HOUSE OF LORDS

Constitution Committee

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

Wednesday 14 June 2023

10.15 am

Watch the meeting

Members present: Baroness Drake (The Chair); Baroness Andrews; Lord Falconer of Thoroton; Baroness Finn; Lord Foulkes of Cumnock; Lord Hope of Craighead; Lord Keen of Elie; Lord Mancroft; Lord Strathclyde; Baroness Suttie; Lord Thomas of Gresford.

Evidence Session No. 1 Heard in Public Questions 1 - 14

Witness

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

Lord Burnett of Maldon.

Q1 **The Chair:** Good morning. This is an evidence session of the Constitution Committee with the right honourable the Lord Burnett of Maldon, Lord Chief Justice and Head of the judiciary of England and Wales, and President of the Courts of England and Wales.

I am conscious, Lord Burnett, that this is probably the last occasion of your appearance before this committee in your current role. You have made a lot of appearances before us, at least five, and I did not want the occasion to pass without putting on record our thanks for the frequency with which you have come to engage with us and deal fully with the issues we have raised. Of particular value were your contributions during the pandemic period on the implications for the courts. Formally, on behalf of the Constitution Committee, could I put on record our thanks for your contribution to the work of this committee?

Lord Burnett of Maldon: Thank you very much indeed, Lady Drake. I do not want this to become a mutual admiration exercise, but I should put on record, at this early stage, my thanks to the committee for the interest that it takes in the workings of the judiciary and of the constitution, both of which are extremely important matters. It has always been a pleasure to appear before your committee, and I am very much hoping that that record will not be broken today.

The Chair: We will certainly try not to break it. As ever, we have, as you would expect, quite a few questions that we would like to put to you, but do you wish to make any opening comments before we go into questions?

Lord Burnett of Maldon: Probably the best course is to go into the various questions that you have, if that is convenient for you and your members. I might say something at the end, if the mood moves me.

The Chair: It would not surprise you that we reflected on the comments you made at the Lord Chancellor's swearing-in ceremony on 24 May this year in respect of the functions of the Lord Chancellor. Maybe this is our opportunity to ask you what considerations led you to suggest that the role of the Lord Chancellor might be separated from that of the Secretary of State for Justice, or at least some of the higher responsibilities, such as prisons.

Lord Burnett of Maldon: This is a topic that this committee is extremely familiar with. I was able over the weekend to remind myself of your sixth report from 2007, when Lord Falconer was a witness rather than a member of the committee, where a number of the potential pitfalls that attached to the way the office was developing were identified by the committee, quite presciently, if I may say so. You have, only recently, looked again at the topic.

It seems to me that one has to start by really asking the fundamental questions, which you did in your recent report, about what the Lord Chancellor is for and how that is distinct from the ordinary role of a departmental Minister. Clearly, there are very high-level constitutional functions identified in the Constitutional Reform Act itself to uphold the rule of law, to defend the independence of the judiciary and to provide secure and sufficient funding for the courts service. To some, those sound like high-minded ideals, but they are, in fact, profoundly important to the operation of our constitutional settlement.

The Lord Chancellor is also responsible for the government policy work that is necessary to improve and develop the operation of the courts and to do the constitutional plumbing, as I call it, in respect of the judiciary and matters to do with the judiciary. The Lord Chancellor is also responsible for delivering whatever government policy may be, in respect of the public funding of litigation of various sorts, and for the oversight of the legal profession.

All those things are extremely important. My concern, which was shared by a number of the witnesses who appeared before you in respect of your recent report, is the possibility, given the political profile of the other aspects of the role, as they have developed over the years, of those core constitutional functions becoming of less importance and significance.

It also seems to me that the Lord Chancellor is particularly responsible for identifying within government the value of the rule of law, of an independent judiciary, and of a vibrant and independent legal profession. One of the struggles I have had in my time as Lord Chief Justice is to raise the eyes of the Treasury above the immediate balance sheet, if I can call it that, of money into the system, what is delivered and what can be saved.

In other words, the way that government seems to work is to see the administration of justice as just another service. It is not just another service, but something that underpins everything that goes on in society. Without a functioning judiciary and administration of justice, and without a strong commitment to the rule of law, business will not flourish; society will not flourish.

In recent years, a lot of work has been done on the underlying value of these things. Nobody would suggest that the value of education, for example, is to be calculated by the amount, in GDP terms, that it contributes each year to the economy, because, clearly, an educated society is one that will deliver prosperity and long-term benefits. The same can be said of health. No doubt, the health sector does generate many billions in GDP each year, but that is not what the point is.

The rule of law and the administration of justice is in the same sort of category. We have done work on this and have been speaking about it. I and other judges have given lectures on it. There is a greater understanding that the rule of law is one of the building blocks of prosperity.

My central thesis, if I can call it that, is that, given all those things that I have described, the need to nurture the rule of law and everything that attaches to it is a really important part of what government should be doing and deserves a Minister who is not distracted by other matters.

There are additional features. The Lord Chancellor, because of his or her special responsibilities with respect to the rule of law and the independence of the judiciary, has to be a politician of considerable substance who is able to say to the Prime Minister and to Cabinet colleagues, "No, you can't do that". One of the features of the system as it has developed, for good or ill, is that we have had a very high rate of turnover of Lord Chancellors.

Of course, I recognise that, in other departments, for reasons that it is perhaps indelicate to go into, there has been a very high turnover of Ministers as well, but that is undesirable. I also consider it undesirable that a Lord Chancellor should be a Minister who is either actively or passively looking for promotion.

One of the great advantages of the system as it operated right through until Lord Clarke was Lord Chancellor was that none of the holders of the office was looking to become Home Secretary, Foreign Secretary or whatever the case may be. That, to my mind, enhances the possibility that the Lord Chancellor can have those very difficult conversations that, from time to time, I do not doubt, are necessary.

Then one has the adjunct of some of the most controversial and difficult areas of Home Office activity that were transferred. Again, this was the subject matter of part of the discussion back in 2007, in which Lord Falconer was much engaged. There are obvious conflicts of interest that arise there. Prisons are also very political—they are at the moment—which means that, understandably, the attention of the Lord Chancellor is likely to be substantially diverted to that side of the business of the ministry. It is the biggest part of the ministry's budget. That leads to good things that need to be done being put off, because there are more pressing things that the Minister wants to do.

Just to make, I hope, an appropriate rather than ad hominem comment, I was very struck by an interview that Lord Mackay of Clashfern gave when he retired from the House of Lords last year—far too soon, in my opinion—about the importance of the Lord Chancellor being able simply to insist that time must be found in Parliament to deal with constitutional plumbing, as I call it, or things to do with the judiciary. I know we may touch a little later in the session on issues, which might be called plumbing issues, that have been put off because there is no parliamentary time, or, to put it differently, there are more pressing parliamentary priorities.

All I am suggesting is that we have now had the current system, if we go back to 2007 as the effective kick-off, although it was earlier, for more than 15 years. It is time to look at it calmly and rationally, to leave aside hyperbole, to try to avoid politics and party politics coming into it, and

simply to ask the fundamental question of whether the current system is serving the rule of law, the independence of the judiciary and the administration of justice generally as it should be.

The Chair: Your emphasis on the importance of the rule of law has been an increasing theme of this committee and a source of concern to us. In our report on the role of the Lord Chancellor and the law officers, we did say that the arguments for and against the status quo are finely balanced and should be kept under review.

Q2 **Lord Falconer of Thoroton:** Could I endorse what Baroness Drake has said about your co-operation with the committee? As a Lord Chief Justice walking a tightrope, you have done a brilliant job, so many congratulations on that.

Could I also declare an interest as a practising member of the English Bar? Could I declare a further interest, in that my wife is the designated family judge in Luton and a circuit judge?

On my reading of what you have just said about the role of the Lord Chancellor—and you must correct me if I am wrong—this is the question: is the Lord Chancellor a strong enough player in government to protect the rule of law; and, separately, is the Lord Chancellor too distracted by prisons to focus on maybe that fundamental role of protecting the rule of law and the constitutional plumbing that goes with it? Would that be a fair assessment of what you are saying?

Lord Burnett of Maldon: Yes, that encapsulates it reasonably well.

Lord Falconer of Thoroton: Again, correct me if I am wrong, but you are not suggesting that we go back to a Lord Chancellor appointed by the Prime Minister appointing all the judges.

Lord Burnett of Maldon: No. Just to be absolutely clear, looking at the Constitutional Reform Act and the collective changes to the role of the Lord Chancellor, I do not think that anybody would suggest that the Lord Chancellor should exercise judicial functions. I doubt that anybody would suggest that the Lord Chancellor should be the Speaker of the House of Lords. I doubt that anybody would suggest that the Lord Chancellor should reassume the appointments functions that are now dealt with by the Judicial Appointments Commission on recommendations.

I appreciate, because I read fairly widely on this topic, that there are views that the Lord Chancellor should have a greater say in some judicial appointments, but I do not think that it would be appropriate for me to comment on that.

Lord Falconer of Thoroton: I do not think that you are suggesting that the appointment of the Lord Chancellor should not be a job for the Prime Minister.

Lord Burnett of Maldon: No, certainly not.

Lord Falconer of Thoroton: So it is the person who the Prime Minister

appoints and the leaving of that person to perform their constitutional obligations as set out in the Constitutional Reform Act.

Lord Burnett of Maldon: Again, I am very conscious that this debate has been flowing around. When the committee was taking evidence from various people who have a deep interest in this, before producing the last report, there were a lot of questions about whether the Lord Chancellor should necessarily be a lawyer, for example. There were various views about it. I am aware that yours, Lord Falconer, is that it is the person who matters, rather than the qualifications that that person has. I broadly agree with that, but there is the subsidiary question about whether the way the office has developed to be an adjunct, as it now is, to a serious departmental office is good for the system.

Lord Falconer of Thoroton: If you are saying that they should appoint a strong character able to say no and who, for example, will last a whole Parliament, I would strongly agree with you. I think that is what you are saying.

Lord Burnett of Maldon: It is, essentially.

Lord Falconer of Thoroton: In relation to the other bit, your focus, both today and in the speech that you made at the installation of Alex Chalk as the Lord Chancellor, is that prisons are a bridge too far. If prisons were not with the Lord Chancellor, take it from me that they would be with the Home Office, which is probably where you would think they would be. Do you think that it is a good thing that what happens to defendants in court should be dealt with by the Home Office and not by the person responsible for the courts?

What I have in mind is that you probably meet the Lord Chancellor regularly. The Lord Chancellor, whoever he or she may be, will, through his or her relationship with the judges, have a good understanding of what the judges are thinking. How often have you seen a Home Secretary in a professional capacity since you have been Lord Chief Justice?

Lord Burnett of Maldon: I have not seen the current incumbent since she became Home Secretary. There was a Home Secretary who was in office for such a short period that we missed the opportunity, but I have met Home Secretaries regularly.

Lord Falconer of Thoroton: Your relationship with the Lord Chancellor is of a completely different nature.

Lord Burnett of Maldon: That is true.

Lord Falconer of Thoroton: The successful relationship that Lord Woolf and I envisaged was one where the constitutional boundaries would be respected—namely, you are an independent judge—but you would co-operate in a whole range of areas, including how you would deal with the practicalities of sentencing. Why does that not put prisons and probation appropriately with the justice department, not the home department?

Lord Burnett of Maldon: There are two aspects to that. The first is that running the prisons is an operational matter; it is nuts and bolts. At the moment, we have a problem in the prisons, which you are reading about all the time. It is a problem that was clearly going to come, and it is disappointing that steps were not taken in time to avoid it. Those are nuts and bolts problems, and not questions about sentencing policy. Sentencing policy is something that would quite naturally sit with the Lord Chancellor, at least in part.

As we are seeing at the moment, the Ministry of Justice is dealing with a real problem in the prisons, which all of you will have been reading about. There have been times recently when, as you know, people remanded in custody or sentenced have been kept in police cells. There have been regular occasions where people are taken very long distances from where they really ought to be for their own sake and the sake of those who come to visit them. Those are absorbing a huge amount of time and energy. That is a purely operational matter about prisons, and it does not seem to me that that, necessarily or even logically, sits with the Lord Chancellor.

My wider concern, as I have expressed it—I appreciate that it was expressed very forcefully by some of those who gave evidence recently—is that, when you have the operation of the courts and all of its adjuncts as representing only a very small part of what the Lord Chancellor does, it necessarily runs the risk of being downgraded. That is the real issue and the real risk.

There are other things that might logically attach to the Lord Chancellor, which are a bit mixed up at the moment—for example, constitutional matters. Lord Falconer, when you were in office, constitutional matters were within your department. I think that they moved out at the beginning of the coalition years, but I am not entirely certain, and quite where they sit now and with what enthusiasm they are looked at is something that I simply do not know.

It is not a question, if I may say so, of just going along a track and saying, "This might usefully attach and this might not". There is the much more fundamental question about whether the rule of law and everything that I have been trying to describe is sufficiently important to have a senior Cabinet Minister responsible for that, and that alone.

Lord Falconer of Thoroton: If you separated sentencing policy from the operational running of the prisons, do you not think that the problems would get massively worse? They are not good; I completely agree with what you are saying. My experience is that, if you left, as you had done until then, those issues—not you, but the state—and separated the operation of the prisons from Home Office policy, which is always to send more people to prison, the position would be considerably worse.

Lord Burnett of Maldon: I must be careful not to express any personal views about sentencing policy, but I would make the observation at the moment that there is, at least in the public and political world, almost no

measured and sensible debate about sentencing policy at all. What one sees too often is politician A saying, "Everybody should go to prison", and politician B in the other party saying, "Yes, and for twice as long". That is not a very grown-up way of debating really important issues.

Lord Keen of Elie: It has been suggested that capacity problems in the prison estate should dictate sentencing policy, but surely sentencing policy should dictate capacity issues in the prison estate.

Lord Burnett of Maldon: Sentencing policy is, in the end, dictated by Parliament. The obligation of government is to provide sufficient places in prisons to house those who, directly or indirectly, Parliament has said should be there.

Q3 **Lord Strathclyde:** Lord Chief Justice, thank you very much for what you said in your first answer, which was a brilliant exposition of what I think you find is wrong with the current system. Although you ended with an appeal to make it as unpolitical as possible, what you have just heard from Lord Falconer demonstrates how difficult that is. It reminded me of the debates that took place nearly 20 years ago now. In hearing you, I could not help thinking that one of the problems was that a change to the role of the Lord Chancellor was done at haste, with seemingly little thought, and resulted in a whole range of compromises to create the system that we now have.

There were two issues in the House of Lords that remain stuck in my mind. The first was the vote on whether the Lord Chancellor should be a lawyer—be legally qualified to make the decisions that he did—and the second was whether the post should remain in the House of Lords. It was Geoffrey Howe who called the role of Lord Chancellor the looming presence in the Cabinet. He did not mean that as a physical presence. He explained that it was a slightly detached political figure, but legally qualified and, as you said, with the ability to say no to the Prime Minister.

Do you think that some of the problem, notwithstanding the questions from Lord Falconer about the specific role on appointments or judicial matters, which I largely agree with, would be solved by making sure that the Lord Chancellor was legally qualified and that, because of the very nature of the House of Lords being very different from the white heat of the House of Commons, his or her position in the House of Lords would provide the answer to many of the questions that you raised?

Lord Burnett of Maldon: I will come at that on two levels, if I may. The first is that the legal qualification was there, I have always assumed, to be a reflection of the need to have somebody who really understands the constitutional position. It is fair to observe that there are many who enter the House of Commons who do not have a very developed understanding of the various aspects of the constitution and the relationships. It is something we have been trying to work on and to help with.

Being a lawyer in a technical sense—knowing a little bit about conveyancing or public law—is not really what it is all about. It is about having in your bones an understanding already of what the independence

of the judiciary means, what the rule of law means, and matters of that sort.

If, as Lord Falconer observed in agreeing with me, it would be a good thing for a Lord Chancellor to be in post for a long time, in other words not changing every year or two—whether anybody will manage as long as Lord Mackay did has to be doubted—it may be suggested that the House of Lords is a good place for that Minister, but it depends a little on what is attached to the job. Coming back to Lord Falconer's observations, it seems to me politically quite difficult to imagine that a Secretary of State for Prisons, if I can put the label that really should attach, could, in today's world, be in the House of Lords.

Lord Strathclyde: Hence the two roles would need to be divided, as you said.

Lord Burnett of Maldon: What I hope I have made clear is that, in swearing-in the new Lord Chancellor, it was an opportunity for me to pick up the baton that had been laid down by this committee and to say publicly that I thought that the issue needs to be looked at. I would not presume to suggest that I have had an opportunity to think through every implication of it and to come up with what I would consider to be a fully developed scheme to present to anybody. I indicated that I would be happy to take part in the debate when I demit from office, should the debate be taken up elsewhere.

The Chair: You are quite right. We did lay down the baton, and that is why it was welcome that you made a contribution.

Q4 **Lord Foulkes of Cumnock:** Notwithstanding Lord Strathclyde's unjustified attack on the previous Labour Government, I come to the same conclusion as he does. The logic of what you are saying is that an ideal Lord Chancellor would be someone in the House of Lords who was not seeking to be Home Secretary or Foreign Secretary and, therefore, could continue for a while. He or she would be a member of the Cabinet. That is the logic of what you are proposing, is it not?

Lord Burnett of Maldon: I can see the convenience of having the Lord Chancellor in the House of Lords, because that would, for all practical purposes, foreclose moving to an overtly political job as Secretary of State for anything. Whether it is necessary would need to be thought through very carefully.

I do not want to be thought to comment on any Lord Chancellor who I have worked with over the last six years—six of them, and one of them twice—but looking back to the early days, although Jack Straw, who succeeded Lord Falconer, was in the House of Commons, he had already been Home Secretary and Foreign Secretary and, I assume, was not looking for further preferment. His successor, Ken Clarke, had also been pretty well everything in his career and it was a terminus job. That is more the important issue.

Lord Foulkes of Cumnock: Without making any predictions or

suggestions, but purely hypothetically, when Sir Keir Starmer becomes Prime Minister at the next election—

The Chair: I am conscious of the judicial guidance.

Lord Foulkes of Cumnock: —Lord Falconer would be a very good Lord Chancellor.

Lord Falconer of Thoroton: I get the terminal job.

The Chair: The Lord Chief Justice will not want to comment on that.

Lord Burnett of Maldon: I have a sphinx-like face for that one.

The Chair: As we said in our report on the Lord Chancellor and law officers, the arguments for and against are finely balanced. We sought to lay them out, and I am sure it is an issue that is going to continue to be debated.

Q5 **Baroness Andrews:** Good morning, Lord Burnett. This is a very granular expression of many of the things that you have been talking about. Last time you appeared before the committee last May, you brought some rather startling figures on the increase in the backlog. You also gave us good advice about being aware of timeliness and the issues of how many cases had been outstanding for six months and 12 months. What are the current figures that you have to compare with what you brought with you last time?

Lord Burnett of Maldon: The broad point that I sought to make last May was that an obsessive focus on the number of outstanding cases in any jurisdiction carries you only so far. You need to know what the cases are. More importantly, anyone tied up in litigation in any field is not very bothered, I suspect, with the number of outstanding cases, but wants to know when his or her case, in whatever form they are involved, is going to come on.

In the Crown Court at the moment, just to put the matter on record, the outstanding caseload, which was coming down gently until the Bar action last year, has now begun to rise again. It is perhaps important for everybody to understand a little bit about why that is happening. For a very long time, the volume of cases coming into the criminal courts has remained depressed as compared with pre Covid, but the position in the Crown Court now is that the cases coming in are on the rise, and that we will be back to pre-Covid levels fairly quickly.

The volume of work being transacted in the Crown Court has increased very substantially as compared with the year 2019-20—in other words pre Covid. We are sitting for roughly 25% more days a year in the Crown Court than we were in financial year 2019-20. In the intervening period, the low-hanging fruit has been disproportionately gathered, and so we have a higher mix of more difficult and longer cases, which is going to have an impact on how the overall caseload is managed.

So far as timeliness is concerned, the latest official figures give us the position up to the end of December 2022. I would expect that it will not be long before some more official figures are published. The position at the end of 2022 was that 49% of cases in the Crown Court had been outstanding for less than six months, 22% for between six and 12 months, and 29% for over 12 months. That is a worry.

This may repeat a little of what I said last year; I am afraid I have not read what I said, but there are important factors to bear in mind. First of all, about two-thirds of cases that come into the Crown Court as trial cases—in other words, they have not been committed for sentence by the magistrates—end up with pleas of guilty.

As the judiciary, we are working with all the players in the system to bring forward the guilty pleas. Ideally, when the case first gets to the Crown Court, there will have been full disclosure and plenty of opportunities for the defence lawyers to talk to the prosecution lawyers and to their clients, and so, if there is to be a guilty plea, it should come very early. The reality is that, in many instances, that does not happen, for all sorts of reasons. Being blunt about it, those facing serious criminal charges are perhaps more apt than others to put off until the last moment having to face reality.

We are working hard to do that. I set up the Crown Court Improvement Group, which has on it all the players whose combined efforts are necessary to make the Crown Court work efficiently. They include the prisons, PECS, who are the people who transport prisoners to court—we lose a huge amount of time because of late delivery of prisoners—the CPS, the police, the defence lawyer community, the judges, probation, et cetera. This has been an enormously successful enterprise, because everybody meets together in a closed environment. They are not tempted to finger-point, because they can be candid confidentially and recognise the problems that their own part of the system is responsible for.

Two things have happened. First, we have recently published a new better case management tool, which is being applied in all the Crown Courts, and all the players have signed up to it. It includes the CPS putting in place new procedures to ensure that disclosure happens sooner, which is critical if people are going to be properly advised. It includes the prisons recognising that they have to enable lawyers to see people in custody, otherwise they cannot get advice.

Secondly, we have looked closely at the way that cases are listed in the Crown Court. It is a very complex matter, but there are differences of approach across the country. The senior presiding judge, Lord Justice Edis, and a small group of judges have worked up a listing protocol, which we very much hope will improve listing and avoid cases dropping out of the system.

None the less, having, as at December 2022, 29% of cases in the Crown Court outstanding for more than 12 months is plainly unsatisfactory. As the judiciary, our aim would be to try, over time, to get to a position

where all cases that are ready to be tried within six months are tried within six months. Custody cases—where people are remanded in custody for trial—are dealt with as a priority, because of the custody time limit that Parliament has specified, which is six months, essentially. It can be extended for good reason, but it is a fairly limited set of reasons.

The cases that are taking too long are, by and large, those where defendants are on bail and are not of very high priority. The sorts of non-custody cases that judges try to prioritise are those with vulnerable witnesses or complainants, for example, and some of the more difficult and sensitive sex cases. There is a lot of work in the Crown Court that is taking too long.

The other point, which I am sure I have made elsewhere, is that one needs to be a bit cautious about statistics that cover the whole country, because the position is very different in different parts of the country. London and the south-east face a particular problem. There are other parts of the country where the problems are very much less.

Baroness Andrews: Thank you very much indeed. Can I follow up on some of the statistics in order to be absolutely clear? First, there seems to be some good news here, in so far as there has been an increase in capacity, if there is 25% more work being done in the courts. As you said, that has picked up some of the low-hanging fruit, so you are possibly expecting that to slow down in the coming months. Does that also reflect some improvement in the number of judges and lawyers, which was something that you pointed to last time?

My second question relates to the over-12-month cases. I was not expecting you to say that. I thought that those cases would be the more difficult ones, rather than ones that were more routine and not a high priority. They are stuck there because they are not a high priority. Do you have any figures on the longest time for which people are being held beyond 12 months?

Thirdly, the Crown Court Improvement Group is really making an impact. Is any of that in the public domain, so that we could read about the sorts of discussions that you are having and what people have been able to do that is making a significant difference?

Finally, I have a slightly different order of question. You were talking about your engagement with the Treasury to make it understand the relationship between the rule of law and a prosperous and secure society. I do not know whether this is out of order, but have you had a conversation about the conditions in the courts, the frustration throughout the profession about the delays and so on, when you make the case for more resources for the legal system?

Lord Burnett of Maldon: I hope that I can pick up each of those points in turn. Rather unexpectedly—at least it was unexpected for me—one of the major constraints that we had to deal with once Covid was coming to an end was a lack of judicial resource in the Crown Court. Those judicial resources are made up of the salaried circuit judges, so the Crown Court

judges, and recorders, so the part-time judges and practitioners who sit for at least three or four weeks a year, some for much more. There are also other cohorts, such as retired judges and district judges from the magistrates' court, who can sit—and some do—as well as some deputy High Court judges, but we did not have enough.

I am not sure whether we are going to come to this later, but one of the reasons is that the competition to deliver Crown Court circuit judges last year fell short. We had an arrangement with successive Lord Chancellors, from Sir Robert Buckland on, for Covid and beyond, that we could sit as many days in the Crown Court as we could find the judicial resources to sit.

That has been a constraint, but it is moving in the right direction. This last financial year, we sat in the Crown Court for 100,800 days. That, of course, was in a year where we had the Bar action, which led to all sorts of difficulties. We are expecting, in this financial year, to be able to sit for at least a couple of thousand days more than that, and I hope more. That has been a constraint, but the Crown Court and circuit judge competition that is just about to be signed off has delivered the number of judges that was asked for, which is an improvement.

There continues to be a problem, more in some parts of the country than others, in securing advocates to appear in all the cases that are listed, for both the defence and the prosecution. That, I am afraid, is the result of a long-term undermining and attrition of the criminal legal profession and is going to take time to repair. The good news at least is that there is now as much work in the Crown Court as anyone is able and wishes to do. Any lawyer can be fully engaged. Part of the problem in the past, when the volume of cases and number of sitting days were falling, up to Covid, was that not only was the rate of pay for lawyers very poor, but there were too many lawyers for the work available. At least on the second part of that, we are now in a different position.

The make-up of the cases in the more-than-12-months category is mixed too. Inevitably, there are complicated cases, especially those that need quite a lot of detailed expert evidence, that are not ready to be tried within 12 months. That is part of it.

We also have quite a large clutch of cases in the system that arise from—I am trying to use the correct expression—an encrypted telephone system being broken into by intelligence agencies around the world. That is called EncroChat. There are quite a lot of defendants awaiting trial, against whom the evidence is quite substantially the content of their EncroChat phones, which they thought were completely secure.

All I can say is that there are an enormous number of legal arguments being run in respect of those cases, which continue. A number of them have bubbled up to the Court of Appeal. There is quite a number of those stuck in the system, because the defendants are running very complex arguments. As you say, there is too large a proportion of the relatively less serious bail cases waiting for too long.

So far as the Crown Court Improvement Group is concerned, the better case management document is in the public domain, and I will make sure that a copy of that and anything else that is in the public domain relating to that group is sent to the clerk.

Lord Hope of Craighead took the Chair.

Q6 **Lord Falconer of Thoroton:** Could we just move to the family system? Could you give us your overview of whether the family justice system is under strain in relation to public law cases? Those are cases where the child might be at risk and the state is wondering whether to take protective measures.

Lord Burnett of Maldon: Yes, it is under strain, in the sense that the time that these cases are taking, although it varies in different parts of the country, is too long, but the number of outstanding cases is coming down.

Lord Falconer of Thoroton: Is that because Covid meant that all the bits of the system could not see cases that required the intervention of the state? For example, schools were not in session and, as a result, cases did not get to the courts. We saw the case yesterday of a horrific murder, in which the public authorities said that the reason why the child had been murdered was that he had slipped through the cracks during Covid. The courts are saying that so many cases did not get to court because the social workers were not working, et cetera. Are you worried about that?

Lord Burnett of Maldon: I am not sure that I am in a position to express a view about whether that phenomenon is an important part of what has been going on, but I am able to say that, in February 2022, the outstanding number of public law cases in the system was just a shade over 13,800 and, in February 2023, a year later, it is a shade under 13,200, so it is a fall of about 5%. There is an enormous amount of activity, which is being led by the family judiciary but also involving local authorities and Cafcass in particular, to try to shorten these cases and to, as they call it, make every hearing count. As I am sure you know, the President of the Family Division, with my entire blessing, has recently relaunched the public law outline, which is designed to drive down the amount of time that these cases are taking.

Lord Falconer of Thoroton: I have one more question on private law. You emphasised the importance of mediation last time you were here. Dominic Raab, as Lord Chancellor, endorsed that. Listening to what was being said—not by you but by the MoJ—I felt that maybe not enough money was going in and not enough drive was being given in relation to that, because people discover that mediation works as a means of keeping people out of the courts. Is enough being done to promote mediation throughout the system and to stop, as it were, divorcing or parting couples rowing in front of the courts?

Lord Burnett of Maldon: The Ministry of Justice, at both official and ministerial level, is absolutely signed up to the importance of mediation. Our hope is that the funding available for mediation will increase, because, as you say, it keeps people out of the courts. It is really depressing when the first thing that a couple at war do is to go to court, rather than the last thing.

Q7 **The Chair:** Before we leave backlog, I have a question that relates to recruitment. Last time you came to us, you mentioned that there was a problem with recruitment, both to the criminal bar and to the judiciary. Can I divide my question into two parts? First of all, what is the present state of the criminal bar? Is there a problem and what can be done to sort it out?

The second is on judicial recruitment. Later today, we have an order coming before us in Grand Committee, which is the Judicial Appointments (Amendment) Order dealing with legal executives who have been recruited. I wondered whether the legal executives can participate in criminal trials or whether they are, essentially, civil practitioners.

Lord Burnett of Maldon: So far as the criminal bar is concerned, in trying to put it as shortly as possible, there were two big problems. First, remuneration did not go up for years. Secondly, the volume of work went down. Thus there was a very substantial drift away from the criminal bar. When there are systemic problems, they cannot be solved overnight. The volume of work, as I have indicated, has gone up. The remuneration has gone up. I am not going to comment on whether it should go up further, but the criminal bar and the criminal solicitors are still under stress.

So far as the recruitment of legal executives is concerned, the order that you have referred to, Lord Hope, is designed to tidy up some anomalies in the system that have been in place for some years. Very few members of CILEx apply for judicial office. I would like to see more apply for judicial office within the scope of the legal skills that they have.

The Chair: Does that extend to criminal cases?

Lord Burnett of Maldon: Yes, indeed. In time, it might make a difference, but I do not think that it is going to make a significant difference straightaway.

Q8 **Lord Thomas of Gresford:** I should declare that I was appointed an assistant recorder in 1974 and later served for many years as a recorder and deputy High Court judge.

We also had a debate here on 17 May on the removal of the increase in magistrates' maximum sentencing powers. The figures we were given by Lord Bellamy were that it had had a 3% impact on the backlog and that there had been a 35% increase in sentences of between six and 12 months, amounting to 500 prisoners, and so there was a change of policy.

As he put it, "The new situation was posing risks to the ability of the prison system to deal with the changes in flow", and the Government

decided that they had to do everything possible to avoid running out of prison capacity, albeit at the expense of some increased pressure on the Crown Court. Have you seen any impact from the reversion in March this year on the various issues that I mentioned?

Lord Burnett of Maldon: The decision to reverse the power, I hope temporarily, was simply to slow down some cases going through the system. It was as simple as that. If the case goes to the Crown Court, it takes longer. It was buying a little bit of time in the spring. There was no evidence at all—and I have seen no evidence—that magistrates were inappropriately using that power. When the announcement was made by the Lord Chancellor, that point was also made.

The reality is that it has not yet been possible to measure precisely how many extra cases are going into the Crown Court, but talk to any magistrates—no doubt you do—and they will say, "We're committing cases for sentence and also sending cases up for trial that we would keep in the magistrates' court, because we don't have sufficient sentencing powers". The calculation of the MoJ originally—I have no reason to suppose that it was wrong—is that increasing magistrates' sentencing powers would save 1,700 days in the Crown Court. Broadly speaking, the disposal rate in the Crown Court is one case per sitting day. Some take weeks and others half an hour, but that is the average.

I hope that the power will be turned back on. It has caused a lot of distress and annoyance to magistrates. It has also, frankly, wasted a good deal of our time and money in training the magistrates to do this for what turned out to be a rather short period. The minute it is turned back on, there will be a spike in the prison population, because the cases will be dealt with in two or three weeks as opposed to a couple of months.

Lord Thomas of Gresford: The training was three hours only. Is that sufficient to give magistrates the increased powers of sentencing between six and 12 months? As you know, that is generally frowned upon as not giving sufficient time to do anything with the prisoner by way of rehabilitation.

Lord Burnett of Maldon: The training was worked out very carefully by the Judicial College and is very much in the context, as you will appreciate, of magistrates already having to make decisions about whether their sentencing powers are sufficient, which involves them in having to make a broad assessment of where the sentence might end up were the person to be convicted or to plead. I have not heard any suggestions that the training was inadequate, and it is important to emphasise that there has been no suggestion and there is no evidence, of which I am aware, that magistrates have inappropriately used these powers.

Lord Thomas of Gresford: So your view is that, as soon as it is possible, we should turn the switch in the other direction.

Lord Burnett of Maldon: That is my view.

Q9 **Baroness Finn:** Good morning, Lord Burnett. My question moves away to the physical side of the courts and to the courts and tribunals reform programme. On the physical state of the courts, last year you expressed concern that the £50 million allocated by the Treasury for capital funding was insufficient, and correctly identified that dreadful working conditions in the courts benefited nobody. I certainly have testimony from friends and colleagues in the legal profession to this effect. One year on, what is your assessment of the state of the court estate? Have your concerns increased or decreased?

Lord Burnett of Maldon: The background to this is that, in the three-year spending review, the Treasury notionally allocated £50 million a year for capital spending in the courts. In fact, last year, the Lord Chancellor of the day, Dominic Raab, found £70 million. We also had an understanding that, if underspends came along, there would be some more. The turnout was just over £80 million. The problem was that a lot of that extra money came at the end of the year, when it was not possible to spend it on things that really mattered, so I have had continuing concerns.

I am just coming to the end of the concordat process, which is the settlement between the Government and the judiciary for funding, for the current financial year. I will not go into why it was not concluded before the beginning of the financial year, since we do not have time, but I have engaged in great detail on this topic not only with the Lord Chancellor but with the Prime Minister. I am reasonably confident, but I am not going to anticipate the final concordat settlement, that the position for this financial year will be much better.

A point that I have been pressing for ages is that it is hopeless to deal with this on a year-by-year basis, because so much of the big capital expenditure will straddle different years. We are working towards an agreement now for the next financial year as well for capital spending. My expectation—I cannot say more than that—is that we will be in a rather better position.

Baroness Finn: My next question is about the court and tribunals reform programme to introduce new technology and modernised working practices. In February, the NAO gave a fairly critical report. It was over budget by 10%; it was over time, since it was supposed to take three years and has taken four years longer, so over twice as long; it has saved less than envisaged; and concerns have been expressed that it is not delivering the intended efficiencies. What is your assessment? Is that a fair assessment from the NAO? What are the reasons for these problems?

Lord Burnett of Maldon: It is no secret that the modernisation programme generally has taken much longer than was expected. The technical difficulties that HMCTS has had to deal with were much greater than it expected. What has happened recently, in part in response by HMCTS to the NAO report and other reports on this, is described as a reset of the timetable.

What was happening was that the timetable was being driven entirely by what were thought to be end dates for funding, and there was growing concern—concern that I certainly had—that, by looking at it simply by reference to when the money was said to be running out, if you ran too quickly, you would really ensure that big parts of the programme did not work, because nobody would be ready to work them.

Last summer, HMCTS did a great deal of thinking about this and came up with a proposal to reset the timetable for the remaining parts of the modernisation programme. I was consulted about this in September, and the judiciary formally agreed to the reset in October last year. For reasons that I would not go into even if I had time, the Ministry of Justice did not agree to the reset until March, and so there were six months lost, to be perfectly honest, which has caused a few additional problems.

The point of it now is that the remaining big projects are going to be timed to ensure, first, that HMCTS can get the technical side of it. There is absolutely no point having a system that is not working properly or is working properly for only 80% of the time. Secondly, it will enable HMCTS staff to be properly ready for it. Thirdly, within my responsibility, it will enable us to ensure that judges are ready for the products before they come along, are appropriately trained, and understand what they have to do.

We are bringing together the training of HMCTS and judges on some of these things, and there is a great deal of work going on. I should pay tribute particularly to Mr Justice Cobb and district judge Tim Jenkins, who have been working like Trojans to put together all of the systems that will support judges through this over the next year or so.

Baroness Finn: Thank you for that. That sounds more encouraging going forward. One of the key concerns on the programme was on the common platform, which is a digital system to join up the work of the criminal courts and the CPS. This is proving more difficult and that is delayed. When I worked in the coalition Government many years ago, we tried to introduce the concept of government as a platform, which was a rather sensible initiative to join up the work of government departments, so that education might be aligned with local government, et cetera.

It proved difficult and there was a lot of resistance; a training programme would have been required, et cetera. Unfortunately, it was dropped, and so it is a matter of regret that it has not happened. Would you think that it was a shame if this common platform was now abandoned? What steps could be taken to make sure that it could be a success?

Lord Burnett of Maldon: It cannot be abandoned, because there is no other show in town. The starting point is that HMCTS and its technical staff have to make sure that it works as intended. It is already in somewhere between 85% and 90% of our criminal courts. No one would pretend that it has been glitch-free, but, in most places, it is settling in. The reset, which gives time for it to be sorted and for everybody to be trained in it, will, I very much hope, resolve the difficulties. Whether all

the difficulties will be resolved and it works absolutely as was envisaged when it was originally planned nearly seven years ago, I would not be rash enough to say, but progress is being made.

The Chair: The Lord Chancellor appeared before us in March and we touched briefly on this subject with him then. He said that the system must be made to work, so he is in line with you in saying that that is the system and that we have to make the best of it. He said that there were some promising signs in relation to probate and divorce proceedings. Would you agree with that?

Lord Burnett of Maldon: The online divorce system, so far as I am aware, has been very successful. Forgive me, but I am not completely on top of what is happening on the probate side of it. The civil products—online money claims, damages claims, the whiplash portal and various others—are coming along. There is a real need for everybody to understand that this programme, which we have been living with now for longer than we had hoped, is not the end of the story.

One of the first speeches that I made on this after I became chief justice nearly six years ago was that we had to be careful not to leave ourselves sitting in aspic of what was then thought to be 2020 or 2021. With technology nowadays, there is a need to be constantly looking at it, upgrading it and taking advantage of developments, and that is very much what we hope will happen. Coming back to the concordat process, a part of it is concerned with funding for technology outside the strict confines of the modernisation programme.

Q10 **Lord Falconer of Thoroton:** Civil legal aid was decimated. I am not saying that in a political way, but, 10 years ago, there was an Act of Parliament that very significantly reduced it. Could you tell the committee what the effect of that decimation has been on court processes?

Lord Burnett of Maldon: It has had quite a profound impact on the family justice system, because, broadly speaking, legal aid was taken away in respect of private family law disputes. Many of us think that it is short-sighted for one little silo of government to save money without fully appreciating how it might add financial burdens not only to government but also elsewhere in the system. I know that the widely held view of the family judiciary is that that is precisely what has happened with the substantially reduced availability of legal aid for family private law disputes.

There has also then been a distorting factor introduced into legal aid, in that it is available in private family law disputes to those who make allegations of domestic abuse of one sort or another, but only to those who make the allegation and not the person who has to respond to the allegation. Slightly flippantly, I have said elsewhere that you do not really need a doctorate in psychology to understand that that is likely to distort the process. That is, again, the view of the collective family judiciary.

There is a need, one way or another, for people who find themselves in dispute in the family context to have advice. A little earlier, I made the observation that it is a shame that going to court is the first step for so many people, rather than the last step. We talked about that in the context of mediation. There are other ways of providing legal advice and assistance without necessarily re-erecting the system of legal aid that existed before the 2012 changes. I hope that Government are looking at that. I cannot predict entirely where that will end up.

In ordinary civil claims, of course, the picture is more complex, because there are so many mechanisms for funding that exist for such claims, and legal aid funding is still available for certain types of civil claim. It is more in the family area that the concerns exist.

Lord Falconer of Thoroton: The Government have announced a review of civil legal aid. That is not going to report until 2024. You have just referred there to the availability of early advice in family matters, not just for those who make allegations of domestic violence. Is that something you would like to see happen before the conclusion of a review currently expected or predicted by the Government to report in 2024?

Lord Burnett of Maldon: The short answer is yes, the sooner the better, because it will keep cases out of the courts, but that is not the only reason why it is important. Families at war and parents at war are completely diverted by their family dispute from all other activity, and it has a profound impact on ability to work and do all sorts of things.

We also know that families at war do damage to children. They do damage educationally and emotionally, and long-term damage as well. There is an enormous benefit in trying to resolve more of these cases quickly and to take the heat out of them. Propelling them into court, which is what happens at the moment, does not seem to me to be the best way of doing that.

Lord Falconer of Thoroton: On criminal legal aid, you referred in earlier answers to the problem about criminal legal aid solicitors. You have referred to the fact that there is work at the moment, but there is still a significant decline in the number of criminal legal aid solicitors' firms, because the money has been so bad over such a long period. Lord Bellamy's report—Christopher Bellamy, as he then was—was effectively saying, "Give the £135 million, but it is only a start. You've got to reinvigorate the criminal legal aid solicitors' market", and that is not happening at the moment. Do you have any views about what needs to be done?

Lord Burnett of Maldon: Part of the process that has now been set up by the Government following Lord Bellamy's review, and the decisions made by successive Lord Chancellors as a result, is a review body on which there will be representation from the legal professions. Its chair has not yet been identified, but the expectation is that it will be a judge with some understanding of the way the criminal courts operate. That is still under discussion.

There needs to be a constant look at this, because, certainly in so far as the solicitors' profession is concerned, the number of people available to provide advice in police stations continues to decline and their age profile continues to rise. Neither of those is a good thing. The reality is that the business model—and solicitors' firms are businesses—for running a criminal legal aid practice was put under severe strain as a result of the failure to increase fees over time. Again, one comes to the simple proposition that, if something has been knocked away, it is not possible with a click of the fingers to get it all back. This will take some time as solicitors' firms rebuild their criminal legal aid practices in the light of the increase of fees and the increase of work that is available now.

Again, I am not an economist. It is all very well increasing fees, but you cannot just sit and do nothing more if inflation is running at the sort of rates it is at the moment. I am concerned and not entirely optimistic that both sides of the criminal legal profession will recover quickly enough to be able to do the work that needs to be done.

Q11 **Lord Foulkes of Cumnock:** What have you done to improve the diversity in the judiciary?

Lord Burnett of Maldon: We the judiciary are more active than any other part of the system in trying to encourage people from diverse backgrounds who have the necessary skills to apply for judicial office that they are ready to fill. There are a whole series of initiatives that we operate ourselves, and in concert with the legal profession and the Judicial Appointments Commission. A lot of it is organised through the Judicial Diversity Forum, which brings together the very senior people in all the players, so the Lord Chancellor, the chair of the Judicial Appointments Commission, me, the president of the Law Society, the president of CILEx and the chair of the Bar.

Lord Foulkes of Cumnock: Do you have any statistics to show how successful you have been?

Lord Burnett of Maldon: The statistics are published every year. The next statistics are coming along by the end of July. The position is as simple as this: there is steady progress in almost all areas, as to both the ethnic make-up of the judiciary and gender balance, so it is moving in the right direction.

Lord Foulkes of Cumnock: There is at least one other category that you might have in mind, and that is in terms of poverty and wealth, and background education. What about that?

Lord Burnett of Maldon: There is overall progress being made there, as far as one can tell. It is something that I have been particularly interested in since becoming Chief Justice, because social demographics actually feed into the question of ethnic diversity as well, given that, historically, large groups of ethnic people coming to the UK tended to start in the lower-paid jobs.

Through the Judicial Diversity Forum we are working on better definitions of how to capture socioeconomic background. It is actually very difficult. There was a time when the question was, "Did either of your parents go to university?" Slightly facetiously I always said, "Well, Prince Charles"—as he then was—"would be a tick for social diversity", so that one does not really work.

What is being looked for now is much more detail about the type of school somebody went to, whether, if it was a private school, they were on full scholarship, free school meals, the occupations that parents held and so on. We are trying to improve and increase the outreach we do to schools and universities.

Lord Foulkes of Cumnock: I was having a look at the background of some of the present occupants. I declare an interest; I went to a private school, but there are still an awful lot of private-school-educated people. Cambridge seemed to do awfully well. Why do people from other universities not manage to get in? At Oxford there are a few. Even the Supreme Court has a Manchester graduate in it.

Lord Burnett of Maldon: Of the five most senior judges I was at Oxford, so I am one of your minority for these purposes. One of the heads of division was at Durham. Another was at Bristol. On the Judicial Executive Board I have somebody who was at Hull. Things are changing quite quickly, but there is no doubt that in the upper reaches of the judiciary, just as in the upper reaches of the legal profession, there is a disproportionate representation of people from affluent backgrounds.

Lord Foulkes of Cumnock: We had evidence when we were looking at the senior civil servants' appointments that people tend to appoint people like themselves who fit their own profile. How could you counter that?

Lord Burnett of Maldon: We do not appoint judges. That is the first thing that needs to be said. The Judicial Appointments Commission makes the recommendations, which are then, under the system, almost always accepted. I can say from my own experience working with the Judicial Appointments Commission and its various chairs—or the two chairs in my time—that they are absolutely alive to the need to put aside anything of that sort. The panels that sift and interview for all judicial appointments are predominantly lay people, not judges, so I just do not really think that is happening.

Lord Foulkes of Cumnock: What kind of lay people are they? When we were looking at the people who appoint senior civil servants, they tended to be the usual suspects and people from a similar background. Do you think the Judicial Appointments Board is sufficiently representative of all interests?

Lord Burnett of Maldon: You will need to ask the chair of the Judicial Appointments Commission for the detail of that, but I know that they have worked really hard in recent years to ensure that their lay panellists—of whom there are very many, because there is so much work

to be done—are a very diverse bunch themselves. They are trying very hard to avoid precisely the concern that you are identifying.

Lord Keen of Elie: There have been an increasing number of appointments to the High Court bench from the solicitor branch of the profession, particularly to the Chancery Division. Do you feel that, if that can be pursued further, it will give rise to an increasingly diverse pool of talent going on to the High Court bench?

Lord Burnett of Maldon: I certainly hope so. Again, we have worked very hard to encourage solicitors who have the right qualifications to become deputy High Court judges and then to apply to be High Court judges. We have very intense mentoring schemes that are part and parcel of this, as well as work shadowing schemes and all sorts of things. There is an enormous amount that we do, and judges do it in their own time, I should say.

There is a huge reservoir of untapped talent out there, and the main difficulty is encouraging some to think that a judicial career is for them and a good thing to do. As you will know, because I know from your question that you have looked at some of the recruits to the High Court bench recently, we have had a really excellent crop coming in from particularly some of the well-known London firms. Many people who are in senior positions in the big London firms, when they get to their mid-50s, are not thinking of taking on a new full-time and very demanding job. They are looking for different things, but we are making progress there.

Q12 **Baroness Finn:** This is something that sprung out of the supplementary evidence here. The then Lord Chancellor Dominic Raab said that, looking at recently qualified barristers, 49% were women. We did a report a few years ago of women in Whitehall, and realised that quite a lot of women were being recruited—in similar numbers to men, possibly more—but when you went further up the ranks the percentages really diminished. I wondered what the status was. What steps are being taken to ensure proper retention, promotion and progression of women and others, which is often a stumbling block?

Lord Burnett of Maldon: The statistics that I mentioned, which are now published annually by the Judicial Diversity Forum, cover the whole of the legal world. It is really important when looking at the make-up of the judiciary to have a very clear idea of the pool from which the judiciary is being recruited. The phenomenon you have just described of there being, in proportionate terms, fewer women in the senior reaches of the legal profession inevitably feeds through into recruitment, particularly at senior levels of the judiciary, but within the judiciary itself the opportunities for promotion have grown.

Looking at Lord Hope, if I may: when Lord Hope first became a judge, promotions did not happen very often in our jurisdiction. There was the odd promotion from circuit bench to High Court bench, or from district bench to circuit bench, but now it is much more common. We have seen

some women come to the High Court bench who started their judicial careers at a lower level, and that is much to be encouraged. I will not name anybody, but you can find them very easily.

Lord Falconer of Thoroton: Just following up Baroness Finn's question, I am not sure whether these statistics are wrong, but there is one woman out of 12 on the Supreme Court—

Lord Burnett of Maldon: That is right.

Lord Falconer of Thoroton: There are 12 women out of 36 in the Court of Appeal.

Lord Burnett of Maldon: Yes.

Lord Falconer of Thoroton: I have counted from the website and my maths might be terribly wrong; somebody needs to check that.

Lord Burnett of Maldon: That feels right, yes.

Lord Falconer of Thoroton: One out of 12 on the Supreme Court means that the normal-sized panel of five will very frequently be men only. Are you worried about that?

Lord Burnett of Maldon: It would be more desirable if it were not that way.

Lord Falconer of Thoroton: Can it be changed in the near future because of the increase in the retirement age?

The Chair: We are going to have questions from the President of the Supreme Court in a few weeks' time, so perhaps we can treat this fairly shortly.

Lord Thomas of Gresford: When I was starting off in my career, former Members of Parliament were frequently appointed High Court judges or county court judges. Is a political career a negative these days in the appointment of judges.

Lord Burnett of Maldon: I am not aware of any serving Member of Parliament having applied for fee-paid office in recent years. The last High Court judge who had been a Member of Parliament was Mr Justice Cranston, who was Solicitor-General in the Labour Government some time ago. Forgive me; I cannot remember precisely when. You are absolutely right, Lord Thomas, that there were many Members of Parliament who were practising barristers and sat as recorders, but I cannot immediately think of any recently.

Lord Thomas of Gresford: Does having a political career disqualify people, even if they never got to Parliament?

Lord Burnett of Maldon: No, it is not a disqualification, but there has been a change in culture in Parliament. There has been a general change in culture that is more circumspect about outside interests and careers at

all. I certainly cannot think of a single Member of Parliament who sits as a recorder, but I may be wrong.

Q13 **Lord Falconer of Thoroton:** The intensive supervision courts pilot is due to be launched on 26 June 2023. The pilot, as the Government have made clear, involves an intensive series of interventions in the defendant's return, it is hoped, to productive life. It involves a single judge who will regularly review each participant's progress. A judge has an important role in relation to it and needs to be properly informed. Is the judiciary sufficiently resourced to perform that role in relation to intensive supervision courts?

Lord Burnett of Maldon: So far as the pilot courts are concerned, the answer is yes. It will of course take judges away from other work that they would be doing. These are called problem-solving courts in looser language. It is an example of interventions in sentencing that are absolutely focused on trying to prevent reoffending and getting the person concerned back to being a useful member of society. In other words, the intense focus is not on punishing and throwing away the key.

As your question certainly implies, these are very resource-hungry proposals. We will have to see how the pilot goes, but, if it is proposed that they be expanded, we have the same judicial resources. The volume of work that needs doing is growing. There are other aspects of the work in the Crown Court that are absorbing resources. There is the Section 28 cross-examination. Members here will know what that is. We do not have unlimited resources.

Lord Falconer of Thoroton: The idea of a judge engaged in regularly and purposefully supervising an offender is one that generally works. The judiciary has always been very co-operative and liked it. It does need resources, because it means the judge is more engaged in individual cases over a longer time. It has been tried previously. There was a court in Liverpool and it worked very well, but the resources were removed. How many pilots are there—just one?

Lord Burnett of Maldon: It is five out of 70 or 80 Crown Courts. It will deal with a relatively small number of people, but they are people who otherwise would almost certainly be going to immediate custody.

Lord Falconer of Thoroton: If it works they would, I hope, not be appearing in court so often.

Lord Burnett of Maldon: That is the hope.

Q14 **Lord Keen of Elie:** The topic of artificial intelligence and its impact upon dispute resolution and the wider court system is one of considerable debate at present and a particular interest of the present Master of the Rolls. I just wondered whether you had any view on what impact you feel the introduction of further artificial intelligence might have on the court system. On the one hand, of course, you have the very considerable financial investment that will be required, but on the other hand you have the potential saving in the medium term upon the physical estate of the

courts. I wondered whether you had formed any views on this.

Lord Burnett of Maldon: I am not an expert in artificial intelligence. I reflect that it is a label that is being applied to things that have been going on for ages. Internet search engines are artificial intelligence. If one were to reel back to about last November, almost nobody was talking about it, and now there is an outbreak of what appears to me to be close on national hysteria surrounding the subject.

As it happens, in 2019 I set up a group to look at artificial intelligence, which was essentially a few judges and some academics. We were quietly thinking of projects that might be undertaken when along came Covid, and I am afraid that it was one of the things that fell down my list of priorities. I do have an adviser on technology and AI in Professor Susskind, and I have had conversations with him. The broad sense at the moment is that things are moving so quickly in that world that it is almost impossible to predict where it is going to be even in six months, let alone a year or two.

My broad view, which I think accords with that of the Master of the Rolls—who, as you say, takes a particular interest in this—is that the administration of justice and the courts should try to harness developments in technology that enhance the rule of law and what we do. We should never be the slave to it, but there will undoubtedly be ways in which artificial intelligence can be used to increase access to justice, for example. There will be very obvious ways in which artificial intelligence might be able to steer, particularly, litigants in person towards resolution of disputes.

Let me give you an example of something that is already happening in Singapore. I think this is right, and if I have this not entirely right I will let you know. If you have a road traffic accident in Singapore you can now go on to a system. You tap in what you say happened. Obviously that might not be entirely what did happen, but you tap it in and it tells you roughly what the outcome of any litigation would be. It is not binding; you can issue proceedings, but it is the sort of thing that would be of some use. AI is something that we want to be looking at to enhance access to justice.

You put your finger, as ever, on an important point. It would cost a lot of money. Do I think that in the relatively near future any Government is going to say to my successor Lord Chief Justice, "Tell me how much you want and I'll send you a cheque"? That is not going to happen.

Lord Keen of Elie: Against that, what you can say is that if you invest now you may make significant savings if you implement these, in the medium term at least.

Lord Burnett of Maldon: Yes.

Lord Keen of Elie: You mentioned Singapore. That system has been going for about four and a half years and has been very successful.

Lord Burnett of Maldon: So I understand.

Lord Keen of Elie: In fact, the counterparty is allowed to go into the system as well, and yet after that the result can be reported. You also have in place the small claims system and the whiplash system, which have been very effective.

Lord Burnett of Maldon: Yes, very effective, in that they help with access to justice, but these cases are also dealt with much more quickly than using paper and the way it was done in the past.

Lord Keen of Elie: Going forward, if we see the further development of commercial contracts being determined on the basis of systems such as blockchain, the dispute resolution mechanisms are going to have to mirror the way in which these contracts were put together in the first place.

Lord Burnett of Maldon: They are certainly going to have to develop to react to the new way in which business is being done. Again, as you will know, Lord Keen, we have tried to anticipate this through a number of working groups, producing statements of where those groups think the law sits, to encourage international business to understand that the common law is capable of moving swiftly and nimbly to deal with developments in business practice and technology in order to encourage the use of English law clauses and English jurisdiction clauses in contracts across the world.

Lord Keen of Elie: Does the LawtechUK delivery panel still sit?

Lord Burnett of Maldon: I am pretty sure it does, but I do not know precisely what it is doing at the moment, I am afraid.

The Chair: Can I ask whether you can carry your judges with you? There are two things. The first is judicial attitudes. The 2022 survey indicated that views were divided as to whether some of the IT resources and artificial intelligence resources were acceptable. There is also a question of training. If they are going to use these things, they need to be trained up. Do you have any comment about that?

Lord Burnett of Maldon: Training is absolutely critical in any world if something new is introduced. Looking outside our world, if a business were to introduce a new IT system and it did not train its staff properly, it would go bust fairly quickly, and deservedly so. This has been part of what we have been trying to achieve in the modernisation programme, which we continue to refine. Rather than dumping new products on judges, they are anticipated, they are explained and necessary training is given.

We also have to recognise that, within a group of thousands of judges, there are very differing levels of basic IT skills. That is no doubt true in the House of Lords as well. We have some who are absolutely at the cutting edge and others who still struggle with spreadsheets.

The Chair: We have come to 12 pm and we really have to release you to go back to your duties. Thank you very much for finding time to come and see us, and for all the very useful bits of information and advice that you have given to us. One happy feature of your retirement is that your disqualification will be lifted and you will be able to come back and speak in the House. I am sure I speak for everybody in saying that we hope very much that you will feel able to do that after a rest, once you have recovered from your retirement. In the meantime it is adieu, and we look forward to having you back in the House very soon.

Lord Burnett of Maldon: Thank you very much, Lord Hope. I repeat my thanks to the committee for its interest and its courtesy over the years. I have always thought the label "disqualified" that attaches to serving judges is a little harsh, because should any member of the public look on the House's website they might think that something awful had happened. I look forward to being able to play what I hope will be a useful and active part in the proceedings of the House come the autumn.