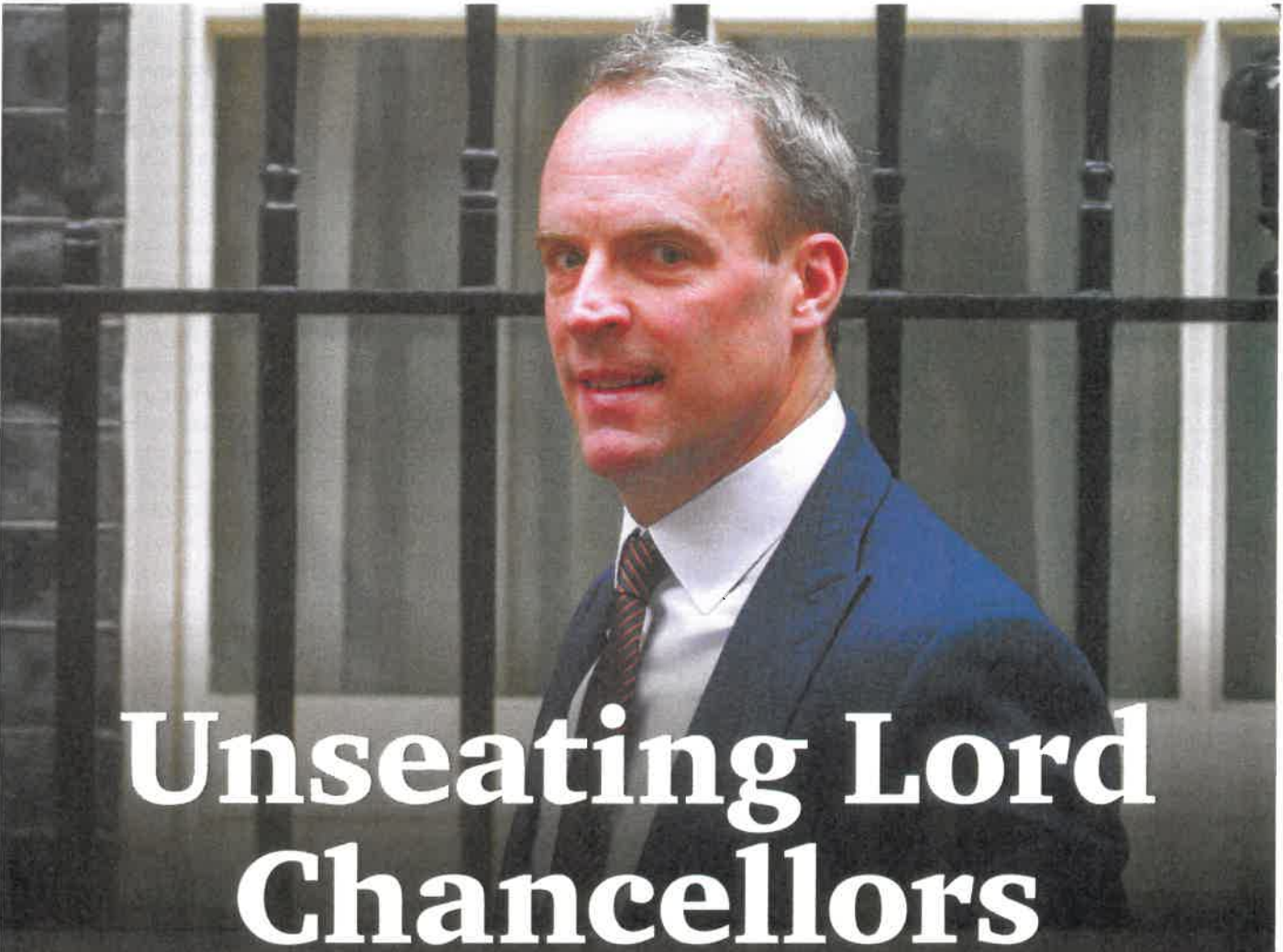




Unseating Lord Chancellors

The Tolley Report raises interesting questions about relations between ministers and officials in our uncodified constitution, writes Austen Morgan

On Thursday, 20 April 2023, Adam Tolley KC's report* on the conduct of Dominic Raab was published by the Prime Minister. The following day, the Lord Chancellor – having announced initially that he would go if found to have bullied officials – resigned. This was reflected in a customary exchange of ministerial letters, which has excited public attention because of what both men said.**

In the UK government, the Prime Minister, using royal prerogative powers, appoints and dismisses ministers. The Ministerial Code requires high standards of behaviour, based upon the seven Nolan Principles of 1994. The Prime Minister is assisted by

the Cabinet Secretary, with officials in the Cabinet Office. An Independent Adviser on Ministers' Interests, currently Sir Laurie Magnus, advises the Prime Minister on adherence to the code.

The 48-page Tolley Report raises interesting questions about relations between ministers and officials in our uncodified constitution, where, as one Cabinet Secretary opined in 1985: *'The Civil Service as such has no constitutional personality or responsibility separate from the duly elected Government of the day.'*

First, why Tolley? Raab called for an independent investigation in November 2022, shortly before Sir Laurie was appointed. With no Independent Adviser in post at the time, the Prime Minister looked to the Bar. It is not clear why Number 10 chose to approach a silk at a commercial set with employment expertise as opposed to a public or constitutional lawyer more familiar with the machinery of government.

Ministers are not employees, and the Senior Civil Service is not their employer – even if the Cabinet Office's ethics and propriety team (most famous *alumnus* Sue Gray of Partygate fame) behaves like one.

 Dominic Raab resigned as Deputy Prime Minister and Lord Chancellor on 21 April 2023 following publication of the Tolley Report. In May, Raab announced that he will not run for Parliament at the next general election.

The investigation, due to the Prime Minister's terms of reference, is not open justice: it is very closed.

Second, what were the complaints? Contrary to media reports of an epidemic of complaints, there were eight covering the period 2018-22. One came from the Department for Exiting the EU. A second came from the Foreign, Commonwealth and Development Office. The remaining six came from the Ministry of Justice (MOJ), where Raab served as a reforming Lord Chancellor from September 2021 (with a short break).

The Tolley Report does its best to impose due process on the parade of complainants. Sequencing of the MOJ complaints is addressed in paras 162-4. Tolley does not suggest coordination, by possibly the First Division Association (FDA), a trade union. But he does see the so-called MOJ Group Complaint as a detonator: *'Only some of those individuals who identified themselves as parties had any direct experience of [Raab]; some had never met him at all but were seeking to support their colleagues.'* Tolley later describes them as *'sincere and committed civil servants, with no ulterior agenda'*.

Third, the terms of reference? These were published on 23 November 2022, when there were two complaints. One line jumps out: *'Information provided to the investigator [Tolley] is provided in confidence.'* And the second para of Tolley's report reads: *'The investigation was conducted on the basis of the confidentiality of the identity of those who participated as witnesses [66 in number]. As a result, it has been possible only to include the most general reference to the factual detail in order to avoid identification or the risk of identification.'*

Confidentiality stemmed from the Cabinet Office's propriety and ethics team (which assisted Tolley), and its duty of care for officials. But the consequence – especially in an area of political contestation – is that readers of Tolley's short report learn little about what may have been going on in Whitehall under the Conservatives in recent years.

True, Tolley waxes almost lyrically on Raab's dedication as a senior minister, and broadly exonerates him of boorish behaviour ('Tomatogate' etc.) But the investigation, due to the Prime Minister's terms of reference, is not open justice: it is very closed. Indeed, the anonymous complainants had no sight of the report until publication – whereas Raab received it in advance with ample time to craft and control the narrative.

It is inquisitorial, with Raab, not his accusers, under scrutiny. Tolley was punctilious in giving Raab a fair hearing and seeking to *'test [not cross-examine] the [complainant] accounts provided'* – yet Raab says the findings are flawed.

This report – the first (and possibly last) of its kind – reads, for a lawyer versed in public inquiries, like a High Court judgment with little in the way of reasons – only opinion; no documentary or oral evidence; and no other actors including the complainants. For reasons of confidentiality,

only the Prime Minister gets full access to the investigation material and Tolley's reasoning is expressed *'briefly and in summary terms'*.

Fourth, what – in this context of ministers and officials in the central State – constitutes bullying? There is no statutory definition of bullying, unlike harassment, a statutory tort and even crime. Tolley adopts a definition accepted by the High Court in a recent administrative court case brought unsuccessfully by the FDA: *R (FDA) v Prime Minister* [2021] EWHC 3279 (Admin), concerning Boris Johnson and Priti Patel, one-time Home Secretary: *'(1) offensive, intimidating, malicious, or insulting behaviour; or (2) abuse or misuse of power in ways that undermine, humiliate, denigrate or injure the recipient.'*

There is clearly a threshold for conduct becoming bullying, but also a concern for the feelings of the complainant rather than the (alleged) perpetrator.

Fifth, the findings? This is what the report is meant to be about. But the findings are not easy to ascertain, even given a conclusion section. Raab, but not Tolley, says he was exonerated on six complaints.

Regarding the Foreign Office complaint of 15 November 2022, Tolley describes Raab as being intimidating *'in the sense of unreasonably and persistently aggressive'* at a meeting and involved in *'an abuse of misuse of power in a way that undermines or humiliates'*; on another occasion, he, as Foreign Secretary, referred improperly to the Civil Service Code, conduct that Tolley found to be *'a form of intimidating behaviour, in the sense of conveying a threat of unspecified disciplinary action, and was experienced as such'*.

What can have been going on? Raab, in his resignation letter, referred to *'the Brexit negotiations over Gibraltar [in 2020], when a senior diplomat breached the mandate agreed by Cabinet'*. The *Telegraph**** subsequently identified Hugh Elliott, the UK's ambassador to Spain (still), who allegedly told Madrid that Spanish police might be based in the colony.

None of this is in the report, or even hinted at. If Raab is right about a rogue diplomat, was a dressing down not in order? After all, the Foreign Secretary does that to foreign ambassadors from time to time. Tolley seems to suggest that Sir Philip Barton, the Permanent Secretary, should have taken complete charge. But s 3(2) of the Constitutional Reform and Governance Act 2010 gives the Foreign Secretary power to manage the Diplomatic Service, and s 6 responsibility for a Diplomatic Service Code.

Why can a junior official hold a senior minister to the ministerial code (through complaining), and a Secretary of State cannot hold an ambassador to the appropriate code over government policy?

Then, the five MOJ Additional Complaints of November and December 2022. Here, Tolley finds that Raab was intimidating and insulting at a number of meetings. However, he characterises this

References

* *Formal Complaints about the Conduct of the Right Honourable Dominic Raab MP Deputy Prime Minister, Lord Chancellor and Secretary of State for Justice – Investigation Report to the Prime Minister*, Adam Tolley KC, 20 April 2023: bit.ly/3nRjpYR

** 'Dominic Raab: Resignation letter and Rishi Sunak's response in full', *BBC News*, 21 April 2023: bit.ly/3M5HowN

*** 'Dominic Raab sunk by row over Spanish forces in Gibraltar', Ben Riley-Smith, Charles Hyams and Dominic Penna, *The Telegraph*, 21 April 2023: bit.ly/3BVvSOP

as occasional abrasiveness, 'in the sense of a personal style which is or feels intimidating or insulting to the individual, but is not intended to be so' and which he distinguishes from the Lord Chancellor being abusive. Tolley notes: 'The DPM has been able to regulate this level of 'abrasiveness' since the announcement of the investigation. He should have altered his approach earlier.' But was it bullying under the definition or not? It is not clear.

Tolley did not uphold the Department for Exiting the EU complaint (when Raab and Elliott had earlier crossed paths), and formally dismissed the MOJ Group Complaint – which had cascaded the process. So, were the MOJ Additional Complaints upheld?

A close study of public policy at the time suggests what might have been going on in the MOJ, where Tolley identifies the Permanent Secretary, Antonia Romeo, to find that she had advised the Lord Chancellor to modify his behaviour (Raab denies this).

The 2019 Conservative manifesto promised human rights reform. However, Boris Johnson appointed Robert Buckland KC, as his first Lord Chancellor. The latter established a review, under Sir Peter Gross, a retired judge. During this, Buckland was replaced suddenly by Raab, on 15 September 2021, with a mission to reform human rights. On 14 December 2021, Gross reported at considerable

length, recommending little change to the Human Rights Act 1998. The same day, briefly thanking Gross, Raab proposed to the House of Commons in contradistinction, a very different Bill of Rights Bill.

Raab, says Tolley in his report, perceived what he described as 'cultural resistance' to his Bill and other policies but to the civil servants concerned this was a 'highly contentious' perception and 'emphatically rejected by many, particularly in view of [their] obligation to give informed and impartial advice'. Tolley made his findings of fact on the 'assumed basis (but without concluding) that the DPM's perception was well-founded'.

Tolley ends by stating that it was for the Prime Minister to apply the ministerial code to his findings, and – by implication – to sack or retain Raab. We know now that No. 10 political advisers gamed scenarios that Thursday, but were unable to get round Raab's promise to resign (made when he expected to be exonerated by an investigation by Tolley).

What of ministerial/official relations? The Tolley Report has arguably not resolved matters. It has, however, identified who may discipline officials... not ministers! And how do ministers, with royal prerogative and statutory powers, and accountable to Parliament and the people through general elections, deal with officials who are, or are perceived to be, behaving politically? ●



About the author

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