



HOUSE OF LORDS

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The Select Committee on the Constitution

Evidence session
with

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES

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Heard in Public

Questions 1 - 11

WEDNESDAY 27 APRIL 2016

10.25 am

Witness: Rt Hon Lord Thomas of Cwmgiedd

Members present

Lord Lang of Monkton (Chairman)
 Lord Brennan
 Lord Cullen of Whitekirk
 Baroness Dean of Thornton-le-Fylde
 Lord Hunt of Wirral
 Lord Judge
 Lord Lester of Herne Hill
 Lord MacGregor of Pulham Market
 Lord Norton of Louth
 Baroness Taylor of Bolton

Examination of Witness

Rt Hon Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales

Q1 The Chairman: Good morning, Lord Chief Justice, and welcome to the Committee. We very much value our occasional opportunities to discuss with you matters that are topical and of interest to both of us. I think it is two years since we last saw you and you are very welcome here again. I will go straight into the questions and ask the first. What impact has the pay and pension package for High Court judges had on recruitment and retention? Are we sure we are still attracting the highest quality of people into the system?

Rt Hon Lord Thomas of Cwmgiedd: There is no doubt that at present we are having difficulties. I think there are two primary reasons and a number of sub-reasons. As you will know, the private sector in the legal profession is immensely prosperous at the moment. For the last number of years, fees have continued to rise and work has continued to flow into London, which is without doubt the pre-eminent legal centre of the world, particularly for commercial and related issues. On the other hand, the public sector has suffered very considerable pay restraint, and last year was the most difficult in that the decision of the Chancellor of the Exchequer to restrict the tax relief on pensions to a maximum of £10,000 a year has had a very, very serious unintended effect on the judiciary, particularly at the High Court level and above and on circuit judges. The result is that a new High Court judge will have a pension at the end of the day that is materially less than that of a district judge. Inevitably, combined with the differentials that have magnified over the past eight years, this has made attracting people more difficult. That is one reason. The second is that the level of work is very high and the pressure on the system is great. Thirdly, the conditions gradually became more difficult. Through the reform programme for the courts we are in the process of

addressing the latter, but it will take time. The volume of work issue and, essentially, the pensions and pay issues are very substantial deterrents in attracting people to the post.

The Chairman: A number of my colleagues would like to follow up on this question. I will bring in Lord Lester, if I may.

Q2 Lord Lester of Herne Hill: I am in difficulty, because I am one of those who did not go to the Bench when I could have done because of the working conditions. It was not about the pay. It was about going on circuit, judges' lodgings, doing mainly crime and matters of that kind. A number of us who might otherwise have gone did not, so I need to declare that. The question I want to ask is: how can we or you persuade really able lawyers to go to the Bench? Leaving aside the question of money, my experience is that when I ask people, especially very able women, whether they will apply to be High Court judges, they say no, because of the working conditions, by which they mean having to go on circuit, do crime, not be with their families and so on. Is there scope for improving the working conditions in that sense to attract a wider pool of very able candidates?

Rt Hon Lord Thomas of Cwmgiedd: Yes. The position generally is that we have cut down—because we have had to, because of the growth of work in London—the number of people who go on circuit. On the whole, if someone wants to go on circuit for a relatively short period—a week or two weeks—that is always possible, because in the administrative court we sit in centres in the north, the Midlands, Wales and Bristol. Also, for the longer criminal trials, which are what take people out of London for long periods, we find we have enough judges who are happy to do those and, generally, when we select circuit slots, if people do not want to go on circuit, there really is no need for them to do so.

What I would say is that many people find the change of going out of London, even if it is for a week or two weeks, makes the job more attractive. I think there is an unfortunate myth that goes back some years about this. We hope to break it down in two ways: first, by making it clear that in practice we operate the system without forcing people to go; and, secondly, that if they were to go for a week or so, they will find the change makes the job more rewarding and interesting.

Q3 Lord Hunt of Wirral: Lord Chief Justice, how right you are to describe us as the pre-eminent legal centre of the world, as you just have. This Committee has looked at the relationship between the Executive, the judiciary, Parliament and the press. We produced a report some eight years ago. Bearing in mind your comments, one of the key reasons why we are so regarded is the independence of the judiciary, which is envied by many leading

countries right across the world. What more can be done to strengthen the independence of the judiciary?

Rt Hon Lord Thomas of Cwmgiedd: As regards individual and institutional independence, the separation from the Executive is pretty good, save in two respects. In 1988, Sir Nicholas Browne-Wilkinson in an article in the *Law Quarterly Review* wrote that it is essential that the justice system is properly financed and that, essentially, the courts are provided in a way that ensures judges have good working conditions. I think the agreement that was entered into in 2008 and the current reform programme have, by and large, subject to the position of the Treasury, obtained for us a suitable measure of interest in the fabric of the court estate.

The second thing that is critical is the appointments process. On the whole, although there are issues that need to be addressed, which go largely to the way we recruit and the scope of those whom we should attract, that works pretty well. This is not a country where the Government attempt in any way to pressure us as regards decisions. I am absolutely certain about that. I would know if it was and would immediately take steps.

I should say about eight or nine years ago there were unfortunate incidents where Ministers of the Crown were very critical of judges' individual decisions. With one or two exceptions, that has now stopped, and I feel in that respect things are better.

Lord MacGregor of Pulham Market: I thought I heard you say, on pensions, that the new pension proposals have impacted more on judges than on barristers and others in the legal profession. Can you outline exactly why that is?

Rt Hon Lord Thomas of Cwmgiedd: If you are in private practice and earning, as people do, very substantial sums of money, you can decide that you will put so much into a pension scheme, and, if you are earning more than a certain amount, there is probably not a lot of point, but you can make alternative investments. We are paid on the basis that we get a salary and a pension, but if, for various reasons, you cannot take the pension, because the fiscal effects of it are so large, you will get no compensation for that. The pension was always regarded by people coming to the Bench as a very important part of the remuneration package, and the changes have through fiscal means, which I am sure were unintended, produced this effect. If I were, say, a barrister and this cap applied, I would not go into pensions, I would not want the tax relief and I would pay my 45% tax. We cannot do that.

Lord MacGregor of Pulham Market: This is the point.

Lord Judge: Lord Chief Justice, you touched on the appointments system. Would you like to add to that, please?

Lord Thomas of Cwmgiedd: Yes. It is very important we have a modern appointments system and I think the JAC has done a very good job. However, 10 years on, it is apparent that there are two or three issues that urgently need to be addressed, and I would hasten to add are being addressed, by the Judicial Appointments Commission.

The first is to make certain that on first entry into the judiciary we have a process of selection that is fair to everyone. In appointing someone to the judiciary for the first time, you have very little to go on, apart from what can happen in an interview, in the role play, which they have introduced, or what is in references. It is apparent that this is an area that needs examining, and the Judicial Appointments Commission has agreed to do so. What we have found is the current system advantages very, very substantially those who practise in a particular area, and it measures that rather than someone who comes from a different area who might have outstanding potential.

The second area is that we have not properly devised a system for obtaining enough information about serving judges. At the moment, I am engaged in the process of the selection of a new chairman for the Judicial Appointments Commission, and I have been immensely impressed with the way in which headhunters have gone out and found out huge amounts of information and everything they can. I pay tribute to the way the Lord Chancellor's Department used to work where they used to gather all the information. We do not do that any more, and, again, we are looking with the JAC at whether this can happen.

The third very important area is proper planning for the long term. You need to ensure that you have enough people in the pipeline. The Civil Service selection committees and companies always say, "Let us look at our pipeline". I hope I have the right HR expression. That is not easy to do within the current legislative structure, but, again, these issues have come to the fore partly because of the problems in recruitment at the moment and partly because the coincidence of the 70 and 75 year-old retirement ages has meant that a lot of people will leave over the next three or four years, and we need to be sure that the planning for that and for the future is much more sophisticated than it is at the moment.

The Chairman: Thank you. That has all been most illuminating. We will move on a bit. Baroness Dean.

Q4 Baroness Dean of Thornton-le-Fylde: I would like to move on to the area of diversity and women and minority ethnic groups within the judicial system. Your recent annual report gave some optimistic messages of how, since 2014, the number of women had increased from 20% to 23% for the circuit Bench and that more than half of judges under 40 are women. Are you very confident that will translate over time into greater diversity in the judiciary? Are

there any specific issues relating to retention, bearing in mind that on the statistics we have, substantial numbers, ranging from 30%-odd to over 50%, have indicated they will consider leaving in the next five years?

Lord Thomas of Cwmgiedd: Can I deal with this in two ways? I am reasonably confident that we are on the right track as regards gender. We have been proactive in trying to persuade women to come, to show that it is a good life and it is very interesting. I believe we have made significant progress. Last year I was slightly worried, because the number of women silks had declined from about 25% to 19%, that there was a pipeline problem, but that may have been a blip. It looks as if the number of women progressing to silk, and similarly, if one looks at the solicitors profession, the number of people progressing to partner is increasing. We have made a significant effort to recruit. I have been to talk to people in bodies such as Citymothers and Cityfathers drawn from the solicitors profession, and I think one or two people who have reached the top in, say, non-transactional work have now realised there is a career.

Secondly, in the competition we ran last year to attract people to become deputy High Court judges straight from the profession without becoming a criminal recorder first, we were quite successful in attracting a number of very able women. However, we did not—and I think this goes back to the selection exercises to which I referred—get as diverse a pool from different backgrounds, particularly the Government Legal Service and the solicitors profession, as we would have liked. We know there is a problem and we know what it is and we will try to address it next time round.

On the recruitment of BAME, I would accept there is a problem. We are recruiting, but not at a sufficient rate. We are trying to do something about it. First, we have established and have in operation a scheme of mentors, because when you apply under the current application procedures, it is a bit like helping one's children, or possibly grandchildren, in relation to the forms you have to fill in for university; you require a degree of skill. We are helping with that. We are trying to make certain they apply at the right time and are giving them much more advice. We are actively engaged. We have 120 or so diversity and community relations judges who are engaged in the community, and we run a lot of recruitment events. The progress is not what I would like it to be, but we are doing everything we can.

Baroness Dean of Thornton-le-Fylde: Can I come back very quickly? That is all very laudable, but are there lessons to be learned perhaps from other sectors, in the sense that the Bindman report of 2014 talked about the opportunity for part-time working. Certainly in health and the police and a number of other areas that has helped with recruitment. Although

you talked about going out and talking to people, which is very helpful, mentors, form-filling and all the rest of it, what about actual policies when people come in on what they can expect to see that will help them with their career?

Lord Thomas of Cwmgiedd: We have a number of part-time positions. In 2002-03, Lord Faulkner, before formally introducing the scheme, appointed one or people on this basis. I remember a year or two ago I swore in someone who had worked a couple of days a week, and, as the children got older, had gradually progressed to working more, and then had moved from being a district judge to a circuit judge. We are offering part-time working now across the system, apart from in the Court of Appeal. At the moment we have decided it is too difficult there.

Baroness Dean of Thornton-le-Fylde: So it is available at circuit judge level.

Lord Thomas of Cwmgiedd: At circuit judge and High Court judge level. We have one High Court judge at the moment who works part-time, but we have not had many applications to do so. At the circuit Bench and district Bench and in the tribunals, we certainly have, yes.

Lord Lester of Herne Hill: Is there not another kind of pipeline problem, which is the legal profession itself? That is to say, given that judges are mainly drawn from practitioners—barristers and solicitors—it is very important that chambers and law firms have effective diversity policies. In the case of my chambers, Blackstone Chambers, we devote a great deal of time to diversity issues, but my impression is that many law firms and chambers still do not do so, and until you get more diversity among legal practitioners, and for that matter academics, it is going to be very hard for you to overcome that when you are making judicial appointments.

Lord Thomas of Cwmgiedd: My impression is that many chambers now do so. The chambers that find it easiest to do so are the prosperous chambers, those such as your own, commercial chambers or chancery chambers. Certainly the very major law firms increasingly target BAME, and they look very consciously at the number of women who are coming up to partnership level, not only in recruitment, where it has always been pretty easy. There are certainly parts that do not, and I agree with you that if the professions do not change, there is a problem.

Why I am keen on recruiting from the broader spectrum is that one of the great successes in diversity has been the Government Legal Service. Sir Paul Jenkins, when he was Treasury Solicitor, pursued a deliberate and immensely successful policy. I am very glad that the organisation Justice has set up a working party under a very distinguished female silk, and Sir Paul has joined that. I am looking forward to the ideas it comes up with. I am always

delighted with new ideas because this is a problem that affects the longer-term strength of the judiciary.

Q5 Lord Norton of Louth: You may have partially answered the question I really wanted to pursue. It is based on the evidence you gave in February to the Commons Justice Committee. One of your statements then was: “We need to show young people from 14 or 15 onwards that the institutions of our civic society are essential and should be open to all.” How far have we got with that and what more could be done to achieve that?

Lord Thomas of Cwmgiedd: I am very encouraged by what the City of London is doing. It is directly engaged. I am quite encouraged by other local authorities. It is very, very important that they are behind what we try to do, which is to get children and students into the courts to see how they operate and that they are fair. If one is looking particularly at aspects of extremism, one of the most important things for our society is to make certain the legal system is seen to be completely open and fair. The only way you can do that is to let them come and see it and to make apparent on all occasions that that is the case.

Lord Norton of Louth: It is partly a case of seeing the process. Picking up on your answer to a previous question, what about looking at those who are on the courts, those who are presiding? Do you think we have gone as far as we can so that young people will think, “One day I could be there”?

Lord Thomas of Cwmgiedd: I would never wish to be complacent, and we have a long way to go, but we encourage as many people as possible, when they are students, to come to visit the courts. I think that there is an inevitability that we do not reach the right people and we have more to do on that. School visits and open days have been very successful. For example, the City has one or two ancient ceremonies, one of which is the Quit Rents Ceremony, which I do not want to spend five minutes explaining to you, and the other is the swearing in of the Lord Mayor. At each of those ceremonies now we have people from the outer academies, so they can pick up some of our traditions and see how things are done in the courts. We try to encourage them to come to other things. That is the kind of thing we need to do to make clear that what we do in the courts is open, that it is fair and that the traditions—speaking here it is so obvious—are also appreciated.

Lord Norton of Louth: Thinking that through though, do you think there is a danger that if there is too much tradition it can put young people off if they are not familiar with it, if you are trying to encourage them with, “You too could be part of this process”?

Lord Thomas of Cwmgiedd: I will give you a yes and no answer, if I may. On the whole I think, from talking to them, that people like and respect it. They are quite forthright and tell

you. What you are doing has to be seen as fair and understandable, and the process that we use has to be seen not as some sort of medieval incantation but as relevant. You have to get the mixture right.

Baroness Taylor of Bolton: I wanted to follow up on what Lord Norton was saying. Thinking about what you have been saying about people visiting, if you are a child in a comprehensive school in the north of England, you will not exactly see many role models that you will identify with and you are not going to come down to London for a visit of that kind. I think there are still some barriers of perception there.

Lord Thomas of Cwmgiedd: One very successful law school, in my view, has been Northumbria University. There is a very close interrelationship between that university and the courts of Durham. At the level of someone who has decided to read law, I think there is a much closer relationship. Getting people in the sixth form, or possibly a bit younger, is where the battle lies.

The Chairman: Thank you. We will move on. Lord Brennan.

Q6 Lord Brennan: Lord Chief Justice, as head of the judiciary and leader of the profession in the country, for the Committee's benefit I would like you to deal with some of the criticisms that have been made of the way our public justice system is malfunctioning at the moment—in three regards. First, how do we help people better understand the way our legal system works so there is a proper appreciation of it? Secondly, how do we maintain public confidence that it is a fair system and is seen to be fair? Lastly, and very importantly, how do we ensure that it is affordable to everyone, rich and poor, and that there is access to justice?

Lord Thomas of Cwmgiedd: I will answer in reverse order, starting with affordability. On the question of legal aid, it appears that we may have reached a stage where legal aid has been rolled back and there is no prospect of it being rolled out again. That is a political decision and we have to be realistic. Thus, it is critical in two areas that we address the problem. The first is in family disputes, because unfortunately our society produces a large number of cases where people's relationships break down and issues such as children and money have to be sorted out. Secondly, it is using the legal system to redress problems that you have in the ordinary course of your life, such as if you acquire something or something you go on is not what you were promised or turns out to be bad. We have come to the view that in that sort of case, first, any legal aid is generally not available, and, secondly, the process of employing a lawyer for the whole thing is not available. I welcome very much what is being done by the legal professions, which is packaging and breaking down their services so that they will do some.

We are also very keen to develop the online court, which at its core will have huge amounts of material available that will try to explain what the answers are to the problems people face and will design forms for redress that are relatively easy to fill in, or can be filled in with assistance, and where, before the case comes for decision to a judge, there is an intermediate level of assistance or mediation. This is a huge project, and it is under the process of development at the moment, but I see that as a critical response. The profession is bound to be slightly uneasy about it, but I do not see any way round dealing with claims that are very substantial to the ordinary person and where the cost of lawyers is so high, particularly if the state makes them unavailable.

Secondly, dealing with the way in which the system is seen to be fair, I think the changes that we are making in the criminal sphere, such as trying to make certain that jury trials run better and evidence is presented in the most modern form possible using the latest technology, are helping a great deal. One of the most successful things we have done recently is to implement what Judge Pigott recommended at the end of the last century, namely to be able to prerecord the cross-examination of witnesses. It is done fairly and I think that helps take a lot of the stress out of complainants' evidence. It is very important that we maintain a strong degree of lay participation both at magistrates' level and at Crown Court level in the operation of the criminal justice system. Thirdly, I think we have to give all the help we can to organisations such as the Personal Support Unit—the PSU—which helps greatly in the courts, and that helps people a great deal.

I think a lot is being done. Obviously, if legal aid came back—and that is a political matter—things would be very different, but I am not terribly optimistic in that respect.

Lord Brennan: And on the point about understanding?

Rt Hon Lord Thomas of Cwmgiedd: Trying to make people understand better how our system works is partly a case of strengthening civics courses in schools. I think this is very, very important. I am always very worried when the young do not vote and do not seem to participate as much. They should realise that the courts and our democratic process, if they are understood properly, can be a great force for change and remedying what is wrong. Through our diversity and community relations judges and visits to schools, we do what we can, but this is much more, in my view, a question of education.

Lord Lester of Herne Hill: Lord Chief Justice, you have twice emphasised that what has happened to legal aid is political, and that is obviously correct, but is it not also a legal issue which the judges may have to tackle in the future? My understanding is that the right of access to justice is a common law and convention right, and if you tax justice too heavily, or

you deprive people of access to justice, is that not, hypothetically, an issue that the courts might have to tackle?

Rt Hon Lord Thomas of Cwmgiedd: Yes. I say it is primarily political because, since the time of Bentham, there has been an argument as to the extent to which the public purse should finance the courts and the extent to which the courts should be financed by fees. If one traces the history of this over the last century and a half, unfortunately it has been the view of the Treasury—and I do not say this with any attack on the Treasury—that it is the litigant who should pay.

There are two reasons why I disagree profoundly with that policy. First, the argument that justice benefits all and our decisions in the courts benefit all is self-evident. People do not measure the importance of judicial decision-making in its value to the rest of society. I do not know why this is so, but they do not. For example, if the commercial court or the chancery division make decisions in relation to patents or commercial law, it stabilises and advances the legal system, and all those lawyers who make money out of transactions worldwide benefit, but that is never brought into account. The second is that levels of fees can become high enough that they deter people. In that sense, yes, it is political, but if you were ever to cross the line—and the Government have on occasions crossed the line and the courts have said that they have made access to justice impossible—the courts will intervene.

In legal aid, I think there are two areas where there has been great concern. One is in family justice, where in the family courts, if the complainant has a case of violence or sexual assault, the idea that they can be cross-examined by the person who is said to have done it is anathema and the Government have been slow to deal with that.

In crime, so far, representation in the Crown Courts has stood up. I think the latest evidence shows that the only cases where we have self-represented people or litigants in person are defendants who have for their own reasons deliberately dispensed with lawyers. Some defendants wish to do that to make the trial more difficult to conduct.

Q7 Lord Cullen of Whitekirk: Lord Chief Justice, you have remarked in the past about the considerable increase in the number of litigants in person, and no doubt what you have described this morning will be very useful for a litigant in person trying to prepare, but eventually the case may come before a judge or judges. What can the judges themselves do to ease the situation? For example, is their role changing somewhat and is it up to them to do much more excavation to understand what really lies at the bottom of a case, analyse it and find a possible solution?

Rt Hon Lord Thomas of Cwmgiedd: If you speak to most district judges in disputes in family cases involving either assets or children, they have become much more inquisitorial where they have litigants on their own. It is impossible in a family situation to expect the adversarial system to work. Outside that, the tribunals have always operated on the assumption that, although the state will be represented, it is unlikely that many litigants will be, particularly in the social entitlement chamber. There has always been the view there that the judge has to help. In the small claims courts, again the judge is moving nearer to a more inquisitorial role. This trend is inevitable if we cannot equip the citizen to do it or the state will not pay.

Q8 Baroness Taylor of Bolton: You mentioned in passing the programme of modernising the court estate. You did that in the context of employment and diversity. Could you update us about how that is going and whether the funding is meeting the needs, because you are doing IT, and that is always expensive, as well as the court buildings? When you are modernising the court estate, is the balance that has to be struck between making sure that people respect the law and that the institutions look as if they should be respected, and making sure that people are not intimidated—that balance between respect and intimidation regarding the property—taken into account at all?

Rt Hon Lord Thomas of Cwmgiedd: Yes. If I can deal with IT first. The progress we are making on IT so far has been good. What we have done works, and this is remarkable. Our previous experience was disastrous. If one goes back to the time of Lord Woolf, he wanted IT for his civil justice reforms and they set about wiring the Royal Courts of Justice and other courts at enormous expense. They did not have the money to complete it and the wiring is now completely redundant as everything is wi-fi. We had other terrible programmes which simply did not work. To date, our principal programmes have been, first, modernising the IT that judges have. If you take someone from Lord Lester's chambers, they would be used to the most modern IT, they could carry it around and it would work. If they came to the courts, we had a system that took 10 minutes to log in, was unreliable, and everything took a long time to download; we have a system now that works. Every judge tells me how wonderful it is. We have not rolled it out completely, but we are in the process of doing it. That has worked.

Much more importantly, in the criminal justice system we have an IT program that is enabling the judge to do all the interlocutory work in a criminal case online. It works very well. I have seen it in Liverpool and when I was in Bristol the week before last, I was talking to the judges and seeing how it works. It is equally important for HMCTS staff. For example, going into a pre-court listing room and finding there is no paper there is wonderful. It is a complete

contrast to the civil courts. If you were to go to the Central London County Court, every bit of floor space is covered in paper.

Thus we are making progress and the system works for practitioners, who are—with one or two exceptions, I accept—happy. I am still extremely cautious as I feel we have done something that works, but I want to be sure the rest of it works. However, I think we have a process in place and we are getting somewhere with the IT.

The court estates are more difficult. I think it is very necessary to examine again the design and the way in which you establish a courtroom. We have done quite a lot of looking ourselves, but, because I think it is always a good thing that people on the outside look, Justice has been looking at this as well and is about to publish a report on it. I am not sure that I or, indeed, everyone will agree with it all, and I am sure that many of my colleagues will not agree with it all, but at least there are some ideas for configuring how we make courtrooms more interchangeable but yet maintain security, because you have to make certain that there is a proper balance between security and formality, and making people comfortable.

Thirdly, there is the vexed question of how we cater for rural areas, which applies particularly to Cumbria, Wales and Cornwall, and possibly, to a lesser extent, to Lincolnshire. There the progress has not been as fast as I would like and people have not been as imaginative in dealing with it as I would like, but that is in hand. In the big centres the court estates grew up because there were so many different bits. The tribunals, the magistrates' courts, the county courts and the Crown Courts had their own buildings, and we are trying to consolidate that. Particularly here in London, we have urgent decisions to make in respect of the disposition of the court estate that are critical to the operation of the programme, but I hope those will all be made on time and will benefit the user of the court estate enormously, but it is a difficult area.

Baroness Taylor of Bolton: Presumably there is some funding coming in from selling the buildings, but is it total funding?

Rt Hon Lord Thomas of Cwmgiedd: Yes, there will be funding coming in from selling buildings. Unfortunately, some parts of the court estate are in a pretty sorry state. If you go to many courts, the lifts do not work or they have buckets catching the water. I know there are problems here, but I can tell you things are much worse in most courts.

There is a realisation in some areas that court estate buildings are probably worth nothing and the sites are not worth very much, but in other areas we have extremely valuable property that we need to consolidate. Assuming proper decisions are made and—this is in place—proper commercial decisions are made, i.e. that the state gets the benefit of the sale and not the developer, we should be successful.

Lord Judge: Do you keep the money from the sale of a big site or does the Treasury take it and let you have back what it wants to let you have back?

Rt Hon Lord Thomas of Cwmgiedd: The deal is we keep the money.

The Chairman: Would you like to move on, Lord Judge, to your next question?

Q9 Lord Judge: You touched on the problem of litigants in person and the district judges and so on. They must cause huge delays, gradually leading to a greater backlog. One of the questions that we are concerned about and have expressed views about is the complexity of the law, in particular, as an example, immigration law and the constant changes in the legislative arrangements and so on. Confining ourselves to immigration law for the moment, how does this affect the way in which the work gets done?

Rt Hon Lord Thomas of Cwmgiedd: A couple of years ago one of my colleagues described the Immigration Rules as something a Byzantine emperor would have been proud of. That remark has been echoed in several further decisions. The difficulty that the Home Office faces with immigration is that it would be of enormous advantage if we could start again, but it never seems to have the time or the ability to do so. That is not meant as a criticism as it is a very difficult area of the law. The law on immigration is immensely complex. Every week there arrives in my email inbox an update on decisions as to how the rules and the Act and the regulations are to be interpreted, and there are about six or seven decisions a week. One of the great advantages we have had in transferring much of the judicial review work to the immigration and asylum chamber is you have people who do nothing but this work and so they are able to cope with the changes much more easily. When it is dealt with in the High Court or the Court of Appeal, the time it takes for someone who is not doing this work day in, day out in making certain they are completely up to date has a serious detrimental effect.

Lord Judge: Are there any other areas of the law that bother you in the same way?

Rt Hon Lord Thomas of Cwmgiedd: Sentencing. We have had a quiet year or two, but I am not sure how long that will continue. The Law Commission is addressing that. Extradition law is a quite difficult area, because it has been amended on a number of occasions. Areas such as social security and tax are complicated, but they always have been. I am increasingly worried about the complexity of the criminal law because you want something that is much simpler. It must have been 15 years ago that Lord Bingham called for a criminal code and there has been no progress on that. It would be wonderful if we were able to do so.

Lord Judge: What are the practical consequences on the Crown Court of the changes to criminal law?

Rt Hon Lord Thomas of Cwmgiedd: First, the law has become much more difficult to operate. Secondly—and I say this with a degree of regret—in the Court of Appeal in many cases it is very necessary for the court to do its own legal research, because you cannot be sure that the people in front of you have the right case law. This happened to me last week. I was somewhat surprised, but this is a contingency one guards against. The circuit Bench certainly has to be absolutely on top of that and the Criminal Procedure Rules. We have modernised the rules and they provide a much better code, but people's familiarity with them is not that great. To be fair to the criminal practitioner, so much is changing all the time—their levels of remuneration are not what they were, and they have had a very tough time because work has been taken away from them—but the complexity of the system makes the work of the Crown Court much more difficult.

One illustration of that, which I think has been published or is about to be, is the new *Crown Court Bench Book*. The one I had when I was an assistant recorder, produced by what was then the Judicial Studies Board of England and Wales, was 43 pages long, I think. Volume I of the new equivalent is, I think, 390 pages long. That is an illustration. If any of you had the time, reading a lecture given by Sir Stephen Richards last year in one of the Gray's Inn series of lectures on what has happened to the Civil Procedure Rules would show you that we have managed to make those immensely complex. It is a very good read, boring though the subject might seem at first sight. It is illustrative of the horrendous complexities we have.

Lord Judge: Is one consequence that you find cases take longer and longer to come to court?

Rt Hon Lord Thomas of Cwmgiedd: Yes, but we are making progress. I think the early indications are, certainly from the Section 28 pilot, that the ability to prerecord cross-examination, has made a very big difference and, secondly, the way in which we now conduct pre-trial hearings is much better. One of the great problems we face is that roughly 40% of the time in the Crown Court is now taken up with sexual offending. In some courts it is higher. That is a huge change and these cases are much more difficult to conduct.

Lord Judge: Do you have an average you can give us—you may not—of how long it would take me to be arraigned before a jury if I had allegedly stuck a knife into somebody and done them serious harm? Are we talking three months, six months, a year?

Rt Hon Lord Thomas of Cwmgiedd: It will vary in different parts of the country. In some places it will be as quick as six to nine months; in some places, for the trial to start, it will take over a year.

Lord Judge: Do we still have a system in which sexual cases are given priority and so other cases fall behind?

Rt Hon Lord Thomas of Cwmgiedd: Yes, we do, except where the defendant is on bail, where, rightly, because of the need to be able to offer a date on which it is to start, those dates go back a long way. One of the great advantages of pre-recording cross-examination is that you can start a trial at any time because you do not have to put the complainant under the stress of coming to court and therefore giving her a fixed time. I say her, but it might not be.

Lord Judge: Just one more.

The Chairman: I thought you were going to say, “No further questions, my Lord”.

Lord Judge: I have been pressing and pressing and hoping that we would get Pigot II in force. Is it actually in force? Has an announcement been made? If it has, none of us has seen it, or at least I have not.

Rt Hon Lord Thomas of Cwmgiedd: We have run three pilots, one in Leeds, one in Liverpool and one in Kingston-upon-Thames. I went to see what it was like for myself. I sat through a cross-examination. I wanted to see what happened. I was very impressed by it. The Ministry of Justice is evaluating it at the moment. The decision has not been made to roll it out, but it is, in my view, unanswerable that we have to have it, to help complainants particularly. It makes such a difference.

Lord Judge: I think it has been around since 1979, so we are still waiting.

Rt Hon Lord Thomas of Cwmgiedd: I referred to the last century. It is a long, long time.

Q10 Lord Lester of Herne Hill: My wife is a part-time immigration and asylum judge and what she tells me makes the word “byzantine” seem like a gross English understatement of the position. Are you aware of some of the things that are happening in that area to the immigration and asylum judges? They are leaving or retiring early because they find the complexity of the law impossible, especially with unrepresented Home Office or individuals before them. The Treasury has just decided that they will not even be paid for the preparation of their decisions, only for the decision itself, which cuts down the rather modest pay they receive. When my wife goes to work at Taylor House, she tells me the administration has been crammed into one floor, the whole system is breaking down, and she has to fill a wheelie bag with enormously heavy documents before she can even get to court. She carries on with my encouragement, but there is now a crisis in that area and I do not know whether you are aware of that.

Rt Hon Lord Thomas of Cwmgiedd: Yes. What has happened is that the law is very complicated and across the Courts Tribunals Service the lack of a proper, modern IT system for the storing and transportation of documents has made things much worse. It is very difficult to pay competitive salaries in London. I am sure everyone here knows how difficult a

task filing is. Most judges will tell you, and it is certainly my experience in the Court of Appeal, that if you are told papers were sent to the court two days ago and we do not have them, that is not uncommon, because they are understaffed and we do not have what any other organisation would have, which is an electronic filing system. I think that can be remedied.

To go back to the particular conditions in Taylor House, part of the difficulty has been caused by the decision, for reasons I can understand, to remove rights of appeal so there is much more judicial review in the system; secondly, having paperwork that is disorganised and not in a right way; thirdly, the quality of the representation, which is so critical, because if you do not have good representation you have to be absolutely on top of the law all the time. Keeping up to date with it, as I hope I illustrated a moment ago, from what I read that comes on to my own laptop, is quite a strenuous task. On the detail of it, the Senior President of Tribunals was talking about a visit to Taylor House the other day, and I did appreciate things are pretty dire there.

Q11 Lord MacGregor of Pulham Market: You described in your annual report the additional training required for judges sitting in Wales. How is that working out? Is the special training for judges in Wales likely to lead to the creation of a de facto distinct jurisdiction?

Rt Hon Lord Thomas of Cwmgiedd: The training that is necessary in Wales has come about because the Assembly have passed legislation that in some very important respects is now different from that in England. It is coming about in family law and it will come about later this year in relation to the law of landlord and tenant, both of which are key areas.

The difficulty is, when the Government of Wales Act was passed in 1998 and revised in 2006, insufficient attention was directed to the fact that the Welsh Government are responsible for certain of their own tribunals. For example, the Mental Health Review Tribunal still exists in Wales and is completely distinct from the First-Tier Tribunal in England, and whereas in England we are trying to encourage tribunal judges to sit in courts and there is provision to do so, between the Welsh tribunals and the courts of England and Wales there is no such equivalent position. No one has really studied the problem of what has happened under the Act and there is no justice function that looks after Wales. By default the courts have put one in place, but there is not a justice function. The Welsh Government do not have justice as a competence and the Ministry of Justice has only just realised, despite our pressing it, that there is a problem. Thirdly, politically what has happened is there is the development of a separate law in Wales. I do not think it requires—but this is a political decision—a separate legal system. That would have huge complexity. It requires a recognition that Wales has a

distinct law that applies to it, so it has a jurisdiction in the territorial sense, but not a jurisdiction in the court sense. If Wales had a separate legal system, that would be a political decision and be perfectly operable, but at the moment we have the training and an understanding that the system can be made to work. Essentially, we have had to do this ourselves because of the lack of a justice function. I do not think there has been sufficient appreciation of the way in which Welsh devolution developed to realise that the lack of a justice function is a serious deficiency in an area where you accord very substantial primary legislative powers to an institution. Sorry, that was rather a long answer.

The Chairman: It has been a fascinating and very illuminating session and you have not been long-winded at all. It has been extremely concise and I congratulate you on your productivity, if I may. We are most grateful to you. We know how busy you are and your answers will be enormously useful to us and, through us, to others in the Parliamentary Estate and possibly beyond so thank you very much indeed for coming.

Rt Hon Lord Thomas of Cwmgiedd: Thank you very much. I regard the justice system as going through a very critical era, and if there are problems, particularly in relation to one or two of the things that I have raised with you, I hope it would not be considered discourteous if I were to ask you if I might come back to seek your assistance. I hope that would be in order.

The Chairman: It would be our pleasure. Thank you.