

# Judicial Input into Parliamentary Legislation

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## Introduction

This article arises from a much wider, AHRC-funded project on the Politics of Judicial Independence.<sup>1</sup> During that project we developed an interest in the changing relations between the judiciary and Parliament, as senior judges recognised a growing need to give an account to Parliament of their stewardship of the judiciary and the courts after the Lord Chief Justice replaced the Lord Chancellor as head of the judiciary in 2006, and they became jointly responsible for the Courts Service in 2007.<sup>2</sup> The main way in which judges explain their work to Parliament is by appearing before Select Committees, which they do with surprising frequency. Patrick O'Brien and Robert Hazell found 418 instances of judges giving oral and written evidence to parliamentary committees between 1979 and 2014, an average of 12 occasions a year.<sup>3</sup> Most judicial evidence involved talking about the work of the courts and tribunals, or matters such as judicial appointments, but in a small proportion (around 20 per cent) of cases judges were invited to give evidence about proposed legislation to committees considering bills or draft bills.

Judicial evidence on bills is of particular interest, because under the *Guidance to Judges on Appearances before Select Committees* the Judicial Executive Board has decreed that judges should not comment on, *inter alia*, 'The merits, meaning or likely effect of provisions in any Bill or other prospective legislation and the merits of government policy'.<sup>4</sup> Robert Hazell therefore decided to embark on a further study looking specifically at judicial evidence on bills, to find out what judges were able to talk about to Parliament without transgressing the guidelines. The study sought to address the following research questions:

- What do judges talk about when giving evidence to Parliament on bills or draft bills?
- How often do they transgress the guidance on appearances before Select Committees?
- What is the value to Parliament, and to the judiciary, of judges giving evidence on proposed legislation?

This study is of interest not just in England and Wales, but to other common law countries, because the practice at Westminster of inviting judges to give evidence to parliamentary committees is very unusual. In Australia, Canada and Ireland, where they have a stricter doctrine of separation of powers, it would be regarded as a gross breach of that doctrine to expect a judge to appear before a parliamentary committee.

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<sup>1</sup> Gee, Hazell, Malleson and O'Brien, *The Politics of Judicial Independence in the UK's Changing Constitution*, Cambridge University Press 2015. AHRC Grant No AH/H039554/1

<sup>2</sup> The Lord Chief Justice became head of the judiciary in England and Wales under s7 of the Constitutional Reform Act 2005. He became jointly responsible with the Lord Chancellor for the Courts Service under the Framework Document 2008, Cm 7350.

<sup>3</sup> R Hazell and P O'Brien, 'Meaningful Dialogue: Judicial Engagement with Parliamentary Committees at Westminster' *Public Law* 2016:1 pp 54-73.

<sup>4</sup> Judicial Executive Board, *Guidance to Judges on Appearances before Select Committees*, October 2012 paras 3 and 10.

Paradoxically it is in the United States, long regarded as strict upholders of separation of powers, where the practice of judges appearing before Congressional committees appears most prevalent. The great majority of these appearances concern judicial nominations, court appropriations and the administration of justice, but American judges do sometimes appear before Congress to discuss proposed legislation.<sup>5</sup> And when they do, American judges offer a surprisingly pragmatic justification of the practice. Robert Katzmann, Chief Judge of the US Court of Appeals, has said that “when a committee of Congress is considering revising a complex piece of legislation, it might be useful for judges experienced in interpreting the statute to testify as to the technical difficulties in discerning congressional meaning”.<sup>6</sup> And for the judges, their task of statutory interpretation can be strengthened because “having a basic understanding of legislative lawmaking can only better prepare [them] to understand their interpretive responsibilities”.<sup>7</sup> As we shall see, this pragmatic justification has strong echoes in the practice of judges giving evidence about proposed legislation at Westminster.

### Judicial Evidence on Bills at Westminster

The first step in our research was to compile a database of all the recorded occasions on which a judge has given evidence before a select committee, on a Bill or draft Bill. Each separate instance of a judge submitting evidence was counted once, irrespective of whether she or he appeared on multiple other occasions before the same committee, and of whether a select committee panel had more than one judge appearing before it. Where a body of judges (the Association of HM District Judges, for instance) provided written evidence, however, this was counted only once. 1979 was taken as the starting point since that was when departmental select committees were instituted on a systematic basis at Westminster. From 1979 to 2015 there were 41 instances of judges giving oral evidence, and a further 46 instances of written evidence, on a total of 20 different Bills and draft Bills. Of the 46 pieces of written evidence, [8?] were supplemental memorandums submitted following oral testimony.

The table below lists in chronological order the 20 bills and draft bills, with the names of the judges giving oral or written evidence in each case.

Figure 1: Judicial evidence on bills at Westminster 1979 to 2015

Year	Select Committee	Subject of Evidence	Judge(s) Giving Oral Evidence	Judge(s) Giving Written Evidence

<sup>5</sup> Rishikoff and Perry, **full ref needed**

<sup>6</sup> R Katzmann, *Interbranch Relations*, Hearings before the Joint Committee on the Organisation of Congress, 1993 p 88.

<sup>7</sup> R Katzmann, *Judging Statutes*, p 22.

1984	House of Commons Special Standing Committee on the Matrimonial and Family Proceedings Bill	Matrimonial and Family Proceedings Bill	Mr Justice Gibson, President of the Family Division Sir John Arnold, and Lord Scarman	
1994	House of Lords Special Standing Committee on the Law of Property (Miscellaneous Provisions) Bill	Law of Property (Miscellaneous Provisions) Bill	Mr Justice Brooke, Chairman of Law Commission	
1994-95	House of Lords Special Public Bill Committee on the Private International Law (Miscellaneous Provisions) Bill	Private International Law (Miscellaneous Provisions) Bill	Mr Justice Brooke, Chairman of Law Commission	Mr Justice Parker, Mr Justice Staughton, President of the Family Division Sir Stephen Brown, Sheriff Principal Nicholson, Lord Bingham MR, Lord Kemp Davidson, Lord Simon, Lord Ackner (retired), Lord Denning (retired), Lord Donaldson (retired)
1995	House of Lords Special Public Bill Committee on the Family Homes and Domestic Violence Bill	Family Homes and Domestic Violence Bill	His Honour Judge Fricker, Mr Justice Brooke (chairman of Law Commission), Ms Justice Hale (former Family Law member of Law Commission)	District Judge Angel, District Judge Bird, District Judge Greenslade, His Honour Judge Fricker, Ms Justice Graham Hall, Mr Justice Jenkins, President of the Family Division Sir Stephen Brown, Association of District Judges
1997	House of Lords Select Committee on the European Communities	Brussels II convention on enforcement of matrimonial judgements		Lord President Rodger

1999	House of Commons Select Committee on Public Administration	Freedom of Information Bill (Draft)	Vice-Chancellor of the High Court Sir Richard Scott, Lord Woolf MR	
2004	House of Commons Constitutional Affairs Committee	Criminal Defence Service Bill (Draft)	Mr Justice Richards, Lord Justice Judge	The Judges' Council
2004	House of Commons Constitutional Affairs Committee	Constitutional Reform Bill: the Government's Proposals	Lord Bingham	
2004-05	House of Lords Select Committee on the Constitutional Reform Bill	Constitutional Reform Bill	Ms Rachel Lipscomb, Lady Justice Arden, Lord Justice Thomas, Lord Woolf LCJ (testified twice), Lord Bingham, Lord Hope (testified twice), Lord Nicholls, Lord Ackner (retired), Lord Mackay (retired), Lord President Cullen, Justice Gault (New Zealand), Justice Sir Kenneth Keith (New Zealand), Chief Justice Dame Sian Elias (New Zealand)	Lord Justice Carnwarth, Lord Woolf LCJ, Baroness Hale, Lord Brightman (retired), Lord Cooke (retired), Lord Donaldson (retired), Lord Jauncey (retired), Lord Nolan (retired), Lord President Cullen, Judge Schiemann (European Court of Justice), Chief Justice Dame Sian Elias (New Zealand)
2004-05	Joint Committee on the Draft Mental Health Bill	Mental Health Bill (Draft)	His Honour Judge Sycamore	Regional Chairs of the Mental Health Review Tribunals
2005	House of Commons Home Affairs and Work and Pensions Committee	Corporate Manslaughter Bill (Draft)	President of the Queen's Bench Division Sir Igor Judge	President of the Queen's Bench Division Sir Igor Judge

2006	House of Commons Select Committee on the Armed Forces Bill	Armed Forces Bill	Judge Advocate General of the Armed Forces Jeff Blackett	Judge Advocate General of the Armed Forces Jeff Blackett
2007	House of Commons Constitutional Affairs Committee	Sentencing Guidelines: Assault (Draft)	Ms Cindy Barnett, chairman of Magistrates' Association	
2008	House of Commons Special Public Bill Committee on the Health and Social Care Bill	Health and Social Care Bill	Lady Justice Smith, chair of the Shipman Inquiry	
2008	Joint Committee on the Draft Constitutional Renewal Bill	Constitutional Renewal Bill (Draft)		Lord Phillips LCJ (testified twice), Lord Mackay (retired)
2011	Joint Committee on the Draft Defamation Bill	Defamation Bill (Draft)	Mr Justice Tugendhat, Sir Stephen Sedley (retired), Lord Neuberger MR, Lord Woolf (retired)	
2012	House of Commons Justice Committee	Children and Families Bill	Ms Justice Pauffley, Mr Justice Ryder	Ms Sally Simon (retired), Magistrates' Association, Association of Her Majesty's District Judges, Judges of the Family Division
2013	Joint Committee on the Draft Voting Eligibility (Prisoners) Bill	Voting Eligibility (Prisoners) Bill (Draft)	Lord Mackay (retired)	
2014	Joint Committee on the Draft Modern Slavery Bill	Modern Slavery Bill (Draft)	Lord Judge (retired)	His Honour Judge Edmunds

2014	House of Lords Special Public Bill Committee on the Insurance Bill	Insurance Bill	Lord Justice Longmore, Lord Mance JSC	Lord Justice Longmore
2015	Joint Committee on the Draft Protection of Charities Bill	Protection of Charities Bill (Draft)	Judge McKenna (Principal Judge (Charity) of the First-tier Tribunal)	

## Analysing the Evidence

### A. General Trends in Judicial Testimony on Bills

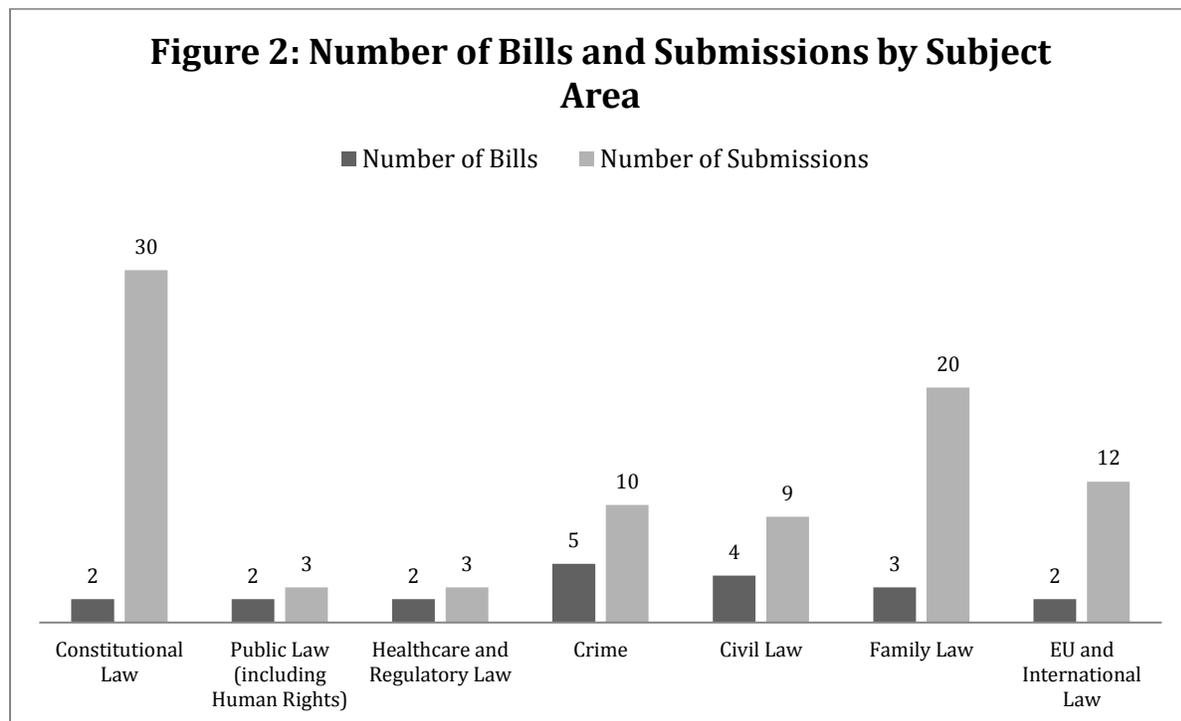
The overall figures disclose that there has been an increase, decade on decade, in the number of judicial submissions on Bills and draft Bills: there were three instances of judicial testimony in the 1980s, 26 in the 1990s, 41 in the 2000s, and 17 so far in the 2010s. If submissions in the current decade continue at the same rate, they will be on course to match the 2000s with approximately 40 instances of testimony. 30 submissions in the 2000s were concerned with major constitutional reform measures which directly affected the institutional position of the judiciary; in the 2010s, submissions have continued at a similar rate, despite the fact that none have been concerned with major planks of constitutional reform. It may also be noted that the 2010s have so far seen no perceptible decrease in the provision of testimony, despite the tightening of centralised control over judicial appearances by the Lord Chief Justice in 2012. The overall growth in judicial testimony on legislative proposals, indeed, may be traced primarily to the fact that the legislative process has been ‘opened up’ in recent years.<sup>8</sup> The Blair administration began the practice of systematically publishing Bills in draft for pre-legislative scrutiny, and half of the legislative proposals on which judges have commented have been drafts. Public Bill Committees were introduced in 2006, for the first time allowing evidence taking during the Committee stage; since then, [XX] out of [22] submissions have been made to committees of this sort. More broadly, the growing reach and influence of Westminster select committees has played a role in enhancing the frequency and depth of pre-legislative scrutiny: the Lords Constitution Committee, for instance, was created in 2001 to examine all public Bills for their constitutional implications, and since then has been one of the more frequent recipients of judicial evidence on legislative proposals. Dedicated joint committees are now regularly appointed to examine major draft Bills: since 2004, [6] such committees have taken a total of [13] submissions from judicial witnesses.

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<sup>8</sup> Meaningful Dialogue article.

Beneath these headline figures, moreover, oral and written testimony exhibit distinct trends: of the 26 submissions made in the 1990s, 19 were written and seven oral; in the 2000s, 20 were written and 21 oral; and in the 2010s, seven have been written and ten oral. Notwithstanding the three submissions made in the 1980s (all oral), it appears that written submissions have continued at a fairly consistent rate since the early 1990s, and that, conversely, the provision of oral testimony has become customary only gradually. One reason for this, perhaps, is that some judges have become less guarded about appearing before select committees, as the practice has become institutionally more normalised and as experience has shown that pre-legislative questioning by select committees is generally collaborative and courteous, as opposed to interrogatory and hostile. It is also carefully choreographed. As an example, Lord Woolf, then Master of the Rolls, told the Select Committee on Public Administration in 1999 that he and fellow witness Sir Richard Scott were “very grateful to your Clerk warning us of what we have in store for us by way of cross-examination”.<sup>9</sup> In the years that followed, Lord Woolf gave evidence on a number of further occasions, even volunteering to testify before the Select Committee on Public Administration again in 2004, on the subject of public inquiries.<sup>10</sup>

These 87 instances of judicial testimony related to a total of 20 pieces of proposed legislation, of which half were Bills and half draft Bills. The legislation at issue covered a wide range of topic areas, from constitutional and public law, to crime and family law, to general civil law. Figure 2 shows the number of Bills and draft Bills scrutinised across a number of different areas, together with the total number of submissions made:



<sup>9</sup> Woolf on FOI Bill, at Q883.

<sup>10</sup> POJI, p. 103, citing: HC Public Administration Committee, Government by Inquiry: Minutes of Evidence (HC 51-II 2005).

To illustrate the application of these categories in action, the 'Constitutional Law' category comprised the Constitutional Reform Bill of 2004 and the Draft Constitutional Renewal Bill of 2008; and 'Public Law', the Draft Freedom of Information Bill of 1997 and the Draft Voting Eligibility (Prisoners) Bill of 2013. 'Healthcare and Regulatory Law' included the Health and Social Care Bill of 2007; 'Crime' included the Draft Criminal Defence Service Bill 2004, reforming criminal legal aid, and the Draft Corporate Manslaughter Bill in 2005; and 'Family', the Family Homes and Domestic Violence Bill of 1995 and the 2012 Children and Families Bill. 'EU and International Law' included Brussels II: The Draft Convention on Jurisdiction, Recognition and Enforcement of Judgments in Matrimonial Matters, and the Private International Law (Miscellaneous Provisions) Bill of 1995. It may be noted that the categorisation of proposed legislation according to subject was not always wholly straightforward: the subject-matter and provisions contained in Bills sometimes cut across multiple topic areas.

What is clear, is that judicial involvement in the pre-legislative scrutiny process has not been limited to certain narrow subject areas; the Bills on which judges have commented have been wide-ranging in terms of their subject-matter. At the same time, certain legislative proposals have attracted a disproportionately high number of submissions. This has usually been because the proposed legislation related to constitutional matters of particular importance to the judiciary: for example, 30 submissions were made on the Constitutional Reform Bill between 2004 and 2005. Other bills made significant or highly technical changes to the law, about which individual judges were concerned: thus the Private International Law (Miscellaneous Provisions) Bill generated 11 submissions in 1995, as did the Family Homes and Domestic Violence Bill in the same year. There are differences, too, as regards the seniority of the judicial witnesses across the seven identified topic areas. Figure 3 shows the breakdown of submissions by judicial rank and area:

**Figure 3: Number of Submissions by Rank of Judge and by Area**



The overwhelming majority of submissions within the ‘Public Law’ and ‘Constitutional Law’ categories were made by senior judges (at the level of the Court of Appeal or above, including retired justices), with a further seven submissions on the Constitutional Reform Bill by senior international judges. The complexity of issues within the ‘Civil Law’ category, including defamation, insurance and charities law, meant that senior judges have dominated here, with seven out of nine submissions being made by them. By contrast, middle-ranking (High Court and Circuit judges) and junior judges (at the level of District judge and below) more frequently comment on Bills in the spheres of ‘Crime’ and ‘Family Law’ – 10 out of 20 submissions on family matters, for instance, were made by middle-ranking judges, four by junior judges, and a further four by bodies of judges including the Association of HM District Judges.

**B. The Content of Evidence Sessions**

To analyse the content of the evidence sessions, a sample was drawn from the total number of bills listed in Figure 1, using a stratified sampling method.<sup>11</sup> The first layer of stratification was according to decade (with the year 1979 included in the 1980s), with a second layer according to judicial rank, so that there was

<sup>11</sup> See below, Section IV, B; PT acknowledgement.

a broadly representative number of evidence sessions, oral and written, from each decade and from each level of judicial seniority. This produced, for oral evidence, one session from the 1980s, two from the 1990s, six from the 2000s, and five from the 2010s. In the sample of written evidence, there was no evidence dating from the 1980s (since there were in fact no written submissions by judges in the course of that decade). There were four submissions from the 1990s, five from the 2000s, and two from the 2010s. The sampling was done without a view as to content, and a small number of the evidence sessions in the sample turned out to be disappointingly brief. These were replaced with fuller submissions from the same decade (indeed, where possible, the same Bill), made by judicial office-holders of the same or similar rank.

The first step in assessing the sampled evidence sessions was to gain an overall impression of the length and structure of judicial testimony. When giving oral evidence, judges are generally asked to introduce themselves for the record, and to give a statement summarising their views on the topic to be discussed, before being asked questions by individual members. Written submissions will usually follow the structure of the consultation questions published or circulated by the select committee, though sometimes judges will simply write a statement recording their own concerns. On occasion, written evidence takes the form of a memorandum submitted following oral evidence, on a specific subject which arose in the course of the hearing. Submissions were in general full and detailed, with an average of 21 points made by judges in writing, and 30 in oral evidence.

### **What do the judges talk about?**

Judges appear as expert witnesses, expert in the law, and in how the law works – or does not work - in their particular field. Some parliamentarians may have qualified as lawyers, but few remain in practice, and they very rarely have the same level of expertise. So the main function of evidence sessions is educational: judges explain how the law currently operates in their field, how the proposed legislation might work, how it could be improved. In the sessions which we sampled, there were several good examples of this. One was Sir Igor Judge (then President of the Queen’s Bench Division) giving evidence on the Draft Corporate Manslaughter Bill.<sup>12</sup> He explained the existing common law offence of manslaughter, the undesirability of having different criteria for the new corporate offence, whether it should apply to unincorporated bodies, or the police, the civil duty of care, how the judge would direct the jury, whether it would be a hindrance or a help to list the factors to be borne in mind. Another example was Judge Jeff Blackett, Judge Advocate General, giving written evidence to the Select Committee on the Armed Forces Bill.<sup>13</sup> He welcomed the Bill, in bringing the standards of the Court-Martial closer to those of the Crown Court, but then pointed to those areas where the Bill did not go far enough: in the composition and minimum size of panels, majority verdicts, sentencing remaining with the panel when it should be left to the judge advocate. His submission closed with a summary of all the main points, and a schedule of the clauses he wished to see amended. A third example of judges educating the committee was the evidence of two High Court judges, Sir Ernest Ryder and Dame Anna Pauffley, on the draft Children and Families Bill.<sup>14</sup> A key recommendation of the

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<sup>12</sup> Joint sitting of the Home Affairs and Work and Pensions Committee, 21 November 2005.

<sup>13</sup> Written evidence to the Select Committee on the Armed Forces Bill, January 2006.

<sup>14</sup> Commons Justice Committee, 20 November 2012.

Norgrove review of family justice and the Ryder report on its implementation was to halve the average time limit for cases of children being taken into care, and Ernest Ryder explained the practicalities that needed to be resolved: training for judges on prioritising their work load, more proactive case management, better management information, a care monitoring system, and involving family court lawyers and social workers in the reforms and not just the judges. This gave the committee useful background before discussing some of the details of the draft Bill.

In discussing the content of bills judges will quite often venture their own views on the policy. They will say (as the Judge Advocate General did) whether they support the bill. And they will say (as he also did) if they think it does not go far enough. In similar vein, Sir Richard Scott (then Vice-Chancellor, and recent chair of the Arms to Iraq inquiry) felt that the Freedom of Information Bill was ‘much, much too cautious’, and suggested that it could be improved by a purpose clause, and by including a requirement on all public bodies to give reasons for their decisions.<sup>15</sup> Sir Ralph Gibson, as chairman of the Law Commission, when asked what should be the minimum period before a spouse could file a petition for divorce, said ‘I see no reason why, for the sake of either convenience or justice, the time limit should not be reduced to one year’.<sup>16</sup> Sir Andrew Longmore, a Court of Appeal judge who was an insurance expert, suggested changes to the Insurance Bill which would benefit policy holders but went against the advice of Lloyds.<sup>17</sup> And Sir Michael Tugendhat, a specialist libel judge, supported the proposal in the Defamation Bill to remove the presumption in favour of trial by jury, because jury trials had become unmanageable.<sup>18</sup>

But judges are careful not to go too far. When Sir Michael Tugendhat was asked whether libel judges should have power to order corrections or apologies, he said that if judges were given the power, they would use it, with the corresponding benefit that damages would be lower. But he added, ‘I do not think it is for me to say whether this should be done or not’.<sup>19</sup> Similarly Sir Igor Judge, when asked whether there should be public policy exemptions to the new offence of corporate manslaughter, said ‘you are really asking me to comment on a policy issue. I think I would be happier not to answer that question ...’.<sup>20</sup>

Judges will also offer advice on drafting and interpretation. This is despite the clear instruction to judges not to comment on the meaning or likely effect of provisions in a Bill, lest they be subsequently asked to interpret those provisions in court. In the sessions in our sample, Sir Igor Judge suggested that ‘benefits’ or ‘profits’ could be used interchangeably in the Corporate Manslaughter Bill.<sup>21</sup> But when giving evidence on the draft Modern Slavery Bill, he warned against using different formulations for the defendant’s state of knowledge in clauses 1 and 2, saying that lawyers would argue there must be a different meaning if the words used are different: ‘it is critical – not for the Court of Appeal, but for the poor trial judge – that we should have the same words used, if that is what we mean to say’.<sup>22</sup> In his evidence on the draft Freedom

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<sup>15</sup> Public Administration Select Committee, 14 July 1999, at Q911 and Q884.

<sup>16</sup> Oral evidence on Matrimonial and Family Proceedings Bill, 20 March 1984.

<sup>17</sup> Special Public Bill Committee on Insurance Bill, 3 December 2014.

<sup>18</sup> Joint Committee on Defamation Bill, 6 July 2011 at Q622.

<sup>19</sup> *Ibid* at Q625.

<sup>20</sup> Joint sitting of Home Affairs and Work and Pensions Committee, 21 November 2005 at Q511.

<sup>21</sup> *Ibid* at Q504.

<sup>22</sup> Joint Committee on Draft Modern Slavery Bill, 25 February 2014 at Q644 and Q648.

of Information Bill, Lord Woolf discussed at length what ‘substantial’ would add to the harm test in the exemption provisions.<sup>23</sup> And in commenting on the exception provisions in the draft Children and Families Bill, Sir Ernest Ryder explained that he could not offer an interpretation, but then went on to do so: ‘You won’t expect me to give an interpretation that binds either myself or my colleagues for the future ... my personal view is that “with a view to” is intended to qualify both sub-sections (i) and (ii) ...’.<sup>24</sup>

Judges will also offer more general advice about drafting technique. Several evidence sessions discussed the pros and cons of defining things in statute or leaving it to the discretion of the judges. The Defamation Bill was a codification of the common law, leading Sir Michael Tugendhat to ask at one point, ‘are we doing more harm than good?’.<sup>25</sup> It might be expected that judges would favour retaining maximum discretion, but that is not always the case. In discussing the harm test in the draft Freedom of Information Bill, Lord Woolf said ‘It is much better that the Act defines it and that we do not leave it to case law, because there are precedents ... where ... some would say the courts have emasculated legislation and really defeated what was intended’.<sup>26</sup> And here is Lord Judge, arguing against including statutory defences in the draft Modern Slavery Bill for those who had been victims of trafficking: ‘... broad declarations in an Act of Parliament about what should and should not apply always run into trouble. One of the worst forms of legislation is deeming anything. It really is, because the facts never ever fit the bill of whatever had been deemed. So I would caution against that’.<sup>27</sup>

As these last quotations imply, a lot of judicial evidence involves judges drawing on their long experience to make general points about how a statutory provision might work in practice. Some of these are about interpretation; some about practice and procedure, and the workload of the courts. Sir Michael Tugendhat advised against early neutral evaluation of libel claims by an interim judge, simply on workload grounds: ‘If I had to make judges available for early neutral evaluation, they would immediately be written off as the trial judge. I do not see how it would work in practice with the resources we have available’.<sup>28</sup> Judge Phillip Sycamore also raised serious concerns about the additional workload arising under the draft Mental Health Bill, suggesting that it would quadruple the number of hearings before Mental Health Review Tribunals.<sup>29</sup> And the Judges’ Council cautioned against the re-introduction of means testing in their written evidence on the Criminal Defence Service Bill, because of the delays which would ensue: ‘One of the problems under the old means-testing system was the delay in obtaining from defendants the documents needed to establish whether any contribution was required.’<sup>30</sup> But the judges do not always oppose procedural changes: they supported the idea that in uncontested divorces a decree nisi could be approved by a court clerk rather than going before a judge.<sup>31</sup>

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<sup>23</sup> Public Administration Select Committee, 14 July 1999.

<sup>24</sup> Commons Justice Committee, 20 November 2012 at Q72.

<sup>25</sup> Joint Committee on Defamation Bill, 6 July 2011 at Q618.

<sup>26</sup> Public Administration Select Committee, 14 July 1999 at Q892.

<sup>27</sup> Joint Committee on Draft Modern Slavery Bill, 25 February 2014 at Q640.

<sup>28</sup> Joint Committee on Defamation Bill, 6 July 2011 at Q626.

<sup>29</sup> Joint Committee on draft Mental Health Bill, 28 October 2004 at Q724.

<sup>30</sup> Written evidence to Commons Constitutional Affairs Committee on Criminal Defence Service Bill, 21 June 2004.

<sup>31</sup> Commons Justice Committee, 20 November 2012 at Q72

In a lot of judicial evidence the judges are also involved in upholding the principle of judicial independence. The guidance to judges contains a specific exception allowing them to comment on the merits of a bill, or government policy, if it affects the independence of the judiciary.<sup>32</sup> This enabled typically robust comment from Lord Ackner on the Constitutional Reform Bill, of which he was a fierce critic.<sup>33</sup> Giving evidence on the same Bill, Lord Bingham argued strongly for greater operational and functional independence for the new Supreme Court, and sought to find a way of making it financially independent of government.<sup>34</sup> He was also keen for the Minister to have no choice in making appointments to the Supreme Court, 'because the whole object of the exercise is to make this demonstrably independent and devoid of political input'.<sup>35</sup> But questions of judicial independence can arise not only at these elevated levels, but all the way down the judicial hierarchy. The Judge Advocate General wanted the Military Court Service to be resourced and administered by the Department for Constitutional Affairs, like the civilian courts service, and for Court-Martial listing to be done under judicial control.<sup>36</sup> Judge Phillip Sycamore had a rather different concern, about judicial functions being extended beyond their proper role. He was troubled by the proposal that mental health tribunals should approve care plans: in his view, that was not a judicial function, and the tribunal hearing risked becoming more of a case conference.<sup>37</sup>

A final point worth mentioning is that the judges are not always in agreement in the evidence they give. This was particularly prominent in the evidence sessions on the Constitutional Reform Bill, where Lord Bingham himself acknowledged 'the government are very well aware that some of the Law Lords favour the Supreme Court proposal and others do not'.<sup>38</sup> Indeed, there was open disagreement between Lord Bingham, then senior law lord, and Lord Nicholls (second senior law lord) about the desirability of establishing a new Supreme Court, and the risk of it expanding its role and powers.<sup>39</sup> Again, disagreements are not only found at these elevated levels. In evidence to the Special Public Bill Committee on the Private International Law Bill Sir Jonathan Parker was very critical of Part III (on the choice of law in tort), saying that 'the subclause could hardly be drawn in wider or vaguer terms ... the judges are being asked to perform an impossible task'.<sup>40</sup> But only a week later Sir Christopher Staughton LJ wrote in to say 'Part III is welcome as bringing a degree of resolution to an old chestnut ... it is to be welcomed as introducing a measure of certainty'!<sup>41</sup>

## Quantitative Analysis of the Content of Judicial Evidence

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<sup>32</sup> Judicial Executive Board, *Guidance to Judges on Appearances before Select Committees*, 2012 at para 13.

<sup>33</sup> Lords Select Committee on Constitutional Reform Committee, 20 April 2004.

<sup>34</sup> Commons Constitutional Affairs Committee, 25 May 2004 at Q111.

<sup>35</sup> *Ibid* at Q100.

<sup>36</sup> Written evidence to Select Committee on Armed Forces Bill, January 2006 at para 6.4.

<sup>37</sup> Joint Committee on draft Mental Health Bill 28 October 2004 at Q724.

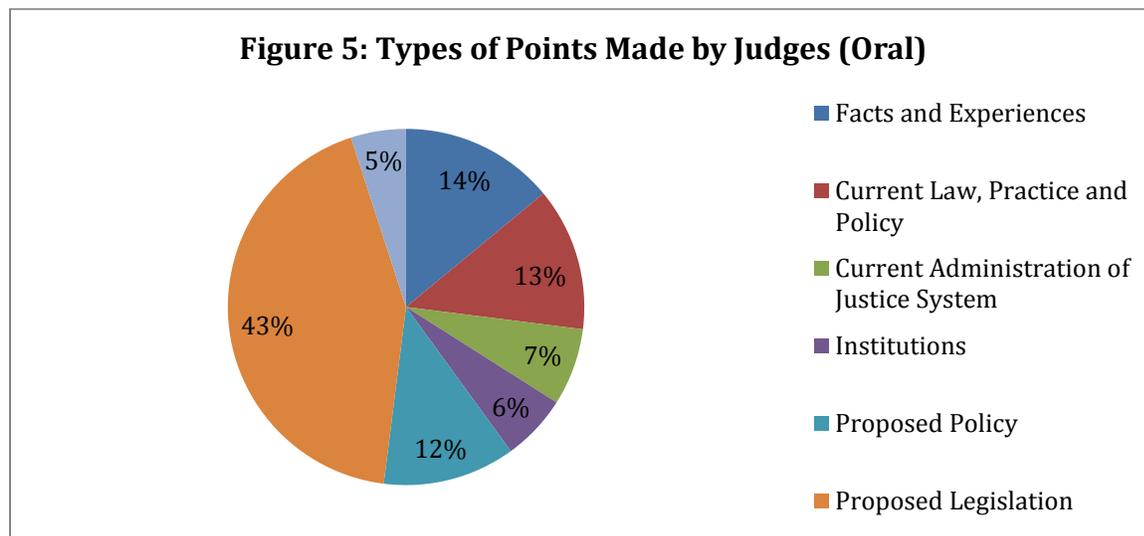
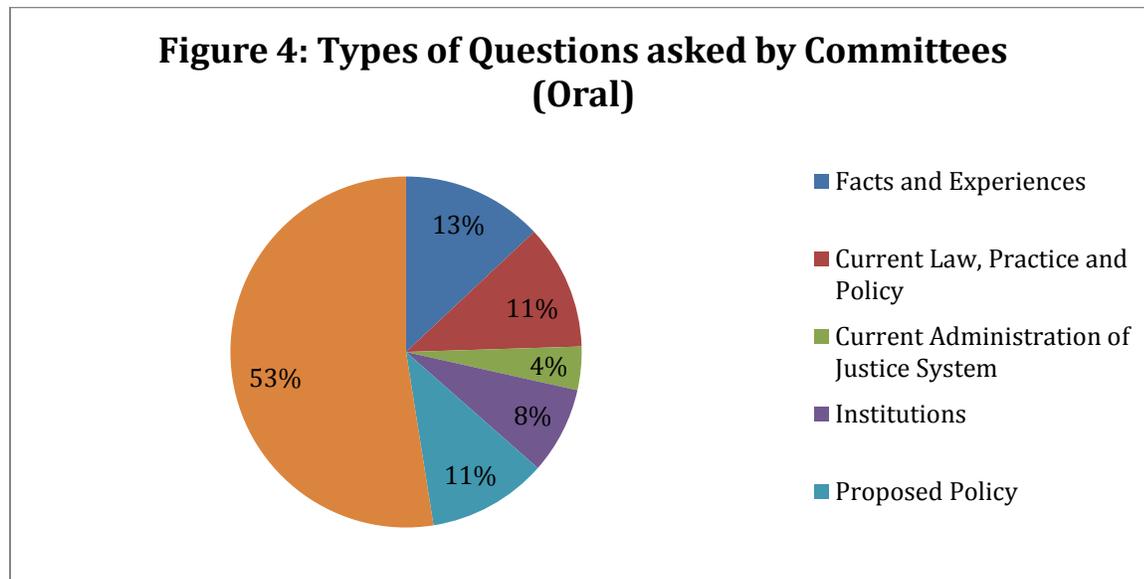
<sup>38</sup> Commons Constitutional Affairs Committee, 25 May 2004 at Q125.

<sup>39</sup> Lords Select Committee on Constitutional Reform Bill, 22 April 2004 at p12.

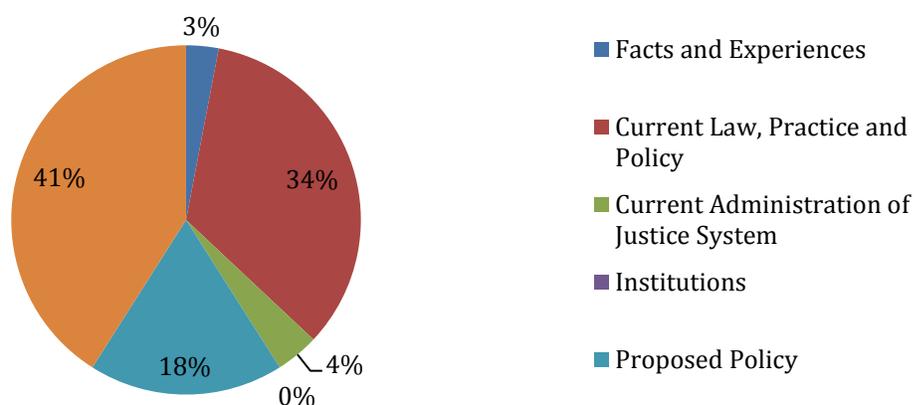
<sup>40</sup> Written memorandum to Special Public Bill Committee on Private International Law Bill, 6 January 1995.

<sup>41</sup> Written memorandum to Special Public Bill Committee on Private International Law Bill, 16 January 1995.

The next, more systematic stage in our research consisted in the development and application of a coding framework, to be supplemented by selecting quotations from the sessions to illustrate the analysis. Across the sampled evidence sessions, written and oral, points made by judges were analysed across six broad categories. These were: statements giving factual information and accounts of experiences; explanations of current law, legal practice and policy; points about the current administration of the justice system; comments about the roles of the different branches of government; comments on prospective policy; and comments on the proposed legislation itself. For oral evidence sessions, we added a seventh category, for judges’ refusals to answer questions posed by members of select committees, where they felt it transgressed constitutionally appropriate boundaries. An equivalent set of labels was applied to questions asked by committee members – but not to written questions, since select committees usually send out a generic set of written questions in their calls for evidence. Figures 4 to 6 show the breakdown of questions and answers into these categories:



**Figure 6: Types of Points Made by Judges (Written)**



Across all three sets of analysis, comments on the proposed legislation formed the bulk of the material, reflecting the primary purpose of the evidence. In oral evidence sessions, questions and answers were spread fairly evenly across the remaining categories. Slightly fewer points were made under the ‘current administration of the justice system’ and the ‘institutions of the state’ – and, in the case of judicial witnesses, ‘refusals to answer’ – categories, at 4 to 8 per cent each. A somewhat different picture emerges with written submissions: here, statements of fact and accounts of experiences received significantly less attention. There is little cause for a judge making a written submission to give significant amounts of factual information or anecdotal evidence<sup>42</sup> – on the one hand, written submissions tend to be succinct and formal, often presuming knowledge of much of the relevant factual background to the legislation; and on the other, select committee members often solicit factual information as a lead-in to more substantive questioning.

The other key difference was that there was a far greater emphasis on setting out current law and practice (34 per cent of the points made in written submissions), largely because written submissions often contain lengthy expositions of the current law, by way of setting evidence on the proposed legislation itself in context.

### *Transgressing constitutional lines?*

We next analysed the content of judicial evidence on bills by reference to the Judicial Executive Board’s *Guidance to Judges on Appearances before Select Committees*, to see whether judges managed to stay within the guidelines. The guidelines generally prohibit, as a matter of constitutional convention, commentary on (i) the merits of individual cases; (ii) the personalities or merits of public officials including judges, or the general quality of judicial appointments; and (iii) the merits, meaning or likely effect of

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<sup>42</sup> This is especially true where the respondent is a body of judges, who obviously cannot give accounts of their individual experiences when writing collectively.

provisions in any prospective legislation, and the merits of government policy. As a matter of ‘desirable practice’, comments on issues which are subject to government consultation on which the judiciary intend to make a formal institutional response, but have yet to do so, are discouraged.<sup>43</sup> Nevertheless, the guidance carves out substantial exceptions within these areas, generating the constitutional ‘space’ in which much judicial-parliamentary dialogue on legislative proposals becomes possible. Judges with ‘leadership responsibilities’ (such as the Lord Chief Justice and Heads of Division) may comment on the general quality of judicial appointments.<sup>44</sup> Most significantly, for our purposes, a number of key exceptions are made in relation to convention (iii). First, where the subject-matter at issue is existing legislation or policy, it is accepted that there is a tradition of “responsible comment on the way in which an [existing] Act works, including unexpected consequences of legislation”.<sup>45</sup> Second, where the subject-matter is prospective legislation or policy, the lines are drawn slightly more narrowly, so that judges may only comment on “the merit of a Bill or policy which affects the independence of the judiciary” or on its “practical operation or technical aspects”, provided that it “directly affects the operation of the courts or aspects of the administration of justice within the judge’s particular area of judicial responsibility or expertise”.<sup>46</sup>

We analysed the content of judicial evidence by reference to these distinctions. Thus the category covering ‘current law, legal practice and policy’ was broken down into ‘responsible comments on current law, legal practice and policy’, ‘comments on the merits of individual cases’, and ‘comments on the merits of existing policy in areas of controversy’. Likewise, the two broader labels of ‘comments on the proposed legislation’ and ‘comments on proposed policy’ were split into ‘comments on the merits and likely effect of provisions in the legislation’ and ‘comments on the merits of the policy’ on the one hand, and categories covering the two exceptions to convention (iii), above, on the other. The aim, then, was to gain an insight into the nature of judicial contributions on proposed legislation, and to assess the extent to which judges deviate from their own institutionally set standards in testifying. Again, a similar set of subdivided categories was used to assess points made by committee members in the course of oral questioning, in order to gain a clearer understanding of the interactive nature of the relationship between parliamentarians and the judiciary in these legislative scrutiny hearings – and, in particular, to investigate the role of select committees in drawing judicial witnesses into answering potentially improper lines of questioning.

Across all submissions by judges, ‘comments on the merits of existing policy in areas of controversy’ were highly unusual, and judges are on the whole alert to the need to steer clear of such issues. Equally, there were virtually no ‘comments on the merits of individual cases’. It appears that judges are especially concerned about lines of questioning that would fall within this category: it is symptomatic that, where judges made explicit reference to the constraints on what they could say, this was frequently framed in terms of a concern to avoid questions on individual cases. The following excerpt from Lady Justice Smith’s

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<sup>43</sup> Guidance, para 3. Contrasts with the decentralisation and ‘maverick ventures’ of the US federal judiciary.

<sup>44</sup> Guidance, para 9.

<sup>45</sup> Guidance, para 12.

<sup>46</sup> Guidance, para 13.

evidence before the House of Commons Committee on the Health and Social Care Bill in 2008 provides an example:

**The Chairman:** ... My colleagues understand that there are certain questions that you cannot answer because of your position. If, at any stage, you feel that the questions are not appropriate, feel free to say.

**Lady Justice Smith:** I will say so, but generally any difficulty will arise out of individual cases. I cannot imagine that you are going to ask me about those.<sup>47</sup>

In the realm of prospective legislation and policy, by contrast, the patterns become altogether more complicated. There were few clear instances of comments by judges ‘on the merits, meaning or likely effect of provisions in the proposed legislation’ – less than 7 per cent of points made in answering oral questions, and less than 4 per cent in the case of written submissions – or indeed of ‘comments on the merits of proposed policy’. But occasionally judges do stray into offering advice on the meaning of legislation. Two examples are given: the first is drawn from Lord Woolf’s evidence on the Freedom of Information Bill in 1999:

**Q886:** ... Is it your understanding, first of all, that... there is a difference between “prejudice” and “substantial harm”? I use “substantial harm” because that was the phrase used in the White Paper which preceded the Bill. In a common-sense way, is the move from “substantial harm” to “prejudice” to be seen as a weakening?

**Lord Woolf:** Undoubtedly. I do not think there is much distinction, if any, between “prejudice” and “harm”; prejudice involves harm. Once you put “substantial” in front of the word “harm” you are adding something which is not there in relation to prejudice. If you said “substantial prejudice”, then I would suggest there is not much significance. The way I would expect the court to view the word “prejudice” on its own is that there must be some real prejudice as opposed to a merely fanciful prejudice – we are talking about something which has some weight – but if you then add the word “substantial” that is something beyond what “prejudice” by itself means.

The second comes from the evidence of Sir Igor Judge (as he was then) on the Draft Corporate Manslaughter Bill in 2005:

**Q504 Gwyn Prosser:** One of the factors which the jury is asked to consider, amongst others, is whether the managers or the company profited from the action or the omission. We have had some evidence which suggests that would better be replaced by “benefits” rather than “profits”. Do you have any strong feelings on the use of those words?

**Sir Igor Judge:** You could use both almost interchangeably. What you are really getting at is the company that chooses to turn a blind eye to its responsibilities in order to make money or profit or benefit. I do not actually see a great difference myself.

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<sup>47</sup> Smith evidence.

More frequently, judges stray into commenting on the merits of the proposed legislation or policy. These included statements of support for the provisions in the Bill or for its overall policy, or comments on the merits which were within the broad territory of the ‘judicial independence’ and ‘practical operation and technical aspects’ exceptions, but which were not clear and precise instantiations of them. In his evidence in 1999, Lord Woolf made the following observations, which, although about the ‘practical operation’ and possible pitfalls of the Draft Freedom of Information Bill, did not directly relate to ‘the operation of the courts or aspects of the administration of justice’:

**Lord Woolf:** ... what this Bill is doing and what it is about is giving people rights to information before the documents reach the Public Record Office... the Public Record Office is dealing with the wholesale in that once the documents get there, they are readily available to people and it is very important... that there is a proper bridge between those two services and I think it is unwittingly done, it is not intentional, but by amending or by deleting part of the old Act, they have unfortunately undermined that very important role.<sup>48</sup>

And before the House of Lords Committee on the Constitutional Reform Bill in 2004, Lord Ackner made the following recommendations about the drafting and effect of the Bill:

**Lord Ackner:** ... clause 1 must in terms say that there is an obligation upon ministers to maintain and support the rule of law. If that had existed the ouster clause [in the Asylum and Immigration Bill 2003] would have had no breath of life and the intervention of a retired Lord Chancellor would not have been necessary.<sup>49</sup>

Clearly, these were comments which were on point and wholly appropriate for Lord Ackner to make, since the judiciary must also participate in the shared governmental responsibility to negotiate and uphold ‘constitutionality’ and the rule of law. Yet they are also not absolutely or positively secured by the Judicial Executive Board’s guidelines, which on a strict interpretation refer narrowly to contributions which go to ‘judicial independence’ – as Lord Ackner himself acknowledged, “[t]he independence of the judiciary is a very important pillar but it is not the same thing.”<sup>50</sup>

The subject-matter of the proposed legislation is often key in determining how far and how often the Judicial Executive Board’s guidance is breached. Submissions on the Constitutional Reform Bill and its progeny rarely strayed over the boundaries of propriety, since matters relating to judicial independence were consistently at the forefront of discussions with judges. Equally, evidence on proposed legislation such as the Mental Health Bill in 2005 and the Armed Forces Bill in 2006 was more likely to stay within the confines of commentary ‘on practical operation or technical aspects’ which ‘directly affected the operation of the courts or aspects of the administration of justice’, since these were largely concerned with reforming court structures and procedure. In addition, there were a number of instances where the judicial witness

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<sup>48</sup> Woolf at Q 922.

<sup>49</sup> Ackner, at Q313

<sup>50</sup> Ackner, at Q313.

was appearing in a dual capacity, for example because they chaired an inquiry into a matter related to the proposed legislation. Sir Richard Scott's evidence on the Draft Freedom of Information Bill in 1999, for instance, was given against the background of his report on the Arms to Iraq Inquiry; and Lady Justice Smith's submissions on the Health and Social Care Bill in 2008 arose directly out of the recommendations she made as chair of the Shipman Inquiry. The first question put to her in the course of questioning was as follows:

**Q61 Sandra Gidley:** The Bill makes a number of changes to the regulation of health care professionals, particularly in medicine. Are the changes proposed in the Bill broadly in line with your findings and recommendations?<sup>51</sup>

In such circumstances, judges have a greater propensity to make overt suggestions on how to improve the policy and drafting of the proposed legislation. An example may again be drawn from Lady Justice Smith's evidence:

**Q64 Sandra Gidley:** ... Would you like to see any other changes to the Bill? Are we missing an opportunity here?

**Lady Justice Smith:** There is one ... I recommended that adjudication panels should be chaired by legally qualified people. I explained a number of reasons why I made that recommendation...<sup>52</sup>

Other variables which appeared to affect the frequency and extent of submissions which violated or stretched the guidelines included the seniority and status of the judicial witness: senior judges and retired judges were generally more relaxed about commenting on the merits of proposed legislation and policy. Personality, too, played a part, with some senior judges being more likely than others to speak out on issues not strictly protected by the guidelines. Another factor was the role played by select committees in drawing judges into discussions that could potentially impair their impartiality. A greater proportion of questions were on the effect or merits of proposed legislation and policy, than were judges' answers. When faced with such questions, judges can simply refuse to answer, or they may deflect the question by responding with a statement of fact or an exposition of the current legal position. Nevertheless, select committees were sometimes successful, through persistent questioning, in obtaining a direct answer, as shown by the following excerpt from Sir Igor Judge's evidence on the Draft Corporate Manslaughter Bill in 2005:

**Q497 Chairman:** The second point of coverage is about police forces, which are not incorporated bodies. There is a weight of evidence, and indeed an assumption by everybody we have spoken to, including the police themselves, that they should be covered by the legislation. Do you have views as to how that might be done?

**Sir Igor Judge:** As to whether it should be done, that absolutely is policy.

**Q498 Chairman:** Even the police have come here saying they should be covered by it.

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<sup>51</sup> LJ Smith evidence.

<sup>52</sup> LJ Smith evidence.

**Sir Igor Judge:** It is still a matter of policy, but let us pause to think. We are envisaging the police behaving in such a way that either a police officer is killed or a member of the public is killed because somebody in the organisation has been grossly negligent. In principle, I see no reason why it should not apply to the police.

This feature of the dynamic between judges and legislators is further borne out by the fact that the incidence of such submissions is lower in written evidence (less than 4 per cent as opposed to slightly over 6 per cent of oral answers). It may be attributable to a number of factors, including parliamentarians' understandable desire to maximise the utility of evidence sessions with judges, the instinct to seek out judicial approval of legislative or policy suggestions as a way of 'lending jurists' prestige'<sup>53</sup> to the committee's ultimate recommendations, and perhaps also to a lack of comprehensive awareness and understanding on the part of committee members about what is appropriate to ask judicial witnesses. Chairs of select committees, for instance, do not always explain to panel members at the outset that judges are subject to certain constraints, although they may remind them in private before the public session begins. But judges sometimes start with a caution of their own, as Sir Igor Judge did before giving evidence on the draft Corporate Manslaughter Bill:

**Sir Igor Judge, Q491:** I am not giving you legal advice and I have to be extremely careful not to comment on matters which are actually policy matters for Parliament and which may be controversial in the very broad political sense, so I have various inhibitions on me.

### *Hostility and Deference*

Oral hearings are, almost invariably, conducted in a courteous and collaborative manner. Hostile questions are virtually unheard of – the closest example we identified was a teasing question by the Chair of the House of Commons Constitutional Affairs Committee to Lord Bingham in 2004, borne out of protracted negotiations with the senior judiciary for housing the proposed new Supreme Court:

**Q107 Chairman:** Are you not beginning to sound a bit like the popstar who rejects all hotel suites which the manager has offered?<sup>54</sup>

In fact, hostile answers from judges were, though still uncommon, more frequent than aggressive questioning. These arose largely in the course of evidence on the Constitutional Reform Bill, with judges venting their frustration at the way in which the reform process had been undertaken. Lord Ackner was frequently acerbic in his criticism of the government:

**Lord Ackner:** One finds that throughout the Civil Service. There is an inbuilt resistance to surrender any power.<sup>55</sup>

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<sup>53</sup> Rishikof and Perry?

<sup>54</sup> Bingham, May 2004 Evidence

<sup>55</sup> Ackner, at Q313

**Lord Ackner:** I think the Home Office as ruled at the moment does not really understand many of the basic tenets of the rule of law and the sooner one does something about it the better.<sup>56</sup>

On the other side, the courtesy which principally characterises the attitude of select committees towards judicial witnesses sometimes borders on deference. Where select committees rely too heavily on the evidence given by judges, the utility of the collaborative exercise may be undermined, as the ‘responsibility to uphold the rule of law’ through ‘information-sharing and constructive negotiation’ becomes less ‘shared’ by the parties to the dialogue, and more one-sided. Too much deference, in this sense, represents something akin to an abdication of responsibility on the part of the committee. This is perhaps illustrated by comments made by the Chair of the Joint Committee on the Draft Modern Slavery Bill, in the course of questioning Lord Judge in 2014:

**Q643 Chairman:** ... I think you have finished off any ideas that the committee might have had about putting in a statutory defence.<sup>57</sup>

**Chairman:** You are helping to write our report as you sit there. It is immensely helpful.<sup>58</sup>

### **Advantages to Parliament and the Judiciary from judges giving evidence on bills**

The final question we addressed in this study was to assess the costs and benefits to Parliament and to the Judiciary of inviting judges to give evidence on bills. For Parliament the benefits are clear. As we have shown from the numerous examples given in this article, judges are highly expert witnesses, on the law and on its implementation in the courts. It would be hard to find greater experts. Sir Andrew Longmore, talking about the Insurance Bill, had spent his career in insurance law; Sir Igor Judge, thinking about how a trial judge would explain the law to a jury, could draw on his own long experience as a trial judge, and of criminal appeals where the summing up had gone wrong; Judge Jeff Blackett, as Judge Advocate General, was an unrivalled expert on the law and practice of Courts-Martial. Judges can explain to Parliament not just how a provision is likely to be interpreted, but what its practical impact is likely to be – including side-effects which might not have occurred to the legislators. And judges who have chaired inquiries, like Sir Henry Brooke when he was chairman of the Law Commission, or Lady Justice Smith who had chaired the Shipman Inquiry, could explain some of the policy thinking behind the changes, as well as the law giving effect to them.

For judges the benefits might seem less clear, and the risks greater. But there are several benefits. They can point to gaps in the law, as the Family Sub-Committee of Circuit Judges did when pointing to the piecemeal protection for battered women, rectified by the Family Homes and Domestic Violence Bill

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<sup>56</sup> Ackner, at Q344

<sup>57</sup> Judge evidence

<sup>58</sup> Judge evidence, at Q644

1995. They can discourage Parliament from passing law which is insufficiently specific (as Lord Woolf did over the draft Freedom of Information Bill), or which is over-specific (as Sir Igor Judge did on the draft Modern Slavery Bill). They can encourage Parliament to go further, as Sir Andrew Longmore sought to do over the Insurance Bill, and Judge Jeff Blackett with Courts-Martial. They can warn Parliament about practical consequences which might have been overlooked. And looking more widely, they can remind Parliament of the basic principles of the rule of law, as Lord Mackay so eloquently did in his opening statement about the UK's obligations under international law, before discussing the draft Voting Eligibility (Prisoners) Bill.

The main cost to the judges is the time invested in researching and preparing a written submission, or attending an oral hearing. They do not have to give evidence: and at an oral session, they can refuse to answer questions which go beyond their proper role. In the sessions we analysed, the judges did occasionally duck a question; but rather more often, they went further than the guidelines strictly allow, by getting into discussions of policy or statutory interpretation. They were able to do this without getting into trouble for several reasons. Although the hearings are on the public record, they attract little or no publicity: the media show no interest in bill committees. Second, the policy issues being discussed are often quite narrow and technical, and unlikely to generate political controversy. Third, although judges can sometimes be tempted into giving their view on a question of statutory interpretation, we are not aware of any case where subsequently they had to recuse themselves as a result.

So overall, we concluded that there are clear benefits to Parliament and to the judiciary from judges giving evidence on bills. We found no instance of judicial independence being compromised as a result; if anything the reverse, since quite a lot of evidence, especially on the Constitutional Reform Bill, consisted of robustly reminding Parliament of its importance. We are not able to report how much influence and impact the judges have had, in terms of successfully getting bills amended, which will have to await a further, more elaborate process tracing study. Our purpose in this initial study has been to explain what judges talk about when giving evidence on bills; and to argue, as we did in our earlier article, that this is a dialogue which is of benefit to both sides.