



Constitution Committee

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

Wednesday 26 May 2021

10.15 am

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Members present: Baroness Taylor of Bolton (The Chair); Baroness Corston; Baroness Doocey; Baroness Drake; Lord Dunlop; Lord Faulks; Baroness Fookes; Lord Hope of Craighead; Lord Howarth of Newport; Lord Howell of Guildford; Lord Sherbourne of Didsbury; Baroness Suttie.

Evidence Session No. 1

Virtual Proceeding

Questions 1 - 15

Witness

[I](#): Lord Burnett of Maldon, Lord Chief Justice of England and Wales.

Examination of witness

Lord Burnett of Maldon.

Q1 **The Chair:** Our witness this morning is the Lord Chief Justice of England and Wales, Lord Burnett. Good morning to you and welcome back to the committee. We have these annual evidence sessions and they have been very useful.

I will start by asking you about the last year, which has clearly been difficult for everyone and difficult for the courts. We would be interested to get your impression of what the key issues have been for the administration of justice during this difficult period.

Lord Burnett of Maldon: I think for all of us it is quite difficult now to think back to the time before the end of March last year when, in so many respects, life was turned on its head for all of us. As you may remember, even before lockdown, I had indicated that in all jurisdictions we should be moving towards using technology much more frequently because there were already problems with social distancing and the expansion of Covid.

Once we had lockdown, at the end of March, there were some urgent decisions that needed to be taken to enable the administration of justice to continue. The first was a review of all our estate—with the Courts Service and the MoJ—to divide the estate up into three groups; those courts that would remain open for all purposes, including public attendance; those courts that would remain open for the use of staff and judges; and those that temporarily would be closed. Critically, the decisions that were made—many of them inevitably by me—were to ensure that things kept going. We were very concerned that if we were to stop altogether, as happened in most countries around the world, there would be grave difficulties in restarting.

In the early stages, we pivoted to the use of technology where it was appropriate and in the interests of justice. It is right that I should pay tribute to the staff in the courts, to the judges in the courts and also to the users of the courts for enabling that to happen in very difficult circumstances. Again, looking back to the position 14 months ago is difficult. We are now using a product called Cloud Video Platform, which is not perfect but provides a relatively stable and good online platform. In the early months of the lockdown last year, judges were using telephones much more frequently—of course we did anyway, in the civil and family courts in particular—and they were using commercially available platforms, Zoom, Skype, Teams and so on. Everybody was put under a great deal of pressure but, happily, in all jurisdictions work carried on.

Our greatest problem, as you can imagine, was in the criminal jurisdiction, both in the Magistrates Courts and in the Crown Courts, where large numbers of people need to be involved in cases. There were difficulties not only in the courtrooms themselves, ensuring that the environment was safe, but also in the buildings with large-volume footfall and in the cells in the criminal courts.

What happened, in short, was that in the Magistrates Courts things carried on: not as normal—trials were paused for a very short time—but they pretty well carried on as best they could, with volumes increasing over the course of the year.

In the Crown Court we had to pause jury trials for six weeks, or maybe seven weeks, in the end while quite elaborate preparations were made to enable jury trials to restart. They did restart in the second week of May last year and then have gently increased over the ensuing months and nearly a year.

Therefore, both in the Magistrates Court and in the Crown Court the volumes of work being disposed of now are back to pre-Covid levels. Outstanding caseloads are gently falling. In fact, in the Crown Court we are doing more work, in the sense of more sitting days, at the moment than we have done since May 2015.

So the position has been, in my view, really quite remarkable in all jurisdictions. The Family Court has sat more days in the last year than it has done in many years—indeed, I think than it has ever done.

There are problems, of course, in all jurisdictions with growing outstanding caseloads, but the efforts being made to resolve the difficulties are pretty fantastic, to be perfectly honest.

We have learned a lot of things. You must stop me, Chair, if I am talking too much but we have learned a lot of things. An important thing that became apparent from the outset was that top-down direction was not what was needed. The success in many of our jurisdictions has resulted from local initiatives—judges and court staff knowing how best to use their courts; local initiatives with all the local players, in crime and in family in particular. So we have been very keen to allow local judges and local participants and processes to get on and come up with good ideas to increase volumes in their own jurisdictions.

That is, perhaps, enough by way of introduction.

The Chair: Thank you, yes. You will be aware that we did a report on Covid in the courts.

Lord Burnett of Maldon: Of course.

Q2 **The Chair:** We did acknowledge the very significant efforts of all those working in that sector. There were, however, of course, many problems pre Covid. The situation was not perfect then and Covid has exacerbated many of those. Going forward, what do you think the main priorities or the key challenges are from your point of view; if you could briefly give two or three priorities?

Lord Burnett of Maldon: Yes, I hear the word “briefly”; forgive me.

First, we have to sit to full capacity in all jurisdictions. That means not only using our buildings to full capacity but also our judges, including fee-

paid judges, and bringing along all the other vital players in each jurisdiction.

In crime, buildings and judges are the beginning of it. We need staff, and the numbers of staff have been expanding over the last year. We need the CPS and probation to be able to keep up with us, for example. In family, we need local authorities in public law work and Cafcass in private law work, to keep up with us.

The overarching message that we, the judiciary, would bring is that we must be enabled to sit to full capacity. I am happy to say that the arrangements that have been put in place between myself, the Lord Chancellor and the Senior President of Tribunals for this coming financial year, April to April, enable us to do just that.

Q3 Lord Sherbourne of Didsbury: As you said, there are a large number of outstanding cases. Can I ask you whether the Government, the Ministry of Justice in particular, could do more that would help you reduce the number of outstanding cases? What more would you like them to do and, in particular, would extra funding be a help in reducing outstanding cases?

My second question is: how big an impact have the Nightingale Courts had in reducing the outstanding number of cases? Have they made a major impact or not?

Lord Burnett of Maldon: Thank you very much, Lord Sherbourne. So far as your first question is concerned, I think it should be acknowledged that during the course of the last 14 months, the Lord Chancellor has secured significant extra funding from the Treasury to enable steps to be taken to increase capacity. There was a lot of money needed to provide the tech into the courts, for example. There has been a lot of money needed to adapt courts for use in Covid-compliant ways, there has been a lot of money needed for additional staff and there has been a lot of money needed for the Nightingales.

For this year funding is not a problem, in the sense that the Lord Chancellor and I have agreed that in the criminal courts we will sit to full capacity—there will be no restriction on sitting days. As you will all appreciate, in recent years there have been artificial restrictions on the number of days that Crown Courts can sit, which have resulted in courts sitting empty with cases ready to be heard. It has been very unsatisfactory. That is not happening this year. Neither is it happening in family and civil, where the allocations really reflect the maximum possible judicial capacity.

My plea, if I may put it that way, is that what is happening this year is not a temporary sticking plaster or blip. It is absolutely vital, in my view, that as we move forward, we will have to continue to sit at full capacity in all our jurisdictions to enable us to retrieve the outstanding caseloads. I am confident the Lord Chancellor believes that is necessary as well. I should say that I have had a discussion with the Prime Minister about it and he gave me the distinct impression that he agrees too. I hope

between them they can persuade the Treasury to provide the funds when it comes to the negotiations for the next financial year.

So far as Nightingales are concerned, they have made a steady and significant contribution to the work that has been done over the last nine months in particular. Nightingales, as they are called, provide us with 58 additional courtrooms, 31 of which are being used for Crown Court trials where the defendant or defendants are not in custody. They have been especially useful for that type of case, and also for some of the long cases that would otherwise be clogging up the courtrooms that can be used to try defendants who are in custody.

There are plans to expand the Nightingale estate. Again, the funding for that is something that the Lord Chancellor must use all his advocacy skills to secure from the Treasury. There have inevitably been some difficulties because a lot of the Nightingale Courts are premises that were otherwise not useable by their commercial owners during the Covid emergency and some of them they are going to want back for their ordinary business. However, I hope those that are lost in that way will be replaced and augmented. In Crown Court terms, it is just over 10% of the operational Crown Court capacity at the moment. When social distancing comes off we will be able to use rather more of our own estate. However, it is certainly a significant contributor.

The Chair: Baroness Doocey, I think you wanted to follow up on that aspect.

Q4 Baroness Doocey: I was interested in hearing you talk about the fact that the staff had expanded over the past year. Anecdotally there is a lot of talk of one of the main issues being a lack of court staff; could you comment on that? If that is the case, I wondered whether recruitment and retention problems—caused, perhaps, in part by the fact the MoJ has traditionally paid lower salaries than people can get elsewhere—would be part of the issue. I would be interested in your views on both of those, please.

Lord Burnett of Maldon: If I start with the recruitment that was put in place last summer, the plan agreed between myself and the Lord Chancellor was that 1,600 additional staff should be recruited into HMCTS, Her Majesty's Courts and Tribunals Service. There was an urgent need for extra staff, particularly to support the remote working that was going on. It perhaps will come as no surprise if I express my mild frustration at how slow recruitment processes in the public sector seem to be as compared with the private sector, but I will not be the first to have made that observation.

The retention problem that you have identified is a really serious one for the Courts Service. The way it works is this: the Courts Service recruits into its ranks and, as you have noted, the pay in the Courts Service at an equivalent grade is rather less than it is in many other central government public sector departments and organisations, including HMRC, the Ministry of Defence and things of that sort. So what we find

happens—and it happens all the time—is that someone joins the Courts Service, is trained to do a particular job and then transfers over to another department because the pay is better. As you will appreciate, there is an ability to transfer between departments when jobs become available. So we lose talent, we lose experience and, ironically, it has to be filled in pro tem with temporary staff from agencies, who are more expensive. This has been a problem for all the time I have been a judge and I suspect it has been a problem for much longer. It is a real disappointment that Government have not been able to solve it yet.

I understand that there is a proposal being developed by the Ministry of Justice to try to resolve this issue, which will of course require Treasury approval in due course. Through you, if I may, can I ask the committee to bring what influence it can to bear on this issue? It is absolutely idiotic that HMCTS recruits good people, trains them and quickly loses them. That should not be allowed to happen in any sensible organisation.

I am conscious that it is not only the Courts Service that suffers from this; it seems to be a problem with the way remuneration is structured in the Civil Service. However, for us, it is one of the critical problems.

The Chair: Thank you for that. Before we leave this area, we were talking about the backlog and you gave some optimistic answers about what might be happening in the future.

There was, of course, a significant backload pre pandemic. There are some very pessimistic estimates about how long some people are going to have to wait for trials, which could have an impact on victims and witnesses and possibly alter the outcome of a case. Does that concern you?

Lord Burnett of Maldon: Yes, it does. It certainly concerns me. The whole question of delays in the criminal justice system as a whole is something that needs careful attention. The reality is that the biggest delays occur between the reporting of an offence and the papers going to the Crown Prosecution Service to decide whether to charge.

Once cases come into the courts, even now, they are dealt with mostly pretty quickly. Of course, anyone who is in custody has the benefit of custody time limits that are set by Parliament, so those cases have to be prioritised. In all of the Crown Courts, the resident judges—who are the senior judges in each Crown Court—with their listing officers review their case mix all the time to ensure that certain types of case, even when they are not custody cases, come forward. To give examples, if there is a youth being tried in the Crown Court, everybody tries to get that case on very quickly, and if there are vulnerable witnesses efforts are made to get the case on very quickly. Even now, as you will see if you look at news stories of cases that are going through the Crown Courts, many of them are coming on remarkably quickly, frankly.

However, the reality is that everything has been moving more slowly and the accumulated caseload, by whatever measure you apply, has grown by

roughly 50% since March last year. That is why I repeat that if we are able to run our courts at full capacity—with the co-operation of the CPS, of the police, of the Probation Service and so on—we will begin to bear down on that caseload quite quickly.

Q5 Baroness Drake: Lord Burnett, during last year's evidence session you referred to the risk that remote hearings could create new barriers to access to justice. With the benefit of the experience of the last year, if virtual proceedings continue into the future, what additional safeguards for vulnerable users would you like to see implemented? Are there particular barrier risks that warrant a higher priority of attention?

Given the different technical capabilities among the judiciary, what steps are being taken to ensure that adequate training and guidance on remote hearings is available to the judiciary?

Lord Burnett of Maldon: I will start with the first of your questions. The reality is that in the course of the last 14 months, judges in all jurisdictions and at every level have come to have a fairly good understanding of the sorts of remote attendance that work and are in the interests of justice, and those that do not. The governing criterion has to be the interests of justice, which include a wide range of factors.

There has been a particular concern in the family jurisdiction over the last 14 months: it has been necessary to deal with cases with unrepresented family litigants who are having to attend using remote technology, in circumstances that are really not very desirable. As a result, there is a great deal of thinking going on at the moment and research in the family jurisdiction—and also the civil and criminal jurisdictions—about how we are going to use remote access in the future.

Some of the difficulties have been the result of having to make awful choices. You either do the case, which might be urgent, in a way that is not ideal or it just gets put off, which is not ideal either. If it concerns children in particular, putting cases off for long periods can itself be quite damaging. The judges in all jurisdictions—and no two are the same—are acutely aware of the need to be sensitive in particular to litigants in person, some of whom are vulnerable, to ensure that their participation in the proceedings is effective.

While, as I think everyone knows, I am a great enthusiast for the use of remote attendance where it is in the interests of justice, I do worry occasionally that some think everything can be done remotely or that in some way it is a panacea for all of the problems we may be confronting in the future.

So far as training is concerned, we had to pivot to the use of Cloud Video Platform very quickly. The training that was organised involved online modules being developed rapidly by the Judicial College and then being available on our judicial intranet and also on the learning management system. Clearly it is not as good as face-to-face training might have been, but it was not possible to do that in the circumstances, as everyone will appreciate.

So far as the future is concerned, there is a bespoke video platform that is being piloted at the moment. That has been in development for two or three years, with judges and the Courts Service being very closely involved in that together. The hope is that the pilot will provide a sufficient opportunity for the glitches to be ironed out and then it can be rolled out over the course of the next year. There will be training provided to judges on the use of that system and it is designed to be very user friendly, so anyone joining it will be walked through how to use it.

The Chair: Baroness Drake, do you want to come back?

Baroness Drake: Yes, if I may, perhaps I can come back on the data issue.

Lord Burnett of Maldon: Of course.

Baroness Drake: What to do for the best is, in part, informed by what you know. The pandemic shone a light on the absence of adequate data on the functioning of the court system. It is arguable that the last year, because of that, was a lost opportunity to capture users' experience, which could have provided valuable information to support and influence the direction of improvements to which you have been referring.

What is happening to improve data collection? What is the drive behind it? What is the timeline to getting the key data points captured, given the need to address issues in the light of the pandemic and the problems that existed before then?

Lord Burnett of Maldon: The problems with data collection stemmed largely from the absence of good systems. I think I made the observation last year—certainly at some point I did—that many of the systems operating in the courts and tribunals should be in the Science Museum rather than continuing to be used. The modernisation programme, the reform programme, is in part designed to overcome those difficulties.

Data collection has improved and continues to improve but I still find it frustrating that neither I nor the Lord Chancellor is in the same position as anyone running a large commercial organisation. Somebody running a big supermarket chain could say, "Tell me how many widgets we've sold in the last month" and within a few minutes an answer would be given. Many of our systems are not able to provide the sort of detail we need. However, as they are all updated and replaced, as part of the modernisation programme, the data will become more reliable.

It is not only the absence of data that has concerned me, it is also that some of the data produced is not reliable; we cannot trust some of the figures that come out. That is improving. There is a big project under way involving the judiciary, the Courts Service and the MoJ looking at data capture. Everybody recognises that to run an organisation effectively you do need to know what is going on and that has been a problem. The modernisation programme is coming towards its final stages and, subject to the Treasury—we come back to the Treasury so often—providing the money, it will be completed in 2023.

The Chair: I think that is the point at which Lord Dunlop might want to come in.

Q6 **Lord Dunlop:** Yes, it is building on Baroness Drake's questions. Lord Burnett, you said that the continued funding of the reform and modernisation programme is essential to recovery of the courts from Covid-19. In that context, do you think the court modernisation programme is embedding effectively the lessons learned during the pandemic and is it sufficiently ambitious? You said it is coming towards the end, but we have just been through an incredible period where huge lessons will have been learned. Perhaps you could comment on whether you think the funding is adequate to take advantage of the lessons learned. Does more funding need to be provided?

Lord Burnett of Maldon: Towards the end of last year the Courts Service and MoJ—the Ministry of Justice—put the final business case for reform to the Treasury. The Treasury accepted the business case; in other words—as I understand it and I hope this puts it simply—it accepted that the ambition set out in the business case was a proper one and that everything in the business case should be done. What did not follow was an immediate, "And here's a cheque to pay for it all".

Lord Dunlop, you will know only too well how these things work. Where we are at the moment is that the funding is available to do everything in the reform programme that will be done during this financial year, up until April next year. The MoJ will have to negotiate, when it comes to its settlement for next year, for appropriate funding to continue with it. Again, that will require the Lord Chancellor to use all his skills of advocacy. It is a process that I hope does not result in "robbing Peter to pay Paul", as I think collectively you observed in the report that Lady Taylor referred to a few minutes ago.

The funding of the courts has been the subject of attrition for very many years. The results of that attrition have left much of what we do and how we operate extremely vulnerable. I have talked about the antique technology and that—a topic we have talked about in the past—the estate in many respects is in a pretty dire condition. That causes the loss of cases. So all of this needs to be in the mix, but particularly for reform. We are finalising the new digitisation of the criminal courts. There is the finalisation of the digitisation of the family public law site—that is care, where local authorities are involved—and there are big steps being made in the digitisation of the County Court. There is the video platform I have spoken of and there is a project dealing with scheduling and listing. All of these things are vital.

I will make one final further point, which I am sure in a way does not need making, but I will make it anyway. I have always been concerned that when the modernisation and reform programme comes to an end, in parts of Government there may well be, "Oh well, that's done then". However, of course, that is not how technology works. What I hope there will be proper thinking about is the need to continue to fund the proper use of technology of all sorts in support of the administration of justice,

rather than in a neat mind a line being drawn with the thought, “We needn’t give any more for that for a few years”. If that were to happen we would simply end up where we were once before, with systems that are antiquated, are beginning to creak and are not keeping pace with what everybody in society is used to and expects when they deal with every other aspect of life.

The Chair: Thank you. I think we need to make some progress because we still have quite a few questions to get through.

Q7 Lord Howarth of Newport: Good morning. You have just now been speaking of the attrition of funding over a number of years. Over the last decade, government funding for the justice system has fallen by a massive amount, some 21% in real terms.

I would like, in particular, to ask you about legal aid. Legal aid budgets have fallen by an even greater proportion, massively, by nearly 40% in real terms. I wonder what your reflections are about the impact this has had on access to justice. After all, is it not a bedrock principle of the rule of law that lack of personal means should not be a barrier to access to justice?

Lord Burnett of Maldon: I agree with that observation completely. So far as legal aid is concerned, if I may I would like to make a couple of comments about it in the criminal context and then, in particular, in the family context.

So far as crime is concerned, it is well known that legal aid rates paid to solicitors and barristers have remained static for very many years. For quite some time there has been a growing concern that the availability of criminal defence solicitors has been diminishing. The Law Society did a lot of work a couple of years ago that gave evidence of the demographics of criminal solicitors. It showed there were far too few youngsters coming into it and far too many people at the other end of their careers—in other words, it was withering—and there were also problems with availability in some parts of the country.

It is vital—absolutely vital—that there is a vibrant and capable criminal defence community. It is vital for the rule of law and the administration of justice, and that extends also to the Bar and advocates.

The Lord Chancellor has commissioned a review of legal aid by Sir Christopher Bellamy. Sir Christopher is working very hard at reviewing criminal legal aid: in particular, not only looking at whether the rates of remuneration are such that someone can make even a reasonable living at it but also looking at its structure. There is a real concern that the way in which criminal legal aid is structured does not incentivise lawyers to get on top of the case at a very early stage, which might result in it being squeezed out of the system, but encourages cases to trickle on. That is very bad for the administration of justice and does nothing to resolve the outstanding caseload.

I am optimistic that Sir Christopher's review will provide some deep insights into the future of legal aid, in crime in particular.

Lord Howarth of Newport: Do you think there will be a parallel review of the civil legal aid system?

Lord Burnett of Maldon: As you know, legal aid in the civil system is very rarely available. It is available for public law cases and it is available for some civil cases, but not very many. Ever since I started as a barrister, which is 40 years ago this year, there have been reviews of funding for civil litigation. All sorts of ideas have been developed and proposed and we have never ended up with a system of funding that is entirely satisfactory. My own view is that it is something that is ripe for general review and is something that is within the province of the Master of the Rolls on my behalf. I do not want to set hares running but I think any of us who are—as I was at the Bar, for example—involved in civil litigation in a quiet moment could sit down and recite the number of reviews and committees that have sat to come up with solutions. Civil legal aid is almost a thing of the past.

For family, the problem is in private family law, where family legal aid has virtually disappeared. The result is that we now have huge numbers of unrepresented family litigants who with the assistance of lawyers would resolve their problems. It is a particular difficulty in the family courts.

The Chair: I think Baroness Doocey wants to follow up on that.

Q8 **Baroness Doocey:** Yes, please. The review of legal aid is, of course, most welcome. However, some legal professionals fear the sector could be heading for something like price-competitive tendering. Do you consider this to be a possibility?

Lord Burnett of Maldon: I am afraid I have not heard of that possibility being considered by anybody. I am completely unaware of that being something that is being thought about, either by Sir Christopher or by the Ministry of Justice.

The Chair: Perhaps that is an early warning of what might be coming across your view in the future. Can we move now to judicial recruitment?

Q9 **Lord Faulks:** Good morning. I want to ask you, as Lady Taylor said, about judicial recruitment.

When you and I started at the Bar there was an element of tapping on the shoulder that resulted in judges being appointed. That has, of course, been replaced by the Judicial Appointments Commission. Do you think it has worked well? I know you have expressed concern about the quality and, indeed, the number of good applicants applying for the judiciary. Of course, there is a continuing suggestion from various quarters that we are not getting enough judges from ethnic minorities and not enough women. Do you have any general comments about this?

Lord Burnett of Maldon: That is an extremely large topic. The Judicial Appointments Commission was part of the constitutional reforms in 2005 when there was, I think, a universal view that the way in which judicial appointments had hitherto been conducted was not suitable for the modern age and, in particular, not suitable given the very large number of judges that were needed. As you say—although I was not a judge at the time, I hasten to add—for the senior judiciary there was a tap on the shoulder, as it was called. In other words, the Lord Chancellor got in touch and invited somebody to become a High Court judge. Within the Lord Chancellor's department, as it was in those days, there were some fairly well-developed processes for application and appointment at other levels. So it was an overdue reform to get some independence into the appointment of judges. So, as you know, the Judicial Appointments Commission recommends for appointment judges at every level up to the High Court in both the UK tribunals and the courts.

There is nobody who has been an observer of what the Judicial Appointments Commission does or who has been involved in the process who does not have something to say about how perhaps it could have been better. However, I think that is true of any process.

By and large I think the process has worked well. The JAC has been doing a quite extraordinary job in delivering recommendations for vast numbers of judges, both fee-paid and salaried. The volume of work it does has increased about threefold in the last three or four years, which I think is something that is much overlooked.

The progress made in diversity has been slower than I think any of us would have liked. So far as gender is concerned, the JAC will be able to speak for itself and I do not carry all of its statistics in my head but, broadly speaking, there is gender parity in appointments in the tribunals and in the courts, save at the High Court level. There the success rate in application is not, as I understand it, in any sense statistically different between men and women. The issue there is that the senior ranks of the legal profession, both solicitors and barristers, are themselves not representative at the highest levels.

So far as ethnic diversity is concerned, again the progress has been steady but slower than many of us would have liked to see. I have spoken publicly and quite often about diversity in the judiciary. It is important that the judiciary should, as far as possible, reflect the society that it serves. It seems to me that that should be so not only through gender and ethnicity but also more broadly. One area that I do worry about is the social diversity of the legal profession and thus the judiciary, which I think is something that itself needs considerable attention.

The reason the judiciary should be diverse is that it is likely to enhance confidence in the judiciary among the people that we serve. Also, it should not be overlooked that there is an enormous pool of lawyers—barristers, solicitors and legal executives now, who are able to apply for many judicial posts—which is very diverse. We want to encourage the best into the judiciary at every level. Getting the best also means

encouraging people from every walk of life within the profession, every type of lawyer and every type of person, to apply. None of us wants anyone to be put off for any reason.

There is much that I could talk about, if you wished me to, which we are doing in the judiciary to support and encourage diversity and to widen the pool of applicants for judicial appointments—and so too is the JAC, so too are the professions and so too is the Ministry of Justice.

Lord Faulks: Thank you very much for that. Can I ask you a short supplementary point? This is something I raised with you on the last occasion and it ties in, I think, with the answer you gave to Lord Howarth about the problems with legal aid, criminal defence solicitors and barristers, and the difficulty of it being possible to have a profession that is functioning well. Does that feed into the problems in getting high-quality judges, from whatever background, on to the Crown Court bench?

Lord Burnett of Maldon: Whether it is yet feeding in is something that I do not have sufficient evidence on to express a view.

Is it something that worries me? It most certainly is. One wants really able people to be doing crime and, in particular, to be willing to do legal aid crime. The reality in life, as we all know, is that it is money that pays the bills, it is money that pays the plumber and the food bills, and it is no surprise that some people who love doing criminal work are none the less deflected from it because of the difficulty of making an adequate living. It is a subject that I wish were more accurately reported. There is a tendency, I am afraid, for everybody to assume that all lawyers are paid huge amounts of money and are very well off. Well, those who rely upon criminal legal aid, at whatever level, do not fall into that category. Criminal legal aid solicitors firms struggle to make a profit at current rates, which is why they do not have spare capacity.

That feeds back to an answer I gave to, I think, Lady Taylor at the outset. I am concerned about whether the criminal defence community will be able to support the substantial increase in work that we plan in the criminal courts over the next year or so.

Q10 **Baroness Corston:** One of your key responsibilities as Lord Chief Justice is representing the views of the judiciary of England and Wales to Parliament and Government. In the light of that, how well do you think the current mechanisms work for communication, consultation and decision-making between your office and the Ministry of Justice? Are the views of the judiciary satisfactorily represented within government?

Lord Burnett of Maldon: Can I mention Parliament to begin with? I obviously appear before your committee and also the Justice Committee from time to time. I also meet the Lord Speaker and the Speaker from time to time. So I can say I am absolutely confident that the relationship between the judiciary and Parliament in its broadest sense is healthy and very good order. There is a lot of contact between my office and various parliamentary committees. I thought it worth mentioning that.

So far as government is concerned, my main point of contact is with the Ministry of Justice. My office and the Judicial Office are engaged with the Ministry of Justice on many topics all the time. The flow of information and dialogue and our input into things that are going on in the Ministry of Justice is substantial and works very well.

I also have contact with other parts of government. As I think you will know, I meet the Prime Minister regularly. I have also recently had a long discussion, for example, with the Chancellor of the Duchy of Lancaster about recovery in the courts. I meet the Home Secretary from time to time and the Cabinet Secretary—all sorts of engagements. Other senior judges also engage with Ministers, Permanent Secretaries and departments that touch the work they do. So the opportunities for engagement, and thus for understanding, are very great indeed. I think things are working fairly well.

The tiny caveat I would enter is that occasionally—particularly when one ranges away from the Ministry of Justice—it is not so much in the DNA of every official, policy adviser and SpAD that the judiciary is the third pillar of the state; Parliament, the Executive and the judiciary. We are completely independent in every sense, just as Parliament is independent of the Executive. We are not accountable to the Executive and neither can the Executive give the judiciary any instructions. I am slightly smiling, forgive me, but we occasionally see a document that emanates that is not very sensitive to that. However, the Judicial Office and my private office make the necessary telephone calls and usually all is well.

- Q11 Baroness Suttie:** You touched a little on the subject I was wanting to raise with you this morning. You have said there is perhaps not such an instinctive understanding of the role of the judiciary, especially by officials. What additional things do you think could be done to strengthen the relationship and mutual understanding between the judiciary and the Executive, and perhaps especially the understanding of the independence of the judiciary by officials across Whitehall?

Lord Burnett of Maldon: Quite a lot is done. The Judicial Office provides information and I think sometimes has done talks for those in government, by which I mean the officials in various parts of Whitehall, to ensure that is understood. I imagine that all officials and policy advisers in government are given a little tutorial on Parliament, and the relationship of the Executive with Parliament, to avoid inadvertently treading on toes. I think that would also be a very good thing for officials and SpADs who find themselves thinking in areas that touch what we do. I am not suggesting there is a big problem, but just occasionally there is the raising of an eyebrow here, which is usually enough to sort the problem out.

- Q12 Lord Howell of Guildford:** Good morning, Lord Burnett. I have a couple of quick questions following that.

There is a perception that in this digital age, people feel much more empowered to go straight to the courts and challenge government on

every conceivable issue and challenge the body politic. A good example of that is the climate campaigners who are forever nowadays, it seems, going to the courts, as are other people pursuing particular identity issues and so on. Does it worry the judiciary that they are being loaded up with more and more issues where, frankly, the challenges are political?

My second question is related to that. Given the heavy task of the judiciary is to interpret the will of Parliament, and Parliament today being not what it was—it is now a far more mosaic and divided assembly, where opinions seem to fly in every direction in some degree of chaos—is it an increasing challenge for the judiciary to get hold of what Parliament really means, what is intended, what is separate and distinct between the Executive and Parliament itself and to disentangle that in attempting to administer the law?

Lord Burnett of Maldon: You will understand that I cannot talk about particular cases. The type of case, Lord Howell, you identified at the outset of your question is, in the overall scheme of things, a very, very small proportion of the public law judicial review work that comes into the courts. They only prosper if there is an arguable point; then they go forward for hearing and sometimes they succeed and sometimes they do not. But the overwhelming majority of what might be described as overtly political claims, which do not really have any legal substance, are weeded out at the beginning because they do not get permission to proceed.

It is obviously an unwelcome thing if potential litigants seek to use the courts for political purposes. The courts have said often that judicial review is not politics by any other means—those are the words that I think have been used in terms.

So the problem is a relatively small one. Most of those cases that come in and are overtly political have no legal merit and the judges in the Administrative Court refuse permission. Those that have some merit get permission, and if they succeed they succeed and if they do not they do not.

So far as trying to interpret the will of Parliament is concerned, as we all know there is a wide range of interpretive tools. There is a very large and learned tome on statutory interpretation, and over decades and centuries the approach to interpreting statutes has become pretty well settled. It does not seem to me, speaking personally, that it is any more difficult than it ever has been. Alas, sometimes the language found in a statute, or more often a statutory instrument, might not unkindly be described as opaque, but usually one way or another we are able to get to what we hope is the right interpretation.

Lord Howell of Guildford: Thank you.

Q13 **Baroness Fookes:** According to a recent judicial attitudes survey, over two-thirds of judges in England and Wales feel they are less respected by society than they were five years ago, and few judges feel valued either by the Government or by the media. Perhaps more seriously, over a third

have concerns about their safety out of court. Do you share those concerns?

Lord Burnett of Maldon: Taking them in order, if I may, Lady Fookes, I think it is appropriate to observe that these attitude surveys are run every few years, so it is always worthwhile looking at the comparative figures from last time.

So far as judges' perception of how they are respected and valued by the public, I suspect that if one were to ask the same of parliamentarians, for example, something very similar would be disclosed. In other words, many doing jobs of a public nature feel they are not as well respected as they used to be. Whether that is right or wrong is very difficult to gauge. However, it is perhaps worth observing that over many years Ipsos MORI has been doing surveys of the public, asking them how they view different professions, including the judiciary, politicians, estate agents, doctors, nurses and so on. The judiciary always comes out very near the top, so it may well be that the reality is different from the perception.

As to how many judges think the Government value them, you are right it was a very low figure—I think it was 9% from memory. In the last survey it was only 2%, so it may well be that the Government take some comfort from that. I think it reflects some of the things we have been discussing already: the attrition of funding, the way the estate is not maintained properly and so on.

As to the media, I do not know. The media tend only to report things that are a little sensational or they think may be disobliging to those they are reporting on. I, again, would guess that if you were to ask most Members of Parliament they might say something similar.

So far as safety out of court is concerned, that is a real concern to me. There is, happily, a big difference between the perception and the reality. There are very few incidents involving judges out of court, but any at all are very unwelcome indeed. What I can do is provide some reassurance that we have a fairly well-honed and effective system for providing support to any judge at any level who feels under threat of any sort. This can arise in a number of circumstances. Again, it is often, I am afraid, in the context of family cases, where emotions run very high and some disappointed litigants, to put it absolutely bluntly, behave very badly indeed. That has generated some cases of concern. So too have social media attacks—something that is very familiar to politicians.

However, we now have a protocol with the police that operates in every police area in the country to ensure that if there is any concern at all that is shared by the police, appropriate steps are taken to provide help and assistance. It is one of the many areas of judicial welfare, for which I am responsible, on which we have been working really hard to try to put in place processes that provide proper protection.

Baroness Fookes: Thank you.

Q14 **Lord Hope of Craighead:** Good morning. I would like to ask you a

question or two about Wales. I speak as somebody who, of course, comes from Scotland, but I have also sat in devolution cases in the Supreme Court and seen something of the development of the devolution system.

In the first case that came to us I used the expression "Welsh law" and my judicial assistant ticked me off and said that was very provocative. But I think we have seen since then—that was about nine years ago—considerable development of Welsh legislation. Although Wales shares a common-law base with England, there is now a distinct system, both in the devolution Administration in Wales and—*[Inaudible]*.

So the first question from me is: what are you doing to address the perception in Wales that the way law is administered in Wales does not measure up to the expectations of the public there?

Lord Burnett of Maldon: I am afraid, Lord Hope, you disappeared in the middle of that question, at least to me. I could not hear it.

Lord Hope of Craighead: I am sorry. Did you hear enough to understand the point? What I am driving at is the perception that law in Wales is not being represented in a way that fully respects the existence of the devolution system and the development of Welsh law.

Lord Burnett of Maldon: Yes, I missed the critical part, so now I have it.

I am far from sure whether that perception has any foundation in fact. So far as the Welsh law is concerned, there has been a whole series of initiatives that have been taken from my office—I am obviously Lord Chief Justice of Wales, and proudly so—to ensure that Welsh law is accessible and, second, that the judiciary who sit in Wales are appropriately and fully trained in distinct Welsh law. To give you an example of the accessibility point, one of the first discussions I had with the then First Minister following my appointment over three and a half years ago was to try to find a mechanism to ensure that Welsh statutory instruments were available to the public, because they were not then. I am happy to say that steps have been taken that have, I think, resolved that particular difficulty.

As time goes by and the Senedd passes Welsh primary legislation, supported by quite large volumes of delegated legislation, there is inevitably a growing difference in some areas between the law in England and the law in Wales. It is particularly so in some areas of family law and also in property—landlord and tenant—law. It is important that judges who sit in Wales and deal with these cases are not only aware that there is a difference but are also trained to ensure that their awareness follows through into their decision-making. I would add that it is important too that the legal profession is aware of the differences, particularly those in the legal profession who cross the border into Wales from England and who are perhaps less well attuned to the differences.

I have a Wales training committee, which deals with all matters of Welsh law. It deals with two separate strands of training in Wales. One is in the

law of Wales that is different from the law of England and also, of course, in training in the Welsh language, because we have a number of judges in Wales who hear cases in Welsh, and importantly so.

There is a lot of work going on at the moment in connection with landlord and tenant, where there are quite significant differences emerging between the law in England and the law in Wales, brought about by the Renting Homes (Wales) Act. This work is carrying on at the moment and should be complete in time for the changes in that area of law by next year.

The detail of it, Lord Hope, you probably do not want to know, but some of this training is delivered face to face. There are regular bulletins that are sent to all the judiciary who sit in Wales to alert them to changes in the law and distinct Welsh areas of law. There is a growing group of judges in Wales who are taking charge, on my behalf, of this important aspect of judicial training.

Q15 Lord Hope of Craighead: Thank you very much indeed for that very interesting reply.

Can I ask you one supplementary question? The Commission on Justice in Wales, which Lord Thomas chaired, made a substantial number of recommendations. How far have you gone in fulfilling what that commission was asking for?

Lord Burnett of Maldon: Very few of the recommendations directly affected the judiciary. At the heart of the commission's work was thinking around whether justice itself should be a devolved issue, which it is not at the moment. There are aspects of the way law is administered in Wales, and the way the courts are administered, which are constantly under review. I have appointed Lady Justice Nicola Davies, who was a presiding judge in Wales before she came to the Court of Appeal, to oversee the work of the Court of Appeal in Wales and to take a leading role for me on behalf of the judiciary in Wales.

There is a range of bodies that exists to support criminal law, family law and other aspects of law in Wales, to which the judiciary contributes. There are many others involved in those and we are trying to ensure they think carefully about anything that has a particular Welsh aspect. That is true particularly of family, if I may say so.

The Commission on Justice in Wales made a large number of recommendations that are, in fact, political and on which therefore I have to be very careful before making any comments.

Lord Hope of Craighead: The promotion of south Wales as a legal centre was one of the recommendations, which I imagine is something you could be assisting.

Lord Burnett of Maldon: We have, in a number of ways, assisted on that. First of all, as you probably know, Cardiff is a centre for the Administrative Court and has been for some years. Recent changes to the Civil Procedure Rules require any judicial review challenge to a Welsh

public authority to be heard in Wales—so we are encouraging public law cases to be heard in Wales.

The Court of Appeal, both divisions, sits in Wales every year and in south Wales in particular. The Civil Division of the Court of Appeal sat in Wales earlier this year and the Criminal Division at the end of last year—I presided over that and I will be doing so again later this year. So we are encouraging those sorts of cases to be heard in Wales.

The business and property courts have a presence in Cardiff. I know, Lord Hope, you are very familiar with this, but we are encouraging significant business and property cases that have a local flavour out of London to be heard locally, whether it is in Cardiff, Liverpool, Manchester, Leeds, Bristol or wherever. That much we are definitely doing.

Lord Hope of Craighead: Thank you very much indeed.

The Chair: Lord Burnett, you have covered quite a range of topics. We are very grateful for the information you have given us. I hope you found the report we did useful; it was intended to be useful. I am glad we have been able to reference it today as well. We will see you again in a year, or maybe before if there are other issues that we should keep in contact with. Thank you very much for your evidence this morning.

Lord Burnett of Maldon: Thank you.