

CONSTITUTION COMMITTEE

ANNUAL EVIDENCE SESSION WITH THE LORD CHIEF JUSTICE

on

Wednesday, 18 May 2022

The Rt Hon the Lord Burnett of Maldon, Lord Chief Justice
and Head, Judiciary of England and Wales, President, Courts of England and Wales

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CHAIR: Welcome to the Constitution Committee, and thank you for coming this morning and for joining us. We do have lots of questions for you, as ever, but before we go into those questions, first of all, I'd like to ask whether you would like to make some opening comments before we went into questions or you happy to go...?

THE LORD CHIEF JUSTICE: I'm very, very pleased to be here, as ever, and I'm conscious that there are one or two new members of the committee since I last made an appearance. I am also pleased to be here in person, because, obviously, for the last couple of years we've been using the screen and it's not too bad, but it's not as good, in my view, anyway. But I'm happy just to plough into the questions because I know there's a wide range of topics that you're likely to want to ask me about.

CHAIR: Thank you very much. Before we start though, I think Lord Falconer as a matter of formality, would make a—

LORD FALCONER: Yes, I have to declare an interest that my wife is a Circuit Judge and the designated family judge in Luton.

THE LORD CHIEF JUSTICE: Yes.

CHAIR: Okay, thank you very much. Well, perhaps I can begin by asking for your views on what's the current state of the backlog, and are there any areas particularly that you feel are under pressure? Perhaps you could bring us up to date.

THE LORD CHIEF JUSTICE: Well, now this is a very big topic, and, frankly, could fill an hour and a half of time without any space for anything else. Inevitably, all of our jurisdictions have been put under great pressure as a result of the COVID events, and if this would be convenient for you, Lady Drake, what I thought I might do is start with the Crown Court, because that is where a good deal of the public and, inevitably, political interest lies, and, if there's time, touch on one or two of the other jurisdictions, including family.

CHAIR: Yes.

THE LORD CHIEF JUSTICE: If I talk for too long, please stop me, but what I would be quite keen to do is to put one or two of the issues in context, because I'm quite concerned that in the public debate that rages on this topic, particularly surrounding the Crown Court, there is too much focus on headline statistics without necessarily a deep understanding of what they mean. So the statistic that is always most referred to is the crude outstanding caseload of the Crown Court.

Now, before COVID, so in March 2020, in round terms that was 40,000 and in round terms that is now 58,000, having been as high as 61,000 last year. But it is important to understand what that figure actually represents. So total number of cases in the Crown Court. They break down, broadly, into three categories; the smaller categories are those cases which are sent by the magistrates for sentence in the Crown Court, because the magistrates do not think they have sufficient sentencing power. The second is appeals from magistrates again, in numerical terms not very large. The biggest group is simply called "trials", and that represents about 75 percent of that 58,000. Now, most people, I think, stop there and assume that that means there are something like 47,000 trials outstanding in the Crown Court and, frankly, I would forgive anybody for approaching it on that basis, but that is not what it means. Because it represents the number of cases that have arrived in the Crown Court and are yet to be dealt with that have been sent for trial. But about half, indeed rather nearer to 2/3 of those, plead guilty at some stage in the process, and so at the very beginning of the process there is a hearing in the Crown Court which is designed specifically to flush out guilty pleas, when appropriate, and which are acceptable to the CPS. There are still quite a lot of guilty pleas that emerge on the day of trial, so something like 25 percent of all trials listed in the Crown

Court don't result in a trial even on the day they're listed because the defendant pleads guilty in a way which is acceptable to the CPS, and in between people plead guilty at all sorts of stages.

So that, I think, is quite important to understand, and I've been saying for years that it's not really the headline figure of outstanding cases that we should be looking at, important though that is. We should also be looking at timeliness. I mean the reality is that if there were 58,000 cases, all of which could be dealt with within six months, everyone would be happy. But the problem that COVID has caused in particular, and it was developing pre-COVID, is that the proportion of cases that are outstanding for more than six months has, for example, gone up since June 2019 from 23 percent to 57 percent, so that's a big jump. The proportion of cases outstanding for more than 12 months in the same period has gone from 7 percent to 28 percent. That is, for me, the thing that we've all got to look at really closely in addition to the crude numbers.

Now, what are the things that are containing the disposal of these cases at the moment? Now, in the early days of COVID our problem was that we had very few Crown Court rooms, courts, in which we could accommodate jury trials with the two metre distancing that was mandated then, and all the other precautions that we all remember and, happily, they are largely behind us. So space was important, and an important constraint. One of the steps taken was to get extra space, so so called "Nightingale courts", and they've been very useful, particularly because they don't deal with custody cases, defendants in custody, they deal with cases where the defendant is not in custody, and those are often the less serious cases where there have been bigger time delays, and so I am very keen that the money should continue to be found to keep as many of those Nightingale courts open as possible.

But the two greatest constraints we have at the moment in disposing of cases more quickly are first, a shortage of judicial resources. We have too few Crown Court judges, and so there is a limit, even using recorders and retired judges, to the volume of cases we can deal with. The other problem that has emerged starkly over the last year in particular as the volumes have gone up, is that the legal profession is struggling to deploy the lawyer power to deal with the cases. So, again, just put very straightforwardly, more and more cases are not going ahead because either the prosecution or the defence have not been able to find an advocate to deal with the case. So there is a systemic problem, both with judicial resource and lawyer resource that has got to be dealt with.

Now, the causes of it are complicated and multifaceted, but at the heart of it is that over the period from about 2010 to 2019 the volume of cases coming into the Crown Court just went down and down and down and down, and the number of judges followed downward. The number of recorders also followed downward, but for more complex reasons, and the legal profession, both solicitors and barristers, reduced in number because there wasn't as much work to be done, and also reduced because of the serious attrition on remuneration rates that came through Legal Aid. Now, just to put that into context, in 2019/20, so that is the last normal year, if I can call it that, the financial allocation from the Ministry of Justice initially allowed for 82,600 sitting days in the Crown Court. Now, that's the unit of currency. Lord Falconer will remember it with joy, I don't doubt, and from every sitting day flows a financial calculation as to how much money goes into the system. In the last year, the financial year that's just passed, we sat a shade under 100,000 sitting days. So that's a huge jump up, despite the resources not being readily available, and this coming year, we very much hope we will get to 105,000 sitting days, which means that we are simply running the courts 25 percent hotter than we were doing three years ago and we're struggling to deploy judges and the legal profession is struggling to deploy lawyers. So those are really big capacity issues which we're still grappling with.

Then we, the judiciary, are working really hard – I would say that some may think, but we really are – to improve the throughput of cases in the Crown Court. So we want to focus hard on squeezing out guilty pleas earlier because that's much better for everybody. I established a group last year called the Crown Court Improvement Group, which has on it representatives of the judiciary, the

police, the CPS, the Law Society, the Bar, Legal Aid Authority, HMCTS, and its purpose is to bring people together confidentially to talk about problems in the system. I should say the prisons are there too, because there are basic issues about lawyers being able to see defendants in prison or via video link in prison before the day of trial and so forth. That group, as I say, meets confidentially, only so that everybody feels entirely able to be frank about their own problems because there has been too much finger pointing in the criminal system over recent years, and that group is looking really hard at everything that happens in the Crown Court to improve the effectiveness of what we do.

So that, broadly, is the Crown Court. Now, Lady Drake, are you happy if I just do two or three minutes on the other jurisdictions?

CHAIR: Absolutely, please do.

THE LORD CHIEF JUSTICE: Alright. I'm sorry, that took a little longer than perhaps it should have done.

CHAIR: It was very rich though, and it prompts some of our questions that are going to follow. So it was very relevant, thank you.

THE LORD CHIEF JUSTICE: Now, so far as the magistrates courts are concerned, they are not causing me any great worry at the moment. The outstanding caseload is a round 10 percent higher than it was pre-COVID, but the timeliness for trials in the Magistrates Court is really pretty good. There are variations regionally of course, but as you will appreciate the very high volume of cases that flow through the magistrates courts include things like TV licences, a lot of motoring offences and so on, and most of them end up being dealt with by way of plea and even those that don't take a great deal of time. So there has in fact been an uptick in motoring offences being prosecuted recently, not entirely sure why but that's that's how it is. So the Magistrates Court, as I say, I don't worry too much about because a great deal of attention was paid to it, particularly last year, to make sure that all the steps were taken to put processes in place to deal with the problems that we knew were there.

So far as family is concerned, there has been an increase in the outstanding caseload in private family law cases. Now, these are cases where parents are having a dispute about children, basically. That is something which has been growing in volume for quite some time, and COVID has exacerbated it but in fact the problems are more endemic. We are working really quite closely with government to look at ways in which the flow of cases into the family court can be stemmed to some extent, and also to enhance the use of, the utility of, the effectiveness of mediation. Because I think one of the real problems in that area of family law is that going to court and scrapping about it has become the first option rather than something that comes later down the line. There has undoubtedly been an impact in the removal of Legal Aid for those types of case. It is quite clear that the involvement of lawyers kept cases out of the courts and also increased the settlement rate and the mediation rate, and so that it that is just one of the realities. But again, the judges are working very hard to devise mechanisms to improve the throughput of cases. They work with Cafcass in particular, which is the agency most engaged in this and others.

On the public law family side, so these are care cases, essentially. The volumes of cases coming into the courts have in fact gone down recently, and thank goodness for that, on a whole range of fronts. Timeliness, the time it takes to complete those cases, has gone up over the last couple of years, but again, it's not entirely due to COVID. I think it's fair to say that in the family system all of the major parts are under strain. So local authorities, the social services departments of local authorities, are under strain, something that I suspect everybody recognises. Cafcass is under strain, and we are under strain with judicial resources as well, because we have not been able, in

recent years, to recruit the number of district judges that we need. It may be we will come to that, and that those judges deal with a large volume of this type of work.

So, overall, we have problems. I think it is fair to say that not only the judiciary but the professions and all the various players in the different systems are working hard to improve the way cases go through the courts, but the capacity issues, to come back to where we started, are no longer space, by and large. There are some family courts and civil courts that need more space for sure, but by and large it's not space, it is other constraints that are that are biting.

CHAIR: Thank you very much. If I could just ask two quick supplementaries? On the capacity issue I don't want to anticipate questions that my colleagues are going to raise, so I'll hold back on some of them, but on the on the issue of the constraint of judicial resources, I understand that the intention is to recruit 2,000 more judges. Is that correct or was that the wrong figure, and how is that progressing?

THE LORD CHIEF JUSTICE: Alright. Again, that's a figure that gets bandied about, and it sounds like a lot of judges, and it is a lot of judges. Forgive me, I'm not suggesting it's not. But that includes fee paid judges, recorders, deputy district judges, fee paid tribunal judges, and judges in the big jurisdictions. The issue in the Crown Court in particular is that we have been seeking more circuit judges to sit in the Crown Court than we have been getting for the last two years. So the way it works is that the number of vacancies in each jurisdiction and each type of judge is quite carefully worked out by something called a complement group, which has judicial, HMCTS and MoJ composition and then, constitutionally, the decision as to how many to seek is for the Lord Chancellor, although there is never any difficulty about that. Then the JAC, the Judicial Appointments Commission, launches a competition and says, for example, last year I think it was "We're seeking 63 circuit judges to be distributed between family, civil, and crime as follows..." Well, last year, so 2020, the recruitment of Crown Court Circuit judges fell short by ten. Now, that's about 2,000 sitting days, so it's actually quite a lot. This year I'm afraid it's falling short even more.

On the district bench, who deal with the family and civil cases, the county court and a large bulk of the family cases, it's difficult to be precise how short we really are, but it's somewhere between 60 and 80 district judges across the country we are short, because competitions one after the other, have failed to produce the salary judges we need. In other words, there have not been sufficient candidates judged by the Judicial Appointments Commission of sufficient merit to be recommended for appointment. So that's the problem there, but in the Crown Court what we've been doing is really looking everywhere for judicial resource, so the recorders who are the fee paid judges who sit part time in the Crown Court, have been encouraged to sit more than they would normally do, and many are doing so. Without their assistance the system would be falling over.

The second thing we've done is to take advantage of a statutory provision never before used that allows district judges from the Magistrates Court to sit in the Crown Court, and there's a cohort of them being trained in June or July – forgive me, I can't remember the precise date – to be deployed into the Crown Court to sit 50 days each a year, and there will be about 45 or 50 of them. So that's another thing we've done.

The third thing we've done, and this is a joint thing that I have to do with the Lord Chancellor, is to approve more retired judges to sit in retirement. There was a time when very few retired judges sat in the Crown Court because there wasn't the work for them to do. Now, if they wish to, we're encouraging them to do so, and the last thing is that of course the retirement age for judges has just gone up, and so one might expect a few judges to soldier on full-time beyond 70 who might otherwise not have done. So that's roughly where we are.

CHAIR: Thank you. Lord Falconer, you had a supplementary?

LORD FALCONER: Yes. Lord Burnett, you referred to timeliness in relation to the Crown Court being perhaps the key issue rather than what the size of the backlog is, and I completely understand that. You identified the third category being “trials”, though some of those would be pleas. Can you give us an indication of how timeliness has changed if you take – this is only in relation to trials, not in relation to sentencing or magistrates courts, appeals – how has timeliness changed between the last pre-COVID year and now?

THE LORD CHIEF JUSTICE: Well, we're still in a position where, overall, most cases or not quite most cases because it's tipped over, but a roughly half of cases are dealt with within six months of their coming into the Crown Court. But, as I mentioned, the percentage of cases not dealt with within six months has more than doubled since the summer of 2019 and the proportion of cases not dealt with within 12 months has pretty well exactly quadrupled since June 2019. That's why I'm focusing on it and so concerned about it.

LORD FALCONER: Have you got figures for contested serious sexual violence trials in the Crown Court as opposed to pleas? Do you know have the delays gone up and what is the average delay now?

THE LORD CHIEF JUSTICE: Yes, the answer to your question, Lord Falconer, is I do have the figures in the sense that the statistics that are available now, and publicly available for all of this, are very, very rich indeed. I don't have those precise statistics at my fingertips but I will make sure that we send in a note with the precise statistics. But the broad picture is really dictated by this: there are custody time limits which Parliament has imposed, so a defendant who is remanded in custody pending trial must, save in very tightly constrained circumstances, be tried within a certain period. So, when it comes to deciding priorities for listing cases, the custody cases are inevitably at the top of the list. Then the way in which judges, working with their listing officers, having to make really difficult decisions about prioritising different types of cases, look at it, first of all, it's not a first in first out system. There is no dictated hierarchy of how these cases are listed. But all judges try to list cases, even non custody cases, that involve vulnerable witnesses or complainants as soon as possible. They try to list cases involving young people and youths as soon as possible, for obvious reasons. So the type of case about which there is a lot of understandable public concern, namely the serious sex case, are considered by all the resident judges in the Crown Court, so that is the Circuit Judge in charge of each Crown Court, as pretty high up any priority for listing.

Now what I do recollect, and I hope my recollection is accurate from the last time I looked at these figures, is that the overall position for sex cases is certainly no worse than for other types of case. One thing that does need to be borne in mind is that serious sex cases disproportionately have “not guilty” pleas. The plea rate in those cases, for as long as I think most people can remember, has been lower than in, let's say, serious violence cases.

LORD FALCONER: But the position I think, is worse now in terms of delays in those cases than it was in the period before the pandemic struck.

THE LORD CHIEF JUSTICE: Yes, certainly, and it has moved in much the same way as other serious cases. So the figures I gave for timeliness sweep in the serious sex cases but they're not outliers in that.

LORD FALCONER: And you can take years to come on in a serious sexual violence case in certain circumstances.

THE LORD CHIEF JUSTICE: Very rarely years. There are relatively few cases of that nature that... if they're in the period between six months and 12 months, that's one thing, if they're beyond 12 months, that's another, but it'll be very few that go into the years category.

LORD FALCONER: You've identified the two problems; judges and advocates. How long before it gets better?

THE LORD CHIEF JUSTICE: Well, so far as judges are concerned, I've given an indication of some of the steps we're taking to ameliorate the problem. Recruitment of circuit judges to sit in the Crown Court has fallen short, as I say, for this competition that's just coming to an end and the last one. There are very many reasons for that. Now, the first and obvious reason is that the natural pool which provides a large proportion of our Crown Court judges, that is the criminal Bar, has itself shrunk and shrunk very significantly in recent years. The second is that for quite a few years the recruitment of recorders was stalled. Now, that, you might remember, came as a result of problems over pensions for fee paid judges. So that was why it happened, and we're still actually catching up from that, because, ideally, we want to appoint, the JAC wants to recommend for appointment I should say, judges who have a good deal of relevant experience sitting as a fee paid judge. So that's another factor. I think a third factor is that the real rates of remuneration of judges along with many other public servants have fallen very significantly over the last ten or 12 years since the financial crisis, at a time when remuneration in the legal profession has not fallen. I put it that way and, indeed, seems to be racing ahead in some sectors. So that's a factor, and another factor, which perhaps is not given the attention it needs but to my mind is a significant one, is that the condition of quite a lot of the buildings is not good. I mean that understates it, as we know, and for people who are thinking of becoming salaried judges who have been in a relatively successful way of practise as a solicitor or barrister, moving into an environment where it is sometimes simply badly degraded is lacking in attraction. Can I say that?

The other factors I think, Lord Falconer, are first that the work of judges in all jurisdictions has got harder and harder and harder, and anyone who looks at what's going on in our courts and tribunals would recognise that. There is a concern, and it's a genuine concern, from many looking in from the outside, that the support that is provided through staff and so on, is not as good as it used to be, and so the job has become less attractive. So those moving towards it are rather more impelled by a sense of duty – that has always been part of it, I think, for everybody, but it's more of a factor now.

CHAIR: Thank you. Lord Sherbourne, you had a question?

LORD SHERBOURNE: Good morning.

THE LORD CHIEF JUSTICE: Good morning.

LORD SHERBOURNE: Can I ask whether you, in increasing the sentencing powers of magistrates, will that have a significant effect on the burden placed on Crown Courts? And, secondly, does that increase in sentencing power for magistrates, does that have any other consequences in itself?

THE LORD CHIEF JUSTICE: Well, the power to increase sentencing powers of magistrates was contained an Act in 2003, so Parliament spoke in 2003, and it has taken 19 years for government to introduce the measure. The concern, Lord Sherbourne, was that the measure allowed for the power to be turned on, but there was no power for it to be turned off should things go wrong for any reason, and so one of the... there is now a statutory power in one of the bills that got royal assent just before the end of the last session. Now, it's something that I've always thought would happen. My predecessor thought it should happen and there was a nervousness that magistrates might overuse the power, and I of course understand that. But we've taken trouble to ensure that all magistrates have had training in the use of their additional powers, and I am absolutely confident that the powers will not be over used by the magistrates. Now, the impact on the Crown Court will be twofold; the first is that at the moment a large number of cases are sent by the magistrates to the Crown Court for sentencing because the magistrates apprehend that their sentencing powers

are inadequate. So that was one of the baskets of cases I mentioned at the outset. So there will be fewer of those going up. How many fewer we don't know, but there will be fewer, and so that will have a marginal impact on the Crown Court.

More significant is the category of case which can be tried either in the Magistrates Court or in the Crown Court, so that's the broad run of middle ranking criminal cases of assaults and sexual offences, and dishonesty and things of that sort. Obviously, a defendant has an absolute right to elect to go to the Crown Court, but there is a pool of cases each year where the defendant is happy to be tried in the Magistrates Court but the magistrates send the case to the Crown Court because they are concerned that their sentencing powers will be too small, and so there will be a significant body of those cases that now stay in the magistrates courts. So that will have two, I hope, positive impacts. The first is that cases tried in the Magistrates Court come on much more quickly and are dealt with much more quickly than in the Crown Court by and large. But, secondly, that will take out of the Crown Court maybe a handful of thousands of cases a year, which in itself won't solve the problems, but it will make a contribution. You asked me about sort of external impacts. There has been an impact which certainly I didn't predict at all.

Earlier this year, a big drive was launched to recruit new magistrates, because the numbers have crept down, or fallen down, and we have too few magistrates. That campaign – I'll call it a campaign, although that rather overstates what was going on, because it's quite quiet – coincided with the announcement of the increase in sentencing powers and you may remember there was quite a lot of kerfuffle in the press over it. I mean, I was frankly very disappointed at some of the disobliging remarks that some lawyers made about the magistrates, but what it has done is to increase the interest of members of the public in becoming magistrates, and so the volume of expressions of interest and now those are beginning to come through the system for appointment has turned out to be larger than we expected, and it seems that this is a... How can I put it? This is an example of the utility of product placement. *[Laughs]*

LORD FALCONER: The enthusiasm for people to become magistrates is because they can now send people to prison for 12 months, and that is a much more attractive job than previously, is that what you're saying? *[Laughter]*

THE LORD CHIEF JUSTICE: No, no, no. I think it's simply, Lord Falconer, you can tease me as much as you like. It's simply that it raised awareness.

CHAIR: Lord Howarth, you had a supplementary, I think, on this?

LORD HOWARTH: Yes, Lord Burnett, you've expressed some optimism which I was very pleased to hear, that the magistracy will be able to acquit itself well of this important increase in their responsibilities, and that they will be able to cope with the workload and the implications for recruitment and training have been attended to. But I've just been wondering whether this may not be one more instance of patch and mend and ad hocery, and, if one stands back and looks at the justice system as a whole, is anyone, anywhere taking a holistic, strategic view of the needs of the justice system, trying to forecast the requirements over a period of years to see how bits of the system interact with each other, and how we can get something more stable, better funded, more reliable, maintaining the traditional quality and integrity of the justice system on which we've prided ourselves? Because there are all those factors that you outlined earlier when you were talking about the difficulties in the Crown Court system, and there are contextual factors, not least the *[inconsonant? 00:18:38]* creation of new offences by parliamentarians. I don't mean offences perpetrated by parliamentarians, I mean legal offences created by Parliament. Population growth. Is anybody really thinking about how to ensure that in ten years' time we have a justice system fit for purpose?

THE LORD CHIEF JUSTICE: Your question might be thought to require a yes or no answer but I'm not going to give one, because I think the answer is yes in the short term, but not enough in the long term. So just to give some examples of what has been done in recent years, there was a real concern, and, frankly, I still have the real concern, that different major players in the system look inwardly too much at their particular bailiwick, and there isn't a good enough system wide approach to all of this. A few years ago a body called the Criminal Justice Board was established on which sit the Lord Chancellor the Home Secretary, the Attorney General, a very senior police officer, a representative of mine and one or two others from the professions. This was something that was particularly driven by the late Cabinet Secretary, Jeremy Haywood, who became, in discussions with judges and no doubt others, very interested in the very question that you have been raising. Now that body still meets and from time to time it meets, but I think it's fair to say that the attention of all the moving parts in our system has been deflected over the last two years to immediate crises caused by the COVID pandemic. As we move back into a life which we all hope looks more normal I think that whole process needs to be reinvigorated. Now we're doing what we can, including through the Improvement Group that we've got going for the Crown Court and so forth, but I've been asking, for example, for serious indications of future projections of work into the courts generally. But we're focusing on the criminal courts at the moment, because one of the realities at the moment is that if the volumes of work coming into the Crown Court were still not depressed, as compared with pre-COVID, we would be in a very difficult position indeed. So I've asked the question, can somebody tell me, as a result of government policy, the pressure being put on the police and CPS, extra funding for police and so forth, what the likely flow of cases into the Crown Court is going to be next year, the year after, the year after that, and it's very difficult because nobody really knows. But it does make planning extremely awkward, it makes it awkward for me.

The second thing which I have a particular concern about is that the funding for the courts, and it may well be true of other major parts in the system, is done on an annual basis, so I'm just coming to the end... I think I have come to the end, I sent a letter just yesterday, of what's called the Concordat process, which is the final resolution of the courts for this financial year. Now that happens year by year and in my view it's not satisfactory. Who would run a serious business looking only year to year at funding? It just doesn't make a lot of sense to me, but that's the way that it's always been done, so that, I think, needs to be looked at.

It's now 20 years since there was an enormous review of the whole criminal justice system in the courts by Sir Robin Auld. He looked at the whole structure of the Magistrates' Courts and the Crown Courts and the different parts that were playing. Like many reports that had a lot of very good ideas in it, one or two minor ones were implemented and then it's been sitting on shelves, so maybe the time has come for a good look again. It's an area which is fraught with political difficulty, and that I do recognise because any suggestion that there should be fundamental changes to the way in which the criminal courts operate requires political courage and determination, because inevitably whatever proposals are made come in for extremely vocal, if sometimes not terribly well informed, criticism. So my overall answer to your question is not enough rather than no or yes.

CHAIR: I think that does dissipate the spending review issue. Lord Robertson, do you want to raise your question?

LORD ROBERTSON: It does, and I just wanted to ask you whether you thought the latest settlement for the Ministry of Justice and for your part of the Ministry of Justice's budget was sufficient to deal with the backlog that you've outlined?

THE LORD CHIEF JUSTICE: The Ministry of Justice has agreed a three year settlement with the Treasury, as I think all departments did. Strictly speaking, the settlement which the Ministry reaches with the Treasury is without prejudice to the settlement that the Lord Chancellor has to reach with me each year to fulfil his statutory duty, which is to fund an efficient and effective court service. The funding in the three year settlement, broadly, subject to inflation, which of course was not taken

account of, but broadly as at last November looked to provide the MoJ with sufficient funding to look after the revenue side of the courts and tribunals. What it did not do was provide sufficient capital funding, particularly for court maintenance. If I remember correctly from the settlement last November, the Treasury was thinking something along the lines of 50 million a year for capital spending on the courts would be sufficient. That's actually less than it's been in recent years, and as the outgoing chief executive of HMCTS, the court service, said I think to the Justice Committee not very long ago, he knew, and we all know, that there is outstanding maintenance, some of it very serious, totting up to about a billion pounds. There was a large survey done of the whole of the court estate, Lord Robertson, about four years ago which indicated really rather glaringly what needed to be spent. So the capital also has to cover things like leases coming to an end and a new building being found and equipped, and we've had one or two of those, there's a big building for tribunals, there's the Luton Civil and Family Court, there's the Civil and Justice Centre in Newcastle, so these absorb quite a lot of the capital spending.

So one of the issues that the Lord Chancellor and I have been discussing, and with some intensity, I hope I can say without breaching any confidence, is where money well beyond that 50 million is going to be found, and it's important not only for the reason I identified that degraded working conditions are not good for anybody, it's dreadful for the staff, it's dreadful for the judges, but I think it's also dreadful for those who have to use the courts. They're turning up at places which are falling apart. But again, without, I hope, being accused of too much cynicism, what I think the Treasury is more likely to look at is the number of courts that we're having to close for days on end because of maintenance problems, because that's going to have an impact on throughput and in the end on recovery as well.

LORD ROBERTSON: So what you're basically saying is the settlement is all right so far as it goes, but the component, the maintenance of the court systems is clearly inadequate.

THE LORD CHIEF JUSTICE: Yes, and I should also say that the overall settlement between the Ministry of Justice and the Treasury was rather higher than many people expected, and I don't quite know how the Lord Chancellor achieved it, but he did, and so he secured more money than many were telling us he would secure. But that aspect, yes, you're absolutely right, the capital spending, particularly on maintenance, is not enough.

LORD ROBERTSON: Thank you.

CHAIR: If we could turn to the issue of access to justice and Legal Aid, Lord Howarth, you had a question.

LORD HOWARTH: Yes, well I wonder whether you feel that more needs to be done to improve access to justice? On Legal Aid, one of my colleagues will ask you about criminal Legal Aid but I would like to ask you for your thoughts on the situation in regard to civil Legal Aid. I mean this is where under LASPO very large cuts were made in the quantum of funding and whole areas of civil justice were taken out of scope of Legal Aid, and you just now touched on the implications of that for the Family Division. There have been in recent years some improvements in funding and some concessions on scope, but that's been very far from reinstating the position to anything like what it was before 2012, and I wondered how worried we should be.

THE LORD CHIEF JUSTICE: The position in civil does not appear to have had a very profound impact on the ability of people to bring civil claims because there have developed other mechanisms which support a lot of civil claims. So, for example, a large number of relatively all civil claims, if not brought by litigants themselves, are supported by insurance that a lot of people have. It's the few pounds that's added on to your household policy or your motor policy, for example. There are much more sophisticated insurance products available to enable people to

pursue more significant litigation, and also there is the whole conditional fee structure, which itself is controversial in some respects, but it's there and it provides a service.

Civil Legal Aid is something that's been the subject of debate since the day I certainly started practice, which is now quite a long time ago, and the same arguments, the same proposals for solution, they come round and round and round and round and round. But the current position with civil Legal Aid, and as you mentioned, there are some little bits and pieces that get added on from time to time, seems to have settled down.

The position with family I do worry about. I mentioned earlier the impact of the withdrawing of Legal Aid in private family cases, and the result is that has put additional burdens on the courts. But I wonder whether this is another example of the sort of silo effect that we were touching on talking about the criminal system a moment ago. It's all very well for a department to look at a measure it introduces and say, 'Well we've saved ourselves x tens of millions of pounds.' I would have thought that it makes more sense to look at what the impact is across the whole of the public sector, and more widely, society. So, Legal Aid in private law family cases, it's withdrawal has undoubtedly increased the burden on the courts, that could be calculated. It has reduced the number of cases that mediate, that could be calculated. It's increased the volume of cases that come in and take up time, that could be calculated. But in private law family cases there's a much broader cost to conflict between parents, the impact on them and the impact on their children. Now I'm not an economist, I couldn't pretend to understand the detail of the sort of calculations that might be necessary, but parents who are engaged in conflict unnecessarily, or for longer than they should be, are not going to be likely to be deploying their full economic activity. Somebody could calculate that.

The impact on children, the impact on children is not necessarily short-term. We all know that the longer children are caught up in parental conflict the more likely it is that will have a long-term impact. So, I simply ask the question, I'm not expressing a view, is whatever the saving being made from private law family Legal Aid actually leading to savings across the system? Then there's a little anomaly that has crept in to that aspect, which I think it is worth mentioning. If in a private law family case involving a dispute about children one party alleges abuse, domestic abuse against the other partner or spouse, then Legal Aid is provided to that one person. Now, I understand why that was done, there was a lot of pressure, there were some very effective pressure groups out there, and so I understand entirely why that was done, but I don't think you need to have a doctorate in psychology to understand that if you say to somebody, 'Make this allegation and we will give you a lawyer paid for by us,' that it affects behaviour. What I fear it has done is to increase conflict in the family courts, or a questionable benefit. But that's a matter for real experts in that field, which I don't pretend to be. But that's how tinkering can have unfortunate consequences.

I think you mentioned that someone else might be asking about criminal Legal Aid so I'll...

LORD HOWARTH: Just before we move on to that, if we look beyond family, which you've just spoken about very eloquently, and look at the implications of the removal of benefits, employment, housing cases from scope of Legal Aid and the failure to fund early advice for people in these kinds of need, aren't we seeing false economies and aren't we seeing the Ministry of Justice exporting costs to other departments in Government, Social Services, the NHS? Once again, don't we need to look, as you yourself have just been saying, holistically across the system as a whole?

THE LORD CHIEF JUSTICE: Well I agree that's not a sort of legal observation or necessarily one that strictly falls within my role as Lord Chief Justice, but it's obvious, and so looking systemically is important. Now, I should say that one of the things that we're doing is discussing intensively with the Ministry of Justice, with ministers, steps that might be taken to deal with some of the issues that you've just identified, and it would be wrong of me and certainly premature of me to expose the detail of some of the things that we are taking about. But, two aspects of it which I think I can mention, is that there is really serious ministerial buy-in to the need to improve the availability and

the effectiveness of mediation in these family cases. The second is that I very much hope, I very much hope that ministers will be able, not just to recognise but to find some money to support the sort of early legal advice that you've been talking about. I'm not unrealistic enough to suppose that the Legal Aid comes back in the form it was, but getting people who are not really well versed in the system, don't understand how it's going to work, to sit down with someone who does, a lawyer who does, seems to me to be a really important and obvious first step.

CHAIR: Thank you.

LORD HOWARTH: Thank you.

CHAIR: Food for thought there. Lord Thomas?

LORD THOMAS: The problem with criminal Legal Aid is that it does not give a career to a youngster. Nobody could advise a youngster to go the Criminal Bar. My grandson, who finishes his finals this week, is offered a pupillage in commercial set with a guaranteed £40,000 for his pupillage year. He ignores the careers of his father, who is head of a large set in Manchester, and indeed of his grandfather, i.e. me. The knock-on effect of it is that in a period of time you will not be able to recruit judges, that's the pool from which judges come to sit in criminal courts, and of course the quality of advice given to those who, unfortunately, become involved in the criminal justice system will diminish.

Now, last year I understand you referred to the review of Legal Aid by Sir Christopher Bellamy and he produced his review, which in essence says a 135 million pounds must be paid now. And I'd be interested in your comments on that please.

THE LORD CHIEF JUSTICE: Yes, well your observations about the difficulty of developing a career at the criminal Bar are, if I may respectfully say so, obviously well made. And there were the twin problems; the diminishing quantity of work for many years and also the diminishing returns, and they were diminishing by and large because they were frozen for so long. The, result as we all know, is that there has been a substantial reduction in the number of specialist criminal barristers. I should also say that the position in the solicitor's branch of the profession is as bad if not worse.

The Law Society, over the last few years, has done some really serious work on the distribution of criminal Legal Aid solicitors across the country, and looked at the demographic of criminal Legal Aid solicitors. And there are parts of the country where there are simply too few to service the work in the police stations and then the magistrate's courts and Crown Courts, which come from it, and as worrying is the demographic. In other words, the average age has gone up and up and up, as it has at the bar as well. So, there is an enormously serious problem here, which actually has a serious implication for the administration of justice and the rule of law.

Now, Sir Christopher Bellamy's report, which I spoke of last time I was before this committee, and I believe he has given evidence as well, whether here or in the other place I'm not sure, but I know he has given some evidence, is a really serious and thoughtful piece of work. And I publicly encouraged the government to accept his recommendations and really get on with it. Now, as you know, there is a dispute between the government and the Bar in particular, and it's vitally important that I say nothing, I do nothing which indicates taking any sides in what is, crudely, an industrial dispute, and so I'm not going to do so.

But I would echo again the need to deal with this problem because if it isn't dealt with the numbers of criminal barristers and solicitors will continue to decline at a time when police numbers are going up and there is enormous pressure on the police and the prosecuting authority to bring more cases into the criminal courts. That's the question, who's going to do them? The reservoir of lawyers is

limited and I think, if I may say so, the real issue which was not appreciated properly was that a system has to have built into it some resilience, it's true of any system.

If you never have any spare capacity at all then the minute you need it, you're finished, and particularly when you have to recognise that augmenting the capacity isn't an overnight issue. Getting an additional cohort of lawyers into both sides of the profession will take time, and so again, looking forwards, we're coming back to the question about the holistic view. If say in five years' time, as we're reading in the papers every day, the political ambition is to have many, many, many more cases in the Crown Courts. My question is, well, who's going to try them? Who's going to prosecute them? And who's going to defend them? If there aren't some pretty profound steps taken to enhance the capacity at every stage.

LORD THOMAS: I think the pandemic threw up the problem that courts were delayed because a counsel or someone caught the disease or a juror or a witness, and everything had to be pushed back and adjourned and so on. So it highlighted the problem—

THE LORD CHIEF JUSTICE: Yes.

LORD THOMAS: —as you say, there was no capacity to fill in the gaps.

THE LORD CHIEF JUSTICE: That's right, and as I mentioned earlier, the want of lawyers has been a growing phenomenon in cases just not starting in the second half of last year, and the phenomenon you've identified of everything slowing down as a result of people getting COVID was still a really potent factor in the couple of months leading up to Easter. We were losing 40, 50 trials a week because somebody had COVID, and the bigger impact actually over the last year has been that complex cases, the longer cases of which you're very familiar, listed perhaps for six weeks would take ten weeks because in week two a juror got COVID, in week the judge got COVID, in week six the defendant got COVID and so on. So that has been something that slowed things down as well. A slightly different point but I agree.

LORD THOMAS: And there is no means of relaunching the criminal Bar it seems to me at this time, because it's no longer an attractive profession.

THE LORD CHIEF JUSTICE: Well, the only silver lining that I can see at the moment is that of course for both solicitors and for barristers there is no need to be 100 percent doing one type of work. So, just to look at it in the context of solicitors' firms, it's very difficult to make a profit doing criminal Legal Aid, but if the Legal Aid rates are raised in the way that Sir Christopher suggested and there will no doubt be additional subtleties about the whole thing, then in firms they may think, "Well, now we can do that," and so we'll have some people who are doing half their time doing crime and half their time doing family, or half their time doing employment or whatever. The same is true of the bar to some extent that if the work becomes more worthwhile doing then more people will start to do it at least in part.

LORD THOMAS: That's the point, it has to become worthwhile.

CHAIR: Yes.

THE LORD CHIEF JUSTICE: Absolutely.

CHAIR: Thank you. Lord Hope, if you want to ask your supplementary on this and move also onto your other question.

LORD HOPE: Thank you very much. I've got a particular point to raise with you which comes out of the evidence you gave last year because you said last year that there's a real concern that the

way in which criminal Legal Aid is structured does not incentivise lawyers to get to the top of the case, but means that at an early stage, I should say, which means that they trickle on longer than they should do. Now, could you just explain what [the point is? 00:08:36] about structure—

THE LORD CHIEF JUSTICE: Yes.

LORD HOPE: —and whether that point which is not related to the rates of pay but just the way the thing is designed is being addressed?

THE LORD CHIEF JUSTICE: Yes, this is something that was looked at very closely by Sir Christopher Bellamy. The point that I have always consistently been making is that those who are arrested, charged and being prosecuted need to get effective advice as early as possible about what they should do and what should happen. And in particular, they need effective advice if the reality is that they should be pleading guilty. Now, there's a lot of fine detail in this, Lord Hope, and now is not the time and anyway, Sir Christopher would probably pick up the phone and tell me I'd got it wrong if I tried to do it in too much detail.

But by way of example, the availability of Legal Aid lawyers in police stations is absolutely critical, absolutely critical, because that can often resolve things, and often resolve things actually for the benefit of the defendant as much as anybody else. So, I think he was concerned that that was part of the system that was underfunded and so the intensity of thinking and advice was not going into it there. So too in the early stages in the magistrates' court and then the Crown Court. So, one of the things our Crown Court improvement group has been looking at, and as I mentioned earlier, the Legal Aid agency is there to be alive to these issues, to make the first major hearing in the Crown Court, the plea and trial preparation hearing effective. And that means that those who are there for prosecution and defence have got to be completely on top of the case—

LORD HOPE: Absolutely.

THE LORD CHIEF JUSTICE: —otherwise there's no resolution, there's a sort of conditional not guilty indication or plea and it goes off for another hearing. So, that's the sort of thing that I had in mind, that remunerate people better for giving early advice that, to come back to a point that was made earlier, ends up saving the system overall lots of money.

LORD HOPE: Yes, so do I understand correctly that improving the structure in the way you've described is still work in progress?

THE LORD CHIEF JUSTICE: Yes, it's part of what the Ministry of Justice has said it will do in its response to Sir Christopher's report, and it's something, no doubt, that there will be intense discussion about in the course of the consultation and then implementation, and with the legal profession.

LORD HOPE: Can I move on to a quite different point, which is online procedure and remote working, and of course it's a real pleasure to have you with us in person this time, and that in a way demonstrates the benefit of face to face contact. But nevertheless we have learnt since COVID some of the benefits of online procedures and remote working have, and I wonder whether you could bring us up to date as to where you stand at the moment on developing the systems to cope with that. Ad perhaps you could comment also on the usefulness of Section 200 of the Police Crime and Courts Act of this year, which gave power to give directions for the use of video proceedings, video hearings in a whole variety of cases from the Crown Court right the way down.

THE LORD CHIEF JUSTICE: Yes, during COVID we essentially pivoted to using remote mechanisms in all sorts of circumstances where we were not using them before, the telephone, Skype, I shan't give all the others, but we ended up with our own system, which is called, 'CVP,'

the Cloud Video Platform, and it is still being used for a vast number of hearings. In all jurisdictions people are becoming more sensitive and better able to work out when such remote attendance, either everybody attending remotely or as often as not you might have the judge in a court and some people in court but others attending remotely. So, in all jurisdictions we've been working very hard to try to determine where it works and where it doesn't, recognising that drawing up hard and fast rules may not be in the interests of justice.

But, broadly speaking, in all jurisdictions the general thinking is that the sort of relatively routine directions hearings, interlocutory hearings, cases involving relatively short legal argument, those are ideally suited for the remote attendance of advocates and often of the parties themselves. In the Crown Court I've encouraged all hearings of that nature to be dealt with remotely if it's suitable. The one thing we have learned, we've learnt quite a lot, but one particular thing we've learned is that remote attendance via video link is only useful if somehow the parties and lawyers are replicating what they would have done outside the court room before they come to the hearing.

Now, I'm conscious that around this table there are a lot of very distinguished lawyers and so I hope what I say is not controversial. In whatever jurisdiction you operated, particularly when dealing with the relatively high volume work, an awful lot of the most valuable work is not done in court but it's done outside court before you go in. So, it's clearing away the cobwebs, it's identifying what you're really there to argue about. So we did find during COVID that too often the parties or advocates were turning up remotely for a hearing but they hadn't spent 15 minutes chatting to each other beforehand, and chatting to their clients and so on, and then the hearing's become completely pointless, often. Another thing we discovered was that the plea rate in the Crown Court went down, and so it isn't altogether straightforward.

But in all jurisdictions we are absolutely wedded to continuing to use technology when it serves the interest of justice, and the new provisions in what is now the new Act, which I'm afraid if you ask me to recite, I would fail, but they broadly replicate a lot of the emergency or temporary arrangements that were put in place for COVID, and we will use those enthusiastically.

LORD HOPE: Yes, there is an aspect of this which is just my final question on this point, it's looking ahead, and let's assume and let's hope it never happens, there is another pandemic or other emergency and suddenly it becomes impossible to conduct proceedings in the way that we would wish, have you learned enough to be able to plan ahead and react more quickly than we were able to last time so that the backlogs which grew up as a result would be avoided?

THE LORD CHIEF JUSTICE: Yes, well, the short answer is yes, obviously the Crown Court will always remain difficult because it's difficult to imagine having a Crown Court trial with the 12 jurors each sitting at their kitchen tables and so on, I mean that just won't work. And if we ever found ourselves in the same position and were not able to get back to jury trials quickly; I should say we only paused them for six weeks before they started again and then ramped up, if we were in that position for the Crown Court we would have to look very carefully at how things go.

But, broadly, I think the answer is yes, we could now pivot as we had to before huge numbers of cases to remote attendance, even if it's not ideal. I mean we had difficult choices to make, it's do you do it in a way which everybody recognises isn't ideal? Or do you not do it at all? Which was how most of the world reacted to this, but I took the decision and it wasn't universally welcomed you may remember, that no, we had to keep doing it because it would be much worse to stop.

LORD HOPE: Yes.

THE LORD CHIEF JUSTICE: We also have a new video platform in development, when I say we, the Court Service is developing, it's being piloted in a number of tribunals, it's being piloted in one or two civil and family courts, it's had a few hiccoughs as new systems do. But I very much hope

that that will be working properly certainly before the end of this year or beginning of next year, and that will provide greater resilience for the future.

LORD HOPE: Can I just ask you a particular point about criminal trials in the Crown Court involving custody cases?

THE LORD CHIEF JUSTICE: Yes.

LORD HOPE: Now, I don't know whether you've had any contact with colleagues in Scotland about the way they have been dealing with that, because the Scottish system as I understand it, was to have the jury all adequately space in another place, cinemas quite often, and the rest of the trial taking place in a court room where spacing was possible. And that has been... that could be used for custody cases because of course the accused is in court with the judge and counsel and so on, but the jury are remote. Now, I'm told that in Scotland that has worked with universal approval of everybody. Have you looked at that and do you think there's anything that you could learn from the Scottish experience?

THE LORD CHIEF JUSTICE: I've certainly looked at it and I've had many discussion with Lord Carlway and Lady Dorian in Scotland about it. As you've indicated, one of the mechanisms that was used in Scotland eventually was to put the jurors in a cinema, spaced out, with a big screen broadcasting to them the proceedings in the court room. That seemed to work quite well. I was, when I first heard about it, quite nervous about it, Lord Hope, because it seemed to me that it would make the jurors a spectator at the trial rather than participate—

LORD HOPE: It was very contentious.

UNKNOWN SPEAKER: I agree with that.

THE LORD CHIEF JUSTICE: The other thing, having spent quite a good deal of my early judicial career trying serious criminal cases, the need for the judge to develop a rapport with the jury is actually quite important, and to be able to see exactly what's going on, which you don't get if you see the jury on the screen, and also looking particularly perhaps at Lord Thomas, that advocates like to do the same. So it wasn't a proposal that I was hugely enthusiastic about for England and Wales. It also was hugely expensive and there were relatively few of them in Scotland, and so what we did instead was to reorganise our Crown Courts so that we could dot the jury all over the place, put in a lot of screens, and although it would have looked rather odd to many of our forebears what was going on in fact it was the more effective way of dealing with it.

LORD HOPE: Thank you very much.

CHAIR: Thank you very much. I'm conscious of time, colleagues, I'm not sure we'll get through all our questions, but a few supplementaries on this, if I could ask you to keep it pointed. Lord Howell and then Lord Falconer.

LORD HOWELL: Thank you, just briefly, do you think when it comes to online data collection that we have something to learn from the American courts who have been developing the technology very deeply for the last 20 or 30 years?

THE LORD CHIEF JUSTICE: Until the modernisation programme was launched in 2015, and is coming towards its close, the quality of data collection in all aspects of courts and tribunals was dreadful, and it's still not perfect everywhere because we still don't have all the systems of the modernisation programme in place. One of the aims is to enable accurate and very rich data be collected in all jurisdictions, and my own view is that unless you really know what's going on in all the different parts of the system you can't react, and particularly can't react nimbly to dealing with

problems, and indeed you might not even know the problems are there. So, the modernisation programme has, as one of its aims, the capability of producing data in a way that we have never seen before.

CHAIR: Thank you. Lord Falconer.

LORD FALCONER: You've just referred to the fact that the modernisation programme is going to be completed in the course of next year, 2023. Taking family law there is a school of thought that says the effect of the modernisation programme has been to increase the burden on judges and facilitate a reduction in staff on the part of the Ministry of Justice. So it's not an improvement process as far as the courts are concerned, it's a cost saving process which might well detrimentally affect processes of justice because judges will be spending more time doing stuff that was previously done by members of the court staff. Would you like to comment on that?

THE LORD CHIEF JUSTICE: Yes, it's a very complex subject. Anyone here, and again we have a number who have been Secretaries of State, will know that the Treasury don't give out money unless they are persuaded that there are some savings that are going to be made long-term from it. So part of it is to deliver some savings.

At the heart of your question is something which is really quite profound; judges do the judging, they're not administrators. So when the Judiciary were engaging with the detail of the various projects across all the jurisdictions, and family has come into it towards the end much later than many of the other jurisdictions, there was a principle agreed that reflected the judges do the judging and they don't do the administration. I know there are many judges, and particularly in the family world which has come to one or two of the programmes that effect that jurisdiction just recently, that they will be forced to do much more administration, and we, the judges, are reminding HMCTS staff who are running this project that that cannot happen.

Now part of the savings in staff are the savings which will be delivered by their not having to do what actually is rather pointless paper management. I'm conscious of time and just, Lady Drake, do just tell me if you want me to pause so you can move on.

CHAIR: I'm conscious of time.

THE LORD CHIEF JUSTICE: Well don't worry too much about my time, I'm concerned about yours. The first getting rid of paper happened in the Crown Court, so something was introduced called the Digital Case System, and the Crown Court is now paperless for all intents and purposes. So there are a couple of really profound consequences, or more than a couple of that. The first is there used to be rooms in every Crown Court building in the country, and you will remember them, which were just full of files. Room after room full of files. So all that's gone and that space has been redeployed. But more critically there were literally thousands of people employed to open envelopes, put the contents of the envelopes on files, wheel the files round the building, photocopy the files when necessary. Judges were spending a huge amount of time wading through great big paper files. Now none of that happens anymore and so that's the sort of saving that can be made.

The same thing is happening across other jurisdictions, as I say it's come last to family but that will be one of the big thigs. But as I know, the overall project leader from the Court Service has recently explained to all the family judges, earlier this week, part of it is to ensure that the staff are doing what's really necessary, which is supporting the judges. Although I know that there are a lot of stresses and strains caused by the modernisation programme, and as it reaches each new cohort of judges there are stresses and strains, I do know that the Court Service is working very hard to try to ameliorate those, and I have in place a structure of judicial engagement which seeks to identify all of the potential problems that affect judges and try as best we can to deal with them and ease them out.

CHAIR: Just on that, is there a specific design of a dataset being collected under the new measures for the Family Court?

THE LORD CHIEF JUSTICE: I don't know the answer to that I'm afraid, so I'll have to take that one away and get back to you.

CHAIR: Okay, thank you very much. Baroness Suttie.

BARONESS SUTTIE: Good morning. Can you say a little about what measures have been taken to improve diversity of judicial recruits since you last addressed this committee?

THE LORD CHIEF JUSTICE: Yes. Well first I should perhaps remind everybody that we published a judicial diversity and inclusion five year strategy in November 2020, which had a whole series of aims and targets, and one of the important things about the strategy is that it's audited every year and there has just been an audit of that. So that was an indication of the seriousness with which I take this issue, and through me Lady Justice Simler chairs the Diversity Committee of the Judges' Council, and the work that she and her colleagues have been doing is really quite remarkable.

There is a whole series of discrete initiatives that we take ourselves or are involved with others in taking. The first is that a judicial diversity forum was established now three years ago, which was largely the initiative of Lord Kakkar at the Judicial Appointments Commission with my support, to bring together the principals, who between us are in a position, we hope, to look seriously and take effective steps to increase the diversity of the judiciary. So it's the Secretary of State, the Lord Chancellor, it's me, it's the Chairman of the JAC, the President of the Law Society, the Chair of the Bar, the Chair of the Legal Services. So it really is the principals looking at all of this.

The first thing that we did was to look closely at the availability of statistics. I'm sorry, it sounds as if I'm statistic mad, but again unless you know what's going on you really can't work out what to do, and so we have published a combined statistics tool which looks at diversity in the legal profession, all three branches, so solicitors, bar and the CILEX and in the judiciary, and breaks it down into every part of the judiciary and the magistracy. The Judicial Diversity Forum set up something called the Pre-application Judicial Education Programme, it's a bit of a mouthful, we all call it PAGE. That we got support from the MoJ, the Lord Chancellor at the time, Sir Robert Buckland, who provided the money, and that provides workshops essentially for people to be able to develop an understanding of the skills needed for judicial appointments. So the professions are involved in that and the judges provide discussion groups. The judges lead the discussion groups. So that's a cross-cutting thing.

Then we also have our own judge led judicial application seminars. There are literally hundreds of judges working on this and setting up seminars to try to assist those who are interested in making an application, particularly for fee paid appointment in the first stage, in all the different areas of judicial activity. We have a judicial mentoring scheme which is made available to solicitors and barristers. There's a targeted outreach programme as well which we run with the JAC by providing judges to talk to those in the most underrepresented groups.

So the progress has actually been better than people might think, and the way I look at it is this; as you may know, I was vice chairman of the JAC back in 2015 and 2016, and so became very involved in looking at the make-up of the judiciary and the structure of different parts of the judiciary. Then, so it's seven years ago, the main focus was on whether there were sufficient women being attracted into the judiciary. Now there's been quite a lot of success there and the reason I know that is not only from looking at the statistics, but also because nobody's really having a go at me about that. Then there was a significant increase in the proportion of ethnic minority judges being recruited from South Asian backgrounds. Interesting disparities between different parts of the Indian subcontinent, but there has been a lot of progress there. Not enough but a lot. Again, I'm

not being taken to task in private discussions about that side of things now. The area where there is particular concern is that the number of black African and black West Indian applicants for judicial appointment remains low, very low indeed. Then if you look at all the statistics from the professions you can see these are endemic problems that are pretty much across the legal profession.

So, there is an enormous amount going on and I've always been keen to ensure that what we do has tangible benefit. I think it's an area where there can be too much of, 'Well let's just do things because we should be doing things,' without actually focusing on the things that make a difference. So the Judicial Diversity Forum, having brought everybody together, and our own activities, are more and more and more looking closely at outcomes not just what we're doing.

BARONESS SUTTIE: Can I just ask you briefly, because last time you said you had a particular concern about social diversity; has any progress been made since you last spoke to us?

THE LORD CHIEF JUSTICE: Well yes, yes there has. It's an extraordinarily difficult thing to measure and there are still no universally accepted indicia which really tell you about social background. Forgive me for being slightly flippant but one that is always mentioned is whether your parents went to university. Now as it happens, my parents did not go to university, but that doesn't tell you very much about me, and as it happens, the Prince of Wales' parents didn't go to university. So I think one's got to be very, very careful about this, but it's again something that we're focusing on, we're focusing a lot of attention on it. So just by way of example, I have a cohort of I think 123 – I think it's 123 – community and diversity relations judges from all the judiciary, and part of what they do is to go out into schools and universities and youth clubs and community organisations to encourage youngsters to think about coming into the law. Every time I visit a part of the country other than London, which I do a lot, I try to fit in a visit to a school myself to do exactly the same thing. This is all part of trying to encourage youngster to think that the law is something for them and eventually if the law is for them then we'll get more judges through those routes, and the professions are doing the same, I mean the Bar and the solicitors profession are really active in that as well.

CHAIR: Baroness Fookes?

BARONESS FOOKES: Lord Burnett, two separate points to you; the first one, given the discussion about worries about people going into the criminal law, is that a point that you might put to these people that you are trying to encourage, as you have explained at some interesting length, would that not be a point to put to them if they are worried about whether they would ever make progress? Here is a gap in the market you might like to fill. That's one point. The other relates to school part; I'm very keen indeed so I'm delighted to hear that judges are going in to schools because I think that's where the problem lies, poverty of expectation one might call it, but what type of schools are the judges going in to, because there are some schools that are much better placed in the State system to encourage people into the professions, whereas other schools have low expectations of the pupils and the pupils themselves have those low expectations. Given you can't go to all schools what is the bias towards less good schools may I put it?

THE LORD CHIEF JUSTICE: Well I can say what I do. When I visit a school I always encourage my office to find a school that is not stuffed full of the children of professional parents, because that's not where the help is needed. It's not where the encouragement is needed. So one of the things that I know is looked at is the proportion of the students that are on free school meals, for example, and where it is. So that provides, for me, an opportunity to talk to usually sixth formers, sometimes GCSE students as well, who I suspect have a relatively slight exposure to professions and the law. It's actually one of the... I can say this. It's one of the most scary things I do, talking to 50, 60, sometimes 100 school children is actually, if I may say so, rather more difficult than talking to a parliamentary committee. *[Laughs]* The most extraordinary thing is that they're completely uninhibited in the questions they ask, completely uninhibited, which can be really quite interesting.

BARONESS FOOKES: Those of us who have taught recognise that phenomenon. *[Laughter]*

THE LORD CHIEF JUSTICE: Yes, yes, but it is... and I think the diversity and community relations judges do much more than I do. I probably get to four or five schools a year. I'm going to one next week. I did one, I think, 3-4 weeks ago, but some of these judges are going to schools every week, every fortnight, and I think making quite a difference in breaking down the barriers you spoke of. It's sort of something that makes me weep internally if there is a view, "Oh, well, the law isn't for the likes of us." I mean, it's just, it's a terrible attitude if that is prevailing anywhere.

BARONESS FOOKES: Now, you've given an admirable example of the way you do it. Do the other judges who are doing this, do they too seek out schools where they all less filled with professional parents?

THE LORD CHIEF JUSTICE: I believe so, and inevitably they're looking at schools in the areas in which they are operating as judges, and so I know that they are focused on, again, *[outreach?]*. So we had a conference a fortnight or three weeks ago of the diversity and community relations judges, a really, really buzzing and interesting discussion involving all these judges, and they're fired up to make a difference.

BARONESS FOOKES: One final point. Is there any arrangement for getting children from these schools actually being taken to a Magistrates Court or something similar so they can actually see it in action and have it explained to them?

THE LORD CHIEF JUSTICE: The answer is yes. The magistrates run a similar programme to the judges, and across the country we encourage youngsters to come to the courts. They come to the Royal Courts of Justice, for example, but they go to their local courts and the judges take a lot of trouble to engage with them and to encourage them to understand what's going on. So the answer to that is yes.

BARONESS FOOKES: Thank you.

CHAIR: Lord Howard?

LORD HOWARD: Lord, Burnett, one of the things the committee is looking at in its current inquiry is the role of the Lord Chancellor following the 2005 changes, and I wondered whether you had any reflections on the changes in the arrangements for judicial appointments following those changes, particularly the appointment of senior members of the judiciary?

THE LORD CHIEF JUSTICE: Yes. It has always struck me that it is important that the appointment of judges has a degree of transparency to it, and it's important that everyone can see that judges are appointed on objective criteria. I think the calibration that went into the 2005 Act to determine the composition of the Judicial Appointments Commission, for example, was careful and balanced. So the Judicial Appointments Commission is a majority lay organisation. When it comes to appointments panels, the lay participation is in the majority, and that is true also for the special appointments panels that are created for the very senior judicial posts as well. So I mean it seems to me that that change is working reasonably well. Of course, it's fairly opaque precisely what was going on before, and I'm looking at Lord Falconer, to your to your left, who was involved, I think, before the new system and also under the new system. It was always well understood that although the old-style Lord Chancellor was wearing all these constitutional hats, was a party politician, a member of the Cabinet, Speaker of the House of Lords, and so on, that when it came to judicial appointments, the Lord Chancellor left the party politics aside. That has been the case for a very long time. I mean looking back over the last two centuries, there have been well, one or two controversies in the 19th century, for example, but none recently. So the system was, it seems to

me, working very well, but it wasn't transparent. And transparency in judicial appointments is, I think, important to garner public confidence.

CHAIR: Thank you. I think I'm going to make the next question the last question because it's quite a full question and, if I may, send you our remaining questions and if you did feel able to respond to them that would be helpful. But I'm conscious I am going to possibly lose some of my colleagues and I'm conscious of our agenda as a whole. But if we could turn to the Lord Chancellor and the law officers, I think Lord Robertson, you were going to open with a question?

LORD ROBERTSON: Yes, the Committee is looking at that relationship that exists between the Lord Chancellor and the law officers, and I wondered how often it was that you spoke with them and what are the sort of things that you discussed, and maybe in particular would you express any views about the adherence of the law officers to the rule of law?

THE LORD CHIEF JUSTICE: So far as the Lord Chancellor is concerned, I mean he and I meet regularly and frequently. We had a meeting two days ago. We had a meeting a week ago, and we have regularly timetabled meetings to catch up on everything to do with the system and we speak in between meetings when we need to. I also have a separate meeting in tandem with those meetings with the permanent secretary so that there is an opportunity to ensure that everything that's on my mind, everything that's on his mind is being looked at.

So far as the law officers are concerned, I meet the law officers much less frequently. I'm struggling actually to think whether it's two or three times a year I tend to meet the law officers. Again, there can be intermediate meetings of one sort or another. I mean with the law officers, the reason for our meeting is to talk about matters that intersect in our interests. So, obviously, the Attorney General has some statutory responsibility for the Crown Prosecution Service, and for the Serious Fraud Office and so on. So those are the sorts of things we talk about. The law officers also have a particular role to play in contempt matters, and those can be of interest to me and the judiciary as well. The law officers have been interested, of course, in the recovery in the criminal courts. They also have other responsibilities of a more discreet nature to do with charities and matters of that sort. So with the law officers we talk about that.

I certainly don't presume to lecture the law officers on their responsibilities in the sphere of the rule of law, that wouldn't be for me to do at all. I mean coming back to the Lord Chancellor's role, his or her functions are set out with some clarity in the opening sections of the Constitutional Reform Act. I think I've picked up that one or two appointees, on reading those statutory duties, have regarded them as being quite onerous, so I think the job of Lord Chancellor remains a very difficult one because of its importance in the intersection between two of the pillars of the state, namely the executive and the judiciary; two pillars that are independent of each other.

So the Lord Chancellor is reminded at the opening section of the Act, if I remember it correctly, that he has the constitutional responsibilities of the Lord Chancellor as they always have been. So I'm conscious that we have a former Lord Chancellor in the room. I shall be careful not to chance my arm, but it would strike me that that includes being the voice of the judiciary at the cabinet table, when that's needed. It also strikes me as importing an obligation to do something that may be quite difficult from time to time, which is to say no to colleagues in cabinet. That can be quite difficult.

The Lord Chancellor also has specific responsibilities in connection with the rule of law and the independence of the judiciary, and with the independence of the judiciary, the language of the Act is to defend the independence of the judiciary. Now, conscious as I am that one of the draughtsmen of the act is in the room, I have certainly taken from that "defend" is something that suggests activity. It's not a passive word, and so there are some pretty strong statutory duties. Then I've already mentioned the need to fund the courts so that they can operate efficiently and effectively.

Now, all of these things are important, and when it comes to discussions with the Lord Chancellor, the Lord Chancellor of the day – I'm on my fourth – the Lord Chancellor of the day and I talk about all matters of mutual interest, respecting, I respect the Lord Chancellor's sphere of activity and wouldn't presume to intrude in areas of what are political policy. I will explain the impacts of proposed policy changes on the operation of the courts, and Lord Chancellors respect the independence of the judiciary and, in particular, however tempting it might be, and I'm sure it is tempting, that what goes on inside courts, subject to statutory intervention, is for the judiciary and not for the executive.

LORD ROBERTSON: So you wouldn't raise any apprehensions about possible interpretations of the rule of law that you thought went beyond the normal accepted meaning of that?

THE LORD CHIEF JUSTICE: I'm very conscious of the environment generally in which, Lord Robertson, you're asking this question. The rule of law is a protean concept. You would struggle to find two people who would necessarily define it in precisely the same terms. The statute doesn't define it. There has, as I think, yet been no need for a comprehensive judicial definition, albeit there have been areas where judges have indicated certain of its indicia.

So it's really important for me to have a close, confidential and working relationship with the Lord Chancellor and my first three Lord chancellors remain, all of them, we're in touch with each other, which perhaps gives you an indication of how the relationship was a very good one, and it has to be confidential. It really has to be confidential. So I'm aware of your broader investigation into these matters, and I think it was well understood that I couldn't come before the committee and talk about the detail of my relationship with David Lidington with David Gauke with Sir Robert Buckland, still less the existing Lord Chancellor, and so you'll have to forgive me if I don't. But I've been Chief Justice now for nearly five years, and there have been occasions during that period – I'll say no more than that – where I have been concerned about some activities intruding upon the independence of the judiciary and rule of law issues and, of course, if I have concerns, I will ventilate them with the Lord Chancellor.

I should also say that my engagement with government goes well beyond the Lord Chancellor. So I see the Prime Minister regularly. Not terribly often, he's got a lot else on his on his plate, but I think the current Prime Minister I've had three long and interesting meetings with, and there's another one coming up, I hope, before too long. I see the Cabinet Secretary regularly. I see the Home Secretary regularly to talk about issues of mutual concern, not policy, not the policy of the Home Office, and I don't know... that's always been happening, so far as I'm concerned, but again, I'm conscious we have a former Home Secretary here, and I don't know whether in Lord Howard's time he saw the Lord Chief Justice of the day.

But, as part of my responsibility is to represent the views of the judiciary to government, that's a sort of indication of the range of direct contact I have, and other senior judges will have contact with ministers in departments that have a direct impact on their work. So so the President of the Family Division has some engagement with the Department for Education. The Senior President of Tribunals with BEIS and so on. So there is there is quite a lot of contact, but we are all very careful to ensure that we respect the constitutional proprietaries, and we recognise the role of ministers and we expect Ministers to understand our role as well.

LORD ROBERTSON: If in these confidential discussions with the Lord Chancellor, you felt that your views in relation to any impact of government policy on your responsibilities, you would seek redress at prime ministerial level?

THE LORD CHIEF JUSTICE: Perhaps all I can say – I appreciate you want to press me, but I am very concerned not to intrude on what might be thought to be confidential matters – but I think those

who know me know that I am not a shrinking Violet and that if there were something that I was concerned about, I would not be nervous about raising it at an appropriate level.

LORD ROBERTSON: Thank you.

CHAIR: Thank you, Lord Hennessy, I know Lord Howard, you want to come in. Lord Hennessy?

LORD HENNESSY: Lord Bennett, I was fascinated by your last answer to Lord Robertson. I think we all have a certain idea of the rule of law, but it does have this elusive property to which you were referring. Just before we gathered, I dug out the description, the definition of Tom Bingham of the rule of law in his classic work *The Rule of Law*, and it is very short. He says:

“The core of the existing principle is, I suggest, that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made taking effect generally in the future and publicly administered in the courts.”

Now, would you accept Tom Bingham's definition as a pretty good working definition? Would it be your definition, and could I ask a second question arising out of that? Could I tempt you to be in your non-shrinking violet mode, to perhaps do a great public service and draw up a template of the requirements of the rule of law against which committees like ourselves, and indeed the public, can test the actions of future governments?

THE LORD CHIEF JUSTICE: Lord Bingham's short book on *The Rule of Law*, in my opinion, is one of the most brilliant pieces of writing from a judge in recent years. It has the virtue of being readable, it has the virtue of being short, and it has the virtue of being right. So I'm not suggesting that those are qualities not usually found in judges, for those who might be watching. But, yes, the working definition, I think, has received almost universal agreement and, as you know Lord Hennessy, Lord Bingham went on to subdivide the indicia of *The Rule of Law* through a series of really penetrating short discussions, and I don't think one will find a better analysis of it which is accessible in the English language anywhere.

Now, as for your second question, you're setting me a task which would not be the work of moments, I fear, but, again, I understand entirely why you ask the question. It's not something I fear that I will have either the opportunity or the time to do in the near future. It seems to me that Lord Bingham's working definition might be sufficient for the moment, and I have in mind one or two other pieces of writing on it, which I won't talk about now because it would be too technical, but which might also be of some assistance.

LORD HENNESSY: Could you put in, perhaps, an interim note that wouldn't be your final word, to help us out?

THE LORD CHIEF JUSTICE: Yes. I know I'm always advised never just to say 'yes' to a question because of the commitment that I might be entering into, but we'll have a look at it, Lord Hennessy. *[Laughter]*

LORD HENNESSY: Thank you very much. Thank you.

CHAIR: Lord Howell had a question on the impact of policy on the courts.

LORD HOWELL: Yes. I think we all obviously respect and appreciate the need for complete confidentiality, and this is not a [press or intrude? 00:02:21] question of any type, but it is a fact that there's a vastly increasing volume of international law which runs through our courts and so do you, in general terms, based on your wisdom and experience, feel that this growth of international

law with all its baggage of policy and politics coming along with it has created more problems for the judiciary. Secondly, with the talk of a Bill of Rights. If we have a Bill of Rights coming along, do you think that will be making life for the judiciary harder or easier? We were talking about a harder and harder life for the judiciary, is this going to be part of it?

THE LORD CHIEF JUSTICE: On the question of international law, international law doesn't automatically come into our domestic law and there has in the last year been a decision of the Supreme Court that has reminded us that international treaty law doesn't become domestic law unless Parliament says so. International law obviously comes into all sorts of aspects, particularly of human rights law and asylum law, but I think the courts are well used to that and, frankly, on top of it. So I don't perceive that to be a particular problem. I don't doubt when I get back to the Royal Courts of justice there will be some who will tell me that I've got that wrong, but I haven't perceived that to be a problem.

Now, so far as the second part of your question is concerned, obviously I'm not going to say anything about proposed government legislation – there was there was a consultation of some sort – but what I can do is just try in a few words to explain what we do when such legislation is proposed. We engage on the practical impacts of any proposed legislative change on the operation of the courts. So, just to look back at the recent past, there was the Judicial Review Bill that was in Parliament that got royal assent just before the end of the last session. Now, the policy aspects of that were for Government and Parliament. But what we do through discussions with officials, with suitably expert judges is just to explain, well, if you do this then it will have this impact on the courts and sometimes it can be quite a profound practical impact which could have resource implications for example, and sometimes we are able to point out in all sorts of areas that sort of relationship between the proposals that are being made and some of the bits and pieces in the law that are there already, which perhaps haven't been looked at with the intensity and clarity that they need to be. So, when it comes to a Bill to do with human rights, I expect that we will do the same. There will be, it seems, proposals to adjust the way the courts approach Strasbourg case law, so we may be able to explain how that will work. There are proposals, I think, to introduce more and more filter mechanisms. Now, that could have quite profound implications on the operation of certain courts, because you are going to generate extra applications and so on. So, all of that, we would point out and those discussions are very productive. They only work, again, because they are confidential, and I know that they are very welcome to ministers.

LORD HOWELL: Thank you very much.

CHAIR: Thank you. Thank you very much indeed for that. It was very full, lots of details to think on, and very informative indeed. So thank you very much.

THE LORD CHIEF JUSTICE: It's my pleasure to be here and I hope I'll see you again before too long.

CHAIR: I hope so.

THE LORD CHIEF JUSTICE: Yes.

CHAIR: Thank you.

[Ends]