HOUSE OF LORDS

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Inquiry on

ANNUAL MEETING WITH THE LORD CHANCELLOR

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10.30 am

Witness: Kenneth Clarke MP

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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

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Examination of Witness

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

Q1 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.

Q2 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.

Q3 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.

Q4 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 were 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.

Q5 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.

Q6 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.

Q7 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.

Q8 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.

Q9 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.

Q10 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.

Q11 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.

Q12 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.

Q13 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.

Q14 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.

Q15 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.

Q16 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.

Q17 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.

Q18 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.

Q19 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 damnedest 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.

Q20 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.

Q21 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.

Q22 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.

Q23 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.

Q24 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.

Q25 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.

Q26 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.

Q27 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.

Q28 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?

Q29 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.

Q30 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.

Q31 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.

Q32 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.

Q33 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.

Q34 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.

Q35 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.

Q36 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.

Q37 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.