

Justice Committee

Oral evidence: [Work of the Law Commission](#), HC 1908

Tuesday 17 October 2023

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Members present: Sir Robert Neill (Chair); Tahir Ali; James Daly; Edward Timpson.

Questions 1 - 51

Witness

[I](#): Sir Nicholas Green.



Examination of witness

Witness: Sir Nicholas Green.

Chair: Welcome to this session of the Justice Committee and welcome to our witness today, Sir Nicholas Green, chair of the Law Commission. It is very good to see you again, Sir Nicholas. I shall quickly deal with declarations of interest, before we kick off. I am a non-practising barrister and a former consultant to a law firm.

Edward Timpson: I am a barrister with a current practising certificate, but am not undertaking any court work. I am a former Solicitor General and former Children's Minister, and former chair of CAFCASS. My brother is chair of the Prison Reform Trust.

James Daly: I am a practising solicitor and a partner in a firm of solicitors.

Q1 **Chair:** Sir Nicholas, this is going to be your last time in front of us, I think, in this job.

Sir Nicholas Green: It is.

Q2 **Chair:** You are leaving fairly soon.

Sir Nicholas Green: At the end of next month. My successor, Sir Peter Fraser, who is behind me, starts on 1 December.

Q3 **Chair:** It is very nice to see you, Sir Peter. We look forward to meeting you in due course.

It will be a shame, Sir Nicholas, for any number of reasons, not least because you always come and give us comparatively positive news, which does not generally happen with a lot of the witnesses we have in front of us. I think November 2020 was the last time you were here. You said that the Law Commission was in good shape. Is that still the case? How would you characterise the situation as you leave?

Sir Nicholas Green: Yes, I would still say that. I would describe us as being in robust good health. It will not come as a surprise to anyone that we have been through a lengthy difficult period since I became chair in 2018, with Brexit, parliamentary logjams, four Prime Ministers, six Lord Chancellors—one of them twice—covid, Ukraine and economic turmoil. Yet throughout this period I think we have been as busy as we ever have in our history. At the moment we have 28 projects, in various stages of completion, on the books, from those that we are in the process of negotiating to those that are coming right to the end of implementation. There is of course something of a backlog of reports awaiting implementation, and no doubt we can come to that in due course, but generally we are working very well post covid.

Q4 **Chair:** When you came and saw us last time you had just introduced a new funding model, where you get direct funding from the MOJ. Now that we have had three years or more to run it in, what is your assessment of



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that?

Sir Nicholas Green: It has worked very well. If I can go back over a little of the history, we had cuts imposed on us in 2017-18, so that we were at 46% of our 2010 budget. I think my predecessor, Sir David Bean, told you that we were essentially facing an existential threat. The only way we could see to make up the shortfall was, in effect, to go out to various Government Departments and say, "We want project financing for law reform projects." My view was that that was transformative for us, because we had to make the effort to be more outward-looking, modern and up front, and to get to know Departments better. Within a couple of years we had made up the shortfall and were back to near the £5 million that is our budget.

That gave us the opportunity to renegotiate our funding model, and in 2019 I agreed a new model with Robert Buckland and I think it has worked very well. The MOJ fully funds us. We still have the right to seek project finance from different Departments. That has given us two advantages. We can take a longer-term, more strategic view of the work that we take on—we no longer have to chase funds—and we have been able to retain key staff. We no longer have to appoint them just for a project and lose them, as we were doing, with six months to go, as they were looking for new employment prospects. I think the effect has been beneficial. Overall, our total budget, of about £4.7 million, is very small beer in Government terms.

Q5 **Chair:** I understand that. What is the total number of staff now?

Sir Nicholas Green: We are about 70 lawyers and researchers and a very small support staff; 95%-plus of our costs go to frontline project research.

Q6 **Chair:** Yes, that is what I remember. You mentioned the deal you came to with Sir Robert. I think you characterised relations between the commission and the Government when Sir Robert was Lord Chancellor as good. How would you describe them during Mr Chalk's tenure of office?

Sir Nicholas Green: We have very good relations with Alex Chalk. He understands us. He is personable, co-operative and sensible. It is what you hope the Lord Chancellor would be. I have no complaints. On a number of delicate matters he has been very helpful.

Q7 **Chair:** And you have regular engagement with him.

Sir Nicholas Green: We have regular engagement with him, yes.

Q8 **Chair:** Did you have that level of engagement with his predecessor?

Sir Nicholas Green: I cannot say I did. Over the course of his two tenures I had little personal contact. It was Dominic Raab who first introduced the cuts in 2017 and 2018, when he was a junior Minister. None the less we maintained close, strong relations with other junior Ministers—Edward Argar and Lord Bellamy—and retained very strong relations with officials in the MOJ. To be fair, it was Dominic Raab who



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made a reference to us on criminal appeals. The relationship was more distant, but it was not dysfunctional.

Q9 **Chair:** Understood. Mr Chalk appears to take quite a personal interest in the work of the commission.

Sir Nicholas Green: Absolutely.

Q10 **Edward Timpson:** Can I ask you about the Government's statutory duty to publish a report on the implementation of any recommendations that the Law Commission makes each year? Since you came in, in 2018, despite the fact that there is meant to be an annual report, we have seen only the one that came out in July this year. I think you may have alluded to some of this at the beginning of your first answer, but can you give us some insight into the reasons for that, and what implications it may have, going forward?

Sir Nicholas Green: As you will recollect, a certain amount of pressure was imposed by Members of the House of Lords, who asked questions about why there had not been a report. As far as the commission's relationship with the MOJ is concerned, we of course know our implementation rate, and we talk to officials about it on a regular basis. On the other hand, it seems to us as a matter of principle that it is extremely important for the Lord Chancellor to be transparent with Parliament about implementation. In the same way as we have duties to Parliament, so too does the Lord Chancellor. We were pleased when the report was eventually, belatedly, submitted to Parliament. The reasons why it was not produced in previous years might have been a matter of personalities, or of the pressure that all Departments were under during Brexit and covid. It is not really for me to express a view about that. I suspect it was for those sorts of reasons. I do not think that it was a priority at the time.

Q11 **James Daly:** The Government's latest implementation report sets out that 24 Law Commission projects, which you have talked about, await a Government decision on implementation. Why is that?

Sir Nicholas Green: Some of them, if you look at that report, go back to 2013 or 2014. They are quite old. We have certainly had a number of very big-ticket projects—weddings, surrogacy, misconduct in public office and things like that—that hit political obstacles. It is not a criticism of the Government or of Parliament that that was the case, but during Brexit Parliament was logjammed. There really was not much headspace for much else. During covid, obviously Parliament was not functioning at 100%, and a great deal of other legislation was taking up its time. We would view a lot of our projects as apolitical. They do not always carry the same political momentum as other projects that the Government are in favour of, so we have a bit of a logjam of projects.

I am pretty confident that our projects will, in due course, be implemented. It is important to look at the timeframe over which you should expect implementation. It is often five or six years. It is unrealistic for us to expect a report to be published and then to have it go straight



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into Parliament. Just think of the present moment. We face a fourth Session prior to an election. The Government will have a particular view, entirely legitimately, about what goes into the fourth Session and the King's Speech. We know that some of our projects are likely to be there, but others will not be. We accept that. Those are the political facts of life.

Q12 James Daly: When a project was, as I think you said, completed in 2013, it still seems to me very surprising—even with Brexit, the pandemic and suchlike—that you do not have a Government response and implementation in that timeframe.

Sir Nicholas Green: I agree. There are projects that go back in history that, to my mind, remain very valuable pieces of work and, all things being equal, should be implemented. They are apolitical. They add value. For one reason or another the Government have never found the time to respond to us.

Q13 James Daly: Clearly, one of the problems is that the 2019 Parliament has not provided the normal level of capacity to implement these things; but the underlying problem probably goes back before the 2019 Parliament as well.

Sir Nicholas Green: Yes, it does. It is interesting that some of the projects—I am thinking about financial remedies on divorce, and contempt—are earlier. We have now taken them up again and are looking at them. The truth is, as I describe it, that a good report lurks. It has an enduring lurking effect. It often provides the focal point around which commentators and academics congregate. Not infrequently it comes back five or 10 years afterwards. It is nothing to do with us, but I saw in the press a couple of days ago that our 2007 report on cohabitation has been picked up by the Labour party. If a report is of sufficient quality, it simply exists, and we find that they come back, often a number of years afterwards.

Q14 James Daly: In terms of what the Committee should take away as to the general Government response, is it essentially—you are not putting it as bluntly as this, Sir Nicholas—that the political reality of the world is that things work at the pace at which they work? Is there any specific recommendation that we can take back, perhaps to get a speedier resolution or response to some of your reports?

Sir Nicholas Green: It is a combination of both. We cannot ignore the realities of life. On the other hand, when we try to resurrect old projects, and when I go to speak to Ministers or civil servants about them, quite often the response is almost, "Well, we're going to have to remind ourselves what that is all about." Within government they live much more in the moment, and what happened 10 years ago is ancient history. It would be nice for there to be a proper consideration of our backlog, because there are some very high-quality reports that should be implemented and that are essentially neutral. They are apolitical. They are things that need to be done, and it would be nice to have a mechanism whereby you could sweep up past reports and have a proper



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assessment of them, and the Government of the day could take a decision on whether they want to implement them.

- Q15 **James Daly:** Moving on from that, according to a stat I have here, the implementation rate for Law Commission reports since 1965 stands at 64%. Clearly, Sir Nicholas, you have not been in your position since that date, and I am not asking you to comment on reports going back many years, but in general terms is an implementation rate of 64% what we should be expecting?

Sir Nicholas Green: The implementation rate is about two thirds. There is a small group of projects in the process of implementation that probably pushes it to the high 60%s or 70%. That is not mathematically accurate, but it is an indication. We also have reports that we target not at Parliament but at the common law, or through soft implementation, so in trying to work out what an effective rate of implementation is, we would be looking at something around the two-thirds to three-quarters mark. One has to understand what is meant by implementation. Sometimes we may produce a report with many hundreds of recommendations. Some of them are very mechanical about the nuts and bolts of achieving an object. We would like to stand back and say that the basic thrust of a report has been accepted, even if recommendations 140 to 170 are not implemented. It is not easy mathematically to grapple with the issue.

- Q16 **James Daly:** My last point is about the three mechanisms designed to increase the implementation rate—the Government’s implementation reports, the protocol and the Law Commission Bill procedure. Are they sufficiently effective?

Sir Nicholas Green: There are three points. To my mind, the protocol has worked reasonably well. It means that the Government must address themselves to the desirability of a piece of legislation. That means that we are both committed. It does not bind the Government, but we are both committed to producing something that works. The Law Commission special procedure was introduced in '07-08 and became a permanent part of the landscape in 2010. About 10 Bills, to date—about one a year—have gone through the procedure.

My own view is that, after a decade, now would be the time to have a look at that procedure. I think we can make greater use of it. I have talked to Chairs who have sat through the process of passing one of our Bills, and they think that some of the mechanics could be improved. For example, there are only 28 days when the Committee can sit and scrutinise a Bill. That is very short and tight. There are issues about scope. We are aware of circumstances when, because of the possibility of an amendment, the procedure has been pulled, so we have lost the opportunity to use it. Perhaps a decade after it first came into full effect might be an opportunity to review it. It seems to me that it is a neutral exercise for Parliament because we use the procedure only for Bills that everybody accepts are good. We would not use it otherwise. That might be an opportunity.



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Can I fly a very small kite? It is for what I sometimes call the one-digit change. When Lord Gardiner, Gerald Gardiner, introduced the Law Commissions Bill into Parliament in 1965, he proposed that there be six commissioners—a chair plus five. It came out as a chair plus four. We have 28 projects at the moment—I counted this morning—at various stages of completion, with four commissioners who are doing all the hard work, so that excludes me. That is a very intensive workload. The capacity of the commission to generate reports is contingent on the human capacity of those four individuals. Everything leads up to a bottleneck, because, at the end of the day, the commissioners and I approve absolutely everything.

We are getting to the point where we really cannot take on more work without the commissioners falling over. There is a case to be made for a fifth commissioner to cope with the work that we have, and that we would hope to be able to do in the future. That is why I call it a one-digit change to the Bill, from four to five. There is always a risk, in proposing an amendment to an Act of Parliament, of opening Pandora's box, but this seems to me something that might be considered in the future.

Q17 James Daly: I have a final question. Obviously, we are all aware of what the Law Commission does, and you have talked very articulately about it today, but can you briefly give us a job description for a commissioner?

Sir Nicholas Green: Yes. The commissioners each have a team of lawyers and researchers. They might have roughly between 10 and 15 lawyers and researchers. They are allocated to different projects. There might be four, five or six different projects, and the commissioner oversees each of those projects and will shape the consultation paper. Before a consultation the commissioner and the team meet with maybe 50 or possibly 100 stakeholders for the purpose of producing the consultation paper. It is then issued and they run the consultation, which might take three or four months.

Then there is a very large exercise of analysing consultation responses and drafting a paper to put back to the five commissioners in a peer review process. I sometimes describe that, for the commissioner concerned, as like attending the PhD viva from hell. You put your draft forward and have to defend it to the other commissioners. Each of them will have added their comments. A position paper will be prepared on all the main issues. Peer review can be six or seven hour-long sessions. The team is then sent away again to revise or rewrite and come back to the commissioners. The peer review can last a month or two months. Then the commissioner has to oversee the final publication of the report.

On top of that, the commissioner engages in peer review of everybody else's projects, so they may attend between eight and 12 peer review sessions a year on other people's projects, which is an enormous amount of reading. I did a quick comparison of the amount of work that commissioners did, say, 15 years ago, and the amount they do now. Social media means that we get much longer responses with much more



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detail, and the volume of work for the commissioners is very intense. It is huge.

- Q18 **Chair:** That is very helpful, thank you. In terms of the worthy projects that there has never been enough political bandwidth for, are there perhaps some examples? If we were going to say to the Government, “Don’t forget about these,” what would they be?

Sir Nicholas Green: I will give you a quick rundown of the projects we have at the moment, just to show the breadth. The criminal team has a number of Bills going through Parliament. Evidence in rape and sexual assault is a very big project; others are criminal appeals and contempt of court. For the property, family and trust team there is wills, and they have just produced surrogacy and weddings. Leasehold reform is being prepared for Parliament. There are also business tenancies, financial remedies on divorce, and new methods of disposing of the dead. There are outstanding projects for that team on trust law reform and museums. The commercial team is looking at the private international law on digital assets—where is a crypto asset or an NFT?—deeds, the classification of digital assets, co-operatives, and friendly societies. The public law team is looking at commercial aircraft, remote control—in other words, drones—and compulsory purchase. They have also just completed projects in relation to Welsh devolved law on planning, devolved tribunals, and coal tips, which is quite a big environmental issue. We are doing everything from trying to unlock the digital economy right the way through to evidence in sexual assault and rape cases. It is an enormous spread of work.

- Q19 **Chair:** Things like compulsory purchase reform have been knocking around for years.

Sir Nicholas Green: Absolutely. It must be at least 15 years—15 to 20 years ago—that we first did a report on that. A lot of the work was done by Lord Carnwath, who was the commissioner at the time. A lot of the work done on that project is still relevant today. We are building on the work we did 20 years ago.

Chair: Thank you. That is very helpful.

- Q20 **Tahir Ali:** The Law Commission’s provisional proposals relating to evidence in sexual offences prosecutions, particularly on excluding the public from the courtroom, have attracted criticism in the media. What is your response?

Sir Nicholas Green: I am glad you raised that question, because the media have raised a very important issue. Can I give a little context? Section 25 of the Youth Justice and Criminal Evidence Act 1999 gives the power to a court to exclude members of the public from, among other things, a case involving sexual assault. The court also has the power to exclude members of the press, save for one named member who is entitled to remain and ensure transparency. We are provisionally proposing retention of that process, that power. It has been on the



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statute book for over 30 years. It is extremely rarely used. I have never come across it in my time as a judge.

We have also provisionally proposed that complainants have an automatic entitlement to certain protective measures, which would include excluding members of the public. The press, to my mind for understandable reasons, have expressed concern that this would curb press freedom. I ought to emphasise a number of points, which I hope are obvious, but which I hope will also provide comfort. This is a consultation paper. We very much want the views of both those who agree and those who disagree with us. We have absolutely no fixed view on this at all, at the moment. The consultation closed on 29 September. We have granted extensions to a number of very important consultees who will produce their responses very shortly. We are therefore just starting the exercise of reviewing the consultations. We received well over 120 very detailed responses, many of them evidence-based. We have received extensive responses from media bodies. I say this entirely candidly, from long experience: we get very high-quality submissions from the press. We have, over many years. They are very frank and sensible, but obviously they argue their case.

To put it in context, the Law Commission is a firm believer in press freedom and transparency in the courts. On the other hand, and I do not think anybody in the press would disagree with me, we also believe in protecting complainants' rights and victims' rights in sexual assault cases. The challenge for us all is to strike the right balance. That is what we are engaged in. I have no criticism of the press. They are entitled to air their position in public. We will watch and listen very intensely. I know the team has already planned a series of meetings with press and media organisations and we will ensure that we collect their views. My experience and the experience of my colleagues over many years is that they help us find solutions. That is what we want in this case.

Q21 Tahir Ali: Should the Law Commission be proposing reforms that are in tension with fundamental legal principles, such as open justice?

Sir Nicholas Green: We don't think that anything we will ultimately conclude or recommend to Government will constitute an affront to open justice. We profoundly believe in it and, as a judge, I could not believe in anything else. As I say, we want the press to help us find the solution that balances the two conflicting interests. I am pretty confident that we will get there. I cannot possibly express a view. It would be premature. If I expressed a view about the merits of the debate now, people would say, "The chair is predisposed, and that's unfair." We obviously wait and see, but we will want to find a solution that protects access to justice to the greatest possible degree.

Tahir Ali: Thank you.

Q22 James Daly: My colleagues may pick up on this, Sir Nicholas. You talked earlier about engagement with stakeholders. How do you ensure that that is a balanced process, in the sense that you do not have 98% of



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stakeholders arguing one way and 2% the other way, with the 98% winning as a matter of course? Do you see the point I am trying to make?

Sir Nicholas Green: Yes. It is never about numbers. We operate a process called snowballing, whereby if we are trying to get to a disadvantaged group, in particular—perhaps a group who are difficult to access—we first identify the representative groups. We quiz them: “We want to speak to you, but who else should we speak to?” We find that we get sent from A to B to C to D. If we think there is an imbalance in consultation responses, we make a concerted effort to ensure that we get to the counterbalancing view. We have 60 years of experience in doing that. Social media enables us to get to more groups than we did in the past. We are very conscious of the fact that some of the most disadvantaged groups are not good at social media, but they have representatives who are very good. It is up to us to make sure that we do that. We have recently introduced equality impact assessment tools for the way we approach consultations. That imposes on us the discipline of making sure that we do precisely what you suggest we ought to do. We accept that onus and we go out and chase the evidence to make sure that we get it.

Q23 **Chair:** One of the other criminal things you are working on, of course, is criminal appeals. I know that is something that the Government requested. Looking at the terms of reference, it seems pretty broadly drawn.

Sir Nicholas Green: It is.

Q24 **Chair:** For example, when we are looking at the routes of appeal to challenge a finding in the magistrates. I take it from that that you are looking both at the appeal by way of re-hearing to the Crown court, but also the position with case stated, for example.

Q25 **Sir Nicholas Green:** We are. We are looking at all aspects of criminal appeals. You are right. It is almost five or six discrete projects and we may actually divide it into separate issues. As far as magistrates are concerned, as you know, Chair, there is a slightly odd procedure. You have an automatic right to go to the Crown court, where the judge sits, generally, with two magistrates. You don’t get any papers from the magistrates, so you start again. We recognise that one of the issues, which has been put to us already, is that if we were to propose amendments it would impose a burden on the magistrates, because you would have to start creating records that would have to be transferred to the Crown court, particularly if, as has been suggested, there is a filter process to prevent unmeritorious appeals. We have both sides of the coin, but that is a relatively self-contained part of the overall appeal process.

Q26 **Chair:** Potentially, the really contentious things are the tests applied both by the Court of Appeal and the Criminal Cases Review Commission.

Sir Nicholas Green: They are, that’s right. Absolutely.

Q27 **Chair:** Have you any thoughts as to what timeframe you have for those



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parts?

Sir Nicholas Green: We are likely, at some point, to hit purdah next year. We can predict, even now, that there is a possibility that some of our publications will become unduly sensitive, but we are aiming to publish in 2024. So far as the CCRC is concerned, obviously, we have been following with interest the Malkinson incident recently. We have spoken to Mr Malkinson and his team, and to APPEAL, the body that had been representing him, and to the inquiry that is looking into it and to the police body that is considering how Manchester police operated.

There is a serious issue underlying that incident, which is whether the test that the CCRC must at present apply caused them to think, "Well, we're not going to get this. There's no real basis for taking this to the Court of Appeal, so we won't do the research." The question for us is whether or not the test is hindering proper cases coming forward. That is what we are trying to collect evidence on at the moment. It highlights why it is a very good thing that we have this timely opportunity to examine the issue.

Q28 **Chair:** To be able to take into account all the learning from Malkinson.

Sir Nicholas Green: Absolutely.

Q29 **Chair:** The other point I was going to touch on was the review of the substantial injustice test, which is potentially, again, controversial.

Sir Nicholas Green: Yes.

Q30 **Chair:** Is there any particular aspect of that that raises concern at the moment?

Sir Nicholas Green: Not at the moment. We are waiting. Again, we are collecting evidence to see where the problems arise. We are conscious of the fact, as I believe the statistics show, that the nature of appeals to the Court of Appeal criminal division has changed somewhat over the last few years. That is due to the fact that there is far greater guidance given to Crown court judges as to sentencing in the sentencing guidelines. In relation to directions to the jury, there is far greater guidance. In consequence, there are probably fewer errors being made.

We are in the process of collecting evidence on that at the moment. We realise that it is a very sensitive issue and people have quite strongly divergent views on whether the test is right or wrong. It would not be right for me to pre-empt the evidence as it comes in.

Q31 **Chair:** That includes situations such as, for example, joint enterprise, accessory liability and so on.

Sir Nicholas Green: How the test applies to those things?

Chair: Yes.

Sir Nicholas Green: There is no limit on what people can submit to us by way of evidence.



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Chair: No.

Sir Nicholas Green: Or in what circumstances the test might apply.

Chair: Understood, yes.

Q32 **Edward Timpson:** Can I take you back to something you mentioned earlier, Sir Nicholas, which is the role of the commission in trying to meet the challenge of the digitisation of society? You talked about digital assets, and about drones and unlocking the digital economy.

Sir Nicholas Green: Yes.

Edward Timpson: Clearly, that is becoming an increasing part of your workload. How are you ensuring, in prioritising that work, that first of all, you have the resources to do it and, secondly, that you can move at a pace that fits with the pace of digitisation, which is very difficult? Also, how is it helping the legal system in England and Wales itself keep pace?

Sir Nicholas Green: Internally, we take the view that this is one of the biggest challenges we will face in the next few years. My successor, Sir Peter Fraser, has expertise in the area. He tried the Post Office Horizon case, so he is very familiar with the uses and misuses of software. We have a growing body of expertise in the commission among the lawyers, who are dealing with a whole range of very sophisticated, very difficult AI-related issues. We think AI will permeate both public decision making and private decision making in the future.

We are talking to Government about new projects. I had a discussion with Alex Chalk about the possibility of us and the MOJ and the judiciary organising some sort of conference, a roundtable on law reform and AI. We have discussions with our colleagues in law reform agencies around the world—New Zealand, Australia and elsewhere—about the use of AI in their jurisdictions and what we can learn from them. We think it will be all- pervasive in the next five, 10 or 15 years. We have to be able to get on top of it and create law reform consistent with dealing with AI.

I will give you an example of one project. To my mind, it is a very technical project but it has wide ramifications. It is one of the projects that the commercial team is engaged in called DAOs, decentralised autonomous organisations. They are, in effect, companies that are run by AI without any human intervention at all. They are emerging in the financial services sector, and you are likely to find them where software is drafted, with instructions, in effect, to profit-maximise. AI runs the company, takes all the commercial decisions and all the governance decisions. Nobody knows what rules really apply—contract, tort, trusts, crime. If you have self-learning AI, the company will run away from your ability to supervise it very quickly; it will take thousands or millions of decisions very quickly. It will learn and change direction, and it is very difficult to know what it might do in the future.

We have been asked by the Treasury to look at the regulatory framework for DAOs. It is quite a technical project but, to my mind, it is



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symptomatic of some of the things we will have to grapple with in the future. Nobody really knows what legal framework applies to these things. It is not as if they are novel; they are already in existence. We have DAOs talking to each other and trading with each other already. That is, I think, an indication of where we will be going in the future.

Q33 **Edward Timpson:** That is quite a dystopian picture you painted there, but it is the reality.

Sir Nicholas Green: It is the reality; it already exists.

Edward Timpson: Yes.

Sir Nicholas Green: I was reading an article in *The Times* yesterday, about how the world has to regulate AI. It is not a matter of choice for us. We have to regulate AI. We have to find appropriate mechanisms to do that.

Q34 **Edward Timpson:** How will that square with the implementation timeframe that currently you seem to have to work to, a lot of which is out of your control? Is there any sense that there is greater urgency in Government to try to quicken the pace and catalyse, making sure that the detail is still done and the quality of the work is still there, of course?

Sir Nicholas Green: In the next Session, when my successor, Sir Peter, is back, he will probably be in a better position to answer that. One would hope that we will have had an election, there will be a new Administration in force with a five-year scan in front of them and we will be able to sit down with a new Administration and say, "Here are some projects relating to AI. We must prioritise them. We need to resource them and then we need you to commit to a quick implementation period."

I hope that, when we get to a period of plainer sailing, we will find the opportunity to agree with Ministers that sort of project. You are right that these are matters beyond our control, but I hope that the political imperative for speed becomes appreciated.

Q35 **Edward Timpson:** With that need for greater speed, could there be implications for the capacity in the commission to meet the new deadlines that will be set?

Sir Nicholas Green: Yes, there could be. You would be surprised at how small the teams are that operate on a project. A typical project of reasonable scale may only have two or three lawyers and a researcher; it is quite small. If you want to do something in double-quick time, you may need to add more lawyers, and you may need to get in software specialists or economists or different types of analysts to work with the team. There could be resource implications. If a commissioner is having to devote more and more of her or his time to a project, you do not want other projects to be prejudiced. The bottleneck that I described to you earlier of having four functioning commissioners is a model that we might wish to see reviewed in due course.

Q36 **Edward Timpson:** Talking about getting on with it, can I take you to



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another area that you have been looking at? That is around arbitration and the very recent publication around the recommendations for an arbitration Bill, with some 18 clauses even up and ready.

Sir Nicholas Green: Yes.

Q37 **Edward Timpson:** Have you had any indication at all whether it is going to feature in the final Session of this Parliament? Or are we still going to have to wait with bated breath?

Sir Nicholas Green: What can I say? We are optimistic. We are optimistic. It could be the sort of Bill that, quite happily, could exploit the special procedure. At the moment, it benefits from very widespread support. It should be capable of being passed very quickly and easily.

When we started on the project, we were told by the City and by others that the Arbitration Act was already a gold-plated Rolls-Royce, but it would send a tremendous signal to the rest of the world if we updated it. We thought there might be four or five amendments when, in fact, we have many more than that, but they have widespread support. It will make the Act much more cutting edge. It is over 25 years old, so it is about time. I am hopeful, fingers crossed, and I am touching wood.

Edward Timpson: I am hopeful too.

Q38 **Chair:** That is very useful. Perhaps it is the number of potential would-be arbitrators around that might spur the interest.

Sir Nicholas Green: What I can tell you is that on some of the very technical issues in that project, I don't think I have ever come across a project where I was written to personally by more former judges, Lord Chief Justices, Masters of the Rolls, Supreme Court judges and senior arbitrators arguing bitterly between themselves about the most minute points. They feel very strongly about this in the arbitration community.

Can I take the opportunity to mention one other piece of legislation that we would very much like to see in before an election?

Chair: Yes, of course.

Sir Nicholas Green: It is the law on digital assets. It is a very cutting-edge report. We think we can reduce it to a Bill of probably one or two clauses. It was a 600-page consultation paper. The final report was about 300 pages. We have had lengthy discussions with the senior judiciary and with the City. They think it would be tremendously valuable to create legal certainty in English law. If we did it, we would be the first jurisdiction in the world to achieve it. We think it would be ideal for the special procedure, but it literally would probably be a one-clause Bill. We would provide legal certainty to the concept of a digital asset. That would provide, we think, a huge fillip to English law. We would quite like to see that in before an election. I am parading my wares in front of you.

Q39 **Chair:** Can the one clause be drafted?

Sir Nicholas Green: Pretty quickly.



Chair: That is a hint. It is very helpful, thank you.

- Q40 **James Daly:** Sir Nicholas, I must say I am not often stunned when I hear evidence. But what you have just described about—forgive me if I have got this wrong—DAOs is quite extraordinary. It is perhaps the most eloquent example that we can use to tell the public about the work of the Law Commission and how important it is, and the interaction between the Law Commission and the Government of the day around something so important. Thank you very much for enlightening the Committee in respect of that.

I want to ask you some questions regarding the consultation on the 14th programme. You have touched on this, Sir Nicholas, so please forgive me if I am asking you to repeat anything. The final programme has not yet been published. Could you tell us about the reasons for that and the reasons for the delay?

Sir Nicholas Green: They are very simple. We just do not think this is a sensible point in time to sit down with the Government and say, “Can we plan a complicated legislative programme covering the next five years or so?” We consulted very widely with the public. We received well over 200 fully worked-up submissions, plus hundreds of individual submissions from members of the public. We did a lot of work internally and we reduced that to approximately 60 or 65 papers, about 10 or 15 per team. We have used those to talk gently to Departments as a basis for possible future projects. A number of them have come back to us as ad hoc references, so we are taking them on even though that means they will not fall into a subsequent 14th programme.

At the moment, the Government have their own priorities for the last Session. It does not make sense for us to waste the Government’s time in asking them to plan for five or six years. Whoever forms the next Government, we will sit down with them and say, “Now we can look long into the future. Here is a series of projects. Can we get on with them?”

- Q41 **James Daly:** Apologies for paraphrasing. Essentially, we are in a period of consolidation between now and the general election whenever it may come, in the sense that you have described what has happened around consultation so far. It seems to be a good period to concentrate on the work that you have already and to interact with Government and try to take those matters forward, prior to the new work perhaps coming after the next general election.

Sir Nicholas Green: You have put your finger on it. We would also like to ensure that we have some degree of spare capacity so that when the new Government are formed after the election, we are not having to say to them, “We are so busy that we can’t start this important project for two years.”

James Daly: Yes.

Sir Nicholas Green: The next 12 to 15 months will, we hope, be steady state. We will keep our heads down and get on with our projects. We will



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try to be uncontroversial. We will try to make space for a new Government to have their own priorities and sit down with us and ask us to take on new projects. Hopefully, it is a steady, uncontroversial next 12 to 15 months.

- Q42 **James Daly:** My final question is about how you would advise your successor. One of the ways, in general, that Parliament is not great, whether it is through external bodies or through committees or Departments, is how we engage with the public.

Sir Nicholas Green: Yes.

- Q43 **James Daly:** You gave the ultimate example around DAOs, a very complicated area.

Sir Nicholas Green: Yes.

- Q44 **James Daly:** Obviously, on something like that, it will not be easy to engage with the public. How do we make sure that, as widely as possible, public opinion is sought in respect all of the issues that we are dealing with? It is fair to say that we should not turn consultation into something where the only people responding to it are pressure groups and organisations set up with an interest in a particular area of law.

Sir Nicholas Green: Yes. The 14th programme is designed to be a democratic exercise. We have a statutory duty to do that. That is why we are very keen on it. We embarked on the 14th programme knowing that we still had old projects from the 13th programme to do, because we wanted to allow the public to make submissions to us. From our point of view, if we go to a Minister and say, "This is something the public feel very strongly about," that is quite important and weighty pressure that we can impose to get a project agreed to. We think it is a really important way of talking to the public and getting them to engage with us. Then we are not just talking to people who are specialists the whole time. Finding a fair balance between the two is important.

Something that might interest you in relation to DAOs and, indeed, some of the digital projects we have been engaged in, is that we have had to think of some very innovative ways to get the techies to talk to us in language we understand. Some of them would almost be happier if we communicated with them in code. We have to find specialist chatrooms and different devices whereby people who would not dream of talking to Government will tell us about what they are up to. Of course, they are not people who are under-privileged; they are people who are at the cutting edge of financial AI drafting and the algorithms and maths associated with that. On the other hand, we must do the same with people who are not able to represent themselves.

Covid was a problem, because we could not get out and talk to people, but it also meant that we had to use digital methods of communication in order to get out to people. We are now trying to find the proper balance; how do we talk to—for example, in sexual assault—victims groups and victims? It is not enough just to talk to the groups who represent them.



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You have to sit down and talk to the individuals. The criminal team have been talking at length to people who have been subject to some very, very harrowing experiences. I entirely agree with the premise of your question.

Q45 **James Daly:** It is quite an interesting point though, isn't it, that you have just raised regarding sexual offending? There are other parties/agencies—the police, the Crown Prosecution Service and defence solicitors—where the challenge and the priority is to get the views of the victim quite clearly and that is the sole priority. Getting the views of all the parties who are potentially involved, to get a rounded picture, is a challenge.

Sir Nicholas Green: Absolutely. We have had responses from about 50 prisoners in sexual assault cases who have managed to communicate with us. If you are to be fair, evidence-driven and objective, you have to get all sides, but you are absolutely right. It is not always easy.

James Daly: Thank you.

Q46 **Tahir Ali:** Is the current model of the Law Commission, as set out in the 1965 Act, whereby periodic long-term programmes of law reform must be approved by the Lord Chancellor, still fit for purpose? Do you believe that adaptations are needed to bring it up to date?

Sir Nicholas Green: Interestingly enough, the 1965 Act, because it is a very broad framework Act, has proven to be very flexible. Over the years, we have been able to adapt ourselves without falling foul of the Act. It has worked very well for us because we get our work in two ways: through programmes and through ad hoc references from Ministers. At some point, I ought to talk about what we do in Wales, which is also an important development under the Act. Generally, the Act has proven to be very flexible and very suitable. I mentioned what I call the one-digit possible change. Other than that, we quite like it.

Can I mention Wales?

Q47 **Chair:** Please talk about Wales.

Sir Nicholas Green: Thank you. We increasingly work with the Welsh Government and the Welsh Senedd in relation to Welsh devolved law. That has been a growing part of our work over the last 10 years since the Law Commissions Act was changed to enable us to agree a protocol with Welsh Ministers for Welsh work.

In the last 10 years, we have taken on a number of very seminal pieces of work for the Welsh Government. First, there was a piece of work called "Form and Accessibility", which the Welsh Senedd adopted in an Act in 2019. It created an obligation on the Welsh Government to work their way through various areas of law to codify it, simplify it and make it accessible to the people of Wales. One of the first projects that we were asked to take on was planning law, and we are just coming to the completion of that. Hopefully, it will go to the Senedd next year. We also were asked to create a new judicial system for Welsh law in relation to



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devolved tribunals, which we have completed and the Government are implementing.

More recently, we were asked to take on a project, at very short notice, to look at the health, safety and environmental aspects of disused coal tips, many of which sit in the valleys above centres of population. Research in Wales established that there were 2,500 such disused tips, many dating back to Roman times. With increased moisture in the air, they became unstable and there was a risk of collapse. There were a number of incidents of moving coal tips in Tylorstown in Wales a few years ago. Of course, with Aberfan as part of their history, we were asked to take on a project for creating a regulatory environment for old disused coal tips. We have done some quite major pieces of legislation for Wales.

We are in the process of discussions with Welsh Ministers and with the Senedd about improving and enhancing the way that we serve Wales as a law reform agency. When we work in devolved law, we are plainly not the Law Commission of England and Wales; we are the Law Commission of Wales, full stop. That is now built into the Law Commissions Act. That is part of the framework, Mr Ali, that you were talking about. That is an important part of the framework that has evolved over the years. Legislation of Westminster has given us the vires and the task of working with the Welsh Government on devolved law. It is an interesting development and an important one for us, because we are working with a new state, if you like.

Q48 Chair: That is fascinating. Is there an argument for a Welsh commissioner, or is that not there yet?

Sir Nicholas Green: If there were a one-digit change, who knows?

Q49 Chair: I wondered. Sir Nicholas, we have got through the topics very expeditiously, for which I am grateful. Five years on, perhaps the only two things that have not changed are that you have been here for five years and I have been here for five years while a lot of people seem to have changed. Looking back on those five years, do you have any reflections on your tenure?

Sir Nicholas Green: Let me take some headings. First of all, projects: we are much more focused on what I would describe loosely as cutting-edge projects, projects relating to the digital economy, projects that concern the state more directly. A lot of the work, for example in the digital economy, that we have done with the commercial team, has sought to modernise the economy, and deal with aspects of AI.

Organisationally, the new funding arrangement, which I agreed with Robert Buckland in 2019, has been very successful for us. It does not mean that we get more money, but it means that we use the money we get more efficiently. We have increased the size of our board. We are in the process of appointing three non-executive board members, about whom we are very excited. We have introduced the diversity and inclusion policy and strategy from top to bottom, because we strongly believe that there are a large number of people from disadvantaged



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backgrounds who must be the subject of our concern. We have to reach them, we have to understand their evidence and we have to be able to reflect it in law reform proposals. We have done quite a lot of work on that.

We have enhanced the international outreach that we undertake. We are the largest law reform agency in the world. The Law Commissions Act of 1965 encourages an international outlook. We now run digital roundtables to which we invite Australia, New Zealand and South Africa. Canada is just joining us. We are holding one on the impact of AI on legislation before the end of the year. We have those on a regular basis. We do exchanges of ideas and materials with our foreign counterparts.

We are actively involved in supporting the Commonwealth Association of Law Reform Agencies. We have increasingly started to be asked to give advice to third world Governments on how, regarding mechanisms, to go about reforming their own laws. Over the last years, we have been providing advice, on a very, very sensitive social problem, to a country in Asia on how they would go about changing a law that is very sensitive in their own country.

In a variety of different ways we believe, as I said at the beginning, that we are in good health. We have a strong international outlook. We hope that we are focusing on the right things. The final thing is that we are continuing with an exercise we started in 2019 to benchmark our work by going to external independent economists and asking them to review it and for their work then to be peer-reviewed, for them to begin to try to quantify, however broadly, the value of what we do. We produced a report in 2019 and we are in the process of asking the economists to provide, as it were, a three-year update beyond that. That is a work in progress, but it is important because it gives us more focus on areas of law that really matter and we are able to persuade people. It is something I feel very strongly about.

Law reform is not just about saving the Government money or about generating wealth for business; it is about access to justice, happiness and contentment among people. The weddings project, for example, is not really about money; it is about increasing liberty and individual freedom. There is a lot about law reform that people need to understand is beyond the financial. We are trying to sell that story strongly and follow it through in our choice of project.

Q50 **Chair:** Are there any particular challenges for your successor that you are prepared to put on the record?

Sir Nicholas Green: First, to steer the commission through the next 15 months to an election; secondly, to contemplate the pressures that will impact on society over the next five to 10 years and what that means for law reform; and, thirdly, finalising the 14th programme in due course with a new Administration. We have to maintain our ability to recruit high-quality staff. They are absolutely our crucial assets and we have to be able to retain them. There is no body of specialists around Whitehall or



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in Cardiff or anywhere that replicates what we have in Petty France on the first floor. Finally, there is something Sir Peter already knows: continuing to protect our independence.

Q51 **Chair:** Understood. Thank you very much, Sir Nicholas. We are very grateful for your time today. We are very grateful, I and all the Committee, for your work over the last five years and the public service you have rendered us. We are grateful to you for your personal engagement.

Sir Nicholas Green: Thank you very much. Can I offer my thanks to this Committee? We view our responsibility to Parliament as fundamental. Under your chairmanship, we have actually fared very well. We have benefited enormously from the wisdom of the Committee. You contributed, for example, suggestions to the 14th programme. You have raised with the Government on a number of occasions matters that you consider to be important, which have helped us; for example, in negotiations over the new funding arrangements. We have benefited very much from our relationship with this Committee and long may it continue. Thank you very much indeed.

Chair: Thank you very much and all the best for the future.