HOUSE OF LORDS

Constitution Committee

Corrected oral evidence: Annual evidence session with the Lord Chief Justice

Wednesday 18 May 2022

10.10 am

Watch the meeting

Members present: Baroness Drake (The Chair); Lord Falconer of Thoroton; Baroness Fookes; Lord Hennessy of Nympsfield; Lord Hope of Craighead; Lord Howard of Lympne; Lord Howarth of Newport; Lord Howell of Guildford; Lord Robertson of Port Ellen; Lord Sherbourne of Didsbury; Baroness Suttie; Lord Thomas of Gresford.

Evidence Session No. 1 Heard in Public Questions 1 - 16

Witness

I: The Rt Hon the Lord Burnett of Maldon, Lord Chief Justice and Head of the Judiciary of England and Wales, and the President of the Courts of England and Wales.

USE OF THE TRANSCRIPT

1. This is a corrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.

Examination of witness

The Rt Hon the Lord Burnett of Maldon.

Q1 **The Chair:** Good morning and welcome to the Constitution Committee. Thank you for joining us this morning. We do have lots of questions for you, as ever, but before we go into those questions, I would like to ask whether you would like to make some opening comments.

Lord Burnett of Maldon: I am very pleased to be here, as ever, and I am conscious that there are one or two new members of the committee since I last made an appearance. I am also pleased to be here in person because obviously for the last couple of years we have been using the screen. It is not too bad, but it is not as good, in my view anyway. I am happy to plough into the questions because I know that there is a wide range of topics that you are likely to want to ask me about.

The Chair: Thank you very much. Before we start, though, as a matter of formality Lord Falconer will make a declaration.

Lord Falconer of Thoroton: Yes, I have to declare an interest in that my wife is a circuit judge and the designated family judge in Luton.

Q2 **The Chair:** Thank you. Perhaps I can begin by asking for your views on the current state of the backlog. Are there any areas that you feel are particularly under pressure? Could you perhaps bring us up to date?

Lord Burnett of Maldon: Yes. This is a very big topic and, frankly, could fill an hour and a half of time without any space for anything else. Inevitably, all our jurisdictions have been put under great pressure as a result of the Covid events. If this would be convenient for you, Lady Drake, what I thought I might do is start with the Crown Court, because that is where a good deal of the public and, inevitably, political interest lies, and if there is time touch on one or two of the other jurisdictions, including family. If I talk for too long, please stop me.

What I am quite keen to do is to put one or two of the issues in context, because I am quite concerned that in the public debate that rages on this topic, particularly surrounding the Crown Court, there is too much focus on headline statistics without necessarily a deep understanding of what they mean. The statistic that is always most referred to is the crude outstanding case load in the Crown Court. Before Covid, in March 2020, in round terms that was 40,000 and in round terms that is now 58,000, having been as high as 61,000 last year.

It is important to understand what that figure represents. Total number of cases in the Crown Court break down broadly into three categories. The smaller categories are those cases that are sent by the magistrates for sentence in the Crown Court because the magistrates do not think they have sufficient sentencing power. The second is appeals from magistrates—again in numerical terms, not very large.

The biggest group is simply called "trials", and that represents about 75% of that 58,000. Most people I think stop there and assume that that means there are something like 47,000 trials outstanding in the Crown Court—and, frankly, I would forgive anybody for approaching it on that basis. But that is not what it means, because it represents the number of cases that have arrived in the Crown Court and are yet to be dealt with that have been sent for trial. But about half—indeed, rather nearer to two-thirds—of those plead guilty at some stage in the process. At the very beginning of the process, there is a hearing in the Crown Court, which is designed specifically to flush out guilty pleas when they are appropriate and acceptable to the CPS. There are still quite a lot of guilty pleas that emerge on the day of trial. Something like 25% of all trials listed in the Crown Court do not result in a trial even on the day they are listed because the defendant pleads guilty in a way that is acceptable to the CPS. In between, people plead guilty at all sorts of stages.

That is quite important to understand. I have been saying for years that it is not really the headline figure of outstanding cases that we should be looking at, important though that is. We should also be looking at timeliness. The reality is that, if there were 58,000 cases all of which could all be dealt with within six months, everyone would be happy. The problem that Covid has caused in particular, and it was developing pre Covid, is that the proportion of cases that are outstanding for more than six months has, for example, gone up since June 2019 from 23% to 57%—that is a big jump. The proportion of cases outstanding for more than 12 months in the same period has gone from 7% to 28%. That is, for me, the thing that we all have to look at closely, in addition to the crude numbers.

What are the things that are containing the disposal of these cases at the moment? In the early days of Covid, our problem was that we had very few Crown Court rooms—courts—in which we could accommodate jury trials with the two-metre distancing that was mandated then and all the other precautions that we all remember, which happily are largely behind us. Space was important and an important constraint. One of the steps taken was to get extra space, the so-called Nightingale courts, which have been very useful, particularly because they do not deal with custody cases, defendants in custody; they deal with cases where the defendant is not in custody, and those are often the less serious cases where there have been bigger time delays. I am very keen that the money should continue to be found to keep as many of those Nightingale courts open as possible.

The two greatest constraints we have at the moment in disposing of cases more quickly are, first, a shortage of judicial resources. We have too few Crown Court judges, so there is a limit, even using recorders and retired judges, to the volume of cases we can deal with. The other problem that has emerged starkly over the last year in particular as the volumes have gone up is that the legal profession is struggling to deploy the lawyer power to deal with the cases. So, again, put very straightforwardly, more and more cases are not going ahead because

either the prosecution or the defence have not been able to find an advocate to deal with the case. So there is a systemic problem with both judicial resource and lawyer resource that has to be dealt with.

The causes of it are complicated and multifaceted, but at the heart of it is that over the period from about 2010 to 2019, the volume of cases coming into the Crown Court went down and down and down and down, and the number of judges followed downward. The number of recorders also followed downward, but for more complex reasons. The legal profession, both solicitors and barristers, reduced in number because there was not as much work to be done, and it also reduced because of the serious attrition on remuneration rates that came through legal aid.

To put that into context, in 2019-20—the last normal year, if I can call it that—the financial allocation from the Ministry of Justice initially allowed for 82,600 sitting days in the Crown Court. That is the unit of currency; Lord Falconer will remember it with joy, I do not doubt. From every sitting day flows a financial calculation as to how much money goes into the system. In the last year, the financial year that has just passed, we sat a shade under 100,000 sitting days. That is a huge jump up, despite the resources not being readily available. This coming year we very much hope we will get to 105,000 sitting days, which means that we are simply running the courts 25% hotter than we were doing three years ago. We are struggling to deploy judges and the legal profession is struggling to deploy lawyers. So those are big capacity issues that we are still grappling with.

We, the judiciary, are working hard—I would say that, some may think, but we really are—to improve the throughput of cases in the Crown Court. We want to focus hard on squeezing out guilty pleas earlier, because that is much better for everybody. I established a group last year called the Crown Court Improvement Group, which has on it representatives of the judiciary, the police, the CPS, the Law Society, the Bar, the Legal Aid Agency and HMCTS, and its purpose is to bring people together confidentially to talk about problems in the system. I should say that the prisons are there, too, because there are basic issues about lawyers being able to see defendants in prison or via video link in prison before the day of trial and so forth. That group, as I say, meets confidentially—confidentially only so that everybody feels entirely able to be frank about their own problems, because there has been too much finger pointing in the criminal system over recent years. That group is looking hard at everything that happens in the Crown Court to improve the effectiveness of what we do.

That broadly is the Crown Court. Lady Drake, are you happy if I do two or three minutes on the other jurisdictions?

The Chair: Absolutely, please do.

Lord Burnett of Maldon: I am sorry, that took a little longer than perhaps it should have done.

The Chair: It was very rich, though, and it prompts some of our questions that will follow, so it was very relevant. Thank you.

Lord Burnett of Maldon: So far as the magistrates' courts are concerned, they are not causing me any great worry at the moment. The outstanding case load is around 10% higher than it was pre Covid. The timeliness for trials in the magistrates' court is pretty good. There are variations regionally, of course. As you will appreciate, the very high volume of cases that flow through the magistrates' courts include things such as TV licences, a lot of motoring offences and so on, and most of them end up being dealt with by way of plea, and even those that do not, do not take a great deal of time. There has, in fact, been an uptick in motoring offences being prosecuted recently—I am not entirely sure why, but that is how it is. So the magistrates' court, as I say, I do not worry too much about because a great deal of attention was paid to it, particularly last year, to make sure that all the steps were taken to put processes in place to deal with the problems that we knew were there.

So far as family is concerned, there has been an increase in the outstanding case load in private family law cases. These are cases where parents are having a dispute about children, basically. That is something that has been growing in volume for quite some time. Covid has exacerbated it but, in fact, the problems are more endemic. We are working quite closely with government to look at ways in which the flow of cases into the family court can be stemmed to some extent, and to enhance the use of, the utility of and the effectiveness of mediation. I think that one of the real problems in that area of family law is that going to court and scrapping about it has become the first option, rather than something that comes later down the line.

There has undoubtedly been an impact in the removal of legal aid for those types of case. It is quite clear that the involvement of lawyers kept cases out of the courts and increased the settlement rate and the mediation rate; that is just one of the realities. But, again, the judges are working very hard to devise mechanisms to improve the throughput of cases. They work with Cafcass in particular, which is the agency most engaged in this, and others.

On the public law family side—these are care cases, essentially—the volume of cases coming into the courts has, in fact, gone down recently—and thank goodness for that on a whole range of fronts. Timeliness, the time it takes to complete those cases, has gone up over the last couple of years, but, again, it is not entirely due to Covid. I think it is fair to say that in the family system all the major parts are under strain. Local authorities, and the social services departments of local authorities, are under strain—something that I suspect everybody recognises. Cafcass is under strain. And we are under strain with judicial resources as well because we have not been able in recent years to recruit the number of district judges that we need; maybe we will come to that. Those judges deal with a large volume of this type of work.

So overall, we have problems. I think that it is fair to say that not only the judiciary but the professions and all the various players in the different systems are working hard to improve the way cases go through the courts, but the capacity issues, to come back to where we started, are no longer space, by and large. There are some family courts and civil courts that need more space for sure, but by and large it is not space but other constraints that are biting.

Q3 **The Chair:** Thank you very much. On the capacity issue, I do not want to anticipate questions that my colleagues will raise so I will hold back on some of them. On the issue of the constraint of judicial resources, I understand that the intention is to recruit 2,000 more judges. Is that correct or is that the wrong figure? How is that progressing?

Lord Burnett of Maldon: Again, that is a figure that gets bandied about and it sounds like a lot of judges—and it is a lot of judges; forgive me, I am not suggesting it is not—but that includes fee-paid judges, recorders, deputy district judges, fee-paid tribunal judges, and judges in the big jurisdictions.

The issue in the Crown Court in particular is that we have been seeking more circuit judges to sit in the Crown Court than we have been getting for the last two years. The way it works is that the number of vacancies in each jurisdiction and for each type of judge is quite carefully worked out by something called the Complement Group, which has judicial, HMCTS and MoJ composition. Then, constitutionally, the decision as to how many to seek is for the Lord Chancellor, although there is never any difficulty about that. The JAC, the Judicial Appointments Commission, then launches a competition and, for example, last year I think it said, "We are seeking 63 circuit judges to be distributed between family, civil and crime as follows". Last year, the recruitment of Crown Court circuit judges fell short by 10. That is about 2,000 sitting days, so it is actually quite a lot. This year I am afraid it is falling short even more.

On the district bench, which deals with the family and civil cases, the county court and a large bulk of the family cases, it is difficult to be precise how short we really are, but it is somewhere between 60 and 80 district judges across the country that we are short, because competitions one after the other have failed to produce the salaried judges we need. In other words, there have not been sufficient candidates judged by the Judicial Appointments Commission of sufficient merit to be recommended for appointment.

So that is the problem there, but in the Crown Court what we have been doing is looking everywhere for judicial resource. The recorders, who are the fee-paid judges who sit part-time in the Crown Court, have been encouraged to sit more than they would normally do, and many are doing so. Without their assistance the system would be falling over. The second thing we have done is to take advantage of a statutory provision never before used that allows district judges from the magistrates' court to sit in the Crown Court. There is a cohort of them being trained in June or July—forgive me, I cannot remember the precise date—to be deployed

into the Crown Court to sit 50 days each a year. There will be about 45 or 50 of them. That is another thing we have done.

The third thing we have done, which is a joint thing that I have to do with the Lord Chancellor, is approve more retired judges to sit in retirement. There was a time when very few retired judges sat in the Crown Court because there was not the work for them to do. Now, if they wish to, we are encouraging them to do so. The last thing is that, of course, the retirement age for judges has just gone up, so one might expect a few judges to soldier on full-time beyond 70 who might otherwise not have done. That is roughly where we are.

The Chair: Thank you.

Q4 **Lord Falconer of Thoroton:** Lord Burnett, you referred to timeliness in relation to the Crown Court being perhaps the key issue rather than what the size of the backlog is, and I completely understand that. You identified the third category as being "trials", although some of those would be pleas. Can you give us an indication of how timeliness has changed—this is only in relation to trials, not in relation to sentencing or magistrates' court appeals—between the last pre-Covid year and now?

Lord Burnett of Maldon: We are still in a position where overall most cases—or not quite most cases, because it has tipped over, but roughly half of cases—are dealt with within six months of their coming into the Crown Court. But, as I mentioned, the percentage of cases not dealt with within six months has more than doubled since the summer of 2019, and the proportion of cases not dealt with within 12 months has pretty well exactly quadrupled since June 2019. That is why I am focusing on it and am so concerned about it.

Lord Falconer of Thoroton: Do you have figures for contested serious sexual violence trials in the Crown Court, as opposed to pleas? Do you know whether the delays have gone up and what the average delay is now?

Lord Burnett of Maldon: Yes. The answer to your question, Lord Falconer, is that I do have the figures in the sense that the statistics that are available now, and publicly available for all this, are very rich indeed. I do not have those precise statistics at my fingertips, but I will make sure that we send in a note with the precise statistics.

The broad picture is dictated by this. There are custody time limits that Parliament has imposed. A defendant who is remanded in custody pending trial must, save in very tightly constrained circumstances, be tried within a certain period. When it comes to deciding priorities for listing cases, the custody cases are inevitably at the top of the list. Then the way in which judges—working with their listing officers and having to make difficult decisions about prioritising different types of cases—look at it is, first of all, not as a first in, first out system. There is no dictated hierarchy of how these cases are listed, but all judges try to list cases, even non-custody cases, that involve vulnerable witnesses or

complainants as soon as possible. They try to list cases involving young people and youths as soon as possible, for obvious reasons. So the type of case about which there is a lot of understandable public concern, namely the serious sex case, is considered by all the resident judges in the Crown Court—that is the circuit judge in charge of each Crown Court—as pretty high up any priority for listing.

What I do recollect, and I hope my recollection is accurate from the last time I looked at these figures, is that the overall position for sex cases is certainly no worse than for other types of case. One thing that does need to be borne in mind is that serious sex cases disproportionately have not guilty pleas. The plea rate in those cases, for as long as I think most people can remember, has been lower than in, let us say, serious violence cases.

Lord Falconer of Thoroton: Is the position worse now in terms of delays in those cases than it was in the period before the pandemic struck?

Lord Burnett of Maldon: Yes, certainly, and it has moved in much the same way as other serious cases. The figures I gave for timeliness sweep in the serious sex cases; they are not outliers in that.

Lord Falconer of Thoroton: You can take years to come on in a serious sexual violence case in certain circumstances.

Lord Burnett of Maldon: Very rarely years. There are relatively few cases of that nature. If they are in the period between six months and 12 months, that is one thing; if they are beyond 12 months, that is another. It will be very few that go into the years category.

Lord Falconer of Thoroton: You have identified the two problems, judges and advocates. How long before it gets better?

Lord Burnett of Maldon: So far as judges are concerned, I have given an indication of some of the steps we are taking to ameliorate the problem. Recruitment of circuit judges to sit in the Crown Court has fallen short, as I say, for this competition that is just coming to an end and the last one. There are very many reasons for that. The first and obvious reason is that the natural pool that provides a large proportion of our Crown Court judges, that is the criminal Bar, has itself shrunk, and shrunk very significantly, in recent years.

The second is that for quite a few years the recruitment of recorders was stalled. That, you might remember, came as a result of problems over pensions for fee-paid judges. That was why it happened and we are still catching up from that. Ideally, the JAC wants to recommend for appointment judges who have a good deal of relevant experience sitting as a fee-paid judge. That is another factor.

A third factor is that the real rates of remuneration for judges, along with those for many other public servants, have fallen very significantly over the last 10 or 12 years since the financial crisis, at a time when

remuneration in the legal profession has not fallen, if I can put it that way, and indeed seems to be racing ahead in some sectors.

Another factor that is not given the attention it needs, but to my mind is a significant one, is that the condition of quite a lot of the buildings is not good. That understates it, as we know. For people who are thinking of becoming salaried judges, who have been in a relatively successful practice as a solicitor or barrister, moving into an environment that is simply sometimes badly degraded is lacking in attraction.

The other factors are, first, that the work of all judges in all jurisdictions has become harder and harder, and anyone who looks at what is going on in our courts and tribunals would recognise that. There is a genuine concern, from many looking in from the outside, that the support provided through staff and so on is not as good as it used to be, so the job has become less attractive. Those moving towards it are more impelled by duty: that has always been part of it for everybody, but it is more of a factor now.

Q5 **Lord Sherbourne of Didsbury:** Will increasing the sentencing powers of magistrates have a significant effect on the burden placed on Crown Courts? Does that increase in sentencing power for magistrates have any other consequences in itself?

Lord Burnett of Maldon: The power to increase sentencing powers of magistrates was contained in an Act in 2003—so Parliament spoke in 2003 and it has taken 19 years for government to introduce the measure. The concern was that the measure allowed for the power to be turned on but there was no power for it to be turned off should things go wrong for any reason. There is now a statutory power in one of the Bills that had Royal Assent just before the end of the last Session.

I have always thought this should happen and my predecessor thought it should happen. There was a nervousness that magistrates might overuse the power, and I of course understand that. But we have taken trouble to ensure that all magistrates have had training in the use of their additional powers and I am absolutely confident that the powers will not be overused by the magistrates.

The impact on the Crown Court will be twofold. First, at the moment a large number of cases are sent by the magistrates to the Crown Court for sentencing because the magistrates apprehend that their sentencing powers are inadequate. That was one of the baskets of cases I mentioned at the outset. There will be fewer of those going up. How many fewer we do not know, but there will be fewer, so that will have a marginal impact on the Crown Court.

More significant is the category of case that can be tried either in the magistrates' court or in the Crown Court. That is the broad run of middle-ranking criminal cases of assaults, sexual offences, dishonesty and things of that sort. A defendant has an absolute right to elect to go to the Crown Court, but there is a pool of cases each year where the defendant is

happy to be tried in the magistrates' court but the magistrates send the case to the Crown Court because they are concerned that their sentencing powers will be too small.

There will be a significant body of those cases that now stay in the magistrates' courts and that will have two, I hope, positive impacts. First, cases tried in the magistrates' court come on much more quickly and are dealt with much more quickly than in the Crown Court, by and large. Secondly, that will take out of the Crown Court maybe a handful of thousands of cases a year, which in itself will not solve the problems but will make a contribution.

You asked me about external impacts. There has been an impact that certainly I did not predict at all. Earlier this year, a big drive was launched to recruit new magistrates because the numbers have fallen and we have too few magistrates. That campaign—I will call it a campaign, although that rather overstates what was going on because it was quite quiet—coincided with the announcement of the increase in sentencing powers, and you may remember there was quite a lot of kerfuffle in the press over it.

I was frankly very disappointed at some of the disobliging remarks some lawyers made about the magistrates. But it has increased the interest of members of the public in becoming magistrates: the volume of expressions of interest and of those who are beginning to come through the system for appointment has turned out to be larger than we expected, and it seems that this is—how can I put it?—an example of the utility of product placement.

Lord Falconer of Thoroton: The enthusiasm for people to become magistrates is because they can now send people to prison for 12 months and so it is a much more attractive job than previously. Is that what you are saying?

Lord Burnett of Maldon: No, no—Lord Falconer can tease me as much as he likes, but it is because it raised awareness.

Q6 **Lord Howarth of Newport:** You have expressed some optimism, which I was very pleased to hear, that the magistracy will be able to acquit itself well with this important increase in their responsibilities, that they will be able to cope with the workload and that the implications for recruitment and training have been attended to. I wonder whether this may not be one more instance of patch and mend and ad-hocery.

If one stands back and looks at the justice system as a whole, is anyone anywhere taking a holistic, strategic view of the needs of the justice system, trying to forecast the requirements over a period of years, to see how bits of the system interact with each other, and how we can get something more stable, better funded, more reliable, maintaining the traditional quality and integrity of the justice system, on which we have prided ourselves? There are all those factors that you outlined earlier when you talked about the difficulties in the Crown Court system. There

are contextual factors, not least the incontinent creation of new offences by parliamentarians. I do not mean offences perpetrated by parliamentarians, but legal offences created by Parliament. Then there is population growth. Is anybody thinking about how to ensure that in 10 years' time we have a justice system fit for purpose?

Lord Burnett of Maldon: Your question might be thought to require a yes or no answer, but I am not going to give one because the answer is yes in the short term but not enough in the long term. To give some examples of what has been done in recent years, there was a real concern—and frankly I still have the real concern—that different major players in the system look inwardly too much at their particular bailiwick, and there is not a good enough system-wide approach to all of this.

A few years ago, a body called the Criminal Justice Board was established, on which sit the Lord Chancellor, the Home Secretary, the Attorney-General, a very senior police officer, a representative of mine and one or two others from the professions. This was particularly driven by the late Cabinet Secretary, Jeremy Heywood, who became, in discussions with judges and others, very interested in the very question you have raised. That body still meets from time to time, but I think it is fair to say that the attention of all the moving parts in our system has been deflected over the last two years to immediate crises caused by the Covid-19 pandemic.

As we move back into a life that we all hope looks more normal, that whole process needs to be reinvigorated. We are doing what we can, including through the improvement group we have got going for the Crown Court. I have asked, for example, for serious indications of future projections of work into the courts generally, but we are focusing on the criminal courts at the moment. One of the realities is that, if the volumes of work coming into the Crown Court were not still depressed, as compared with pre Covid, we would be in a very difficult position indeed. I have asked the question, can somebody tell me, as a result of government policy, the pressure being put on police and CPS, extra funding for the police and so forth, what the likely flow of cases into the Crown Court will be next year, the year after and the year after that? It is very difficult, because nobody really knows, but it makes planning extremely awkward for me.

The second thing that I have a particular concern about is that the funding for the courts—and it may well be true of other major parts in the system—is done on an annual basis. I have come to the end, and I sent a letter yesterday, of what is called the concordat process, which is the final resolution of the funding of the courts for this financial year. That happens year by year, and it is not satisfactory in my view. Who would run a serious business looking only year to year at funding? It does not make a lot of sense to me, but that is the way it has always been done, so that needs to be looked at.

It is now 20 years since there was an enormous review of the whole criminal justice system in the courts by Sir Robin Auld. He looked at the

whole structure of the magistrates' courts and the Crown Courts, and the different parts they were playing. Like many reports that had a lot of very good ideas in it, one or two minor ones were implemented and then it has been sitting on the shelf. So maybe the time has come for a good look again.

It is an area that is fraught with political difficulty and I recognise that. Any suggestion that there should be fundamental changes to the way the criminal courts operate requires political courage and determination, because, inevitably, whatever proposals are made come in for extremely vocal, if sometimes not terribly well-informed, criticism. So my overall answer to your question is "not enough" rather than "no" or "yes".

The Chair: That anticipates the spending review issue. Lord Robertson, do you want to ask your question?

Q7 **Lord Robertson of Port Ellen:** It does, and I wanted to ask you whether you thought the latest settlement for the Ministry of Justice, and your part of the Ministry of Justice's budget, was sufficient to deal with the backlog you have outlined.

Lord Burnett of Maldon: The Ministry of Justice has agreed a three-year settlement with the Treasury, as all departments did. Strictly speaking, the settlement the Ministry reaches with the Treasury is without prejudice to the settlements the Lord Chancellor has to reach with me each year to fulfil his statutory duty to fund an efficient and effective court service.

The funding in the three-year settlement broadly—subject to inflation, which is not taken account of—as at last November looked to provide the MoJ with sufficient funding to look after the revenue side of the courts and tribunals. What it did not do was provide sufficient capital funding, particularly for court maintenance. From the settlement last November, the Treasury thought around £50 million a year for capital spending on the courts would be sufficient. That is less than it has been in recent years, and as the outgoing chief executive of HMCTS, the courts service, said to the Justice Committee not very long ago, he knew and we all know that there is outstanding maintenance, some of it very serious, totting up to about £1 billion. There was a large survey done of the whole of the court estate about four years ago that indicated rather glaringly what needed to be spent.

The capital also has to cover things such as leases coming to an end and a new building being found and equipped, and we have had one or two of those. There is a big building for tribunals, there is the Luton Civil and Family Court, and there is the Civil and Justice Centre in Newcastle. These absorb quite a lot of the capital spending.

One issue the Lord Chancellor and I have discussed with some intensity—I hope I can say without breaching any confidence—is where money well beyond that £50 million will be found. It is important not only for the reason I identified, namely that degraded working conditions are not

good for anybody. It is dreadful for the staff and judges, but it is also dreadful for those who have to use the courts. They are turning up at places that are falling apart. Without I hope being accused of too much cynicism, I will say that I think the Treasury is more likely to look at the number of courts that we have to close for days on end because of maintenance problems, because that will have an impact on throughput and in the end on recovery as well.

Lord Robertson of Port Ellen: You are saying the settlement is all right so far as it goes, but the component, the maintenance of the court systems, is clearly inadequate.

Lord Burnett of Maldon: Yes, and I should also say the overall settlement between the Ministry of Justice and the Treasury was rather higher than many people expected: I do not quite know how the Lord Chancellor achieved it, but he did. He secured more money than many had told us he would secure. But you are absolutely right that the capital spending, particularly on maintenance, is not enough.

The Chair: Turning to the issue of access to justice and legal aid, Lord Howarth has a question.

Q8 **Lord Howarth of Newport:** Do you feel that more needs to be done to improve access to justice? On legal aid, one of my colleagues will ask you about criminal legal aid, but I would like to ask you for your thoughts on the situation regarding civil legal aid. This is where, under LASPO, very large cuts were made in the quantum of funding and whole areas of civil justice were taken out of scope of legal aid, and you touched on the implications of that for the Family Division. There have been in recent years some improvements in funding and some concessions on scope, but that has been very far from reinstating the position to anything like what it was before 2012. How worried should we be?

Lord Burnett of Maldon: The position in civil does not appear to have had a very profound impact on the ability of people to bring civil claims, because other mechanisms have developed that thwart a lot of civil claims. For example, a large number of relatively small civil claims, if not brought by litigants themselves, are supported by insurance that a lot of people have. It is the few pounds added on to your household or motor policy, for example. There are much more sophisticated insurance products available to enable people to pursue more significant litigation. Also, there is the whole conditional fee structure, which itself is controversial in some respects, but it provides a service.

Civil legal aid has been the subject of debate since the day I started practice, quite a long time ago. The same arguments, the same proposals for solution come round and round. The current position with civil legal aid—and as you mentioned there are some little bits and pieces that are added on from time to time—seems to have settled down.

I worry about the position with family cases. I mentioned earlier the impact of withdrawing of legal aid in private family cases. The result is that has put additional burdens on the courts.

I wonder if that is another example of the silo effect that we touched on when talking about the criminal system. It is all very well for a department to look at a measure it introduces and say we have saved ourselves tens of millions of pounds. It makes more sense to look at what the impact is across the whole of the public sector and, more widely, society. The withdrawal of legal aid in private law family cases has undoubtedly increased the burden on the courts. That could be calculated. It has reduced the number of cases that mediate. That could be calculated. It has increased the volume of cases that come in and take up time. That could be calculated.

But in private law family cases, there is a much broader cost of conflict between parents: the impact on them and the impact on their children. I am not an economist; I could not pretend to understand the detail of the calculations that might be necessary. But parents who are engaged in conflict unnecessarily or for longer than they should be will not be likely to deploy their full economic activity. Somebody could calculate that.

The impact on children is not necessarily short-term. We all know that the longer children are caught up in parental conflict, the more likely it is to have a long-term impact. I simply ask the question. I am not expressing a view. Is the saving being made from private law family legal aid leading to savings across the system?

There is a little anomaly that has crept into that aspect, that I think is worth mentioning. If in a private law family case involving a dispute about children, one party alleges domestic abuse against the other partner or spouse, then legal aid is provided to that one person. I understand why that was done. There was a lot of pressure; there were some very effective pressure groups out there. I understand entirely why that was done. But I do not think you need to have a doctorate in psychology to understand that, if you say to somebody, "Make this allegation and we will give you a lawyer paid for by us", it affects behaviour. I fear it has increased conflict in the family courts, or is of questionable benefit. That is a matter for real experts in that field, which I do not pretend to be. That is how tinkering can have unfortunate consequences.

You mentioned that someone else might ask about criminal legal aid.

Lord Howarth of Newport: Before we move on to that, if we look beyond family, which you have just spoken about very eloquently, at the implications of the removal of benefits, employment and housing cases from the scope of civil legal aid, and the failure to fund early advice for people in these kinds of need, are we not seeing false economies? Is not the Ministry of Justice exporting costs to other departments in government, or to social services or the NHS? Do we not need to look, as you have just been saying, holistically across the system as a whole?

Lord Burnett of Maldon: I agree. That is not a legal observation or necessarily one that strictly falls within my role as Lord Chief Justice, but it is obvious, and so looking systemically is important.

I should say that we are discussing intensively with the Ministry of Justice, and with Ministers, steps that might be taken to deal with some of the issues you have just identified. It would be wrong and premature of me to expose the detail of what we are talking about, but there are two aspects of it that I can mention. First, there is serious ministerial buy-in to the need to improve the availability and effectiveness of mediation in family cases. Secondly, I very much hope that Ministers will be able not just to recognise but to find some money to support the early legal advice you have been talking about.

I am not unrealistic enough to suppose the legal aid comes back in the form it was, but getting people who are not well-versed in the system and do not understand how it will work to sit down a lawyer who does, seems to me an important and obvious first step.

The Chair: Thank you; food for thought there.

Lord Thomas of Gresford: The problem with criminal legal aid is that it does not give a career to a youngster. Nobody could advise a youngster to go to the criminal bar. My grandson, who finishes his finals this week, is offered a pupillage in commercial set, with a guaranteed £40,000 for his pupillage year. He ignores the career of his father, who is head of a large set in Manchester, and of his grandfather—me. The knock-on effect of it is that, in a period of time, you will not be able to recruit judges. That is the pool from which judges come to sit in criminal courts. The quality of advice given to those who unfortunately become involved in the criminal justice system will diminish.

I understand you referred last year to the review of legal aid by Sir Christopher Bellamy. He has produced his review, which, in essence, says that £135 million must be paid now. I would be interested in your comments on that.

Lord Burnett of Maldon: Your observations about the difficulty of developing a career at the criminal bar are, if I may respectfully say so, obviously well made. There were the twin problems: the diminishing quantity of work, for many years, and also the diminishing returns. They were diminishing because they were frozen for so long. The result, as we all know, is that there has been a substantial reduction in the number of specialist criminal barristers.

The position in the solicitors' branch of the profession is as bad, if not worse. The Law Society over the last few years has done some serious work on the distribution of criminal legal aid solicitors across the country and looked at the demographic of criminal legal aid solicitors. There are parts of the country where there are simply too few to service the work in the police stations, and then the magistrates' courts and Crown Courts

that come from it. As worrying, is the demographic. In other words, the average age has gone up, as it has at the bar.

There is an enormously serious problem here, which has a serious implication for the administration of justice and the rule of law. Sir Christopher Bellamy's report, which I spoke of last time I was before this committee—I believe he has given evidence as well, though whether here or in the other place I am not sure—is a serious and thoughtful piece of work. I publicly encouraged the Government to accept his recommendations and get on with it.

As you know, there is a dispute between the Government and the bar, in particular, and it is vital I say nothing and do nothing that indicates taking any sides in what is, put crudely, an industrial dispute, so I am not going to do so. However, I echo again the need to deal with this problem. If it is not dealt with, the numbers of criminal barristers and solicitors will continue to decline, at a time when police numbers are going up and there is enormous pressure on the police and the prosecuting authority to bring more cases into the criminal courts.

That is the question: who is going to do them? The reservoir of lawyers is limited. The real issue, which was not appreciated properly, was that a system has to have built into it some resilience. It is true of any system; if you never have any spare capacity at all then the minute you need it, you are finished. You have to recognise that augmenting the capacity is not an overnight issue. Getting an additional cohort of lawyers into both sides of the profession will take time.

Looking forward, and coming back to the question about the holistic view, if, say, in five years' time, as we are reading in the papers every day, the political ambition is to have many more cases in the Crown Courts, who is going to try them, who is going to prosecute them, who is going to defend them if there are not some profound steps taken to enhance the capacity at every stage?

Lord Thomas of Gresford: The pandemic threw up the problem that courts were delayed because a counsel, juror or witness caught the disease, and everything had to be pushed back and adjourned and so on. It highlighted the problem that, as you say, there was no capacity to fill in the gaps.

Lord Burnett of Maldon: That is right. As I mentioned earlier, the want of lawyers has been a growing phenomenon in cases just not starting in the second half of last year. The phenomenon you have identified of everything slowing down as a result of people getting Covid was still a potent factor in the couple of months leading up to Easter. We were losing 40 or 50 trials a week because somebody had Covid. The bigger impact over the last year has been that complex cases—the longer cases of which you are very familiar—listed perhaps for six weeks would take 10 weeks because, in week two, a juror got Covid, in week four the judge got Covid, in week six the defendant got Covid and so on. That has been

something that has slowed things down as well. It is a slightly different point, but I agree.

Lord Thomas of Gresford: It seems to me that there is no means of relaunching the criminal bar at this time because it is no longer an attractive profession.

Lord Burnett of Maldon: The only silver lining that I can see at the moment is that for both solicitors and barristers there is no need to be 100% doing one type of work. To look at it in the context of solicitors' firms, it is very difficult to make a profit doing criminal legal aid but, if the legal aid rates are raised in the way that Sir Christopher suggested—and there will no doubt be additional subtleties about the whole thing—firms may think that they can do that. They might have some people who are doing half their time doing crime and half their time doing family, or half their time doing employment, or whatever. The same is true of the bar, to some extent. If the work becomes more worthwhile doing then more people will start to do it, at least in part.

Lord Thomas of Gresford: That is the point. It has to become worthwhile.

Lord Burnett of Maldon: Absolutely.

Q9 **Lord Hope of Craighead:** I have a particular point to raise with you, which comes out of the evidence you gave last year. You said last year that there is a real concern that the way in which criminal legal aid is structured does not incentivise lawyers to get to the top of the case at an early stage, which means they trickle on longer than they should do. Could you explain what it is about structure, and whether that point, which is not related to the rates of pay but the way the thing is designed, is being addressed?

Lord Burnett of Maldon: This is something that was looked at very closely by Sir Christopher Bellamy. The point that I have always consistently been making is that those who are arrested, charged and being prosecuted need to get effective advice as early as possible about what they should do and what should happen. In particular, they need effective advice if the reality is that they should be pleading guilty.

There is a lot of fine detail in this law to open; now is not the time, and Sir Christopher would probably pick up the phone and tell me I had got it wrong if I tried to do it in too much detail. But by way of example, the availability of legal aid lawyers in police stations is absolutely critical because that can often resolve things, and often resolve things for the benefit of the defendant as much as anybody else. I think he was concerned that that part of the system was underfunded and so the intensity of thinking and advice was not going into it there.

The same is true in the early stages in the magistrates' court and then the Crown Court. One of the things our Crown Court improvement group has been looking at—as I mentioned earlier, the Legal Aid Agency is there—is to be alive to these issues, to make the first major hearing in

the Crown Court, the plea and trial preparation hearing, effective. That means that those who are there for prosecution and defence have to be completely on top of the case, otherwise there is no resolution, there is a conditional not guilty indication or plea and it goes off for another hearing.

That is the sort of thing that I had in mind: remunerating people better for giving early advice—to come back to a point that was made earlier—ends up saving the system overall lots of money.

Lord Hope of Craighead: Do I understand correctly that improving the structure in the way you have described is still work in progress?

Lord Burnett of Maldon: Yes. It is part of what the Ministry of Justice has said it will do in its response to Sir Christopher's report. It is something about which no doubt there will be intense discussion with the legal profession in the course of consultation and then implementation.

Q10 **Lord Hope of Craighead:** Can I move on to a quite different point, which is online procedures and remote working? It is of course a real pleasure to have you with us in person this time. That demonstrates the benefit of face-to-face contact. Nevertheless, we have learned, since Covid, some of the benefits that online procedures and remote working have. I wonder whether you could bring us up to date as to where you stand at the moment on developing the systems to cope with that. Perhaps you could comment also on the usefulness of Section 200 of the Police, Crime, Sentencing and Courts Act 2022, which gave power to give directions for the use of video hearings in a whole variety of cases from the Crown Court right the way down.

Lord Burnett of Maldon: During Covid we essentially pivoted to using remote mechanisms in all sorts of circumstances where we were not using them before, including the telephone and Skype. I will not give all the others but we ended up with our own system, which is called CVP, the cloud video platform. It is still being used for a vast number of hearings.

In all jurisdictions people are becoming more sensitive and better able to work out where such remote attendance—perhaps everybody attending remotely, or you might have the judge in a court and some people in court but others attending remotely—works and where it does not, recognising that drawing up hard and fast rules may not be in the interests of justice.

Broadly speaking, in all jurisdictions, the general thinking is that the relatively routine directions hearings, interlocutory hearings, and cases involving relatively short legal argument, are ideally suited for the remote attendance of advocates and often of the parties themselves. In the Crown Court, I have encouraged that all hearings of that nature be dealt with remotely, if it is suitable.

We have learned quite a lot but one particular thing we have learned is that remote attendance via video link is useful only if, somehow, the

parties and lawyers are replicating what they would have done outside the courtroom before they come to the hearing.

I am conscious that around this table there are a lot of very distinguished lawyers, so I hope what I say is not controversial. In whatever jurisdiction you operate, particularly when dealing with relatively high-volume work, a lot of the most valuable work is not done in court but is done outside court before you go in. It is clearing away the cobwebs. It is identifying what you are really there to argue about. We did find during Covid that, too often, the parties or advocates were turning up remotely for a hearing but they had not spent 15 minutes chatting to each other beforehand and chatting to their clients and so on, and then the hearings often become completely pointless.

Another thing we discovered was that the plea rate in the Crown Court went down. so it is not altogether straightforward. But in all jurisdictions we are absolutely wedded to continuing to use technology when it serves the interest of justice. The provisions in what is now the new Act—which if you asked me to recite I would fail—broadly replicate a lot of the emergency or temporary arrangements that were put in place for Covid. We will use those enthusiastically.

Lord Hope of Craighead: This is my final question on this point. Let us assume—though let us hope it never happens—there is another pandemic or other emergency, and suddenly it becomes impossible to conduct proceedings in the way you would wish. Have you learned enough to be able to plan ahead and react more quickly than we were able to last time, so that the backlogs which grew up as a result will be avoided?

Lord Burnett of Maldon: The short answer is yes. Obviously the Crown Court will always remain difficult. It is difficult to imagine having a Crown Court trial with the 12 jurors each sitting at their kitchen tables and so on; that just will not work. If we ever found ourselves in the same position and were not able to get back to jury trials quickly—I should say we paused them for only six weeks before they started again and then ramped up—for the Crown Court we would have to look very carefully at how things go. But broadly, I think the answer is yes; we could now pivot, as we had to before, huge numbers of cases to remote attendance, even if it is not ideal.

We had difficult choices to make. Do you do it in a way that everybody recognises is not ideal or do you not do it at all, which was how most of the world reacted to this? I took the decision—it was not universally welcomed, you may remember—that we had to keep doing it because it would be much worse to stop.

We also have a new video platform in development. When I say "we", the Courts Service is developing it. It is being piloted in a number of tribunals and in one or two civil and family courts. It has had a few hiccups as new systems do, but I hope that that will be working properly, certainly before the end of this year or the beginning of next year. That will provide greater resilience for the future.

Lord Hope of Craighead: Can I ask you a particular point about criminal trials in the Crown Court involving custody cases? I do not know whether you have had any contact with colleagues in Scotland about the way they have been dealing with that, but the Scottish system, as I understand it, has the jury adequately spaced in another place—cinemas quite often— and the rest of the trial taking place in a courtroom where spacing was possible. That could be used for custody cases, because obviously the accused is in court with the judge and counsel and so on but the jury are remote. I am told that, in Scotland, that has worked with universal approval of everybody. Have you looked at that? Do you think there is anything that you could learn from the Scottish experience?

Lord Burnett of Maldon: I have certainly looked at it and had many discussions with Lord Carloway and Lady Dorrian in Scotland about it. As you have indicated, one of the mechanisms that was used in Scotland, eventually, was to put the jurors in a cinema, spaced out, with a big screen broadcasting to them the proceedings in the courtroom. That seemed to work quite well. When I first heard about it I was quite nervous about it, because it seemed to me that it would make the jurors a spectator at the trial rather than participating.

Lord Hope of Craighead: It was very contentious.

Lord Burnett of Maldon: Having spent quite a good deal of my early judicial career trying serious criminal cases, I know that the need for the judge to develop a rapport with the jury is quite important, and to be able to see exactly what is going on, which you do not get if you see the jury on a screen. Looking particularly perhaps at Lord Thomas, advocates like to do the same. It was not a proposal that I was hugely enthusiastic about for England and Wales. It also is hugely expensive, and there were relatively few of them in Scotland.

What we did instead was to reorganise our Crown Courts so that we could dot the jury all over the place and put in a lot of screens. Although what was going on would have looked rather odd to many of our forebears, in fact it was the more effective way of dealing with it.

The Chair: I am conscious of time, colleagues. I am not sure we will get to all our questions. We have two supplementaries on this, and ask you to keep it pointed.

Q11 **Lord Howell of Guildford:** Do you think that, when it comes to online data collection, we have something to learn from the American courts, which have been developing the technology very deeply for the last 20 or 30 years?

Lord Burnett of Maldon: Yes. Until the modernisation programme was launched in 2015—it is coming towards its close—the quality of data collection in all aspects of our courts and tribunals was dreadful. It is still not perfect everywhere, because we still do not have all the systems of the modernisation programme in place. One of the aims is to enable accurate and very rich data to be collected in all jurisdictions. My own

view is that, unless you really know what is going on in all the different parts of the system, you cannot react, and particularly cannot react nimbly, to dealing with problems. You might not even know the problems are there. The modernisation programme has, as one of its aims, the capability of producing data in a way that we have never seen before.

Lord Falconer of Thoroton: You have just referred to the fact that the modernisation programme is going to be completed in the course of 2023. On family law, there is a school of thought that says the effect of the modernisation programme has been to increase the burden on judges and facilitate a reduction in staff in the Ministry of Justice. It is not an improvement process as far as the courts are concerned, it is a cost-saving process that might well detrimentally affect processes of justice because judges will be spending more time doing stuff that was previously done by members of the court staff. Would you like to comment on that?

Lord Burnett of Maldon: It is a very complex subject. Everyone here—and we have a number who have been Secretaries of State—will know that the Treasury does not give out money unless it is persuaded that there are some savings to be made long-term from it. Part of it is to deliver some savings.

At the heart of your question is something that is quite profound: judges do the judging; they are not administrators. When the judiciary was engaging with the detail of the various projects, across all the jurisdictions—family has come into it towards the end, much later than many of the other jurisdictions—there was a principle agreed that reflected that judges do the judging and they do not do the administration.

I know that there are many judges—particularly in the family world, which has come to one or two of the programmes that affect that jurisdiction just recently—who will be forced to do much more administration. The judges are reminding the HMCTS staff who are running this project that that cannot happen. Part of the savings in staff are the savings that will be delivered by there not having to do what is rather pointless paper management.

I am conscious of time, Lady Drake; do tell me if you want me to pause so that you can move on.

The Chair: I am conscious of your time as much as ours.

Lord Burnett of Maldon: Do not worry too much about my time; I am concerned about yours.

The first getting rid of paper happened in the Crown Court, with the introduction of the digital case system. The Crown Court is now paperless for all intents and purposes. There are more than a couple of profound consequences of that.

First, there used to be rooms in every Crown Court building in the country—you will remember them—that were full of files; room after room full of files. All that has gone, and that space has been redeployed. But more critically, there were literally thousands of people employed to open envelopes, put the contents of the envelopes on files, wield the files around the building, and photocopy the files when necessary. Judges were spending a huge amount of time wading through great big paper files. None that happens anymore, and so that is the sort of saving that can be made. The same thing is happening across other jurisdictions. As I say, it has come last to family, but that will be one of the big things, as the overall project leader from the Courts Service explained to all the family judges earlier this week.

Part of it is to ensure that the staff are doing what is necessary, which is supporting the judges. I know that there are a lot of stresses and strains caused by the modernisation programme, and as it reaches each new cohort of judges there are stresses and strains. I know that the Courts Service is working very hard to try to ameliorate those.

I have in place a structure of judicial engagement that seeks to identify all the potential problems that affect judges, to try as best we can to deal with them and ease them out.

The Chair: Is there a specific design of a dataset being collected under the new measures for family courts?

Lord Burnett of Maldon: I do not know the answer to that, so I will have to take that one away and get back to you.

Q12 **Baroness Suttie:** Can you say a little about measures that have been taken to improve diversity of judicial recruits since you last addressed this committee?

Lord Burnett of Maldon: First, I should remind everybody that we published a judicial diversity and inclusion five-year strategy in November 2020, which had a whole series of aims and targets. One of the important things about the strategy is that it is audited every year, and there has just been an audit. That was an indication of the seriousness with which I take this issue. Through me, Lady Justice Simler chairs the Diversity Committee of the Judges' Council, and the work that she and her colleagues have been doing is quite remarkable.

There is a whole series of discrete initiatives that we take ourselves or are involved with others in taking. A judicial diversity forum was established three years ago, which was largely the initiative of Lord Kakkar at the Judicial Appointments Commission, with my support, to bring together the principals who, between us, are in a position, we hope, to look at this seriously and take effective steps to increase the diversity of the judiciary. It is the Secretary of State, the Lord Chancellor, me, the chairman of the JAC, the president of the Law Society, the chair of the Bar and the chair of Legal Services Board. It is the principals looking at all this.

The first thing we did was to look closely at the availability of statistics. It sounds as if I am statistic mad, but unless you know what is going on, you cannot work out what to do. We have published a combined statistics tool which looks at diversity in all three branches of the legal profession—solicitors, the bar and the CILEX—and in the judiciary, and breaks it down into every part of the judiciary and the magistracy.

The Judicial Diversity Forum set up the pre-application judicial education programme—that is a bit of a mouthful, but we all call it PAJE—and we got support from the MoJ and the Lord Chancellor at the time, Sir Robert Buckland, who provided the money. That provides workshops, essentially for people to be able to develop an understanding of the skills needed for judicial appointments. The professions are involved in that and the judges provide and lead the discussion groups. It is a cross-cutting thing.

We also have our own judge-led judicial application seminars. There are hundreds of judges working on this, setting up seminars to try to assist those who are interested in making an application, particularly for fee-paid appointment in the first stage, in all the different areas of judicial activity. We have a judicial mentoring scheme, which is made available to solicitors and barristers. There is a targeted outreach programme, which we run with the JAC, by providing judges to talk to those in the most under-represented groups.

The progress has been better than people might think. I was vice-chairman of the JAC back in 2015 and 2016, and so became very involved in looking at the make-up of the judiciary and the structure of different parts of the judiciary. At that time, seven years ago, the main focus was on whether there were sufficient women being attracted into the judiciary. There has been quite a lot of success there. The reason I know that is from not only looking at the statistics but because nobody is having a go at me about that.

Then there was a significant increase in the proportion of ethnic-minority judges being recruited from south Asian backgrounds. There are interesting disparities between different parts of the Indian subcontinent but there has been a lot of progress there—not enough, but a lot. Again, I am not being taken to task in private discussions about that side of things now.

The area where there is particular concern is that the number of black African and black West Indian applicants for judicial appointment remains very low. If you look at all the statistics from the professions you can see these are endemic problems across the legal profession.

There is an enormous amount going on and I have always been keen to ensure that what we do has tangible benefit. It is an area where there can be too much of doing things because we should be doing things, without focusing on the things that make a difference. The Judicial Diversity Forum, having brought everybody together, and our own activities are, more and more, looking closely at outcomes and not just at what we are doing.

Baroness Suttie: Last time, you said you had a particular concern about social diversity. Has any progress been made since you last spoke to us?

Lord Burnett of Maldon: Yes, it has. It is an extraordinarily difficult thing to measure. There are still no universally accepted indicia that tell you about social background. Forgive me for being slightly flippant, but one that is always mentioned is whether your parents went to university. As it happens, my parents did not go to university, but that does not tell you very much about me, and the Prince of Wales's parents did not go to university. It does not tell you very much. One has to be very careful about this but it is something that we are focusing a lot of attention on.

By way of example, I have a cohort of, I think, 123 community and diversity relations judges from all the judiciary. Part of what they do is to go out into schools, universities, youth clubs and community organisations to encourage youngsters to think about coming into the law. Every time I visit a part of the country other than London, which I do a lot, I try to fit in a visit to a school myself to do exactly the same thing. This is all part of trying to encourage youngsters to think that the law is something for them. Eventually, if the law is for them, we will get more judges through those routes. The professions are doing the same; the bar and the solicitors' professions are very active on that as well.

Q13 **Baroness Fookes:** Lord Burnett, I have two separate points to put to you. First, given the discussion around worries about people going into criminal law, is that not a point that you might put to the people you are trying to encourage, as you have explained at some interesting length? Would that not be a point to put to them if they are worried about whether they would ever make progress? Why not say that here is a gap in the market that you might like to fill?

The other point relates to the school part. I am delighted to hear that judges are going into schools, because I think that is where the problem lies—poverty of expectation, one might call it. But what types of schools are the judges going into? There are some schools that are much better placed in the state system to encourage people into the professions, whereas other schools have low expectations of the pupils, and the pupils themselves have those low expectations. Given that you cannot go to all schools, what is the bias towards less good schools?

Lord Burnett of Maldon: I can say what I do. When I visit a school, I always encourage my office to find a school that is not stuffed full of the children of professional parents, because that is not where the help and encouragement is needed. One of the things that I know is looked at is the proportion of students that are on free school meals, for example, and where it is. For me, that provides an opportunity to talk to usually sixth formers, and sometimes GCSE students as well, who I suspect have a relatively slight exposure to professions and the law.

It is one of the most scary things I do. Talking to 50, 60 or sometimes 100 schoolchildren is rather more difficult than talking to a parliamentary

committee. The most extraordinary thing is that they are completely uninhibited in the questions they ask, which can be quite interesting.

Baroness Fookes: Those of us who have taught recognise that phenomenon.

Lord Burnett of Maldon: The diversity and community relations judges do much more than I do. I probably get to four or five schools a year. I am going to one next week, and I was at one about three or four weeks ago. But some of these judges are going to schools every week or every fortnight, and making quite a difference in breaking down the barriers you spoke of. It is something that makes me weep internally; if there is a view that the law is not for the likes of us, that is a terrible attitude to prevail anywhere.

Baroness Fookes: You have given an admirable example of the way you do it. Do the other judges who are doing this seek out schools that are less filled with the children of professional parents?

Lord Burnett of Maldon: I believe so. Inevitably, they are looking at schools in the areas in which they operate as judges. We had a conference a fortnight or three weeks ago of the diversity and community relations judges; a buzzing and interesting discussion involving all these judges. They are fired up to make a difference.

Baroness Fookes: Is there any arrangement for children from these schools to be taken to a magistrates' court, or somewhere similar, so that they can see it in action and have it explained to them?

Lord Burnett of Maldon: Yes, the magistrates run a similar programme to the judges. Across the country we encourage youngsters to come to the courts. They come to the Royal Courts of Justice, for example, and they go to their local courts, where the judges take a lot of trouble to engage with them and to encourage them to understand what is going on.

Q14 **Lord Howard of Lympne:** One of the things the committee is looking at in its current inquiry is the role of the Lord Chancellor following the 2005 changes. Do you have any reflections on the changes in the arrangements for judicial appointments following those changes, particularly the appointment of senior members of the judiciary?

Lord Burnett of Maldon: It has always struck me that it is important that the appointment of judges has a degree of transparency to it and it is important that everyone can see that judges are appointed on objective criteria.

The calibration that went into the 2005 Act to determine the composition of the Judicial Appointments Commission, for example, was careful and balanced. The Judicial Appointments Commission is a majority lay organisation. When it comes to appointments panels, the lay participation is in the majority. That is true also for the special appointments panels

that are created for the various senior judicial posts as well. It seems to me that that change is working reasonably well.

Of course, it is fairly opaque precisely what was going on before. I am looking at Lord Falconer to your left, who was involved, I think before the new system and also under the new system.

It was always well understood that, although the old-style Lord Chancellor was wearing all these constitutional hats—was a party politician, a member of the Cabinet, Speaker of the House of Lords and so on—when it came to judicial appointments the Lord Chancellor left the party politics aside. That has been the case for a very long time. Looking back over the last two centuries, there have been one or two controversies in the 19th century, for example, but none recently. It seems to me that the system was working very well, but it was not transparent, and transparency in judicial appointments is important to garner public confidence.

The Chair: I am going to make the next question the last because it is quite a full question. I will send you our remaining questions, and if you did feel able to respond to them it would be helpful. I am conscious I am going to lose some of my colleagues and conscious of our agenda as a whole. Perhaps we could turn to a question on the Lord Chancellor and the law officers.

Q15 **Lord Robertson of Port Ellen:** The committee is looking at the relationship that exists between the Lord Chancellor and the law officers. I wondered how often you spoke with them and what sorts of things you discussed. In particular, would you express any views about the adherence of the law officers to the rule of law?

Lord Burnett of Maldon: So far as the Lord Chancellor is concerned, he and I meet regularly and frequently. We had a meeting two days ago and we had a meeting a week ago. We have regularly timetabled meetings to catch up on everything to do with the system and we speak in between meetings when we need to. I also have a separate meeting, in tandem with those meetings, with the Permanent Secretary, so there is an opportunity to ensure everything that is on my mind and everything that is on his mind is being looked at.

I meet the law officers much less frequently; I am struggling to think whether it is two or three times a year I tend to meet them. Again, there can be intermediate meetings of one sort or another.

With the law officers, the reason for our meeting is to talk about matters that intersect in our interests. Obviously the Attorney-General has some statutory responsibility for the Crown Prosecution Service, the Serious Fraud Office and so on, and those are the sorts of things we talk about. The law officers also have a particular role to play in contempt matters, and those can be of interest to me and the judiciary as well. The law officers have been interested, of course, in the recovery in the criminal courts. They also have other responsibilities of a more discrete nature to

do with charities and matters of that kind, and so we talk about that. I certainly do not presume to lecture the law officers on their responsibilities in the sphere of the rule of law; that would not be for me to do at all.

Coming back to the Lord Chancellor's role, his or her functions are set out with some clarity in the opening sections of the Constitutional Reform Act. I have picked up that one or two appointees, on reading those statutory duties, have regarded them as being quite onerous. I think the job of Lord Chancellor remains a very difficult one because of its importance in the intersection between two of the pillars of the state; namely the Executive and the judiciary, two pillars that are independent of each other. The Lord Chancellor is reminded in the opening section of the Act, if I remember it correctly, that he has the constitutional responsibilities of the Lord Chancellor as they always have been.

I am conscious we have a former Lord Chancellor in the room, so I shall be careful not to chance my arm, but it strikes me that that includes being the voice of the judiciary at the Cabinet table when that is needed. It also strikes me as importing an obligation to do something that may be quite difficult from time to time, which is to say no to colleagues in Cabinet. That can be quite difficult.

The Lord Chancellor also has specific responsibilities in connection with the rule of law and the independence of the judiciary. With the independence of the judiciary, the language of the Act is to defend the independence of the judiciary. Conscious as I am that one of the draftsman of the Act is in the room, I have certainly taken is that "to defend" is something that suggests activity; it is not a passive word. So there are some pretty strong statutory duties.

I have already mentioned the need to fund the courts, so that they can operate efficiently and effectively.

All of these things are important. When it comes to discussions with the Lord Chancellor, the Lord Chancellor of the day—I am on my fourth—and I talk about all matters of mutual interest. I respect the Lord Chancellor's sphere of activity and would not presume to intrude in areas of what are political policy. I will explain the impacts of proposed policy changes on the operation of the courts. Lord Chancellors respect the independence of the judiciary and accept, however tempting it might be not to—I am sure it is tempting—that what goes on inside courts, subject to statutory intervention, is for the judiciary and not for the Executive.

Lord Robertson of Port Ellen: So you would not raise any apprehensions about possible interpretations of the rule of law that you thought went beyond the normal accepted meaning of that.

Lord Burnett of Maldon: I am very conscious of the environment generally in which you are asking this question. The rule of law is a protean concept. You would struggle to find two people who would necessarily define it in precisely the same terms. The statute does not

define it. There has, I think, as yet been no need for a judicial definition, albeit there have been areas where judges have indicated certain of its indicia.

It is important for me to have a close confidential and working relationship with the Lord Chancellor. All of my first three Lord Chancellors were in touch with each other, which perhaps gives you an indication of how the relationship was a very good one. It has to be confidential—it really has to be confidential.

I am aware of your broader investigation into these matters. I think it was well understood that I could not come before the committee and talk about the detail of my relationships with David Lidington, David Gauke and Sir Robert Buckland, and still less that with the existing Lord Chancellor, so you will have to forgive me if I do not.

I have been Chief Justice now for nearly five years. There have been occasions during that period—I will say no more than that—where I have been concerned about some activities intruding upon the independence of the judiciary and rule of law issues. Of course, if I have concerns, I will ventilate them with the Lord Chancellor.

I should also say that my engagement with government goes well beyond the Lord Chancellor. I see the Prime Minister regularly—not terribly often, as he has a lot else on his plate. I have had three long and interesting meetings with the current Prime Minister, and there is another one coming up, I hope, before too long. I see the Cabinet Secretary regularly. I see the Home Secretary regularly to talk about issues of mutual concern but not the policy of the Home Office. That has always been happening, so far as I am concerned. Again, I am conscious we have a former Home Secretary here, and I do not know whether in Lord Howard's time he saw the Lord Chief Justice of the day.

Part of my responsibility is to represent the views of the judiciary to government and that is an indication of the range of direct contact I have. Other senior judges will have contact with Ministers in departments that have a direct impact on their work. The President of the Family Division has some engagement with the Department for Education, and the Senior President of Tribunals with BEIS, and so on. There is quite a lot of contact. However, we are all very careful to ensure we respect the constitutional proprieties. We recognise the role of Ministers and we expect Ministers to understand our role as well.

Lord Robertson of Port Ellen: If, in these confidential discussions with the Lord Chancellor you felt any impact of government policy on your responsibilities, would you seek redress at Prime-Ministerial level?

Lord Burnett of Maldon: I appreciate you want to press me but I am very concerned not to intrude on what might be thought to be confidential matters. Those who know me know I am not a shrinking violet. If there were something I was concerned about, I would not be nervous about raising it an appropriate level.

Lord Robertson of Port Ellen: Thank you.

Q16 **Lord Hennessy of Nympsfield:** Lord Burnett, I was fascinated by your last answer to Lord Robertson. I think we all have a certain idea of the rule of law but it does have this elusive property to which you were referring.

Just before we gathered I dug out the definition of Tom Bingham, in his classic work, *The Rule of Law*. It is very short. He says this: "the core of the existing principle of the rule of law: that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts". Would you accept Tom Bingham's definition as a pretty good working definition? Would it be your definition?

Can I ask a second question arising out of that? Could I tempt you—in your non-shrinking-violet mode—to perhaps do a great public service and draw up a template of the requirements of the rule of law against which committees like ours, and indeed the public, can test the actions of future governments?

Lord Burnett of Maldon: Lord Bingham's short book on the rule of law in my opinion is one of the most brilliant pieces of writing from a judge in recent years. It has the virtue of being readable, it has the virtue of being short and it has the virtue of being right. I am not suggesting that those are qualities not usually found in judges—for those who might be watching.

Yes, the working definition has received almost universal agreement. As you know, Lord Bingham went on to subdivide the indicia of the rule of law through a series of penetrating short discussions. I do not think one will find anywhere a better analysis of it that is accessible in the English language.

As for your second question, you are setting me a task that would not be the work of moments, I fear. Again, I understand entirely why you ask the question. It is not something I fear I will have either the opportunity or the time to do in the near future. It seems to me that Lord Bingham's working definition might be sufficient for the moment. I have in mind one or two other pieces of writing on it, which I will not talk about now because it would be too technical, that might also be of some assistance.

Lord Hennessy of Nympsfield: Could you perhaps put in an interim note, which would not be your final word, to help us out?

Lord Burnett of Maldon: I am always advised never just to say yes to a question because of the commitment I might be entering into, but we will have a look at it, Lord Hennessy.

Lord Hennessy of Nympsfield: Thank you very much.

The Chair: Lord Howell has a question on the impact of policy on the courts.

Lord Howell of Guildford: We all obviously respect and appreciate the need for complete confidentiality, and this is not a press or intrude question of any type. However, it is a fact that a vastly increasing volume of international law runs through our courts. Do you, in general terms and based on your wisdom and experience, feel that this growth of international law—with all its baggage of policy and politics coming along with it—has created more problems for the judiciary?

Secondly, with the talk of a Bill of Rights, if we have a Bill of Rights coming along, do you think that will make life for the judiciary harder or easier? You talked about a harder and harder life for the judiciary; is this going to be part of it?

Lord Burnett of Maldon: International law does not automatically come into our domestic law. In the last year, there has been a decision of the Supreme Court that has reminded us that international treaty law does not become domestic law unless Parliament says so.

International law obviously comes into all sorts of aspects, particularly of human rights law and asylum law. I think the courts are well used to that and are, frankly, on top of it. I do not perceive that to be a particular problem. I do not doubt that, when I get back to the Royal Courts of Justice, there will be some who tell me I have that wrong, but I have not perceived that to be a problem.

So far as the second part of your question is concerned, obviously I am not going to say anything about proposed government legislation. There was a consultation of some sort. What I can do is to try, in a few words, to explain what we do when such legislation is proposed.

We engage on the practical impacts of any proposed legislative change on the operation of the courts. To look back at the recent past, the judicial review Bill was in Parliament and got Royal Assent just before the end of the last Session. The policy aspects of that were for government and Parliament. What we do, through discussions with officials with suitably expert judges, is to explain that if you do this then it will have this impact on the courts. Sometimes it can be quite a profound practical impact that could have resource implications, for example. Sometimes we are able to point out, in all sorts of areas, the relationship between the proposals being made and some of the bits and pieces in the law that are there already, which perhaps have not been looked at with the intensity and clarity that they need to be.

When it comes to a Bill to do with human rights, I expect that we will do the same. There will be, it seems, proposals to adjust the way that the courts approach Strasbourg case law. We may be able to explain how that would work. There are proposals, I think, to introduce more and more filter mechanisms. That could have quite profound implications on the operation of certain courts, because you are going to generate extra applications and so on. All of that we would point out. Those discussions are very productive. Again, they work only because they are confidential, and I know they are very welcome to Ministers.

Lord Howell of Guildford: Thank you very much.

The Chair: Thank you. Thank you very much indeed for that. It was very full, with lots of details to think on, and very informative.

Lord Burnett of Maldon: It is my pleasure to be here, and I hope I will see you again before too long.

The Chair: I hope so. Thank you.