



JUDICIARY OF  
ENGLAND AND WALES

## ***The Accountability of the Judiciary***

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### ***Introduction***

The constitutional changes reflected in the Constitutional Reform Act 2005 (“CRA”), in particular the displacement of the Lord Chancellor as the Head of the Judiciary and the creation of a Supreme Court, led to new interest in the judiciary as an institution and in the issue of the accountability of judges and the judiciary.

Both individual judges and the judiciary as a branch of the state are subject to a number of forms of accountability which are not incompatible with their individual and institutional independence. These are, however, not always understood: nor are the necessary limits to judicial accountability required to protect that individual and institutional independence.

So in what sense, if any, are they “accountable”, and to whom?

The forms of accountability and their limits are discussed below. The limits result from the acknowledged need in a democracy for an independent and impartial judiciary which is free from improper influence.

## **Individual judges and the position of the judiciary as a branch of the state**

In the past, attention has primarily been focussed on the position of individual judges. There was almost no consideration of the position of the judiciary as an institution. The reason for this was that the Lord Chancellor, as the Head of the Judiciary, was responsible through Parliament to the public for the overall efficiency of the justice system. Accountability was thus achieved through the ordinary channel of ministerial responsibility.<sup>1</sup> There was little need for the consideration of the position of the judiciary as an institution separately from the position of the Department and Minister responsible for the justice system. This has now changed.

## **The respective responsibilities of the Lord Chancellor and the Lord Chief Justice**

The present position, as now more clearly demarcated by the CRA and the Concordat, is:

- The Lord Chancellor remains responsible through Parliament to the public for the funding of and the provision of the administrative system for the courts pursuant to Part 1 of the Courts Act 2003. In particular, pursuant to section 1 the Lord Chancellor is responsible for ensuring “that there is an efficient and effective system to support the carrying on of the business of” the courts, that is the provision and allocation of resources for the court service and the judiciary, and for the education and training of the judiciary. The Lord Chancellor is also responsible for setting the framework for the organisation of the court system, including functional and geographical jurisdictional boundaries.
- The Lord Chief Justice is responsible for deployment of individual members of the judiciary, the judicial business of the courts (including the allocation of work within the courts), and the well-being, training and provision of guidance for the judiciary.
- There is concurrent responsibility for some matters, for example appointment of Presiding Judges and discipline. Responsibility for other matters is allocated to either the Lord Chancellor or the Lord Chief Justice, but subject to a duty to consult the other.

This requires there to be a working relationship between the Lord Chancellor and the Lord Chief Justice.

The accountability of individual judges and of the judiciary as an institution, a branch of the state is considered below. Under current legislation the position of tribunal judges differs from that of the judiciary and their position is not considered.

## ***Issues and principles***

There are three issues: what is meant by “accountability”, and for what and to whom should individual judges and the judiciary as an institution be accountable.

### **What is meant by “accountability”?**

Accountability was once seen as part of a command and control relationship. Today, however, the concept is more fluid including a number of practices which explain, justify and open the area in question to public dialogue and scrutiny. The difference is captured by Professor Vernon Bogdanor’s distinction between “sacrificial” and “explanatory” accountability.<sup>2</sup> The former involves taking the blame for what goes wrong, and forfeiting one’s job if something goes seriously wrong.

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<sup>1</sup> See e.g. Irvine *Human Rights, Constitutional Law and the Development of the English Legal System* (2003) 205; Shetreet, *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary* (1976), 39-41.

<sup>2</sup> Bogdanor, *Parliament and the Judiciary: The Problem of Accountability*, (Third Sunningdale Accountability Lecture 2006); Le Sueur in *Independence, Accountability and the Judiciary* (BIICL 2006), eds Andeanas and Fairgrieve, 49-50.

The latter involves giving an account of stewardship, for instance, in the case of ministers to Parliament and to the electorate.

It is generally accepted that, save in accordance with the Act of Settlement 1701, judges cannot be held accountable either to Parliament or to the executive in the sacrificial sense and that they cannot be externally accountable for their decisions. Such accountability would be incompatible with the principle of the independence of the judiciary. But, save for the House of Lords, they are held to account by higher courts hearing appeals, and (save where the issue is one of EU law) it is open to Parliament to legislate in order to reverse the effect of a decision or body of doctrine. Moreover, the duty to give reasons for decisions is a clear example of “explanatory” accountability which assists transparency and scrutiny by the other branches of the state and the public (as well as facilitating appeals).

Some consider that a judge cannot be both independent and externally accountable, and that even “explanatory” accountability is incompatible with or a danger to judicial independence. The late Lord Cooke of Thorndon argued that “... [j]udicial accountability has to be mainly a matter of self-policing; otherwise, the very purpose of entrusting some decisions to judges is jeopardised”.<sup>3</sup>

In relation to the judiciary of England and Wales, it is suggested that the position now is that there are a number of practices which can be understood as forms of accountability in one or other of the senses of that term. They and their limits are discussed in the paragraphs below. It is suggested that their limits stem from the requirements of the principle of judicial independence.

### **For what should individual judges and the judiciary as an institution be accountable?**

Once there is recognition that some practices which fall within the broad and amorphous meaning now given to the term “accountability” are not incompatible with the independence of individual judges and the judiciary, the question arises as to what these are and for what the judiciary should be accountable.

In answering this question the following five principles are of central importance:

- a. The nature and form of accountability depends on the responsibilities and conduct of the individual or the group.
- b. The vital importance of the independence of individual judges and the judiciary as a body, now recognised by section 3 of the CRA, follows from the judiciary’s core responsibility as the branch of the state responsible for providing the fair and impartial resolution of disputes between citizens and between citizens and the state in accordance with the prevailing rules of statutory and common law.
- c. Neither individual judges nor the judiciary as a body should be subject to forms of accountability prejudicing that core responsibility.
- d. Within the resources provided, and subject to the areas for which there is shared responsibility with the Lord Chancellor, the responsibility of the Lord Chief Justice for deployment of individual judges, the allocation of work within the courts, and the well-being, training and guidance of serving (full and part-time) judges, mean that the judiciary is responsible for:-
  - i. An effective judicial system, including the correction of errors;
  - ii. Training judges in the light of changes in law and practice; and
  - iii. Identifying and dealing with pastoral, equality, and health and safety issues concerning serving judges.

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<sup>3</sup> Robin Cooke, *Empowerment and Accountability: the Quest for Administrative Justice* (1992) 18 Commonwealth Law Bulletin 1326.

The Lord Chancellor and the Lord Chief Justice share responsibility for the provision of a complaints and disciplinary system to identify and deal with issues of competence, misconduct, and personal integrity.

- e. Within a common law system the judiciary is responsible for the interpretation of statutes and the development of the non-statutory principles embodied in case-law. This is done by the system of precedent and incremental development of the principles of law, in particular by appellate courts.

Comments on these principles:

**“a”:** This follows from the proposition that one cannot properly be made accountable for that for which one is not responsible. Accordingly, for example, notwithstanding the extent of judicial representation on the Judicial Appointments Commission, it is the Commission and not the judiciary which is responsible for and therefore accountable for appointments and it is the Lord Chancellor who is responsible for and therefore accountable for providing resources for the courts and the judiciary. For this reason, issues of accountability concerning the appointment process and the resourcing of the courts are not discussed.

**“b”:** Judicial independence is not an absolute concept and there are many formulations of it.<sup>4</sup> There is, however, general agreement that the minimum requirements are that the judiciary is impartial, that its decisions are accepted, that it is free from improper influence, and that it has jurisdiction, directly or by way of review, over all issues of a justiciable nature so that it is capable of rendering justice on all issues of substantial legal and constitutional importance.<sup>5</sup>

**“c”:** The executive, legislative and judicial branches of the state should show appropriate respect for the different positions occupied by the other branches (see e.g. the Commonwealth’s *Latimer House Principles*. The need for appropriate respect for the different positions occupied by others also applies to respect for and by the media. The branches of the state should respect the importance in a democratic society of vigorous scrutiny by the media, and the media should recognise the positions of and restrictions on the branches of the state, including the judiciary. The limits of what it is proper for judges to say to Parliamentary Committees, Ministers, the media, or in lectures, follow from the need to safeguard the core constitutional responsibility of the judiciary. The corollary should be that government ministers, Members of Parliament, and the media should also respect the need to safeguard and to avoid prejudicing or corroding this core responsibility. That should limit what it is appropriate to say to or about judges and individual decisions.

**“d”:** The structure of the system including the appellate process and the process for making complaints about the conduct of judges is determined by statute and regulation and, in the case of complaints and discipline, by the Concordat.<sup>6</sup> The appropriate forms of accountability are thus in part identified by those instruments. To furnish information about court process, delays, workloads, training, appeals, complaints, lack of integrity and misconduct and equality issues to Parliament and the public is an appropriate way of explaining, justifying and opening these areas to public examination and scrutiny. It can also identify the boundary between the respective responsibilities of the judiciary (for the business of the courts) and of the Lord Chancellor (for resourcing the courts) and HM Courts Service (HMCS) (for providing court buildings and court staff). To voluntarily offer what is a form of “explanatory” accountability for the matters which are

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<sup>4</sup> See the United Nations *Basic Principles on the Independence of the Judiciary* (1985), the European Charter on the Statute for Judges, adopted by the Council of Europe in 1998, the Bangalore Principles of Judicial Conduct, 2002, the Commonwealth (Latimer House), *Principles on the Accountability of and the relationship between the Three Branches of Government*, agreed by Commonwealth Law Ministers and Heads of Government in 2003, and the Beijing Statement of Principles of the Independence of the Judiciary.

<sup>5</sup> See for example, page 10 of the Latimer House Principles.

<sup>6</sup> There are currently discussions between the Lord Chancellor and the Lord Chief Justice about their respective responsibilities in relation to HMCS.

the responsibility of the judiciary set out in “d” is not inconsistent with the requirements of judicial independence.

“e”: One of the justifications for two levels of appeal (to the Court of Appeal and then to the House of Lords) is the particular responsibility of the judiciary in a common law system for developing the law.

### **To whom are individual judges and the judiciary accountable?**

Four forms of accountability are considered:

- Internal accountability to more senior judges or courts by way of (a) the system of appeals against judicial decisions, and (b) procedures for dealing with complaints about the conduct of judges,
- External accountability to the public by way of amenability to scrutiny in particular by the media, but more widely by civil society,
- Accountability to the executive branch of the state (the Government), and
- Accountability to the legislative branch of the state (Parliament).

These forms of accountability overlap. For instance, the appeal and complaints processes provide both internal accountability and accountability to the public, and the giving of evidence to legislative committees provides direct accountability to Parliament and indirect accountability to the public.

### ***The accountability of individual judges***

#### **Accountability to the executive of the state**

Under the Act of Settlement 1701 and subsequent legislation (currently the Supreme Court Act 1981, section 11(3) as amended by the CRA) judges of the High Court and the Court of Appeal hold office during “good behaviour”. This protection was given to protect judges against the power of the executive. These judges are not individually accountable to the executive in their capacity as such in either the “sacrificial” or the “explanatory” senses. It is axiomatic that safeguards on their tenure are a vital part of the independence of the judiciary.

That is not to say that the executive in the form of the Lord Chancellor has no role to play in the consideration of complaints and disciplinary proceedings made against judges. Such accountability, however, is subject to the limits set out in the CRA and the Concordat. The fundamentally important requirement is that the Lord Chancellor and the Lord Chief Justice have to agree before a judge is removed or disciplined in some other way. The fact that both have a role ensures that the independence of an individual judge is not improperly infringed, either by the executive, or internally by another member of the judiciary.

#### **Accountability to the legislative branch of the state**

As has been stated, both Houses of Parliament have the power, originating in the Act of Settlement, to petition the Queen for the removal of a judge of the High Court and the Court of Appeal, i.e. the ultimate form of accountability. It has not been exercised in modern history.

Turning to other forms of accountability, subject to a rule (“the *sub judice* rule”) preventing the discussion of ongoing cases, the decisions and conduct of individual judges may be mentioned in debates in either House. This, however, does not mean that judges are accountable to Parliament for their decisions in particular cases, save insofar as Parliament may legislate to reverse the effect

of a decision (on which see below). Accountability for their decisions is incompatible with judges' necessary independence.

Individual judges may also be invited to give evidence to Parliamentary Committees. Under Standing Orders, Select Committees and their sub-Committees have power to "send for persons, papers and records" relevant to their terms of reference. In modern times judges who have been asked to attend have done so voluntarily, subject to the well-established and long-standing rules and conventions that prevent judges from commenting on certain matters.<sup>7</sup> Parliamentary Committees respect these rules and conventions. The prohibited matters include; the merits of government policy, the merits of individual cases whether involving that judge or other judges, or of particular serving judicial officers, politicians and other public figures, and the merits, meaning or likely effect of provisions in prospective legislation.

### **Internal accountability to "the judiciary"**

In the sense that their decisions are subject to appeal and other judges are responsible for the allocation of cases to them, individual judges are accountable to senior judges or judges holding positions of responsibility. As for the conduct of judges, a working group established by the Judges' Council published a *Guide to Judicial Conduct* in October 2004.<sup>8</sup> This seeks to provide guidance on matters such as; impartiality, integrity, competence and diligence, personal relationships and perceived bias and activities outside the court.

The responsibilities of the Heads of Division, Presiding, Resident and Family Liaison and Chancery Supervision Judges, and judges in charge of a particular jurisdiction, are designed to assist in the effective management of judicial work.<sup>9</sup> They must be exercised with due regard to the importance of the need to respect the independence of individual judges in relation to the decisions before them. This means, for example, that they cannot tell another judge how to decide a case. Decisions as to listing and allocation are designed to ensure that cases are heard by an appropriate judge and that the available judiciary is fully and effectively deployed within the resources provided by the executive branch of the state. It is to be observed, however, that one of the guarantees of independence under Article 6 of the European Convention of Human Rights, reflecting underlying common law principle, is that judges must be free from outside instructions or pressure from other members of the court or the judiciary. This limits the extent and form of discipline to which a judge may be subjected.

### **Accountability to the public**

The formal processes of court proceedings provide a form of accountability to the public enabling scrutiny of the work of individual judges. As a general rule court proceedings and the decisions of judges are made in public. Decisions must be reasoned, and are subject to comment, often robust comment, by the media and other commentators. The quality of individual decisions is also subject to control in the form of appeal to higher courts against alleged errors. This identification and correction of error by appellate courts is also public and reasoned.

Complaints against the personal conduct of the judiciary (other than against decisions in proceedings) are handled by the Office for Judicial Complaints. Ultimately a report is made to the Lord Chief Justice and Lord Chancellor. Complaints about the handling of such complaints can be made to the Judicial Appointments and Conduct Ombudsman.

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<sup>7</sup> *Guidance to judges agreed by the Judicial Executive Board in July 2006 is available on the judiciary's website ([www.judiciary.gov.uk](http://www.judiciary.gov.uk)).*

<sup>8</sup> *Available on the judiciary's website.*

<sup>9</sup> *See The Responsibilities of Resident Judges and Designated Civil and Family Judges (July 2004), esp. paragraphs 9, 10(a) and 11(a). Available on the judiciary's website.*

## **The limits of these forms of accountability and practices**

Reference has been made to the limits on what a judge may properly deal with in giving evidence to a Parliamentary Committee and the fact that High Court judges and above can only be removed by the Queen on an address from both Houses of Parliament. Other judges can be removed for incapacity or misconduct pursuant to statutory powers.

When the Lord Chancellor was Head of the Judiciary he exercised the power to remove members of the circuit and district benches alone. The changes in the nature of the office of Lord Chancellor in 2003 mean this is no longer appropriate and the CRA and the Concordat provide he may only do so if the Lord Chief Justice agrees<sup>10</sup>. The Lord Chief Justice may only suspend a person from a judicial office if the requirements of section 108(4)-(7) are satisfied.

Judges of the High Court and the Court of Appeal court are also absolutely immune from personal civil liability in respect of any judicial act done in the *bona fide* exercise of their office as a judge of that court.

The position of circuit and district judges who sit in courts of limited jurisdiction is different. They may be in certain circumstances liable in tort for acts beyond their jurisdiction and to judicial review proceedings. The immunity extends to judicial acts undertaken by officers of the courts but not to administrative acts by HMCS.

The reason for a judge's immunity from civil suit is "so that he should be able to do his duty with complete independence and free from fear". It is not because the judge has any privilege to make mistakes or to do wrong. The appeal system deals with such matters, and the criminal courts deal with criminal wrongdoing.<sup>11</sup>

## ***The institutional accountability of the judiciary***

### **Introduction**

There are clear links between the features of individual accountability and the question of institutional accountability.

It is important to distinguish the accountability of the judiciary as an institution from that of the courts as an institution and that of HMCS. This is because of the responsibility of the Lord Chancellor for the resourcing of the courts. For example, if a lack of resources means there are insufficient courts, court staff or judges and the result of this is delay, it is the Lord Chancellor and not the judiciary who is responsible and accountable.

The responsibility of the judiciary for the deployment of judges, training, pastoral issues, part of the complaints and disciplinary system, and the provision of an effective judicial system within the resources provided mean that it is legitimate for there to be some form of accountability in respect of these matters. In respect of those matters on which the judiciary share responsibility with the Lord Chancellor, it is legitimate for there to be a measure of "explanatory" accountability by the judiciary. The remainder of this section considers existing forms of such accountability.

### **Accountability to the executive branch of the state**

The reasons precluding the accountability of individual judges to the executive apply equally to institutional accountability. In the light of the dangers to judicial independence of direct accountability to the executive, it would appear that the primary forms of accountability must

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<sup>10</sup> Section 17(4) of the Courts Act 1971 and section 11(5) of the County Courts Act 1984, both as amended by paragraphs 68 and 164 of Schedule 4 to the CRA.

<sup>11</sup> *Sirros v Moore* [1975] 1 QB 118, 133, 148. See also *Re McC* [1985] AC 528.



either be to the legislature or to the public in the sense that the system is made amenable to and subjected to scrutiny by civil society.<sup>12</sup>

### **Accountability to the legislative branch of the state**

This takes a number of forms. The first is strictly a matter of control rather than accountability. Save where the issue is one of EU law, Parliament may change the law by legislation reversing a decision or decisions concerning the interpretation of a statute or a body of common law doctrine.

Judges also give evidence to legislative committees in a representative capacity. The basis for such invitations and the matters on which judges should not give evidence are set out above, and more fully, in July 2006 Guidance produced by the Judicial Executive Board (JEB).<sup>13</sup> The *Guidance* recognises that an individual judge might appear as a representative. It states that judges should carefully consider whether they can answer questions about matters concerning the administration of justice which fall outside their area of judicial responsibility or previous responsibility.

The boundaries of legitimate questioning reflect the need to protect the independence and impartiality of the judiciary. Increasingly, committees are interested in hearing from a judicial witness who can give evidence in a representative capacity, although there are also invitations to judges because of their experience. Senior judges including the Lord Chief Justice, the Master of the Rolls, President of the Queen's Bench Division, President of the Family Division, the lead judge in the Administrative Court, the Judge Advocate General, and the Senior District Judge responsible for extradition have responded to invitations by Parliamentary Committees and have given evidence in a representative capacity.

The giving of evidence pursuant to such invitations by representatives of the judiciary, including those responsible for a particular jurisdiction, is a form of institutional "explanatory" accountability. The accountability is primarily to Parliament, but indirectly it is also to the public. Select Committees can also be an appropriate forum for the Lord Chief Justice or other senior judges to explain or state their views on aspects of the administration of justice that are of general interest or concern and upon which it is appropriate for them to comment. The appearance of judges before Select Committees should, however, be a relatively rare, and thus a significant event less the proper boundary between the judiciary and Parliament is crossed. Appearances by judges before Parliamentary Committees should be a relatively rare and significant event. Such appearances must be truly necessary and appropriate.

### **Accountability to the public and amenity to scrutiny by civil society**

Some of the forms of accountability discussed above can be seen as an indirect form of accountability to the public. This is so in the case of the formal processes of court proceedings and the appellate process. These enable scrutiny of the outcomes of cases and comment by the press, interested parties and commentators. In addition, there is also the giving of evidence to Parliamentary Committees by representatives of the judiciary on occasions where this is truly necessary and appropriate.

*Interviews and media briefings:* The giving of interviews and subjecting oneself to questions by representatives of the press and other media is certainly a form of accountability. From time to time, at any rate since Lord Taylor became Lord Chief Justice in 1993, the holder of that office has given occasional interviews and media briefings, as have other senior members of the judiciary.

*The judiciary's website:* Much information about the judiciary is now available to the public on the judiciary's website ([www.judiciary.gov.uk](http://www.judiciary.gov.uk)). It has assisted in explaining and opening up the work of judges to public scrutiny. There are sections on 'About the Judiciary', containing sections *inter*

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<sup>12</sup> No public funds are entrusted directly to the judiciary as opposed to the Directorate for Judicial Offices for England and Wales.

<sup>13</sup> Available on the judiciary's website.

*alia* on 'roles and types of jurisdiction', 'Judges and the Constitution', 'Conduct, complaints and appeals', 'Terms of service', and 'Court dress'. The focus of the site is on accessibility and on matters which are considered to be of interest to the public.

*Annual Reports:* The annual reports on the operation of particular jurisdictions and the report that the Lord Chief Justice makes to the Queen and Parliament are another and more direct form of accountability to the public.

Annual reports are made by the Civil and Criminal Divisions of the Court of Appeal, the Commercial and Admiralty Courts, and the Technology and Construction Court, the regional reports by the Crown, County, Family and Magistrates Courts, and "overview" reports by the Senior Presiding Judge on the Crown and County Courts, and by the President of the Family Division on the Family Courts. There are also reports by the Judges' Council by the Ethnic Minority Liaison Judges on the judiciary's website, and the JSB publishes an annual report which can be seen on its website. HMCS also publishes the annual *Judicial Statistics*.

Formal complaints about personal conduct and other complaints against judges will be considered by the Office for Judicial Complaints (OJC) and the Judicial Appointments and Conduct Ombudsman (JACO). Both publish annual reports.

The court reports and *Judicial Statistics* provide a statistical analysis of the work and waiting times based on the figures provided by HMCS. Many of them discuss significant developments and assessments of the implication of trends. The other reports referred to, such as the Judicial Study Board's (JSB) annual report, also contain much valuable information. The reports are valuable tools for external scrutiny of the system and are thus potentially another and more direct form of accountability to the public for the administration of justice.

The court reports do not always clearly identify and separate the respective responsibilities of the department, HMCS, and the judiciary and thus the respective areas for which each should be accountable. While this means that they are not purely tools for the accountability of the judiciary, they do in part provide such accountability. They are important sources of information for the public, for Parliamentarians, and for the government. They are also an important resource for the judiciary in that it is the detailed information in reports which enable the judiciary to comment, for example in the Lord Chief Justice's annual report, on matters such as the condition of the court estate, staffing levels, and the provision and allocation of resources.

## ***Summary***

Individual judges are subject to a strong system of internal accountability in respect of legal errors and personal conduct, but outside the judiciary these are often not understood in terms of accountability.

Individual judges are accountable to the public in the sense that in general their decisions are in public and are discussed, often critically, in the media and by interest groups and sections of the public affected by them. The judiciary is similarly institutionally accountable in respect of first instance and appellate decisions.

Neither individual judges nor the judiciary are, nor should they be, accountable to the executive branch of the state because that is inimical to the judicial independence which is a necessary requirement for the discharge by judges of their core responsibility to resolve disputes fairly and impartially. The Lord Chancellor's role in the consideration of complaints and disciplinary proceedings against judges is not inconsistent with this. The requirement that the Lord Chancellor and the Lord Chief Justice have to agree before a judge is removed or disciplined in some other way ensures that the independence of an individual judge is not improperly infringed, either by the executive, or internally by another member of the judiciary.

Individual judges should not be accountable to Parliament for their decisions or for matters which fall outside their area of judicial responsibility or previous responsibility, but may be invited to give evidence to Select Committees on the operation of the jurisdictions for which they are responsible and in which they operate. The matters on which they should not answer questions are set out in the Judicial Executive Board's *Guidance*. Senior judges are accountable to Parliament through the procedure for removal set out in the Act of Settlement, but there are no examples of dismissal being considered let alone exercised in modern times. There are, however, a small number of examples of senior judges resigning following public discussion about their conduct, including delay in delivering judgment.

When representatives of the senior judiciary and those responsible for particular jurisdictions give evidence to Select Committees on aspects of the administration of justice that are of general interest or concern and upon which it is appropriate for them to comment this can be seen as a form of institutional accountability to Parliament and through Parliament to the public. The boundaries of legitimate questioning are indicated in the *Guidance*.

The annual reports on the operation of particular jurisdictions and that by the Lord Chief Justice to the Queen in Parliament are valuable tools for external scrutiny of the system and are thus another form of accountability for the administration of justice.

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