



HOUSE OF COMMONS

Justice Committee

Oral evidence: [Coronavirus \(COVID-19\): The impact on prison, probation and court systems, HC 299](#)

Friday 22 May 2020

Ordered by the House of Commons to be published on 22 May 2020.

[Watch the meeting](#)

Members present: Robert Neill (Chair); Paula Barker; Richard Burgon; Rob Butler; James Daly; Miss Sarah Dines; Maria Eagle; John Howell; Kenny MacAskill; Dr Kieran Mullan; Andy Slaughter.

Questions 137 - 175

Witness

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



Examination of witness

Witness: the Rt Hon Lord Burnett of Maldon.

Q137 **Chair:** Welcome to this meeting of the Justice Committee. I am grateful to our witness, Lord Burnett of Maldon, the Lord Chief Justice, for joining us. Thank you very much for making the time.

Lord Burnett: It is a pleasure to be here.

Chair: It is very much appreciated.

As you will know from being familiar with the process, Members have to make relevant declarations of interest. I am a non-practising barrister and consultant to a law firm. In fact, we are members of the same Inn of Court, but I do not think that will prejudice our discussions in any way.

John Howell: I am an Associate of the Chartered Institute of Arbitrators.

Dr Mullan: I have no interests to declare.

Maria Eagle: I am a non-practising solicitor.

Richard Burgon: I was a practising solicitor prior to being elected.

Paula Barker: I have nothing to declare.

Andy Slaughter: I am a non-practising barrister.

Kenny MacAskill: I have nothing to declare.

Rob Butler: Prior to my election, I was a non-executive director of HM Prison and Probation Service, and a magistrate member of the Sentencing Council, of which Lord Burnett is President.

Miss Dines: I am a practising barrister. I was called to the Bar, Lincoln's Inn, in 1988. I have not taken any cases since my election in December.

Q138 **Chair:** Thank you very much.

We are grateful to you, Lord Burnett, for your time. As you know, we are particularly interested in the position in which courts find themselves in the current Covid-19 circumstances, but there are some broader issues that we would like to talk about.

I will start with the most pressing issue—the impact of the Covid outbreak on the functioning of the courts. The Minister, Mr Philp, was before us last week. He said that the courts are operating at less than half normal capacity. Can you update us on the position?

Lord Burnett: Yes. The position has improved over time since the lockdown on 23 March. The figures that I have suggest that the performance of the courts is rather better than 50%, but it varies from jurisdiction to jurisdiction.

As I think everybody will know, we started making adjustments even before the lockdown to try to encourage the use of telephone and online



HOUSE OF COMMONS

platforms, where it was possible to conduct proceedings in accordance with the interests of justice. That has continued ever since.

In the High Court and in the business and property courts around the country, in the region of 80% of the ordinary business is being transacted. Both divisions of the Court of Appeal are continuing to sit and are conducting roughly half of their usual business.

In family and civil, the position depends on the nature of the work one is talking about. The public law family work has continued, certainly not as usual because the volumes are down, but all the urgent work is being dealt with.

In private family law, the position is less rosy, simply because priorities have to be established. In the family field, there is a lot of urgent work that just has to be done. The same is true, of course, in quite a lot of civil contexts.

In crime, the position is much more complex. The volume of work being undertaken by magistrates courts has grown very substantially in the last few weeks. Trials are being conducted again. The single justice procedure is back up and running, and will soon be back at full blast.

In the Crown court, as everybody knows, it was necessary to adjourn trials temporarily from 23 March. We have just started a few trials in the Crown court again, but in the interim the Crown court has been cracking through all the other work. In fact, one of the ironies of the position is that the number of disposals has actually gone up because we have been able to deal with a lot of outstanding sentencing. There have been a lot of procedural hearings. A lot of cases have been called in for mention, which enables pleas to be taken and so forth.

The picture is actually rather better than 50%, so far as I am aware.

May I mention one thing about statistics and data in this field? In any ordinary business environment, a chief executive or an operations director would be able to say, "Tell me what the turnover in a particular store was. Tell me what the occupancy rate in any hotel was." A button would be pressed and the figures would come out.

What we have discovered, as we have been trying to delve down into all the figures, is that because of the rather haphazard systems that still operate in a lot of our courts it has been extremely difficult to get reliable data. An enormous amount of work is being done by the Courts Service, particularly by analysts, to extract reliable data. In my view, that is going to be absolutely critical to making decisions about how to go forward into the future.

Q139 **Chair:** That is a fair point. While we are talking about data, with those caveats, I would be interested to know how England and Wales as a jurisdiction compares with those of some of the other major economies



and our neighbours, who have had to go through a very similar process of lockdown at one point or another.

Lord Burnett: One of the decisions that we took right at the beginning of this was that we had to keep the wheels of justice turning. That has been achieved—quite remarkably, in my view. It is a tribute not just to the judges and magistrates, although I would pay tribute to them, but to the Courts Service and all its staff, from top to bottom, who have been quite magnificent in keeping things going, as have the professions and others involved in our cases.

The position around the world was very patchy. It appears that we were quite a long way ahead of the game. A lot of countries essentially shut down their courts when these problems began to engulf them, which we did not do. As a result, we have been able to keep a lot of work going that I know in other jurisdictions simply came to a halt.

That has been commented on, particularly in the context of the commercial and business work that we do. The commercial court and the business and property courts, as I have indicated, have carried on, not entirely but pretty much as normal.

Q140 **Chair:** That is interesting. As a Committee, we share your observations about the hard work that has been done right across the piece by everybody involved in the system, yourself and others included. We should not leave you out of the credit. It is important, and those of us who have dealt with our own county court staff locally will be conscious of that.

Given that we clearly have an issue with loss of capacity—you have told us about the steps that are being taken—do you envisage it being possible to ramp that up further?

Lord Burnett: Yes. When this problem engulfed us, one of the first things that was done was to divide the court estate into three. We developed courts that we called open courts, which are fully open to everybody; courts that are staffed and in which judges can operate, from where quite a lot of the video and telephone hearings have been taking place; and a number of courts were suspended.

Work is going on at the moment—again, in close co-operation between judges, the Courts Service and the MOJ—urgently to reopen the courts that have been closed and to turn those courts that are staffed but not fully open into fully open courts.

Across the whole of the estate an exercise is under way to determine what work can be done in every courtroom that we have, taking account of the Public Health England guidance on social distancing. It is important that we do that because we want to get as many hearings going as possible.

Q141 **Chair:** Looking at where the courts that are open are operating, and at



HOUSE OF COMMONS

those where it has been possible to restart jury trials in a criminal jurisdiction, there are clearly one or two geographical gaps. For example, in east England we do not yet seem to have courts operating. Are there plans to plug that, and how much is that of concern to you?

Lord Burnett: I was not aware that there was any swathe of the country that did not have open courts, so forgive me if I do not have all the details of each court that sits in that hierarchy of categories.

Jury trials are obviously of great concern to the public. We have them running at the moment in London, Cardiff, Manchester and Bristol. We hope that jury trials will start next week in Winchester, Reading and Warwick. Generally, and gently, the open jury trials will spread across the country. The same is true of the use of the courts in all jurisdictions.

Q142 **Chair:** The two that were drawn to my attention in the criminal context were the north-east—normally, you would expect Newcastle—and east Anglia.

Lord Burnett: The idea is that, with a little bit of luck, by the end of June or thereabouts all the courts that are not open will be open. It depends on all sorts of logistical arrangements that have to be put in place, but that is what we are broadly aiming for.

Q143 **Chair:** We know that before the lockdown—for want of a better word—started, there was a backlog of about 37,000 cases in the Crown courts. We know too from the Minister last week that receipts coming into the Crown courts from the magistrates are down by about 77%. That was his figure. There is obviously an awful lot waiting to come through from the lower courts, much of which will find its way into the Crown court.

Have you been able to estimate the size of the pipeline and what is likely to be needed to get that back to an acceptable level from the judiciary's point of view?

Lord Burnett: The figure of 37,000 outstanding cases in the Crown court came from the published statistics from December last year. It is important to understand that that is the total number of cases in the Crown court at that point rather than an indication of the number of jury trials that are likely to come from them. That figure includes cases that have been sent for sentence by the magistrates court and cases that theoretically arrive as trial cases. As everyone will know, a very large proportion of them end up pleading.

That is an indication of one of the data problems that we have. What I have been trying to find out—we have not got there quite yet, I am afraid—is to identify with much more clarity how many trials we have, how many are trials with defendants awaiting trial in custody, and how many are defendants awaiting trial on bail.

A useful indicator roughly of the throughput is the number of jury trials that have been conducted over the past couple of years. In 2018-19 I am



told by the Courts Service that the average figure was about 900 jury trials a month. The year before it was more, but you will remember that the sitting days were cut. It is probably not a bad rule of thumb, but no more than that, to assume that the number of jury trials accumulating at the moment is of the order of 1,000 a month.

It is subject to this caveat. As you have indicated, the number of cases coming into the Crown court at the moment is very substantially reduced. The number of cases coming into the criminal courts altogether, at the magistrates court, is very substantially reduced. The information I have at the moment is that there is of the order of 1,400 cases waiting to go from the magistrates court to the Crown court.

That demonstrates that, if the current situation persists for very many more months, we are going to accumulate an outstanding body of Crown court trials that will take a considerable amount of time to dispose of under the current arrangements. If this all finishes within a handful of months, the position will not be so bad. I, like everybody else, am not in a position to predict at all what is going to happen.

The main constraint in getting Crown court trials going at greater volume is the need for social distancing. At 2 metres one can understand that rooms that could hold a large number of people can now hold only a small number of people. The broad approach that we have adopted is to assume that any trial that would have occupied one court is likely to occupy three: one for the judge, jury, advocates and defendant; one for the press and any interested members of the public who attend; and of course we need a much larger room to enable the jury to gather and deliberate in private.

One of the points that has been made to me by those who have been looking at this in great detail is that, were the social distancing guidance from Public Health England less than 2 metres, we would be able to run very many more trials. It is the same point that is made in business and across the whole of the country.

As I think you know, Sir Bob, my personal view is that, if it looks like this is going on for much longer, Government and Parliament are going to have to look at temporary legislative changes to enable additional Crown court trials to be conducted within our current constraints.

The other thing that is being looked at, and in detail, is the possibility of using outside accommodation to conduct court hearings. I suspect the reality is that it would be easier to conduct civil trials, tribunal cases and family cases in hotel conference centres, sports halls and things of that sort than jury trials. That is being looked at and might provide an opportunity for courts to be freed up to be used for the cases that really cannot be dealt with anywhere else. All of this is being thought about.

Q144 **Chair:** Realistically, the Criminal Bar Association and the Bar Council have said that, if we get to a stage where social distancing is relaxed, it



will be necessary, in effect, to sweat the assets by sitting the available courts to the maximum. Have you been in discussion with HMCTS and the Ministry of Justice about increasing the sitting days available?

Lord Burnett: Yes. I have made my position quite clear, both publicly and in internal discussions. As soon as circumstances allow, we should use the court estate to its maximum capacity in all jurisdictions to deal with the inevitable backlogs that are arising. That will require a recognition from Government that sitting days will need to be increased, certainly in crime and possibly in other jurisdictions as well. There will also need to be a willingness to use fee-paid judges to help augment the judicial capacity.

Q145 **Andy Slaughter:** I want to pursue the backlog figures. From the detailed answer you have given, there are obviously a number of imponderables here. Your previous evidence in the House of Lords was that the starting point of 37,000 was likely to go up by about 1,000 a month.

Lord Burnett: Yes.

Q146 **Andy Slaughter:** If this continues, in some form or other, for another year, how do you see that being addressed? We asked the DPP the same question yesterday, and the import of his remarks was that he expected to see matters rising. Where do you think we will be in a year's time with that backlog?

Lord Burnett: If a backlog in the Crown court does accumulate at that sort of pace, there will be a number of undesirable consequences. The first is that it will be extremely difficult to complete cases involving defendants remanded in custody pending trial within the custody time limits. That is undesirable even though, as you will appreciate, the custody time limits can be extended for exceptional circumstances. As a matter of general principle, it seems to me that keeping people in custody pending trial for a long time is undesirable. That is the first impact that there might be.

The second is that non-custody cases will inevitably be delayed yet further, because custody cases are going to have to take priority. Long delays in any legal process are extremely undesirable, but in the criminal context especially so. I hope it can be avoided. That is why I am repeatedly saying that I think the time will come—probably quite soon—for Government and legislators to think about temporary measures to enable a greater throughput of jury trials.

Q147 **Andy Slaughter:** Thank you. Perhaps you could give us a number for where you see us in a year's time. Would you in all candour expect us to have a higher backlog than now? It is very welcome to hear you say there would be prioritising of remand cases, if I understood you correctly.

Could I ask you about another effect of Covid? Is the recent Court of Appeal decision in Manning being implemented by courts in remand or sentencing decisions? Are they taking consideration of the conditions in



prison before sending people there? Are you doing anything, either through the Sentencing Council or through guidance to judges, to reinforce that?

Lord Burnett: It is a long-standing principle of sentencing practice that the impact of a custodial sentence on a defendant and on those close to a defendant can be taken into account, both in connection with whether an immediate custodial sentence is called for at all and in the length of sentence. There is nothing novel about that. It is now probably three weeks—it is very difficult to keep track of time at the moment—since I gave a judgment in the criminal division of the Court of Appeal emphasising that point.

I have absolutely no doubt that from the beginning judges have been alive to this issue, not least because it has been so well reported that, for reasons one understands of safety, prisoners have been subject to much longer periods of lockdown in prison. The position was that no visits were being allowed. One also understands at a human level the anxiety about being in an environment where it has been reported—I am not expressing a view— that there are concerns about added risk.

I am confident that it is a basic principle of sentencing practice of which all sentencers will be well aware.

Q148 **Chair:** You have hinted that there might be temporary measures. What might those be that Parliament might need to be involved in?

Lord Burnett: One that has been discussed quite comprehensively in the media and among professionals is the possibility of temporarily reducing the number of jurors in a Crown court trial to seven, which was done during the second world war, save, I think, for murder and treason. That is one possibility. It would certainly make matters simpler if the jury were smaller. It would not get rid of all the difficulties.

I have read many letters, comments and articles about the possibility of introducing temporary judge-only trials. My own view—and I think I expressed it to the Constitution Committee—is that that should be contemplated only in extremis because the involvement of lay people in serious criminal trials is important on account of that involvement. In other words, they are not simply dealt with by professionals. It also increases, as it seems to me, public confidence in the system. It is also quite a strong thing for the first time ever, so far as I am aware, for serious criminal cases in England and Wales not to be tried by a jury save in very limited circumstances.

An intermediate step has been suggested by a number of people: conducting a Crown court trial with a judge and two magistrates. That is a possibility that policymakers and legislators may come to consider. It could be considered in a relatively subtle way. As we know, a whole raft of cases in the Crown court could be tried in the magistrates court—the “either way” offences, as they are called. It has been suggested by some



HOUSE OF COMMONS

that you might try the “either way” offences in the Crown court with a judge and two magistrates, just as appeals to the Crown court from the magistrates court are dealt with by a judge and two magistrates, and reserve juries for indictable-only offences.

I am expressing no views at this stage about what might be the best course, not least because I think we need to have a better idea of how long the current emergency is likely to last. If social distancing is much reduced, or if, as we all hope, a vaccine is found within a few months, or if possibly even the antibody test, which is much talked about at the moment, delivers what is hoped of it, then some of these things might not be possible.

My plea to all concerned is: don’t wait until we are in a really difficult position before you start to think about this and work up the policies. Begin to do it now so that when it becomes necessary, if it becomes necessary, there is not a great delay in legislating.

Q149 Chair: It is quite a profound constitutional matter to make that change. The Minister, Mr Philp, rather pushed back against the idea of removing the right to a jury trial where it currently exists. You have used the phrase “in extremis”.

Lord Burnett: My view on that is well known.

Q150 Miss Dines: I am very concerned about the discussion of any constitutional reduction in size of the jury to seven. This is an international pandemic, but do we really need to go to that drastic length? There are other possibilities, such as opening up venues in the hospitality industry that are empty at the moment.

How far have your discussions gone in discussing the reduction of jury size and, in some cases, abolishing them altogether?

Lord Burnett: My discussions have gone no further than essentially drawing up a menu, a list of options. All of us hope that none of them will be necessary, but my real concern is that if we do not think about it now and we only start thinking about it months ahead, when things have got no better, we will build up a backlog of cases that will take a very long time to clear.

Any such changes, if they develop as a policy choice of Government and a legislative choice of Parliament, where the choices lie, must be temporary. Just as for the emergency legislation that was introduced two months ago, it has to come back to Parliament from time to time for review. I would hope that, if it is thought necessary, because of a developing backlog, to legislate in some way to enable these cases to be dealt with, it is temporary and that Parliament would have an opportunity to review it regularly in the light of developing events.

Q151 Rob Butler: Following the discussion about how to reduce the backlog, the Magistrates Association has suggested to us that one possible



HOUSE OF COMMONS

solution would be to extend JPs' sentencing powers from the current maximum of six months in custody to 12 months. What do you think about that? It might reduce the number of cases going up to the Crown court.

They have also separately raised the issue of potentially raising the retirement age of magistrates from 70 to 72 or 75. I would be interested in your views on that.

Lord Burnett: It is undoubtedly right that if the sentencing powers of magistrates were increased fewer cases would go to the Crown court. The legislation to enable that to happen was passed years ago; it has simply not been introduced.

The concern, as I understand it, but it is not something in which I have been directly involved or had discussions about with anyone, is that by increasing the sentencing powers of magistrates there will be more people sent to prison for relatively short periods. As the Committee and its predecessor members will know, from time to time the Government get interested in short sentences in particular. There was a period not long ago when there was quite a head of steam to reduce the use of short sentences. That is the problem.

The short answer to your question whether it would be likely to reduce the number of cases going to the Crown court is yes. Is it a good idea? That really is a matter for the policymakers and Government, rather than me wading into something that I know is quite controversial. I hope you will forgive me for ducking that one.

I am on record as supporting the thought that the judicial retirement age should be raised across the board to include magistrates. Were it not for the current emergency, I rather suspect that the Government would have started a consultation on this issue. It is being discussed. My personal view is that an increase to 72 across the board would be sensible. The Magistrates Association and I see entirely eye to eye on that.

Q152 **Rob Butler:** Would you have no concerns in that regard about there being potentially less diversity among the magistracy if it was very heavily skewed towards people who are over 60 and even over 70?

Lord Burnett: Diversity concerns have always been articulated in this area. The problem at the moment is that we are struggling to recruit sufficient magistrates. There has been a big recruitment campaign under way for at least a year. I think it is delivering some good results, but the magistracy has shrunk over recent years and there is a general recognition that it needs to grow again, and so there is going to be no problem in recruiting extra people.

Q153 **Rob Butler:** If I could change tack slightly, will you tell us a little about what lessons you think have been learned across the different jurisdictions—family, crime and civil—from the sudden and unexpected increase in the use of technology in a way that was not the case prior to



HOUSE OF COMMONS

Covid and coronavirus?

Lord Burnett: As a preface to my answer to your question, the first observation I would make is that everybody moved at breakneck speed two months ago to increase the use of technology. In the first instance, the telephone was used much more than anything else. There have been telephone hearings in courts for at least 20 years and maybe longer. Telephone conferencing was the first port of call.

Online platforms such as the one we are using at the moment have also been used, but quite a lot of people in the legal system, including judges, were not very familiar with that. It has taken quite a lot of time for people to get used to it.

My own view is that an online encounter of this sort is almost always better than a telephone, if it can be arranged easily. The important thing is to recognise that people, quite remarkably, have been adjusting to new things in difficult circumstances and have achieved wonders. We have learned a lot, and we are learning more.

One of the first things we learned was that conducting hearings, whether on the telephone or by links of this sort, were very much more tiring for everybody involved than doing them in a room in the ordinary way. I do not doubt that endless PhDs will tell us why that is so, but that is the universal experience not only of judges but of all the other participants in such hearings. I think that is really very important.

The second is that a lot of judges found dealing with this sort of hearing from home very much more difficult than doing it from a court. Although the data is a little flaky, the anecdotal evidence is that you can get through more if you are in court doing it remotely than you can at home, particularly in tense family cases. A lot of judges found it very intrusive to have argumentative and emotional people in their homes, albeit on a link.

The other thing that has been very clear to us—with growing clarity—is that the quality of the kit matters a great deal. If you are doing this sort of encounter with a laptop, you are hunched over it, you are cramped and you do not have room for paper. If you are doing a full video hearing, you need two screens: one you can put papers on and the other so you can see people. We have been catching up on that because, inevitably, people have been doing their level best. Those are all the sorts of things we are learning as we go along.

There have been snapshots taken in the family courts, and there is one being taken in the civil courts, the results of which I hope will be available fairly shortly, which are gathering information about initial experiences with a view to providing evidence to support improvements that can be made now.



There is a project rolling out across the courts at the moment called cloud video platform. Most people who use it say it is better than just using any of the ordinary online platforms. I hope that that will improve things for people as we go forward. Undoubtedly, the need to continue with increased remote hearings of one sort or another, phone or online, is going to be with us for some time, not least because we will not be able to accommodate the volumes of work that we are used to accommodating in the courts.

Q154 **Rob Butler:** Thank you; that is very clear. Once coronavirus is over, there are some people who believe that that move online ought to become a permanent feature of more court hearings. Would you say a word or two about what you think about that and where some concerns might come for you? For instance, I have had concerns raised about its viability in the youth court, where you want to have much more personal engagement.

Lord Burnett: The important thing to recognise is that some hearings lend themselves to the telephone and online, and some do not. The heads of jurisdiction and I have been quite careful to encourage judges to make decisions about the suitability of different types of case for resolution remotely. Inevitably, in an emergency there are sometimes difficult choices. You either do it remotely or it cannot be done at all, and then you do more harm.

The way I look at it is that simply by dint of circumstance the volume of usage of remote mechanisms—albeit, as I have indicated, not anywhere like as good as the ones being developed for long-term use—has resulted in our taking three steps forward. I suspect that we will take one step back. What has to happen, and is happening, is that information will be gathered about the experience of the use of these facilities so that careful decisions can be made about where they work, where they are good, where they do not work so well and where they do not really work at all.

Q155 **Maria Eagle:** It is good to see you, Lord Burnett. You have made some interesting comments about the difficulties reported by participants in court proceedings, which MPs sat at home will have some sympathy with. In respect of the public and the media, what is being done with these new technologically driven hearings to ensure that justice remains open and transparent?

Lord Burnett: A great deal of work was done from the outset to ensure that particularly the press could join remote hearings. Similar facilities have been made available for those in the public with an interest in joining in. One of the ways it is done is to publish the lists in the normal way, with an indication of the way in which a hearing is to be conducted. There is also an arrangement between the Courts Service and the press to enable members of the press to say, "I would like to watch that one, please. Can you arrange it?" Then, it can be arranged.



HOUSE OF COMMONS

There have been some quite interesting examples—some quite high-profile cases in the last few weeks in the High Court in particular. You will know one or two of those I am thinking of, although I will not name them. I was told that in one of them well over 50 journalists joined to watch online. It is inconceivable that there would have been 50 journalists in court. That is an interesting little example of how it has widened media access.

I know that so far as the Crown court is concerned—both the non-trial cases that have been running and the trial cases that are now starting—a lot of effort has gone into ensuring that the media can be properly involved. I am keen to encourage that because—all Members of Parliament will be very conscious of this—as a result of the diminution of resources available to local newspapers in particular the number of reporters who attend courts across the country has been in steep decline. Enabling people to attend by joining a link of this sort, albeit that they have to be muted and quiet, improves things. It is one of the ironies of the situation.

Q156 **Maria Eagle:** What about members of the public?

Lord Burnett: Members of the public can ask to join as well.

Q157 **Maria Eagle:** That is interesting. You told the Lords Constitution Committee that substantial new investment is needed in the criminal justice system, particularly in better technology. I assume that has been emphasised by what has been happening lately. Can you tell us what discussions you have had with the Lord Chancellor about substantial new funds being made available?

Lord Burnett: Yes. The need for new funds extends well beyond just the criminal justice system. What we have learned over the last couple of months is what happens when systems and parts of an organisation are starved of funds that deny an opportunity to update in a pretty routine way. For example, had we had the ability for parties to lodge their papers online in the county court or in some of the family courts, much more work would have been capable of being done.

You ask me about when I have discussions with the Lord Chancellor about this. As you will appreciate, the Lord Chancellor and I meet very frequently. I suspect any of his officials who are watching this will have smiled when you asked that question, because there is barely a meeting that goes by without my mentioning resources and the need for there to be proper funding of the administration of justice. It has been underfunded for years and years. The consequences of that underfunding are coming home to roost.

Q158 **Richard Burgon:** Before I ask the question I planned to ask, I want to follow up on something Maria Eagle asked. She referred to the media and the public. You referred to 50 members of the press accessing a hearing digitally online. Are you aware of any members of the public having



HOUSE OF COMMONS

successfully observed any of the criminal proceedings by digital means during the lockdown?

Lord Burnett: I will have to come back to you. I do not have detail on that, but I will happily take it away and drop a line to the Chair.

Q159 **Richard Burgon:** Thank you. The question I had planned to ask was in relation to vulnerable court users. As constituency MPs, and as MPs in general, we often get referred to accessibility issues in relation to some of the old court buildings. Now that digital facilities are being used more prevalently in lockdown, what practical lessons have been learned for the future on the effect that digital justice can have on vulnerable court users?

Lord Burnett: You and I have talked about this in a different context. The general proposition is that, when we are back into normal times, nobody will be forced to use digital engagement with the courts if they are not able to do so. That is always an absolutely fundamental starting point. That will not change.

One of the things that everybody who conducts hearings is conscious of is that vulnerable court users, and vulnerable people with vulnerabilities caused by a range of different circumstances, need to be treated with particular care. Young people comprise a group where there is a large number of vulnerable people. A large number of people in the court system have mental difficulties and again can be very vulnerable. Of course, in some of the tribunal contexts—the social entitlement chamber and so on—again there can be great vulnerability.

Looking forward, we are where we have always been. The courts are particularly concerned to safeguard the interests of vulnerable people. At the moment the difficulty for some of the vulnerable is that they are not able to engage in or use this sort of facility, or even the telephone. To give examples, we have heard so much of this in the family courts, where there are a lot of litigants in person. They are often living in fairly deprived circumstances. It is unreal to suppose that they have good broadband connections, computers and so on to be able to attend a hearing remotely.

That is why it is important that we get as many cases back into the courts as soon as possible, observing social distancing and all the Public Health England and Wales guidelines, which is what is happening. I come back to the answer I gave to the Chair at the beginning: we are working hard to reopen as many courts as possible in the next few weeks.

Q160 **John Howell:** Lord Burnett, I want to ask you a question about the modernisation programme. You will be aware that we have highlighted problems with the modernisation programme, but given the pressure on the courts are you confident that the full scope of this programme can still be achieved in the time available?



HOUSE OF COMMONS

Lord Burnett: There are two questions there that raise two separate issues in my mind. "Am I confident that the funding will continue to be made available by the Treasury?", I suspect, is one of the underlying questions.

My unequivocal view is that the funding must be made available. I have put it this way in a number of observations in public over the last couple of years. What we are trying to do is move the courts forward in a handful of years, in a way that should have been happening incrementally over 15, 20 or 25 years. We are catching up, and it requires proper funding.

My nervousness, which will be shared by anybody who is responsible for an organisation that is publicly funded, is that there is always a desire for money to be saved. Of course, I understand that, and I understand that in the immediate future the financial position for the nation is a little precarious, but the administration of justice has been something of a Cinderella over the last decades. Its funding has never been lavish. Its funding has not been protected because it is a sub-part of the Ministry of Justice, whose funding was not protected. Thus, there has been a steady erosion of available resources, which cuts services back to the bone.

The first point is that we must have, through the MOJ, the money being delivered to the Courts Service to enable it to continue with this project.

The second is about timing. It is perhaps not unusual, particularly for IT projects in the public sector, to encounter some choppy waters. As you know—this Committee has looked at it, as has the Public Accounts Committee—there have been some delays in developing some of the tools that have been devised to improve the service that the courts can provide in the future. Those delays are regrettable. I know that the head of the Courts and Tribunals Service has given evidence to a number of Committees about this. Those delays have happened. Those of us who are looking on, and pushing, hope that the delays will not increase as time goes by. One of the things that will cause delay is if there is cheeseparing on the money. If the money is reduced, projects have to have money taken away from them, priorities have to be identified and things suffer.

To give you an example of how transformational some of these projects could be, family public law cases are due to be digitised quite soon. It is running at the moment. It has been delayed, but it is now running and, I hope, running smoothly. The expectation is that, when that happens, it will very substantially reduce the number of pre-trial hearings necessary in public law cases. That means the judges will be freed up to do other things. Money will be saved because legal aid will not be spent on hearings involving local authorities and CAFCASS that are, in truth, unnecessary if we have the systems in place to enable things to be sorted out digitally.



The view of the President of the Family Division—oddly enough, we were talking about it earlier today, but in a completely different context—is that when that happens it will be a game changer so far as that aspect of our work is concerned. That is a really powerful example of how critical this is to the future of the administration of justice.

Q161 Maria Eagle: If the money is forthcoming and the future scope of the programme is fully completed, what impact might it have on tribunal waiting times? Like many colleagues, I have constituents who have to wait an average of a year for social security tribunals. They are vulnerable people. Quite often, they have lost disability benefits of one kind or another. When they get to the tribunal, 80% of them get their benefit reinstated, but they have spent a year having had a substantial chunk of their money upon which they rely for a decent life taken away from them. The stress and pain is terrible. What impact might a modernisation programme have on those real-life tragedies that delays in tribunal hearings cause?

Lord Burnett: The social entitlement chamber is a very good example. There is work going on as part of the modernisation programme that is designed to squeeze out delay. The Senior President of Tribunals would be able to give you more detail than I can. There are also changes being made of a procedural nature, also designed to squeeze out delay. As you have indicated, in that chamber a very large proportion of the appeals succeed.

What the Senior President and those concerned with that tribunal are trying to do is head off at the beginning a lot of the cases that are bound to succeed. The modernisation programme, and digitising it between the Department and the tribunal, is part of what it is about. Yes, that must carry on because, for all the reasons you articulate, those who are going to that chamber are, disproportionately, people who are disadvantaged and vulnerable. Long waits are undesirable; everybody accepts that.

Q162 Miss Dines: Going back to modernisation by getting rid of some of the preliminary hearings in family cases—family public law was one of my areas of specialism before I was elected—I am very concerned that we do not throw the baby out with the bathwater. If we have too much modern technology, and I am certainly not being a luddite, we do not get justice. Parts of these hearings are when very vulnerable people will come, and you can sit down with a client who is not engaging with a social worker. You can show him or her the paperwork, talk to them and agree a way forward. It is not all about saving money, saving time and modernising. You must accept the best of the future, but don't get rid of some of the best parts of the past that make our system one of the best in the world.

I am very cautious about that. There needs to be a lot of thought before we streamline things like public law cases. I ask you to take a lot of time over consideration of that and come back to us before any major decisions are made.



HOUSE OF COMMONS

Lord Burnett: A lot of time is being spent on this. I can assure you that your sentiment—get the best of the future but not at the cost of the best of the present—is very much at the heart of what everybody is doing in this environment. I can assure you that the President of the Family Division, whom no doubt you know—I am aware that you are a family specialist—is not going to allow anything to happen that does any damage.

To reassure you, if I may, in each jurisdiction there is a group of judges, called a judicial engagement group, which looks at, comments on and works collaboratively with the Courts Service in developing all the reform programme—every single project and every single development. There is one for crime. There is one for civil. There is one for family. There is a separate one for magistrates. There is one for tribunals. The judicial engagement group comprises judges at all levels who are experts in their field. Everything that is happening in the context of family justice modernisation is happening with the full engagement and input of specialist judges in the field. I hope that gives you some reassurance.

Miss Dines: There are a lot of questions we can ask, but I am a bit concerned that we are not going to get through in time, so I am happy to let other members of the Committee ask a few questions.

Chair: There is quite a bit of ground to cover. We will now move on to the question of judicial appointments.

Q163 **John Howell:** What consultations have taken place between the judiciary about the democracy and rights commission?

Lord Burnett: This is the proposal in the Conservative party manifesto.

Q164 **John Howell:** It is the Constitution, Democracy and Rights Commission.

Lord Burnett: There are discussions going on to the extent that I am occasionally updated by the Lord Chancellor on where his Department's thinking has got in terms of how to deal with some of the issues that were foreshadowed in that manifesto commitment. It would be entirely inappropriate for me to jump the gun. I know they are still thinking about all sorts of aspects of it, but no doubt the Lord Chancellor will be in a position to say something before long. In the meantime I can simply reassure you that the Lord Chancellor is keeping me abreast of where his thinking is going.

Q165 **John Howell:** There is nothing in there that concerns you about the independence of the judiciary, is there?

Lord Burnett: The point that I have been making consistently about any look at judicial review in particular is that there are two irreducible and non-negotiable features. One is the rule of law and the other is the independence of the judiciary.

Judicial review is a completely common-law construct. It has been developed by the judges, particularly over the last 40 years. Parliament



has never intervened on the substance of judicial review. Parliament has occasionally intervened on procedural matters. It is not inappropriate at all for Parliament to be invited to consider this matter, should somebody think that a good idea, but the irreducible features—the non-negotiable features for Parliament as well, no doubt—would be the rule of law and judicial independence.

Q166 **John Howell:** How do you deal with recent arguments that we have heard that the law is expanding into the domain of politics?

Lord Burnett: This is what, as a matter of policy, both Government and Parliament are entitled to look at. It is undoubtedly the case that if I look back to the days when I was an undergraduate—just over 40 years ago—when I first learned administrative law, judicial review was in its infancy. In the course of my time in practice at the Bar—I did a lot of public law, as you may know—the scope of judicial review expanded.

Often, the steps that were taken were legally controversial at the time. It is undoubtedly the case that were the architects of judicial review in the 1980s to come back today they would look at a system that is rather different from what it was 35 years ago. It is a perfectly legitimate topic for investigation.

One of the concerns I have is that there could, if people are not very careful, be a confusion between the development of judicial review, which is a common-law construct of the judges in this country, and its relationship with the Human Rights Act, which is a different thing altogether and a statutory intervention by Parliament. It is true that a lot of judicial review cases involve consideration not only of domestic public law concepts but of the European convention on human rights, and thus judges are called upon to exercise a rather different function from the traditional function in judicial review.

It is important to bear in mind that, to the extent that the Human Rights Act is engaged, the judges have been following precisely what Parliament instructed them to do, and in particular to take account of the developing jurisprudence of the Strasbourg court.

Q167 **Chair:** We also have the royal commission on criminal justice. Have you been consulted on the scope of that work, its possible composition, the involvement of judicial colleagues, and timetables?

Lord Burnett: In broad terms, my understanding is that the thinking on that is much less well developed, but there have been discussions. The proposal was for a royal commission on criminal justice process rather than on criminal justice itself. It is a slightly unusual concept because the criminal justice process starts from the commission of a crime and the involvement of the police. It finishes, if a case gets to the courts at all, at the disposal of the case in the criminal courts. The big bits are the beginning of it. Your Committee will be aware of at least the statistical mismatch between the volume of crimes committed and the number of



HOUSE OF COMMONS

crimes that find their way into the court system. That is in part a process matter. Quite what the Government has in mind on that is yet to evolve.

Q168 **Chair:** But you have been assured that you will be consulted on those matters.

Lord Burnett: Certainly, yes. I have had a number of range-finding discussions, if I can call them that, with the Lord Chancellor.

Chair: We want to touch on a couple of other topics, one of which is judicial recruitment and diversity.

Q169 **Miss Dines:** Lord Burnett, do you feel there is any sacrifice of the experience that judges traditionally have had from the Bar and the quality of the lawmaking if one goes too far in pursuing just a goal of diversity? Do we not have to keep the qualities that experience brings?

Lord Burnett: The governing statutory criterion for appointment to any judicial post is merit. My own view is that that is absolutely critical to maintaining the standard of the judiciary, the integrity of the judiciary and public confidence in the judiciary. That is the governing criterion.

There is no conflict at all between that criterion and seeking broader diversity among the judiciary. I have been saying that time and time again since I was appointed. The reason is simple. There is an enormous body of able lawyers out there from which good judges can be found.

My own preference is for potential judges to seek fee-paid engagement so that they can see whether they like being judges and the system can also see whether they make good judges. Almost all of us started our judicial careers as fee-paid judges sitting a few weeks a year.

The strides that have been made in diversity in recent years, as the result of an enormous amount of hard work by the profession, the judiciary, the Judicial Appointments Commission and by all sorts of people, have been quite striking. They have been more successful so far in recruiting a much greater proportion of judges who are women. You will know broadly the figures. I do not have them in my head at the moment, but in broad terms the percentage of women has grown in both the courts and in the tribunals. For the younger cohort of judges, women are broadly half now. There are a lot of people who say keep going on gender, but things have moved a long way and it is in a much better position.

The position with BAME candidates for the judiciary, particularly at the senior ranks of the judiciary, is much less good at the moment, but a lot of effort is being made, and it, too, is gently improving.

Q170 **James Daly:** I need to make a declaration as a practising solicitor. One of my concerns, having been a solicitor for many years, is the lack of judicial opportunity for solicitors within the higher courts. Specifically, solicitors from working-class backgrounds are not represented in sufficient numbers within the judiciary. Would that be a fair comment?



Lord Burnett: So far as solicitors generally are concerned, great efforts have similarly been made to try to encourage solicitors to seek fee-paid appointments and then, if they wish, to seek salaried appointment after that. There have been some striking successes. Last year, of 10 High Court judges who came, two of them were solicitors, as it happens. There are strides being made in that direction.

In the High Court, since 2016, there has been a dedicated programme to recruit deputy judges who, it is hoped, might go on to become salaried High Court judges. Similarly, a number of solicitors have joined that programme and successfully been appointed, so I do not think the position is as gloomy as you are suggesting.

Social diversity is a feature that is quite difficult to capture. The Judicial Appointments Commission does gather information about educational background now, which is a pretty crude proxy for matters of that sort. It also asks questions about whether the parents were at university and matters of that sort. I am simply not in a position to tell you, even among some of my colleagues in the High Court and other courts, what their background was in terms of what their parents did. I am afraid that I simply do not know.

Q171 **Chair:** One of the observations that might be made is that you are right about High Court appointments, but a lot of those solicitors have come from not quite the “magic circle”, as they are sometimes termed, but from some of the large London law firms, whose recruitment background is perhaps rather different from that of the high street, about which Mr Daly is talking.

Lord Burnett: I think it is still the case that the majority of district judges are ex-solicitors, and a very large proportion of recruits to the circuit bench have been promoted from the district bench. I think things are changing.

Q172 **Maria Eagle:** I want to say well done to you, Lord Chief Justice, for the ongoing efforts that the judiciary are making. I know that over many years it has been very difficult to get this moving. It is important that we do recognise where there is improvement and say that it is a good thing.

What more needs to be done to improve further? One of the difficulties with these issues is that, if you stop applying the pressure, you can easily slip backwards. What plans are there to make further improvements in this field?

Lord Burnett: I am very grateful to you for your observations. I can assure you that a huge amount of work is done. I have a diversity statutory duty, as does the Judicial Appointments Commission and the Lord Chancellor. I have a powerful diversity committee, headed by Lady Justice Simler. That looks at what we are doing and is constantly seeking to improve the programmes and so forth that we run.



HOUSE OF COMMONS

There is an important series of steps being taken at the moment. We think we—when I say “we”, it includes the Judicial Appointments Commission and the Lord Chancellor—will continue to deliver some improvements. A programme called “pre-appointment judicial engagement” was set up last year and is developing to focus on people from non-conventional backgrounds, both social and professional backgrounds, to help them get ready for successful applications for judicial appointment. That is one thing.

The second thing happening at the moment is that we are trying to evaluate in a much stricter way the value and outcomes of all the various programmes that we run. Lady Justice Simler is particularly involved in that at the moment.

The next thing that happened six months ago was that we established a judicial diversity forum, which has a very tight and senior membership: the Lord Chancellor, me, the chairman of the Judicial Appointments Commission, the President of the Law Society, the chairman of the Bar and one or two others. We are conscious as judges that all of our judges come from the legal profession. We are completely beholden to the legal profession to develop the careers of suitable candidates for judicial office.

Over the last few years there has always been very close attention paid to the precise composition of the judiciary, but we want to look at what is happening in the legal profession so that, if necessary, we can reach back into the profession to ensure that the appropriate steps are taken rather earlier than at a time when people come to apply for judicial appointment.

Looking at the make-up of partners in solicitors’ firms, and particularly partners in the bigger solicitors’ firms, is going on at the moment. It is delivering some very interesting results—similarly, the make-up of the Bar.

What is planned is that a little later in the year—I think the early autumn is where we are aiming—some rather better statistics will be published to inform the important debate that all of us have been engaged in for some time. I can assure you that having now brought together me, the Lord Chancellor and the chairman of the Judicial Appointments Committee on the same group—we are the ones with the statutory duties—we are determined to continue to deliver improvements.

Chair: Dr Mullan will address the final topic that we want to ventilate.

Q173 **Dr Mullan:** I want to talk about community sentences. Some of the previous reports from this Committee have identified both a lack of understanding and a lack of confidence in community sentences, perhaps related to the judiciary feeling they do not have the power, when passing that sentence, to dictate it in the way they would want to make it robust. What would your view be on why there might be a reluctance to use community sentences, and have you yet had any engagement with



HOUSE OF COMMONS

Government in their plans to improve the robustness of community sentencing?

Lord Burnett: The time you are referring to about problems with community sentencing started a handful of years ago, perhaps a little bit more, when some quite profound structural changes were made to the way community sentences were delivered. Problems developed, which included the reality that too many community sentences were not being followed through. There was a particular judicial concern that those who were breaching community sentences were not coming back before the courts.

The Committee knows probably better than I do the to-ing and fro-ing that has gone on over the last four or five years with the structures of probation and delivering community sentences. It is enough for me to observe that it is now completely different from how it was at the time when those problems developed.

My understanding, although I do not have the figures available to me as I speak to you, is that confidence has grown and has continued to grow. It is quite a striking feature of the current emergency that the probation service continues to deliver a service. It is another remarkable example of developing practices in the face of adversity at great speed. I believe that most judges have more confidence in community sentences than they did three or four years ago.

It is an absolute rule of sentencing that, if a community sentence is the appropriate sentence, you must impose one. You cannot default to a more serious sentence.

As for the future, it is well known that the Government are keen to develop more effective community sentences and monitoring with tagging, in particular, drink monitoring and things of that sort. As with other things, the Lord Chancellor and I do talk about that. Oddly enough, I think we had a conversation about it either this week or last week; I cannot now remember precisely when. As with everything, the Lord Chancellor keeps me completely abreast of policy thinking in the Department. Other Ministers as well talk not only to me but to other judges who are more directly responsible for what is going on in relation to sentencing.

I think everybody would agree that if a community sentence is appropriate it should be imposed. Everybody would agree that community sentences should be effective and monitored. It is quite interesting to look at the development of tagging, because curfews can be quite an imposition, particularly for the young. Young men are the people who commit too many of the offences, and a curfew that can be enforced on a young man is quite a powerful punishment.

We have seen recent discussion of the monitoring of drink. That has been successful where it has been piloted. There are international programmes



that have been successful. I would hope that that will develop and become widely available.

Q174 **Andy Slaughter:** Do you think this provides any opportunity to further reduce the prison population, given the current crisis, in respect of looking at alternative sentencing to incarceration, particularly for vulnerable groups, perhaps people with mental health problems, children or women?

Do you want to comment on the current early release proposals? You have just mentioned tagging. A statutory instrument that would have extended that was withdrawn in Parliament last week. The programme for release, which was to target up to 4,000 current prisoners, has not yet got beyond double figures. It just seems to be an opportunity. Do you think we should seize that?

Lord Burnett: Taking those in order, if I may, the statutory underpinning of sentencing requires judges to resort to custody only if no other disposal is suitable. Clearly, if there are effective community sentences supported by restrictions, judges are more inclined to use them and to consider them a suitable alternative to custody. I applaud any efforts to make community sentences more effective. The more effective they are, the more likely they are to be imposed. Of course, if they are effective more broadly, they should lead to the rehabilitation of criminals.

As far as vulnerable defendants are concerned, a lot of work has been going on in connection with the sentencing of the mentally ill. There has been a consultation by the Sentencing Council, which is developing a guideline on sentencing defendants with mental problems. It is a project to which I have given a lot of support, and it has been close to my heart since the day I became Lord Chief Justice. I hope that guideline will come out at some stage in the relatively near future during the course of this year.

Early release is entirely a political matter. I appreciate, only because I read the papers and keep my ears open, that the proposals were quite controversial. It is not territory into which I will enter, if you will forgive me. As the Lord Chancellor has been saying, the prison population has come down a fair bit over the last eight weeks because fewer people have been going in from the courts. In bringing forward and dealing with cases that were waiting for sentence, for example, quite a few people who were remanded in custody awaiting sentence have in fact been released.

Q175 **Chair:** Thank you very much, Lord Burnett. We have managed not to sit too late on a Friday before a bank holiday, which did not always happen in some Crown courts I used to appear at. We are very grateful to you for your time and for your evidence. Thank you for undertaking to come back on some of the specific matters that were raised. We are very grateful to you indeed.



HOUSE OF COMMONS

Lord Burnett: Thank you for your time. It is good to see everybody. My earnest hope is that, before too many months pass, we will be able to meet in a more conventional way.

Chair: Absolutely right; many thanks.