the Lord Chancellor of his statutory duties to uphold judicial independence and ensure adequate resourcing of the courts under section 3(1) of the Constitutional Reform Act 2005 and section 1(1) of the Courts Act 2003. Prior to becoming Secretary of State for Justice on 9 May 2007, the Lord Chancellor's primary departmental responsibility as Secretary of State for Constitutional Affairs was for the courts, the judiciary, the civil justice system and legal aid. However, the creation of the MoJ added to the Lord Chancellor's responsibilities the more politically controversial and resource-intensive running of the Prison and Probation Services. This dramatic increase in the Lord Chancellor's role and remit is borne out by the number of staff of the old DCA and the new MoJ: while the DCA, on 31 March 2007, had 36,910 staff, the new MoJ now has 88,483;²¹ the number of staff has thus more than doubled. We were warned by the Lord Chief Justice that this amalgamation of responsibilities and, of course, budgets in the new MoJ could lead to a "real conflict of demand on a single budget".²² On 29 March 2007, Lord Phillips informed the Judges' Council in a letter that "the cost of the ministry's other

22 Q 75

^{18 &#}x27;Home Office to be split in two', Guardian Unlimited, 29 March 2007, www.guardian.co.uk

¹⁹ Ibid

²⁰ Ev 31

²¹ HC Deb, 20 June 2007, cols 1836-1837W

responsibilities, and in particular, that of the prison service and offender management, must not be permitted to put at risk the proper funding of the court service."²³

12. In its position paper of early April 2007, the Judiciary of England and Wales insisted that the creation of the MoJ "is not a simple Machinery of Government change, but one which impacts on the separation of powers by giving the Lord Chancellor, as Minister for Justice, decision-making powers which are incompatible with his statutory duties for the courts and the judiciary".²⁴ In this context, both the Lord Chief Justice and Lord Justice Thomas, the former Senior Presiding Judge for England and Wales, went as far as describing as a "serious constitutional problem" the situation which the establishment of the MoJ and subsequent lack of an agreement on structural safeguards for the independence of the judiciary in terms of the resourcing and administration of the courts had created.²⁵ This was not seen by the judiciary as a merely theoretical problem. They indicated that there had already been disagreement between the judiciary and the DCA/MoJ about whether the terms of the *Concordat*²⁶ between Lord Falconer and the judiciary in Comprehensive Spending Review discussions involving the DCA/MoJ.²⁷

13. Despite having advertised the creation of the MoJ as "an important—indeed, a landmark—moment in the development of our public services and our justice system",²⁸ Lord Falconer, the then Lord Chancellor, while not sharing the judges' view that there was a constitutional problem, nevertheless acknowledged that this was a "serious matter".²⁹ In the House of Lords, Lord Falconer insisted that the creation of the MoJ neither reduced the responsibilities of the office of Lord Chancellor in protecting judicial independence, nor reduced his ability to do so in practice.³⁰ The then Prime Minister, Tony Blair, confirmed his Lord Chancellor's assessment that there was no constitutional problem in relation to the establishment of the MoJ in response to a question from our Chairman in oral evidence to the Liaison Committee on 18 June 2007. He said that this process was not "a constitutional change".³¹ He added:

"I think the real concern for the judiciary, and I entirely understand this, [...] they want to know that there is someone in Government that they can go to and make their case to and, also, they want to know that they are not going to be at a disadvantage in relation to courts' funding because the Ministry of Justice has got the prisons and probation in it too. I totally understand that, I do not actually think it is a constitutional point."³²

²³ Ev 24

²⁴ Ev 25

²⁵ Qq 47, 86

²⁶ See para 17.

²⁷ Q 92 [Lord Phillips of Worth Matravers]

²⁸ HL Deb, 29 March 2007, col 1797

²⁹ Q 182

³⁰ HL Deb, 24 May 2007, col 807

³¹ Oral evidence taken before the Liaison Committee on 18 June 2007, HC (2006-07) 300-ii, Qq 167 & 169

14. Professor Alan Page, of Dundee University, disagreed with this position. He told the Lords Constitution Committee on 9 May 2007 that the establishment of the MoJ:

"...is not just a machinery of justice change because it does have a very real constitutional significance...namely the consequences for the relationship between the funding of the judicial system and judicial independence. I think that is the key constitutional issue which is raised by this machinery of government change."³³

Similarly, in its most recent report on Machinery of Government changes, the Public Administration Select Committee noted that it shared the judiciary's view that the establishment of the MoJ had serious constitutional implications which required a proper, open examination in order to ensure both Parliament and the Judiciary as well as the Executive were content with the proposed arrangements.³⁴

15. We agree with this assessment. Significant changes to the Lord Chancellor's responsibilities as Secretary of State took place as a consequence of the creation of the MoJ. They are of constitutional importance as they may affect, in practice or public perception, the exercise of the Lord Chancellor's core statutory function of guardian of judicial independence, both in organisational and budgetary terms. They can have the potential to upset the carefully balanced arrangements agreed between the judiciary and the Lord Chancellor in the *Concordat* of 2004 which was given statutory footing in the Constitutional Reform Act 2005. Such changes go far beyond a mere technical Machinery of Government change and as such should have been subject to proper consultation and informed debate both inside and outside Parliament.

The lessons of 2003

16. The situation in Spring 2007 mirrored the unsatisfactory manner in which a previous Machinery of Government change involving the office and responsibilities of the Lord Chancellor was brought about in 2003: on 11 June 2003, the then Prime Minister announced a ministerial reshuffle and Machinery of Government changes. The post of Lord Chancellor was to be abolished in its entirety and the Lord Chancellor's Department replaced by a new Department for Constitutional Affairs, headed by a Secretary of State for Constitutional Affairs. The radical announcement was almost completely unexpected.

17. A consultation paper issued in September 2003³⁵ gave more detail of the necessary legislative changes needed to abolish the office. On the basis of these consultation papers and negotiations between the then Lord Chancellor and the then Lord Chief Justice, Lord Woolf, both agreed what has since become known as the '*Concordat*': *Constitutional Reform: The Lord Chancellor's judiciary-related functions: Proposals.*³⁶ This document laid down detailed rules on the relationship between the Lord Chancellor as Secretary of State for Constitutional Affairs and the judiciary. The *Concordat* became the basis for the

³³ Oral evidence taken before the House of Lords Select Committee on the Constitution on 9 May 2007, HL (2006-07) 151, Q 480

³⁴ Public Administration Select Committee, *Machinery of Government Changes*, Seventh Report of Session 2006-07, HC 672, para 41

³⁵ DCA, Constitutional Reform: reforming the office of the Lord Chancellor, CP 13/03, September 2003

³⁶ http://www.dca.gov.uk/consult/lcoffice/judiciary.htm

Constitutional Reform Act 2005, which received Royal Assent on 24 March 2005, and which put the agreed relationship between the Secretary of State and the judiciary on a statutory footing. On 3 April 2006, the statutory changes to the judicial role of the Lord Chancellor took effect.

18. The way in which the changes to the ancient office of Lord High Chancellor of Great Britain were initially announced by prime ministerial press notice and subsequently partially withdrawn and significantly modified, attracted a great deal of criticism both inside and outside Parliament. When the then Prime Minister gave evidence to the Liaison Committee on 3 February 2004, he conceded that mistakes had been made in the way in which the changes to the office of the Lord Chancellor were initially dealt with:

"...it would have been better probably had we published a paper, had we taken a step back, separated the reshuffle very clearly from the departmental changes and then presented it at the very outset as it indeed then became, because what it then became was not in fact a decision that was rubber stamped and forced through, it actually became a consultation with papers being published and then a debate in the House of Lords. I think we could have in retrospect—this is entirely my responsibility done it better."³⁷

He told the Liaison Committee that pressure for constitutional change had been building up in his mind³⁸ and led to the announcement of 12 June 2003. He stressed again that, while the policy decision to change the role of the Lord Chancellor was right, "we could have done it better and done it differently and of course we should learn the lessons of that".³⁹

19. The Constitutional Affairs Committee in the last Parliament, in its report *Judicial Appointments and a Supreme Court (court of final appeal)*,⁴⁰ commented that "it is a matter of regret that the proposals [to change the office of Lord Chancellor and to create a Supreme Court for the UK] were formulated and announced in a way that was hurried and evidently without the knowledge of many of those who would be expected to have been extensively consulted." The Committee concluded that:

"The way in which these fundamental proposals were announced, as a part of a Cabinet reshuffle and without consultation or advice, has created anxieties amongst the most senior members of the judiciary and was felt by some supporters of the changes to have been unhelpful in presenting the case in favour of them."⁴¹

20. When the Chairman of this Committee referred the then Prime Minister, at his appearance before the Liaison Committee on 18 June 2007, to the apologetic comments he had previously made in evidence to the Liaison Committee in February 2004,⁴² Tony Blair

³⁷ Oral evidence taken before the Liaison Committee on 18 June 2007, HC (2006-07) 300-ii, Q 65

³⁸ Ibid., Q 64

³⁹ Ibid., Q 66

⁴⁰ Constitutional Affairs Committee, Judicial Appointments and a Supreme Court (court of final appeal), First Report of Session 2003-04, HC 48-I, para 14

⁴¹ Ibid., para 14

⁴² See above para 18

defended the way the creation of the MoJ had been trailed and finally announced on 29 March 2007 as being "a different situation altogether" ⁴³ from the changes to the office of Lord Chancellor announced in June 2003, as the present changes did not involve "a constitutional change".⁴⁴ However, we disagree with this assessment and note the similarities between the way the changes in the office of Lord Chancellor in 2003 were announced and the way the creation of the MoJ was trailed in early 2007.

21. The process leading to the creation of the Ministry of Justice leaves the impression that the Government has failed to learn the crucial lessons from the way changes to the Lord Chancellor's office were announced and subsequently effected between 2003 and 2005. As in 2003, the Government has manifestly underestimated the significance of the Machinery of Government changes announced on 29 March 2007.

22. Lack of sufficient consultation prior to the initial, Government-prompted, public proposal and then announcement of the creation of the Ministry of Justice has led to a highly undesirable public conflict between the senior judiciary and the previous Lord Chancellor. This conflict appeared to have been exacerbated by an underestimation of, and insensitivity for, the concerns of the judiciary which changes to the role and responsibilities of the Lord Chancellor may raise. Had the lessons of 2003 been learned, we believe such a situation could have been avoided.

43 Oral evidence taken before the Liaison Committee on 18 June 2007, HC (2006-07) 300-ii, Q 164

Conclusions and recommendations

- 1. Significant changes to the Lord Chancellor's responsibilities as Secretary of State took place as a consequence of the creation of the MoJ. They are of constitutional importance as they may affect, in practice or public perception, the exercise of the Lord Chancellor's core statutory function of guardian of judicial independence, both in organisational and budgetary terms. They can have the potential to upset the carefully balanced arrangements agreed between the judiciary and the Lord Chancellor in the Concordat of 2004 which was given statutory footing in the Constitutional Reform Act 2005. Such changes go far beyond a mere technical Machinery of Government change and as such should have been subject to proper consultation and informed debate both inside and outside Parliament. (Paragraph 15)
- 2. The process leading to the creation of the Ministry of Justice leaves the impression that the Government has failed to learn the crucial lessons from the way changes to the Lord Chancellor's office were announced and subsequently effected between 2003 and 2005. As in 2003, the Government has manifestly underestimated the significance of the Machinery of Government changes announced on 29 March 2007. (Paragraph 21)
- 3. Lack of sufficient consultation prior to the initial, Government-prompted, public proposal and then announcement of the creation of the Ministry of Justice has led to a highly undesirable public conflict between the senior judiciary and the previous Lord Chancellor. This conflict appeared to have been exacerbated by an underestimation of, and insensitivity for, the concerns of the judiciary which changes to the role and responsibilities of the Lord Chancellor may raise. Had the lessons of 2003 been learned, we believe such a situation could have been avoided. (Paragraph 22)

Formal minutes

Tuesday 17 July 2007

Members present:

Mr Alan Beith, in the Chair

Robert Neill Mr Andrew Tyrie Keith Vaz Dr Alan Whitehead

Draft Report (The creation of the Ministry of Justice), proposed by the Chairman, brought up and read.

Ordered, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 22 read and agreed to.

Conclusions and recommendations read and agreed to.

Resolved, That the Report be the Sixth Report of the Committee to the House.

Ordered, That the Chairman do make the Report to the House.

Several papers were ordered to be reported to the House for printing with the Report

[Adjourned till Tuesday 24 July at 4.00pm

Witnesses

Tuesday 17 April 2007	Page
Rt Hon Lord Falconer of Thoroton QC, a Member of the House of Lords, Secretary of State and Lord Chancellor and Alex Allan, Permanent Secretary, Department for Constitutional Affairs	Ev 1
Tuesday 22 May 2007	
Rt Hon Lord Phillips of Worth Matravers, a Member of the House of Lords, Lord Chief Justice of England and Wales, and Rt Hon Lord Justice Thomas	Ev 6
Rt Hon Lord Falconer of Thoroton QC, a Member of the House of Lords, Secretary of State and Lord Chancellor and Alex Allan, Permanent Secretary,	
Department for Constitutional Affairs	Ev 13

List of written evidence

1	Rt Hon Lord Phillips of Worth Matravers, Lord Chief Justice of	
	England and Wales	Ev 24
2	JUSTICE	Ev 30
3	Rt Hon Lord Falconer of Thoroton QC, Secretary of State for Constitutional Affairs and Lord Chancellor	Ev 31

Reports from the Constitutional Affairs Committee

Session 2006-07

First Report	Party Funding	HC 163
	Government response	Cm 7123
First Special Report	Party Funding - Oral evidence from the Lord Chancellor on the	HC 222
	role of the Attorney General	
Second Report	Work of the Committee 2005-06	HC 259
Second Special Report	Scrutiny of Constitutional Reform	HC 907
Third Report	Implementation of the Carter Review of Legal Aid	HC 223
	Government response	Cm 7158
Fourth Report	Freedom of Information: Government's proposals for reform	HC 415
Fifth Report	Constitutional role of the Attorney General	HC 306

Session 2005-06

First Report	The courts: small claims	HC 519
	Government response	Cm 6754
Second Report	The Office of the Judge Advocate General	HC 731
Third Report	Compensation culture	HC 754
	Government response	Cm 6784
Fourth Report	Legal Services Commission: removal of Specialist Support	HC 919
	Services	
Fifth Report	Compensation culture: NHS Redress Scheme	HC 1009
	Government response	Cm 6784
First Special Report	Legal Services Commission's response to the Fourth Report on	HC 1029
	removal of Specialist Support Services	
Sixth Report	Family Justice: the operation of the family courts revisited	HC 1086
Seventh Report	Freedom of Information—one year on	HC 991
	Government response	Cm 6937
Eighth Report	Reform of the coroners' system and death certification	HC 902

Session 2004–05

First Report	Freedom of Information Act 2000 — progress towards implementation	HC 79
	Government response	Cm 6470
Second Report	Work of the Committee in 2004	HC 207
Third Report	Constitutional Reform Bill [Lords]: the Government's proposals	HC 275
	Government response	Cm 6488
Fourth Report	Family Justice: the operation of the family courts	HC 116
	Government response	Cm 6507
Fifth Report	Legal aid: asylum appeals	HC 276
	Government response	Cm 6597
Sixth Report	Electoral Registration (Joint Report with ODPM: Housing,	HC 243
	Planning, Local Government and the Regions Committee)	
	Government response	Cm 6647
Seventh Report	The operation of the Special Immigration Appeals Commission	HC 323
	(SIAC) and the use of Special Advocates	
	Government response	Cm 6596