



Select Committee on the Constitution

Corrected oral evidence: Oral evidence session with the Lord Chancellor and Secretary of State for Justice

Wednesday 9 May 2018

10.00 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 Morgan; Lord Norton of Louth.

Evidence Session No. 1

Heard in Public

Questions 1 - 12

Witness

I: Rt Hon David Gauke MP, Lord Chancellor and Secretary of State for Justice.

Examination of witness

David Gauke MP.

Q1 The Chairman: Good morning, Lord Chancellor. Thank you very much for coming, and for agreeing to a session that, although not open-ended, is longer than we sometimes have.

Can we start by talking about your role? Historically, the role of the Lord Chancellor is absolutely central to the British constitution in many ways, yet you are a political Cabinet Minister as well. How do you manage to draw a distinction in practice between your two roles?

David Gauke MP: You are right to say that it is a combined role. There are areas of overlap. On the one hand, I have my Lord Chancellor duties, which relate to the courts and the judiciary: appointments, conduct, terms and conditions, pay and pensions, and so on; the court and tribunal system; coroners; civil, family and administrative law; and legal aid and legal services. With that side of things come various ceremonial duties, as Lord Chancellor. In addition, I am the Secretary of State for Justice. The largest single part of that is probably the prisons side: prisons and probation and issues such as sentencing.

I have described it as a portfolio role, perhaps more than some other positions. Having said that, I was previously Secretary of State for Work and Pensions, where there was a benefits side of things and I was also dealing with private pensions. As a Secretary of State in most places, one has to cover a fairly wide range of activities.

My personal view, four months or so in, is that the two roles fit together reasonably well. An understanding of what is happening with the judiciary comes together with an understanding of what is happening with, for example, penal policy. There is an overlap. The range of activities makes sense.

The Chairman: You mentioned that you were briefly in another department. There has been quite a changeover of people in your position.

David Gauke MP: Yes.

The Chairman: That can lead to a loss of collective memory and institutional approach to the responsibilities of the Lord Chancellor. How do you make sure that civil servants are there long enough to appreciate that role, and to give the Lord Chancellor the independence that is absolutely necessary?

David Gauke MP: With regard to turnover, my personal experience as a Minister was seven years in one department and seven months in another. I would now quite happily take seven years in one department, but of course that is not entirely within my control. My intention and my approach to this role is to work at it on the basis that I will be there for some time, in order to be strategic and to take a long-term approach to

things, whatever may in fact happen. I certainly encourage my department to work on that basis. It is not all about what we can achieve in a few months; it is about thinking through the longer term.

That is the approach that one should take to any position, but particularly to this one. You touched on the fact that it is a unique role. One aspect of it is to provide a voice around the Cabinet table for the rule of law, stressing the importance of the independence of the judiciary, for example, and representing long-standing British values and institutions. That is a voice that one has to take. To some extent, it is something you can adapt to very quickly or something you may be uncomfortable with and never fully master, but I certainly endeavour to represent those values and institutions.

The Chairman: Do your civil servants and your private office ever say to you, "Wearing this hat, this is the advice we've got to give you. In a political role, this is what you might want to do"? There might be two different and not necessarily parallel tracks.

David Gauke MP: Not quite in those terms. In every decision I make, either wearing the hat of Secretary of State for Justice or as Lord Chancellor, I am conscious that I have a responsibility in respect of the rule of law and the independence of the judiciary. That sometimes requires me to take an approach that might be a little different if I did not have those responsibilities and had not made those commitments. It requires you to think through the impact on the judiciary, for example, in a way that is probably different from what happens in other departments.

Q2 **Lord Norton of Louth:** Lord Chancellor, you mentioned responsibilities that are clearly constitutionally central. How do you see your role in relation to the constitution as the constitution? Do you regard yourself as the Minister for the constitution?

David Gauke MP: Not as such. Clearly, central responsibility for the constitution falls within the Cabinet Office, led by my predecessor, David Lidington, and specifically Chloe Smith as the Constitution Minister. In recent years in particular, quite a lot of constitutional issues have been very closely bound up with issues to do with devolution. That is not something I deal with day to day, any more than any other Secretary of State.

To come back to one of my previous answers, there is a particular responsibility on the Lord Chancellor with regard to the rule of law and the independence of the judiciary. That is part of our constitution. As far as that part of the constitution is concerned, there is a specific responsibility on whoever is performing my role.

Lord Norton of Louth: You have a responsibility for those particular aspects, but when it comes to discussing constitutional issues in the round, there is a danger of seeing them as fairly disparate, with the rule of law here and devolution there. We need to stand back and think about the constitution as a constitution, particularly if one is thinking about

where we want to be with the constitution of the United Kingdom in five or 10 years' time. With the sorts of issues you were talking about, there is a danger of being reactive and protective: "I must defend the rule of law". What are the processes within government for looking ahead and thinking more about the shape of the constitution that is appropriate to the United Kingdom?

David Gauke MP: First, to reiterate, if you are looking for the person who is performing the role of thinking about where we will be five years ahead and bringing it all together, that falls within the Cabinet Office, so it would be the Chancellor of the Duchy of Lancaster. Obviously, government is a collective institution. Around the Cabinet table, for example, I am conscious that the Lord Chancellor has a particular contribution to make on constitutional matters and I work on that basis. Setting out where the constitution will be in five years' time is not generally how we have operated in this country. Were we to do so, it would fall to the Chancellor of the Duchy of Lancaster.

Lord Norton of Louth: As you say, we have not usually done that, because historically we have not needed to, but we could say that, with all the pressures we are under now, there is more of a case for doing that and thinking it through. I take it from what you are saying that the lead would come from the Chancellor of the Duchy of Lancaster, but with the Cabinet as a co-ordinating or collective body for the discussion of constitutional issues.

David Gauke MP: Yes, for anything that was of constitutional significance. There are two particular areas of constitutional attention at the moment. Obviously, one relates to Brexit. The second is devolution. The voices of the Secretaries of State for Scotland, Wales and Northern Ireland are very strong on that as well.

Lord Norton of Louth: As you say, you have responsibility from the perspective of the rule of law in particular. Obviously, that has some relationship to ensuring things such as legal services, not least as regards Brexit. Can you tell us a little more about how you co-ordinate with others such as the Chancellor of the Duchy of Lancaster on those issues? Is it very much you going in on those issues, or is there a more collective role?

David Gauke MP: In the context of Brexit, you are absolutely right to highlight the issue of legal services. It is one of the areas I am very focused on in my international engagements when attending Justice and Home Affairs Council meetings with the EU or, indeed, when engaging with the Secretary of State for Exiting the European Union. These matters are pretty prominent in what I am doing in the MoJ. There is a lot of engagement with the legal professions to ensure that the UK is in a strong position post Brexit. That is an important part of what we do as a department.

We engage very strongly with other parts of government, including DExEU, BEIS and the Treasury. It is relevant for all of them, given that

legal services are a very significant part of our economy. I am very keen to ensure that it is one that can prosper in a post-Brexit world. There is that route in, and there is a lot of cross-government work on that particular area. That feeds into what we are doing more widely with Brexit. I certainly ensure that the MoJ's voice is heard in those discussions.

Lord Norton of Louth: My final question follows from that. As you say, there is an awful lot of work liaising with other departments, co-ordinating and raising the importance of the rule of law. How much of that is reactive, making sure that the rule of law is there and is defended? How much time do you have to think proactively and to think ahead, not just to protect the rule of law, but perhaps to advance it?

David Gauke MP: It is a good point. It is something I intend to say more about, because the rule of law is very important to us as a country in order to protect individual liberties. It is also at the heart of our prosperity. The reason why the UK has been as successful a country as we have been since the industrial revolution is in part that we have a system that is trusted. People know that there is a legal system that will back them up, will seek to get to the truth and will not be influenced in an improper way. There is greater certainty about enforcement of contracts, and people know where they stand.

If we are to be successful in the future, those attributes will have to be at the fore of what we are about as a country. We live in a period when there is a degree of populism that does not necessarily sympathise with those values or that finds difficult the constraints that the rule of law might sometimes impose. Those of us who believe in the rule of law have to articulate its importance and centrality, not just to our individual liberty but to our economic prosperity.

Lord Judge: Is there a formal demarcation of the constitutional responsibilities of the Lord Chancellor and those of the Chancellor of the Duchy of Lancaster, or is it an ad hoc arrangement that drifts over the lines depending on who holds those offices?

David Gauke MP: I am not sure that it necessarily depends on who holds the offices. It has certainly been the position for as long as I have been a Minister that the lead department on devolution matters and the electoral system has been the Cabinet Office. Those are the areas that have attracted most constitutional attention, and they have clearly fallen within the remit of the Cabinet Office for some time.

The Chairman: You have just mentioned devolution and electoral reform or change, whatever you want to call it. In the last few years, we have seen quite a lot of examples of very piecemeal changes. I hope we will not see the same in the next few years. Do you feel that you would have a role in saying to the Chancellor, "Actually, this has wider implications than just a simple piecemeal change. There are ramifications for other parts of our constitution"?

As regards devolution, the reason why we have certain problems now is

because certain aspects of the devolution deals have not worked properly. In particular, the joint ministerial partnerships have not been there: "Devolve and forget" was the approach the Committee picked up. You were not Lord Chancellor at the time, but would you expect a Lord Chancellor to have a role in trying to minimise problems of that kind arising, because you have a responsibility for the overview of how well constitutional settlements are working?

David Gauke MP: It is quite a hard question to answer in the abstract, because it depends on the nature of the issue. The responsibility of the Lord Chancellor comes in when it is about our legal system, the rule of law and the independence of the judiciary. For example, it is not part of my responsibility, any more than it is part of the responsibility of other Cabinet Ministers, to take a position on voter ID checks at polling stations, to take a topical issue. Obviously, I would be very interested in a devolution matter, but I come back to the point that the lead for that would be within the Cabinet Office.

The Chairman: I understand that the lead would be there. I am just saying that there seems to be a vacuum where there could be an overview of how different elements of change may interact in the future.

David Gauke MP: I would argue that that overview fell to the Cabinet Office.

Lord Morgan: Is one problem with devolution, for example, a certain lack of transparency in how the whole thing operates? When two or three areas of law, from different agencies, impinge on particular institutions or individuals, some genuine uncertainty has been expressed as to which law is the right one. Is that kind of problem important?

David Gauke MP: That is a fair point. I come back to the point that it is difficult to answer in the abstract. If it is not clear what a legal position is, that is clearly an issue for me and my department. I accept that.

On the question of which issues should be devolved, let us go back to the Smith commission, for example. I was not in my current role at that point, but I assume that the position of the Lord Chancellor would have been to ensure that there was sufficient clarity as to which laws applied. The detail of which particular powers were devolved is more likely to have been an issue for the relevant departments, with an overview by the Cabinet Office.

Lord Morgan: It seems to recur frequently. Many of these scenes are being played out again in the Brexit discussions. The Government have tried to clear things up, but it seems extraordinary to me that there are so many uncertainties at a key moment, which, at the very worst, could create a crisis in our union, as well as in the EU.

David Gauke MP: The debates on Clause 11 and so on are very much led by David Lidington.

Q3 **Lord Judge:** My question is about part of your responsibilities for the

rule of law and the independence of the judiciary. Before you became Lord Chancellor, you were a member of the Cabinet at the time of the media storm following the judges' decision in the Miller case. This is a side question, really. As a member of the Cabinet, did you see dealing with that as part of your responsibility or not?

David Gauke MP: As a—

Lord Judge: Not as the Lord Chancellor, but as a member of the Cabinet.

David Gauke MP: It is right to say that there is a responsibility on all Ministers to uphold the rule of law. Obviously, there is a unique responsibility on the Lord Chancellor, but parliamentarians, not just Ministers, should be defenders of the rule of law. I have said before that I felt that the headline "Enemies of the People" was wrong. The Lord Chief Justice was right to distinguish criticism from abuse. Abuse that undermines the judiciary to such an extent that it undermines the independence of the judiciary and the strength of that institution has dangers. I come back to my earlier remarks about how the rule of law and the independence of the judiciary are a cornerstone not only of individual liberty but of our economic prosperity.

Lord Judge: If next week or next month there were a similar outburst following a judicial decision, what would you regard it as your responsibility to do?

David Gauke MP: It would be my responsibility to defend the judiciary from that abuse.

Lord Judge: Would you feel that it was your responsibility to act in a way that was completely independent of all other Ministers, including the Prime Minister?

David Gauke MP: There are particular responsibilities on the Lord Chancellor that mean that I have to defend the judiciary and that it would be right for me to do so, notwithstanding the position of the Government as a whole, but I know that the Prime Minister is very committed to the rule of law

Lord Judge: I am referring not to this particular Prime Minister but to any Prime Minister. What would you do about it?

David Gauke MP: The point is to be out there making the argument, and defending and articulating the value and importance of the judiciary. The judiciary is not above criticism; I do not think anyone argues that it is. It is also very important that we have a vibrant and free press. However, if as a country we have a political discourse that undermines the legitimacy of our judiciary, that is a very dangerous environment to be in. I have a responsibility, whether proactively on occasions such as this, or reactively in the event of similar headlines, to go out and make the case.

Lord Judge: Would you, for example, invite editors of newspapers to come to see you about it?

David Gauke MP: I would have to consider the right course of action in the particular circumstances. That might be something I would do.

Lord Judge: I put it that way just so that we can have a flavour of what you would actually do.

David Gauke MP: It is principally about making the public case for the importance of the judiciary. I would need to make a judgment in the circumstances about which particular meetings I would have and in which particular forum I would make that point, whether on the Floor of the House of Commons or on Twitter.

Lord Judge: I understand. I will move on to Twitter. We have had evidence, and it is pretty obvious, that there has been some fairly abusive treatment of the judiciary on social media. Indeed, there are concerns about the security of some judges. Can you amplify your concerns about that and how we should deal with it?

David Gauke MP: First, there is a broader point to be made. In a number of cases, social media has resulted in a coarsening of our public discourse. Almost anybody in the public eye now receives a level of abuse that they would not have received 20 years ago; at least, it would not have been as visible to them 20 years ago as it is now. That is deeply regrettable.

There is a particular issue when it comes to the judiciary, for all the reasons we have been stating. The independence of the judiciary is central to our way of life and our constitution. At issue is how easy it is to address that. Most of us feel that, in many circumstances, social media platforms could do more, but I am conscious of the fact that there is a balance as regards freedom of speech. Sometimes that crosses the line, but the reality is that we will all get criticism. One cannot and should not stop that, but the coarsening of debate, particularly in the direction of the judiciary, is something that I am more than willing to criticise.

Baroness Corston: Lord Chancellor, some of the judges who are most vulnerable are family judges, who adjudicate on cases relating to the care of and contact with children, a field in which I used to practise. What specific assistance would you give them? They are very vulnerable.

David Gauke MP: Yes, those can be some of the most emotive and difficult cases. I cannot necessarily go into specifics today, but, in the protection of the judiciary as a whole, we need to assess where the risks are greatest. You are probably right to say that the risks can be very significant in family courts. When it comes to support that we can provide from the police, it is important that protection is there.

Q4 **Baroness Drake:** The 2016 judicial attitudes survey revealed low levels of morale among the judiciary. It found that only 2% felt valued by the Government, which is a very low percentage. In our *Judicial*

Appointments: Follow-Up report, we noted several factors affecting morale. In particular, relationships with the Ministry of Justice and pay and pensions were mentioned. What assessment have you made of those issues? What steps are you taking to address them?

David Gauke MP: It is an important point. There are a number of aspects to the way in which the judiciary feels valued. I certainly hope that the relationship I want to have with the judiciary can be co-operative and constructive. When the Lord Chief Justice gave evidence to you, he said that that is where he feels the relationship is, which I am very pleased about. I want to work with him and other members of the senior judiciary to ensure that together we try to address some of the issues. You touched on pay and pensions, and the Senior Salaries Review Body is looking at that issue.

It is important for me to stress how important we consider the judiciary to be. It is very important to how we operate in this country. Earlier, we touched on legal services. If we are to seize the opportunities that exist for legal services in this country, we need a strong and flourishing judiciary. I am working very closely with the judiciary to ensure that we can do that. I am conscious that there are pressures, such as High Court vacancies. We need to give consideration to what we can do to address those.

Baroness Drake: We all agree, quite rightly, that the rule of law is very important, but if 98% of the judiciary say they feel undervalued by the Government, there is a big issue, is there not?

David Gauke MP: Yes. It is a dangerous thing to impose a metric on oneself, but I see it as one of my responsibilities to articulate to a greater extent the way in which the Government value the judiciary. I am not for a moment going to pretend that there is an easy solution. The judiciary is very important to us as a country and I am an advocate of what it does. We are fortunate to have a very high-quality judiciary in this country. It is very important that we maintain those standards. At the moment, there is a challenge for us to attract the number of people we need in the judiciary. The quality of those who are coming into the judiciary remains very high, but I would like more strong applicants. I certainly want to make the case for how central the judiciary is to our country.

Q5 **Baroness Drake:** You have said that you would like to “see a wider range of legal professionals applying to join the judiciary”. What steps are you taking to encourage that wider range of movement into the judiciary?

David Gauke MP: You are absolutely right; I have said that on a number of occasions. I stress that I still want the star barristers to become judges. This is very much in addition, not instead. I look at my own background as a solicitor in the City and see a lot of people who would be very good judges, but it has probably never even occurred to them that they could or should do that. In some cases, people have been interested, but need to be encouraged. For example, one of the things we are doing is funding pre-application judicial education, so that we can get

a more diverse range of people, from different backgrounds, coming forward to join the judiciary. There is work that CILEx, the Law Society and others are doing. We are keen to support and encourage that.

We are taking steps to broaden the range of people coming forward. We are making that case very publicly and saying, "This is a fascinating role". Last week, I had lunch with judges at the Old Bailey. Yes, they have concerns, and there were issues they wanted to raise, but I was struck by their sense of fulfilment and their enthusiasm for a job that they find fascinating and rewarding.

Baroness Drake: What steps are you taking to address the particular set of barriers that women and BAME individuals may face in entering the judiciary?

David Gauke MP: The Judicial Appointments Commission is very focused on that issue. I have met Lord Kakkar on a couple of occasions and discussed it with the commission. It is putting a lot of effort into that. The pre-application judicial education we are funding is designed to encourage greater diversity in applications. It is important that we have a judiciary that, first and foremost, is excellent, which it continues to be, and that has a diversity about it. It strengthens the judiciary if a broad base of people are contributing to it and are part of it.

Lord Judge: My question is about applications by solicitors. I speak with experience of this. What can you do to persuade the successful City firms, and the major firms around London and the big cities, that a judicial career is something they should encourage for their young men and women under 40 who are thinking about it but who will need time to go on the pre-appointment judiciary courses and to sit with judges to learn whether or not they want to do the job? That seems to me to be something that the solicitors' profession will not tackle. Can you do anything about it?

David Gauke MP: I am already having conversations with representatives, senior partners, at some of the leading City firms on an informal level to get their views on what more we could do, and what more they could do. I am relatively in the foothills of this, but at the moment I detect a bit of a mismatch with what the City firms are telling me, which is that there is no easy route in. Anecdotally, I am told about people who would make excellent judges, but things have not moved forward as quickly as they might have. On the other hand, I hear, "We are just not getting people and applications coming forward as much as possible". There is a challenge for the legal professions on all sides to see what more we can do to encourage more solicitors to move towards the judiciary, perhaps in the later stages of their career. You are absolutely right to say that it needs to be thought about earlier. People need to do the preparation.

Lord Judge: They need to know whether they want to do it.

David Gauke MP: Yes.

Lord Judge: It is no good asking them at 55, when they are due to retire, whether they want to do it. They need to be thinking about it from the age of 40 onwards.

David Gauke MP: I agree. The first thing that I can do is raise the profile of the opportunity, which I have done on a number of occasions. There is a question as to whether we have found the right structure to identify people, or to encourage people to identify themselves, at an early stage of their career, so that by the time they get to their early or mid-50s and are in a position to move over, the preparation has been done and the system is there. There is more work to be done on that, but I am engaging with City law firms to encourage them to think about it, and with the judiciary to encourage it, too, to think about what more we could do. Perhaps offline, I would welcome Lord Judge's thoughts and suggestions.

Lord Judge: Thank you for answering the question and for the invitation. I may take it up.

The Chairman: I would be very surprised if you did not take it up.

Baroness Corston: Some of the people in City firms may not be terribly keen to contemplate the drop in salary that would be inevitable on going to the Bench. Looking at the background of judges, and given that the President of the Supreme Court started out as an academic lawyer, what work are you doing in law departments in our universities?

David Gauke MP: We have talked a little about City law firms in relation to diversity within the judiciary, but you are absolutely right to say that academia can also be a source of members of the judiciary. Brenda Hale is a very good example. There is the work the Judicial Appointments Commission is doing, and the funding of pre-application judicial education. It is about making sure that, within academia, people are aware of the route to the judiciary and that it is seen as available to them. The more we can do to highlight that, the better.

The Chairman: Are you going to monitor it? Do you have any targets to judge the success of your approach?

David Gauke MP: There are risks in having hard targets in that area. First and foremost, it has to be about excellence and getting the very best people into the judiciary. I would not want to be in a position of compromising on standards in any way. We look constantly at where the numbers are when it comes to appointments and their background. It is very much part of what the Judicial Appointments Commission and, indeed, my department do.

The Chairman: But the shortages are getting quite worrying, are they not?

David Gauke MP: We have seen a lack of numbers applying in the High Court round again this year. There is evidence of that. I do not think there is an immediate, quick solution. There is probably a whole range of

factors driving it. The point that Baroness Corston made about the fall in pay for City lawyers also applies to commercial barristers. The income of commercial barristers has gone up a lot in recent years, so the gap between them and being a judge has grown.

Q6 Lord Dunlop: Lord Chancellor, the MoJ has been conducting a post-implementation review of the Legal Aid, Sentencing and Punishment of Offenders Act. The legal community has raised serious concerns about access to justice and the rise in the number of litigants in person. Those concerns are evident from the judicial comments in the MoJ internal report that was made public yesterday. There are some very graphic comments from judges about criminal defendants without proper representation acting like rabbits in the headlights and not having a clue about what is going on in the courtroom. What steps are you taking to improve access to justice for individuals, particularly those who come to court without proper legal representation?

David Gauke MP: It is worth remembering that, in the Crown Court, something like 99% of applicants for legal aid are successful and get that. That has not changed as a consequence of the reforms that we have undertaken.

You are right to highlight the fact that we are undertaking a review of LASPO. We expect it to report by the end of the year. It will be evidence-based, to the extent that we need to take steps to address particular problems. It is a very significant piece of work, which is now ongoing. I expect that we will have it completed by the end of the year.

Lord Dunlop: You referred to legal aid. A couple of weeks ago, we took evidence from the Lord Chief Justice, who highlighted concerns that there are very few young criminal legal aid solicitors and barristers coming through. Can you comment on that, and the action taken by criminal barristers in relation to their concerns about legal aid?

David Gauke MP: There is action at the moment in the context of the AGFS, and we feel a little frustrated by that. The reforms to it predate my time in this position, but it was revised in close consultation with the legal professions, including the Bar Council and the Criminal Bar Association. None the less, we have faced action on that particular front.

It is important that we review legal aid as a whole. Yes, some difficult decisions were made on legal aid in the previous Parliament, in the same way as most government departments had to make some difficult decisions. It is right that we come back to it, right that we review it and right that we gather and examine the evidence as to the right way forward.

Lord Dunlop: In light of experience, do you think that the funding available is sufficient, given the concerns that have been expressed?

David Gauke MP: I do not want to prejudge the conclusions of the review. It is important that we look at the evidence and reach conclusions from that. I come back to the point that applicants for legal aid in the

Crown Court are overwhelmingly getting legal aid and the support that they should get, in the way they did previously. As I said, we need to look very closely at the evidence before reaching conclusions. It is the case that we do not have large sums of money available to us. None the less, it is important that we look at the evidence.

Lord Morgan: We have heard reference made to the views of the legal profession on how things are going under legal aid. Has any attempt been made to find out the views of litigants, particularly those who are unfortunate enough to have to defend themselves in court? I have in mind, for example, the fact that quite a lot of them are from ethnic minorities, who might feel that being in the courts is a rather colonial experience, rather like the last days of the Raj, that is not attuned to their background and outlook. Is there any evidence of that kind?

David Gauke MP: I am not sure about that specific case. In the review that we are undertaking, we are engaging with representatives of a large range of organisations to ensure that we get the broadest base of evidence that we possibly can. They will include representatives of various organisations, to ensure that we proceed on the basis of the best possible evidence.

Lord Morgan: Perhaps we should try somehow to find more evidence from ethnic minorities. There have been specific surveys of other aspects of the law, such as what happens to people in magistrates' courts, looking at how people respond in court and whether or not they feel afterwards that they have had a fair crack of the whip. Perhaps that is not the right metaphor, but I wonder whether that approach could be extended.

David Gauke MP: As a Government, we brought in the race disparity audit, which shone a light on a whole range of issues, including the criminal justice system, to ensure that we have as much evidence as possible to address what the Prime Minister describes as "burning injustices". It is right that we do that: that we analyse the evidence and ensure that we have a system that has public confidence across the board. That is something my department is very well aware of.

Lord Morgan: That is very reassuring. I know that the Runnymede Trust is one organisation that has conducted inquiries into this kind of area and different aspects of the law. Perhaps it could be utilised again.

David Gauke MP: In light of what you are saying, particularly given the work we are doing on LASPO, perhaps we should share with the Committee the names of the stakeholders, if you will forgive the word, we are engaging with, to demonstrate that it is a broad-based piece of work.

Q7

Lord Beith: Lord Chancellor, apologies for my late arrival. In one of our recent reports, we recommended "that the Government should, as a priority, provide the Law Commission with the necessary resources to start consolidating those areas of the law where consistent application of

the law is now under threat from the sheer complexity of the existing statute book". From evidence we had seen, we identified immigration and sentencing law as two areas where that is particularly necessary.

Are you in a position to say that the Government will give the Law Commission the resources it requires and whether by doing so they will effectively commit themselves to providing a parliamentary opportunity for the outcome of that work to be enacted, bearing in mind that, if it is pure consolidation, the pressure it creates on parliamentary time is minimal? Only if it involved changes in the law would it really require significant parliamentary time.

David Gauke MP: I take that point. In previous experience, both in opposition and in government, I took through some of the tax law rewrite Bills, which, you may recall, were enormous pieces of work that ran to several hundred pages. I seem to remember the Committee stage taking approximately half an hour. I take your point that in some circumstances it does not require parliamentary time if it is pure consolidation.

The Law Commission plays a really important role, and I strongly support its work. It continues to be seen as relevant and important. A programme of 14 new areas of reform was announced in December. We are backing that programme of reform, and have given assurances that it will receive the resourcing and support that it needs.

I take your point that if it is purely a consolidation exercise it might not require much parliamentary time. Let us see where we get to. If there is an opportunity to bring forward legislation in that way, there is clearly a conversation that I will need to have with the business managers, the Whips and so on, but it is potentially something on which we can make progress. We will need to see precisely where we get to on that.

Lord Beith: Professor Ormerod made the point to us that a survey showed that 30% of sentencing appeals in the Court of Appeal Criminal Division involved "an unlawful sentence", because the judge had not appreciated what the sentencing requirements or opportunities were. As David Ormerod said, "The cost of that is astronomical", so there is a considerable potential cost saving if we can do something about it.

David Gauke MP: I take that point. I must admit I was very surprised when I saw that statistic. There is an opportunity to try to do something about it. Certainly, when I speak to judges about the matter, they are very supportive of the work that is being undertaken and believe that there is potential. We continue to support it, and I look forward to seeing the draft consolidation Bill in due course.

The Chairman: That will be very useful.

Lord Judge: Your surprise can only be attributed to the fact that you have never had to try to pass sentence, particularly on somebody aged 15 and a half or 17 and a half.

David Gauke MP: That is very true.

Lord Judge: I understand that the Law Commission has done a huge amount of work on consolidating the sentencing provisions, including the provisions relating to youth sentencing, and that it hopes to complete that work by July. If it does, will the Government put before Parliament the two simple paving clauses that are necessary to get the process on its way, so that we can have a sentencing code consolidation?

David Gauke MP: All I can say at this point is that we would need to have discussions with the Whips, the business managers and so on.

Lord Judge: Could you put some pressure on them, as opposed to discussing it with them?

David Gauke MP: The best thing I can say is that I hear what you are saying, Lord Judge, and I have a great deal of sympathy with the point you are making.

Lord Beith: I am not sure that the Whips and business managers have much recent experience of consolidation legislation, because there has been very little of it. They may not realise how relatively easily it can be taken through Parliament.

The Chairman: That is exactly the point I was going to make, as a former business manager. This is not one of the areas that would cause business managers great concern. Maybe you should bear that in mind.

David Gauke MP: I will take the transcript of this session, highlighting those comments. That is very helpful.

Q8

Lord MacGregor of Pulham Market: When the Lord Chief Justice came to see us a couple of weeks ago, it is fair to say that he was very concerned and critical about the state of the court estate. Inevitably, this involves expenditure, so these will be questions from one former Chief Secretary, although a long time ago, to another former Chief Secretary. What estimate have you made of the costs to Her Majesty's Courts & Tribunals Service of trials being adjourned due to the unavailability of courtrooms, judges, lawyers, witnesses, defendants or translators? What steps are you taking to improve the efficiency of the justice system to reduce the costs associated with such delays?

David Gauke MP: There can be a range of reasons why there might be a delay or an adjournment. The way the listing works is that, when there is an adjournment, very often another case can fill the space. In those circumstances, measuring the cost can be difficult. Indeed, in some cases, there is no cost to the courts and tribunals system from an adjourned trial, because another trial can take place.

It is all very well talking about costs, but we have to recognise that an adjournment is not just about money. It can cause distress to witnesses, victims and defendants. We have to be conscious of that. That is why, as part of the reform programme, it is right that we take steps to improve scheduling and listing in all jurisdictions. The design of the IT is

something we can improve on. There is probably already some improvement, but it is an important point.

The reforms to our court system that we are considering can enable the parties to collaborate more on case management and improve the efficiency of the process, so that we can provide a better service, remove some of the uncertainty and reduce the risk of unexpected adjournments for one reason or another. It is important that we do that.

Lord MacGregor of Pulham Market: I will come to the court estate in a moment. It has been reported that 6,500 jobs will be cut by Her Majesty's Courts & Tribunals Service as part of the modernisation programme. How will that help?

David Gauke MP: On job numbers, all I will say is that where we can find efficiencies in the system, whether in the use of the estate or by doing things that are less labour-intensive, we have a responsibility to do that in order to modernise and to improve efficiency. The challenge for us is to do it in such a way that it maintains and improves the service to the public. The measure of success of a public service is not the number of people it employs.

Lord MacGregor of Pulham Market: No. To a considerable extent, it relates to the state of the buildings and of the court estate as a whole. It was there that the Lord Chief Justice was most concerned. He told us that the court estate needed "a good deal of money" to address the dilapidated state of the buildings and facilities, and that it would require not "tens of millions" but "hundreds of millions" of pounds. What discussions have you had with colleagues in the Treasury about that? What are you preparing to do?

David Gauke MP: As one former Chief Secretary to the Treasury to another, it will come as no surprise to you that we are in regular conversation with the Treasury on that issue. We have commissioned a programme of building fabric, mechanical and electrical surveys to make an assessment of our longer-term needs. We have released sums of money to improve particular facilities; quick wins can be undertaken in some cases. From 2015-16 to March 2018, we spent approximately £108 million on capital maintenance to improve our estate.

Going around the country, I am conscious that some courts are in a better condition than others. I hear the concerns. We need to address the situation in a sustainable and affordable way. As I said, we have regular conversations with the Treasury as part of our discussions for the next spending review to ensure that we have a sustainable court estate.

Lord MacGregor of Pulham Market: I understand why you do not want to say too much about the forthcoming spending review at this stage. We very much got the impression that a lot more needs to be spent on the court estate. Can you give us any indication of the sort of scale that you are thinking and talking about?

David Gauke MP: I am afraid I do not think I can at this stage. It is obviously a point that I have discussed with the Lord Chief Justice on more than one occasion, and he has been very clear in his views. Indeed, talking to the judiciary more widely, I am conscious of some of the issues and pressures that are felt. In some places, the court estate is in very good condition—in others, not so much. We continue to look at ways in which we can make improvements within a tight budget settlement.

Lord MacGregor of Pulham Market: I do not know whether you have seen the National Audit Office report on this, which I think came out today.

David Gauke MP: I have not had an opportunity to read it.

Lord MacGregor of Pulham Market: This may be a bit unfair, but I will press you on some of the points. The NAO says: "Expected costs have increased and planned benefits have decreased ... There are gaps in the funding for reforms in later years ... HMCTS still needs to develop how the new services will work in practice", and, "Delays in introducing primary legislation have created a significant degree of uncertainty".

Of more concern is that we seem to be almost running behind. The NAO says: "Failure to sustain commitment from all delivery organisations will significantly reduce the likelihood of success and the benefits achieved", and, "The benefits claimed so far by HMCTS exceed expectations but risk putting pressure on its ability to maintain services", and so on. There are quite a lot of recommendations. I take it that you will be looking at this report, and I hope that you will be able to use it in pressing the case to the Treasury.

David Gauke MP: As one former Chief Secretary to the Treasury to another, I can see the advantage. The £1 billion court reform programme is a big piece of work, but we are already seeing some of the benefits coming through. There is much more to be done, but very recently the changes, for example to divorce filing—there has been extremely good feedback on that from the pilots we have done—are now being extended more widely. There are good opportunities to try to make a system that is more user-friendly and does not involve quite the levels of bureaucracy and difficulty that the previous system did.

That is a small illustration of what can be done, and there are other areas where we are delivering reform. It is an important set of reforms that can bring our justice system up to date and meet the public's expectations in 2018. People expect to be able to do much more digitally, for example, and at their convenience in a way that the justice system until now has not been able to do.

Lord Beith: The Lord Chief Justice told us that without some of the changes that were envisaged in the Prisons and Courts Bill, the judicial system would remain trapped in a previous century. What has happened to the courts Bill? Why has it still not been introduced, and when will it be?

David Gauke MP: There are discussions with business managers about this, and I hope we can make progress on it before very much longer. There are a number of things that we can do in this area that are non-legislative, but there are also some things that are best done in a legislative way. Without being able to give the Committee a timetable today, I am keen to make progress on that before very much longer.

Lord Beith: You do not yet have a positive answer from the powers that be on when you can bring in the Bill.

David Gauke MP: If I may, I would urge a degree of further patience on that point. I recognise the need for legislation to address some of the points that are best done through legislation, and I hope we can progress that before very much longer.

Lord Beith: What is at stake is part of the ability to deliver your programme of court reform.

David Gauke MP: Indeed, yes.

Q9 **Lord Hunt of Wirral:** Lord Chancellor, what concerns do you have about the recent high-profile criminal cases related to evidence disclosure?

David Gauke MP: This is an important issue. It is clearly important that the system works, and disclosure is a key part of it. As you will be aware, the Attorney-General is undertaking a review that will report during the summer. There is a considerable amount of work in this area. The Attorney-General leads on it, but it is right that we undertake that review and that we have an effective system.

Lord Hunt of Wirral: The growth in technology has significantly increased the volume of material that may be gathered in investigations, and which ultimately may be presented in courts. What steps have you taken to recognise the additional demands that all this places on lawyers, courts and judges?

David Gauke MP: Fundamentally, I do not think that it is just about resources, or even primarily about resources. It is important that people do their job effectively. It is all part of the review that the Attorney-General is undertaking to ensure that the system can work.

Q10 **Baroness Corston:** What are the criteria for the dismissal of the chair of the Parole Board?

David Gauke MP: In those circumstances, the criteria for dismissal are set out in the terms of appointment, in accordance first of all with the relevant legislation, which is Schedule 19 to the Criminal Justice Act. There are a number of criteria set out in the terms of appointment for the Parole Board chair. They include failure without reasonable excuse to discharge the functions of the office for at least three months continuously, and then, for example, conviction for an offence, or bankruptcy and so on.

Baroness Corston: We know that none of those applied in the recent

case. As the public understand it, while we may all condemn a decision that was made, the Parole Board was following a procedure laid down by your department. Are you therefore considering a way in which the Parole Board's decisions can now be made more available to the public?

David Gauke MP: Yes. We need more transparency in the system. A couple of weeks or so ago, we set out our assessment of the way forward. First of all, we are abolishing rule 25, the prohibition on sharing any information, which the High Court concluded was the right course of action. Since I have been in post I have argued that we need more transparency.

Secondly, we have set out our proposals for a reconsideration mechanism whereby within the Parole Board there is the ability, once an interim decision has been made by the panel for it, to go to a reconsideration committee of the Parole Board to ensure that all the right factors have been taken into account. Essentially, it is a bit like a judicial review test as to whether everything has happened in the way it should have happened. At that point, the decision becomes final, assuming the reconsideration panel accepts the original proposal.

We think it is right that more information is put out, so that victims are able to understand why a particular decision has been made. We need greater transparency.

Baroness Corston: Given that the Parole Board was, as I understand it, implementing a regime that was sourced and came from your department, did you think about your position in this sorry saga?

David Gauke MP: My view was that clearly there had been errors in the dossier that was provided in November last year by the MoJ to the relevant Parole Board, if we are talking about Warboys. More fundamentally, there were other points. The Parole Board did not probe Warboys's position. It did not probe the evidence that existed that his offences may have been wider than those for which he was convicted, and did not take into account all the evidence that it should have taken into account. That is why the High Court overruled the decision of the Parole Board on that particular point.

I think there were significant failures within the processes there. My view was that that was not something that the Parole Board was really willing to fully accept and properly examine.

Baroness Corston: In that case, given that it was implementing a regime that had come from your department, are you now in the process of establishing a new regime for the Parole Board whereby no one will be put in that position again by implementing something that came from government?

David Gauke MP: The High Court found that the Parole Board had not followed the process in the way that it should have done. I want a system where the public can have greater confidence that there is internal rigour

within the Parole Board such that, if a decision has been made, there is the opportunity for it to be properly tested again to make sure both that all the relevant considerations have been considered and that the Parole Board is able to articulate why it has made a decision.

Let us be clear. I have not criticised the Parole Board for failing to articulate, because it was bound by rule 25. That has never been a point of contention. The Parole Board was not in a position to articulate why it had made that particular decision, or indeed any other decision. It is right that there are circumstances where it is able to articulate that.

Lord Beith: Are you not concerned, as Lord Chancellor, by the precedent you have set? It was clear from your earlier answer that you did not apply the criteria for dismissal of the chairman of the Parole Board, but made it clear to him that in your view his position was untenable, thereby achieving the same effect, which was removing him from office. Is it not in some ways analogous to a judicial appointment, in which it would be very dangerous if the decision of a Minister, however well founded, that a particular case had not been handled in the way he would have wished, or did not have the outcome he would have wished, could lead to the removal of the person responsible for that decision?

David Gauke MP: I made a judgment in this particular case that in order to move forward with the reforms that were necessary, the Parole Board needed new leadership. The chair of the Parole Board was not part of the Parole Board panel. It was not about that particular judgment, but my view was that the Parole Board needed new leadership in those circumstances, notwithstanding that there was much that Professor Hardwick achieved at the Parole Board in dealing with backlogs and so on, which I have always acknowledged. I felt that there was a need for new leadership.

The reforms that I have set out, putting in place a reconsideration mechanism, provide greater rigour. The reforms on transparency provide greater ability for the Parole Board to articulate why it made decisions, to maintain public confidence, and to ensure that the board remains independent. There is sometimes tension in this area between accountability and transparency, but I believe that the reforms I have set out strike the right balance between accountability and transparency on the one hand and independence on the other. I believe the set of reforms I have set out maintains independence in individual cases.

Lord Beith: Are you telling us that you decided that the leadership of the Parole Board needed to be changed entirely independently of the circumstances of that case, even though it coincided with the circumstances of the case?

David Gauke MP: No, that is not what I am saying. The point I am making is that I believe that within the Parole Board there was insufficient recognition that something had gone wrong in that particular case. I had received assurances that the process was fine and that, although it was a decision that perhaps others would not have made,

essentially the relevant Parole Board panel had looked at all the things it should have looked at and had therefore reached a perfectly reasonable conclusion.

Given what emerged in the course of the High Court hearings, and the judgment from the High Court, the Parole Board panel had not fully taken into account things that should have been taken into account. There had not been the probing that there should have been. In fact, that was something of which the Parole Board leadership should have had greater awareness.

Lord Judge: You have told us about this reconsideration process. Who is going to decide which cases should be subject to reconsideration?

David Gauke MP: We are consulting on the details, but we have set out—

Lord Judge: May I interrupt you? We have only limited time. I take it that that will not be a politician or a Minister.

David Gauke MP: I do not think it should be a matter whereby it is solely down to the Secretary of State to say, "Right, look at this case or that case". I do not think that is right.

Lord Judge: What does "solely" mean in that context?

David Gauke MP: My point is that the reconsideration panel will have clearly defined criteria on which to make an assessment. It will not be a matter of, "We don't like the decision. Let's overturn it". The purpose of the reconsideration panel, in much the same way as a judicial review, will be to look at whether improper factors have been taken into account or whether there are proper factors that have not been taken into account.

Lord Judge: Again, forgive me for interrupting. I understand that, but who is going to decide, "This case requires reconsideration"?

David Gauke MP: We are consulting on what that mechanism should be.

Q11 **Lord Morgan:** Prisons are another big subject. There has been discussion, I would not say throughout my lifetime, but at least since Michael Howard was at the Home Office in the 1990s, about the critical state of our prisons. You yourself, in a rather remarkable recent speech, said that, "prisons have, frankly, fallen below the standards that we expect". This is obviously deeply disturbing. There are problems of reoffending and wider problems for society. Could you tell us what steps you are taking to remedy it?

David Gauke MP: First, we are recruiting additional staff. We recently announced our policy of recruiting an additional 2,500 prison officers by the end of 2018. We are up by 3,111 since that announcement was made in October 2016. Recruiting additional staff will be very important.

Focusing on 10 prisons in particular, we are looking at what we can do to improve security, and we are taking further steps to stop the drugs

getting in that are the cause of a lot of our problems in prisons at the moment. The new psychoactive substances have created very substantial pressures on prisons. We are looking to take action in that particular area. Those are some of the steps we are taking. There is more I will say over the weeks ahead. I will say more about education and employment in prisons, for example, because rehabilitation is very important.

I have touched on whether we need to look again at the categorisation of prisoners, particularly focusing on prisoners who are part of serious, organised criminal groups, and who could be manipulating what goes on in prisons—for example, the drug smuggling. I want to know whether there is more we can do to disrupt that activity.

I have talked about making sure that we get the basics right. The Prisons Minister, Rory Stewart, has been focused on that. He has talked about getting the incentives right—the carrots and sticks within prisons. We have to reward the good behaviour and ensure that there is something for prisoners to progress to. Prisons should be places where there is a second chance. They should be places that are not hopeless, but we also need to maintain discipline. That is where the sticks come in for those who are not able to abide by the standards of behaviour that we expect of prisoners.

Lord Morgan: Are you taking particular steps to focus on the grievances expressed by staff in prisons, and their trade union representatives? You could say that one of the problems in our prisons has been that they have been victims of austerity. The proportion of trained staff fell in the period under Chris Grayling, and it sounds as if you are, valuably, redressing that. Are you focusing particularly on staff, who have been complaining generally about intolerable overwork and their miserable conditions of employment?

David Gauke MP: We are increasing staff numbers, as I said. The numbers have gone up. Now is probably not the time and place to have a discussion about the need to control the public finances when we came to office in 2010. Prisons were not immune from that, but the reality is that staff numbers are now increasing, and are at their highest level since 2013. It has been necessary, for example, to respond to the levels of new psychoactive substances that have been getting into our prisons, which have meant that in some circumstances conditions in prisons are below those we can accept. Prisons should be clean and humane places. They should be well-disciplined places. We need to get those basics right in prisons.

Q12 Lord Hunt of Wirral: Lord Chancellor, the legal system in the UK is world renowned, and English law is the most commonly used law in international business and dispute resolution. What steps will you take to ensure that this reputation is maintained after Brexit, and that the financial benefits to the UK of the legal services sector are retained?

David Gauke MP: It is a very good point. I touched on it briefly at the very beginning. First and foremost, I come back to the point that the rule

of law is very important. It is the cornerstone of our legal system, which is a sizeable part of our economy, and contributes something like £24 billion a year.

The potential is very much greater than that, because the UK is very well placed, given the international nature of legal services. When it comes to which law will be pre-eminent for artificial intelligence, fintech, virtual reality and so on, it will probably be English law. When it comes to which language, it will probably be English. There is an opportunity for us, but we need to be aware that there are threats as well. There is competition in this very mobile area.

In the Brexit negotiations, we need to ensure that we make progress, for example, on civil judicial co-operation and the enforcement of judgments, and on mutual recognition of professional qualifications. All of that is important. We have a role in government to ensure that we promote our legal services. We had a team out in Kazakhstan a week or so ago at an international conference, which was very successful. We will have a team in China in the next couple of weeks, making that case. The Legal Services are GREAT campaign is very important. I am certainly backing it, and Lord Keen is enthusiastically backing it as well. We have a role to play, because our legal services are a very important contribution to our economy.

The Chairman: Thank you very much. We have finished within two minutes of the allotted time, so I congratulate colleagues. Thank you very much for coming, Lord Chancellor. We will obviously be following up on some of the issues, but we look forward to seeing you again in the future, on the basis that you said there should not be too much change in the personnel in certain departments.

David Gauke MP: I hope so. Thank you very much.

The Chairman: Thank you.