JUSTICE COMMITTEE

Chaired by Sir Robert Neill MP

Transcript of

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES

(The Right Honourable the Lord Burnett of Maldon)

Giving Evidence On

Tuesday, 16 November 2021

at

THE GRIMOND ROOM

CHAIR: Order, order. Good afternoon, welcome to this session of the Justice Committee, and turning almost immediately to our witness today, the Lord Chief Justice, Lord Burnett of Maldon. Good to see you, Lord Chief Justice.

THE LORD CHIEF JUSTICE: And you, and good to be back in person.

CHAIR: Well indeed, that is a big plus for all of us, I think, is it not, to do that? Can we just, as usual, do our declarations of interest. I am a non-practicing barrister and, like Lord Burnett, I am a bencher of the Middle Temple and I am a former consultant to a law firm. [Inaudible].

MARIA EAGLE MP: I am a non-practicing solicitor, chair.

CHAIR: Ms Farris?

LAURA FARRIS MP: I am a practicing barrister.

ROB BUTLER MP: Prior to my election, I was a non-executive director of HMPPS and a magistrate member of the sentencing counsel.

CHAIR: That has covered everything. Okay, well, thank you very much, as I say, Lord Burnett for coming to see us and we are grateful for your annual report that we have had and received and have read with considerable interest. It has obviously been a rather difficult and exceptional set of circumstances since we last saw you before the Committee in person.

THE LORD CHIEF JUSTICE: Yes.

CHAIR: And during the various online sessions that we have had together, and I wanted to start, if I might, by your assessment as to where we are now with the system, which has been under probably pressure of a different kind than it has ever been before.

THE LORD CHIEF JUSTICE: Yes. Well shall I try to just sketch out in respect of each jurisdiction where overall I think—

CHAIR: Yes, by all means, and then we will come back into the detail, yes. That is fine.

THE LORD CHIEF JUSTICE: — we are. As you know, chairman, I have got rather a heavy cold, and so if I am sounding even more odd than usual, that is the reason why. Clearly, the greatest public interest and thus political interest is in what has been going on in the criminal courts during COVID and just winding back a little bit, everyone, I hope, will remember that although we had to pause jury trials for a very short while, in the end it was only seven weeks, the work of the crown court continued. At no stage were the crown courts shut down in England and Wales. By last October/November, we had about 300 court rooms capable of conducting jury trials and the number has continued to rise and my latest figure that I was given just a day or two ago is that it is now 366. So physical capacity is no longer really a constraining factor.

There are other aspects of capacity which are providing some constraints. The first I should mention in the crown court is judicial capacity. As all members will remember, the crown court sitting days were quite severely cut in the years before COVID and the result was that the number of crown court judges was also reduced. We are finding that we are struggling in some parts of the country to provide the judicial resources necessary to do all the work in the crown court that we want to do. We are encouraging the recorders to sit more and the recorders are stepping up to that challenge, but again, the position is different in different parts of the country. London presents a particular problem. The Midlands the next problem. Other parts of the country less so. I am also

encouraging recently retired circuit judges to sit in the crown court and we are deploying high court judges more than we did before COVID to sit in the crown court. So judicial capacity is a factor.

The other capacity factor which has taken us a little bit by surprise is the capacity of the legal profession, both solicitors and barristers, in some parts of the country to manage to do the work that we are listing to do, and so capacity is one of these things that has many different facets and there are other important features of capacity which include the staffing levels in HMCTS, the ability of probation to keep up, the CPS to keep up and so on. So things are moving in the right direction in the crown court but however one looks at the statistics, and I am not going to blind you with statistics because they can be quite complex and in some respects misleading, but however one looks at it, the outstanding caseload in the crown court is about 50 percent higher than it was when lockdown started last March. The outstanding caseload has been coming down gently in the last few weeks but I think it is too early to suggest that that is a herald of things to come. One of the factors that we are extremely conscious of is that the volume of work coming in to the crown courts remains depressed as compared with pre-COVID. So that is the crown court.

The magistrates' court, the picture is actually quite positive. In many parts of the country the magistrates' courts are back where they were before COVID, not everywhere yet, but the expectation is that within a few months, pretty well everywhere will be back to pre-COVID levels. So that is just a broad overview of crime. I may be talking too much, Sir Robert, but if I just say a few words about family, which I—

CHAIR: Yes, indeed, fine.

THE LORD CHIEF JUSTICE: —think is also extremely important. During the COVID emergency, for all sorts of reasons the call for judicial time in civil diminished, that is to say in the county court, and that judicial time was absorbed by family. So the volume of family cases not only stayed at the level pre-COVID but increased, but the picture in the family courts is also one of increased outstanding caseload. In public family law, so these are care cases essentially, the average time being taken to complete cases has extended a little. A good piece of news there is that the volume of care cases coming in has diminished, and we think that that is largely the result of initiatives that have been proposed by the judiciary and involved local authorities and Cafcass and others to encourage the issue of public law proceedings only when it is really necessary.

By contrast, the private law family proceedings, so these are disputes between parents over children in particular, have continued to grow and are causing a good deal of concern. We might come on in time to explore a little bit what is happening there. So far as civil is concerned, the reality is that the higher courts, the high court and the business and property courts, the Court of Appeal, carried on almost without missing a beat during COVID and there is no appreciable additional outstanding caseload in any of those courts. In the county court, the volume of cases issued in 2020 and in the first part of this year was very significantly down on pre-COVID levels, all sorts of reasons for it, but the result is that, broadly speaking – and I have to say broadly speaking because the data is not very satisfactory on this – but, broadly speaking, outstanding caseloads and timeliness in the county court is pretty much where it was before.

CHAIR: Okay, that is very helpful and I think that is probably a good chance to give you a pause and we will come to some of the questions. Can I come back first of all to the criminal jurisdiction.

THE LORD CHIEF JUSTICE: Yes, of course.

CHAIR: We as a committee will want to express our thanks to the judiciary and all those involved in keeping the show on the road to the extent that has been possible, which I know has been extremely challenging, and that is a convenient way of leading in to the very useful visit which a number of members of the Committee had to the crown court at Crown Square in Manchester

where we met Judge Dean in the court and a number of his colleagues and a number of the court staff. What struck us looking at the position when we were speaking to them was that although it is possible to keep operations going, it requires some really considerable efforts, does it not, physically to adapt courts?

THE LORD CHIEF JUSTICE: Yes.

CHAIR: And that is particularly challenging in the case of multi-handed trials, of which one court at Manchester is adapted, I think, to do that, and I think there is one coming on stream at Loughborough.

THE LORD CHIEF JUSTICE: Yes.

CHAIR: Now, I think when you last gave evidence to us, one of the last two occasions, Lord Burnett, you referred to the complexity of the mix that was coming through and the likely growth in multi-handed trials. Now, is this level of capacity with what appears to be one "super court room", one adapted court room in Manchester, one in Loughborough, perhaps others on the way, is that going to be sufficient to deal with that growth in the multi-handed trials and the judicial time that will be taken up because it is taking a judge there for perhaps three or four months or more?

THE LORD CHIEF JUSTICE: Yes. Well, can I say first that I was delighted to hear that you went to Manchester and went physically and had an opportunity to talk, not only to judges but to staff and no doubt others, to professionals and so on.

CHAIR: Indeed, yes.

THE LORD CHIEF JUSTICE: Because, speaking for myself, I learn more by speaking to staff and judges and lawyers when I visit courts than I ever do through piles of paper coming onto my desk that are designed to brief me, and so I am sure that collectively you will have really come to understand what some of the practical difficulties are which we have been dealing with over the last 21 months, and which have not left us altogether. I am grateful for your observation of your thanks to the judiciary. I think it is fair to say that without the astonishing input from all of the judiciary, I am not just talking about crime, but we are focussing on crime at the moment, the system would have ground to a halt. The imaginative way in which individually judges worked with staff in courts and with local professionals to devise mechanisms, systems and approaches which were suitable for individual towns and cities and courts was really quite remarkable. We do still have a real problem with the big multi-hander cases.

Now, the cases with two and three defendants pretty well everywhere are being dealt with satisfactorily. They are taking longer than they would otherwise because of the practical arrangements that have to be made. As I am sure you will have appreciated, the opportunity for trials just to be held up by a day because somebody has had to self-isolate or because somebody has gone off for testing or so on, this is having a real impact on the speed with which a lot of cases are being dealt with, but we do not have very many court rooms that can deal with the really big multi-hander cases, so these are with six, seven, eight, nine, ten defendants, particularly defendants in custody. There are a few of them, and the cases are being dealt with but one of the solutions has been for judges to try to chop the cases up and that is something that is being done with great energy to ensure that these cases are being tried and obviously we have to be very sensitive, the judges have to be sensitive to custody time limits which continue to present quite a challenge.

CHAIR: In terms of severing the indictments, to split some of these multi-handed cases, that has always been an option that is available to the court, upon application if it is in the interest of justice and so on, but is there something there to be learnt from that, perhaps are we in fact being more

willing to severe indictments now than was previously the case and one assumes that is being done without any great injustice to the parties?

THE LORD CHIEF JUSTICE: Well it would not be happening if there were real concerns about whether it was delivering justice. I mean there are all sorts of reasons why the prosecution in particular are keen to keep all the defendants together and quite often the defendants are quite keen to be separated. I appreciate you have a great deal of experience of this from your days in practice at the Bar, but it is something I suspect that will be part of the lessons learned.

CHAIR: [Inaudible], yes, thanks. You gave us the figure of 366 that we are currently up to at the moment in terms of trials disposed of per week, but that has taken a bit longer than was expected to get to that sort of level, has it not, because originally the government's plan was to be disposing of 333 by November 2020.

THE LORD CHIEF JUSTICE: 366 are the number of court rooms.

CHAIR: Court rooms, sorry, yes.

THE LORD CHIEF JUSTICE: Which are available to conduct jury trials doing the necessary—

CHAIR: Yes, and that is the increase which we have got.

THE LORD CHIEF JUSTICE: Yes.

CHAIR: But then we were talking about the throughput of trials, is that satisfactory still?

THE LORD CHIEF JUSTICE: Well it is going as quickly as it can and the rate at which trials are being dealt with is back to where it was pre-COVID but we have got to go beyond that and a long way beyond that if we are going to reduce the outstanding caseload. That is the reality.

CHAIR: Because that is the key point, is it not, because the backlog many would argue was too high, even pre-COVID? One of the cases that we saw in Manchester concluded as it happened so one can just refer to it, was a rape offence. I think the offence was committed some three years ago.

THE LORD CHIEF JUSTICE: Yes, one of the questions I always ask—

CHAIR: Long before lockdown.

THE LORD CHIEF JUSTICE: —when I hear about delays is to understand where the delays have actually occurred. There are three critical points in any criminal case. The first is when the complaint is made to the police; the second is when the charge is made, which follows the involvement of the CPS; and the third then, because it is only when someone is charged that it comes into the courts, the time it takes to dispose of it in the courts. The position has been, for all sorts of reasons, that the time between reporting particularly of sexual offences and charge has grown quite substantially in recent years because of the nature of the investigation that is undertaken but the time that the case is in the courts has not grown by so much but it is clearly unsatisfactory that an offence which occurred in 2018 and was reported in 2018 is being tried in 2021, even if it has only been in the courts for six or nine months, which may well have been the case.

CHAIR: It seems to be quite common though, certainly bail cases are being listed out well into the latter part of next year.

THE LORD CHIEF JUSTICE: Yes, that is right and into the early part of 2023.

CHAIR: [And 2024?], yes.

THE LORD CHIEF JUSTICE: Again, the picture is different in different parts of the country and London and the South East and the Midlands are the areas where the timeliness of cases is least good. In Wales, in the West, in the North West and North East things are very much better and from the point of view of the judiciary, we would like to see cases tried as soon as they are ready to be tried, as long as we have got the space to try them, the judges to try them and the lawyers to represent both sides in them.

CHAIR: What is it therefore that you need to be able to achieve that? You talked about judicial capacity, what else?

THE LORD CHIEF JUSTICE: There is a series of things that we need; the first is to increase the judicial capacity. So the recent circuit judge competition fell short by 12, and the 12 it fell short by were all criminal crown court judges rather than family and civil judges. There is another competition running at the moment which I hope will deliver all the judges that have been asked for, but that depends upon candidates of the right calibre presenting themselves to the JAC. So that is the first thing we need to do. We are increasing the number of recorders. A very large number have been appointed or are about to be appointed; I have accepted them for appointment and there will be another competition next year. So the recorder pool is being replenished constantly and we are accelerating the training of criminal recorders once they are appointed, so I think that that will help. So that is a judicial resource. We need to have the money, the finance to operate the courts and that means we have to be provided with sufficient money to sit as many days as the system has capacity to sit and I very much hope that we will not return ever to the situation where there are court rooms sitting empty, judges available to hear cases and cases ready and able to be heard but which are being held up because the money is not made available to do the work.

CHAIR: Does the current spending review give you any confidence you can sustain that?

THE LORD CHIEF JUSTICE: Well, as you will appreciate, the spending review is a stepping stone to the Concordat process. So the Ministry of Justice has settled with the Treasury for the next three years, and I have read with a great deal of care every word that was said by the Chancellor of the Exchequer and all the supporting documents, and there is money being made available for the Criminal Justice system, which of course is a much broader concept than the courts, and there is undoubtedly going to be some money made available to try to deal with outstanding caseloads in the crown court. But the process by which the settlement of finance is done between the Lord Chancellor and me is set out in the Concordat that was agreed ten or more years ago, and the Concordat process is without prejudice to whatever the MoJ and the Treasury have settled on. So I will be pressing the Lord Chancellor to ensure that in crime, which we are talking about at the moment, sufficient funds are made available for us to sit all the days we will be capable of sitting in the next financial year, and then although there is a three year settlement with the Treasury, our Concordat process is an annual one.

CHAIR: I think it referred to the importance of recognising in funding the importance of the rule of law, the justice system and the value being set out.

THE LORD CHIEF JUSTICE: Yes.

CHAIR: I imagine would be indicated, or be having conversations, I will not want to hold you to what they are without the need for sustainable funding over a period of more than just one year.

THE LORD CHIEF JUSTICE: Yes. It is something that increasingly frustrates me, that the funding for the courts, for the administration of justice, is done annually and that there is not a more long term view about the financial support that is necessary. One of the consequences of that, particularly in recent years where for all sorts of reasons I do not need to go into, money has been very tight, perhaps it is always very tight, is that one looks around for where the worst leak in the boat is and you then plug that particular leak, but there is not anything going on to make the vessel seaworthy in the long term, if I can extend the metaphor. So at the moment, obviously, the political focus is very much on outstanding caseloads, but all the underlying problems about which I have spoken since appointment four years ago, my predecessor spoke for four years, his predecessor for five years, about the estate being allowed to degrade. I am worried that will not have sufficient funds or any proper funds to make good some of those degradations.

CHAIR: The maintenance backlog of the courts is something which is perhaps not talked about often enough.

THE LORD CHIEF JUSTICE: Well I talk about it quite often, chairman, but I agree with you that others do not as much as is necessary. We have some very good buildings, I do not make any bones about that, and oddly enough a lot of them are the PFIs, because there are contractual arrangements in place which mean they have to be kept in decent condition. But we have some buildings which are frankly an embarrassment and which I personally do not think members of the public should be expected to tolerate as users of our courts, nor the staff working in the courts, nor the judges also working in the courts. The shortfall in maintenance is something that has been recognised for years by government, and yet the money necessary to deal with it, just to put the estate into a decent condition has not yet been made available, and, looking at everything that was said in the spending review documents, I struggle, frankly, to see where the money is for that, but I shall be pressing the Lord Chancellor for it nonetheless.

CHAIR: That is very helpful. Laura Farris?

LAURA FARRIS MP: Thank you, chair. Lord Burnett, I just wanted to ask you about a few potential non-monetary solutions to the crown court backlogs. Last year I think I read an interview with you where you said, “Do some of the low grade cases that go to the crown court really need to have as many as 12 jurors?” It is an issue that we have grappled with in parliament, and I am sure you have too, but does it remain your view that there could be swifter disposal of cases in a crown court if there were smaller juries for certain categories of case and what do you think that would look like?

THE LORD CHIEF JUSTICE: Well these are extremely interesting questions, which I dipped a toe into in the early days of COVID, particularly when there was a good deal of public discussion about whether as a temporary measure it might be sensible to do cases differently. Now, the moment passed and there was no political appetite for that, and I recognise entirely that fundamental policy issues surrounding the way cases are tried are really political issues, and so I am very cautious about entering into the arena, and I know you have read some of what I said. I have always posed it as questions, in other words I have been careful never to make a proposal, and I am not going to do so today. But these are questions which have been floating around for as long as I have been involved in the law, time and time and time again there have been discussions about it.

LAURA FARRIS MP: Let me put it a different way then; do you think it remains a germane question while you have issues with people involved in trials possibly having to self-isolate and [inaudible] You do?

THE LORD CHIEF JUSTICE: Yes, I do. I think it is part of a much bigger question. There was a fundamental review conducted into criminal trials by Sir Robin Auld, now I think, nearly 20 years ago. He made a series of proposals, he raised all sorts of questions, which really came to asking

the question is the way we do things necessarily the best way? Now my own view about anything that we do is that we should be asking that question all the time, but recognising, as I must, that any changes to the way that trials are conducted, even the balance between trials in the magistrate's court and the crown court, take one into extremely controversial territory straight away. I remember, is it now 18 months ago, when the last Lord Chancellor floated the possibility of doing trials in the crown court differently during COVID, that there was a sort of explosion of opposition, and it was essentially politically impossible to do it. So my feeling on this is what COVID has taught us is that our system is perhaps more fragile than we thought, and also we have to grapple with long term problems, there is no doubt about that. So rather than instant sticking plasters I just wonder whether the time might have come for another look at some of these things in the same way that Sir Robin Auld did, now 20 years ago?

LAURA FARRIS MP: Another option which we have again discussed in a political way quite a lot is about Section 28 procedures in rape trials, and the chair just gave the example of the rape case that was three years past the incident. I mean there has been pilots going on, do you have any view on that and whether or not that, you think, would be an effective way of managing rape trials during this process of clearing the backlog?

THE LORD CHIEF JUSTICE: There are two fundamental observations I would make about that. Section 28, as you appreciate, is a statutory provision that enables cross-examination to be canned in advance of a trial. It started being piloted with children under 16, then it was children up to 18, then it was vulnerable witnesses, and now it has been piloted in seven courts for ordinary complainants and witnesses. The evaluations of that have not taken place, they are being undertaken by HMCTS at the moment, and there are some quite fundamental questions about it, I think, to which everybody ought to know the answer. So, for example, does recording the cross-examination and then playing it later have an effect on guilty plea rates? I would like to know the answer to that question. Does it have an effect on eventual conviction rates? I would like to have the answer to that question. If you talk to prosecutors and judges there is a concern, anecdotal at the moment, that the cross-examination is simply not very immediate and effective, the evidence is not very effective, and there may well be increased acquittal rates.

Now, I would like to know the answers to that before this is rolled out more generally. But there are some quite serious practical implications at the moment that I think we need to be absolutely clear about. If there is to be a cross-examination in advance it is one thing to cross-examine a child where the questions are all worked out in advance and it is all over in half an hour or 45 minutes. Even that is quite disruptive because it means the lawyers have to prepare the case as if for trial, the judge cannot be doing a trial, there is a lot of interruption of trials. But as this is rolled out to vulnerable witnesses where the cross-examinations are longer, and also as it is now rolling out to non-vulnerable witnesses, the burdens being imposed on the courts are enormous. So the judge has to prepare as if for trial. The cross-examination may take half a day or a day. The lawyers have to prepare. The judge and the lawyers have to come out of other trials, and so trials are being disrupted, so one of the real worries I have about expanding it too quickly is that it will actually result in the outstanding case load being kept artificially high because there will be a lot of time and energy being devoted to dealing with Section 28 cross-examinations.

I think, subject to evaluating the pilots, as I say I have been 40 years now a lawyer, I like to proceed on evidence not hunches, subject to the pilots it is obviously an extremely valuable tool to save complainants and some other witnesses the trauma of having to wait, and that is undoubtedly a trauma. But my own view is tread very carefully because this could easily go wrong.

LAURA FARRIS MP: My next question was going to be about listing.

THE LORD CHIEF JUSTICE: Yes.

LAURA FARRIS MP: You deal with this actually in your report and you say a range of listing strategies and so on, it is something again we have been thinking about in parliament a lot. There is divergence between the way that different judges will list and the argument has been made that there could be room for a centralised listing function to subsume that role and to ensure greater standardisation which might again assist with the backlog. What is your view on that?

THE LORD CHIEF JUSTICE: Well first of all there is a thing called The Scheduling and Listing Tool being rolled out as part of the reform programme at the moment. Now, that is being rolled out across all jurisdictions and in the next 18 months it is expected that it will be operating in criminal, civil and family courts. Whilst listing is a judicial function, undoubtedly, most cases are listed in a grid, effectively. It happens in the Court of Appeal, it happens in the high court, it happens in the crown court, and the listing is done in accordance with overall listing policy. So the expectation is that that new scheduling and listing tool, if it delivers what it is designed to deliver, will facilitate more certain and more effective listing. Now, one of the problems that I appreciate you will be very familiar with, with listing, is that it is not a science it is an art, and my own view, particularly in the crown courts, is that a really good listing officer is worth ten percent of efficiency because a really good listing officer knows all the local solicitors and barristers and knows instinctively which cases are likely to be effective and which are not and so on. No machine can quite capture that. But at the moment we do have a real tension, and it is one that I recognise in some places is not delivering perfect outcomes for everybody, and that is trying to ensure that the courts are kept busy, in other words avoiding a case pleading and having nothing to come into the court behind it. So that is aim one, and aim two is to avoid over listing, which means cases not being reached or being stood out at very short notice, which I appreciate is undesirable. So this is a topic which needs constantly to be kept under review. Local conditions, I think, are really important because no two places are the same, but underlying your question is, I think, a sentiment that not everything is right everywhere with listing and I would not disagree with that but it is something which, if we are talking about the crown court at the moment, all the resident judges are very conscious of.

LAURA FARRIS MP: Thank you.

CHAIR: It has been suggested to some of us when we talk to practitioners actually the approach of different resident judges, if I may be blunt, can be idiosyncratic is the phrase that has been used to me, and that judge A at crown court Y will be notorious for listing all the pre-trial hearings, place progression hearings in person, whereas a judge B at crown court Z will have a very different approach and will generally try and list things remotely. Now is there some protocol, judicial leadership perhaps through the presiding judges, to try and ensure consistency in that?

THE LORD CHIEF JUSTICE: I need to make a few observations before I answer your question but I am not avoiding the question. There is a tendency to suppose that all procedural hearings can satisfactorily be conducted remotely.

CHAIR: A case necessary.

THE LORD CHIEF JUSTICE: But the reality is that they cannot, and what is sometimes lost, what is often lost if particularly the first procedural hearing in the crown court is always listed remotely is the opportunity for the defendant to sit down with his or her advocate, and then for there to be discussions with the prosecution advocate that lead to resolution, pleas that are acceptable. You are absolutely right that there are differences in different parts of the country, but whether it is right to say it is the result of idiosyncrasy or the resident judges understanding and reaction to different cultural practices I think is the moot point. So I will not identify any different parts of their country but there are some where more of the preliminary, the first hearings, the PTPHs as they are called, are being listed in person than others, and it is because it is the only way that cases are being resolved.

So I think one just needs to be quite careful to look at precisely what is going on everywhere, but what I can say is that all the resident judges and the presiding judges meet regularly. I mean it is one of the silver linings of COVID, these meetings are happening on Teams or Zoom, very frequently and they are exchanging best practice. The other observation I would make, and I hope that no-one takes this amiss, is that sometimes the advocates are very keen to attend remotely even if the interests of justice frankly should have them present, because you can do a 10 o'clock hearing in Sheffield, an 11 o'clock hearing in Liverpool, a two o'clock hearing in Exeter and so on, and the law on this is quite clear and the legislation that was put in place immediately following the COVID lockdown really comes to this: that in the criminal courts, judges are obliged to allow remote attendance unless it is not in the interests of justice to do so, and that is the test that I believe they are conscientiously applying.

CHAIR: Dr Mullan, do you want to come in very quickly?

DR KIERAN MULLAN MP: Just a quick supplementary on that point.

CHAIR: Yes, on the listing point, then I will [inaudible].

DR KIERAN MULLAN MP: I think you have articulated really well the complexity of the issue and we heard on the court visit, but dare I say it seemed to me that the sensitivity about the complexity has meant that there are not even common sense recommendations that we could make that everybody would agree on that I think would benefit the system. There just seemed to be a few… there are enormous variations, and while we would not want to remove that variation there is perhaps a middle ground where we could recommend and advise, just to pick up that low hanging fruit where really people are behaving unreasonably in all different directions.

THE LORD CHIEF JUSTICE: Well, I would not disagree with that. One of the things that has actually rather frustrated me in recent months is that I hear grumblings of discontent but when I try and follow through and ask for particular examples, or the presiding judges are asking for particular examples, we do not really get them.

CHAIR: I suppose, then we perhaps move on from listing actually now, you are right to say listing is a judicial function but, equally, putting it on the grid, it has a lot of administrative elements to it.

THE LORD CHIEF JUSTICE: Yes.

CHAIR: Are we sometimes perhaps a little bit over caution in regarding all listing as a judicial function, or is a lot of it actually the reality that the judge has precious little option in terms of what the courts administration give to them?

THE LORD CHIEF JUSTICE: Well—

CHAIR: And it sort of sometimes can be almost a reason for not probing further, as to the efficiency of listings and say, "Well, it is a judicial decision."

THE LORD CHIEF JUSTICE: Yes, well, individual judicial decisions on listing in most jurisdictions are relatively rare. Last week I was sitting in the Court of Appeal criminal division and I did not personally decide when the case was going to be listed. That was the office listed it. So judges do make individual decisions but the issue, I think, is that overall listing has to follow judicial direction and policy.

CHAIR: Yes.

THE LORD CHIEF JUSTICE: So I mean taking ourselves into a completely different jurisdiction, in the county court it is not uncommon for a district judge or a deputy district judge to do ten or 15 short applications a day. Well, it is not for an official suddenly to say, "Well, I am going to make them all do 20." That can only happen if there is a judicial decision to that effect, so there is the general and the specific.

CHAIR: The concern that is often raised with a number of us is the way [inaudible] refer to the county court, cases being taken out of the list at very short notice. You know, a small money claim that has been set down for some months for trial on a Friday on a Monday, and the Friday it is taken out of the list and it will not go back in for another six months, and the reason that is given is lack of judicial availability.

THE LORD CHIEF JUSTICE: Well, I am afraid that that is the reality in the county court and in the family courts, that it can be difficult to find deputy district judges to come in and do the lists. It is happening less than it was because a great deal of efforts are being made to encourage deputies to sit. The limits have been taken off the amount of days that they can sit in any given year, but I know it is still happening and it is very unsatisfactory that a list should be cancelled at short notice for want of a judge.

CHAIR: The suggestion is happens with considerable frequency still, unfortunately.

THE LORD CHIEF JUSTICE: Well—

CHAIR: Do you have any statistics at all [inaudible]?

THE LORD CHIEF JUSTICE: I am afraid that is not something I have any statistics on but I will make some enquiries and I will let you know if I find anything out.

CHAIR: Thank you very much.

MARIA EAGLE MP: Thanks, chair. You have told us a little bit already about the constraint that judicial capacity has. In the past ten or 11 years you have increasing limits on sitting days that have been a constraint. Now that you are allowed unlimited sitting days to tackle some of the backlog, to what extent does that lack of judges and the lack of availability and the criminal judges being the ones that were not recruited in the last round, to what extent does that stop you tackling the crown court backlog? Is it a big problem or is it a decreasing problem?

THE LORD CHIEF JUSTICE: At the moment is is quite a big problem. So, just to get the numbers in one's head, the sitting day allocation for 2019/2020 in the crown court was 82,600 days. It was increased by a small margin later in the year when it became apparent that the projections for work were not being borne out by events, but 82,600. This year, that is 21/22, we expect to sit just over 100,000 days. So that is a big percentage increase, a very big percentage increase, and that is why we are having to find so many of those days by encouraging our recorders to sit. There is an irony in that because before COVID when the days were being cut, cut, cut, we were finding it difficult to find the days for our recorders to sit. So, having been told two years ago we are struggling to find you your 15 days which we would like you to do, now we are begging them to do more, and I emphasise that many of them are sitting more, and the new ones are sitting. But we expect this year, that is before the end of the financial year, to fit around 100,000, maybe 101. We will do our best to sit more, and the rates are going up. Next year, so 22/23, I would be very disappointed if we cannot find the judicial resources to sit 105 or 106,000 days and I hope that the money will be made available to do that. After that, we think… when I say "we", these are projections that have been done by HMCTS and the MoJ, we think that we will be able to sit at a rate considerably beyond 105, maybe as many as 110,000. If we can get to that sort of rate, and if we get the funding to sit at that sort of rate, then there is a realistic prospect of bringing the outstanding caseload down. But

that too depends upon what happens to the incoming work, and there are huge uncertainties about that and looking into the future is always difficult, but there are lots of variables which mean that it is difficult to predict exactly what is going to happen.

MARIA EAGLE MP: Thanks. I mean the National Audit Office said that the crown court backlog increased by 23 percent in the year leading up to the pandemic, and we know it was going up.

THE LORD CHIEF JUSTICE: Yes.

MARIA EAGLE MP: And increased by a further 48 percent thereafter.

THE LORD CHIEF JUSTICE: Yes.

MARIA EAGLE MP: Since the onset of the pandemic to over 60,000 cases on 30th June. One of our new justice ministers has recently told the House of Commons that the extra money allocated in the spending review for the criminal justice system, and he said, and this is a quote, "Will allow us to reduce the crown court backlogs caused by the pandemic from 60,000 today to an estimated 53,000 by March 2025." Now, do you recognise those numbers, because a fall of 7,000 in that time does not sound like an enormous hit in tackling that backlog.

THE LORD CHIEF JUSTICE: Well, I agree.

MARIA EAGLE MP: Okay, you do not have to say any more than that. *[Laughter]* I do not want you to conduct your Concordat negotiations in this committee room. I wonder to what extent you think the current Legal Aid framework and the way in which it works has an impact on the operation of the courts? The committee has recently done a report on the future of Legal Aid and one of the things we noted was the system does not seem to provide enough incentives for legal representatives to take early action to progress cases through the system as quickly as might be the case. The incentives are all sort of the wrong way and in a system where criminal lawyers are actually finding it hard to get remunerative rates anyway, and having an incentive that incentivises being slow or not proceeding swiftly through and resolving cases does not seem to be helpful. Do you think that there is an issue there that might be tackled?

THE LORD CHIEF JUSTICE: Yes, I do. The detail of it is extraordinarily complex but, as you know, Sir Christopher Bellamy has been conducting a review of criminal Legal Aid and he is very shortly to be in a position to provide his report to the Lord Chancellor. I am pretty confident that Sir Christopher has looked at this issue, the issue raised by the committee, in great depth and I very much hope that to the extent there is an issue about the structure of Legal Aid in addition to the cruder issue about the rates of remuneration, the structure of Legal Aid, if there is an issue there that is having an effect on the way cases are being run then I am confident he will have found it. He will expose it and he will explain to the Lord Chancellor what needs to be done to resolve it. But if it is there, and I cannot pre-judge what Sir Christopher is going to say and I do not have his depth of knowledge or expertise but if it is there it has got to be dealt with.

MARIA EAGLE MP: Thank you, chair.

CHAIR: Thank you very much, Dr Mullan?

DR KIERAN MULLAN MP: You talked at the outside about some of the civil jurisdictions but I would just like to revisit that and if you could highlight across the civil jurisdictions where you think are the greatest concerns about backlogs and the processing of cases?

THE LORD CHIEF JUSTICE: Well, as I mentioned in the introductory observations in answer to Sir Bob, in the higher courts there is not really a COVID related outstanding caseload issue. In the

county court, one of the problems we have at the moment, and it is one I have spoken of in the past, is a lack of data. It ought to be possible for me to say with confidence how many cases there are waiting to be disposed of in the county court and how long they are taking and all the rest of it, but that is not possible because so much is still not digitised and so the data is very poor. The outstanding caseload and delays in civil, I am told are pretty much back to where they were pre-COVID and there are all sorts of interlocking reasons for that. One I have mentioned already is that the volume of cases issued in the county court in 2020 and 2021 was significantly lower than normal and that was a COVID-related effect. Secondly, as you will know, Dr Mullan, there was a whole series of interventions from the government to pause possession claims, and so that helped enable other work to be done.

One of the things that appears to have happened, and I put it quite tentatively at the moment, but appears to have happened, is that there has been a change of culture, particularly amongst social landlords, reflecting in their use of court proceedings as the start of what they do, in other words issue and then try to resolve problems. As a result of COVID it went the other way around: try to resolve problems and then issue, and those who are responsible for the detail of civil justice, that is the master of the rolls and the deputy head of civil justice, are relatively optimistic that there has been a change of culture that may be banked into the future. We have also got some changes that have come along as a result of the reform programme, so online money civil claims, which started as a pilot, expanded and is now a very broad project. There is the Whiplash Portal, there is Damages Online and there will be other ones coming along as well. So the view of those, as I say, who are looking closely at this, is the problems in the county court are actually rather less than we feared they were going to be.

DR KIERAN MULLAN MP: Okay. You mentioned the lack of digitisation and the reform programme. Could you give us a sense of how well that is progressing then? You said the problems are not as bad as we thought they might be but are there specific things that have been happening in the background to progress those reforms?

THE LORD CHIEF JUSTICE: Yes, well, the reforms are carrying on, and I have mentioned a number of those that touched the civil courts directly. The three big areas of reform that are yet to be completed are the Common Platform in crime, the scheduling and listing tool, which I mentioned in answer to a question from Sir Bob, and then the Video Hearing Service, as it is called, VHS, so it takes us all back quite a few years, does it not? But that is a bespoke video hearing system which is a good deal better than anything we use at the moment. It is being piloted, and like all pilots it is exposing glitches and difficulties. It is not without its problems but that is something which is coming along as well.

DR KIERAN MULLAN MP: Okay, and on recruitment, as you have mentioned, you have told us previously that previous appointment rounds were unable to appoint to the capacity that you actually had in terms of positions. Has there been an improvement in that regard and what have you done if there has been to secure that improvement?

THE LORD CHIEF JUSTICE: Well, in the civil court, which is the focus of your question, we still have a real problem. Last year the shortfall in the recruitment of district judges who provide the backbone of the county court was very substantial indeed. There is a district judge competition running at the moment where the complement sought is 100 new district judges. Now, whether the JAC will have 100 candidates to recommend for appointment we have to wait and see but there have been some real problems in recruiting district judges of late. The recruitment of deputy district judges has been much more successful, and there will be another round of deputy district judges recruited during the course of the next year. But there are still problems, real problems, with the district judge bench.

DR KIERAN MULLAN MP: Without wishing to kind of rehearse the reasons that you gave when you spoke about it before, again, what again would you say are the barriers to those being filled? If we did that 20 years ago would you always manage to fill it? Is it a new problem or a worsening problem?

THE LORD CHIEF JUSTICE: Well, it has been a particular problem in the last two or three years. The reality is that for pretty well all the salaried judicial posts we have been falling short in the sense that the JAC have not had candidates they have been able to recommend. So are still one or two down in the High Court but that is a problem that is now almost sorted. I have mentioned that we were 12 down in the circuit bench this year and the district bench more. Now, I think the reasons for that are, again, quite complex, multifaceted. I mean one of the things that worries me is that the district bench are disproportionally located in courts which are really not very good, and I think one has got to be realistic about this, that we are trying to recruit successful lawyers, solicitors and barristers who will not have spent the last ten or 15 or 20 years of their lives in buildings where the heating might not work or the air conditioning won't work or the roof leaks or the loos leak, and so on, and although that's not the universal picture – I'm not suggesting it is – it is too common a picture. People coming from the legal profession are used to working in environments where the IT works and where there is appropriate staff support and so on. I think that this is one of the consequences of the degradation in the funding of the system that we have seen over many years, that the environment in which people are expected to work in many places is just not good enough. That is one thing.

The other thing is that lately the job of the district judge has undoubtedly become more difficult. It has become more difficult because the pressures of work are greater. District judges are spending more and more time doing family cases; less and less time doing civil cases. The insistency of family work is really great, and I think that that is a factor that undoubtedly bears upon the recruitment.

There have been difficulties with remuneration, as you are aware. There is a bill before Parliament at the moment which sorts the pension issues that we have been talking about for so many years. I think that that will help with recruitment but, at the moment, the job of the district judge in particular is one that I think needs to be made more attractive and we are working to try to achieve that.

CHAIR: Before we move on to that point, can I just come on one thing, Lord Burnett, about the very helpful observations you made about the position in the county courts and so on. You have said on a number of occasions that we thought that was down to pre-COVID levels, but in civil as much as in crime is that an acceptable level?

THE LORD CHIEF JUSTICE: Well, no is the answer. Again, cases should be dealt with when they are ready to be dealt with, if the system can cope with them. Obviously, in civil there can be some different factors coming in because often the parties are not that keen for them to be resolved too quickly for all sorts of reasons. But timeliness actually is the thing that really matters, in my mind. In any jurisdiction, you might have 100,000 cases waiting to be dealt with but if they are all going to be dealt with in six months, nobody would be very unhappy.

CHAIR: It is a length of time.

THE LORD CHIEF JUSTICE: But if you had 10,000 and they were going to take three years, you would be very unhappy indeed. So, I think the focus on the number is not necessarily the only thing we should be looking at.

CHAIR: The other issue in civil, of course, is that most of the parties will not be legally aided and, therefore, if there are aborted hearings they are likely to pick up the costs thrown away.

THE LORD CHIEF JUSTICE: Yes.

CHAIR: If twice taken out of the list in a year, £10,000 in thrown away costs.

THE LORD CHIEF JUSTICE: That is right.

CHAIR: That is not just on the litigants, is it?

THE LORD CHIEF JUSTICE: Well, it is very undesirable and of course in the county court, a very large volume of the work is conducted by litigants in person.

CHAIR: Yes, of course.

DR KIERAN MULLAN MP: We are currently conducting an inquiry into the justice… I wanted to ask you about in relation to the civil court. I will just read you some evidence from the Bureau of Investigative Journalism. They said:

"Our reporters attempted to attend a day of possession court hearings on 110 cases over two months. On six different days, we were turned away by judges who told us all possession hearings were held in private. In fact, possession hearings should be public as default."

They also give examples where they were told they would only be allowed in if there was a letter from a senior judge. Another occasion where they were told only they would be allowed in if there was permission from the defendant. I wondered what your sense of how successfully the media are able to attend court and, for me, how would someone follow up those individual instances that where no doubt they were unjustly turned away and what would be done to look into that.

THE LORD CHIEF JUSTICE: Possession hearings are public hearings, and so I am disturbed to hear that those problems were encountered. Obviously, I do not know anything about the individual cases. There have been difficulties during COVID in numbers who can come safely into the building, so footfall questions, but members of the public and the press should not be turned away from possession hearings because they are not private. Beyond that, I am not sure what I can say in response to that. Open justice is absolutely at the heart of what we do. It is at the core of the values of the common law and it has been for centuries and it continues to be at the core of it.

During COVID, we have tried to facilitate the attendance of the press in particular to hearings that they wished to attend, even if they have been doing that remotely. I cannot say that it has been perfect and obviously the examples you give suggest that it has not been, but huge efforts have been made to publish lists where the cases have been dealt with remotely or where some of the people are attending remotely so that members of the press can also ask to join remotely in appropriate cases. It has been a great success in some of the more high profile cases that have been running around in the last year or 18 months, and oddly enough it has facilitated much greater press access than would otherwise be the case.

So, nothing has changed. Open justice is at the core of what we do. In crime and civil, obviously that has always been the case. There are large projects underway, as I am sure you will know, in

the family courts to increase access to the press and public and the President of the Family Division published a large report on that only the week before last. So there is a great deal being done.

DR KIERAN MULLAN MP: If I could just say, as I said, if you feel you are a journalist and you have been inappropriately turned away from a hearing, what is the mechanism whereby someone would say that was done incorrectly and how would that court be looked at or have you even scrutinised how it is administering open justice?

THE LORD CHIEF JUSTICE: Well, I do not want to encourage endless letter writing, but if a member of press has not been allowed access to a public hearing then he or she should get in touch with the local court and ask why. The example you gave was, it seems, judges misunderstanding the position and that these need to be brought to our attention.

DR KIERAN MULLAN MP: There would not be a formal… could they formally complain? How does it work?

THE LORD CHIEF JUSTICE: I do not know.

DR KIERAN MULLAN MP: Okay.

THE LORD CHIEF JUSTICE: We do not have a formal complaints mechanism. If somebody is worried about what has happened, they usually find a way of letting those in authority know.

DR KIERAN MULLAN MP: Okay.

THE LORD CHIEF JUSTICE: Including occasionally writing to me.

DR KIERAN MULLAN MP: I take your point about we do not know exactly what has happened nor the circumstances. There may have been legitimate reasons that we are not aware of, but I think it is important that they have a route to scrutiny.

THE LORD CHIEF JUSTICE: Yes, well, I will certainly get a copy of that evidence and I will, as I say, take that point away.

DR KIERAN MULLAN MP: Thank you very much.

CHAIR: Kate Hollern.

KATE HOLLERN MP: In May, you told the Constitutional Committee, and I will quote:

"It is idiotic that HMCTS recruits good people, trains them then quickly loses them and it should not be allowed."

Off the back of those comments, do you believe that HMCTS is understaffed, especially with respect to legal advisors and court clerk, and do you think there is unrealistic workload put onto people?

THE LORD CHIEF JUSTICE: Yes. In answer to the first part of your question, I should note – and the committee can get detail of this from the Ministry of Justice or HMCTS – but there has been a significant restructuring of pay in HMCTS, which has been designed in part to condense the differentials between HMCTS pay at a particular grade and the pay in other government agencies

and departments to try to reduce the temptation for people to leave. So, there has been some work done and it is not for me to comment how successful it will turn out to be, because in all of these things there are winners and losers and so it depends on who you talk to, but that is something you might like to get information from the MoJ about.

So far as legal advisors are concerned, HMCTS is struggling to recruit sufficient legal advisors. Now, one of the reasons for that is that the pool of lawyers likely to be available and suitable for that is being fished by others at the same time, and particularly by the CPS who have been increasing their lawyer numbers over the last year or 18 months. So, although I do not carry the figures in my head, I do hear frequently that the number of legal advisors is down in quite a few parts of the country and that that is having an impact on the number of magistrates' courts that can be sat and particularly the family courts which are staffed by magistrates. So, it is having an impact there.

Whether pay differentials are part of that is something that I am not in a position to comment on because I do not carry all the figures in my head. I suspect, but I do not know the answer for sure, that, as in any organisation, if you are short staffed, one of the consequences is likely to be that those staff you do have are asked to or just do more, and I suspect that it is just the same for legal advisors.

KATE HOLLERN MP: Well, obviously there is a lot of hearsay that has been widely experienced. Would you be in a position to offer advice on what else could be done to help reduce the problem?

THE LORD CHIEF JUSTICE: Off the top of my head, I do not think I am well enough informed to do that. Undoubtedly, jobs are attractive for a combination of different reasons for different people. Pay is obviously extremely important. The burdens of the job are very important. One of the advantages that many legal advisors have is that because there are posts all over the country, it is possible to work close to where you live, which is an advantage, but it is not so true in the big cities and urban conurbations. So, the precise details of the problems in recruiting legal advisors to HMCTS is something I think you really have to take up with HMCTS, because it is not something that I have direct responsibility for and it is not something I am well enough informed on, I think, to give advice.

KATE HOLLERN MP: Okay, thank you.

CHAIR: Thank you very much, Kate. Paul Maynard.

PAUL MAYNARD MP: Thank you. You have mentioned points already today the state of the court estate, the problems coming from the heating that is going wrong, the very poor upholstery, the peeling paint, the proliferation of buckets collecting drips left, right and centre because it makes for a very unwelcoming environment for the public, an unpleasant working environment also for those in the court system. I am interested in understanding a bit more; what impact do you think that might have on HMCTS's modernisation programme specifically? Also, on the ability of the courts to catch up on the back-log? Yes, it is a nasty state of affairs to have and has been thus for quite a while. What practical impact is it having on the problems you are facing right now in the court system?

THE LORD CHIEF JUSTICE: Well, I think it has a series of effects. The first I have already mentioned is that I am fairly confident that it is one of the inhibitors to attracting people to become judges. I know that to be so because that is what people say. It is also, I suspect, very demoralising

for staff as well and the truth is, surely that if people are demoralised by their physical environment they are much less likely to be working effectively and enthusiastically. The reality is that everybody is human and if you are having to put up with difficulties which are really not very reasonable, it is likely to have an impact on how you are working.

There is a direct impact which, as I appreciate we talked about this in the past when you were in a different position, but there is a direct impact. When the ceiling falls down in a court, as it does from time to time, that court is out of action for some time. Every winter, we have not had the cold snap yet, but every winter we lose hearings because the heating has broken and there is a limit to how much you can expect people to sit in court in coats, in bobble hats and in gloves – you just cannot do that. In the summer, we have the reverse problem that in many of our buildings the cooling systems break down and they become intolerable. Every year, we have lifts breaking down, which take ages to repair, which means that courts cannot be used.

So there is a direct effect on the capacity of the system to conduct business. But I think that is only part of it. I think the much more fundamental point is that it is simply not reasonable to expect the public, our staff or our judges, or the professionals – all those who come to court – to endure conditions which are simply intolerable.

PAUL MAYNARD MP: You mentioned that this was not a universal situation; that there were courts that were good standard. I am yet to see one but I will take your word for it. Are you able to provide any assessment or are you aware of any evaluation of the throughput at a high quality court versus a poor quality court? That would be an interesting data set to evidence your points.

THE LORD CHIEF JUSTICE: I will pick you up, if I may, first on your observation – to hear a former Parliamentary Under Secretary of State from the Ministry of Justice say he has never seen a court in good condition is something else.

PAUL MAYNARD MP: It may just may have been irritation with me on my visits, I do not know. *[Laughter]* Presumably, they wanted to show me the bad bits to get the money out of me, who knows.

THE LORD CHIEF JUSTICE: Well, I will take that away, but as for the comparative figures, they exist in the sense that HMCTS will be able to produce statistics, I do not doubt, if asked, about days lost to maintenance problems. Now, we know and, Mr Maynard, you will remember, that there was a survey done of the whole of the court estate some years ago with a view to identifying what needed to be spent on it. Now, the figures were eye watering precisely what were many many hundreds of millions of pounds. Of course, if you ask surveyors to tell you how much you need to spend on a building, they put everything in, and so I am not for a moment suggesting that the gross figure which was the top end of the hundreds of millions of pounds needs spending immediately. But there is the need to spend hundreds of millions of pounds before too long on the court estate otherwise it is just going to get worse. It is no different from our homes. If you do not clean the gutters out, you get water in and then you have to replaster the walls. It is as simple as that.

PAUL MAYNARD MP: You will agree that this is a material risk in reducing the back log?

THE LORD CHIEF JUSTICE: Yes.

PAUL MAYNARD MP: Yes. Thank you.

CHAIR: That is the first time we have had a member of the committee give some corroborative evidence, if I could put it that way. Very telling, perhaps, too.

PAUL MAYNARD MP: I am hoping that on our committee visits I can now see the very best from the worst. *[Laughter]*

CHAIR: That is very helpful and the points are well made, I think, to those of us who do do the visits.

THE LORD CHIEF JUSTICE: Yes.

CHAIR: And why we need to do more, actually, Lord Burnett, just to see that physical situation these days. Rob Butler?

ROB BUTLER MP: I wonder if I could pick up a few of the points that you have raised? The theme in many of the questions has been problems of recruitment, whether we are talking about recorders or whether we are talking about district judges or whether we are talking about legal advisors in the magistrates' court. Right at the beginning, you also mentioned an unanticipated concern over capacity in the legal profession to make up the backlog. Are you saying, essentially, that there is a shortage of lawyers in the system full stop?

THE LORD CHIEF JUSTICE: I am pausing because the shortage of lawyers that I was referring to was very much a crown court phenomenon, so I am not aware, no-one has yet said to me that there is a general shortage of lawyers to conduct litigation, for example, or a general shortage of lawyers to deal with family cases or tribunal cases, or so on. There is a problem in the criminal legal profession and the likely reason is the relentless reduction in real rates of remuneration over the last 15 years.

You will remember that the Law Society did a lot of work on this two or three years ago and produced heat maps, effectively, of where there were Legal Aid deserts, and one of the most alarming things that their work revealed was the increase in average of age of Legal Aid solicitors, which tells you actually everything you need to know. The same appears to be true in some areas of the country with the Bar, that there has been a moving away from criminal work and it is not surprising at all. Again, I come back to Sir Christopher Bellamy's work, because this needs to be sorted. The rule of law in every area of legal endeavour, it depends on having a vibrant, independent legal profession that can service the work that needs doing. So I think that that is one aspect of it.

I am reading, along with everybody else, all sorts of interesting commentary about how the legal profession is moving and changing at the moment as a result of the ability to work from home. I do not know whether you have seen some of what has been said at the moment, but London firms of solicitors, for example, who generally are able to pay a bit better, are recruiting people in parts of the country a long way from London, who then will be working from home a lot, and it is having an impact on the local legal profession. So I think we are seeing some quite profound changes going on at the moment. But a shortage of lawyers overall, I would not have thought so, but a shortage of criminal lawyers? Yes.

ROB BUTLER MP: It is a shortage of pools of people to appoint to some of the judicial functions that you have been talking about, and to legal advisors, and potentially to serving their criminal courts.

THE LORD CHIEF JUSTICE: I am confident that there are plenty of well qualified people capable of filling all the judicial vacancies we have, the difficulty at the moment is attracting them to apply.

ROB BUTLER MP: You have highlighted some of the reasons for that. I wonder whether a further one explicitly is moral across the judiciary, because that is something that you note in your annual report that, "Judges have been subjected to harassment by members of the public on social media," to quote your own words. I wonder whether you could tell us a little bit more about how that harassment is manifesting itself in terms of the reaction of the judiciary to you and whether you think that is feeding through and potentially putting off applicants?

THE LORD CHIEF JUSTICE: Well, in broad terms we try to measure moral through our judicial attitude survey, so there was one done last year and compare it with the one done previously, and overall moral appears to be better than it was. There are pockets of difficulty. Questions of harassment should not be overdone, if I may say so. I am very conscious speaking to parliamentarians that a number of your colleagues, maybe some of you as individuals, have been subjected to quite astonishingly vile harassment from all sorts of people, and I do not think there are any judges who get it as bad as some of your colleagues do.

But one of the problems that perhaps it is true across society generally is that people are able very easily to vent their frustration, to vent their spleen and to say and do things which, until 15 or 20 years ago, they might have muttered to themselves or to somebody in a pub, but now they can just go straight on to social media and say something. The judges who are most vulnerable to nastiness from litigants are those dealing in family cases, and particularly family cases where there are no legal representatives.

So it is not a universal problem but it is sufficiently common, I think, to be one of those just features that is in the back of everybody's mind, and obviously in the family cases when there are no lawyers to mediate the behaviour of the litigants, dealing with people who are before the court because they basically cannot sort themselves out. They are often emotionally very highly charged. The experience of everybody who deals with those cases is that you get some who are really not very well able to approach the issues rationally and so they are more likely to see the judge who makes the decision that they ae not happy with as part of the problem.

So I would not want to overstate it but it does happen. But what I should emphasise is that we now have in place really quite elaborate mechanisms to provide support to judges to deal with these problems, so it includes in the event that anything is done which raises a concern about safety, protocols with local police. It includes getting things taken down on social media. It has included seeking injunctions on behalf of judges to protect them, and so I think that is one of the really good developments over the last three or four years, that as a result of the just general increase in this sort of behaviour a lot of work has been done to enhance the welfare support and the practical protection that can be given to judges if they do face this difficulty.

ROB BUTLER MP: I am sure that will be reassuring to many people. I wonder if I could just briefly explore another aspect of social media that arose during our inquiry into open justice, and the fact that it is now possible, effectively, for any member of the public to go into a court and not just observe but to Tweet what is going on at the same time. Journalists, trained journalists, and I declare an interest that I was a trained journalist many, many years ago, we knew what the law was in terms of covering cases and we knew how to avoid getting into contempt. I wonder if you have any concerns about the fact that effectively there is almost a free for all in ongoing scription and commentary of cases and whether you think that poses any threat to justice being done?

THE LORD CHIEF JUSTICE: Well the short answer is yes, of course it does. The position has been now for certainly a decade that journalists who attend courts are almost always at liberty to Tweet. That is a very good thing, I think particularly for local journalists to be able to explain what

is going on in a case locally is important, and as you say, journalists will be sensitive to what can be put into the public domain and what cannot be. So classic is a criminal case, a sex case, the complainant has lifelong anonymity. Relatively few judges would be sanguine about ordinary members of the public Tweeting from a court if there were anything sensitive about it at all because there is then no effective control over what is going on. With journalists there is an element of trust. The same issue arises when people seek to join hearings remotely. There are many cases where genuinely interested people will ask to join remotely, family of one of the parties in the case, and generally judges will allow that if they know who it is, and, generally if there is a remote hearing or what is called a hybrid hearing so some people attending remotely, the judge is in court, if it is happening anyway most judges would be pretty sanguine about a journalist attending remotely. But none of us is likely to be remotely sanguine about opening it up to everybody because you lose control completely, you have no idea what people are doing with the material that they are looking at, it could be recorded, it could be broadcast when it should not be and so on.

So these are questions that flow into quite profound thinking about open justice for the future. There is sometimes a tendency for people to think, 'Well now everything can be livestreamed, anybody can join remotely, you should just allow it willy nilly,' but the truth is it is much more complicated than that. But for journalists when the hearing is anyway being organised to allow people to attend remotely it seems to me, generally, to be a good idea because it provides a broader scope for reporting, which is in the public interest.

ROB BUTLER MP: I am very conscious of time so I shall hand back to the chair, thank you.

CHAIR: Thank you very much. Ms Eagle, have you got a topic that you wanted to bring in?

MARIA EAGLE MP: Thank you, chair. I just wanted to ask a little bit about diversity, the continued lack of diversity that there is in the judiciary. There has been quite a slow pace of change. Do you think that that sits with the appointment process or the statutory requirement to appoint on merit, or both of those things? Because it has been going on for many years now, there has been a general wish, everybody has had for years to improve and yet we still keep having this problem of there being an obvious lack of diversity. So I wonder if you have got any thoughts about why that is and where the problem lies?

THE LORD CHIEF JUSTICE: The starting point for me is that a diverse judiciary is necessary to secure public confidence, that is the first starting point. The second starting point is that we recruit from the legal profession, the JAC recruits from the legal profession, and there is an enormous pool of talent out there which we, the judiciary, would like to tap into. So I think at the moment it is likely that we are not attractive enough to large numbers of solicitors and barristers who we would love to see become judges.

Now at the heart of any issue about diversity is the reality that the judiciary is a second career, so even for those who are joining as fee paying judges for those positions where the statutory requirement is five years post-qualification, the average actual experience is 17 years, and for salaried jobs it is much more. So we are inevitably dependent to some extent upon the diversity within the legal profession generally at its senior levels. The legal profession, both solicitors and barristers and CILEX, are working hard to increase the diversity in the senior ranks of their respective parts of the legal profession, and that would be something that benefits the judiciary.

A huge amount of work – a huge amount of work – is going on to try to increase the diversity of those who apply for judicial posts and the Judicial Diversity Forum, which I have spoken of in my annual report and you will have heard from others about it, was established to bring together those who were really in a position to effect change, so the Lord Chancellor, the chair of the JAC, me, chair of the Bar Council, the president of the Law Society, president of CILEX. Collectively the first thing we did was to look very closely at all of the underlying statistics, because from that that

important evidence base you can begin to see what is going on. Secondly, collectively and individually each part of the system is working hard to promote diversity in a practical sense, by which I mean not just talking about it, it is very easy to talk about it, but to set up programmes to identify people who might be suitable for judicial appointments, to provide mentoring, to provide courses and things of that sort, and there has been a huge amount of work done in that regard.

So where has it led us? Well, the position so far as gender balance is concerned is, again, you can look at all the statistics, I will not bore you with those but the appointment rate is pretty much the same for men and for women, and the difficulty we have is the higher up the system you go we are still catching up, so at the fee paid appointment level there is gender balance, pretty well, and the proportion of candidates being appointed from different ethnic minorities has also grown. It has grown too slowly for my liking but it has grown. But what we are also doing at the moment, which is different from the rather broad approach up until a few years ago, is really digging down into the statistical material to see whether different ethnic minorities are having differential success rates.

I think that is really very important, because what it has shown is that for all parts of the judiciary, those of South Asian heritage have been making really visible progress but those from West Indian and Black African backgrounds have not. As you will know, the figures have pretty well stalled. So I think the most important thing is that we are looking so carefully at it now, and everybody trying to devise ways to encourage applications from good people that there will be further progress, frustratingly slow though it is for me at the moment.

MARIA EAGLE MP: When might we have equality at the higher levels do you think? If I were to say 50/50 for women and a relevant percentage for people of Black African heritage, because one way of challenging yourself is to say, "This is where we want to get to," and then plot a path to get there. So if you were to take that as an aspiration, I am not suggesting it precisely is, how long do you think it would take? Because those of us over the years who have worked on issues such as this, in various organisations, including the Labour party, I might say, find that having an endpoint and a place to get to is sometimes a way of making sure you get there in a reasonable time, whereas if you just say, 'Oh well, it is slower than we would like…' I mean I heard when I was in the department somewhat before [Paul?] was in the department, I heard that said at the time then, and we do not seem to have made much progress.

THE LORD CHIEF JUSTICE: Well things have actually moved a long way in the years since you were in the department if I may say.

MARIA EAGLE MP: I am glad to hear that. When might we get there?

THE LORD CHIEF JUSTICE: Well I do not know is the answer.

MARIA EAGLE MP: Okay.

THE LORD CHIEF JUSTICE: I mean one of the things one has got to bear in mind is that if you are looking at the high court, for example, the rate of success of female applicants is as high as male applicants and there is steady progress being made. But the turnover in the judiciary at the very top is actually quite slow, quite slow, and there need to be vacancies and then there need to be applications, and then there need to be appointments and so I think it's unlikely that anybody, even if they had the time to sit down and work out all the variables, I think it would be quite difficult for anybody to come up with an answer that was anything other than a finger in the wind.

MARIA EAGLE MP: It's too soon to say. Thank you, chair, thank you.

CHAIR: Thank you. The final thing I was going to ask you, if you don't mind, Lord Burnett, I just noticed today that you and the Lord Chancellor have announced some changes to the procedure

for investigations into judicial misconduct. That's something that we often hear about or talk about. Is there anything in particular that's prompted that or is it just a…?

THE LORD CHIEF JUSTICE: No, this is a review that I commissioned with – do you know, I can't now remember whether it was Lord Chancellor Buckland or Lord Chancellor Gauke – but it was a review that I commissioned some years ago to just look at the way judicial conduct works because the system was put in place not long after the Constitutional Reform Act changes and it just seemed to us that it was time to have a good look at it to see whether it needed changing and improving, and so there's a consultation document which is going out and has gone out as I now know, as you've told me, and once that's through there will be a look at some of the… It's nuts and bolts; it's nothing very fundamental.

CHAIR: It's gone out enough to be in the Law Society [inaudible]. It must be out. It's not prompted anything in particular; it's just [inaudible]. Well, that's very helpful. Lord Burnett, thank you very much indeed for your time and for giving evidence to us today. It is appreciated. I hope your voice has lasted out – it's lasted very well, actually.

MARIA EAGLE MP[?]: Better than mine.

THE LORD CHIEF JUSTICE: The two of us are struggling a little but…

CHAIR: We'll obviously have an hour in the morning and see what [inaudible] is like in the room.

THE LORD CHIEF JUSTICE: It's a real pleasure to see everybody and, as I said at the outset, I was really, really heartened to hear that you've been managing to make some real visits to real courts and we'll do everything we can to facilitate any visits that you wish to make.

CHAIR: That's kind and I know we're encouraging individual members to go to their local courts as well as our Committee visits and again I'm sure you'll take back our thanks, collectively, to all those who work in the Court Service and all members of the judiciary for what you do. The session is concluded. Order, order.

[Ends]