

HOUSE OF LORDS

Select Committee on the Constitution

9th Report of Session 2010–11

**Meetings with the
Lord Chief Justice
and the Lord
Chancellor**

Report

Ordered to be printed 19 January 2011 and published 14 February 2011

Published by the Authority of the House of Lords

HL Paper 89

Select Committee on the Constitution

The Constitution Committee is appointed by the House of Lords in each session with the following terms of reference:

To examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution.

Membership

Lord Crickhowell
Baroness Falkner of Margravine (until end December 2010)
Lord Goldsmith
Lord Hart of Chilton
Lord Irvine of Lairg
Baroness Jay of Paddington (Chairman)
Lord Norton of Louth
Lord Pannick
Lord Powell of Bayswater
Lord Renton of Mount Harry
Lord Rodgers of Quarry Bank
Lord Shaw of Northstead

Declaration of Interests

A full list of Members' interests can be found in the Register of Lords' Interests:

<http://www.publications.parliament.uk/pa/ld/ldreg/reg01.htm>

Professor Adam Tomkins, Legal Adviser, is a Member of and unpaid Ad Hoc Legal Adviser to Republic.

Publications

All publications of the Committee are available on the internet at:

<http://www.parliament.uk/hlconstitution>

Parliament Live

Live coverage of debates and public sessions of the Committee's meetings are available at

www.parliamentlive.tv

General Information

General Information about the House of Lords and its Committees, including guidance to witnesses, details of current inquiries and forthcoming meetings is on the internet at:

http://www.parliament.uk/about_lords/about_lords.cfm

Committee Staff

The current staff of the Committee are Emily Baldock (Clerk), Stuart Stoner (Policy Analyst) and Nicola Barker (Committee Assistant).

Contact Details

All correspondence should be addressed to the Clerk of the Select Committee on the Constitution, Committee Office, House of Lords, London, SW1A 0PW.

The telephone number for general enquiries is 020 7219 1228/5960

The Committee's email address is: constitution@parliament.uk

Meeting with the Lord Chief Justice and the Lord Chancellor

1. On 15 December 2010 we held our annual evidence session with the Lord Chief Justice, Lord Judge. On 19 January 2011 we held our annual evidence session with the Secretary of State for Justice and Lord Chancellor, the Rt Hon Kenneth Clarke MP. The transcripts of those sessions are reproduced here, for the information of the House.

WEDNESDAY 15 DECEMBER 2010

Members present

Baroness Jay of Paddington (Chairman)
Lord Crickhowell
Baroness Falkner of Margravine
Lord Goldsmith
Lord Hart of Chilton
Lord Irvine of Lairg
Lord Norton of Louth
Lord Pannick
Lord Powell of Bayswater
Lord Renton of Mount Harry
Lord Shaw of Northstead

Examination of Witness

Witness: **Lord Judge**, [Lord Chief Justice].

Q1 The Chairman: Good morning, Lord Chief Justice. Thank you very much for coming and giving us your time. I know that this is a slightly irregular annual session, though not irregular in terms of the content. I should inform you that this Committee is being televised and sound-recorded, so if you would be kind enough to identify yourself for the record, that would be helpful.

Lord Judge: I am Igor Judge and I am the Lord Chief Justice.

Q2 The Chairman: We have about an hour and a quarter with you, which is very generous, so I shall plunge straight into some of the areas of questioning that come to us as being most relevant. I do not know whether you have had the chance to look at the report which we did most recently on the Public Bodies Bill in November about what are colloquially known as Henry VIII clauses in legislation, which I know from reading your speech at the Mansion House in July is one of your considerable concerns. It has also been a serious concern of ours and we drew particular attention to it in our report. That was only

the most recent of our concerns about it. Perhaps you could help us with the subsequent development of what you said in your speech.

Lord Judge: There are two separate aspects to my concern. The first is the broad and general one: I was rather horrified to discover that something like 120 bills with Henry VIII clauses had been enacted in the Session 2008-09. That is astonishing. In times of war, you do not have Henry VIII clauses. Henry VIII's power itself lasted only about seven years; I think that it was removed immediately on his death and that was supposed to be the end of it. But that Parliament was so subservient as to say that he could do anything he liked – he could do nearly anything he liked, but, then, they had said he was God on Earth, so that had rather encouraged him to think that he was. But I shall be serious about it in the context with which I am particularly concerned. Schedule 7 to the Public Bodies Bill includes a large number of institutions which are of importance in themselves, which are important to the public and whose independence is part and parcel of the independence which we attach to the entire way in which the judiciary works. Let us take as an example the Judicial Appointments Commission. That is set up on the basis that it will be an independent body, and so it should be. The Criminal Cases Review Commission is set up by legislation as an independent body. The same goes for the Parole Board, the Sentencing Council – there are a whole series of them. The object is to ensure that they will remain independent of whichever Government of the day we happen to have. If you put all those into Schedule 7, you make them amenable pretty rapidly to disposal by the Government of the day. That seems to me to be extraordinary. I have made my views entirely clear in the way in which it is appropriate for the Lord Chief Justice to do so, and I very much hope that, as a result of a whole lot of people making their views entirely clear, very careful reconsideration will be given to the whole series of bodies in Schedule 7 which currently perform a quasi-judicial function but whose independence is all part and parcel of the weft of an independent

judiciary. The independent judiciary standing entirely alone is rather a small body, but if all those other bodies which exercise quasi-judicial functions are independent of Parliament then it strengthens the independence of the judiciary. If Parliament bothers to pass legislation to introduce or create an independent body, the disappearance or amendment of the way in which that body works should be for Parliament doing it by primary legislation, not by ministerial order under what I have described as Henry VIII clauses. That is where I stand on it.

The Chairman: Lord Irvine, I know that you wished to pursue a point that was not entirely related, but was about the burden of criminal justice legislation.

Q3 Lord Irvine of Lairg: Do you think that there is legislative overload, particularly in the criminal justice sphere? Do you think that it would make sense for any new criminal justice legislation to be accompanied by an impact assessment stating any anticipated increase in the workload of the criminal courts from the proposed change to the criminal law?

Lord Judge: Yes, to both questions. In 2003, there were six criminal justice Acts, starting with the Crime (International Co-operation) Act and ending eventually with Criminal Justice Act. I have looked up some notes that I made for myself; you may be interested. The Crime (International Co-operation Act) had 96 sections and six schedules, with 124 paragraphs. The Anti-social Behaviour Act – it is only anti-social behaviour – had no fewer than 97 sections and three schedules. The Courts Act had 112 sections and 10 schedules, with 547 paragraphs. The Extradition Act had 227 sections and four schedules, with 82 paragraphs. The Sexual Offences Act had 143 sections and seven schedules, with 338 paragraphs, and the great daddy, the Criminal Justice Act, had 339 sections, 38 schedules and 1,069 paragraphs, excluding Schedule 37, which sets out no fewer than 20 pages of statutory repeals. That is the beginning of it. There are then – I cannot tell you how many – transitional and commencement provisions. You then wonder why the courts system takes so much longer

than it used to in the happy days when legislation in the criminal justice field came once every five years. You also wonder how it is that a question of whether a prisoner should be released from his custody requires a decision not merely of a High Court judge sitting the administrative court but three judges sitting in the Court of Appeal and eventually five Justices sitting in the Supreme Court, so that the governor of the prison in question can know that the woman concerned should be released on such and such a day. This cannot be right. I regret quoting myself, but I said that it was outrageous. The governor should know that when the prisoner comes in he or she will be released on such and such a date subject to any further things that may happen. If I may take Lord Irvine's point a little further. You – I am sorry to put it this way – have just enacted the Coroners and Justice Bill. It has changed the law of provocation, which is a constant in cases of alleged murder. The courts were not at their best in dealing with the partial defence of provocation as we understood it, but we now have a parliamentary Act whereby the draft direction that a judge is supposed to give the jury covers five typed pages. I will give you a “for instance”, because it is the sort of case that will arise. A wife comes home and finds that her husband is upstairs with not very many clothes on and that in the same room with him is a young lady with not very many clothes on. The judge has solemnly to direct the jury that they are to ignore that situation as a trigger to her possible loss of self-control, but if when she taxes the husband, as she is entitled to, he uses some foul language to her and says that it is all her fault because she is frigid, then the jury can be told that they can take into account the language that was used by the husband as possible triggers justifying for the purpose of the law her loss of self-control. I do not think that this is a sensible way for us to proceed. So the answer to your question, Lord Irvine, is absolutely and emphatically yes. As to the second question, it would be admirable to have some idea of the likely impact. The difficulty, just dealing entirely from my perspective through the court system, is that it takes a long time to work out how much

time a case will take to get to the Court of Appeal so that it can decide what a new piece of legislation means and what its consequences are. All I can say is that every new piece of legislation adds to the length of the hearings in the criminal justice system, both in the magistrates' court and in the Crown court, and then ultimately in the Court of Appeal. I would welcome an impact statement; my query is whether it would be practical politics in terms of the department producing information that would be reliable.

Q4 Lord Irvine of Lairg: Are you essentially saying that you think that a great deal of the legislation – I put it colloquially – is a waste of time, that it does not really add to the quality of the criminal law and that much of it would be better left to the judges?

Lord Judge: No, I am not saying that. No legislation is a waste of time; proposals for legislation are a waste of time. There is an increasing tendency in the legislative structure, in relation to crime, at any rate, to become more and more prescriptive. Take the Sexual Offences Act 2003. We now have a huge series of offences. Most people know what rape is—or probably they don't know, because rape has been redefined. They know what indecent assault is. They can work out that what is not an indecent assault to a consenting adult remains indecent assault to an under-age child, and so on. We don't need 143 sections and seven schedules. So, yes.

But you then take how we sentence in these cases. I hope you all understand that I am not being facetious about this, but do you know there is a guideline for judges passing sentence on those rather odd people who have sexual intercourse with a corpse, and there is a different possible approach depending on whether it is more than once, with the same corpse or a different corpse? This is not, I would have thought, what the criminal justice system should be interested in.

Q5 Lord Crickhowell: As a non-lawyer, may I take you back to the answer you gave on Henry VIII clauses? You followed it up very specifically on a particular Bill before us at the

moment and its impact on quasi-judicial bodies. My question is prompted by a conversation I had very recently with a former Lord Chancellor, who said that one of the general objections about Henry VIII clauses is that they make it much more difficult for the judges to know exactly what Parliament intended the law to be, because there isn't the normal detailed examination by Parliament of the clauses as they come forward and it leads to more uncertainty in many cases. Have I got that right? Would you think that that is one of the general criticisms of this kind of legislation?

Lord Judge: I am not sure, given the source of the information, that I can say this, but I don't think that's the problem. If you have a Henry VIII clause it's usually pretty clear. You may have huge regrets that such a clause has become law, but I don't think it affects the clarity of the law. I think it undermines the principle that there should be parliamentary supervision of the Executive. That is my objection. It is so easy for a Minister of the Crown or for the Government of the day of whatever political view to say, "Right, let's sort this out. The way to do it is with a Henry VIII clause." I don't mean this too disrespectfully, but there's no real supervision on this, and so it goes through. I think it was the 2006 proposal that did run into the sands. Lots of people were aware of it because it was such a broad proposal and its impact would have been huge. To have them tucked away into Act after Act—120 in one parliamentary Session, as I said—undermines the purpose that we are here for, which is that you enact law and then if the Government of the day doesn't like the law that we have, or the decision of the judges on the law that they have enacted, they come back to Parliament and ask Parliament to say, "This won't do". And if Parliament thinks it won't do, then it doesn't do.

Q6 Lord Goldsmith: I think I ought to declare I am a barrister practising in the courts and elsewhere. You have made three possibly distinct points. One is the volume of

legislation. The second is the substance of the legislation. You have expressed views about the new definition of the partial defence of provocation, which as you may recall—

Lord Judge: I did not express a view about it; I was merely indicating the practical consequences.

Lord Goldsmith: Well, that's the point that I wanted to get to, but I'd have sympathy if you were expressing a view. The third point you made may be not so much to do with Parliament but with others, on the guideline in relation to corpses. My practical question is, what do you see as the proper role of the judiciary, perhaps particularly the Lord Chief Justice, when these things are being formulated by Government and coming before Parliament? Plainly the judiciary has huge expertise and understanding of what the practical consequences are going to be and may also have views on what the right answer to some of these questions may be. What do you see as the proper role of the judiciary in helping the Government and Parliament to get it right?

Lord Judge: It rather depends on whether or not the legislation has followed a broad consultation process, or even a narrow consultation process. We have to be very careful not to be seen to be entering into the political arena, so that if a proposal is—if I may put it this way—party-political in the sense that there appears to be a political divide between the Government and the Opposition, we have to be extremely careful and tactful about it, but where there is a consultation paper, there is absolutely no reason why we should not respond to it.

When there is, I usually ask a group of judges to consider what the judicial response should be. We are considering, for example, the judicial response to the current proposals on legal aid and the current proposals on sentencing that have just recently come out in the—I cannot remember whether it is a Green, White or semi-Green-and-White—Paper.

If we are not consulted, our position is very much more difficult. If there is no broad consultation, there is something rather worrying about the idea of judges going to have private words with Attorneys-General or Lord Chancellors to say, "This won't do". This is a problem. This is not a fixed line, but my approach is that I am perfectly happy to say to the Attorney-General of the day: "The practical consequences of what you're proposing will be this. Bear them in mind". However, I do not think that the Lord Chief Justice of the day should say to the Attorney-General of the day, "I think this proposal is bunkum", because that is interfering with the political process and it may be that the Attorney-General of the day will spot it for himself. I think it is a delicate line. We have to be very careful that judges cannot get mixed up in the political process and, more importantly, be seen to have got mixed up in the political process.

The Chairman: I am coming on, I am sure, to your understanding of the independence of the judiciary, but I think Lord Pannick has a point he wants to raise specifically on this.

Q7 Lord Pannick: You mentioned how difficult—sometimes impossible—it is to understand legislation on sentencing, a matter of fundamental importance where simplicity is essential. You mentioned the celebrated judgment in the Supreme Court earlier this year that pointed to a piece of legislation that is quite impossible to understand. Does the Ministry of Justice not listen? Does it not understand the need for simplicity, or does it just not care about these matters?

Lord Judge: That is the sort of question I might be asked in cross-examination. The answer to it is that I think it cares very much, much more now that it has taken over the running of prisons. This legislation, and its consequences, all came about before the Ministry of Justice took on the element of prisons which it now holds. I think there is a combination of factors. I think it is muddle. To go back to the Criminal Justice Act, parts of it have been enacted, but not brought into force, so when another Act comes in, people forget that that provision

exists, and we even had transitional provisions for the possibility that it would come into force which have not come into force and then there is a new Act with transitional provisions that relate to provisions that have come into force, and you are struggling through to find out where the answer is. I am quite sure the Ministry of Justice cares. I think it is all to do with the idea that you can actually legislate for just about every single possible possibility. The answer is that you cannot. I would much rather have legislation that was much broader and much less prescriptive.

Q8 Lord Hart of Chilton: When I was sitting on the Merits of Statutory Instruments Committee the other day, there came before us an order which sought to implement changes to the PACE codes. One of the facts that emerged was that the consultation on the changes was for only four weeks and involved a limited group of consultees. I rather wondered whether you had been consulted about matters of that sort.

Lord Judge: No, we are not on the list of people who are obliged to be consulted. I was not consulted, and I have checked with my office whether anybody was consulted about it, and the answer to your question is no, we were not.

The Chairman: I will turn now to what I might describe as the non-lawyers' side of the table. Lord Norton, you wanted to ask about the independence of the judiciary.

Q9 Lord Renton of Mount Harry: Lord Chief Justice, I should also just declare my cards. I am going to ask you a party question about Ken Clarke, who I have known for years, both as an MP and when we were Ministers together. He is now both Lord Chancellor and Secretary of State for Justice. How is your working relationship with him? Is there a difference between the two jobs?

Lord Judge: No, the working relationship—I will start the answer again, if you do not mind, because I would rather not make it personal. I have had to deal with two Lord Chancellors/Ministers of Justice. I like to think that the working relationship with both has

been extremely equable. Both sides understand the constitutional conventions. Ultimately, of course, he has to fund the part of the system for which I am responsible—the courts and the tribunal system—and he has to fund that out of whatever he is allowed to run all the other parts of his department, including—the most important part in terms of expense—prisons and dealing with the sentencing arrangements. He has to find the money that is needed to run the court system and the tribunal system out of the pot, and there are lots of other people putting pressure on him, as always, and particularly nowadays. Everybody feels under pressure, so he has to deal with the matter in an objective and quasi-judicial way. Apart from the issue of how the court system is financed, there are all sorts of things that are connected with it, such as the more efficient running of the system and arrangements for legal aid, which are part and parcel of the system, so I have to have fairly wide-ranging discussions with him, which I do every month, sometimes at his place, sometimes at mine, where we try to thrash these things out.

I have to be slightly delicate, but just at the moment, I am trying to negotiate a figure which he will provide for the running of the courts for the years 2011 to 2012. We have not reached an agreement yet. There are three possibilities: the first is that when the figures are examined, I come to the conclusion that the arrangement is a reasonable one that I can sign up to—that is called a concordat agreement. The second is that he offers a figure that I do not think is necessarily going to enable me to fulfil my responsibilities, and I write to him and say, “Well, that’s all you’ve got. I understand the difficulty you’re in. I have reservations about it, but let’s do the best we can”. I do not sign the concordat agreement, but we all get on as best we can and see what events turn out. The third would be a disaster and a crisis of great magnitude and is that the Lord Chancellor of the day offers the Lord Chief Justice money that the Lord Chief Justice is completely satisfied is derisory for the purposes of running the administration of justice, in which case the option available to the Lord Chief

Justice is to bring the concordat to an end. That would be very serious for all sorts of obvious reasons.

Q10 Lord Renton of Mount Harry: That has never happened?

Lord Judge: No. Of course, the arrangement is very new. I do not suppose it will ever happen, but that is the ultimate sanction and it would, of course, be of great concern to Parliament. Those are the three possible scenarios of the current negotiations, and they are negotiations. I do not mean that in the sense that the parties are at daggers drawn, but the Ministry will suggest that we could save some money by doing this, for example, by closing some courts. We can say, “Whether you’re right or not about the courts you close, your budget estimate is that it is going to save—for the sake of argument—£20 million. The way we see it is that in the first year it won’t save anything at all. The savings won’t accrue until the second, third or fourth year”. Thus there is a negotiation, and the various different contentions are put across the table and eventually a figure goes down on a sheet of paper. Sometimes different figures go down on two different sheets of paper.

Q11 Lord Renton of Mount Harry: If you were to recall the concordat, what would happen then?

Lord Judge: I think we would have to renegotiate a new concordat, and I would expect that this Committee would be following very closely how we were reaching the concordat that we were trying to reach. I do not regard the concordat agreement between the Lord Chief Justice and the Lord Chancellor of the day as private between them. It is a public document, and anybody can look at it at any time. If the situation were to reach such a parlous state that it broke down completely, I suspect the Lord Chief Justice of the day—because this will not happen in my time—would be very anxious to exercise such power as is left to him in the context of the parliamentary process: (a) this Committee, (b) the Justice Committee

and (c) the exercise under Section 5 of the Constitutional Reform Act of, in effect, writing to Parliament and setting out his or her concerns.

Q12 Lord Renton of Mount Harry: We will be hearing evidence from the Lord Chancellor early in the new year. Are there any issues that you are particularly anxious about that you would like us to take up with him?

Lord Judge: That is an offer of great generosity.

Lord Renton of Mount Harry: And is meant to be.

Lord Judge: I think I had better turn it down. Forgive me; I am not being discourteous.

In the dealings I have had with the former and present Lord Chancellors and, for that matter, Attorneys-General, a bit of encouragement and persuasion usually goes a lot further than sounding the battle horns. I would much rather win the quiet victory as a result of cajoling, encouragement and persuasion than lose the battle having gone in with drums banging and trumpets blowing, so I shall turn down the offer, if I may, but it is not discourteous.

Lord Renton of Mount Harry: I understand why you say that.

The Chairman: On the specific points about the budget, I know there are other members of the Committee who have particular things they would like to ask you about but, if I may, you mentioned the 2005 Act, and I slightly jumped the gun by not coming back to Lord Norton, who I know wanted to raise a general point about it.

Q13 Lord Norton of Louth: The 2005 Act stipulates the need to defend the continued independence of the judiciary. To some extent, you have already expressed concerns, particularly in relation to Schedule 7 to the Public Bodies Bill, but are there any other concerns you have as head of the judiciary in regard to the continued independence of the judiciary?

Lord Judge: No, I have no particular concerns at the moment. There is always the overriding concern that something may come along that does disturb me, and we have just discussed the Public Bodies Bill issue. We live in a wonderful country where, actually, just about everybody understands these conventions and why they are important, but you have to look out for what I would describe as imperceptible and, I suspect, unintended threats. Let me give you an example. There was a time when it became the habit of government Ministers who were unhappy with a decision reached by the courts not merely to say, “I intend to appeal”, which is a perfectly reasonable response to a decision that you disagree with, but, in effect, to go to the media to criticise the individual judge on a personal basis and to explain why, spinning fast, the judgment was absolutely daft. That I did regard as an imperceptible threat because the independence of the judiciary, when all is said and done, depends on the public will that the judiciary should be independent. If judges are constantly being criticised by Ministers for their decisions, it undermines the principle and the perception.

However, owing, no doubt, to a lot of good work by some very sensible people, that particular habit has gone. I do not think it will return. I hope it will not return, but I have to be on the lookout for the possibility that a different form of imperceptible threat may come. I really cannot see any Government that we can envisage in this country in the foreseeable future actually threatening judicial independence in a direct way.

Q14 Lord Norton of Louth: On the point you made about criticism from Ministers, there are two possible reactions. One is to ensure that Ministers exercise some restraint and do not engage in that, and the other is to counter it by the judges themselves or the judiciary having some relationship with the media so that they could explain the position. To some extent, you have been moving in the direction of developing that relationship so that there is better information about how the courts operate and what the role of judges

Lord Judge: We have a judicial communications office, and the directive I give it is that it is not a spin machine, and we have a number of judges who are, in effect, media-trained for the purposes of dealing with criticisms based on a failure by the media to appreciate the constraints under which the judge was working, but we need to be very careful. Let us go back to the example that I gave, which has now happily disappeared, of the politician running out to the media and telling them that the judge's decision was daft. I really cannot have a judge or somebody responding on behalf of the judiciary saying, "No, the judge wasn't daft; the Minister was daft", then we have a bit of yah-booing and both sides descend in public esteem.

The relationship between the judiciary and the media is very interesting. I think the judiciary used to take a view which, because it was a long time ago, is entirely out of date. I do not think that the judiciary can work on the basis that the only thing a judge should ever do is to say what he has to say in court and nobody should ever deal with the matter any further. That is for a variety of reasons, but ultimately I think that judges have to face the fact that they live in a very fast-moving information world and that what judges do is a matter of public interest, and sometimes concern. Judges have to realise that when there is concern, it needs to be thought about.

Where do you go from there? Actually, not very far, but one of the ways that you go further is to recognise that the media have their own responsibility. If judges recognise that, then both the media and the judges, if they think about it, will understand something that I have been advocating to the media publicly, which is that it is an extraordinary feature of the case that the judiciary who are criticised by the media, and, occasionally, the odd member of the media who is criticised by the judiciary, have a mutual interdependence. By

that I mean that I simply cannot conceive of a constitutional arrangement in which you have a judiciary that is subservient to the Government of the day and yet a fully independent media. Equally, I cannot think of a constitutional arrangement in which the media just simply rolls out whatever propaganda the Government of the day wishes it to roll out, yet the same constitution says, “But we must have independent judiciary” and acknowledges it. These two independences matter and should sustain each other without in any way compromising the right of the media to criticise a judgment or a decision and without, at the same time, any compromise in relation to a judge who thinks that a member of the media has behaved badly.

We need to go a bit deeper into it. For example, I am very anxious that—and this is happening—up and down the country there is a resident judge in each Crown Court. He or she has a number of responsibilities, but one that I have asked them to do is to know who the editor of their local paper is. That is not in any way to compromise either side, but if, for example—and the days are now going—there is a young cub reporter in the Crown Court who rushes into the newspaper and says, “The judge made a complete Horlicks of this, look what he said”, at least the editor will say, “Let’s ring up the Crown Court and just check that’s what the judge said”. The judge can then make available, or have somebody make available, what he did say. That can be sent back over the road, and the editor can then decide whether his cub reporter has got a good story or no story. It makes for a balance.

However, there is a problem—I am sorry I am going on about this—the open justice principle, which is a passionate belief of mine. There are going to be some cases where there will not be standing room in court—that was true of two cases yesterday—but most cases now do not have any reporters in the room because the newspaper industry faces the struggles that it does. I do not think we as judges can start funding the newspaper

industry—that might undermine everybody’s independence—but what I am really driving at is that I think that in 2010, there has to be a different attitude by judges to the newspapers and the media and by the media and newspapers to judges.

Q15 Lord Norton of Louth: Do we take it that it is work in progress rather than the optimum balance that has been achieved?

Lord Judge: I think it is work in progress but it always will be. It only needs one thing going wrong, or one new problem arising to upset the balance and make us all think again. I know that the newspapers today are full of the fact that in a case yesterday information was Twittered out of court. This is of great importance to the media. I happen to think it is of great importance to the way we run our system. We have to resolve that. I am about to send out a paper to the media suggesting that I’d like their assistance on these issues. The obvious answer is: why shouldn’t somebody who is behaving properly and responsibly Twitter out what’s happening in court? The difficulty is somebody responsible doing it responsibly. If it is during a jury trial it may have a completely different impact than a case heard before a magistrate or full-time judge in the divisional court.

Q16 The Chairman: And it has to be questioned whether it can be really responsible in 140 characters.

Lord Judge: Absolutely right.

Q17 Lord Crickhowell: After you made your critical comment about the behaviour of Ministers and before Lord Norton asked his question and the extraordinarily interesting answer, I was going to ask about the media. The media sometimes assert or allege that law is being made by the judges and not by Parliament. It is a comment you often see in the press and I’d like your reaction to it.

Lord Judge: The law is made by Parliament and there is a tendency, particularly in the context of the Human Rights Act and the European convention, now incorporated as a

result of the Human Rights Act, to say that judges are making the law as they go along. Well, what judges are doing is making a decision about the law that they are required to make because the Human Rights Act has been enacted, and it has brought the European convention into our legal system. In doing that, they have to look at decisions of the European Court in Strasbourg, which after all is responsible for the interpretation of its own convention. In one sense judges are making the law up—not as they go along—but they are doing it on the basis that Parliament has said that the Human Rights Act requires you to take account of the provisions of the convention. That is the long and the short of it.

Q18 Lord Shaw of Northstead: Arising out of that, in your 2010 *Review of the Administration of Justice in the Courts* you observed that, “it is imperative to ensure that the development of specific European criminal law is complementary to our common law heritage”. Can you explain that?

Lord Judge: The common law is a most extraordinary and wonderful instrument. You can go to India and they are operating common law principles; you go to the United States. This tiny little system on this tiny little island out on the edge of Europe is now a worldwide system of justice. We have to face the fact that the decisions of the European Court of Justice are binding on our courts. That is a result of the Act that followed the treaty—what I call community law. Judges have no choice at all. The Convention is Strasbourg law. One seeks to remember occasionally that when it was first drafted it was done largely by British lawyers for a war-torn Europe where men and women were taken away in the middle of the night, stuck into concentration camps and never got home again. The decisions of that court, under our Act, are to be taken account of in our courts. In other words, the distinction is very clear. Luxembourg Communities, binding; Strasbourg, Convention—“take account of”. The way in which the courts will decide that they should take account of Strasbourg jurisprudence seems to me to be still an open question. Lord Pannick may have a different

submission to make on a different occasion, so I must be very careful to make it clear that I would make a decision on any subsequent case on the submissions that he, or somebody in his position would make to me.

I will give an example, if I may, which will illustrate what I was driving at. We have an Act of Parliament that enables evidence to be given, which in the old days would be regarded as hearsay. In the particular case under consideration, a woman who said she had been indecently assaulted by her doctor gave a statement in solemn form, in accordance with the statutory provision that he had indeed indecently assaulted her. The case is called *Al Khawaja*. That case went through our system and we said there was nothing wrong with the conviction. As far as we were concerned it was a safe conviction and it went to the Commission in Strasbourg. The Commission—which is actually the name for a court, which confuses the position, so we will call it the first-tier court in Strasbourg—said that won't do and that it falls foul of Article 6. The issue then arose in a case, still in England, which went from the Court of Appeal to the Supreme Court, where I happened to be sitting. It was called *Horncastle*. Having looked at the decision in the first-tier court in Strasbourg in *Al Khawaja*, we said, “No. Our legislation is perfectly clear. It has not produced an unsafe conviction in the sort of circumstances that the half-way court in Strasbourg said.”

Al Khawaja has now gone to the Grand Chamber, which is the full 27 judges. They will have before them our legislation and the decision of our Supreme Court saying that it is all right. They have had the hearing and we are awaiting the outcome. It could say, “No, we think that our first-tier court in *Al Khawaja* was right”. Let us pause. Where does that take us? Probably, if they say that Mr *Al Khawaja* will go to the Criminal Cases Review Commission, it will refer the case to the Court of Appeal Criminal Division, which will almost certainly send it up to the Supreme Court eventually, and the decision will be: should we regard

ourselves as bound by the decision of our Supreme Court, or should we regard ourselves as bound by the decision of the European Court in Strasbourg, Grand Chamber?

I shall not forecast the outcome but you can see that a moment's thought would make it clear that this would be a really big question. It would call up for consideration what you or Parliament meant when the Human Rights Act was enacted and the courts in the United Kingdom were required to take account of decisions of the European Court. When *Al Khawaja* emerges, I see that if we stick by the decision of the Commission—the lower half of the system—that will have huge implications for the way in which the entire criminal justice system in this country works: whether it is to be governed in the end by our own most senior court, or whether if it goes to the Grand Chamber in Europe, it can in effect, say that our legislation isn't good enough or does not fulfil the requirements of Article 6. I am sorry it has taken so long to get there.

Q19 Lord Shaw of Northstead: No, I think this is fundamental. Assuming the thing goes as we would not wish, would it be your view that this is the beginning of a need for the judges themselves to start pressing for a change in the very Act that binds us and your decisions into the European decisions?

Lord Judge: My answer to that, I am afraid, is that I simply do not think that judges can put pressure on Parliament. For a start, judges may have different views. The way in which this part of the constitution works has to be left entirely in the hands of Parliament. What the judges can do in their judgment is to say, "This is the conclusion we have reached. If you don't like it, it's up to you to legislate if you wish to". Then I suspect there would be rather a great debate about it.

Q20 Lord Goldsmith: This is a fairly remarkable session, Lord Chief Justice. In our professional lifetime, the idea of a Lord Chief Justice sitting here—you are not the first to have sat in this place—and talking in the way you have been to this Committee is a

significant development. You have talked about some of the other developments that have taken place—the 2005 Act, the Human Rights Act, a Lord Chancellor who sits in the House of Commons. All of these things are very different. But there is an issue that then may come through this, which I suspect is more pointed than saying that judges make the law. You are obviously right that judges are doing what Parliament has told them to do, which is the question of the extent of accountability of the judiciary, particularly to Parliament. Is this sort of session on an annual—or something like that—basis the extent of the accountability that there should be? We don't have confirmation hearings for judges—even for the Supreme Court—these days. Where do you see accountability at the moment, and do you see it evolving over the next few years?

The Chairman: And specifically the Judges' Council. Is that a relevant subset of this question?

Lord Goldsmith: Well, if that is part of the Lord Chief Justice's answer. I suspect it may not be.

Lord Judge: Can I just deal with the Judges' Council first and get that out of the way, then come to Lord Goldsmith. The Judges' Council is a body that exists—this sounds awfully grand, forgive me—for the benefit of the Lord Chief Justice and the judiciary as a whole. Its function is to advise the Lord Chief Justice and let him know the things that are troubling different parts of the judiciary. It exists to enable us to consider discipline and welfare. There are all sorts of committees of the Judges' Council to deal with these matters. It is not a public body at all. It is an internal arrangement by which judges from all parts of the judiciary, including the tribunals' judiciary and the magistracy, meet together to tell me, in effect, where they think I am going wrong or even occasionally that I have not got it completely round my neck. So I don't think the Judges' Council is the route.

The accountability question is fascinating. I do not regard myself as accountable to anybody, nor any judge accountable for any decision that he or she reaches in court. That is full stop—the end of it. If my decision is not liked, it can be criticised and if in the end the parliamentary process leads to a change from the decision I have reached, and the law is different from what I said it was—fine. That, too, is part of the process.

The more difficult problem relates to the new relationship that has to emerge. As Lord Chief Justice, as I was saying earlier, I have a budget. It is public money. It is reasonable for Parliament, if it wishes, to ask where the money is going and why we need £x million to run so many court days, or why we need so many court days. Questions like those have to arise with anybody who has responsibility for a large budget. Then there are more sensitive questions, if you like—because both the first and the second are obvious—which is where we are here. Just like I think the days are long gone when judges were entitled to say that the issue of the media is of no relevance and that when we give our decision that is the end of it, I do not think we can say that the issue of how the judiciary is working or the problems and so on are confined simply to what we do in court. It is self-evident. The issues we have been discussing will show that we are not confined to court work.

I like the idea that I should come to a parliamentary Committee like this to answer any questions that any members have. I am quite willing to come twice a year if that is helpful. And the same with the Justice Committee. I am anxious that it shouldn't turn into a circus so that we have endless judges coming endless times to answer endless questions, which anybody can look up on Google and get the answer in two minutes, but because a judge says it, it is somehow that much more authoritative. But the system for accounting is that you are entitled to ask me questions and I will do my best to answer them. I also believe that we should produce an annual report of the issues that seem to us to be important, so that you and the equivalent, or indeed any Member of Parliament for that matter, or any newspaper

for that matter can see where we think we are going and to raise questions about whether we are going the right way, and to ask us to consider whether we should change what we are doing or rethink it.

One of the issues that is a little strange is that I am here because under the constitutional reforms the Lord Chief Justice cannot speak in Parliament. There are arguments both ways about this. I would not have been unhappy to have been able to say what I had to say in Parliament about the Public Bodies Bill, which impinges on the whole issue of judicial independence. I see the arguments both ways but I don't think coming to sit on the steps, not even as a Cross-Bencher, is actually of great value. The answer to your question is: yes, there has to be a system by which if this Committee or the justice committee has concerns it can ask for a visit from the Lord Chief Justice of the day and other senior judges.

Q21 Lord Goldsmith: That is enormously helpful and there is a lot in what you said. Can I just pick you up and accept the invitation to ask another question? I don't think I will find the answer on Google. You mentioned finance and the position in relation to running the courts. We know that there is a debate about legal aid and maybe there will be questions about that. One area of potential cuts that has not been mentioned very much is the effect there may be on the Prosecution Service. As Lord Chief Justice wanting to see a proper balance in the courts between prosecution and defence, do you have any views, questions or concerns about what the cuts may do to the Prosecution Service?

Lord Judge: I have concerns about what cuts may do to the Prosecution Service and I have concerns about what cuts may do to the defence system. That is my immediate responsibility. I hope Lord Goldsmith that you don't think I am being facetious but I have concerns even about things like coastguards as I happen to spend a lot of time at sea if I can. We are living in an age of financial austerity. I was saying that the country was broke long before it was possible for anybody to say it. We were and we are, so we have to cut our

cloth accordingly. I do not think I can say, much as I would like to, that this bit of the system is special. Everybody says, “Everybody else can have cuts but our bit is special and we can’t have cuts there”.

I want the Prosecution Service to be an efficient team of people doing its very best. I know it is under financial pressure. I know perfectly well from a discussion I had with the Attorney-General yesterday, who I will be seeing again this afternoon with the Lord Chancellor, to see how we can better address the efficiency of the criminal justice system on both sides—on the judicial side, too. I am aware of it but I really can’t sit here and say there is a bit of the system for which I am responsible which we really have to preserve. I am not responsible for the CPS but I cannot say either that that has to be immune from the cuts that everybody else is suffering.

Q22 Lord Pannick: On a different matter Lord Chief Justice, do you share the concern that judges of the Supreme Court who were appointed to the Bench after March 1995 will have to retire at the age of 70? I confine the question to judges of the Supreme Court because it obviously takes time to arrive at that level and we are talking about our most senior, and one would hope most expert judges. Is it appropriate to require them to retire at such a comparatively young age? I declare an interest as a practising barrister and, I hope, still a comparatively young one.

Lord Judge: I think the way you formulate the question contains its own problem. I do not think that it is possible to formulate the question solely in the context of the 12 judges of the Supreme Court. That is my concern. The rest of the argument is fine. But why do we have an age limit? We used not to have an age limit for High Court judges and above, and then it was 75. I am one of those who can carry on working until I am 75. Then we had 72, I think. Anyway, we now have 70. There must be a reason why we have this. The reason, I

suspect, is that it is possible that even the Lord Chief Justice might start ageing rather faster than he should and so 70 is regarded as an appropriate age.

If the reason is the fear that good people may start to age so that they are no longer up to the quality that they were, that is true across the board. I am not identifying any individual judge in this process, you will appreciate. But that is the concern. If you said that Supreme Court justices could continue to 75, or further than 70—I deliberately emphasise that I am not making any observation about any current member of the court because I know perfectly well who we both have in mind—I would have a large number of magistrates say, “What on earth is the problem with me? I am 72. I am perfectly fit. My doctor gives me a certificate”. Then there are High Court judges and Court of Appeal judges: why should a Court of Appeal judge retire at 70 if the Supreme Court Justice is not required to?

If you said, “Well, that raises the question of whether there should be an across the board increase in age”, there is a very serious argument in favour of that, particularly if we are talking about straitened times, judicial pensions and so on.

So my answer to your question, I am afraid, Lord Pannick is that I am not answering it. I do not think that you can answer the question in the way you formulated it. The knock-on effect has to be seen across the entire body of those people who exercise judicial functions.

The Chairman: If I may say so, before we get to the point of retirement there are some general points that people want to make around the question of judicial appointments.

Q23 Lord Powell of Bayswater: Lord Chief Justice, I was going to appoint judges before they retire, but Lord Pannick has raced ahead. We had a letter from the Lord Chancellor the other day in which he said he was working with you to achieve greater responsiveness and efficiency in the judicial appointments process. Will you tell us a bit more about what you think is necessary to achieve greater responsiveness and efficiency?

Lord Judge: Yes, but I am going to start even earlier, if you don't mind Lord Powell. The Judicial Appointments Commission was set up. The idea of it was excellent. The funding for it was not as good as it should have been. The uncertainty about whether it would be based in London or in Birmingham was not exactly a huge inducement to recruitment. It started off with those difficulties. I think that it has done a remarkably good job in many ways, but it has in my view—it is for the commission to decide what system they wish to have—become process driven. That is understandable in a new body set up to try to do away with the idea of who you were, where you went to school or university, or anything about you that could have any bearing on your appointment. So the processes were designed as far as humanly possible to ensure that nothing came through the system which could possibly be open to that sort of criticism. Again, that is a perfectly reasonable standpoint.

But I have been concerned about some of the problems. I do not think, for example, that it is necessary—I say this with due respect to the commissioners—for all the commissioners to take part in deciding every appointment. If I were responsible for it, I would say, “Well, here are the district judges, and here are so and so, and so forth”.

If the commission re-examines its processes, it may find that it would run more comfortably. So my concern is very much directed to the processes it has seen necessary to employ in its first few years when establishing its credentials as a body that really is only selecting on merit and must be seen only to be selecting on merit. I am not sure I have answered your question, but that is what I thought your question to be driving at.

Q24 Lord Powell of Bayswater: Yes, I think that you have answered it. I have two supplementaries to it really. One is, does the commission have a concept of succession planning or does it just look at every upcoming appointment out of the blue? Secondly, you have spoken about your personal commitment to diversity. What more do you think needs

to be done in that respect? Is greater diversity being achieved in reasonable time or are you distressed at the slowness of it?

Lord Judge: I am not distressed, if I take that question first. We have a problem. The Appointments Commission can only choose from those who apply for appointment. Then it can only choose from those who apply for appointment who are of adequate quality and pass the merit test. I am concerned about two different features of the problem. One is immediate, one is long term. I have tried terribly hard—I have said it publicly—to get solicitors working in the major firms, who after all are attracting some of our brightest and best young men and women to work for them, to actually address the question of whether or not some of those young men and women at the ages of, say, 38 to 45—the sort of age when a man or woman in independent practice at the Bar would consider whether he or she wanted a judicial career—should be enabled to apply for appointment as a junior judge, as a recorder or a deputy district judge, to see whether they like it and whether they have actually got judicial qualities. The brightest and the best do not necessarily have those.

Yet there, there is a huge pool of men and women of great potential who could adorn the Bench at all levels right up to the Supreme Court where we do have a former solicitor. So far, at least, I have been unsuccessful in persuading the major City firms that this is a sensible route which should be available to some of their men and women. Of course, not all—nobody should be dragooned—but the opportunity should be provided. If we had that we would have a more diverse judiciary in the long term.

The longer-term problem arises in the context of legal aid, which we are talking about now. I am not going into the whys and wherefores of the legal aid issue in terms of cuts, but can I just address one long-term consequence? A lot of people working in the criminal world and on family work do so on the basis of legal aid. There are shining men and women who go into the commercial court world. They do fine—they do the Chancery Division. But an

awful lot of the judicial work at the coalface—the sentencing of the rapists; the trial of the terrorists; and so on and so forth—is done by people whose background is legal aid criminal work, prosecuting criminal cases and family work. If we cannot attract young men and women of real talent into doing criminal and family work on the basis of what is available on legal aid, we shall lose a significant part of the practising Bar from minority ethnic backgrounds and women. If we lose them or don't collect them, in 20 years' time the Judicial Appointments Commission will have fewer applicants from these backgrounds than they have at present, which will in its turn stultify the progress towards a more diverse judiciary. I see those two questions running side by side, although one is a much longer-term problem.

The other question you asked was succession planning. It is very difficult to envisage this—I am so sorry—in the context of judicial appointment. Every time there is a new round of applications, say, to the Circuit Bench, those who failed to get an appointment the last time are entitled to apply again. They are then treated on their merits—with their previous failure, I think, not taken into account at all.

In terms of the senior judiciary. Heads of Division and so on and so forth, each appointment of those individuals is an individual appointment. It is an individual process. It is common knowledge that the President of the Queen's Bench Division is going to retire next summer, so I can use him as an example. There will be an appointment process. Individuals will be invited to apply. There is absolutely no way there is any one individual at the moment who is regarded, or could be regarded, as the front runner for the appointment because it has been clear for some time that, because he has done this, the next step for him would be that. So we do not have succession planning in that sense. We do not have a succession of people. The next Lord Chief Justice is somebody unknown. I mean that. There is no obvious line of succession. So succession planning is more of a problem for us. I would love to know how

we could do it, but we could not do it if the cost would be that anybody who might be appointable would be inhibited from applying.

The Chairman: I am aware of time passing and Lord Goldsmith and Lord Hart both want to address things in this area.

Lord Judge: If I may say so, I am quite happy to go on a bit longer if that would suit.

The Chairman: That is extraordinarily kind of you. You have been very generous with your time. But let us see how we proceed in the next few minutes.

Lord Judge: Can I call it off if I don't like the question?

Q25 Lord Goldsmith: In a slightly different sense, I was going to ask you a little bit further about going on a bit longer, because I wanted to come back to the retirement question. If I may say so, I entirely understand why, as head of the whole judiciary, you have put it this way. You have looked at the effect of a change of retirement ages on the whole of the judiciary from the Supreme Court to the magistrates. Would you recognise that there may be a different case for retirement ages at different levels of the judiciary? I can point out two or three reasons why that may be so. Others may have others. One would be the different function that the Appellate Court has from the magistracy. You can look at it less flippantly, as less a worry about people saying, "What are the Beatles?". It shows how old I am that I use that example rather than a more modern one.

Lord Judge: I am not going to say anything.

Q26 Lord Goldsmith: But in terms of the skills which are required of the appellate judge—great experience of the law, wisdom, technical expertise—which often come more with experience and greater seniority with age, and the problem that you have averted to as well about getting particular people on to the Bench, which may mean that their professional careers take a certain time for them to reach the stage when they are able to join the Bench, one may have their services for a relatively short period of time, which means that the

courts are deprived of that benefit, but also the law as a whole and its development is deprived of their continued involvement. Would you recognise that there is a different case to be made in relation to different parts of the judiciary?

Lord Judge: There is a different case to be made, but the question really is why do we have a 70-year limit overall? If it is just because it was a figure plucked out of the sky, that is a figure plucked out of the sky. Figures plucked out of the sky can be sent back and replucked. But if the reason was a perception that a judge aged over 70 may not be—and some of them certainly would not be—as good as they had been when they were 65, none of us is immune from the effect of ageing, we do not know what our particular pattern is going to be, do we?

Q27 Lord Goldsmith: But if one looks at the history of the House of Lords before the Supreme Court, one sees extraordinary contributions made—to take that particular example—by people well over 70.

Lord Judge: I quite agree. Because of the artificiality of plucking figures out of the sky, we have a number of judges in the Supreme Court and a number of judges in the Court of Appeal who are 73 and 74. They were appointed at a time when the limit was 75, so they are still sitting. So, yes, there is an inconsistency. Just looking at every member of the Court of Appeal, some will have to go when they are 75 and some will go when they are 70. There will actually be rather a concentration of departures when the 70 year-olds catch up with the 75 year-olds.

Q28 Lord Goldsmith: Just to finish this, have you been able to divine what was the justification for 70 which remains valid today?

Lord Judge: Again, I hope you won't think I am being facetious. I can't help wondering whether it was that because a judge said "Who are the Beatles?", someone said, "They're all old. They're all codgers. They're allowed to stay on as long as they like and we must have a lower age limit". I cannot think of any other reason.

Lord Goldsmith: That is very helpful. Thank you.

Q29 Lord Hart of Chilton: I would just like to go back to this question of enlarging the pool from which you can select judges because that is an incredibly important issue. In my time, I was sent off to City firms to try to promote the idea that they were not making use enough of another career structure open to people and, in particular, trying to encourage women to contemplate taking a judicial role in the future. In some cases I was rebuffed on the grounds that these people were high-value commodities—that they had been trained to do particular jobs—and the firm just wasn't interested in allowing one of their resource to go into a different field. Others were welcoming and did contemplate having a dual career. I am interested in how you thought that you had failed on a similar mission.

Lord Judge: The proof of the pudding is in the eating. We occasionally get lip service paid by individuals. That is not fair. The individual himself or herself can say, "Yes, what a good idea". But we are not getting enough applicants from among major firms of solicitors aged between 38 and 45 for starting judicial jobs. We are not getting them. If ever I meet a solicitor who says, "Well, I am interested", I have no trouble. I ask a judge if they will just have them for a week. I know of a young man and a young woman—youngish by my age—who have spent a week in their own holidays, in the time they are allowed from the firm, to see whether they would like it.

I have said publicly to solicitors, or to some solicitors, "Look you all do fantastic pro bono work". There is a huge amount of pro bono done by major firms of solicitors—all unsung. "You have got to regard this in the same way. This is pro bono. This is looking at the public interest in the long term. Among them, there would be some men and women of outstanding potential as judges". But we are not getting them.

Q30 Lord Renton of Mount Harry: I have talked to some, as it were, within the family that, as young solicitors aged 35 to 40 with a growing family, think they can earn more money by staying with the solicitor's company than by becoming a judge.

Lord Judge: I am quite sure that in these major firms able men and women do earn very good money. But I really do not think that the loss of four weeks a year—in relative terms, that is what they have to do—which will probably be three because of the cuts, in the overall context is going to make the difference between poverty and riches.

Q31 Lord Renton of Mount Harry: Forgive me, but does not the firm then think that if he or she is going off to be a judge for four weeks, perhaps that's what they would like to do? So the promotion within the solicitor's company that would otherwise normally follow perhaps goes to someone else.

Lord Judge: That is a view that has been expressed to me by a number of young men and women: that if they appeared to show any interest in going down the judicial career ladder, they would be regarded as not entirely committed to the interests of the firm. Yes, that has been said to me by people whose views I respect.

Q32 The Chairman: Lord Chief Justice, we have covered a very wide agenda indeed. As far as I can remember from our previous discussion, we have covered most of the issues which members of the Committee wanted to raise with you. I do not know whether anybody is catching my eye about some pertinent point that they felt had been ignored. No, they are not. Is there anything that you feel we have inadequately covered that you would like to say to us now?

Lord Judge: No thank you. But, at the risk of repeating what I said, I do regard these meetings as immensely useful to us. I hope that they are useful to you. But they are useful to us because the very questions that you ask give me a very clear indication of the sort of issues that are bothering or are of concern to the Committee. So thank you.

The Chairman: I do not think that I need to refer to members to say on all our behalf it has been immensely valuable and very interesting. As was said, I think by Lord Goldsmith slightly earlier, this has been very significant in terms of the things that you have been able to say to us this morning, which have been of great value. Thank you very much for your generosity of time and your generosity of view.

Lord Judge: Thank you very much indeed.

WEDNESDAY 19 JANUARY 2011

Members present

Baroness Jay of Paddington
Lord Crickhowell
Lord Goldsmith
Lord Hart of Chilton
Lord Irvine of Lairg
Lord Norton of Louth
Lord Pannick
Lord Powell of Bayswater
Lord Renton of Mount Harry
Lord Rodgers of Quarry Bank
Lord Shaw of Northstead

Examination of Witness

Witness: **Kenneth Clarke MP**, [Secretary of State for Justice and Lord Chancellor].

Q33 The Chairman: Good morning Lord Chancellor and thank you very much for coming. As you are aware this is part of our series of annual sessions with members of the Government who hold responsibility for constitutional affairs. We had a very interesting and informative session with the Lord Chief Justice immediately before the Christmas Recess. Some of the matters we will want to take up with you arise directly from that conversation that we had with him. This will be a televised and recorded session, so if I may I will ask you to begin. You may wish to make an opening statement.

Kenneth Clarke MP: I can give a general opening statement if you wish but I think it is probably best to press on to the questions.

Q34 The Chairman: Fine, in that case I will simply ask you to identify yourself for the record and will go straight into our issues.

Kenneth Clarke MP: I am Kenneth Clarke, the Lord Chancellor and Secretary of State for Justice.

Q35 The Chairman: Thank you again. We would like to start with the relationship between the judiciary and the Executive and Parliament, how you see that having evolved in the last few years and how you expect it to develop in the future.

Kenneth Clarke MP: To begin on a very general basis, I am very committed to the independence of the judiciary from the Executive. The reform of the post of Lord Chancellor reflected all that and put this country in theory totally in line with the separation of the judiciary from the Executive. In practice we always were, because of the way everybody behaved in this country, but having made all the constitutional changes I think the reality of judicial independence from the Executive should be maintained. My other general view is that Parliament has got too weak vis-à-vis the modern Executive and Parliament should be strengthened. In my time in politics the courts have become much more courageous and powerful vis-à-vis the Executive and have invented and expanded judicial review to a quite astonishing extent. Parliament has been very timorous towards the Executive and has steadily allowed all its powers to be eroded and has allowed the institution to be turned into a bit of a sausage machine. I think the problems lie on the parliamentary side rather than on the judicial side.

Q36 Lord Irvine of Lairg: At the time of the passage of the Constitutional Reform Bill in 2005, you will recall that the principal judicial concern was to secure judicial independence. I think everyone agrees that the rule of law is the basic foundation of our democracy, but for that to be real the independence of the judiciary must be secured. The 2005 Act refers to that. As our Chairman has just said, Lord Judge, the Lord Chief Justice, recently gave evidence to us, saying that although he had no specific concerns currently about the independence of the judiciary, he had a concern that the past could be replicated when it had become the habit of government Ministers unhappy with a court decision to go to the media to launch an attack on the judge or judges, or on the judgement. I always thought and

said that it was immature for government Ministers to clap judges when they found for them and to boo them when they found against them. Would you generally agree with that?

Kenneth Clarke MP: Yes, I think I largely agree with that. I remember all the concern at the time of the constitutional change in 2003-04, or whenever it was, but obviously you were closely involved in that, Lord Irvine, so you know more about that than I do. I remember the judges, unnecessarily as it turned out, were anxious to ensure that judicial independence was not threatened by whatever changes were made. I think the rule of law depends on the total independence of the judiciary. I tend to judge the constitutions of other countries—or I used to in my non-executive business phase—by whether this was a country where the Government could ever lose a case of any importance in its higher courts. There are quite a lot of countries where the Government never loses in its higher courts and most of them are countries I would not like to live in. Here the Government can sometimes be given a hard time by the courts and I think that is a good thing.

As for commenting, judges cannot be too hoity-toity. People are entitled to give an opinion on a judgement in a case as they are allowed to give anything else. They are not somehow above criticism and should not be too sensitive. They are very publicly exposed, as we all are, to the modern media. But I think Ministers are unwise if, largely for grandstanding purposes, they start commenting on what happens, certainly in criminal cases. I also think—and I'm sure you agree, Lord Irvine—that the Lord Chancellor is a particularly unsuitable person to start sounding off about whether he, on behalf of the Government, agrees with a decision or a sentence or anything of that kind in a particular case.

Q37 Lord Irvine of Lairg: Yes. You would obviously agree in general terms that if a Minister is concerned about the correctness of a decision, the appropriate course for him to follow is to appeal or to seek a legislative slot to change the law.

Kenneth Clarke MP: Completely. And those are the steps that a Minister is perfectly entitled to take, like any other litigant. But then we have the advantage as a Government that if we believe the judges have taken the law in a direction that is contrary to the policy of the Government, you can invite Parliament to legislate.

Q38 Lord Irvine of Lairg: Lord Judge told us that when all is said and done, in his view judicial independence depends on the public will that the judiciary should be independent. Do you agree that if government Ministers are sniping at judges, that causes a certain amount of public disquiet because the system is not seen to be working as it should?

Kenneth Clarke MP: Yes, I think there is a perfectly sound argument that it undermines confidence in the system if Ministers are seen to be at odds with the courts. Unfortunately, you can't guarantee that the public will always be unerringly on the side of the judiciary against a critical Minister. I can remember occasions, if I may say so, under the former Government when Ministers sounded off in very intemperate terms. They did so because they thought that what they were saying was popular with the general public. The difficulty is that you are undermining the judiciary. Public opinion on criminal cases in particular, but sometimes also on civil cases, can only be based on whatever description of the facts of the case has been given in the media that they happen to read. That is not always totally accurate in my experience.

Q39 Lord Irvine of Lairg: It sounds as if we are agreeing.

Kenneth Clarke MP: It sounds as though you and I share exactly the same views, which is probably not surprising.

Q40 Lord Irvine of Lairg: The Lord Chief Justice is now the head of the judiciary, not the Lord Chancellor, but the working relationship between the two is still obviously highly important. Lord Judge told us that his working relationship with you was extremely equable.

Kenneth Clarke MP: I think it is excellent. I get on very well with Lord Judge, who I happen to have known for years. The two of us get on perfectly well personally, but more importantly I think our professional relationship is very good. We are in regular contact with each other. We normally meet in his rooms, because he is more tied to the courts than I am to the House of Commons, but we meet in various places. We make sure that we are up to speed with each other's views and we discuss the serious things that we ought to talk about together. The relationship reminds me rather of the relationship I used to have with the Governor of the Bank of England when I was Chancellor of the Exchequer. In my opinion the Governor of the Bank of England and the Chancellor of the Exchequer should meet fairly regularly. We used to have lunch. I don't have lunch with the Lord Chief Justice. That is not for any particular reason, we just don't work it that way.

More seriously, if Lord Judge or I thought that there was any difficulty we would work at making sure we had a proper professional relationship. It is necessary for the Lord Chief Justice and the Lord Chancellor to feel that they know exactly what the other is doing, where they are coming from and what their reaction is to any difficult problems. On the last question, the one thing we never talk about is any particular case in which the Lord Chief is involved, in case the public get the wrong idea. The one thing I never talk to him about is the decision of the courts.

Q41 Lord Irvine of Lairg: To revert to the question with which our Chairman began the session, what is generally is your perception of the present relationship between the judiciary, the Government and Parliament in comparison with those that you have known intimately before, across your very long period in public life?

Kenneth Clarke MP: I do not think it has changed significantly. Because of the constitutional reform a few years ago, there was a momentary alarm among the judiciary that there was going to be an attempt to alter their relationship with Parliament and the Executive. I don't

think it has actually changed. The other main concern they had was that they thought the reorganisation of business that put the Prison Service with the judiciary was going to mean that all the money kept pouring into the Prison Service and they would find that they were starved of money to maintain the judicial system. I don't know to what extent you were involved in putting in place what I regard as a rather elaborate arrangement with concordats to try and protect against that. I regard this as a very odd way of settling a public expenditure round, with which I'm familiar.

The basic underlying position with the judiciary remains good, I think. The one thing that has changed in my time, if you want to start reminiscing in this august setting with my old colleagues, is that the growth of judicial review is quite remarkable. I have always supported it, ever since Lord Woolf got it under way. The modern Executive was at last to be made properly subject to review, to prevent arbitrary and unfair action at the expense of the individual. Even I, who have always been a firm enthusiast of it, am astonished at the way that judicial review sits over every decision that anybody in government and the administration makes. I'm beginning to find myself thinking, "Why on earth have they given leave for judicial review of such an obscure and tiny issue?" It's an industry and it takes up a very high proportion of the time of the administrative courts. That has nothing to do with me. It is where the judiciary wishes to take it and it would be very dangerous to try to reverse it, because anybody in any position in the Government or administration should be subject to the law of judicial review, but that has changed the relationship. It has changed it more than the European Convention on Human Rights has, in my view, which everybody gets very excited about. Judicial review lies behind half the discussions I find myself having across government or inside my department about how we are going to handle a particular case.

Q42 Lord Irvine of Lairg: We can leave this on the basis that lawyers are certainly very adept at creating legal industries.

Kenneth Clarke MP: I think so. Supporters of judicial review should ask whether a certain amount of creative work is going on here. Big important issues should be addressed by the courts if there is any suggestion that decisions have been taken arbitrarily or without proper reflection or opportunity to consult, but if we're not careful every planning dispute is going to wind up subject to judicial review.

Q43 Lord Pannick: I should declare an interest as a practitioner in the area of judicial review, for and against Government.

Kenneth Clarke MP: It is an area of growth, I'm sure you'll agree.

Lord Pannick: It certainly is. You mentioned your view that Parliament should be strengthened against the Executive. You will know that we heard evidence last month from the Lord Chief Justice, who expressed concern about Henry VIII clauses, and particular concern about aspects of the Public Bodies Bill, which will confer greater powers on Ministers. My question is whether it is really appropriate for Parliament to confer powers on Ministers to regulate by secondary legislation important bodies such as the Judicial Appointments Commission, the Criminal Cases Review Commission, the Parole Board and many others that are listed in the schedules to that Bill.

Kenneth Clarke MP: I think most parliamentarians don't like Henry VIII clauses and people have been denouncing them for years. They do increasingly get used. The Lord Chief made a particular point of attacking Henry VIII clauses at the judges' dinner when I was newly appointed and I said at the time that I largely agreed with him. There are occasions when decisions have to be taken that will take years if you have to set out every detail in a Bill. That is why—it is not for any sinister reason—successive Governments have brought forward these proposals. The Bill in question is largely about scrapping quangos, merging them with each other or moving them to departments. There is an argument for saying that, given the financial crisis, it is fine in principle for you to say that these should all be done by

separate Acts of Parliament, but it will take about 10 years to get to through the lot by the time every quango has defended itself and you have had all this debate. We are trying to be careful that we don't abuse it. We have listened to what their Lordships have been saying and I think we had the same arguments in the Commons with some of these. I was about to look up which of the ones that you mentioned we have already taken out of Schedule 7. We have slightly got there because people thought that in case we ever want to do anything to change the powers of the Parole Board, shouldn't we slip it in? I think the amendments have been tabled already to take it out again. That is not a proper way of proceeding. So we are trying to respond. The purist in me says that every one of these should be addressed by some distinct Act of Parliament in the relevant field—you could bundle all the Ministry of Justice ones together—but we know that would take years and every lobby group would hold them all up.

Q44 Lord Pannick: The thing about Schedule 7 is that it is not concerned about scrapping quangos that ought to be removed; it is about bodies in respect of which the Government has no current intention to do anything, but they may wish to at some undefined stage in the future. To take that sort of power surely is not consistent with strengthening Parliament against the Executive, which is your objective.

Kenneth Clarke MP: We have had several from my Department that fitted that description. They have been put in just in case we ever needed to change them. I think we have taken them all out. If not, we are intending to do so. It is not my Bill so I should say that I think you will find the Government is still listening to all this. I was very much in favour of this quango-shoot. Every now and again you have to trim down the colossal number of non-departmental public bodies and quangos that you create. If you're not careful, the Government then starts creating a whole lot of new ones as the modern process of government produces pressure. Some of the things we are getting rid of should have been

got rid of years ago. I think you will find that we have listened to Parliament as we have taken it through and we are trying to be sensitive to how far the administrative convenience of getting it over with and doing it reasonably quickly can be reconciled with proper parliamentary process. I take on board what you say about Schedule 7 and no doubt the Ministers on the Bill will listen to the debate on the Bill that is still going on in this House.

Q45 Lord Shaw of Northstead: On this question, in the last six or seven years I have been on two Committees and a large amount of time has been spent looking at Henry VIII clauses. It seems to me that you should not do away with the right of investigation by Parliament on each of these cases. Some may be unnecessary, but there ought to be a full investigation by Parliament in all of these—maybe not by the whole House, but by Committees of some sort who can publish their findings. The number of times we recommended that the Henry VIII clause be waived is significant. It goes back to the Civil Service and they accept that it is not appropriate. In other words, they try to get away with it. It seems to me that Parliament ought to be more deeply involved than it would be if all this were allowed to go through.

The Chairman: The additional point to that is that a concern has been raised about bodies, taking your point about shooting the quangos, that have been set up by individual independent statute which are now, as it were, subject to abolition by secondary legislation.

Kenneth Clarke MP: Well, in principle I entirely agree with Lord Shaw. I am trying to find a list of the things that we are abolishing. The fact is that you will have some pretty strange Bill surrounding some agricultural body—I choose a random one and I'm sure there isn't some insignificant agricultural body involved—which would just take up a lot of parliamentary time and nobody in the end would conceivably think of addressing the underlying decision to get rid of this strange organisation. We faced the same problem with the Law Commission's proposals and when we tried to simplify tax legislation. You have to have some process that

streamlines the way you take it through the House of Commons if really you can design a process that doesn't undermine Parliament but does enable you to tackle things with some expediency. It is rather appropriate that I should be saying so when your House is going in for filibustering on a scale never previously done. It is possible for Oppositions of either party to start holding up the Government's entire programme because there is some row going on at some stage and it then makes it more difficult to go through the full process. You have to have some quick process. Having said that, Henry VIII clauses are not the most attractive process and I hope we will minimise their use. I hope we will continue to consider the debate on the current Bill. I think their Lordships are having an effect. I have already said that we have taken out of Schedule 7 a whole raft of bodies in my area that really should never have been there in the first place.

Q46 Lord Goldsmith: Can I just follow up on that for a moment? What you have said is very interesting. I recognise this isn't your Bill, but it sounds as if your approach, at least, is that in principle there shouldn't be bodies in Schedule 7, not just from your area but from other Departments, where there isn't any current intention to change them. Schedule 7 shouldn't be used just to take a reserve power to do something to those bodies if someone in the future thinks it might be a good idea to change, amend or abolish them.

Kenneth Clarke MP: That is certainly the view I took about the bodies that are relevant to my Department. That would be my starting point. I don't know whether some other Minister has some counter-argument to that. I would have thought that to put something in the schedule just in case in future some Government wants to vary the statutory powers, with the wisdom of hindsight I would have said that you'll never get that through the House of Lords. But there we are.

Q47 Lord Goldsmith: May I just move on? I wanted to ask you something that Lord Judge also talked about, and that is funding, particularly of the judiciary, although as I

understand it your responsibilities go somewhat wider than that. I ought to declare an interest. I am a practising lawyer, although I don't do legal aid work. I am a part-time judge, at least on your books at the moment, although I am not a very active practitioner in that field. Lord Judge expressed some concern about what cuts may do to the Crown Prosecution Service and the defence system, but acknowledged that we are living in an age of financial austerity, so we have to cut our cloth accordingly. There are two parts to my question. First, what's your view about whether there need to be mechanisms to protect the independence of the judiciary as far as funding is concerned? That is one of the issues that was discussed at the time of the concordat. Or can one just leave that, as it were, under the present system? Secondly, do you have a concern about what cuts might do particularly to the prosecution service, in which I obviously have a particular interest from my previous role, and to the defence system?

Kenneth Clarke MP: As you will know, the Crown Prosecution Service is in the Law Officers' Department under the Attorney, but obviously it has great relevance to the court system as well. I have found that what I described earlier as a rather elaborate system which was set up in 2003 is working quite satisfactorily. It requires the Lord Chief Justice and me to discuss these matters and reach an agreement. I think we have reached a perfectly satisfactory settlement. I wouldn't wish to go any further than that. I have already said that I respect the independence of the judiciary completely. Obviously it is relevant to that, but we have to be absolutely sure that the Executive is not underfunding the court system or the judiciary or any part of the legal system because it has some political desire to put pressure on it. But it has to be subject to the same constraints on public expenditure as everybody else. With the best will in the world, people who work in the courts and the Crown Prosecution Service have the same views about what should be spent on their service as everybody else does. It is probably because I have been in the Treasury and the iron has

entered my soul, but I don't dismiss the arguments of doctors about hospitals. These are very responsible people talking about very important subjects, but the day will never come when they agree with the Treasury that they have enough money. In the end, you have to sit down and negotiate. The attempt in 2003 was to put under the grand name of a concordat a glorious special system around the funding of the court service. Although it was all in the name of protecting judicial independence, I think it was largely and quite understandably caused by a fear that the more politically popular expenditure on other parts of the department was going to start squeezing out proper expenditure on the court service. I hope the Lord Chief agrees with me that we have avoided that. I think it's right, as I did when I was Health Secretary, to get a proper settlement in the circumstances for your Department, but in the end, however elaborate you make the constitutional arrangements, it is two people sitting around a table arguing with each other about what can actually be afforded and what is necessary for the service.

Q48 Lord Goldsmith: So would you tear up that part of the concordat?

Kenneth Clarke MP: I wouldn't tear it up because it isn't causing any difficulty and I wouldn't want to start a row about it, but one day you will get to a situation where the Lord Chief does not agree that he has done well. You quite frequently get vice chancellors of universities or Ministers in Departments who think they haven't got enough. I am cautious of leading everybody to expect that the court service has some sanctified constitutional position where they can just insist that in the end they decide how much money they get. That is not conducive to efficiency and good governance, in my view.

The Chairman: On a related issue, in terms of expenditure, in a letter that you wrote to me and others recently about the review of the Judicial Appointments Commission you said that you thought some organisational change should be made to reduce costs. Lord Pannick has some questions on that.

Q49 Lord Pannick: That letter referred to a series of important constitutional issues that required consultation and then possible legislative change. One of the subjects is the role of the Lord Chancellor in the appointments process. Do you think the Lord Chancellor should retain a role in the judicial appointments process, or could some of your functions be transferred to the Lord Chief Justice?

Kenneth Clarke MP: We are looking at that. We haven't come to any firm decisions. I think the Lord Chancellor should retain a role. It is a question of what role and at what seniority. You are looking at a vast raft of appointments. I have a predecessor sitting among us. To pretend that you can seriously get immersed in some of the appointments that come across your desk is a bit of an illusion. On the more senior ones, usually again you don't interfere, but it's right that the Lord Chancellor has a role reserved to him or her in case he wants to intervene. Parliament would expect that. We are looking at all that. There are some that require the Prime Minister's theoretical intervention, and all this sort of thing. Without undermining people's proper constitutional responsibility, we are considering whether we should move slightly more in the direction of sensible practice. That is what lies behind that phrase in the letter, if I remember it correctly.

Q50 Lord Pannick: Would you be sympathetic to the notion that the Lord Chancellor should have no role below the level, say, of the Court of Appeal?

Kenneth Clarke MP: I would look at that. It is a question of where you draw the line. The Lord Chancellor's role at any level should not be to get political patronage brought back into the system. When I practised at the Bar, political patronage was just at the point of finally dying out, and I don't think we should ever revive it. One of the worst judges I ever appeared before was a former Conservative MP, although some of our best judges were also former Conservative MPs. We had spectacularly successful former Conservative MPs. I can't remember the last time a former MP went on the High Court Bench. We don't want to drift

back to that. Just to reinforce the point, I think things are better now than they have been at some times in our glorious past, on this front as on others.

Q51 Lord Rodgers of Quarry Bank: Apart from responsibilities between the Lord Chancellor and the Lord Chief Justice, what do you think, looking back on your extensive experience, of the role of the Lord Chancellor today and its relationship with the Home Secretary? You said you had very heavy responsibilities. If you were able to think again or wanted to make changes to the balance between your Department and the Home Office or in any other way, would you like to rearrange your role and be more effective or less strained than it is?

Kenneth Clarke MP: It is obviously not a matter for me, but having been Home Secretary and now come to the current arrangements, I don't think there is any harm in my saying that I wouldn't have divided it in the way that was done. The old Home Office was a giant, all-embracing Department and the bits of it have now been scattered all over the place. I have got bits of the old Home Office, principally the Prison Service, and most of the old Lord Chancellor's Department. There are some oddities, with the prisons on one side and the police on the other, and we have to collaborate on the criminal justice system. On the other hand—it is probably not for this Committee or for me; it is up to the Prime Minister, but if he were to ask my opinion—I would not recommend that he went in for more institutional reorganisation of departments at the moment. My experience of shuffling around responsibilities between departments and putting a new name on the door is that it never achieves very much, despite whatever the Prime Minister thinks it was going to achieve. It causes the utmost upheaval. The Department stops doing anything for six months and then you settle down with a new structure. If, in due course, those with the power and responsibility for these matters were to decide that they wanted to readdress the division between the Home Office and Justice or the Law Officers, I would do it cautiously and wait

for a quieter time than the middle of a financial crisis and a reform agenda at the beginning of a new coalition Government. I would strongly recommend that we shouldn't make it an issue at the moment.

As for the relationships in practice, we are working very hard at making sure that, however it is divided, we all work inside one criminal justice system. Already, Theresa May, Dominic Grieve and I are beginning to set in place regular mechanisms for getting together, discussing things and making sure our officials work together. Plainly, there is always opportunity for tension between different government Departments. From the top, both politically and at official level, we are doing our damndest to ensure that we stop that and that we ensure that we all go in the same direction. We have some very important work to do on improving the efficiency of the criminal justice system, which I don't think is the most efficient process at the moment, not just to reduce costs but to make sure that witnesses, victims and everybody else are not inconvenienced by some of the inefficiencies of case management, for example, that still exist in the system.

Q52 Lord Powell of Bayswater: Coming back for a moment to the judicial appointments question, do you foresee a time coming when there will be parliamentary hearings on the appointment of very senior judges, rather on the US model? Do you think that is conceivable in our system in the future?

Kenneth Clarke MP: I personally would be very much against that, because I think it would run the risk of politicising appointments the moment you did it. It certainly would in our House and I think it might here. Here I am with my contemporaries in the House of Lords. We are reminiscing a bit and I will try to avoid being provocative. The worst example of political interference in the judiciary that I can recall was the political controversy around Lord Donaldson when we passed the Industrial Relations Act in the early 1970s. I am not being too contentious, because there was nobody who is currently in politics involved, but

sections of the Labour Party got it into their heads that because we had made Lord Donaldson chairman of the court that was set up under the Act, his was somehow a political appointment. Personal attacks were made on him. Fortunately, his career was not permanently blighted when a Labour Government was subsequently elected, because the more sensible people in the Labour Party realised that this had all been a bit of nonsense, but I think it was affected. I think he wound up as Master of the Rolls. Suddenly we had a politically controversial judge, and people who were not familiar with the system were suddenly making speeches about this stooge of the Tories and the CBI, and so on. That may be an extreme example, but it was bad. Sooner or later, somebody will get it into their heads, in a parliamentary hearing, to start politicising the appointment of a judge. That is my personal view. I don't think that's a considered statement of government policy, but it is my personal reaction.

Q53 Lord Goldsmith: You have said before—I don't disagree with you at all—that judicial review has grown enormously and the result is that many decisions find their way into the courts. The Human Rights Act has some impact, but I also agree with you that that is not the primary reason; it is the growth of judicial review before that. Looking forward, do you see that the consequence of that may be a growing clamour from the public and from parliamentarians to know something about the political views and philosophy of people before they are appointed, at least to the most senior judicial positions? I am not putting that forward as a proposal, but do you predict that that is one of the things that may happen?

Kenneth Clarke MP: I would hope not, but again it could. It requires care on the part of a wholly independent judiciary about quite where they take orders. As we know, judicial review does not mean that the judge substitutes his personal opinion for the opinion of the Parliamentary Under-Secretary of State on the political issue before him, but it can sometimes get dangerously near that. Because it is never on the merits and is always on the

process, we develop ever-more elaborate processes. Sometimes, because a judge thinks an injustice has been done and he wants to correct it, he starts inventing all sorts of arguments about the audit trail and the consultation process in order to knock on the head a decision on which he feels sorry for the claimant or the group who are lobbying and he wants to find in their favour. If that gets taken too far, you will start finding that some judges get reputations as liberal judges and some get reputations as conservative judges. People will look at the balance of appointments, particularly in the administrative division. We are a million miles away from that at the moment. People accept that judicial review is a valuable tool that is here to stay, but I would very much regret it if we started having an American-type system where people alter the political balance of the Bench because they think it is lurching too far in favour of one lobby or another.

Q54 Lord Goldsmith: I think the last MP appointed to the Bench was probably Mr Justice Cranston, who of course was a Labour MP.

Kenneth Clarke MP: I had forgotten. He was also a Law Officer. I had a high regard for him. He was not the person I had in mind. I haven't appeared before any judge, except as a witness on a couple of occasions, for over 30 years, so the former Conservative MP who I criticised very much when I appeared before him in the 1960s can remain shrouded in mystery. He was the last from our side ever to be appointed.

Q55 Lord Norton of Louth: I have two points, if I may. Earlier you touched on the relationship between Government and Parliament and between Government and the judiciary. I have one question on each of those two prongs. On the Parliament side, you implied that the Commons is getting weaker relative to the Executive, but what about the argument that since you were first elected to Parliament you now have departmental Select Committees, Public Bill Committees and a new Back-Bench Business Committee. Since you were elected, government Back-Benchers have become far more willing to vote against their

own side, occasionally—on rare occasions—leading to defeat, which never happened before the 1970s. So perhaps there is an argument that the Commons isn't that weak and it is holding its own to some extent. You might argue that the Commons is weak, but not necessarily that it has got weaker.

Kenneth Clarke MP: I very much hope that we are reversing the process that I was denouncing. I have had discussions with you, Lord Norton, when Sir George Young, Andrew Tyrie, Laura Sandys and some other non-parliamentarians and I were doing reports advising David Cameron in opposition. We produced reports with Lord Butler on how to restore collective government, how to make a modern Executive properly accountable to Parliament and on a whole raft of parliamentary reforms that might restore the proper accountability of the Government to Parliament in our opinion. I'm glad to say that we're making progress. One of my collaborators on that, George Young, is now the Leader of the House. Select Committees nowadays have become a very important way of holding the Government to account. It is one of the things that has grown rather than weakening in recent years. We have introduced the election by secret ballot of the Chairmen of Select Committees. It is probably a good job that the new Government did it straight away, because after a bit the pressures of the Executive start weakening on these reforming enthusiasms. We moved pretty quickly to create a few rods for our own back and for our successors by having elected Select Committee Chairmen, and so on. The Whips can't fix the elections, so we have real Chairmen. There are going to be other procedures. We are giving more time, even in this crowded first Session, to our legislation. I strongly disapprove of the outburst of rebelliousness in a Parliament that is already proving the least disciplined of modern times. No doubt that will be corrected, but I am confident and optimistic that a lot of things that took place under successive previous Governments are being reversed. This Commons has

started off quite well really, as long as it doesn't defeat any of my legislation in the near future.

Q56 Lord Norton of Louth: So on the Commons side, if you like, the moves are in the right direction? Do you feel that it is the same with the judiciary, particularly the effects now of the creation of the Supreme Court? What is your assessment of that? Has that physical change had any political ramifications?

Kenneth Clarke MP: I don't think so. I don't notice any. That was a remarkable reform. I'm not quite sure why they did it. I think I was in favour of it when it was proposed because, rather like the change in the role of the Lord Chancellor, you were getting rid of anomalies that you couldn't explain to foreigners, which didn't in practice affect the independence of the highest court in the land. They have a very impressive building over the way and we have a Supreme Court that is independent. I have a high regard for the Supreme Court. I don't have any doubts about the functioning of the Supreme Court. Nothing has yet occurred to make me question the way in which it is going. It seems to be going very satisfactorily. I have contact with the judges over there. I try to keep in touch and as far as I'm aware it is working very satisfactorily. The late Lord Bingham was a great enthusiast for doing it, so it is a kind of monument to his work, really.

Q57 The Chairman: On these practical questions about the assessment of institutions, what assessment do you make about the Judicial Appointments Commission?

Kenneth Clarke MP: Well, I don't think we can get rid of it because there were weaknesses in the old system and I think it is good for public confidence, so it isn't in the Bill that is currently before the Lords. The idea that it is seen to be independent and there is a process is very good. I don't think there was that much wrong with what was done before, but it was subject to judicial prejudice sometimes and people could be the victims of a judicial veto and so on and it didn't carry public confidence because it was so closed and looked like a bit of

an old boys' club renewing itself, which I don't think it was. Now we have got it there, we must keep it and that's fine. I perceive no change in the quality of appointments made or anything of that kind. Nobody has yet complained to me and no serious problem has arisen, so it is probably a good idea that there is more lay involvement and it has a set process and all the rest of it. I don't see why on earth it costs as much as it does and I have no idea why it takes so long. The people making the appointments don't have the advantage of having seen all the advocates in action and knowing them all, having seen them in a court. In the old days you knew exactly which of your fellow practitioners were likely to be the next people to get silk and you knew exactly who would be the next people on the Bench, because by general view they were above the obvious candidates and on they went. Now there has to be a process and we have all the paraphernalia of the modern human resources industry brought to bear where they all have to fill in forms, write essays, have interviews, do role-playing and all the rest of it. They have developed systems of their own where every commissioner takes part in the appointments at practically every level. I am trying to enjoin them to say that of course we should keep the Judicial Appointments Commission, but we must address the cost and the speed. Of course they are independent so, with a new chairman, they will have to decide how to run the process so you can make these important appointments in a reasonable time at much less public expense. We can't pay £10 million a year for process.

Q58 Lord Hart of Chilton: I am a solicitor, but not practising any more, and I spent many happy years with two Lord Chancellors. One of the topics that was never far from our minds was trying to widen the pool from which judicial appointments were made. Since the Lord Chief Justice was also concerned about the pool of appointments and the diversity of them, I wondered whether you had any views in relation to how there could be better success on that than we ever managed to achieve.

Kenneth Clarke MP: I think success is being achieved, but I agree that it is irritatingly slow. Diversity remains a set aim, as long as it does not override the obvious principle that appointments to the judiciary are made on merit. The steady increase in the number of women on the Bench and the seniority at which they occur, ethnic minority representation and the divided legal profession not excluding solicitors from senior appointments—it is all coming along steadily. We still have the task force that advises the Government on this and we still monitor it. I would welcome a more diverse and widely representative Bench. I hope the process continues.

My personal opinion is that the difficulties don't arise at the level where you are selecting and appointing judges. It seems to me that the legal world at the level we are talking about is free of people with prejudice on grounds of gender, ethnicity or professional background or anything like that. People will say that's absolutely reckless and I am not aware of people's hidden or subconscious prejudices, but I think the sort of people who are involved in the appointment of judges are no longer against the appointment of women and they have no views on ethnic minorities. This is the competent upper middle class professionals who are utterly beyond all that. So the question is why we don't get an increase in the number of candidates coming through in order to speed up the process. You have to look more to the internal workings of the legal profession, legal education, opportunities, confidence and so on, if you think it is all going too slowly and you have to speed it up. That is utterly beyond the reach of the Lord Chancellor's Department. But it is a worthwhile aim and I would welcome anything that speeds it up.

Q59 Lord Pannick: Lord Chancellor, you say that progress is coming along, but the senior judiciary remains almost overwhelmingly male and white. Do you think there is a risk of damage to public confidence in the law by the face that the judiciary presents and how high a priority is it for your Department to try to do something about it?

Kenneth Clarke MP: I can't remember how many women are in the Supreme Court.

Lord Pannick: One.

Kenneth Clarke MP: One, is it? It remains a priority. I just anticipate that sooner or later we are going to have a judiciary where at least half of them are women at every level and the proportion of ethnic minority people or all groups of society will be roughly equivalent to the rest of society, but that requires all kinds of things to happen in society as a whole, on social mobility and so on. I am no longer in practice, but career breaks still affect the extent to which women get up towards the top. It remains a priority. We are not getting rid of it or shunning any of the advice. We are not shunning the objective of diversity. I share the anxiety that it would be nice if we could see that we were going faster. I don't think the Judicial Appointments Commission has made a blind bit of difference to this—that is a personal opinion. There is more diversity now than when it was set up, but I don't think it has gone any faster than you would have expected it to go under the old arrangements anyway. Appointments must be on merit. Everybody, including leading women lawyers, would agree that any hint of quotas or some lowering of the bar to promotion because you want more women is demeaning to distinguish women lawyers, let alone anybody else. They have got to be there on merit.

We will address any proposals put to us. We have a Judicial Diversity Taskforce to advise us. I would be very worried if I thought we were losing public confidence and going back to the image that people used to have of all judges being upper class, public school, white, reactionary and old. That was always a bit of an illusion, but I think a lot of the public had that vision of the judiciary about 50 years ago. We are a million miles away from it in practice.

Q60 Lord Goldsmith: You said a moment ago that there was a question of what your Department could do about some of this. One issue that we looked at when we were in

government is the obstacles to appointment to the Bench of people who don't come from the traditional legal background, particularly from the Bar. This relates particularly to the solicitors' profession, and particularly the employed lawyers, many of whom are in government, but for whom there are obstacles such as whether they can do the part-time judicial work that is normally regarded as necessary. Have you and the Attorney-General looked at the demographic makeup of those parts of the legal profession and whether something could be done to make it easier for them to qualify for the Bench? That would be in their interests and in the interests of the wider public.

Kenneth Clarke MP: I confess that I haven't looked at that particularly. I think it is a perfectly reasonable and attractive point. We have the advisory committee, which makes recommendations and we act on them. We have a task force that is going to report to us. I will go away and consider it. I want to avoid being complacent about it—I will give you my views why in a moment—but I don't see anything directly to attack. The employed lawyers is a very relevant point. Some of the best lawyers in the country are employed either by the Government or by corporations. Once you go there you get better paid, or you have more security anyway, but otherwise you are rather excluded from the other processes. It would be worthwhile trying to think of ways. How do you answer the question? How can an employed lawyer start sitting as a recorder, as a part-time appointment? It is quite a good idea normally—not always—for someone to sit as a recorder before you contemplate moving them higher up the judiciary.

Lord Goldsmith: Thank you for saying that you will look at that further. It is an important point.

The Chairman: Could we move on to a different area and look at the Green Paper that you published on Breaking the Cycle?

Q61 Lord Crickhowell: It would be interesting to have your views about the underlying philosophy, but first I have a non-lawyer question—what I often call my Pooh Bear question, as an ignorant layman. We have seen an announcement in the last week of the perfectly proper closure of some awful old prisons and a reduction in the construction of new prison places. It seems to me that there must be a relationship with sentencing, because if the court doesn't alter and the guidance system doesn't change the sentencing policy, it is likely to create a tension with the judiciary, who may want to send people to prison, but there may be no prison places. How do you resolve that problem? Is this an issue that arises in your discussions with the Lord Chief Justice?

Kenneth Clarke MP: We are still building some prisons. We have two big contracts under way—Belmarsh and another one—with potentially almost 3,000 places under construction. They are still on stream. I would quite like to get rid of some of the old, high-cost, unsuitable accommodation. To have a proper estate, you are going to replace some of it if you can. The first two that we have closed down are, in my opinion, slightly no-brainers. One is a medieval castle, which I was trying to close 20 years ago when I was Home Secretary. The other was wrecked in a riot and it has never been cost-effective to rebuild it, so most of it is in a derelict state.

The question of accommodating prisoners is at the heart of the whole thing. The courts determine how many people you have to imprison. I would be strongly against changing that. In a way, we are a demand-led service. It is the duty of the Prison Service to incarcerate all those whom the courts decide should be punished in that way and they should be held securely. So we slightly respond to the courts and to demand. In recent years, Parliament has stimulated that demand by putting more pressure on the courts to lengthen sentences. We will always have to make sure that we have accommodation. The judgment, when I decided to go ahead with closing Lancaster and Ashwell and giving a women's prison called

Morton Hall to the Border Agency, which has more need for it, was based on having a good cushion. We don't seem to be at the remotest risk of running out of accommodation and we could therefore proceed with these closures. The places we are getting rid of are old, unsuitable and high-cost per inmate, or they are ruined—Ashwell isn't that old, but it's ruined.

That is straightforward. The problem with accommodating prisoners is that it is very difficult to forecast. That has always been the case. You have to make your best estimate of how many prisoners you are going to have. For no reason that can be quickly worked out, it can suddenly go wrong. I am constantly vigilant to make sure that we have a proper cushion so that I am not suddenly caught out. The last Government—I think this is my first partisan remark of the morning—went out of its way to stimulate the ever-accelerating rise in the prison population and then found it couldn't keep up with the demand it had provoked, so 80,000 people had to be let out before they had finished their sentences. That is a catastrophe that I very much hope to be able to avoid. I am sorry to ramble on—I must make shorter answers because we are towards the end of the time—but the key thing is that in the end the courts must decide how many people are in prison and for how long, subject to whatever guidance they get from Parliament or from the sentencing council.

Q62 Lord Crickhowell: That seems to imply that even in a time of financial difficulty, money has to be found if necessary to provide sufficient prison accommodation and to see that people are housed. I think you are implying that.

Kenneth Clarke MP: If necessary, I think it would. The trouble is you can't turn on a tap and produce a new prison, so you have to make your best judgment on what prison building programme you require. If the prison population doesn't explode, you can do things like getting rid of the medieval premises and the high-cost places and have a more efficient estate in which you can do more sensible things. That is roughly the course. We are proposing very

important sentencing reforms, which I think are very sensible, but there is a slightly unreal debate at times, as though the whole thing should be judged by the yardstick that it must be a good thing if it is increasing the number of prisoners and a bad thing if it is reducing it, when actually neither my critics nor I have the slightest control over the numbers. They have been exploding like mad. It was 40,000-odd when I was in office. When Michael Howard was Home Secretary I think we had 65,000 prisoners. It has recently dropped a bit, but it is still about 85,000. After the Carter review, the last Government was cheerily planning to see it go to 95,000. So we need sentencing reforms from which we can judge what impact it is going to have. We have practically doubled the number of prisoners and almost doubled the expenditure in real terms. So you have to ask where on earth all this is going.

Q63 Lord Crickhowell: That takes us back rather neatly to the philosophy behind the Green Paper. It does not artificially control the number of prisoners, but you obviously have other objectives in terms of effective punishment and rehabilitation and so on. Would you like to say a little more about that?

Kenneth Clarke MP: There is no getting away from the fact that we had to contribute to the public spending costs. In real terms, I think spending since 1997 has increased by about three quarters. It is one of the Departments of Government that was completely soaring away throughout the last Government. It was going up when we handed over in 1997, because my successor at the Home Office was also driving up the prison numbers at quite a rate. In the House of Commons, I have quoted Newt Gingrich criticising what has happened in America and saying it is bad value for money for the taxpayer and they are locking up the wrong people, in this case in Carolina. He said it was time it was brought down. Most of the States in America, having seen their prison population explode since the 1970s, are taking steps, now that they are broke, to try to bring it down again.

Contribution to spending control had to be part of this, as it is part of every other policy, but it wasn't the main point. I want to combine it with a reform of the sentencing system at its weakest. The worst failure of the British system in my opinion, and the opinion of the Government, is our terrible figures for reoffending. Real value could be given to the public if we did not have a situation in which three quarters of the people in prison sooner or later commit another criminal offence and about half of them will be caught committing another criminal offence within a year of leaving prison. We will help victims and reduce pressures on the system, but we will also protect the public if we improve that. Probably the majority of crime in Britain is caused by drugs. The majority of people in prison have, or have had, drug problems. We must improve drug rehabilitation; we must do something about alcohol abuse; we have lots of mentally ill people in prison—about 40% of them have diagnosable mental illness. Some of them shouldn't be there at all. We have to tackle that.

Across the Government, the focus is going to be on rehabilitation. We are going to try to get better value for money through the payment by results system. If you can release the pressures, you can do something about the regime. We would like prison to be a place of work. We would like people to develop working habits. We'd like to tie in with employment programmes so that more of them might get a job and go straight when they come out. That is what the sentencing reforms are all about. That is why I begin by being so defensive on this argument—which I regard as slightly irrelevant—that has broken out about our estimates of where the prison population is going to go. If the prison population starts exploding again, I shall have to go back to the Treasury and say that they will have to give me hundreds of millions of pounds. I'll ask for an aircraft carrier.

Q64 Lord Renton of Mount Harry: I have a very unlikely opportunity of declaring an interest. You have just mentioned Morton Hall, the women's prison that has just been closed. I would just put it on the record that it was built by my grandfather. I spent many

happy years there as a child. It is very nice to have the opportunity of putting that on the record. Thinking about what you were just saying, if you have had time to read the *Times* today, you will see that Lord Ramsbotham is again very much taking up the question of what is the point of sending young teenagers to prison. They go there illiterate and without any skills and they come out still illiterate and without any skills. Therefore, as you have just said, they commit another offence very quickly. He has often quoted the example of continental European countries that seem to handle this much better than us, giving training for such young people, but not in prison. What is your view on that? Can we move in that direction?

Kenneth Clarke MP: I haven't seen the *Times* this morning and I will look at Lord Ramsbotham's suggestion. I have met him. Lord Ramsbotham is more liberal than I am by a good long way. We are locking up fewer young offenders. Young offender institutions are not under great pressure. But you have to be careful to make sure that you are not just locking up fewer people, but you are doing some good and protecting the public by effectively tackling them in other ways. That is my reservation.

You ask what is the point of a young offender or anybody else being sent to prison. I always emphasise that the main point is to punish people. The public expect some retribution to be inflicted on people who misbehave badly. For serious criminals, it is the best punishment. It is just that there is no point in getting more and more people brought in. Newt Gingrich also deals with the point about the waifs and strays that they take into the American system without doing much good.

You have to have a different approach for young offenders. If you can divert young offenders out of prison in a way that reduces the likelihood of them turning into serious adult criminals and gives them a chance of starting their life properly, that is very important, but you have to be cautious. We have all met some worryingly frightening 16 or 17-year-olds.

There is a hard core of them and unless you can get their behaviour under control, you are going to have to lock them up. But that number does not have to just grow exponentially.

Q65 Lord Renton of Mount Harry: I have talked about this quite often with Lord Ramsbotham. He manages to quote countries such as Sweden, where they have exactly the same problem, but by sending the teenager back to his village and seeing that the village looks after him and trains him, the end result is better. Clearly there is a problem here.

Kenneth Clarke MP: We are looking at these international comparisons. Restorative justice will apply for adults as well. We are very interested in involving the community and involving victims if they want. Rehabilitation is one of the aims of our policy. I insist on focusing on reoffending rates. Then you can explain to the public that there is a payback to them for trying to sort out the lives of these people, because you are stopping them going out and committing more crime at the expense of more victims. That is very relevant for young people. I have a high respect for David Ramsbotham's views—I was not dismissing them when I said he is more liberal than I am. I will have a look at what he said in the *Times*. We are looking at international experience. This is nothing to do with me in my seven or eight months there, but young offenders are not being incarcerated at the rate they were a few years ago.

Q66 The Chairman: One of the things you have said that is relevant in this context is that you are looking at different methods of delivering justice without what you have described as the full grim court experience. What is the import of that?

Kenneth Clarke MP: Some of it is tied in with legal aid reforms, like the growth of mediation, which is growing very rapidly rather than the full, prolonged legal process with its adversarial content. In many of the disputes, it is not the best way of sorting them out. We are trying to improve the court process. We have been experimenting with virtual courts. We will carry on experimenting with them, mainly to get the police and lawyers to adapt

their practice to the fact that you can do these things by video link and so on without everybody having to turn up. We are trying to tackle case management. The small claims process has had some remarkable success. You can mediate small claims. Most of them are done on the telephone with quite a high success rate nowadays, sorting out disputes that otherwise would all go to the county court or have someone with no remedy whatever.

I stress case management as well, because most ordinary members of the public don't enter a court more than once or twice in their lives, unless they are lawyers, criminals or keen litigants. It is not as bad as it used to be, but in my opinion it is still the case that people regard being involved in a law case and having to go to court with a sense of dread. It is slightly disorganised. People who do jury service and witnesses talk about the time they waste and abortive hearings. The handling of witnesses and those attending court is much better than it used to be, but we should still look at the process and see what we can do to make sure it is a public service and it is resolving disputes, not exacerbating them, and it is not an inconvenience to everybody who has anything to do with it. There is a lot to do in that area. It has to be said that the law has not traditionally been wholly consumer-oriented. The rights of the individual citizen who happens to be caught up in it tend sometimes to be forgotten. There is still a lot to do in that area, although to be fair to my predecessors, a lot has been done and things are not as bad as they used to be.

Q67 Lord Goldsmith: Thank you for that last remark as well. When you produced the two consultations on legal aid and on civil litigation funding, one of the things that was said was that they were a first step in a programme of radically reforming and rebalancing the justice system. Can you give us a bit more insight into what you see that rebalanced and radically reformed justice system looking like? You have mentioned mediation and some things that have been taking place up to now. Do you see other big changes? Can you give us some insight?

Kenneth Clarke MP: The use of mediation has greatly increased since we started paying for supported mediation. We have encouraged that. The biggest thing we have in hand is the review of family law. It is an exploding area. In today's society there are a large number of problems when relationships break up, particularly surrounding the interests of children—proper access to children, proper parental involvement with children. We are not convinced that a classic adversarial court process is the best way of resolving all these disputes in the interests of the child or anybody else. In the worst cases it can make things worse. You encounter parents who have broken up with the utmost bitterness on both sides and the bitterness is slowly being fed by countless protracted hearings and mutual allegations, complaints and arguments about access and all this kind of thing. It is a difficult area to solve, but that is probably the biggest area to focus on.

Courts are an essential part of a civilised society. We need to make sure that all the time we are concentrating on the best way of enabling citizens to best resolve disputes and not, as occasionally happens in litigation, exacerbating them.

Q68 Lord Goldsmith: Would it involve a review of how successful the Woolf reforms have been, for example?

Kenneth Clarke MP: Yes. We will certainly follow up on the Woolf reforms, which achieved some success. I haven't looked at it, I must say. It was your time, not mine. I followed the Woolf reforms. I didn't follow this Department very closely, not least because I was shadowing another one, but the Woolf reforms seem to me to be a good idea and they did achieve something, but both you and Lord Irvine would be able to give evidence more authoritatively than me on that.

Q69 The Chairman: Lord Chancellor, you have given an enormous amount of authoritative evidence on a very wide range of subjects and we are very grateful indeed. I realise that we are running up against our clock deadline. I wonder if you or any Member of

the Committee has any point that we haven't adequately covered. Are there any other points that you would like to make?

Kenneth Clarke MP: Not surprisingly, if I may say so without ingratiating the Committee, this is one of the more interesting and sensible discussions I have had on the whole subject for quite a long time. I rather expected, coming before this particular Committee, having looked at the cast list, that it would lead to an interesting discussion about criminal justice policy and its future. I hope it has been helpful to the Committee. It has been very helpful to me and it steers me in a direction of things that, on reflection, perhaps I had not devoted enough attention to yet. That has come out of our exchanges.

The Chairman: In that spirit of mutual co-operation and gratitude, thank you very much for coming. We hope to see you again for another session of this kind. Thank you very much, Lord Chancellor.