

HOUSE OF LORDS  
MINUTES OF EVIDENCE  
TAKEN BEFORE  
THE SELECT COMMITTEE ON THE CONSTITUTION  
**MEETING WITH THE LORD CHIEF JUSTICE**

THURSDAY 6 DECEMBER 2007

THE LORD CHIEF JUSTICE and LORD JUSTICE THOMAS

Evidence heard in Public

Questions 1 - 59

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THURSDAY 6 DECEMBER 2007

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Present

Bledisloe, V  
Goodlad, L (Chairman)  
Lyell of Markyate, L  
Morris of Aberavon, L  
Norton of Louth, L  
O’Cathain, B  
Peston, L  
Quin, B  
Rodgers of Quarry Bank, L  
Rowlands, L  
Smith of Clifton, L  
Woolf, L

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Witnesses: **Lord Phillips of Worth Matravers**, a Member of the House, Lord Chief Justice of England and Wales and **Lord Justice Thomas**, examined.

**Q1 Chairman:** Lord Chief Justice and Lord Thomas may I bid you a warm welcome to the Committee and thank you very much indeed for making time to come and see us. We are being televised, as you know. I will ask the first question, if I may, which is what is the current situation in respect of the negotiations with the government over the outstanding area of difficulty, namely the status of Her Majesty’s Court Service?

**Lord Phillips of Worth Matravers:** Thank you. As the Committee is already aware Clare Sumner, who is a senior official in the Ministry of Justice, and Michael Walker, who is an experienced District Judge and a member of the Judges’ Council, have been examining a series of options for the Court Service. This has resulted in the production of a model; the model reflects a partnership between the Lord Chancellor and the Lord Chief Justice. The Lord Chancellor and I are meeting next week to discuss this model and we will then be in a position to know whether that can be adopted and we shall of course update Parliament in the New Year.

**Q2 Chairman:** Do you think, Lord Chief Justice, that any agreement is likely to satisfy the Committee's recommendation that the courts' budget should receive the maximum protection from short-term budgetary pressures upon and within the new Ministry?

*Lord Phillips of Worth Matravers:* I doubt if anything that is proposed will provide the maximum protection. I hope that this proposal, if agreed, will provide reasonable protection.

**Q3 Chairman:** Lord Chief Justice, your response to the Committee's previous report did not address the recommendation that the government and the judiciary should give further consideration to how advisory declarations might be used to provide guidance on questions relating to Convention rights. Would it be appropriate now to tell us what you think about that particular recommendation?

*Lord Phillips of Worth Matravers:* I have reservations about this recommendation. The role of judges is to resolve disputes – disputes between parties. If the judiciary are going to be asked to give an advisory opinion in advance on something that is essentially an issue of law the first question is, to whom do they give it and what input is there into the discussion? If it is not going to be an adversarial process so that government asks the judiciary to give its approval to a proposal, to say in advance that the proposal would be in accordance with the law, that opinion would then be given not in an adversarial process but a one-sided process and the judiciary would be, as it were, committing itself in advance to an issue that it might then be asked to resolve in an adversarial process. The other side in that process would not consider this to be fair; they would consider that the judiciary had already indicated a view before hearing the argument.

**Q4 Lord Woolf:** Could I ask a follow-on question? I should disclose my hand that I am very enthusiastic about the concept of advisory declarations and have written on the subject. But you are presupposing that there is no adversarial situation. If there was an adversarial

situation – and we have many cases now where organisations such as Liberty have been able to in fact carry the argument of the individual against proposals such as extending periods of detention without trial – would your answer differ?

**Lord Phillips of Worth Matravers:** I think it might differ. If it were postulated that this should be done in accordance with our normal court process of having a party on each side putting the rival arguments, then my conclusion might well be different.

**Q5 Lord Woolf:** I must concede that I was partly an author of this suggestion. I was presupposing a situation where really what one was doing was dispensing with the need to find a nominal claimant and in this way it is only used exceptionally where there is a burning dispute which is a matter of great public interest, if the court had a discretion – it did not have to do it, but only did it when it thought that the public interest required it to do it, might there be merit?

**Lord Phillips of Worth Matravers:** I think there might well be merit in that. I was rather envisaging something along the lines of what happens in France where the Conseil d'État is consulted by the government about proposed legislation and that is a one-side process.

**Q6 Lord Morris of Aberavon:** Lord Chief Justice, your response to the report stated that you were cautious – and I have some sympathy with that – about the suggestion that Select Committees might ask senior judges about key legal issues in the cause of transparency and better understanding of such issues amongst both Parliament and the public. Would you be good enough, Lord Chief, to elaborate on your caution about the suggestion?

**Lord Phillips of Worth Matravers:** I think it is twofold. First of all, I would be reluctant for it to become too common for judges to be coming to give evidence before Select Committees. Secondly, I think my caution relates to the question of what these issues would involve. It comes back again to the point I was making before, that judges should not be committing

themselves in advance to a view on any matter which they may subsequently be required to resolve in a judicial category.

**Q7 Lord Morris of Aberavon:** That, Lord Chief Justice, I fully understand, but are there broad issues which are of more general interest, which do not apply to a particular indication that you might have to adjudicate, such as the use of comparative law, which you have been doing for longer than I remember, the distinction between sections 3 and 4 of the Human Rights Act, and the wider interpretation, if it is used any more, of *Pepper v Hart*, which many of us thought was not always a good line to go on and matters of that kind.

**Lord Phillips of Worth Matravers:** There are these wider issues and indeed I suspect that some of them sometimes are raised and dealt with by judges on an occasion such as this one. The *Pepper v Hart* example I think is an example of something which might impinge on a decision the judge was required to reach in relation to the application of the *Pepper v Hart* doctrine in a particular case.

**Q8 Lord Norton of Louth:** Our report gave a warm welcome to your proposal for an annual report to be laid before Parliament, and you have indicated previously that we are likely to receive that early in the New Year. Would it be possible to give us any idea of the type of issues that we will be raised in that and particularly your comment that it will highlight areas of particular concern to the judiciary?

**Lord Phillips of Worth Matravers:** I hope that it will not just be areas of concern, there may also be some success stories to report. Essentially the report will be looking at the way the justice system is working and the justice system works as a result of the partnership between the Ministry of Justice and the judiciary, so we will obviously be focusing on the question of how it is working in the partnership, looking at the different courts, looking at problems that are arising, how we are dealing with those problems and trying to give an overview of the

extent to which the justice system is working well, or problems that we are confronting that need to be dealt with, and whether we have the resources that we need to deal with them.

**Q9 Lord Norton of Louth:** In your response you indicated that you saw it as a mechanism for reaching out and explaining not just to the Executive and Parliament but to the media and the public. Do you have any ideas as to the way in which you would help to bring it to the attention of the public?

*Lord Phillips of Worth Matravers:* I think we can rely on the media to help with that and they may well want to talk to me after I have delivered this report about various matters it discusses.

**Q10 Lord Norton of Louth:** The mechanism, I was not quite clear from the response whether you saw it as the basis for your future meetings, say, with this Committee, that it would be based on the report.

*Lord Phillips of Worth Matravers:* I imagine that this Committee would be quite likely itself to want to ask questions about the report, and I would see that as a desirable and appropriate mechanism for bringing these matters before the public in so far as the report itself does not do so clearly or adequately.

**Q11 Lord Rowlands:** You mentioned resources. Will the report deal in any detail with the issue of resources, that Parliament can be well informed as to whether the judiciary think they are being funded properly?

*Lord Phillips of Worth Matravers:* I think I can give a firm yes to that one.

*Lord Justice Thomas:* Could I add a word about this? Since about 2000 the Crown Courts have published short annual reports and these have become more informative over the years. The Commercial Court has done so for much longer, and that has become informative. So

there is a basis you can look at – these are now published on the Web and they have been for the last two or three years – and they do, Lord Rowlands, cover the volume of business before the courts, how the courts are dealing with resources, what the success stories are and what the downside has been.

**Q12 Lord Norton of Louth:** Those reports are speaking, if you like, to an attentive public, whereas with this annual report you are actually seeking to reach out to a much wider audience.

**Lord Justice Thomas:** Yes. Those reports are produced by each Crown Court so each local newspaper can see as regards its own community what it is dealing with. It tries to address it in terms that would address that audience, but obviously the Lord Chief's report has to try and give a complete picture across the country.

**Q13 Lord Peston:** I think I am in favour of the annual report – I must be because I was on the Committee when they agreed to recommend it – but as Members of their Lordships' House we must get every day at least one annual report from one body and they go straight into the wastepaper basket, if I might say in my case almost invariably. I often ponder, apart from the cost of them, as to who reads them at all. We are talking often of bodies that are very narrow and so on, but in your case do I take it that what you have in mind is that you would actively wish to promote the annual report? There will be people in the legal business who will read your annual report but if we ask who else is actually interested one begins to wonder. You have a concept for reaching out, I take it?

**Lord Phillips of Worth Matravers:** I do. I see the annual report as an answer in large measure to those who ask the question how the judges are going to be accountable. I would say to them that if you want to ask us how we are accountable the answer is that I am going to

produce an open report on which I shall be open to questioning and if you want to see what we are doing read the report, and if you have questions raise the questions.

**Q14 Lord Peston:** If I could ask for an exact example. If we take what people have been talking about in the last day, whether we have too many people sent to prison, would that come as a topic that would appear in an annual report and that you would respond to the public's response, or would you rule that out on other grounds?

*Lord Phillips of Worth Matravers:* I do not think it would be ruled out. I think in so far as overcrowding of prisons was impinging upon the way that judges administer justice it would be a proper thing on which to comment. But I think perhaps the more general topic – and it is obviously an important topic – would not probably be a subject matter of the report.

**Q15 Baroness O'Cathain:** Before I ask my question could I pick up on something that Lord Thomas said about Crown Courts in the various parts of the country operating on the principle of giving an annual report, and that then can be shown to the public and the reporters on the local newspapers. I am very interested in all of these things and I have never seen any reference to any Crown Court response in our local newspapers. So my question is: do you track this? If you do track it are you satisfied with the coverage you get, and if you are not satisfied how are you going to do something about it?

*Lord Justice Thomas:* I think that the way the Crown Court normally relates to its local communities is by its annual open day where people come and there are now quite considerable numbers who come. As to the newspaper reporting in the Crown Court, one has seen over the years a decline in the amount of reporting generally on court cases. And as to whether the newspapers report Crown Court reports: it is very rare, in my understanding, that they do so, partly because the fact that they exist is not that widely known. We have tried to promote it but, as I think has already been said, annual reports sometimes do not thrill people

as being very exciting. But they do contain a great deal of information and quite often it is information that is very important, as to delay, conditions for jurors, conditions of the buildings, problems, for example, with the prison escort contract we had. So there is a lot of information contained in them.

**Q16 Lord Rowlands:** The reason I asked about resources was when we were preparing the last report I tried to discover what the net cost of the court system was and I found it rather difficult to find.

*Lord Justice Thomas:* I think it is very difficult to find because government accounting I have never found easy to follow. The cost of the court system is not contained in the annual reports of the Crown Court; the nearest you find it is in the annual report of Her Majesty's Court Service, and to try and split out the costs between, for example, providing civil justice, family justice and the Crown Courts is never easy, largely because in many buildings you conduct all three jurisdictions. There should be a principle, because the Treasury likes civil justice to pay for itself, that the amount we spend on the civil justice system ought to be contained in a separate document so that one can see the money that is raised by fees is actually spent on civil justice and not on other things, and we have been pressing for clearer and more transparent accounting.

**Q17 Lord Rowlands:** And will your report in time be able to help us in that regard?

*Lord Justice Thomas:* At the moment it is not so fully within our knowledge. It should be within the Court Services' because at the moment the current constitutional framework is that that lies exclusively within the responsibility of the Lord Chancellor, but in the future the judges may be able to contribute more, depending on the matter to which the Lord Chief Justice has regard, namely the future governance of HMCS.

**Q18 Baroness O’Cathain:** Our report recommended that consideration should be given to appointing one or more spokesman with appropriate qualifications and legal experience, who would be permitted to speak to the media with the aim of securing coverage which accurately reflects the judgment or sentencing decision. Your response seemed to endorse this and *The Times* apparently reported that a panel of judges is to be trained to talk to the press and do broadcast interviews whenever there is a need for a judicial voice to help to produce a more informed and balanced debate. Could you explain exactly what is intended and how far indeed you have got with this initiative? It does really link in with the previous subject.

**Lord Phillips of Worth Matravers:** The first question is do the judges think it is a good idea to talk to the media at all in such circumstances. It is an important question of principle and you are quite right that we reached the decision that the answer was yes, in appropriate circumstances. Deciding which circumstances are appropriate and which are not is the most delicate matter and it has to be done essentially on a case by case basis. We decided that it is desirable that there should be judges who are available to respond in appropriate cases. There has been a sub committee of the Judges’ Council looking at this in detail. We have identified five judges representing different areas of judicial activity and different geographical areas, who are going to receive training in talking to the media and who will then be available as a resource when we need – urgently, very often – a judicial spokesman to perform that role.

**Q19 Baroness O’Cathain:** So the panel of judges will constitute just five?

**Lord Phillips of Worth Matravers:** At the moment there will be five; if these do not prove to be enough then we will have to consider training up a few more.

**Q20 Baroness O’Cathain:** How do you link in then with the responsibility of Sir Igor Judge on this one because he has a PR role – and I do not mean PR in the sense of PR, but an informative role, because there is no question about it that this is needed, is it not?

**Lord Phillips of Worth Matravers:** Yes. Sir Igor Judge is after all one of the big guns and sometimes one needs to call up a big gun. But the role we are really envisaging that these judges will perform is not so much a big gun role; it is a role in dealing with an individual case that calls for some input from the judiciary. Sir Igor, or indeed I on occasion think it is appropriate to speak to the media where a big gun is needed.

**Q21 Baroness Quinn:** How do you intend to ensure speed of reaction in these circumstances because very often it seems that if reaction is not quick then stories get legs and become very, very unmanageable and difficult and often very misleading.

**Lord Phillips of Worth Matravers:** Yes, I think we must rely primarily on our communications office. As its name involves it is about communications. We would hope that they will learn, sometimes even in advance of circumstances where this input may be needed. It is important that judges get used to getting on to the communications office if they anticipate that a judgment they are about to give, a sentence that they are about to impose is going to be controversial, so that we can be forewarned that it may be necessary to deal with media comment. Otherwise, one may be taken by surprise by media comment and have to react quickly; but, again, the communications office will be the first to pick up the comment and maybe get on to me and say, “I think we ought to have a judge to deal with this.”

**Q22 Viscount Bledisloe:** Will the press and the media have a list of these judges with contact numbers, or will they talk to the communications office and then be put in touch with the judge if the communications office thinks it is appropriate? Secondly, will the individual judges on the panel take a proactive role sometimes and get in touch with the media and say, “You would like to know about this” or “I will clarify this.”

**Lord Phillips of Worth Matravers:** These are questions on detail on which I am not in a position to give an informed comment other than guessing what the answer is likely to be. I

do not think the answer is likely to be that the press are going to be provided with phone numbers for five judges so that they can ring them up whenever they want to bounce anything off a judge. I think that these judges are more likely to be reactive than proactive.

**Q23 Lord Morris of Aberavon:** Lord Chief, is not the important thing that one cannot really anticipate where the story will have legs, as Lady Quin has suggested. These situations arise, and therefore what is important is that the communications office – which is the first line of defence, after telephone numbers of judges – is in touch with the sentencing judge who can put them right, so that when they talk they talk with knowledge; and only in the second resort do these specialist spokesman need to react at all.

*Lord Phillips of Worth Matravers:* I would entirely agree with that; I think it is very important that the communications office is informed, preferably in advance. But certainly if there is a sentence that has been imposed that is provoking a reaction the first thing they will want to know is what is behind it, and these judges should be used as a last resort.

**Q24 Lord Norton of Louth:** Clearly you would expect these cases to be exceptional where you would need a judge to come out and deal with the media to explain a particular case and, as you indicate, the important thing is deciding on a case by case basis what would apply. But are you able to give an illustration of the type of issue you think that would fall within the area that would require this type of reaction? In essence, where is the dividing line?

*Lord Phillips of Worth Matravers:* I think the Craig Sweeney case was a classic example where the sentencing judge had been acting entirely as he should in accordance with statutory requirements and was being attacked, quite unfairly, as if his decision had been something entirely of his discretion. If a judge says, “I am going to allow you one-third off because you pleaded guilty at the outset,” you can imagine the press perhaps attacking the judge – “Fancy giving a third off to this villain just because he said he was guilty, when it was quite obvious

he was going to be convicted anyway.” Somebody needs to say to the press, “Actually if you look at the statute that is what the judge is required to do.”

**Q25 Lord Norton of Louth:** So at the core of it would you envisage that what is happening is where there is a misinterpretation of the role of the judiciary in dealing with particular cases?

**Lord Phillips of Worth Matravers:** That, I think, is the classic situation. Obviously details of a particular case it is undesirable should be discussed in public, there is always the chance or even sometimes likelihood that there is going to be an appeal, and the appeal is the right mechanism for challenging the individual decision reached by a judge.

**Chairman:** Lord Lyell, whose birthday today the Committee has already acknowledged!

**Q26 Lord Lyell of Markyate:** One of the most significant changes, Lord Chief Justice, brought about by the Constitutional Reform Act in 2005 was that the Lord Chief Justice became Head of the Judiciary. In that role where do you draw the boundary between matters on which you feel able to comment publicly and those you must avoid? For example, you recently gave a very interesting speech to the Howard League for Penal Reform calling for a re-examination – it seems to have proved terribly timely – of the legislative framework for sentencing, and in March in Birmingham you welcomed the Law Commission’s proposals for new homicide legislation. Where does the dividing line come?

**Lord Phillips of Worth Matravers:** I try to avoid matters that are politically controversial. The Birmingham lecture was a lecture essentially to a law faculty about proposed changes to our substantive law and there I felt it perfectly appropriate to look at the problems that our law had been giving rise to in this area – problems for judges, numbers of cases that were going all the way up to the House of Lords because the law was uncertain – and giving my view in relation to the desirability of some of the changes that were proposed from really a

rather technical viewpoint of how well the law will work. Moving on to the speech to the Howard League for Penal Reform, sentencing is, I think, unfortunately very much in the political arena and in giving that speech I did my best to avoid any areas of political controversy. I said that if there was a proposal, as we now know there is, from Lord Carter, that there should be a sentencing commission or some body which would enable Parliament to anticipate the consequences of legislation or maybe other trends on the demand for prison places then I hoped that this would receive detailed consideration in a non-political atmosphere, or words to that effect.

**Q27 Lord Lyell of Markyate:** I think it is bound to be political although one hopes that the solution will be right and command consensus. What Lord Carter seems to be suggesting is that there should be a sentencing commission which will look and see how many people there are in prison and give guidance that, whereas you might have thought of giving ten years, now since we are so crowded you should not give more than eight years, or something of that nature. Were you consulted about this idea of the sentencing commission before the Carter Report and the government statement was made?

**Lord Phillips of Worth Matravers:** I have had discussions with Lord Carter about this idea. It is a very complex concept. Certainly in this jurisdiction one sees the way it has been adopted in the United States. I did not give and I have not given a view as to how it would work, whether it would work, how desirable it would be if adopted in this jurisdiction; what I have said is I really think that this is something we ought to look at so that we can see what is involved. Lord Carter has suggested that there should be a working group with judicial involvement to look at what is involved and how this would work, and that is something in principle I would favour.

**Q28 Baroness Quinn:** I personally agree with what you have just said but is there a real issue in trying to resolve the dilemma between the principle that the punishment fits the crime, on the one hand, and the second statement, about which we heard a lot yesterday, that resources have to be taken into account?

**Lord Phillips of Worth Matravers:** This is, I think, an important and very interesting area. The first question is the punishment fitting the crime. That raises the question is there some absolute level of punishment for any particular crime? If you believe that there is and it should be left to the judges to decide what that punishment should be, regardless of the cost, then fine. I myself believe that Parliament, which is responsible for taxing the public and using the revenues raised, has a legitimate interest in the cost of punishment. The public is paying for punishing offenders. You have to keep offenders in prison when they are dangerous, but there are prisoners who have ceased to be dangerous; maybe they were sent to prison at the age of 22 for murdering somebody in the course of drugs dealing – a very serious offence calling for serious punishment, and they are dangerous at the age of 22. Ten years on their personalities may have matured and they may no longer be dangerous. If you keep them in prison after that you are keeping them in prison to punish them. That has its cost. As I said in the lecture, if you are going to put somebody in prison for 30 years by way of punishment you are investing £1 million or more in that operation. I think Parliament ought to reflect whether that is the most desirable way of using resources having regard to, obviously, the viewpoint of the electorate. But it is a debate, I think, that needs to be had.

**Q29 Lord Smith of Clifton:** For the first time ever, Lord Chief Justice, the Lord Chancellor is a Member of the House of Commons rather than this House, and someone who has been drawn from the world of politics rather than the law. How has this novel background affected the relationship between the Lord Chief Justice and the Lord Chancellor? Has the significant growth in the Lord Chancellor's policy remit been a significant factor in this context?

**Lord Phillips of Worth Matravers:** When this Committee reported it was before Jack Straw had been appointed as Lord Chancellor and this Committee said it hoped that in future the Prime Minister would always appoint as Lord Chancellor somebody of sufficient seniority. The Prime Minister obviously listened to the words of this Committee because he could not have done much better than to appoint somebody with the experience and seniority of Jack Straw. Jack Straw, when he took office and swore the oaths that the Lord Chancellor has to swear, went out of his way to state how seriously he took his responsibilities to the rule of law, his responsibilities to the judiciary and his responsibilities to make sure that the justice system is properly resourced. My relationship with him has been excellent; I have not observed any adverse effect from the size of his portfolio. He has expressly made it plain that he would not contemplate robbing the Court Service of funds they need because of the demands either of legal aid or of the prison system.

**Q30 Lord Smith of Clifton:** Do you regard the office of Secretary of State for Justice/Lord Chancellor as one that will inevitably become more and more party-politicised, given the range of policy matters now falling within the Ministry of Justice? I can understand that with a new innovation everyone wants to act perfectly correctly and so on, but as it becomes part of the routine of constitutional life and the personalities change, particularly with regard to the Secretary of State, one can see some slippage in the Chinese walls and the protocols that are observed?

**Lord Phillips of Worth Matravers:** The role of the Minister of Justice, having regard to the size of his portfolio, I think is bound to bring him into the political arena much more than the role of the old Lord Chancellor and I also agree that that has its dangers, and it is important that he should distinguish between the functions he performs as Lord Chancellor, which should be apolitical, and other areas of his portfolio, such as prisons, which certainly at the moment have considerable political implications.

**Q31 Viscount Bledisloe:** Lord Chief Justice, I want to ask you a couple of questions about the judicial appointment system. In your speech to the Commonwealth Conference in Kenya you said that the Commission, whilst of very great calibre, has proved to be over bureaucratic and far too slow. But you expressed the confidence that we should be able to put that right. To what extent has it been put right? To what extent would it be put right and what will then the time lag be between application and appointment?

**Lord Phillips of Worth Matravers:** It has not been put right yet. It is a big task and I think that part of the problem was that the Judicial Appointments Commission was coming in cold and had to hit the ground running – there was no period of shadowing or anything like that, it had to set up its system and start operating it, and there have been teething problems. We are looking at those problems at the moment. I am confident that we are able to resolve problems that we have identified. As it happens, I am meeting with Usha Prashar at 12.15 today and officials are meeting this afternoon to look at the nuts and bolts of the problems. But I believe that there are areas of bureaucracy that we have identified that we undoubtedly will be able to deal with. At the end of the day there will always be a problem of timescale involved in judicial appointments because it does take some while to go through the process. However speedily you manage to do it you cannot concertina the process as it is now to the extent that we had in the old days where the Lord Chancellor tapped somebody on the shoulder and said, “I have a vacancy next week, how about it?” So it is going to take time. One has to select enough candidates to fill vacancies that one cannot foresee because people retire through ill health or maybe die unexpectedly and you have to have the appointees available to fill those gaps if the system is going to work well.

**Q32 Viscount Bledisloe:** You mentioned the tapping on the shoulder and you said in your note that very often many of the best people who went on the Bench had got there by being

tapped on the shoulder. Do you find it a disadvantage not to be able to tap people on the shoulder?

**Lord Phillips of Worth Matravers:** Yes, I think so. I think that was inevitably going to be a disadvantage, balancing to some extent the advantages of a transparent judicial appointments system. It is undoubtedly the case that there are practitioners who are not thinking of going on the Bench, have been in the past, who have been persuaded to consider that perhaps it is their duty, having taken a lot out of the system, to put something back by becoming a judge. That is something that is simply not open to us at the moment; anyone who wants to become a judge has to go through the appointments system and the competition.

**Q33 Viscount Bledisloe:** What is an applicant meant to do in between the time he applies and gets a decision? Is he meant to go on accepting work knowing that if his application is successful he will not be able to do it, or is he at liberty to go on taking work from people under that risk of having to let them down?

**Lord Phillips of Worth Matravers:** That risk has always been inherent in the system. What happens very often is that the solicitor will ask counsel that he is thinking of instructing, “Have you applied for the Bench?” If counsel then says yes the solicitor may not instruct the counsel. This is a matter of considerable concern to us because obviously it is part of the disincentive of applying to go on the Bench. You find that solicitors are not instructing you because of apprehension that you may not be able to do their case if appointed.

**Q34 Lord Lyell of Markyate:** Just taking up those words “tap on the shoulder” you may find there is a solution – you have probably already seen it – that actually that is not quite what happened. During the ten years that I had some involvement as a law officer what the pre-judicial Appointments Commission did was to build up A lists, B lists and C lists and people were let into the secret that they were on the A list; they were encouraged to come,

there were regular meetings. Therefore, they could see ahead a great deal more clearly. I see no reason why the judicial appointments system should not once again adopt that sort of system, while being more transparent. Has that been considered?

**Lord Phillips of Worth Matravers:** The A list, B list, C list system certainly post-dated my appointment; I was tapped on the shoulder, and I had no inclination of the tap at all. The A, B and C list I think was for people who had applied because we had a halfway house where people could apply to the High Court Bench and therefore be put on the list, but the Lord Chancellor could also invite counsel who had not put their names forward as applicants. The idea of having a standing list so that you know you are in the A team I think is one that merits consideration. We have that to some extent at the moment because when, as I understand it, an applicant is considered to be of sufficient calibre to have a High Court appointment but there is not a vacancy at the moment, that applicant will be informed that he or she is selectable but will have to wait to see whether a vacancy becomes available. What is not clear to me at the moment – and I suspect maybe not even been decided – is how long you remain in that position and are you going to remain in that position if there is a subsequent competition in order to have more candidates. That, I think, is an area we have to look at.

**Q35 Lord Lyell of Markyate:** I do recommend you to look back because actually it was in position for a very long time. I think you probably went on the Bench at the same time as I became a law officer in 1987, and it was well developed by 1990, I think.

**Lord Phillips of Worth Matravers:** If you had to apply to go on the list solicitors would still, I think, ask you had you applied for a judicial appointment, to which you would have to answer yes, and the more they rated you – and obviously the solicitors are likely to be instructing people that they rate highly – the more apprehensive they might be that as you applied and you were prepared to go on the Bench as a vacancy arose then there was a risk that you would not be available for their case.

**Lord Lyell of Markyate:** You are absolutely right. I have had exactly the same feedback that you are giving to us.

**Q36 Lord Morris of Aberavon:** Lord Chief Justice, is there not something in between tapping on the shoulder and the full bureaucracy which is obviously developing, and are you right that they were coming into this cold? There was some delay before they took up their full responsibilities. One might have thought that whoever anticipated that delay would have ensured that the machinery was in place. I remember asking the question whether they had the resources and I was told they had the resources, and the delay is really down to appointment of an honorary Recorder. There is a huge delay of anticipation and is it fair for somebody to have to wait a long time to tell solicitors that “I may not be able to do your work.” I was reading only the other day of a specialist appointment in the High Court where the judge retired in February – a very senior judge – and his successor was only appointed in October. That sounds to me odd.

**Lord Phillips of Worth Matravers:** It is far too long, I quite agree, and these are the flaws in the way the system has been operating, that we believe we are going to be able to address. It is quite true that there was a period under which the new Commission obviously was recruiting and working out how it was going to set about its task. It was not a very long period; there was no real shadowing period. It had very considerable problems, one being there was a time at which it was planned that they would relocate in the Midlands and this made recruitment extremely difficult. I know that Usha Prashar is finding life much easier now it has been decided that the Commission will remain in London.

**Q37 Lord Morris of Aberavon:** Has everyone got to apply?

**Lord Phillips of Worth Matravers:** Yes, you have to apply if you are going to be considered.

**Q38 Lord Rowlands:** You have weighed the advantages and disadvantages in the replies to your questions. Which side do you fall on? Do you think that the new system is going to be better than the old, or not?

*Lord Phillips of Worth Matravers:* In balance I think the new system was absolutely inevitable and it was desirable that it should be put in place. One has to have a transparent system of independent judicial appointments, in my view.

**Q39 Lord Peston:** I am referring to the Ministry of Justice Consultation paper on judicial appointments, which wants to know whether the role of the Executive, by which they mean the Lord Chancellor, should have a reduced role and whether the role of Parliament, in which I hope they include their Lordships' House, should have an increased role. The first is a technical question, will you be responding?

*Lord Phillips of Worth Matravers:* We will be responding; we are preparing a response.

**Q40 Lord Peston:** But you have not yet made up your minds?

*Lord Phillips of Worth Matravers:* I think we have largely made up our minds what is going to go into that response, and I think it is probably better that we should wait for the report.

**Q41 Lord Peston:** Are you going to tell us now what your response is going to be, or you would rather we shut up?

*Lord Phillips of Worth Matravers:* I do not think I am going to tell you what our response is going to be. I think what I can say about the suggestion that relates to the Lord Chancellor's involvement – because the current Lord Chancellor has made his own attitude quite plain and we are in the course of implementing that – as a matter statute the Lord Chancellor is required to approve all appointments. It is perfectly obvious that the Lord Chancellor himself is not in a position to make reasoned decisions in relation to hundreds of appointments, so either he

has to have a large staff who are second guessing what the Judicial Appointments Commission is doing so that he can make the informed decision on each one, or it is a rubber stamp. The same is true, to a large extent, of vacancy notices which have to be given by the Lord Chancellor, usually on perfectly obvious requirements, and one has to have a mechanism of going through the Lord Chancellor before the Judicial Appointment Commission can begin to take steps to fill the vacancy. So these are areas where I think everybody is in favour of doing away with requirements of the formalities that do not reflect what has to happen in practice.

**Q42 Lord Peston:** There is one supplementary that I would like to ask, which I hope you could in this case answer, that there has been the suggestion – which I may say I am totally opposed to myself – that we should hold in Parliament, which again includes our House – post-appointment hearings for the most senior judges. As I say, I regard that as completely inappropriate but I would certainly like to know your view.

**Lord Phillips of Worth Matravers:** My personal view is that I share your view. I really cannot see a desirable role for Parliament in such circumstances. I think that Lord Bingham was asked about this and he said, “What are they going to ask? They are going to ask political questions; they are not going to ask, ‘Do you keep cats?’”

**Q43 Lord Peston:** It would be like the American system, would it not, they would go into your personal background and everything else under the sun; but it is hardly appropriate if you are talking about a very senior judicial figure?

**Lord Phillips of Worth Matravers:** I personally have yet to see a suggestion of a role that Parliament would play at that stage, to which I would be attracted.

**Q44 Lord Lyell of Markyate:** I am a little worried because in the end the appointment of the senior judiciary – indeed the judiciary – is not a judicial function it is an Executive function. But it is a function which, in my opinion, ultimately the government of the day is responsible for, and it actually worked in practice very well down the decades and the centuries – we have a very, very high standard judiciary. I hope that the Lord Chancellor will retain and take seriously his overview – rather like the Attorney General’s overview of the prosecuting system – and responsibility for the appointment of the judiciary, and I should be very reluctant – and I hope you would agree with me – that the Lord Chancellor should find himself having withdrawn from that deep responsibility.

**Lord Phillips of Worth Matravers:** I agree with those comments, I think. The comments I was making before were about what I described as rubber stamping appointments where the Lord Chancellor simply is not in a position himself to make an informed decision at all. When you reach the top judicial appointments – and there the judicial appointments system is different, there is a much greater input from the serving judiciary as to these top appointments – I have always made it plain that I accept that it is desirable that there should be executive involvement at that level because it would be highly unsatisfactory to have, for instance, a Lord Chief Justice appointed in whom the government had no confidence.

**Lord Lyell of Markyate:** I think we are very close to agreement, but in practice in government you have to accept responsibility for things in which you do not have time for personal involvement, but you should have the power because you should never have responsibility without at least theoretical power.

**Q45 Lord Morris of Aberavon:** Where would you draw the line about involvement of the Executive? You mentioned, Lord Chief, the appointment of a Lord Chief Justice. How far would you go on that? And recalling your earlier words, if it is not going to be rubber stamped the Lord Chancellor has to have the appropriate staff to advise him.

**Lord Phillips of Worth Matravers:** That is certainly true but it depends how many members of the judiciary are going to be involved in a meaningful process of consideration by the Lord Chancellor. If he were to be meaningfully involved in relation to the entirety of the judiciary then you need a very large staff for simply second guessing the Judicial Appointments Commission. But when you get to the top I think I would be reluctant just off the cuff to attempt to draw the line, thinking about the heads of division, those members of the judiciary who have necessarily to work quite closely with government, as we do at the moment in the partnership of the administration of justice.

**Q46 Lord Woolf:** The way that the Constitutional Reform Act was drawn was to substantially reduce the involvement of the Lord Chancellor, but to give him an involvement, namely he could refuse in very limited circumstances. An attempt of that sort to give him an involvement but a limited involvement, in principle are you against it?

**Lord Phillips of Worth Matravers:** No, I am in favour of it.

**Q47 Lord Woolf:** Of course, how the Lord Chancellor exercises his discretion and what information he needs is very much a matter for him, but as I understand what you are saying – and correct me if I am wrong – is that with regard to appointments where, quite frankly, the Lord Chancellors in the past have entirely relied upon their officials because they would not be personally involved, is merely a mockery to think that he has to second guess the appointment machinery that we now have in place.

**Lord Phillips of Worth Matravers:** It is a mockery unless he has a huge body of people in his department who are in effect second guessing the job that the Judicial Appointments Commission has done in order to give him informed advice as to whether they have done a good job. I do not believe in that because I think if you have a Judicial Appointments Commission you let them get on with it.

**Q48 Lord Lyell of Markyate:** Just very quickly – and again I think we are extremely close – Parliament is an enormous information gathering machine, and supposing out in some distant county it becomes known that somebody who, for reasons, is thoroughly unsuitable is about to be appointed to what in the locality is a very important position, and that comes, say, through a Member of Parliament to the Lord Chancellor, that residual power which effectively would be used by saying to the Judicial Appointments Commission, “If you appoint this person I will ask you to think again,” is a valuable power, and it is a valuable power in the cohesion of this country. Would you agree with that?

**Lord Phillips of Worth Matravers:** I think I would agree with it and it is reflected to some extent in statutory consultation which takes place with statutory consultees – and I am very often one of them – which give an opportunity to say, “Wait a minute, there is something you ought to know about this particular candidate.”

**Q49 Lord Rowlands:** We are now less than two years away from the date on which the Supreme Court is going to be set up. Do you think that there are broader implications for the legal system in the actual transfer from an Appellate Committee here to a separate Supreme Court?

**Lord Phillips of Worth Matravers:** The change I think is much more one of form than substance. It is bringing our system transparently into the system that in practice already exists. The Supreme Court will be there for all to see as an independent Supreme Court. At the moment the man in the street is totally bemused, I think, when he or she hears that this case is going to the House of Lords – they have no idea what that means. I myself think that the standing of the Supreme Court is going to be enhanced above that of the Law Lords. Some of the Law Lords take a completely different view, but that is my own personal view. I think essentially the changes are going to be changes of form rather than substance. The same Law Lords will be doing the same job in new premises with new labels.

**Q50 Viscount Bledisloe:** Eighteen months ago we asked you about the split of your time between judicial work and administrative and you said that ideally you would like to sit judicially three days a week and do admin for two days, but that your recent six months had had a particularly heavy burden. Has the burden in fact lightened and have you achieved your aim?

**Lord Phillips of Worth Matravers:** I have not quite achieved sitting on average three days a week. I think more or less I sit about half my theoretical working time. Essentially I find that I am doing at least one and a half jobs, and so I am under very great pressure of time. I have been sitting three days this week and because I did not have the time I would have liked before the sittings I now have reserved judgments that I have to find time to do, whereas if I had had the time that most judges have to prepare for their cases I anticipate I would have been able to deliver judgments as soon as those cases were completed. So I am under a great pressure but I am still succeeding in sitting, I hope enough to satisfy what I consider are the requirements of any Lord Chief Justice.

**Q51 Viscount Bledisloe:** Are you going to be able to improve the situation yet further or is this administrative burden going to be inevitable? And I go back to a previous question, is that going to discourage the best people from succeeding to your job?

**Lord Phillips of Worth Matravers:** I hope it will not because when I talk to people I tell them that I am enormously enjoying the job, despite the pressure. But I do not think the pressure is going to lessen, no.

**Q52 Lord Norton of Louth:** Just going back to the point about the move to the Supreme Court. You mentioned that people did not understand the current system basically because of the nomenclature of it, and I am not sure that there is much evidence for that, but if we go on the basis that the name itself was misleading, if it moved to the Supreme Court – and you are

saying that the change is really one of form – do you think that there is the danger that people will misunderstand what the role of the Supreme Court is, given the name that is attached to it?

*Lord Phillips of Worth Matravers:* Undoubtedly they do all the time when I talk to them. They imagine that our new Supreme Court is going to be like the American Supreme Court, which will be able to overhaul Parliamentary legislation on the ground that it is not constitutional. But I hope that in time the public will recognise the true nature of the new Supreme Court.

**Q53 Lord Norton of Louth:** Would it have been perhaps an alternative of another name that would reflect more accurately what happens?

*Lord Phillips of Worth Matravers:* I do not think I would be in favour of that; I think the Supreme Court is rather a good name, and it is only a question of a short period before people understand the nature of that Supreme Court.

**Q54 Baroness O’Cathain:** Are you going to have a great publicity campaign to try and inform people about it, because your point is an extremely valid one? If you talk about the Supreme Court all they think is American movies.

*Lord Phillips of Worth Matravers:* I hope there will be adequate publicity that will inform the public as to the nature of the new Supreme Court. Of course the public basically reads about these things in the newspapers, so we must rely upon the media to give them that information.

**Q55 Baroness O’Cathain:** There is another method but I hesitate to suggest it to you, because the Lord Speaker here has an outreach programme at the moment to inform young people, sixth formers who are doing politics or will do in university, and a number of us are

going from school to school with a very good power point presentation, and a lot of good information which comes from the information office, and it is a very worthwhile thing. But of course I guess that the judges just do not have that sort of time, or indeed resources to do it. But it might be worth thinking about it, and indeed even talking to the Lord Speaker about the results that are coming in on this, because it is the young we need to get to.

**Lord Phillips of Worth Matravers:** This raises a much wider issue than understanding in the Supreme Court. It would be very useful if the young understood the difference between criminal and civil jurisdiction, which they do not. I am very enthusiastic about teaching children in schools about our legal system, the basics of our legal system, including of course the Supreme Court. And judges do involve themselves on an individual basis in this as much as they have power to.

**Lord Justice Thomas:** The Magistrates' Association does a lot of good work in this respect as well. There has been for some time a programme, both for the full the judiciary to help, but the magistracy have done a great deal of help, going to schools on a very regular basis.

**Q56 Viscount Bledisloe:** Could you not recruit some of the retired judiciary to do some of this education?

**Lord Phillips of Worth Matravers:** One could try. We try to recruit the retired judiciary to do all sorts of things and we do not always find they are enthusiastic.

**Q57 Lord Woolf:** Could I just say that I know of one retired judge who goes to a number of schools to give talks.

**Lord Phillips of Worth Matravers:** I am sure there are lots who do.

**Q58 Lord Lyell of Markyate:** You are an enthusiast for the Supreme Court but you rightly said that it will be misunderstood as having American powers. Are there not other possible

unintended consequences? You will be aware that the European Court of Justice and the European Court of Human Rights both reached their conclusions by a much, much wider sense of research and input and diplomatic input and positive lobbying and lunches with Advocates General and all that sort of thing. Are we going to see that kind of change in our Supreme Court or are we going to remain very purist as we have been in the House of Lords, where the idea of anybody having lunch or working with a law clerk would be regarded as extraordinary?

**Lord Phillips of Worth Matravers:** I hope the latter. We do not find in the Court of Appeal that we are being lobbied or our clerks are being invited out to lunch by those who would like to interest us, and I do not anticipate that if anyone attempts this with the Supreme Court that they will get a very favourable response.

**Q59 Lord Lyell of Markyate:** But you do recognise that it happens in Europe and the United States?

**Lord Phillips of Worth Matravers:** I do not have personal knowledge of either but I am perfectly prepared to take your word for it, the fact that it does.

**Chairman:** Lord Chief Justice, Lord Justice Thomas, can I thank you both on behalf of the Committee very much indeed for your attendance and indeed for your evidence, which is greatly appreciated. Thank you very much indeed.