HOUSE OF LORDS

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**The Select Committee on the Constitution**

# MEETING WITH LORD CHANCELLOR

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WEDNESDAY 21 NOVEMBER 2012

10.30am

Witness: Rt Hon Chris Grayling MP

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Members present

Baroness Jay of Paddington (Chairman)
Lord Crickhowell
Baroness Falkner of Margravine
Lord Goldsmith
Lord Hart of Chilton
Lord Lang of Monkton
Lord Lexden
Lord Macdonald of River Glaven
Lord Pannick
Lord Powell of Bayswater
Baroness Wheatcroft

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**Examination of Witness**

**Rt Hon Chris Grayling MP**, Lord Chancellor and Secretary of State for Justice, gave evidence.

**Q1 The Chairman:** Good morning, Mr Grayling, and thank you very much for coming to the Constitution Committee. This has become a regular meeting of the Committee with those holding your position. I have just asked you whether you preferred to be called Lord Chancellor or Secretary of State. You said very kindly you were relaxed about that, so I think given that this Committee focuses on constitutional matters we will probably refer to you, if we may, as Lord Chancellor. Thank you for being so prompt. Can you give us an indication of how much time you have? Do we have about an hour or an hour and a half?

***Chris Grayling***: I think my next appointment is at 11.30.

**The Chairman:** We shall press on in that case. Thank you very much.

As you will be aware, the Constitutional Reform Act 2005 refers expressly to the Lord Chancellor's constitutional role in relation to the rule of law; similarly, the oath that you take is in respect of that. How do you understand personally your constitutional duties in respect of that principle?

***Chris Grayling***: They are certainly very different to the historic role of both presiding over the House of Lords and leading the judiciary. I think it remains a very important role. There is a need for somebody within Government who is the intermediary and the guardian of the relationship between the state and the judiciary, but somebody who is also there to say to the state, "Just remember the judges are independent". There is a tendency in the world of politics—particularly today under the media spotlight—to think, "Somebody should do something about it". The truth is that the principle of an independent judiciary is an extremely important one.

I think there is also still a safeguarding role. I am sure one of the areas we will discuss is the nature of the Lord Chancellor's role in relation to judicial appointments. I think there is an important safeguarding role still embodied in the role of Lord Chancellor, to make sure things stay on the straight and narrow. I do not see it as my job to tell the Lord Chief Justice who to appoint further down the chain. I think it is my job to make sure that the judiciary is developing in a way that is based on merit and it is not changing its character in a way that would steer it away from the principles that underpin its independence.

**Q2 The Chairman:** We welcome the fact that the Government have said that they are going to amend the Crime and Courts Bill, which is before the House of Lords, so that you retain the present position—that you have a veto on appointments of the President of the Supreme Court and the Lord Chief Justice. You are not directly involved in the selection panels for those appointments, which was something we recommended in our *Judicial Appointments* report, which we will return to.

***Chris Grayling***: Yes.

**The Chairman:** Lord Pannick, do you want to pursue the point about the rule of law?

**Q3 Lord Pannick:** Yes. Good morning, Lord Chancellor. Can I declare an interest as a practising barrister in public law? Can I ask you about prisoners' voting rights? We understand there is to be a draft bill published tomorrow setting out options. Are the Government going to recommend to Parliament a particular option to follow?

***Chris Grayling***: I have to be quite cautious, because one of the things that you, as the Constitution Committee, would expect me to uphold is the principle that I have to make statements to Parliament first, so I fear I will not be drawn on the detail of tomorrow's statement. What I would say is that in the days when this House was at the pinnacle of the judiciary, it was Lord Hoffmann who ruled that Parliament had the clear right to exercise sovereignty over human rights decisions; if the European Court of Human Rights reaches a decision that Parliament disagrees with, Parliament has the right to say, "We do not agree. We are not going to do it". Lord Hoffmann said that Parliament also has to recognise that there is a political consequence for taking such a decision, and that is certainly a principle that will underpin our decision-making about taking these matters forward. But you will forgive me if I cannot anticipate tomorrow's statement today.

**Q4 Lord Pannick:** I understand that. Could I then deal with the general issue rather than the specifics of the draft bill? You say there is a political dimension. Would you accept there is also a very strong rule of law dimension? This country signed up to the convention and it might be thought therefore we have a legal obligation as a matter of international law to comply with the judgments of the European Court of Human Rights—not just those that we agree with, but all of them, and not to do so, to defy the European Court, is simply a breach of the rule of law.

***Chris Grayling***: It is certainly the case that I, as Lord Chancellor, and my colleagues as Ministers, have a duty to implement decisions reached by the European Court of Human

Rights unless and until this country, as a sovereign nation, forms a view that it does not wish to be part of those arrangements in their current form. I have been very clear in expressing the view that the nature of the European Court of Human Rights has changed over 50 years. If you look back to the origins of the convention, it was a laudable document written by Conservatives at a time when Stalin was in power in Russia, people were being sent to the gulags without trial. It has become, through 50 or 60 years of jurisprudence, very different to what was originally, I believe, envisaged by and set out by its creators. That has led to a political debate in this country about whether we are willing to accept and to be part of an international arrangement that has evolved so much over that period of time.

That is a debate that commands strong views in both Houses of Parliament, and where I personally have strong views. I see a clear distinction between my obligation as Lord Chancellor to uphold the rule of law and my ability as a politician to argue for change. I have had conversations with the judiciary about this—a more general point—that it is all too easy for politicians in today's world to say, "Oh, what a crazy decision from that judge. It is outrageous. He should be sacked." There is plenty of that that takes place when a judge reaches a decision that is controversial. The truth is that up and down this country every day of every week judges are taking decisions that are not controversial, that are entirely sensible, just every now and then one comes along that prompts a storm. Everybody says dumb things or does dumb things or takes decisions that we disagree with.

That is entirely the prerogative of the judiciary. It is not for me as Lord Chancellor to criticise any judge for the decision they take. It is my job to defend them and defend their right to take the decisions they take, but one of the things I have said to the senior judiciary is that it does not mean I will not disagree with them and it does not mean I will not seek to change the law off the back of that decision. That is my job as a legislator. My job as Lord Chancellor is to defend absolutely the independence of the judiciary, whether it is here,

whether it is in Strasbourg, but equally I have a right as a legislator to say, "I am not happy with the direction of travel. I do not believe that is what society intends" and to exercise the sovereignty of Parliament to say, "We want to do something different."

**Q5 Lord Pannick:** Does that mean in relation to the European Court that of course you and others are perfectly entitled to argue that there ought to be a change in the institutional arrangements, but that while we remain a signatory of the European Convention, this country has no obligation but to comply with the judgments of the European Court?

***Chris Grayling***: It is certainly the case that we have an obligation to comply with the rulings of the European Court but, as we also know, parliamentary sovereignty supersedes those rulings. This is not just an issue for us. There are plenty of examples elsewhere in Europe where there are interesting tensions around some of the decisions that the court has taken. Ultimately, Parliament can say, "We are not prepared to accept that." The political consequence comes around the table in the Council of Europe as to what our position then is. I see it as my job to be very clear to Parliament about what my obligations and the obligations of my fellow Ministers are—indeed the obligations of the country—but equally, since there is a clear legal precedent established in this House that Parliament has the right to exercise its sovereignty, it is also my duty to point out to Parliament that it also has that right.

**Q6 Lord Goldsmith:** Can I follow that up please, Lord Chancellor, because I am a little taken aback by the way you have expressed that? The point that Lord Pannick was putting to you, with which I agree, is that the obligations that we assumed as a country when we signed up to the European convention are not political obligations, they are legal obligations, and we are therefore obliged to follow them. The Committee of Ministers is a way of enforcing

those legal obligations; it is not simply—although it also has this role—a political committee to discuss change. I do not recognise—and I wonder if this really is the position that the Government takes, no doubt having taken the advice of the Attorney General and others—that the Government is entitled because of parliamentary sovereignty not to follow the ruling of the European Court on the grounds that Parliament does not wish to do so. Is that the position the Government takes?

***Chris Grayling***: You would be aware that any legislative change that results from a court decision has to pass through Parliament. You talk about the legal position: the legal position as set out by Lord Hoffmann, as acknowledged and set out by the Attorney General two weeks ago, is that Parliament has the right to exercise sovereignty and to decide not to follow the instructions of the European Court of Human Rights. That is the legal position. That is a matter for Parliament to decide whether it wants to follow that route. It is clear that it faces potential political consequences if it chooses to do so, but it is a matter for Parliament. Now, the Government cannot change the law on its own. It is Parliament that changes the law and it is Parliament that will form a view about what happens off the back of any judgment from the European Court of Human Rights.

**Q7 Lord Goldsmith:** I wonder what message you think that position would give to the rest of Europe who, it may be argued—indeed, you may argue—needs the European Convention on Human Rights in a sense more than the UK does? What message would it send to them if the UK is heard to be saying, "We can decide not to follow a ruling of the European Court, even though we have signed up to it, because our Parliament is sovereign"?

***Chris Grayling***: It is not a question of message, it is a question of the law. You started with your point saying that this is not a political issue; it is a legal issue. The legal position is that

Parliament has the right to exercise sovereignty. Whether Parliament chooses to do so or not is a matter for Parliament, but that is the legal position.

**Lord Goldsmith:** I do not agree with that as a statement of the legal position, but that may be the difference between us.

**Q8 Lord Hart of Chilton:** One of your predecessors used to say that you do not boo when you get a decision that you do not like, and you do not cheer when you get one that agrees with you. In those days, the problem used to arise in relation to the Home Secretary usually, because the Home Secretary often used to become very agitated by judicial decisions and Lord Irvine of Lairg thought it was his job to place a restraining arm upon the Home Secretary, which used to lead to a lot of quarrelling. I would like to know from you whether you take that view and have you discussed it with the judges that in fact it is very important that all politicians, and particularly those in the Cabinet, read the judgments that come out and not just take a tabloid view, a headline of what they think is being said in a particular case? Have you so far had to exercise any restraining influence upon your colleagues?

***Chris Grayling***: Not so far, and I was very pleased that when we had the issue of the judgment that was quite controversial in relation to a judge's comments about a burglar who was in front of him, the Prime Minister was very careful not to criticise the judge in that situation. I think it is important that we are all measured in respect of what happens in our courts. I have been very clear that I neither intend to criticise nor to comment about the rights and wrongs of individual judicial decisions, except in so far as when it is a matter of either my department or the Government bringing a case. I reserve the right to say, "I disagree with that judgment and we are going to appeal." I think that is entirely reasonable. I do not think it is my job to pass comment on a judgment about a sentence for a shoplifter or whatever. I do not think that is appropriate at all and I do not think it is appropriate for

Government Ministers to do so either. I think the Prime Minister set a very good lead on that.

It is of course absolutely my right to say—I have said this to the judges and they are very much in agreement with me—"A judgment has been released. It is absolutely the right of the judge to take that decision, but I think this highlights the fact there is a need for a change to the law." That I see as my right, but it is absolutely not the role of any senior politician to get into detailed criticism of an individual decision in the context of attacking the judge personally for reaching that decision. There are always going to be decisions in the courts that every one of us as citizens disagrees with, thinks are bonkers, but my job as Lord Chancellor is to defend absolutely the right of judges to get it right and of judges to get it wrong. We have appeal systems and we have the means of changing the law to deal with that when it happens.

**Q9 Lord Hart of Chilton:** Having arrived from a non-legal world, how are you getting on with the judges?

***Chris Grayling***: So far so good. There are one or two thorny issues around, but I have sought to be as approachable as possible to the judges, to spend time with them. I have spent quite a lot of time with the senior judiciary. I have started a series of visits to individual Crown Courts to meet the district judges. For example, I am going to be in Wales next week meeting the judges in Cardiff. I see that as a very important part of my job and it is also a very helpful part of the job because if you look at my broader remit as Secretary of State for Justice with a focus on rehabilitation and on the prison regime, the judges are the guys who sit there week in, week out, dealing with offenders, understanding the issues and challenges around crime. They have a huge amount of knowledge to share, so it is not simply

about the constitutional role of working with the judiciary, it is also enormously helpful to do so.

**Q10 Lord Hart of Chilton:** It would not be a wild guess to suspect that one of those thorny issues that you just mentioned might be judicial pensions. How are you getting on with that?

***Chris Grayling***: I am working through very carefully with the judges trying to make sure that we have a package that is both reflective of some of the individual issues, but also defensible. It is of paramount importance that we do not take steps that undermine public confidence in the judiciary. I think that is really important. The constitutional position for our judiciary is this: that for very good reasons, there are protections in law and protections in constitutional principle that prevent any executive or any Parliament from saying to the judiciary, "If you do not do what we want, we will cut your pay." It is a really important principle in maintaining the independence of the judiciary.

That does not mean though, in my view, that the judiciary are immune from change to parts of their arrangements where those arrangements or where those changes result from pressures across our society and pressures that are being applied across the whole of the public sector. We have to be very careful to preserve the first, while not allowing the judges to become the standout exceptions that makes them a target for hostility from the public, who see them as a special case that they do not believe.

**Q11 Lord Hart of Chilton:** Yes, but a constant pay freeze and a diminution in pension rights may be seen as a salary cut and that may be seen as something that discourages future applicants to the judiciary. I am sure you would not want to be the first Lord Chancellor to have brought about the withering on the vine of judicial appointments.

***Chris Grayling***: I do not think it is sensible for our judiciary to be a special case at a time of austerity, because that will make them a target in the eyes of the public. The question will be inevitably asked, "Why are the judges different to the rest of us?" How can I defend that to a police officer in my constituency who says to me, "I joined the police force for 30 years or 35 years and I thought my pension was going to be such and such at the end of it. Now you are saying it is going to be different. You are going back on the deal that you did with me. How is that fair?" The reason it is happening is not the short term—this year's austerity challenges—it is all about making sure that we can afford over the next 20, 30 or 40 years the public sector pension system that we have in place at a time when people are living longer and longer. When all these arrangements were put in place, the average lifespan of a citizen in this country was shorter than it is now and much shorter than it is going to be in the future. All of that has to be paid for. We cannot hand an unaffordable system to our children.

Since change has to happen and all of the debates about, "I signed up to a deal and it is changing and that is not fair" are to be found in the health service, in the police, in other parts of the public sector, for us to say the judiciary are immune from those changes would, I think, put the judiciary on to a pedestal that would make it a target for public hostility in a way that would be deeply damaging to its integrity and its position in our society. I do not think it is sensible to do that.

**Q12 Lord Lang of Monkton:** I wanted to seek clarification on a point on the previous question about prisoners and the vote. As one non-lawyer to another—this may sound like a tabloid view—my understanding was that the judgment of the court was that the Government should present a bill to Parliament. Is it the Government's case that by presenting a bill to Parliament it is fulfilling its legal obligation? Or does that carry with it an

obligation to do best endeavours to get the legislation passed through Parliament and into law?

***Chris Grayling***: The difficulty here is you are dragging me quite a long way into the statement that I am due to give tomorrow and so therefore I must be quite cautious in what I say. My understanding of the legal position is that it would not be appropriate for somebody in my position who has a duty to uphold the law to argue against the implementation of a European Court ruling. However strongly I might feel about a particular issue, I cannot stand up in front of the House of Commons—nor do I intend to—to say, "You must vote this way" or, "You must vote that way."

**The Chairman:** Does that help?

**Lord Lang of Monkton:** Not really, no.

***Chris Grayling***: I am very happy to discuss this in greater detail next time I sit in front of you, but you will understand, as a former Member of Parliament, why it is difficult for me to pre-announce my statement to this committee today rather than to the House tomorrow.

**Q13 Lord Lang of Monkton:** Yes, and you are stating a personal position as Lord Chancellor, but somebody else will be winding up the debate presumably, if there is a second reading debate—I do not know. Perhaps it is just the presentation of a bill tomorrow with a statement, so presumably no other Government Minister will speak tomorrow?

***Chris Grayling***: I think that it has been flagged up that I am simply doing a statement tomorrow.

**Lord Lang of Monkton:** Thank you. I will let it rest.

**Q14 Lord Crickhowell:** Can I, as another non-lawyer, go back to your position as Lord Chancellor in relation to the European Convention on Human Rights? I understand and fully

appreciate that Parliament always has the right to change the law and to make fundamental change, having carefully considered the profound implications of withdrawing or altering its relationship with the Convention on Human Rights. What I found a little surprising, if I may say so, in your presentation, which was about your role as Lord Chancellor in upholding the rule of law, was that you spent as much—if not more—time on the rights and role of Parliament in changing the law against your duty as Lord Chancellor at the present time to uphold the rule of law as it is. It seemed to me that you went out of your way to emphasise the changing the law role of Parliament rather than the question that was being put to you about your duties as Lord Chancellor in upholding the rule of law, which all former Lord Chancellors, including some pretty formidable political practitioners who have held that office, always did and did with great authority and with the full understanding and co-operation of their political colleagues in their carrying out that role.

***Chris Grayling***: In a sense, I have two streams of the law to uphold. I have the ruling of the European Court and I have a quite clear duty. I cannot act in a way that contravenes that ruling, but I also have the very clear message provided from this House 12 years ago in 2000 by Lord Hoffmann, who said that Parliament does not have to implement a ruling of the European Court of Human Rights. It has the right to overrule such a ruling. It must understand though that if it chooses to do so it may face a political consequence. That is also the legal position that underpins our response to rulings from the European Court. My job, in my view, is to not act in a way that contravenes a ruling of the court, but sometimes the law offers different channels and it is not my job to arbitrate between them.

**The Chairman:** I think we should turn to a potentially and sometimes contentious area of domestic law: the Freedom of Information Act 2000 and some of the actions that have been taken by the Attorney General in recent times under that. Lord Macdonald, do you want to take us into that?

**Q15 Lord Macdonald of River Glaven:** Yes. Good morning, Lord Chancellor. I declare an interest as someone who in a few years' time will be in receipt of a judicial pension, but not a very large one. I want to ask you about section 53 of the Freedom of Information Act, which broadly allows a decision notice that has been served on a Government department or a public authority to be overruled if a certificate is issued by the Attorney General or a Government Minister stating that the issuer has on reasonable grounds decided that the information does not need to be disclosed. Some people have strongly argued that this provision is likely to be contrary to the rule of law in that it allows a party to court proceedings to ignore the determination of the court if he does not wish to follow it, and therefore he becomes judge in his own cause, in breach of a pretty well-established constitutional principle.

When this clause was being debated in Parliament the then Home Secretary, Mr Jack Straw, said that he envisaged it would be used in cases, for example, of national security. But the last two examples of its use were first in an FOI request in respect of the Health and Social Care Bill risk register, and secondly, in respect of some of the correspondence between the Prince of Wales and Ministers. I wonder whether you think that the operation of this provision is undermining of the rule of law. Secondly, what rules you think should govern its operation? In what circumstances is it appropriate for this veto to be used by the Attorney General or another Government Minister?

***Chris Grayling***: It is certainly the case that I think there has perhaps been a lack of clarity about the circumstances of the use of the veto. The Justice Select Committee, when it reported on post-legislative scrutiny of the Act in June, stated very clearly its view that the ministerial veto is a necessary backstop to protect sensitive information, but it did ask us to clarify the circumstances of its use, a recommendation we take very seriously and are

looking at very carefully. We are finalising our response to the select committee at the moment. We will set out much more clearly our future policy intentions for the veto.

I take the point that you are making. I think it is a serious point. We have to be careful about using the veto, but I also think it is necessary for Government to have some element of safe space for it to do its business. If it is simply not possible to protect any information within Government, it makes it much more difficult for Government to operate. You end up with people not being able to minute discussions, not being able to exchange correspondence on sensitive matters. The veto is not a measure to be used lightly, and it is used infrequently, but I think, and we think, that the retention of some form of veto is necessary. But we agree with the principle that we need to be much clearer when and how it is to be used—that is something we will address in our response.

**Q16 Lord Macdonald of River Glaven:** Is the position at the moment that there are no rules; there is no particular guidance; it is relied upon by Ministers in exercising the veto; it simply becomes a matter of personal and departmental choice?

***Chris Grayling***: It is a matter of judgment when the individual circumstance arises. We do not think the rules are clear enough and we intend to set out more clearly our policy intentions for the use of the veto in future.

**Q17 Lord Macdonald of River Glaven:** You are going to publish some rules or some guidance?

***Chris Grayling***: We will publish much more clearly how we intend to handle the veto in future when we produce that response to the Justice Committee.

**Q18 Lord Macdonald of River Glaven:** They will permit the use of the veto in cases other than national security cases: that is your estimation?

***Chris Grayling***: It is not our intention to stop having a veto, but we will be clearer in that response about when and how it will be used.

**Q19 Lord Macdonald of River Glaven:** What do you say to the rule of law point? Recently, I think the Attorney General—or it may have been another Minister—simply vetoed the decision of a High Court judge in the Upper Tribunal, a case to which he was a party. He simply vetoed it. How is that possibly consistent with the rule of law?

***Chris Grayling***: It was always the wish of Parliament in the original Act that there should be a right to do that, and Parliament stated its intention that it should be possible to do that. From time to time the Government will exercise that right.

**Q20 Lord Macdonald of River Glaven:** My question is: do you think it is consistent with the rule of law?

***Chris Grayling***: I think that in every democratic society there is always going to be some ability—and there needs to be some ability—for the Government of the day to say, "No, we cannot do that." I would not wish us to end up offering less freedom to the courts in relation to this matter, because in 99% of cases the rulings of the court are, in the view of Ministers at the time, entirely sensible and we follow them, we accept them. But Parliament took a decision when it passed this piece of legislation that there would be occasional circumstances in which Government believed that the publication of a particular piece of information was contrary to the public interest and would exercise that veto. What Ministers are simply doing is exercising what is there in legislation.

**Q21 Lord Macdonald of River Glaven:** Just to be clear from your answer, your position is that in a democratic society there are occasions when it is appropriate for a Government simply to veto the decision of the court—simply to veto it?

***Chris Grayling***: When a Government believes that it is important to protect sensitive information, then it was the will of Parliament when it passed the law that the Government should have the power to do that.

**Q22 Lord Lang of Monkton:** I think Lord Macdonald elicited the sort of replies that I had hoped to elicit, Lord Chairman. I simply observe that if the law allows the Attorney General to overrule something, then that is part of the rule of law, is it not, because the rule of law develops with Parliament's legislation? I am happy to be corrected if that is wrong. I simply want to welcome what I think the Lord Chancellor has said, which is that he is going to look at this very carefully and possibly bring forward further guidance.

**The Chairman:** Did you want to come in on this, Lord Goldsmith?

**Q23 Lord Goldsmith:** I wanted to say that on this point I agree with the Lord Chancellor. It is part of the structure of the Freedom of Information Act. Maybe it should not be, but that then falls into the changing the law, rather than asking the question whether this is something that is contrary to the rule of law at the moment.

***Chris Grayling***: What I think is reasonable and what we will address is that we will set out more clearly our future policy intentions in relation to the veto. I think it is right and proper the Government should do that.

**Lord Goldsmith:** That is helpful.

**The Chairman:** Can we turn then, if we may, to the area of judicial appointments? As I said at the beginning, the committee very much welcomes the Government's amendments to the

Crime and Courts Bill, which will remove the Lord Chancellor, as was originally suggested, from the appointments process for the President of the Supreme Court and for the Lord Chief Justice. We made a number of other recommendations in our report on judicial appointments, which we finished last session, some of which have been incorporated and we have welcomed in the Crime and Courts Bill, some of which have not. Perhaps we could look at some of those now. Lord Powell, perhaps you would like to start on this.

**Q24 Lord Powell of Bayswater:** Good morning, Lord Chancellor. Some of us are apologising for not being lawyers and some of us are boasting about not being lawyers. It is the latter in my case.

The Government has taken quite a bit of notice of our recommendations, but one disappointingly it has not is in relation to judicial diversity, both gender diversity and ethnic diversity. We recommended there should be a statutory duty upon you and upon the Lord Chief Justice to ensure this. It is not that we did not recognise there has been progress. There has, but it has been at the pace of a pregnant snail. It has not come anything like as fast as one would like to see. First, are you personally committed to driving this forward? Secondly, why can you not accept a statutory duty to do so? It then makes it easier to measure progress.

***Chris Grayling***: I am absolutely committed to making this happen. Indeed, if I might just diverge, and I will explain why I am diverging from this, if we look at the decision I took very quickly on taking office about the role of the Lord Chancellor in appointing the Lord Chief Justice and senior judicial figures, I deemed it very important that the final veto should remain. I also expressed a clear view that the Lord Chancellor should be able to state a view at the start of the process about the kind of person who should be hired. I did not feel it was appropriate to sit on the Judicial Appointments Commission and we are at one on that.

One of the reasons I was keen to ensure that I had the right to set out some expectations at the start of the process was this: those of you who were involved in the Government in the 1980s will remember the appointment of George Carey as Archbishop of Canterbury and the wish expressed by the Prime Minister at the time that the Church of England might ask the question not, "Who is the next Archbishop?" but, "Who is the next Archbishop after that?" and appoint them with a view to making sure there was some more forward-thinking leadership in the Church at the time.

When it comes to a challenge like judicial diversity, when it comes to an area where change is necessary and is happening, whether within the court system or aspects of the way the legal system works, what I am looking for in judicial leadership in the coming years is a forward-looking vision. I am looking for somebody who can embrace change, who can lead change—particularly important—somebody who understands the nature of the challenge the judiciary faces and has the determination to lead it forward. In exercising my role in the appointment—and we now know that the Lord Chief Justice will retire next year; there will be a need to find a successor—I am looking for the Appointments Commission, and it is not for me to tell them who it should be in detail, to find somebody who can give the judiciary that kind of leadership.

I think it is much more important to have in place people who understand the nature of the challenge and are committed to trying to deal with it than passing a law that places yet another duty of equality when there are multiple duties of equality affecting all of us already. We have a habit in Parliament, in both Houses of Parliament, of cluttering up the law, sometimes for political reasons, sometimes for parliamentary reasons, to get something through. I just thought, "Why do we need to legislate for something that just needs to happen and a lot of effort has been put into already?"

If you look at the mix of new appointments, the proportion of women is much higher than it used to be. There is now a good number of ethnic minority judges coming through. I have not heard a single judge say that this is not important. I know that we have had senior members of the judiciary warning that it may still take a long time. Of course, to some degree it takes time, because we are in a process where people retire, others follow behind them, and anyone who has sat with a group of judges at the moment knows that the demographic is quite consistent. It will take time to change that and we need to put rocket boosters under the drive to change it.

Equally, I do not want to get to a position where we are turning away good judges for reasons of diversity, so we have to find the balance. I just think passing laws to do what is right is kind of motherhood and apple pie, and it clutters up the law. I think we should just do it. I regard it as important. The current Lord Chief Justice regards it as important. I would expect the next Lord Chief Justice to regard it as important. The pressure is coming from all sides. Let us let it just happen without passing a law.

**Q25 Lord Powell of Bayswater:** The counterargument is that it has not just happened; it has gone much more slowly than anyone would have hoped or expected. It is clear that it is happening more slowly in the judicial field than it is in many other fields of life. Without a statutory duty that really concentrates the minds of those responsible for these things and enables a yardstick against which we can measure progress, it will not happen, despite the best intentions. With respect, what you have said has been said by your predecessor and his predecessor and so on, unto the fourth and fifth generation, as the Old Testament would say, but the progress has still been very slow. It does not seem a very strong reason against having a statutory duty. We took a lot of evidence on this and it is quite clear that there is a lot of dissatisfaction still among many women who are in the legal profession and many

ethnic minorities that despite all the good intentions the progress is not happening. Would you be prepared to reconsider this point, as you have reconsidered very sensibly one or two others?

***Chris Grayling***: I am not closed minded to it, but I am not persuaded it is the right thing to do now. The message that this committee and others are sending out is very clear. We have a new Lord Chief Justice starting in a few months' time, next autumn. We have an Appointments Commission that I have talked to—and I have looked at the statistics—and from all the signs I can see is making real efforts to address this challenge. If we do not see progress accelerating, then I perfectly accept that this might be something we need to do. Legislating for good practice is something I always struggle to see as sensible. I just think we need to make it happen. I think we have too much law in this country, so my natural instinct is not to legislate unless we have to. I would like to put rocket boosters under it through the leadership I give, through the leadership I expect the new Lord Chief Justice to give, through the appointments we make to the Appointments Commission, and through the messages we send out through the judiciary.

**Q26 Lord Powell of Bayswater:** Would you be prepared to accept a target in terms of time and quantity, not a binding commitment, but a target to increase by a certain proportion?

***Chris Grayling***: What do you think such a target should be?

**Q27 Lord Powell of Bayswater:** We had quite a lot of discussion on that if you look at the evidence in our report. I do not want to come forward with one today, but does not the concept of a target make some sense to you?

***Chris Grayling***: Having just argued politically against a target culture, I am less happy about saying there will be 40.1% of appointments made next year who are women. I prefer to see a process of continuous improvement. What I will be happy to state is a clear intention and a clear message to the judiciary that we should see year-on-year improvement as this happens. It is more sensible to say, "I want to see more women and more people from ethnic minorities appointed each year and for this to be a constant goal for the Appointments Commission" not to simply say, "This is the percentage you should aim for."

**The Chairman:** There are other members of the committee who want to come in on this, among them Lady Falkner, Lord Pannick and Lord Hart, but I have to say, Lord Chancellor, that one area where we took a lot of evidence where we felt there was absolutely no professional leadership of the kind that you are expressing a need for was in the whole area of the solicitors' profession. We did not take evidence from the Law Society or other leaders of that profession where we felt that the rocket boosters, as you have described them, were there.

**Q28 Baroness Falkner of Margravine:** Lord Chancellor, there is something about your turn of phrase that slightly alarms me. In relation to judicial pensions, you said that you did not want to give judges the idea, and I quote, "If you do not do what we want, we will cut your pay". I thought that was quite an aggressive way of dealing with what you were clearly saying you did not want to do.

***Chris Grayling***: No, I did not. Let us be clear, I did not say that. What I was describing was the constitutional position of the judiciary, which is very clear to me, which is that—and the precedents for this go back hundreds of years—the judiciary should never be in a position where any executive or any Government can say to the judiciary, "If you do not do what we want, we will cut your pay." That is the point I was making. That is why we have

constitutional safeguards in place in statute that protect judges' pay and we do so for a reason: because although we live in a thoughtful democratic society and the issue does not arise and has not arisen, none the less you need to make sure that you have safeguards in place to ensure that something as fundamental as the independence of the judiciary is always safeguarded.

**Q29 Baroness Falkner of Margravine:** The point I am making is that there is a tendency in what we have heard in the last 45 minutes for you to take a perfectly reasonable position and make it seem quite adversarial. On judicial diversity, you have just said, "I do not want to turn away good judges for reasons of diversity." Before that, you detailed quite clearly and articulately what you thought the components of the candidates for these positions might be and I agree with you entirely on that. But it seems to me that when one says, "I do not want to turn away good judges for reasons of diversity", you are sort of suggesting that more diverse candidates may not be good judges. I would like you to clarify that. I hope that you will be able to tell us whether you believe that ethnic minorities, women and other people may be equally qualified, and therefore your exercise of a veto occasionally may take place when you have equally qualified candidates in favour of diversity.

***Chris Grayling***: Of course I do, and I completely refute the suggestion that any of my comments are adversarial. In terms of what I was saying before, I was not making a personal statement. I was making a statement of why we provide protection against somebody being adversarial because it is necessary to do so. I think it was Lord Hart who made the very important point that we have to maintain the highest quality judiciary that we can in this country. It would be a dereliction of our duty if we were to do otherwise.

Of course there are really good judges who are women; there are really good judges who are from ethnic minorities; there are really good lawyers who come from ethnic minority

backgrounds; there are really good lawyers who are women. Of course there are, and we have to encourage more of them to put their names forward to become judges. What I would never wish to see us do, though, is to turn away some of the highest-quality legal minds in the country simply because they were men. We have to ensure that we have a steadily and progressively more diverse judiciary based on high-quality professionals.

I want and expect to see the Judicial Appointments Commission, and indeed the judicial leadership, being more proactive in terms of encouraging those very good candidates who we know are there to come forward to join the judiciary, to provide them with all the support and guidance that might be necessary from a relatively early stage in their career. We should be seeing judges, I think, mentoring and supporting younger lawyers with the potential to join the judiciary earlier in their careers, to make them think about that. Of course that is important, but we must not also lose sight of the fact that it is also important to maintain the quality of the judiciary. We want the best candidates for the job. I have no doubt that the best candidates for the job very often—and more frequently than has been the case in the past in terms of the recommendations of Appointments Commissions—are from ethnic minorities and are women. We have to get them to apply.

**The Chairman:** Lord Pannick, did you want to come in on this?

**Q30 Lord Pannick:** Yes. Can I add to the point that was raised by Lord Powell about whether or not there should be a statutory duty on the Lord Chancellor and the Lord Chief Justice? You mentioned the importance of getting people to apply because there are many excellent potential candidates, ethnic minorities and women, out there.

***Chris Grayling***: Of course, absolutely.

**Q31 Lord Pannick:** The point surely is that there is a statutory duty on the Judicial Appointments Commission to promote diversity. The law already recognises that to impose such a duty is a signal as to how important this matter is and it focuses minds. The argument surely is that those in other central leadership roles—the Lord Chancellor and the Lord Chief Justice—should also have a statutory duty to emphasise to everybody how important this matter is.

***Chris Grayling***: I think my point was not that there should be an absence or indeed that there is an absence of duty in this area. There is. There are multiple laws in this country, both upon the Appointments Commission and upon public services more generally, to promote diversity and equality, and rightly so. All I am saying is: do we then need more laws to put on the shoulders of the Lord Chancellor and the Lord Chief Justice who have to sit in front of you and justify their actions? Do we need more legislation? I worry in this country that we have reached a point where we have a statute book that is not noticeably slim. Is it really the case that we need more laws, to place more duties on more people to do something that they should be doing—that certainly from the point of view of the Lord Chancellor they are doing—when they are accountable to you, who will have the chance to grill them if you are not satisfied with progress? That is the point. I am not disagreeing with the principle of what you are saying. All I am saying is: do we need yet another law to deliver that?

**Q32 Lord Hart of Chilton:** My ears pricked up when you mentioned the words that you had some rocket boosters. I wondered specifically what these rocket boosters were, and in particular what you were going to do to encourage the solicitors profession to do more to encourage people to come forward from that branch of the profession to take up judicial

positions? Because the evidence that we had when we looked at it was that they were not doing enough.

***Chris Grayling***: My own view is that the key step is the appointment of the new Lord Chief Justice. I have to say in no way am I suggesting that the current Lord Chief Justice, for whom I have the highest admiration, is not already doing this, but he will be retiring in a year's time. There will be a successor in place and I see a key part of the role of that successor as being to provide a really thoughtful, forward-looking leadership to take the judiciary on through what I hope will be a significant term in office, whether that is really driving across the judiciary the kind of encouragement and support that can be delivered by judges on the ground. The judge in a Crown Court who says to the smart young barrister, "Think about it, maybe not this year, maybe not next year, but in five years' time think about the judiciary." Encouragement and support are things that do not happen through passing laws. They happen through good leadership, through encouragement, through spotting candidates who can be nurtured. That comes from really good, effective leadership of the judiciary, something that permeates the organisation, where individual judges on the ground are encouraged to do some talent spotting, to encourage people to think about the judiciary as a career. It is a cultural thing and I think that if you said to me, "What is the crucial task?" it is to make sure that the person who takes over from Lord Judge is really attuned to the need to do that.

**Q33 Lord Hart of Chilton:** Of course you are also one of those leaders, so I was interested in what you are going to do yourself.

***Chris Grayling***: I think it is my job in conversations I have with the Law Society and the Bar Council to do what I can to encourage and to talk about the need for diversity, to encourage and support those people who have joined the judiciary from different backgrounds. All of us

have a leadership role, but the Lord Chancellor's role is different today to what it was in the past. The burden falls much more clearly on the shoulders of the Lord Chief Justice, who today is the boss effectively for most of them.

**Q34 Lord Hart of Chilton:** That is true, but also the legal profession would pay particular attention to anything that you had to say specifically in that area.

***Chris Grayling***: Absolutely, yes.

**Q35 Lord Hart of Chilton:** I go back again to the fact that the solicitors profession needs constant prodding to do its job in encouraging more people. Of course, 50% of that profession are women, and there are vast untapped resources available. We have known always that it was the pool of resource that is the most important thing to get quality candidates from.

***Chris Grayling***: Yes. I will give you a commitment today that I will prod happily.

**Lord Hart of Chilton:** Thank you.

**The Chairman:** I think Lord Goldsmith wanted to come back on this.

**Q36 Lord Goldsmith:** I would like another commitment, Lord Chancellor, which is on a point that is also referred to in our report. There is a pool of very talented lawyers within the Government Legal Service as well, employed lawyers with the Government Legal Service too, but there are barriers to government lawyers entering the judiciary. May I respectfully ask: can you give a commitment that you will look at how those can be reduced and talk to the senior judiciary as well so that that pool of talented, diverse lawyers can be opened up?

***Chris Grayling***: I will happily do that. You have touched upon an area that being relatively new in the job I was not aware of, but I will happily go and take a look.

**Q37 Baroness Wheatcroft:** Lord Chancellor, I share your antipathy to adding to the weight of the statute book and was interested when you talked about culture being the area in which you can increase the diversity within the profession. One thing that struck me, and I probably will never get an invitation there again, but having been invited to lunch at the Old Bailey on a few occasions, it is culturally not the most inviting place for those who do not come from the normal background of the judiciary. The thing that stunned me and others who were invited in is the wine consumed over lunch before the judges go back into court in the afternoon. I just wonder whether in changing the culture you think that is something that should be looked at.

**The Chairman:** Targets for alcohol consumption, if not for other things.

***Chris Grayling***: I think I might struggle to impose that kind of culture change on the judges. I can only speak from personal experience that I find that if I have a drink at lunchtime it is difficult to stay awake in the afternoon. We know that if, horror of all horrors, the judge falls asleep in court, it is a bit of a problem. Were I a judge, I certainly might think twice about whether it was really a good idea to have a couple of glasses at lunchtime.

**Q38 Lord Macdonald of River Glaven:** I wanted to add briefly to Lord Goldsmith's point about lawyers in government service and refer particularly to the case of prosecutors. When Lord Goldsmith was Attorney General and when I was Director of Public Prosecutions during some of the time that he was Attorney General, we had discussions about this on a number of occasions and never made a great deal of progress. In most jurisdictions it is perfectly normal for prosecutors to go on to the Bench and it seems to me there is no reason why we should not have that sort of potential progress in this country. It would increase the diversity of the Bench because the Crown Prosecution Service employs

many women and ethnic minority lawyers, and it broadens the perspective on the Bench. Is that something that you would be prepared to look into?

***Chris Grayling***: Yes, I definitely would be. I am coming to this fresh, but I cannot see any obvious reason why a career prosecutor should not become a judge. I am very happy to discuss that with the Attorney General.

**The Chairman:** As Lord Goldsmith mentioned, we referred to this in our report, so it is quite useful to look at that.

**Q39 Lord Lexden:** Lord Chancellor, you referred to putting the case for change in private conversations. Can we expect ringing public declarations from you in your speeches as well?

***Chris Grayling***: I am happy to commit to give a ringing public declaration of the importance of promoting diversity.

**Q40 The Chairman:** I think that would be very helpful. There was one other point that we raised in our report, and Lord Pannick tabled an amendment at the committee stage of the Crime and Courts Bill related to this, which was about the potential for a differential retirement age for judges. I do not know if you have had any further thoughts about reconsidering what your predecessor's position was on this.

***Chris Grayling***: My first instinct is sympathetic to my predecessor's position. I think that one of the challenges, and it is a difficulty now for retirement planning generally, is if we do not have a standard age then it becomes very difficult to manage, with judges going on to the age of 75, and many judges can go on perfectly happily to the age of 75, but it becomes a more difficult management issue. More particularly, I think it is important not to do a disservice to the surveillance commissioners, because having had discussions with their chief about the

challenge of recruiting surveillance commissioners, I would not want to deprive him of the pool of very expert retired judges who go on to play a very important role in our society.

**The Chairman:** Thank you. I am very aware of the time and your point that you made about another engagement at 11.30 am.

***Chris Grayling***: It is in the House so I can keep going until about 11.28 am.

**The Chairman:** Oh, very good. Lord Pannick, you wanted to raise something.

**Q41 Lord Pannick:** Can I ask you about your statement on Monday on the subject of judicial review, where you said the Government is concerned about the burdens that the growth in judicial review has placed on stretched public services? You would recognise, I hope, that judicial review serves an essential purpose. For example, but for judicial review we would not know about the admitted defects in the tendering process for the west coast main line route. Would you accept that it is essential to maintain judicial review as a crucial means of ensuring that public decisions are made lawfully, fairly and rationally?

***Chris Grayling***: There is no question of scrapping judicial review. I accept fully that it has an important role to play. It is the case though that judicial review is used in a way that I do not think when it was introduced was envisaged. Having seen this from within government, it is my view that judicial review is often used for PR purposes rather than legal purposes. The mere principle or the mere fact of launching a judicial review case will create a good news story for you—if you are a pressure group—about the Government doing things wrong, regardless of the legalities. The fact that you can keep going back again and again using the judicial review system, in my view, exposes public bodies to abuse of that system. What we are looking to try to do is not in any way to undermine its existence, but to make sure that it is used for the purposes that it was envisaged and not abused by those who simply see it as a vehicle they can exploit.

**Q42 Lord Pannick:** The best way of ensuring that surely is that the judge makes the decision speedily on the merits or otherwise of the application and that requires properly funded courts to ensure that judges are available speedily to address these issues.

***Chris Grayling***: What we cannot do is deny somebody the ability to even enter the process in the first place, but it is not unreasonable to say, "If you are going to do this you should make some commitment of cost. You should not be able to come back again and again and again. Once a judge has formed a decision about the rights and wrongs, you should not be able to appeal multiple times. There should be some degree of time limit for you to launch a case." Those are things we can do in the short term. We will look more broadly at the way judicial review is working to make sure that it is sensible and defensible. I am not for a second suggesting that judicial review should not exist, but there is a danger.

We have a habit in this country of starting with a problem, that we clearly had when judicial review was introduced in the first place, and the pendulum swings to the other extreme, whereas you need to be settled in the middle. At the moment, I think we all believe that judicial review has gone to extremes in terms of the nature and volume of usage and the way that it is used. Particularly I see it as being used very frequently for PR purposes rather than legal purposes, and that is what we have to constrain.

**Q43 Lord Pannick:** But you recognise something like 75% of these cases are immigration and asylum? That is where the growth has occurred.

***Chris Grayling***: That is also the case. When I talk about being able to come back again and again and again, that is what I am referring to. I think we have good judges and they take decisions and maybe we challenge those decisions once, but we are in a situation in the tribunal system where it is popularly regarded that nobody takes the first tribunal very

seriously in the immigration procedure, because you can come back again and again and again. We need to get back to a position where the judge who presides over a case takes a decision and unless there is good reason, that is that.

**Q44 Lord Hart of Chilton:** I am totally with you on multiple applications. I do not think many people would disagree with that. Where there is difficulty depends, and when we see the detail it will be clearer.Take planning, for example. There are many planning authorities that can come to conclusions that may well be perverse. If you load up the cost element, it runs quite counter to a view of localism, that local people should have the right to be able to challenge decisions. That is one of the few routes that they have. They have no right of appeal against the grant of planning permission, for example, but they have a right, if they think something has gone wrong in the way in that a decision has been reached, for judicial review. If it is loaded against them in terms of cost, that would be a very sad day, in my view.
***Chris Grayling***: It is a balance, is it not? It is rather like the principle of seeking election. If you are going to seek election, you have to get some people to sign a nomination paper for you. If you are going to go to court over something like that, you should, in my view, have a hurdle to cross. That may mean getting a team of people who are concerned about something to chip into the cost of starting a process. What I do not want to have is a situation where people can simply use judicial review on a whim. There has to be a degree of challenge to get there in the first place. I am not saying that challenge should be unreasonably high, but it should be there.

**Q45 Lord Hart of Chilton:** That is why there is a system of leave to seek judicial review, so you have to go through the first system of seeking leave from a judge, who looks at the papers, and in many cases will just throw the case out because he sees it is ridiculous.

***Chris Grayling***: But that alone is a huge time consumer for judges. Judges are spending quite a lot of time dealing with completely spurious claims.

**Lord Hart of Chilton:** I suspect it does not take that much time for an experienced judge to go through the papers and to see quickly whether there is a real issue or not, but we will see the detail of it.

**Q46 The Chairman:** Lord Chancellor, we have covered a very wide range of questions about your responsibilities. Thank you very much. It has been a very helpful session for members of the committee. Is there anything further in the remaining couple of minutes that you feel we have not covered that you wanted to say?

***Chris Grayling***: I do not think so. It has been a very helpful conversation. I will take away some of the points raised. I hope to come back and address you again in the not-too-distant future.

**The Chairman:** We look forward to that.

***Chris Grayling***: Thank you very much.

**The Chairman:** We realise that in some instances we were trespassing on your parliamentary responsibilities, but thank you very much for being so clear. We look forward to continuing these sessions, if we may.

***Chris Grayling***: Okay.

**The Chairman:** Thank you very much indeed.