



Select Committee on the Constitution

Corrected oral evidence: The Lord Chief Justice

Wednesday 25 April 2018

10.25 am

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Members present: Baroness Taylor of Bolton (Chairman); Lord Beith; Baroness Corston; Baroness Drake; Lord Dunlop; Lord Hunt of Wirral; Lord Judge; Lord MacGregor of Pulham Market; Lord Norton of Louth; Lord Pannick.

One-off Evidence Session

Heard in Public

Questions 1 - 12

Witness

I: The Rt Hon Lord Burnett of Maldon, Lord Chief Justice of England and Wales.

Examination of witness

Lord Burnett of Maldon.

Q1 **The Chairman:** Welcome. It is very good to have you here. You know of some of the issues that we have raised in the past, and there are some you have concerns about as well. I understand that you would like to say a few words at the beginning about your current position and role, and how you see things. The floor is yours.

Lord Burnett of Maldon: Thank you very much. I am grateful that you have given me an opportunity to say a little at the outset. It is a great pleasure to be here. I hope I can help you with the issues that are of concern to your Committee. I am particularly grateful for this opportunity to say a few words.

I want to state how important I consider the relationship between the judiciary and Parliament to be, particularly with this Committee and the Justice Select Committee. Like my predecessors, I believe that an effective relationship and understanding of our respective responsibilities is critical to the functioning of our constitution, and I look forward to working with you during my time as Lord Chief Justice.

It might help briefly to identify my priorities. I have three broad themes of which I have spoken on a number of occasions: first, to improve judicial morale; secondly, to continue to fashion and then implement the long overdue modernisation of our courts and tribunals, known as the reform programme; and, thirdly, to increase public understanding of what judges do and why the rule of law matters.

There are two issues that I want to give special mention at this stage, if I may. The first is recruitment and retention, which of course is tied up with morale. The second is modernisation.

The current difficulties with judicial recruitment, in my view, pose a threat to our ability to discharge the business of the courts effectively. This affects the ordinary work of the civil, family and criminal courts dealing with cases between individuals, businesses or the state that affect the daily lives of many. Additionally and importantly, the difficulty in recruiting to the High Court threatens to undermine the worldwide reputation of the judiciary of England and Wales, and reduce the attraction of London as the pre-eminent centre for international dispute resolution. The voluntary use of our courts by those from outside this jurisdiction is worth billions a year.

The causes of the difficulties are many and varied. Remuneration, particularly the taxation treatment of pensions, is at the top of the list, as this Committee noted itself last year. That is compounded by an increasingly heavy workload at all levels and deteriorating working conditions. Those causes, and others, must be tackled if the expertise and excellence of the judiciary at all levels is to be maintained in the future.

I prefer to talk about modernisation rather than reform, because in many ways the current programme is about dragging our courts and tribunals into the 21st century, and moving from paper-based to digital processes. While that is long overdue, modernisation is also about so much more than IT. I said recently to the Association of Her Majesty's District Judges that it has three features. The first is improving the administration of justice. That is simply making it more efficient and sensitive to the needs of those who are caught up in it, many of them not voluntarily. The second is widening access to justice, essentially making it easier for people to bring proceedings. The third is improving the conditions for those who use and work in our courts and in the tribunal system. If I may say so, the Government have to deal with the long-standing maintenance backlog. I know we may talk of that a little later.

I fear there are pockets of misunderstanding about the modernisation programme among the judiciary and the professions, and more widely. We have tried to transform judicial engagement in the development of the components of reform to ensure that the interests of justice and judicial independence are fully recognised, and to bring our collective expertise and experience to bear. We are seeking the views of the wider judiciary on all aspects of reform that will affect their particular jurisdictions.

At the heart of what is in contemplation is a change in procedures and practices, some of which will require enabling legislation, followed by rules and practice directions. Of course, the latter will be under judicial control. The question whether all but the most basic procedural hearings will be by telephone or videolink will, in the end, be for the judge to decide, having received representations if necessary.

We hope the legislation that fell at the last election will be back before Parliament fairly soon. Without it, some of the courts and tribunals, or at least some of what we do, will remain trapped in the mid-20th century. At a more prosaic level, modernisation will simply align the courts and tribunals with ways of operating which the outside world, and even Government, have long ago adopted.

Q2 The Chairman: Thank you. As you know, this Committee has commented on many of those issues in the past. We are continuing to look at some of them, and we will cover some of the points you raised a little later.

May I start with one of your first priorities? You mentioned judicial morale. You have recently talked about the "intolerable pressure" from social media on judges. It is a problem in other areas as well. Could you say what impact you think it has had, and what could be done to try to address the situation?

Lord Burnett of Maldon: Lord Chairman, your Committee drew a distinction in its report last year between criticism, which all of us must be ready to face, and abuse, which is not appropriate in any circumstances. There is still a good deal of abuse being hurled at judges

in social media and on the internet. There have been some very striking recent examples. Forgive me if I do not give details, because I do not want to give them the oxygen of further publicity. It is a particular problem for those who are operating in the family field and for some who operate in tribunals. One understands that emotions can run extremely high in those circumstances.

I am conscious that it is not only judges who receive this type of abuse. Members of Parliament have recently articulated publicly some deeply affecting examples of the sort of abuse that they have received and that their families receive. It is, unfortunately, something that affects people, because whatever we do, whether judges or parliamentarians, we are after all human and we have concerns for our families in particular. I consider it to be a significant problem that stretches across society in general.

How it is to be dealt with, in the sense of stopped, is a very much more difficult question. I suspect that there will be no solution until the providers of the platforms on which all this material is placed develop appropriate algorithms to ensure that it is instantly deleted, but we may well be some way from that. There is no doubt that it is dispiriting, and it is sometimes genuinely frightening for some of our judges. It is not right that any public servant should be put in fear for themselves or for their family. It is a factor that inevitably may play into the recruitment of judges. Put crudely, if people are thinking of applying, particularly in some jurisdictions, they may ask themselves, "Why should I put myself through what might happen?" That is a problem.

Of course, abuse and vitriol that is completely unjustified but that gets a good deal of public attention and circulation is itself capable of undermining the rule of law because it erodes confidence in an institution that does not deserve to have its confidence eroded. In my view, it has a wider implication than simply the impact on the individual judge, very serious though that is.

We have put various mechanisms in place to provide support and protection for judges who face this. Again, I hope you will forgive me if I do not give too many details, but I can assure you that we take a great deal of trouble and time to provide that protection. We are also putting systems in place to encourage what is described by others as resilience, and to provide support for judges who are likely to find themselves in that sort of position.

Finally, one of my other themes has been to look at the way in which we can help better inform the public about what judges do at all levels. People tend to forget that there are thousands of judges dealing one way and another with our fellow citizens at all sorts of different levels. I suspect that most people have little idea of what goes on until, if they are unlucky enough, they find themselves engaged with the courts. We are working to enhance educational programmes, which the judiciary is very deeply engaged in, as are the magistracy. We are looking to develop materials that encourage schools to include judges and the rule of law in

their citizenship curriculum at key stages three and four aspects of the justice system.

Q3 Baroness Drake: Continuing on the theme of undermining the judiciary, and consequently the rule of law, in evidence to us last year your predecessor raised concerns about the media coverage following the judgments in the Miller case and comments made by the Lord Chancellor at the time.

This is a question in two parts. What discussions have you had with the new Lord Chancellor about that? Are you now satisfied that if such circumstances were to arise again, the independence of the judiciary would be defended?

Lord Burnett of Maldon: I have been very fortunate indeed in both my Lord Chancellors. It might be surprising to have to reflect that I have been in office for just under seven months, but I have my second Lord Chancellor. I hope that, subject to the usual exigencies of political life, I do not have another one for some time.

We have an extremely good working relationship. I am confident that the Lord Chancellor has a very clear understanding of the constitutional position of his office and of the differences between being Secretary of State for Justice and being Lord Chancellor. I would like to think that Lord Chancellors might occasionally ask their officials, "Give me the advice that you would give me as Secretary of State, and now give me the advice that you would give me as Lord Chancellor". That may be too much to ask, but it is a distinction that I am confident the Lord Chancellor has in mind.

As you know, I have regular discussions with the Lord Chancellor. I also have regular discussions with him and the Chairman of the Judicial Appointments Commission, and with him and the senior officials of HMCTS. I have regular discussions with the Permanent Secretary and with the Cabinet Secretary, and in consequence I have absolutely no doubt that the constitutional position is fully understood.

The channels of communication include my officials and the Lord Chancellor's officials. There have been occasions when it was necessary to have discussions about the possibility of the Lord Chancellor having to intervene. Happily, it has not been necessary for this Lord Chancellor to intervene, but we both have our antennae fairly finely attuned, looking ahead to the type of circumstances in which it might be possible. When we have identified such cases, the necessary steps have been taken in the MoJ to enable the Lord Chancellor to intervene should it become necessary. In Mr Gauke's time, it has not yet been necessary.

We have tried to draw a line under Miller and everything that followed from that. Whatever the perturbations may have been in the relationship in the past, we are set fair at the moment.

Lord Pannick: I want to return to your earlier answer, Lord Chief Justice. You mentioned the virulence of some of the abuse that tribunal

members and family judges receive. It is obviously very difficult to prosecute in such cases. A lot of time passes before a prosecution can be brought.

There is another remedy, which you will know about, of course, from your practice at the Bar, and that is contempt of court. Does the judiciary consider, through you, in the most extreme of these cases, simply reporting the matter to the Attorney-General and asking him speedily to bring a contempt of court case? If a prosecution of that nature were brought, and it was successful and a sentence handed down, it might have a very real impact on those people.

Lord Burnett of Maldon: I agree entirely with those sentiments. There are two distinct features, if I may say so. One is abuse hurled at judges in the courtroom. That happens, and it has happened to me. I suspect it may have happened to Lord Judge. Often, it is in the heat of the moment, and, in a sense, one shrugs one's shoulders and moves on. But there are cases of persistent abuse, and, in my view, the contempt jurisdiction should be explored more fully in that context.

The problem with much of the social media-type abuse is that it is impossible immediately to identify who the abuser is. Inevitably, if it comes through one of the ordinary social media platforms, it is often anonymised. I am afraid I do not know how easy it is to discover identities behind pseudonyms, but it is certainly something that should be looked at. You will appreciate that occasionally the police become involved and they take action. Also, regrettably, it has been necessary on behalf of a handful of judges to take civil action in our courts to obtain appropriate orders restraining people from doing things that are quite inappropriate. We are alive to all those possibilities, but I am grateful to you for highlighting the contempt one.

Q4 Lord Hunt of Wirral: Lord Chief Justice, how well do the current mechanisms work for communication, consultation and decision-making between your office and the Ministry of Justice? I am never quite sure of the difference that you see between the Secretary of State for Justice and the Lord Chancellor, but my main concern is whether you believe the views of the judiciary are satisfactorily represented within the Government.

Lord Burnett of Maldon: Yes, I do. In answer to Lady Drake's question, I gave some detail of the type of interaction that we have with the MoJ and with Ministers. I should add to that, as you all know, that I have direct access to the Prime Minister, and have had the opportunity to sit down with her and explain the matters of greatest concern to me as they touch the judiciary.

The Judicial Office is in constant touch and engagement with the Ministry of Justice on all matters that touch upon the judiciary. All my senior colleagues—the Master of the Rolls and the heads of division, and the senior presiding judge—from time to time have direct access to Ministers

as well. We constantly talk to them about reforms, changes and matters of mutual interest.

In my brief time as Chief Justice, I can think of only one relatively minor glitch, details of which do not matter, when an announcement was made by the Ministry of Justice that should have been run past me and other judges but which had been overlooked. When the Permanent Secretary and the Lord Chancellor became aware of it, they were immediately in touch to express their regret at what had happened, and to explain why it had happened.

On that front, I have no systemic concerns. The only point I should make is that, inevitably, in a department with a high turnover of officials, there are relatively few who have been in the Ministry of Justice for a long time. I have a faint underlying concern that more widely across officialdom there is not the instinctive understanding of the constitutional position that affects judges and government that perhaps once was the case.

Lord Hunt of Wirral: What could be done about that?

Lord Burnett of Maldon: A good deal is done to provide opportunities—it is not really training—for officials to have explained to them the basic constitutional position. That is happening not only in the Ministry of Justice but in other departments as well.

Q5 **Lord MacGregor of Pulham Market:** In our judicial appointments follow-up report, we identified several factors that were deterring applicants from applying. In your opening remarks, you referred to a number of them: remuneration, pensions, increasingly heavy workload, conditions, et cetera. Are those the key issues or are there others, and could you say a bit more about the solutions?

Lord Burnett of Maldon: The first thing to say is that I, the Lord Chancellor and the chairman of the Judicial Appointments Commission spent some time together considering the report that was produced last year, and in particular considering it in advance of the Government's response. You identified, as you say, Lord MacGregor, a number of key features that might be affecting the ease with which we can recruit judges. They are also factors that affect the retention of judges. There is undoubtedly a growing phenomenon of judges retiring a little earlier than they need, so we need to look at both ends of the picture.

It is a very serious issue for the reasons I identified in my opening remarks. If we cannot recruit sufficient judges at a number of different levels—and certainly at the moment we cannot—we have the problem that we have difficulty in discharging the business of the courts. My view is that the reasons have to be identified candidly, and steps then have to be taken to try to deal with some, if not all, of those reasons.

I do not want to focus on remuneration, but your Committee identified pensions, particularly the quite odd tax changes, one of which impacted only on judges, that came in in the last few years. I was relatively

heartened by the Government's response to that. Perhaps I might be forgiven if I read out a couple of sentences from it: "The Government notes the Committee's comments about the impact of judicial pension issues on judicial morale. The Government recognises that, taken together, workload, pension reform and pay restraint have had an impact on morale and on recruitment and retention ... We are committed to addressing this through court reform and through a major review of judicial pay led by the Senior Salaries Review Body". They indicated that the SSRB was due to report in summer 2018. They added that "the Government will engage seriously with the recommendations of this review and will do so in a timely manner". That was obviously quite encouraging. The SSRB's timetable has slipped slightly, and it does not expect to be able to report until the autumn.

Undoubtedly, the main issue is uncertainty over terms and conditions. The Committee raised other issues that I will say a few words about, if I may. Return to practice was identified as a possibility for helping recruitment, and raising the retirement age to help with retention. There was a focus on the pool of talent in the Government Legal Department and the Crown Prosecution Service, and a reference to too few solicitors coming forward, particularly to the higher ranks of the judiciary.

On return to practice, I am not at all convinced that the fact that judges are not able to return to practice is a significant or real inhibition for those seeking to apply, in particular because almost all who seek salaried judicial employment have been fee-paid judges for some time. The general expectation is that those of us who sat for some time as fee-paid judges had learned sufficient to understand that we wanted to be salaried judges. It is not universal. There are some, a very small number, who become salaried judges and then regret it.

There would be some real problems attaching to return to practice—in particular, former judicial colleagues appearing before their former colleagues. It would cause particular problems in relatively small court centres. I think it would cause problems at the higher levels as well, and raise questions about independence and advantage being gained even if they were not proper concerns. It seems to me that it would look pretty odd. With respect to the Committee, I am not persuaded that that would really help even if it were feasible, which I doubt.

The retirement age is a very controversial topic. My personal view is that the observation made by the Committee in its report, namely to consider raising the retirement age for the very senior judiciary, should be looked at closely, simply for the reason that we are losing some judges when they are absolutely at the height of their powers. The irony, as you will know, is that some judges retire unwillingly at 70, particularly from the Court of Appeal and the Supreme Court, and then, one way or another, engage in almost full-time activity as arbitrators or sitting as ad hoc judges in other jurisdictions. We are losing talent there. I appreciate that it is not a straightforward question, and you understand many of the arguments that are raised against it.

As I indicated, our real problem at the moment is retaining judges. There are some who would like to go on beyond the retirement age. The statutory provisions allow extensions for circuit judge and below, for up to a year at a time beyond their 70th birthday, until they are 75. That used almost never to happen, but now it is happening quite a lot simply because we need them on the books. It is also possible for retired judges to sit as fee-paid judges in retirement. To be perfectly frank, we would struggle to dispose of the business in the Court of Appeal and the High Court at the moment if our retired colleagues were not willing to come back from time to time to do the work.

Turning to the Government Legal Department and the CPS, I should declare an interest. My wife, although no longer practising, was in the Government Legal Department. I consider that there are some first-rate lawyers in both organisations. A few are coming through to fee-paid and then to salaried judicial employment. I hope there will be more.

As far as solicitors are concerned, so much is being done to try to encourage suitably qualified solicitors to become fee-paid judges and then salaried judges that I begin to wonder what more can be done. I will talk in a little while of one initiative that is coming on. Again, there is a huge reservoir of talent that is not coming forward to the pool from which the Judicial Appointments Committee makes its recommendations for appointment.

Lord MacGregor of Pulham Market: Can you quantify for us just how serious the problem is?

Lord Burnett of Maldon: For recruitment and retention?

Lord MacGregor of Pulham Market: Yes.

Lord Burnett of Maldon: I know that you want to talk about the High Court in particular in due course, but I will foreshadow that by saying that we are running the High Court 14 judges down. We are not optimistic that we will be able to make that good in the near future. The last three High Court competitions failed to provide the number of judges we need. The last two circuit judge competitions failed to provide the number of judges we need. There is a real problem, and it does not appear to be a transient problem either.

Q6 **Baroness Corston:** Lord Chief Justice, you have strayed slightly into the question I was going to ask you. In your work with the Judicial Appointments Commission, you obviously try to spread the net in looking for recruits to the judiciary. Given the background of our illustrious President of the Supreme Court, to what extent do you look in academia for new judges?

Lord Burnett of Maldon: Anyone who has the statutory qualification, which for England and Wales requires them to be solicitors or barristers, can come forward for appointment. We have a number of distinguished academics who are fee-paid judges and a handful who have become full-time judges. You mentioned Lady Hale, who was an academic, then a

Law Commissioner and then a judge. In the Supreme Court, we also have Lord Lloyd-Jones, who was an academic, combined it with private practice and in due course was at the High Court, the Court of Appeal and Supreme Court. Recently, Lord Justice Beatson retired from the Court of Appeal. He had been the Rouse Ball Professor of Law at Cambridge.

In the Upper Tribunal, I can think of three or four legal academics who were professors. Sir Ross Cranston was an academic and of course a Member of Parliament. He had a very broad and useful experience. This has been happening. There is a very distinguished academic who recently became a deputy High Court judge, and who may or may not wish to be a salaried judge in due course. We have others who are fee-paid judges sitting as deputy High Court judges or recorders. The door is wide open for those who can demonstrate the necessary skills to the JAC to become fee-paid judges and then, if they wish, salaried judges.

Baroness Corston: Do they know that? To what extent is that information or opportunity disseminated to them, or are direct approaches made?

Lord Burnett of Maldon: I am confident they know it, because so many of them have done it. It brings us to a more general question about the efforts that are being made to recruit judges from backgrounds that are not the traditional ones, particularly recruitment to the High Court, about which a great deal is being done. The focus has been on gender and ethnicity, and on solicitors, I think it is fair to say, but there are some notable and distinguished academics in the judicial ranks. I do not see it as a problem, to be perfectly honest. I am sure that those who are interested and can demonstrate the necessary skill sets will get through the JAC processes.

Q7 **Lord Norton of Louth:** You mentioned in opening the need to address the deteriorating working conditions. We heard last year about the dilapidated position of the court estate and that it might deter people from seeking a judicial appointment, but it links to your first point as well; presumably, it affects the morale of existing judges. There are wider issues about the delivery of justice. What steps are being taken, both in the short term and the long term, to address the estate?

Lord Burnett of Maldon: I will start by saying something that may be a bit counterintuitive in answer to your question. We have some terrific buildings, particularly those that are relatively new or very new. The problem is that they are the minority rather than the generality, and many of our buildings are terrible. Indeed, they are frankly an embarrassment. I do not say that they are an embarrassment for me as a judge, but they are an embarrassment in that we expect the public to have to operate in them.

Over many years, the money allocated for maintenance of the court estate was in fact underspent. I have no real idea why it was underspent, save that it may simply be a reflection of the fact that after 2008 there was a pressing need for everybody to try to save money today,

irrespective of what the consequences might be tomorrow. Within the last two years, the money—the budget—has been fully spent, which I welcome because it is a long overdue improvement.

I have been going round many courts. To my eye, non-expert I hasten to add, the condition of our estate is such that maintaining it on the current budget will simply not get close to putting it back into a decent condition. I am enormously encouraged that HMCTS has undertaken a proper survey of the estate. The results are coming in and are being looked at. It appears that the survey is confirming my very non-expert view and that at some stage very substantial funds will be needed to restore the estate to a place of decency.

Recently, I asked for work to be undertaken in HMCTS to identify any problems with our estate that potentially put us in breach of statutory obligations. Obviously, we cannot run a system that does not comply with what Parliament has indicated is the law. That work is happening. The indications are that a relatively modest amount of money will be needed to do it. That will have to be got on with and the money will have to be found.

The second thing I have been particularly concerned about as a priority is to identify anything that is a security matter—either security in the sense of people coming into buildings with things they should not have, or security in the sense of providing appropriate first-line protection for the judges who deal with the highly emotional types of case that we were talking of a little while ago. That too is being done, so I am extremely heartened by that.

The truth is that at some stage it has to be generally realised within government that this is not a question—to use a homely metaphor—of putting a couple of new tiles on the roof because they have slipped. That is not the position we are in. At some stage, a good deal of money will have to be found to deal with the problems.

For the financial year that has just ended, we have identified a relatively small amount of additional money, amounting to £7 million, to deal with immediate problems in our estate. I was very struck when I was going round that there were problems that would cost relatively little to put right, but were disproportionately irritating staff and judges or, frankly, disproportionately affecting users of the courts, such as paint peeling, filthy carpets and broken chairs. That sort of thing was legion. I am happy to say that much has been done to sort out those minor problems, but, looking forward, if we want to create a decent environment in which the public engage in the justice system and in which staff and judges can work, a good deal of money will have to be found.

Lord Norton of Louth: I stress the point that you made. You are talking about the users of the court, so it is not just the judges and the counsel; it is members of the public, and indeed jurors and the provisions laid on for them.

Lord Burnett of Maldon: Yes. Oddly enough, one of the things that struck me most when I was going round the courts was the frankly disgusting state of the accommodation provided to jurors. It is not quite squelching across a carpet with your feet sticking because of accumulated bubble gum, but not far short, to be perfectly honest. That is being dealt with, and other things are being done to improve the conditions for public users of the courts.

Lord Norton of Louth: You mentioned the immediate things and the £7 million provision for dealing with that, but in the longer term there are bigger issues, some of which are, I assume, capital intensive because they are structural or whatever. Do you have any idea of the scale of that and what it would entail for the public purse?

Lord Burnett of Maldon: I am not sufficiently confident in any figure for it to be proper for me to venture a guess, because that is what it would be. To be perfectly frank, we are not talking about tens of millions; we are talking about hundreds of millions. That will need to feature in future negotiations between the MoJ and the Treasury, and then in due course between the MoJ, me and HMCTS.

Lord Beith: I feel that initially I should exonerate the Old Bailey, having spent five weeks as a juror there last year in quite reasonable conditions, which were a credit to the court management.

Lord Burnett of Maldon: I agree that if all our courts looked like the Old Bailey, and staff, judges and members of the public operated as they do at the Old Bailey, I would have no complaints at all.

Q8 **Lord Beith:** You indicated your commitment to the application of technology in the court system and the importance of ensuring that judges' experience is fed into the process by which it is being developed. I just want to pick up on a couple of issues that arise in relation to that.

I will start with videolinks, which can be extremely useful and can save a great deal of time and money in the court system. It has been assumed until recently that in the case of children they are the answer, and that having videolinks rather than bringing children to the courtroom may be helpful to them. That has been questioned by more recent research. Do you have a view about that?

Lord Burnett of Maldon: On videolinks generally, there has been a lot of misunderstanding, certainly reflected in some of the comments I have read in the press, about what is envisaged for videolinks. In the end, they will be under judicial control. It is not envisaged that they will be used as a substitute for court hearings. Indeed, if any of you has in mind the legislation that fell, a very tight structure was envisaged, certainly for the criminal courts, which would ensure that, for example, full trials were not dealt with by everybody sitting in different rooms all round the world.

So far as children are concerned, the research waxes and wanes. In due course, when the relevant rules are put in place, the judiciary and HMCTS will need to have an eye to what the interests of justice require. I do not

suppose that we have heard the end of where the balance lies for some of these things. We have to recognise that sometimes there are competing interests at stake as to whether it is a good thing or not to take evidence via videolink in some proceedings.

Hitherto, the use of a remote videolink for children in particular and for other vulnerable witnesses—it is not only children—has been entirely informed by concern for their welfare. You may remember that, when these developments first came in, concerns were articulated about the impact of taking evidence in that way on the fairness of the trial for a defendant in criminal proceedings, for example. Those have rather evaporated as a result of experience, but I doubt that at the moment we are in the final place on expert input into the impacts of some of the changes. We will have to look at them very carefully.

Lord Beith: The challenge is partly based on the idea that the child's understanding of the situation, and of the courtroom, is not necessarily helped if they are completely detached from the proceedings.

Lord Burnett of Maldon: Yes.

Lord Beith: There is a welfare issue on both sides.

Lord Burnett of Maldon: That is absolutely right.

Lord Beith: You said earlier how disappointing it was that we still had not had the courts part of what was to have been the Prisons and Courts Bill, and that it was trapping some courts in the previous century. I assumed that you meant in relation to technology. Could you illustrate that for us?

Lord Burnett of Maldon: In the criminal part of the Bill, for example, changes are proposed that mean that it will not be necessary for people to attend physically in magistrates' courts as they are required to do by statute at the moment. That needs primary legislation. We can all think of examples, either through the media or personal experience, of utterly pointless personal attendances at court in circumstances where no serious business was going to be transacted. That is an example.

The ability in the civil field to have dedicated rules created by a rules committee for online courts requires legislation, for example. Many other features contained in the old Bill were simply designed to unclog the arteries of what has been going on for a very long time. That is why I very much hope that legislation will be back relatively soon. It was in the Queen's Speech, as you will remember. We are optimistic that it will be back before too long.

Q9 **Lord Beith:** One thing that is clearly affected in many ways by technology is disclosure; some people have referred to a disclosure crisis. Obviously, you may feel that a lot of this is a matter for the Attorney-General, but it has massive implications, for example for the disruption of trials when disclosure requirements have not been met. Do you want to say anything about it?

Lord Burnett of Maldon: It is a matter of great concern. Over many decades, if one looks at some of the most egregious miscarriages of justice, disclosure or failure to disclose has been at the heart of them, so it is a matter of great concern. As you say, the Attorney-General is reviewing these matters, and there is input from the judiciary. At the heart of disclosure problems in the criminal context, there seem to me to be very straightforward propositions that the people who are responsible for ensuring that disclosure occurs in accordance with the statutory scheme are under an enormous amount of pressure. Police officers are those primarily responsible for looking at disclosure and identifying for disclosure anything that undermines the prosecution case or advances the defence case.

For some police officers, there may be some problems, which may be dealt with by training, of understanding what advances the defence case and what undermines the prosecution case. In a number of the cases that have gathered a lot of public attention, we have seen disclosure happening right at the end, often only under pressure from assiduous prosecutors sometimes, in the CPS or from defence solicitors and advocates.

I wonder whether that is a phenomenon that reflects the fact that those who have to do the work have too much to do, because there are fewer of them and they put things off. We are all perhaps occasionally guilty of that. If we have too much to do, we have to prioritise things. The truth is that in the criminal sphere, sometimes cases go away. Sometimes they go away because they collapse and the prosecution collapses. Sometimes they go away because a defendant pleads guilty. It would not be altogether surprising if there was a bit of putting off going on, quite apart from any other underlying problems. When fewer people, both in the police and in the CPS, are doing the same amount of work, there will inevitably be problems. I very much hope that the Attorney-General gets to the bottom of it.

Baroness Corston: Is the problem of disclosure emphasised by the fact that the police and the CPS, both of whom you have acknowledged have suffered budget cuts, often have to trawl through thousands and thousands of text messages on mobile phones, which, in one recent rape case, led to the collapse of the trial? That must be an extraordinarily time-consuming process.

Lord Burnett of Maldon: Yes, I agree. The enthusiasm with which people text each other is such that some people have thousands and thousands and thousands on their phones. This is an area, it seems to me, where the sensible use of technology itself must surely be able to help, but I know what will be said: "Get new technology to search phones or a complainant's emails, or whatever it is, and it will require somebody to invest quite a lot of money in providing the equipment and the technology to do it". I can well envisage the sort of political debate that would go on. It will be, "Yes, it is a very good idea but I would rather someone else paid for it".

Q10 Lord Dunlop: I want to ask about your third priority, which is promoting public understanding. You recently said that you wanted to explore recording and broadcasting sentencing remarks in high-profile criminal cases to improve transparency and public confidence. Can you say something about what benefits and risks that might give rise to, what practical challenges you can see that need to be overcome, and whether you have looked at the Scottish experience of broadcasting sentencing remarks?

Lord Burnett of Maldon: As I think the Committee knows, a pilot scheme was run in a handful of Crown Courts in England and Wales to record sentencing remarks. That pilot scheme is being evaluated by the Judicial Office and various judges. Exploration continues of the possibility of making available for broadcasting sentencing remarks in a small number of high-profile Crown Court cases.

My personal hope is that we will be able to devise a scheme that enables that to happen, albeit in a relatively small number of cases. As you indicated, Lord Dunlop, the Scots are ahead of us in that. I remember so well appearing before Lord Hope and reading his judgments, and often finding a couple of paragraphs that told us that the Scots were ahead of the English. We will need to look carefully at that.

I do not want to underestimate the logistical and practical issues that might arise in devising a scheme. There is a good deal of concern being voiced by many judges that doing this at all could expose the judges in question to security problems, and that is something we will have to think about quite closely. The practical problems can inevitably be overcome, particularly if money can be found and arrangements can be made with broadcasters, similar to those we have already in the Court of Appeal, Criminal Division and Civil Division, for the recording and broadcast of what goes on in those courts. Very rarely does what goes on seem to be of sufficient interest to the media for it to be broadcast.

There is also a parliamentary consideration. I understand that it would need an affirmative resolution statutory instrument, and getting parliamentary time at the moment for anything is not easy. We are working on that.

Can I use your question as an opportunity to identify another development that I hope will be coming along fairly soon? You all know that in the Supreme Court the proceedings are livestreamed. There is usually only one court sitting, or sometimes two courts. We are planning to livestream selective cases from the Court of Appeal Civil Division. Some practical things are still being worked through, including looking at some contractual issues, but I am pretty optimistic that that will come along relatively soon.

It all feeds into a theme that I have been trying to pursue. We want the public to understand better what we do, and this is a very good way of at least putting material into the public domain, which might enable some to do so.

Lord Dunlop: To go back to the criminal cases, what sort of timescale are you working to for announcing an outcome to the pilot?

Lord Burnett of Maldon: I am not working to any particular timescale at the moment because there is a lot of work going on in the background.

Q11 **Lord Pannick:** As you know, Lord Chief Justice, the Criminal Bar Association has expressed the view that the current arrangements for criminal legal aid are not just unacceptable but pose a threat to the rule of law. Do you share those concerns?

Lord Burnett of Maldon: On the question of criminal legal aid, you will understand, I hope, if I do not wade into what is, essentially, a trade dispute between the Ministry of Justice and the criminal Bar and the criminal solicitors.

The new scheme that came into force on 1 April was, in fact, devised jointly by the Ministry of Justice and the Bar. I hope I am not speaking controversially if I say that the real issue is not the nuts and bolts of the new scheme, but a more profound concern being expressed by criminal lawyers that the funding available is so small that the problems you identified in your question are materialising.

In the last few weeks, the Law Society has published information that identifies where criminal legal aid solicitors are operating across the country, and their age demographic. It is the age demographic that really struck me; there are very few young criminal legal aid solicitors. In other words, what appears to be happening, according to the Law Society, is that the cadre of legal aid solicitors acting in the criminal sphere is getting older and older. That is happening at the Bar as well. There is fairly convincing evidence from the Bar Council that, at the bottom, the junior Bar is not recruiting many to criminal work.

In the long run, whatever the causes—and remuneration may well be at the heart of them—it cannot be good for the rule of law or the administration of justice, because it will mean that there are simply insufficient suitably qualified solicitors and barristers properly to represent those who need representing in the criminal courts. It is a matter of concern.

Lord Pannick: The association expressed a concern that you may also have a view on. The Bar has done a great deal over the last 20 years to promote diversity. Real concern is being expressed that, if we do not pay people sufficiently, we will go back to the old system where many of the people performing activities as barristers have private means, or other sources of income, and that will have a really damaging effect on diversity.

Lord Burnett of Maldon: If that were to happen, it would be deeply retrograde. The truth is that in any environment you have to pay people a decent amount to do the job. In the end, the law of supply and demand will apply just as starkly to criminal solicitors and barristers. I think that is the point that the Law Society's work on the demographics was

designed to illuminate. The remuneration is now such that people are simply not joining the ranks. In the long run, that is an unfortunate development.

The Chairman: It is a serious problem at the moment, but it could clearly become a crisis.

Lord Burnett of Maldon: Yes. I always hesitate before using the word "crisis". All I can say is that I had not appreciated, until I read the Law Society research recently, quite how desperate the position appears to be in many parts of the country. If it gets worse, if one simply cannot get duty solicitors to turn out in many police stations, it is a problem that has to be resolved.

The Chairman: It is a pretty desperate problem.

Q12 **Lord Judge:** As Lord Chief Justice of Wales, can you help us by describing as briefly as you can how the impact of the growing body of legislation by the Assembly in Cardiff is impacting on the administration of justice in Wales?

Lord Burnett of Maldon: I will make two or three very short points if I may, because I appreciate that time is marching. An increasingly rich body of Welsh law has come from the Assembly, either as primary legislation or as delegated legislation. We in the judiciary are alive to that. The Judges' Council committee for Wales, which I chair, has developed training for judges that deals with the new developments in Welsh law.

Secondly, I have had a particular concern about the lack of accessibility to Welsh statutory instruments. When I first met the Counsel General and the First Minister after I was appointed, it was something I raised with them as a real problem, because it is quite impossible to find some of the statutory instruments at the moment. They are taking that forward, including with a Bill that will impose duties on the Counsel General, if I have it straight, to ensure accessibility to Welsh legislation.

Lord Judge: I think you said there were three points, but we may have run out of time.

Lord Burnett of Maldon: Yes. There were two points in the first: we have the Welsh committee, and we are developing, and have developed, training.

Lord Judge: Two and a half.

Lord Burnett of Maldon: We can certainly agree on that.

The Chairman: Thank you very much indeed for giving us your time, and a little extra. We are grateful to you for coming and we will obviously be keeping an eye on all these issues, which we think are important and fundamental.

Lord Burnett of Maldon: Thank you. Could I add one thing?

The Chairman: Indeed.

Lord Burnett of Maldon: Inevitably, our talk has focused on quite a lot that is not right about our system. If you would give me no more than one minute, I would like to emphasise that when I travel the country talking to judges, if I talk to them about the state of their buildings they get very gloomy, but if I talk to them about why they became judges and what is interesting, fun and worth while about being a judge, they light up. They recognise that it is a privilege to be a judge; it is a public service that people enjoy, and it brings enormous personal and professional satisfaction.

They also speak of the astonishing commitment of the staff in HMCTS in our courts. I have seen that for myself. It is a wonderful thing to talk to staff who express concerns that the judges are overworking, and then talk to judges who express concerns that the staff are having to overwork and operate in a difficult environment. The same is true of magistrates.

Although we have difficulties and problems, I assure you that the judges and the staff are discharging all their obligations in relatively difficult circumstances, and providing what I consider a magnificent service to the public. Thank you very much.

The Chairman: Thank you.