

Justice Committee

Oral evidence: [The work of the Lord Chief Justice](#),
HC 868

Tuesday 16 November 2021

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Members present: Sir Robert Neill (Chair); Rob Butler; Maria Eagle; Laura Farris; Kate Hollern; Paul Maynard; Dr Kieran Mullan.

Questions 1 – 53

Witness

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

Examination of witness

Witness: Lord Burnett of Maldon.

Q1 Chair: Good afternoon and welcome to this session of the Justice Committee. I will turn almost immediately to our witness today, the Lord Chief Justice, Lord Burnett of Maldon. It is good to see you, Lord Chief Justice.

Lord Burnett: And you. It is good to be back in person.

Chair: Indeed. I think that is a big plus for all of us. As usual, can we make our declarations of interest? I am a non-practising barrister and, like Lord Burnett, a bencher of Middle Temple. I am a former consultant to a law firm.

Maria Eagle: I am a non-practising solicitor.

Laura Farris: I am a practising barrister.

Rob Butler: Prior to my election, I was a non-executive director of HMPPS and the magistrate member of the Sentencing Council.

Q2 Chair: That has covered our interests.

Lord Burnett, thank you for coming to see us. We are grateful for your annual report, which we received and read with considerable interest. It has been a rather difficult and exceptional set of circumstances since we last saw you before the Committee in person and during the various online sessions we have had together. I want to start by asking for your assessment as to where we are now with the system, which has probably been under pressure of a different kind than it has ever been before.

Lord Burnett: Shall I try to sketch out in respect of each jurisdiction where I think we are?

Chair: Yes. We can then go back into the detail.

Lord Burnett: Chairman, as you know, I have a rather heavy cold, so if I sound even more odd than usual that is the reason why.

Clearly, the greatest public interest and thus political interest is in what has been going on in the criminal courts during Covid. Winding back a little bit, I hope everyone will remember that, although we had to pause jury trials for a very short while—in the end, it was only seven weeks—the work of the Crown court continued. At no stage were the Crown courts in England and Wales shut down. By last October-November we had about 300 courtrooms capable of conducting jury trials, and the number has continued to rise. The latest figure, which I was given just a day or two ago, is that it is now 366. Physical capacity is no longer a constraining factor. There are other aspects of capacity that are providing some constraints.



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The first I should mention in the Crown court is judicial capacity. As all Members will remember, the Crown court sitting days were quite severely cut in the years before Covid, and the result was that the number of Crown court judges was also reduced. We are struggling in some parts of the country to provide the judicial resources necessary to do all the work in the Crown court that we want to do. We are encouraging recorders to sit more and they are stepping up to that challenge, but the position is different in different parts of the country. London presents a particular problem, the midlands the next problem and other parts of the country less so. I am encouraging recently retired circuit judges to sit in the Crown court, and we are deploying High Court judges more than we did before Covid to sit in the Crown court, so judicial capacity is a factor.

The other factor that has taken us a little by surprise is the capacity of the legal profession, both solicitors and barristers, in some parts of the country to manage to do the work that we are listing to do. Capacity is one of those things that has many different facets. There are other important features of capacity, which include staffing levels in HMCTS, the ability of probation and CPS to keep up and so on.

Things are moving in the right direction in the Crown court, but however one looks at the statistics—I will not blind you with statistics because they can be quite complex and, in some respects, misleading—the outstanding case load in the Crown court is about 50% higher than it was when lockdown started last March. The outstanding case load has been coming down gently in the past few weeks, but it is too early to suggest that that is a herald of things to come. One of the factors we are extremely conscious of is that the volume of work coming into the Crown courts remains depressed, as compared with pre-Covid. That is the Crown court.

In the magistrates court, the picture is quite positive. In many parts of the country, magistrates courts are back where they were before Covid; not everywhere yet, but the expectation is that within a few months pretty well everywhere will be back to pre-Covid levels. That is just a broad overview of crime.

I may be talking too much, Sir Robert, but perhaps I could say a few words about family, which is also extremely important. During the Covid emergency, for all sorts of reasons the call for judicial time in civil diminished—that is to say, in the county court. That judicial time was absorbed by family, so the volume of family cases not only stayed at the level pre-Covid but increased. The picture in the family courts is also one of increased outstanding case load. In public family law, essentially care cases, the average time being taken to complete them has extended a little. A good piece of news there is that the volume of care cases coming in has diminished. We think that is largely the result of initiatives proposed by the judiciary and involved local authorities, CAFCASS and others to encourage the issue of public law proceedings only when it is really necessary. By contrast, private law family proceedings—in



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particular disputes between parents over children—have continued to grow and are causing a good deal of concern. In time we might come on to explore a little bit what is happening there.

As far as civil is concerned, the reality is that the higher courts—the High Court, the business and property courts and the Court of Appeal—carried on almost without missing a beat during Covid, and there is no appreciable additional outstanding case load in any of those courts. In the county court, the volume of cases issued in 2020 and the first part of this year was very significantly down on pre-Covid levels for all sorts of reasons. The result is that, broadly speaking—I have to say broadly speaking because the data on this are not very satisfactory—outstanding case load and timeliness in the county court is pretty much where it was before.

Q3 **Chair:** That is very helpful. That is probably a good chance to give you a pause, and then we will come to some of the questions. Can I come back to the criminal jurisdiction?

Lord Burnett: Yes, of course.

Q4 **Chair:** We as a Committee want to express our thanks to the judiciary and all those involved in keeping the show on the road to the extent that has been possible. I know it has been extremely challenging. That is a convenient way of leading in to the very useful visit that a number of members of the Committee made to the Crown court at Crown Square in Manchester.

Lord Burnett: So I understand.

Q5 **Chair:** We met Judge Dean, the recorder, and a number of his colleagues as well as court staff. What struck us when speaking to them was that, although it was possible to keep operations going, it required considerable effort physically to adapt courts. That is particularly challenging in the case of multi-handed trials. I think one court in Manchester has been adapted to do that, and one is coming on stream at Loughborough. On one of the last two occasions you gave evidence to us, Lord Burnett, you referred to the complexity of the mix coming through and the likely growth in multi-handed trials. Is this level of capacity, with what appears to be one “super-courtroom”, an adapted courtroom in Manchester, one in Loughborough and perhaps others on the way, going to be sufficient to deal with that growth in multi-handed trials and the judicial time that will be taken up? It will perhaps take a judge three or four months or more.

Lord Burnett: I was delighted to hear that you physically visited Manchester and had an opportunity to talk not only to judges but to staff and no doubt other professionals and so on. Speaking for myself, I learn more by speaking to staff, judges and lawyers when I visit courts than I ever do from piles of paper coming on to my desk that are designed to brief me. I am sure that collectively you will have come to understand



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some of the practical difficulties we have been dealing with over the past 21 months and which have not altogether left us.

I am grateful for your observation and your thanks to the judiciary. It is fair to say that, without the astonishing input from all of the judiciary, the system would have ground to a halt. I am not just talking about crime, although we are focusing on crime at the moment. The imaginative way in which judges individually worked with staff in courts and local professionals to devise mechanisms, systems and approaches that were suitable for individual towns, cities and courts was quite remarkable.

We still have a problem with big multi-handler cases. Cases with two and three defendants are being dealt with satisfactorily pretty well everywhere. They are taking longer than they would otherwise because of the practical arrangements that have to be made. As I am sure you will have appreciated, the opportunity for trials to be held up by a day because somebody has had to self-isolate, or go off for testing and so on, is having an impact on the speed with which a lot of cases are dealt with, but we do not have very many courtrooms that can deal with the really big multi-handler cases with six, seven, eight, nine or 10 defendants, particularly those in custody. There are a few of them and the cases are being dealt with, but one of the solutions has been for judges to try to chop up the cases. That is being done with great energy to ensure that those cases are being tried. Obviously, judges have to be sensitive to custody time limits, which continue to present quite a challenge.

Q6 Chair: Severing the indictments to split some of these multi-handed cases has always been an option available to the court on application if it is in the interests of justice and so on, but is there something to be learned from that? Are we perhaps more willing to sever indictments now than was previously the case? One assumes it is being done without any great injustice to the parties.

Lord Burnett: It would not be happening if there were real concerns about whether it was delivering justice. There are all sorts of reasons why the prosecution in particular is keen to keep all defendants together. Quite often, defendants are quite keen to be separated. I appreciate you have a great deal of experience of this from your days in practice at the Bar, and I suspect it will be part of the lessons learned.

Q7 Chair: That is an important aspect. You gave us the figure of 366 for trials disposed of per week currently. It has taken a bit longer than expected to get to that level, because originally the Government's plan was to be disposing of 333 by November 2020.

Lord Burnett: The 366 is the number of courtrooms available to conduct jury trials.

Q8 Chair: Courtrooms, sorry. That is the increase. But when we are talking about the throughput of trials, is that still satisfactory?



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Lord Burnett: It is going as quickly as it can. The rate at which trials are being dealt with is back to where it was pre-Covid, but we have to go a long way beyond that if we are to reduce the outstanding case load. That is the reality.

Q9 **Chair:** That is the key point, isn't it? Many would argue that the backlog was too high even pre-Covid. One of the cases we saw in Manchester, now concluded so I can refer to it, was a rape offence. I believe the offence was committed three years ago, long before lockdown.

Lord Burnett: One of the questions I always ask when I hear about delays is to understand where the delays have occurred. There are three critical points in any criminal case. The first is when the complaint is made to the police; the second is when the charge is made, which follows the involvement of the CPS; and the third point—because it is only when someone is charged that it comes to the courts—is the time it takes to dispose of it in the courts.

For all sorts of reasons, the position has been that the time between reporting particularly of sexual offences and charge has grown quite substantially in recent years because of the nature of the investigation undertaken. The time the case is in the courts has not grown by so much, but it is clearly unsatisfactory that an offence that occurred in 2018 and was reported in 2018 is being tried in 2021 even if it has been in the courts for only six or nine months, which may well have been the case.

Q10 **Chair:** It seems to be quite common that certainly bail cases are being listed well into the latter part of next year.

Lord Burnett: That is right, and into the early part of 2023. The picture is different in different parts of the country. London, the south-east and the midlands are areas where the timeliness of cases is least good. In Wales, the west, the north-west and the north-east things are very much better. From the point of view of the judiciary, we would like cases tried as soon as they are ready to be tried, as long as we have the space to try them, the judges to try them and the lawyers to represent both sides in them.

Q11 **Chair:** What is it that you need to be able to achieve that? You have talked about judicial capacity. What else?

Lord Burnett: We need a series of things. The first is to increase judicial capacity. The recent circuit judge competition fell short by 12. The 12 by which it fell short were all criminal Crown court judges rather than family and civil judges. There is another competition running at the moment that I hope will deliver all the judges who have been asked for, but that depends on candidates of the right calibre presenting themselves to the JAC. That is the first thing we need to do.

We are increasing the number of recorders. A very large number have been appointed, or I have accepted them for appointment and they are about to be appointed, and there will be another competition next year.



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The recorder pool is being replenished constantly. We are accelerating the training of criminal recorders once they are appointed, so that will help. That is a judicial resource.

We need the money, the finance, to operate the courts. That means we have to be provided with sufficient money to sit as many days as the system has capacity to sit. I very much hope that we will never return to the situation where there are courtrooms sitting empty, judges available to hear cases and cases ready and able to be heard but held up because money is not made available to do the work.

Q12 Chair: Does the current spending review give you any confidence that you can sustain that?

Lord Burnett: As you appreciate, the spending review is a stepping-stone to the concordat process. The Ministry of Justice has settled with the Treasury for the next three years. I have read with a great deal of care every word said by the Chancellor of the Exchequer and all the supporting documents. Money is being made available for the criminal justice system, which is a much broader concept than the courts, and undoubtedly there will be some money made available to try to deal with outstanding case loads in the Crown court, but the process by which the settlement of finance is done between the Lord Chancellor and me is set out in the concordat that was agreed 10 or more years ago.

The concordat process is without prejudice to whatever the MOJ and the Treasury have settled on. I will be pressing the Lord Chancellor to ensure that in crime, which we are talking about at the moment, sufficient funds are made available for us to sit all the days we will be capable of sitting in the next financial year and that, although there is a three-year settlement with the Treasury, our concordat process is an annual one.

Q13 Chair: You have referred to recognising in funding the importance of the rule of law, the justice system and the value of it. I imagine that would indicate that you will be having conversations—I do not want to hold you to what they are—about the need for sustainable funding over a period of more than just one year.

Lord Burnett: Yes. Something that increasingly frustrates me is that funding for the courts for the administration of justice is done annually, and there is not a longer-term view about the financial support that is necessary. One of the consequences of that, particularly in recent years when for all sorts of reasons that I do not need to go into money has been very tight—perhaps it is always very tight—is that one looks around for the worst leak in the boat and you then plug a particular leak, but there is nothing to make the vessel seaworthy in the long term, if I may extend the metaphor.

At the moment, obviously the political focus is very much on outstanding case loads, but given all the underlying problems about which I have spoken since appointment four years ago, which my predecessor spoke



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about for four years and his predecessor for five years, of the estate being allowed to degrade, I am worried that we will not have sufficient or proper funds to make good some of those degradations.

Q14 Chair: The maintenance backlog of the courts is perhaps something that is not talked about often enough.

Lord Burnett: I talk about it quite often, Chairman, but I agree that others do not as much as is necessary. We have some very good buildings and I make no bones about that. Oddly enough, a lot of them are the PFIs because there are contractual arrangements in place that mean they have to be kept in decent condition, but we have some buildings that are, frankly, an embarrassment that I do not think members of the public as users of our courts, the staff working in the courts or the judges also working in the courts should be expected to tolerate. The shortfall in maintenance has been recognised for years by Government, but the money necessary to deal with it, just to put the estate into a decent condition, has not yet been made available. Looking at everything that was said in the spending review documents, I struggle to see where the money is for that, but I shall be pressing the Lord Chancellor for it none the less.

Chair: That is very helpful.

Q15 Laura Farris: Lord Burnett, I want to ask you about a few potential non-monetary solutions to the Crown court backlogs. Last year, I read an interview in which I think you said: "Do some of the low-grade cases that go to the Crown court really need to have as many as 12 jurors?" It is an issue we in Parliament have grappled with, as I am sure you have, too. Does it remain your view that there could be swifter disposal of cases in the Crown court if there were smaller juries for certain categories of case and, if so, what do you think that would look like?

Lord Burnett: These are extremely interesting questions that I dipped a toe into in the early days of Covid, particularly when there was a good deal of public discussion about whether as a temporary measure it might be sensible to do cases differently. The moment passed and there was no political appetite for that.

I recognise entirely that fundamental policy issues surrounding the way cases are tried are really political issues, so I am very cautious about entering the arena. I know that you have read some of what I said. I have always posed it as questions; in other words, I have been careful never to make a proposal, and I am not going to do so today. These are questions that have been floating around for as long as I have been involved in the law. Time and time again there have been discussions about them.

Q16 Laura Farris: To put it a different way, do you think it remains a germane question while you have issues with people involved in trials possibly having to self-isolate and so on?



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Lord Burnett: I do. I think it is part of a much bigger question. A fundamental review of criminal trials was conducted by Sir Robin Auld nearly 20 years ago. He made a series of proposals and raised all sorts of points, which came to asking the question: is the way we do things necessarily the best way? My own view about anything we do is that we should be asking that question all the time, but recognising, as I must, that any changes to the way trials are conducted, even the balance between trials in the magistrates court and the Crown court, take one into extremely controversial territory straightaway.

I remember that about 18 months ago, when the previous Lord Chancellor floated the possibility of doing trials in the Crown court differently during Covid, there was an explosion of opposition and, essentially, it was politically impossible to do it. My feeling is that what Covid has taught us is that our system is perhaps more fragile than we thought, and we also have to grapple with long-term problems. There is no doubt about that. Rather than instant sticking-plasters, I wonder whether the time might have come for another look at some of these things in the same way that Sir Robin Auld did 20 years ago.

Q17 **Laura Farris:** Another option that we have discussed in a political way quite a lot is about section 28 procedures in rape trials. The Chair gave an example of a rape case that was tried three years past the incident. There are big pilots going on. Do you have any view on whether or not that would be an effective way of managing rape trials during the process of clearing the backlog?

Lord Burnett: I would make two fundamental observations about that. Section 28, as you appreciate, is a statutory provision that enables cross-examination to be canned in advance of a trial. It started being piloted with children under 16; then it was children up to 18; then it was vulnerable witnesses; and now it is being piloted in seven courts, I think, for ordinary complainants and witnesses. The evaluations of that have not taken place; they are being undertaken by HMCTS at the moment.

There are some quite fundamental questions about it to which everybody ought to know the answer. For example, does recording the cross-examination and playing it later have an effect on guilty plea rates? I would like to know the answer to that question. Does it have an effect on eventual conviction rates? I would like to have the answer to that question. If you talk to prosecutors and judges, there is a concern, anecdotal at the moment, that the cross-examination is not very immediate and effective; the evidence is not very effective, and there may well be increased acquittal rates. I would like to know the answers to those questions before it is rolled out more generally.

There are some quite serious practical implications at the moment that we need to be absolutely clear about. If there is to be a cross-examination in advance, it is one thing to cross-examine a child where all of the questions are worked out in advance and it is all over in half an hour or 45 minutes. Even that is quite disruptive because it means the



lawyers have to prepare the case as if for trial and the judge cannot be doing a trial; there is a lot of interruption of trials. As this has rolled out to vulnerable witnesses where the cross-examinations are longer, and as it is now being rolled out to non-vulnerable witnesses, the burdens being imposed on the courts are enormous. The judge has to prepare as if for trial; the cross-examination may take half a day or a day; the lawyers have to prepare; the judge and lawyers have to come out of other trials, so trials are being disrupted. One of the real worries I have about expanding it too quickly is that it will result in the outstanding case load being kept artificially high because a lot of time and energy will be devoted to dealing with section 28 cross-examinations.

I have been 40 years a lawyer and I like to proceed on evidence, not hunches. Subject to the pilots, it is obviously an extremely valuable tool to save complainants and other witnesses the trauma of having to wait. That is undoubtedly a trauma, but my own view is: tread very carefully because this could easily go wrong.

Q18 Laura Farris: My next question is about listing. You deal with it in your report and you refer to a range of listing strategies and so on. It is something we in Parliament have been thinking about a lot. There is divergence in the ways different judges list. The argument has been made that there could be room for a centralised listing function to subsume that role and ensure greater standardisation, which might assist with the backlog. What is your view on that?

Lord Burnett: First, there is a thing called the scheduling and listing tool being rolled out as part of the reform programme at the moment. It is being rolled out across all jurisdictions, and in the next 18 months it is expected that it will be operating in criminal, civil and family courts. While listing is undoubtedly a judicial function, most cases are listed in a grid, effectively. It happens in the Court of Appeal; it happens in the High Court; and it happens in the Crown court. The listing is done in accordance with overall listing policy. The expectation is that the new scheduling and listing tool, if it delivers what it is designed to deliver, will facilitate more certain and more effective listing.

One of the problems with listing that I appreciate you will be very familiar with is that it is not a science; it is an art. My own view, particularly in the Crown court, is that a really good listing officer is worth 10% of efficiency. A really good listing officer knows all the local solicitors and barristers and knows instinctively which cases are likely to be effective, which are not and so on. No machine can quite capture that, but at the moment we have a real tension, which I recognise in some places is not delivering perfect outcomes for everybody, in trying to ensure that the courts are kept busy— in other words, avoiding a case pleading and having nothing behind it to come into court. That is the first aim.

The second aim is to avoid over-listing, which means cases not being reached, or being stood out at very short notice, which I appreciate is undesirable. This is a topic that needs to be kept under constant review.



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Local conditions are important because no two places are the same, but I think that underlying your question is the sentiment that not everything is right everywhere with listing. I would not disagree with that, but if we are talking about the Crown court at the moment it is something of which all resident judges are very conscious.

Q19 Chair: It has been suggested to some of us when we talk to practitioners that the approach of different resident judges, if I may be blunt, can be idiosyncratic. That is the phrase that has been used to me. Judge A at Crown court Y is notorious for listing all the pre-trial and case progression hearings in person, whereas judge B at Crown court Z has a very different approach and generally will try to list things remotely. Is there some greater role for judicial leadership, perhaps through the presiding judges, to try to ensure consistency?

Lord Burnett: I need to make a few observations before I answer your question. I am not avoiding the question. There is a tendency to suppose that all procedural hearings can satisfactorily be conducted remotely.

Chair: That is not necessarily the case.

Lord Burnett: The reality is that they cannot. What is often lost, particularly at the first procedural hearing in the Crown court, which is always listed remotely, is the opportunity for the defendant to sit down with his or her advocate and for there to be discussions with the prosecution advocate that lead to resolution pleas that are acceptable. You are absolutely right; there are differences in different parts of the country, but whether it is right to say it is the result of idiosyncrasies or the resident judge's understanding and reaction to different cultural practices is the moot point.

I will not identify different parts of the country, but there are some where more of the preliminary or first hearings—the PTPHs as they are called—are listed in person than others, because it is the only way that cases are being resolved. One needs to be quite careful and to look at precisely what is going on everywhere. What I can say is that all the resident and presiding judges meet regularly—one of the silver linings of Covid is that these meetings are happening on Teams or Zoom very frequently—and exchange best practice.

My other observation, and I hope no one takes it amiss, is that sometimes advocates are very keen to attend remotely, even if the interests of justice, frankly, should have them present, because you can do a 10 o'clock hearing in Sheffield, an 11 o'clock hearing in Liverpool, a 2 o'clock hearing in Exeter and so on. The law on that is quite clear. The legislation put in place immediately following the Covid lockdown comes to this: in the criminal courts judges are obliged to allow remote attendance unless it is not in the interests of justice to do so. That is the test I believe they are conscientiously applying.

Q20 Dr Mullan: You have articulated really well the complexity of the issue



which we heard about during the court visit, but dare I say that it seemed to me that sensitivity about complexity has meant there are not even common-sense recommendations we can make that everyone can agree on which would benefit the system? There is enormous variation. While we would not want to remove that variation, there is perhaps a middle ground where we could recommend and advise picking the low-hanging fruit where people are behaving unreasonably in all different directions.

Lord Burnett: I would not disagree with that. One of the things that has rather frustrated me in recent months is that I hear grumblings of discontent, but when I try to follow through and ask for particular examples, or the presiding judges ask for them, we do not really get them.

- Q21 **Chair:** Perhaps we can move on from listing. You rightly said that listing is a judicial function, but equally putting it on the grid has a lot of administrative elements. Are we sometimes perhaps a little bit over-cautious in regarding all listing as a judicial function? For a lot of it, the reality is that judges have precious little option in terms of what the courts' administration gives them? Sometimes it can almost be a reason for not probing further on inefficiency in listing to say, "Well, it was the judiciary."

Lord Burnett: Individual judicial decisions on listing in most jurisdictions are relatively rare. Last week, I was sitting in the Court of Appeal criminal division. I did not personally decide when the case was going to be listed. The office listed it. Judges make individual decisions, but the issue is that overall listing has to follow judicial direction and policy.

Taking ourselves into a completely different jurisdiction, in the county court it is not uncommon for a district judge or deputy district judge to do 10 or 15 short applications in a day. It is not for an official suddenly to say, "I'm going to make them all do 20." That can happen only if there is a judicial decision to that effect, so there is the general as well as the specific.

- Q22 **Chair:** The concern often raised with a number of us—you referred to the county court—is that cases are taken out of the list at very short notice. A small money claim that has been set down for some months for trial on a Monday is taken out of the list on the Friday and will not go back in for another six months. The reason that is given is lack of judicial availability.

Lord Burnett: I am afraid that is the reality in the county court and in the family court. It can be difficult to find deputy district judges to come in and do the list. It is happening less than it was, because great efforts are being made to encourage deputies to sit. The limits have been taken off the number of days they can sit in a given year, but I know that it is still happening. It is very unsatisfactory that a list should be cancelled at short notice for want of a judge.

- Q23 **Chair:** The suggestion is that, unfortunately, it is still happening with considerable frequency. Do you have any statistics at all?



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Lord Burnett: I am afraid that is not something I have any statistics on, but I will make inquiries and let you know if I find anything.

Q24 **Maria Eagle:** Lord Burnett, you have told us already a little bit about the constraint on judicial capacity. In the past 10 or 11 years, you have had increasing limits on sitting days that have been constrained. Now that you are allowed unlimited sitting days to tackle some of the backlog, to what extent does the lack of judges' availability, with criminal judges not being recruited in the last round, stop you tackling the Crown court backlog? Is it a big problem or a decreasing one?

Lord Burnett: At the moment, it is quite a big problem. Just to get the numbers in one's head, the sitting day allocation for 2019-20 in the Crown court was 82,600 days. It was increased by a small margin later in the year when it became apparent that the projections for work were not being borne out by events. In 2021-22, we expect to sit just over 100,000 days. That is a very big percentage increase, and that is why we are having to find so many of those days by encouraging our recorders to sit. The irony is that before Covid when the days were being cut, cut and cut, we found it difficult to find the days for our recorders to sit. Having been told two years ago, "We're struggling to find you the 15 days we would like you to do," now we are begging them to do more. I emphasise that many of them are sitting more and the new ones are sitting, but we expect before the end of this financial year to sit around 100,000, maybe 101,000. We will do our best to sit more, and the rates are going up.

Next year, 2022-23, I will be very disappointed if we can't find the judicial resources to sit 105,000 or 106,000 days. I hope that the money will be made available to do that. After that—these are projections being done by HMCTS and the MOJ—we think we will be able to sit at a rate considerably beyond 105,000, maybe as many as 110,000. If we can get to that sort of rate and get the funding to sit at that sort of rate, there is a realistic prospect of bringing down the outstanding case load, but that too depends on what happens to the incoming work. There are huge uncertainties about that. Looking into the future is always difficult, but there are lots of variables that mean it is difficult to predict exactly what is going to happen.

Q25 **Maria Eagle:** The National Audit Office said the Crown court backlog increased by 23% in the year leading up to the pandemic. We know that it was going up.

Lord Burnett: Yes.

Q26 **Maria Eagle:** It increased by a further 48% thereafter, since the onset of the pandemic, to over 60,000 cases on 30 June. One of our new justice Ministers recently told the House of Commons that the extra money allocated in the spending review for the criminal justice system "will allow us to reduce the Crown court backlogs caused by the pandemic from 60,000 to date to an estimated 53,000 by March 2025." Do you recognise those numbers? A fall of 7,000 in that time does not sound like an



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enormous hit on tackling the backlog.

Lord Burnett: I agree.

Q27 **Maria Eagle:** Okay. You don't have to say any more than that. I do not want you to conduct your concordat negotiations in the Committee room.

To what extent do you think that the current legal aid framework and the way in which it works has an impact on the operation of the courts? The Committee has recently done a report on the future of legal aid. One of the things we noted was that the system does not seem to provide enough incentives for legal representatives to take early action to progress cases through the system as quickly as might be the case. The incentives are all the wrong way. In a system where criminal lawyers are finding it hard to get remunerative rates anyway, an incentive that incentivises being slow, or not proceeding swiftly in resolving cases, does not seem to be helpful. Do you think there is an issue there that might be tackled?

Lord Burnett: Yes, I do. The detail of it is extraordinarily complex, but, as you know, Sir Christopher Bellamy has been conducting a review of criminal legal aid and will very shortly be in a position to provide his report to the Lord Chancellor. I am pretty confident that Sir Christopher has looked at the issue raised by the Committee in great depth. To the extent that there is an issue about the structure of legal aid—in addition to the cruder issue about the rates of remuneration—having an effect on the way cases are being run, I am confident he will have found it; he will expose it and explain to the Lord Chancellor what needs to be done to resolve it. If it is there—I cannot prejudge what Sir Christopher will say and I do not have his depth of knowledge or expertise—it has to be dealt with.

Maria Eagle: Thank you.

Q28 **Dr Mullan:** We talked at the outset about some of the civil jurisdictions, but I would like to revisit that. Perhaps you could highlight across the civil jurisdictions where you think there are the greatest concerns about backlogs and the processing of cases.

Lord Burnett: As I mentioned in my introductory observations in answer to Sir Bob, in the higher courts there is not really a Covid-related outstanding case load issue. In the county court, one of the problems we have at the moment, and one I have spoken about in the past, is lack of data. It ought to be possible for me to say with confidence how many cases are waiting to be disposed of in the county court, how long they are taking and all the rest of it, but that is not possible because, as so much is still not digitised, the data are very poor.

I am told that the outstanding case load and delays in civil are pretty much back to where they were pre-Covid. There are all sorts of interlocking reasons for that. One that I have mentioned already is that the volume of cases issued in the county court in 2020 and 2021 was significantly lower than normal, and that was a Covid-related effect.



Secondly, as you will know, Dr Mullen, there was a whole series of interventions from the Government to pause possession claims. That helped to enable other work to be done. One of the things that appears to have happened—I put it quite tentatively at the moment—is a change of culture, particularly among social landlords, reflected in their use of court proceedings as the start of what they do—in other words, issuing and then trying to resolve problems. As a result of Covid, it went the other way round. They try to resolve problems and then issue. Those who are responsible for the detail of civil justice—the Master of the Rolls and the deputy head of civil justice—are relatively optimistic that there has been a change of culture that may be banked for the future.

We also have some changes that have come along as a result of the reform programme. Online money civil claims, which started as a pilot, have expanded and are now a very broad project. There is the whiplash portal with damages online, and others will come along as well. The view of those who are looking closely at this is that the problems in the county court are rather fewer than we feared they were going to be.

Q29 Dr Mullan: You mentioned the lack of digitisation and the reform programme. Could you give us a sense of how well that is progressing? You said the problems are not as bad as you thought they might be, but have specific things been happening in the background to progress those reforms?

Lord Burnett: The reforms are carrying on. I have mentioned a number of those that touch the civil courts directly. The three big areas of reform yet to be completed are the common platform in crime; the scheduling and listing tool, which I mentioned in answer to a question from Sir Bob; and the video hearing service, as it is called. VHS takes all of us back quite a few years, doesn't it? It is a bespoke video hearing system which is a good deal better than anything we use at the moment. It is being piloted and like all pilots it is exposing glitches and difficulties; it is not without its problems, but it is coming along as well.

Q30 Dr Mullan: On recruitment, you told us that previous appointment rounds were unable to appoint to the capacity you had in positions. Has there been an improvement in that regard and, if there has been, what have you done to secure that improvement?

Lord Burnett: In the civil court, which is the focus of your question, we still have a real problem. Last year, the shortfall in the recruitment of district judges, who provide the backbone of the county court, was very substantial indeed. There is a district judge competition running at the moment where the complement sought is 100 new judges. Whether the JAC will have 100 candidates to recommend for appointment we have to wait and see. There have been some real problems in recruiting district judges of late. The recruitment of deputy district judges has been much more successful. There will be another round of deputy district judges recruited during the course of the next year, but there are still real problems with the district judge bench.



Q31 Dr Mullan: Without wishing to rehearse the reasons you gave when you spoke about it earlier, what would you say are the barriers to those being filled? If we were doing it 20 years ago, would you always manage to fill it? Is it a new problem, or a worsening problem?

Lord Burnett: It has been a particular problem in the last two or three years. The reality is that for pretty well all the salaried judicial posts we have been falling short, in the sense that the JAC has not had candidates it has been able to recommend. We are still one or two down in the High Court, but that is a problem that is now almost sorted. I mentioned that we are 12 down in the circuit bench this year, and more with the district bench. The reasons for that are quite complex and multifaceted.

One of the things that worries me is that the district bench is disproportionately located in courts that are not very good. One has to be realistic about this. We are trying to recruit successful lawyers, solicitors and barristers, who will not have spent the last 10, 15 or 20 years of their lives in buildings where the heating or the air-conditioning might not work, the roof leaks, the loos leak and so on. Although that is not the universal picture—I am not suggesting it is—it is too common a picture. People coming from the legal profession are used to working in environments where the IT works, where there is appropriate staff support and so on. This is one of the consequences of the degradation in the funding of the system that we have seen over many years. The environment in which people are expected to work in many places is just not good enough. That is one thing.

The other thing is that lately the job of the district judge has undoubtedly become more difficult because the pressures of work are greater. District judges spend more and more time doing family cases and less and less time doing civil cases. The insistency of family work is great, and that is a factor that undoubtedly bears on recruitment. There have been difficulties with remuneration. As you are aware, there is a Bill before Parliament at the moment which sorts out the pension issues that we have been talking about for so many years. I think that will help with recruitment, but at the moment the job of the district judge in particular needs to be made more attractive, and we are working to try to achieve that.

Q32 Chair: Among the very helpful observations you made about the position in the county courts and so on, you have said on a number of occasions that you thought we were back down to pre-Covid levels in civil as much as in crime. Is that an acceptable level?

Lord Burnett: No is the answer. Cases should be dealt with when they are ready to be dealt with, if the system can cope with them. In civil there can be some different factors coming in, because often the parties are not that keen for them to be resolved too quickly, for all sorts of reasons. Timeliness is the thing that really matters in my mind. In any jurisdiction, you might have 100,000 cases waiting to be dealt with, but if they were all going to be dealt with in six months nobody would be very unhappy. If you had 10,000 and they were going to take three years, you



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would be very unhappy indeed. I think that the focus on the number is not necessarily the only thing we should be looking at.

Q33 **Chair:** The other issue in civil is that most of the parties will not be legally aided and, therefore, if there are abortive hearings they are likely to pick up the costs thrown away. If a case is twice taken out of the list in the year it means £10,000 in thrown-away costs. That is not just to the litigants, is it?

Lord Burnett: It is very undesirable. In the county court a very large volume of the work is conducted by litigants in person.

Q34 **Dr Mullan:** We are currently conducting an inquiry into open justice. I want to ask you about that in relation to the civil courts. I will read you some evidence given to us by the Bureau of Investigative Journalism: "Our reporters attempted to attend a day of possession court hearings on 110 occasions over the two months, but on six different days we were turned away by judges who told us all possession hearings were held in private. In fact, possession hearings should be public as default."

They also gave examples where they were told they would be allowed in only if there was a letter from a senior judge. On another occasion, they were told they would be allowed in only if there was permission from the defendant. What is your sense of how successfully the media are able to attend court? How would someone follow up individual instances where they felt they were unjustly turned away, and what would be done to look into that?

Lord Burnett: Possession hearings are public hearings, so I am disturbed to hear that those problems were encountered. Obviously, I do not know anything about the individual cases. There have been difficulties during Covid in the numbers who can come safely into the building—footfall questions—but members of the public and the press should not be turned away from possession hearings because they are not private. Beyond that, I am not sure what I can say in response.

Open justice is absolutely at the heart of what we do; it is at the core of the values of the common law and has been for centuries, and it continues to be at the core of it. During Covid, we have tried to facilitate the attendance of the press in particular to hearings they wish to attend, even if they have been doing it remotely. I cannot say it has been perfect, and the examples you give suggest it has not been, but huge efforts have been made to publish lists where the cases are being dealt with remotely, or some of the people are attending remotely, so that members of the press can also ask to join remotely in appropriate cases. It has been a great success in some of the more high-profile cases that have been running around in the last year or 18 months. Oddly enough, it has facilitated much greater press access than would otherwise be the case, so nothing has changed.

Open justice is at the core of what we do. In crime and civil that has always been the case. There are large projects under way in the family



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courts to increase access for the press and the public, as I am sure you know. The president of the Family Division published a large report on that only the week before last, so a great deal is being done.

- Q35 **Dr Mullan:** If you are a journalist and you feel you have been inappropriately turned away from a hearing, what is the mechanism whereby someone can say that it has been done incorrectly? How would that court be looked at, reviewed and scrutinised in how it is administering open justice?

Lord Burnett: I do not want to encourage endless letter-writing, but if a member of the press has not been allowed access to a public hearing, he or she should get in touch with the local court and ask why. In the example you gave it seems that judges were misunderstanding the position, and that needs to be brought to our attention.

- Q36 **Dr Mullan:** Could they make a formal complaint? How does it work?

Lord Burnett: We do not have a formal complaints mechanism. If somebody is worried about what has happened, they usually find a way of letting those in authority know, including occasionally writing to me.

- Q37 **Dr Mullan:** I take your point; you do not know exactly what is happening in all those circumstances. There may have been legitimate reasons we are not aware of, but it is important that they have a route to scrutiny.

Lord Burnett: I will get a copy of that evidence and, as they say, I will take that point away.

- Q38 **Kate Hollern:** In May, you told the Constitution Committee that “it is...idiotic that HMCTS recruits good people and trains them, then quickly loses them. It shouldn’t be allowed.” On the back of those comments, do you believe that HMCTS is understaffed, especially with respect to legal advisers and court clerks? Do you think that unrealistic workloads are being put on people?

Lord Burnett: In answer to the first part of your question, I should note—the Committee can get the detail of this from the Ministry of Justice or HMCTS—that there has been a significant restructuring of pay in HMCTS, designed in part to condense the differentials between HMCTS pay at a particular grade and the pay in other Government agencies and Departments to try to reduce the temptation for people to leave. There has been some work done. It is not for me to comment on how successful it will turn out to be because in all of these things there are winners and losers, so it depends on who you talk to, but that is something about which you might like to get information from the MOJ.

HMCTS is struggling to recruit sufficient legal advisers. One of the reasons for that is that the pool of lawyers likely to be available and suitable is being fished by others at the same time, particularly the CPS, which has been increasing its lawyer numbers over the last year or 18 months. Although I do not carry the figures in my head, I hear frequently



that the number of legal advisers is down in quite a few parts of the country, and that is having an impact on the number of magistrates courts that can be sat, particularly the family courts that are staffed by magistrates. It is having an impact there. Whether pay differentials are part of that is something I am not in a position to comment on, because I do not carry all the figures in my head. I suspect, but I do not know the answer for sure, that, as in any organisation, if you are short-staffed one of the consequences is likely to be that the staff you have are asked to do more, or just do more. I suspect that it is just the same for legal advisers.

Q39 Kate Hollern: Obviously, a lot of your advisers have wide experience. Would you be in a position to offer advice on what else could be done to help reduce the problem?

Lord Burnett: Off the top of my head, I do not think I am well enough informed to do that. Undoubtedly, jobs are attractive to different people for a combination of different reasons. Obviously, pay is extremely important; the burdens of the job are very important. One of the advantages many legal advisers have is that because there are posts all over the country it is possible to work close to where you live. That is an advantage, but it is not so true in the big cities and urban conurbations. The precise details of the problems in recruiting legal advisers to HMCTS is something you will have to take up with HMCTS, because it is not something I have direct responsibility for and I am not well enough informed on it to give advice.

Kate Hollern: Thank you.

Q40 Paul Maynard: Lord Burnett, you have mentioned twice already today the state of the court estate: the thumps coming from the heating that is going wrong; the peeling paint; the proliferation of buckets collecting drips left, right and centre. That makes for a very unwelcoming environment for the public and an unpleasant working environment for those in the court system. I am interested to understand a little more what impact you think that might have on HMCTS's modernisation programme specifically, and on the ability of the courts to catch up on the backlogs. Yes, it is a nasty state of affairs and it has been thus for quite a while, but what practical impact is it having on the problems we are facing right now in the court system?

Lord Burnett: I think it has a series of effects. The first I have already mentioned. I am fairly confident that it is one of the inhibitors to attracting people to become judges. I know that to be so because that is what people say. I suspect that it is very demoralising for staff as well. The truth is that, surely, if people are demoralised by their physical environment they are much less likely to work effectively and enthusiastically. The reality is that everybody is human and, if you have to put up with difficulties that are not very reasonable, it is likely to have an impact on how you are working.



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There is a direct impact. We have talked about this in the past, when I appreciate that you were in a different position. When the ceiling falls down in a court, as it does from time to time, that court is out of action for some time. We have not had the cold snap yet, but every winter we lose hearings because the heating is broken. There is a limit to how much you can expect people to sit in court in coats, bobble hats and gloves. You just cannot do that. In the summer we have the reverse problem. In many of our buildings the cooling systems break down and they become intolerable. Every year, we have lifts breaking down which take ages to repair and mean that courts cannot be used. There is a direct effect on the capacity of the system to conduct business. That is only part of it. The much more fundamental point is that it is simply not reasonable to expect the public, our staff, our judges or the professionals—all those who come to court—to endure conditions that are simply intolerable.

- Q41 **Paul Maynard:** You mentioned that this was not a universal situation and there are courts of good standard. I have yet to see one, but I will take your word for it. Are you able to provide any assessment, or are you aware of any evaluation, of the throughput at a high-quality court versus a poor-quality court? It would be an interesting dataset to evidence your points.

Lord Burnett: If I may, first I will pick up your observation. To hear a former Parliamentary Under-Secretary of State at the Ministry of Justice say he has never seen a court in good condition is something that I—

- Q42 **Paul Maynard:** That may be why they were taking me on these visits. I do not know. They did not want to show me the best ones to get more money out of me. Who knows?

Lord Burnett: I will take that away. As for the comparative figures, they exist in the sense that, if asked, I do not doubt that HMCTS will be able to produce statistics about days lost to maintenance problems. Mr Maynard, you will remember that a survey was done of the whole of the court estate some years ago with a view to identifying what needed to be spent on it. The figures were eye-watering—many, many hundreds of millions of pounds. Of course, if you ask surveyors to tell you how much you need to spend on a building, they put everything in, so I am not for one moment suggesting that the gross figure, which was at the top end of hundreds of millions of pounds, needs spending immediately, but there is a need to spend hundreds of millions of pounds before too long on the court estate; otherwise, it will just get worse. It is no different from our homes. If you do not clean out the gutters, you get water coming in and then you have to replaster the walls. It is as simple as that.

- Q43 **Paul Maynard:** You would agree that it is a material risk in reducing the backlog.

Lord Burnett: Yes.

Chair: That is the first time we have had a member of the Committee give some corroborative evidence, if I may put it that way, perhaps very



tellingly too.

Paul Maynard: I am hoping that on our Committee visits I can now see the very best rather than the worst.

Chair: I think the point is well made for those of us who make the visits and why we need to do more, just to see the physical condition of the estate.

Q44 **Rob Butler:** I want to pick up a few of the points you have raised, Lord Burnett. The theme in many of the questions has been the problem of recruitment, whether we are talking about recorders, district judges, or legal advisers in the magistrates court. Right at the beginning, you also mentioned an unanticipated concern about capacity in the legal profession to make up the backlog. Essentially, are you saying that there is a shortage of lawyers in the system, full stop?

Lord Burnett: I am pausing because the shortage of lawyers I was referring to is very much a Crown court phenomenon. No one has yet said to me that there is a general shortage of lawyers to conduct litigation, for example, or a general shortage of lawyers to deal with family cases, tribunal cases and so on. There is a problem in the criminal legal profession, and the likely reason is the relentless reduction in real rates of remuneration over the last 15 years.

You will remember that the Law Society did a lot of work on this two or three years ago and produced heat maps, effectively, of where there were legal aid deserts. One of the most alarming things that their work revealed was the increase in average age of legal aid solicitors, which tells you everything you need to know. The same appears to be true in some areas of the country with the Bar; there has been a move away from criminal work and it is not surprising at all. I come back to Sir Christopher Bellamy's work, because this needs to be sorted. The rule of law depends in every area of legal endeavour on having a vibrant, independent legal profession that can service the work that needs doing. That is one aspect.

Along with everybody else, I am reading all sorts of interesting commentary about how the legal profession is moving and changing at the moment as a result of the ability to work from home. I do not know whether you have seen some of what is being said at the moment, but London firms of solicitors, for example, which are generally able to pay a bit better, are recruiting people in parts of the country a long way from London who then will be working from home a lot. That is having an impact on the local legal profession. I think we are seeing some quite profound changes going on at the moment, but is there a shortage of lawyers overall? I would not have thought so, but there is a shortage of criminal lawyers.

Q45 **Rob Butler:** There is a shortage of pools of people to appoint to some of the judicial functions you have been talking about, and legal advisers and



potentially those who serve in the criminal courts.

Lord Burnett: I am confident that there are plenty of well-qualified people capable of filling all the judicial vacancies we have. The difficulty at the moment is attracting them to apply.

Q46 **Rob Butler:** You have highlighted some of the reasons for that. I wonder whether a further one explicitly is morale across the judiciary. That is something you note in your annual report. To quote your words, judges have been "subjected to harassment by members of the public on social media." Could you tell us a little bit more about how that harassment is manifesting itself in the reaction of the judiciary to you and whether you think that is feeding through and potentially putting off applicants?

Lord Burnett: In broad terms, we try to measure morale through our judicial attitudes survey and compare it with the one done previously. There was one done last year. Overall, morale appears to be better than it was. There are pockets of difficulty.

Questions of harassment should not be overdone, if I may say so. Speaking to parliamentarians, I am very conscious that a number of your colleagues and maybe some of you as individuals have been subjected to astonishingly vile harassment from all sorts of people. I do not think there are any judges who get it as bad as some of your colleagues do. One of the problems that is perhaps true across society generally is that people are able very easily to vent their frustration and spleen and to say and do things that until 15 or 20 years ago they might have muttered to themselves, or to somebody in a pub, but now they can just go straight on to social media and say something.

The judges who are most vulnerable to nastiness from litigants are those dealing with family cases, particularly family cases where there are no legal representatives. It is not a universal problem, but it is sufficiently common to be one of those features that is in the back of everybody's mind. In family cases, when there are no lawyers to mediate the behaviour of the litigants, you are dealing with people who are before the court because, basically, they cannot sort themselves out. They are often emotionally very highly charged. The experience of everybody who deals with those cases is that you get some who are not very well able to approach the issues rationally, so they are more likely to see the judge who makes a decision they are not happy with as part of the problem. I would not want to overstate it, but it happens.

What I should emphasise is that we now have in place quite elaborate mechanisms to provide support to judges to deal with those problems. In the event that anything is done that raises a concern about safety, they include protocols with local police; they include getting things taken down from social media; and they have included seeking injunctions on behalf of judges to protect them. One of the good developments over the last three to four years is that, as a result of the general increase in this kind of behaviour, a lot of work has been done to enhance the welfare support



and practical protection that can be given to judges if they face this difficulty.

Q47 Rob Butler: I am sure that will be reassuring to many people. Perhaps I could briefly explore another aspect of social media that arose during our inquiry into open justice. It is now possible for any member of the public to go into court and not just observe but tweet what is going on at the same time. I declare that many years ago I was a trained journalist. We knew what the law was in covering cases and how to avoid getting into contempt. Do you have any concerns about the fact that there is almost a free-for-all in ongoing description and commentary on cases, and do you think that poses any threat to justice being done?

Lord Burnett: The short answer is yes, of course it does. The position has been, certainly for a decade, that journalists who attend courts are almost always at liberty to tweet. That is a very good thing. In particular, for local journalists to be able to explain what is going on in a case locally is important. As you say, journalists will be sensitive to what can and cannot be put into the public domain. The classic is a criminal case, a sex case, where the complainant has lifelong anonymity. Relatively few judges would be sanguine about ordinary members of the public tweeting from a court if there was anything sensitive about it at all, because there is then no effective control over what is going on. With journalists, there is an element of trust.

The same issue arises when people seek to join hearings remotely. There are many cases where genuinely interested people will ask to join remotely—for example, the family of one of the parties in the case. Generally, judges will allow that if they know who it is and there is a remote hearing, or what is called a hybrid hearing with some people attending remotely and the judge is in court. If it is happening anyway, most judges would be pretty sanguine about a journalist attending remotely. None of us is likely to be remotely sanguine about opening it up to everybody, because you lose control completely. You have no idea what people are doing with the material they are looking at. It can be recorded; it can be broadcast when it should not be and so on. These are questions that flow into quite profound thinking about open justice for the future.

There is sometimes a tendency for people to think that now everything can be live-streamed, anybody can join remotely and we should allow it willy-nilly, but the truth is that it is much more complicated than that. For journalists, when a hearing is anyway being organised to allow people to attend remotely, it seems to me generally to be a good idea because it provides broader scope for reporting, which is in the public interest.

Rob Butler: Thank you.

Q48 Maria Eagle: I want to ask a little bit about the continued lack of diversity in the judiciary. The pace of change has been quite slow. Do you think that sits with the appointment process or the statutory requirement



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to appoint on merit, or both of those things? It has been going on for many years. For years, everybody has had a general wish to improve it and yet we still have the problem of an obvious lack of diversity. Do you have any thoughts on why that is and where the problem lies?

Lord Burnett: For me, the first starting point is that a diverse judiciary is necessary to secure public confidence. The second starting point is that the JAC recruits from the legal profession. There is an enormous pool of talent out there which we, the judiciary, would like to tap into. At the moment, it is likely that we are not attractive enough to large numbers of solicitors and barristers we would love to see become judges.

At the heart of any issue about diversity is the reality that the judiciary is a second career. Even for those who are joining as fee-paid judges, for those positions where the statutory requirement is five years post qualification, the average actual experience is 17 years, and for salaried jobs it is much more, so we are inevitably dependent to some extent on the diversity within the legal profession generally at its senior levels. The legal profession—solicitors, barristers and CILEX—is working hard to increase the diversity in the senior ranks of their respective parts of the legal profession. That will benefit the judiciary.

A huge amount of work is going on to try to increase the diversity of those who apply for judicial posts. The Judicial Diversity Forum, which I have spoken about in my annual report and you will have heard about from others, was established to bring together those who were in a position to effect change: the Lord Chancellor; the chair of the JAC, me; the chair of the Bar Council; the president of the Law Society; and the president of CILEX. Collectively, the first thing we did was to look very closely at all the underlying statistics because from that important evidence base you can begin to see what is going on. Secondly, collectively and individually, each part of the system is working hard to promote diversity in a practical sense, by which I mean not just talking about it—it is very easy to do that—but setting up programmes to identify people who might be suitable for judicial appointment and provide mentoring, courses and things of that sort. There has been a huge amount of work done in that regard.

Where has it led us? The position as far as gender balance is concerned—you can look at all of the statistics; I will not bore you with them—is that the appointment rate is pretty much the same for men and for women. The difficulty we have is that the higher up the system you go, we are still catching up. At the fee-paid appointment level, there is gender balance pretty well. The proportion of candidates being appointed from different ethnic minorities has also grown. It has grown too slowly for my liking, but it has grown.

What we are also doing at the moment, which is different from the rather broad approach until a few years ago, is to dig down into the statistical material to see whether different ethnic minorities have differential success rates. I think that is very important because it has shown that for



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all parts of the judiciary those of south Asian heritage have been making visible progress, but those from West Indian and black African backgrounds have not. As you know, the figures have pretty well stalled.

I think the most important thing is that we are looking so carefully at it now, and everybody is trying to devise ways to encourage applications from good people, that there will be further progress, frustratingly slow though it is for me at the moment.

- Q49 **Maria Eagle:** When do you think we might we have equality at the higher levels, say 50-50 for women and a relevant percentage for people of black African heritage? One way of challenging yourself is to say, "This is where we want to get to," and then plot a path to get there. If you were to take that as an aspiration—I am not suggesting it is precisely that—how long do you think it would take?

Those of us who over the years have worked on issues such as this in various organisations, including the Labour party I might add, find that having an endpoint and a place to get to is sometimes a way of making sure you get there in a reasonable time, rather than just saying, "Well, it's slower than we'd like." When I was in the Department, somewhat before Paul, I heard that said at the time and we do not seem to have made much progress.

Lord Burnett: Things have moved a long way in the years since you were in the Department.

- Q50 **Maria Eagle:** I am glad to hear that. When might we get there?

Lord Burnett: The answer is that I do not know. One of the things one has to bear in mind is that, if you are looking at the High Court for example, the rate of success of female applicants is as high as it is for male applicants and steady progress is being made, but turnover at the very top of the judiciary is quite slow. There need to be vacancies, and then applications and then appointments. I think it would be quite difficult for anybody, even if they had the time to sit down and work out all the variables, to come up with an answer that was anything other than a finger in the wind.

Maria Eagle: It is too soon to say. Thank you.

- Q51 **Chair:** I noticed that today you and the Lord Chancellor have announced changes to the procedure for investigations into judicial misconduct. That is something we often hear about or talk about. Is there anything in particular that has prompted that?

Lord Burnett: This was a review I commissioned some years ago, with either Lord Chancellor Buckland or Lord Chancellor Gauke—I cannot now remember—to look at the way judicial conduct worked. The system was put in place not long after the Constitutional Reform Act changes, and it seemed to us that it was time to have a good look at it to see whether it needed changing and improving. A consultation document has gone out,



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as I now know because you have told me. Once that is through there will be a look at it. It is nuts and bolts and nothing very fundamental.

Q52 **Chair:** It has gone out enough to be in the *Law Society Journal*, but it is not prompted by anything in particular. That is very helpful. Lord Chief Justice, thank you very much indeed for your time and for giving evidence today. It is appreciated. Your voice has lasted well.

Maria Eagle: Better than mine.

Lord Burnett: The two of us are struggling a little.

Q53 **Chair:** We will all see how we are in the morning, to see what the ventilation is like in the room.

Lord Burnett: It is a real pleasure to see everybody. As I said at the outset, I was heartened that you have been managing to make some real visits to real courts. We will do everything we can to facilitate any visits you wish to make.

Chair: That is kind. We are encouraging individual members to go to their local courts as well as going on Committee visits. I am sure you will take back our thanks collectively to all those who work in the Court Service and the judiciary for what they do. The session is concluded.