



Public Accounts Committee
Inquiry of MoJ recall: Covid-19 impact on courts and prisons
Bar Council written evidence

About us

The Bar Council represents approximately 17,000 barristers in England and Wales. It is also the Approved Regulator for the Bar of England and Wales. A strong and independent Bar exists to serve the public and is crucial to the administration of justice and upholding the rule of law.

Scope of response

This submission addresses the topics the Committee has sought evidence on:

Her Majesty's Courts and Tribunals Service and Her Majesty's Prison Service on a range of current issues in the Department's remit including the impact of Covid-19 on courts and prisons; the HMCTS transformation programme and the prison estate.

Overview

1. The Bar Council's submission to the Justice Select Committee in September 2020 addressed the impact of Covid-19 in relation to court capacity. The summary of the submission was¹:
 - a. *"The additional pre-Covid-19 provision of sitting days and the one-off additional capital funding are inadequate to address the backlog and maintain an acceptable throughput of cases. This is the case across the criminal, civil and family courts and tribunals, meaning that the entire court estate requires more sitting days and/or judicial capacity urgently.*
 - b. *The vast reduction in Crown Court capacity over the last six months has caused the adjournment of the majority of trials which were listed to take place. We do not consider that the trial participants in these cases have experienced proper access to justice – whilst cases continue to be listed as much as two years ahead, that will remain the case. While the civil and family courts have fared better, the approach has been inconsistent, and this has led to unnecessary delays. Moving cases online has gone some way to assuage this but has not been able to absorb the entire impact or been consistent across jurisdictions or the country.*

¹ <https://committees.parliament.uk/writtenevidence/12126/pdf/>

- c. *The physical capacity of court rooms is increasing, and the promised numbers are encouraging. However, emphasis must be placed on securing sufficient staff to cope with increased capacity and in tackling the problems associated with large and complex trials.*
- d. *More robust and reliable technology is vital for future court business. It is also vital to ensure that the correct balance is struck between remote and in-person hearings."*

Backlog

2. An efficient, effective and respected justice system needs a court estate which is fit for purpose. The current court estate is not fit for purpose in scale or condition. Since 2010, eight Crown Courts² (out of 92) and 164 Magistrates' Courts have been closed (out of 320)³, as well as 90 County Courts (out of 240), 18 tribunal buildings (out of 83) and 17 family courts (out of 185). That is a total of 297 closures, leaving an estate of approximately 350 buildings. There are now backlogs throughout the entire justice system, not solely the criminal justice system.
3. The magistrates' backlog at 27 December 2020 stood at **468, 035** cases – a reduction of **11%** from the peak seen on 26 July, but still **15%** up on the pre-Covid baseline.⁴ The Crown backlog at 27 December 2020 has reduced marginally, but is still at **54, 115** cases.⁵ This is **38%** higher than the pre-Covid baseline (which was even then at record levels), and is the highest for at least twenty years, with the backlog disproportionately composed of complex and lengthy cases needing jury trials.
4. There is a shortfall of courts suitable for use with Covid safety measures. The severe cuts to the court estate budget over the past decade has meant that buildings which were already inadequate in terms of facilities and maintenance are now struggling to deal with the necessary but onerous safety requirements, particularly around social distancing. There is inadequate provision of appropriate facilities for consultation and conferences with clients. This does not lend itself to either the interests nor administration of justice or safety of court users. Urgent investment into the present court estate is required and indeed the provision of additional buildings as promised is now time critical.

Multi-handed trials

5. Multi handed trials, i.e. trials of more than one defendant, are the subject of chronic delay. Consequently, the issues are compounded when it comes to managing these trials. Many courtrooms simply do not have capacity for trials with eight, nine or even more defendants. The use of remote juries is not contemplated, and this is for good reason, in the Bar Council's opinion. The Bar Council was pleased to hear of proposals for 'Supercourts' that would facilitate multi-handed trials for up to 12 defendants. However, the small scale of this project will not, we fear, go far enough to rectify the

² Sturge G, Court Statistics for England and Wales, House of Commons Library, 2018, p. 16, retrieved 12 October 2019, researchbriefingsfiles.parliament.uk/documents/CBP-8372/CBP8372.pdf

³ <https://commonslibrary.parliament.uk/local-data/constituency-data-magistrates-court-closures/>

⁴ HMCTS (14 January 2021) "HMCTS weekly management information during coronavirus - March to December 2020" <https://www.gov.uk/government/statistical-data-sets/hmcts-weekly-management-information-during-coronavirus-march-to-december-2020>

⁵ Ibid.

difficulties which are making it impossible for trials of such scale to continue whilst social distancing is in force. Action is required sooner rather than later.

Custody time limits and time on remand

6. A recent report by the BBC⁶ which referenced Her Majesty's Courts and Tribunals Service's (HMCTS) own statistics demonstrated that those on remand are sometimes waiting years for their trials to go ahead. While it is good news that the backlog in the Magistrates' Courts is falling, HMCTS' most recent statistics show the remand population is at its highest in nine years, an increase of 24% over the past year (to 12,066)⁷. These long waits are causing severe psychological issues for defendants and cannot be considered acceptable in a properly functioning justice system.
7. The government has also temporarily extended the custody time limit for those on remand from 182 to 236 days⁸ supposedly in an effort to help clear the court backlog. The Bar Council has always believed that justice delayed is justice denied, and the longer defendants wait from charge to their day in court the longer they do not see justice done. The Bar Council asks the government to provide more data, including on the average length of time spent on remand.

Delay

8. London's Independent Victims Commissioner, Claire Waxman, has warned that delays in hearing trials also have adverse effects on victims, by further traumatising victims and increasing the chance of victims dropping out of the criminal justice process altogether.⁹ There is also a further potential impact on the effective delivery of justice. Many cases, in all jurisdictions, rely on witness recollection, which can only be hampered by delays.

Current Situation

Unnecessary attendance at court

9. The Bar Council continues to receive reports from its members on lack of space to socially distance in courts, including in common areas and in consultation rooms (where available), poor or no ventilation in courtrooms, lack of care taken by security services to observe Covid-safe practices, and lack of provision for remote hearings. This means that practitioners and court users must often attend court for matters such as non-contentious short hearings which could be heard remotely in order to ensure the safety of all those involved, or are forced to return briefs where they cannot attend as a result of self-isolation.
10. The reduction of footfall into court for all jurisdictions ought to be encouraged. The practice of "block listing" of cases in some courts continues, with the inevitable but avoidable increase in footfall and overcrowding.¹⁰ Data from our most recent Bar

⁶ <https://www.bbc.co.uk/news/uk-wales-54957734>

⁷ <https://www.gov.uk/government/publications/offender-management-statistics-quarterly-july-to-september-2020/offender-management-statistics-quarterly-july-to-september-2020-2>

⁸ <https://www.legislation.gov.uk/ukxi/2020/953/introduction/made>

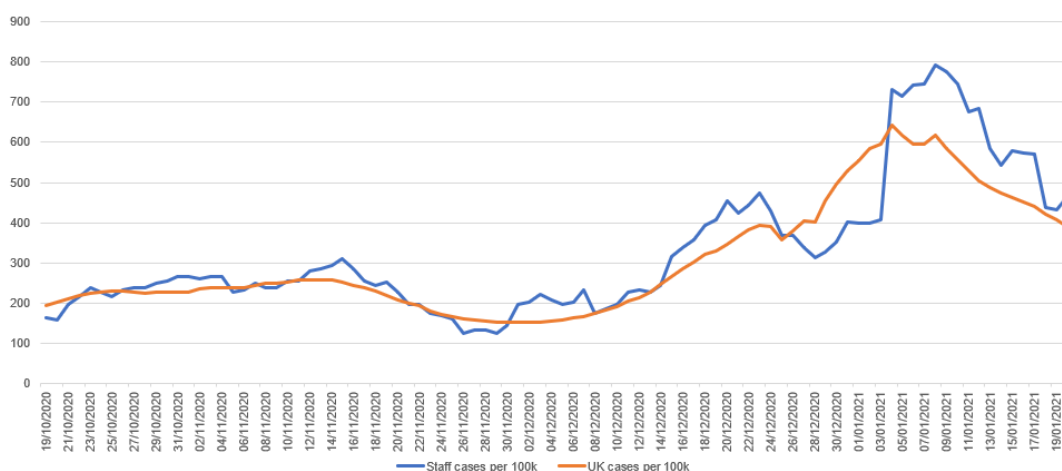
⁹ <https://www.london.gov.uk/press-releases/mayoral/victims-face-years-of-delays-to-court-cases>

¹⁰ <https://www.gov.uk/government/news/hmcts-online-event-21-january-2021-court-safety-for-legal-professionals>

Survey in December¹¹ shows that, of barristers who attended court in December 2020, before the new variant and national lockdown, **84%** had concerns about practical arrangements from the perspective of their safety and wellbeing. This has not improved since the summer.¹²

11. The seriousness of these concerns is evident in a report made to our Talk to Spot service of two defendants who were arrested together and were partners. One had tested positive for Covid-19 and was heard remotely, but their partner was still brought to court despite having been in close contact with someone who had tested positive. A recent survey of Magistrates Courts included reports of a lack of space in conference rooms and in the cells meaning practitioners could not socially distance, and some cell staff not wearing face masks, as well as a lack of conference rooms.
12. A recent Parliamentary Question on the number of Covid-19 cases across the court estate (25 January 2021)¹³ showed that staff rates including tribunals were at 461.8 per 100,000 against a national figure of 390.5, which are concerning and suggest Covid safety and security measures implemented by HMCTS are not working. Whilst the Bar Council appreciates that HMCTS' assessment of the number of court users who have tested positive recently is consistent with numbers across the UK, it is not clear how these numbers are calculated or who exactly falls within this definition, and it seems that HMCTS does not have a reliable record of the number of court users.
13. The graph below, supplied by HMCTS, shows the number of Covid cases amongst staff as compared with the UK population's cases:

HMCTS staff rolling 7 day average



14. The Criminal Bar Association's joint letter to acting CEO of HMCTS Kevin Sadler noted: 'Confirmation of over 600 positive cases amongst professional court users since

¹¹ <https://www.barcouncil.org.uk/resource/bar-survey-summary-findings-december-2020.html>

¹² In fact, it is slightly worse. In July, 82% of those who had attended court had concerns about court arrangements.

¹³ <https://questions-statements.parliament.uk/written-questions/detail/2021-01-25/142920>

24th November across the HMCTS estate, evidences the alarming extent of the crisis emerging in the justice sector. If HMCTS continue to fail to take remedial action to ensure that transmission levels are significantly reduced and professional, lay and public court users remain safe then further action will be necessary. That remedial action must include the rapid introduction of lateral flow testing at every court and for every prisoner brought to court to ensure that all court users are tested negative before they enter buildings.¹⁴ The Bar Council supports the call for rapid introduction of testing and proper checks carried out before prisoners are brought to court.

Video Remand Hearings

15. The Bar Council was pleased to learn that the majority of police forces are now once again operating Video Remand Hearings for Covid-confirmed and suspected individuals. It is clear that any and all provisions available to reduce unnecessary footfall in courts must be taken. Whilst the Bar Council was pleased to learn that a testing pilot has begun in Manchester in relation to court users, we question the necessity for a pilot given the immediacy of the situation and consider that “testing” has been successfully operating on a national scale for many months now. If the pilot is merely assessing the practicality of administering tests in that location, and given the repeated statements by HMCTS about the diversity of the court estate, it seems unlikely that the pilot will produce data which can usefully be applied elsewhere.

The need for remote hearing capability

16. Access to remote justice enabling the work of the courts to continue away from the physical court estate remains an issue. In response to a question during the HMCTS Webinar on Court Safety for Legal Professionals¹⁵ it was confirmed that all courtrooms should have access to remote hearing capability with almost 3,200 Cloud Video Platform (CVP) rooms alone currently available across the courts and tribunals. It was also stated that 2,300 rooms on the court estate were equipped with video hardware before the pandemic and, since the pandemic began, video equipment has been installed in over 300 more rooms and another 450 rooms have been surveyed, with installations taking place in the coming weeks. Data on usage and numbers of hearings will be published in February 2021. The Bar Council would like to see this data when it becomes available.
17. Whilst the above figures are reassuring, we continue to receive concerns from our members on securing access to remote justice. Two examples include:
 - a. Counsel put in a CVP/telephone application for a two-minute mention five days prior to the date. The CVP address bounced, the Magistrates’ Court was also emailed with a request and there was no response. Counsel at the time could not attend court as their partner had developed Covid symptoms and they were waiting on a test, about which they informed the court. No response from the courts was forthcoming, despite chasing. Solicitors were eventually called by the court and told Counsel had to attend in person. Luckily there was

¹⁴ <https://www.criminalbar.com/wp-content/uploads/2021/01/Joint-Statement-to-Kevin-Sadler.pdf>

¹⁵ <https://www.gov.uk/government/news/hmcts-online-event-21-january-2021-court-safety-for-legal-professionals>

an agent at court in this case, but otherwise the clients would not have had representation;

- b. Counsel received an instruction to attend in person at Inner London Crown Court for a non-compliance hearing. This was a mention and the non-compliance issue had been resolved. There had been no direction allowing counsel to attend remotely, despite there being no need for it to be heard in person.

Recommendations

18. In the Bar Council's submission to the Justice Select Committee's Court Capacity inquiry September 2020, we stated¹⁶: *"The approach to remote hearings across the courts on all circuits has been inconsistent. The pinch points appear to be in the County Court rather than the High Court."*
19. Whilst the Bar Council welcomes the improvements that have been made in the lower courts since then, the issue has seemingly yet to be rectified. We note a recent survey of legal professionals in the Magistrates Court, between October 2020 and January 2021, where 17 respondents requested CVP and only three were granted. This was often due to lack of necessary facilities in those courts. The Bar Council called upon the Ministry of the Justice to consider the following recommendations in our Budget Submission of January 2021¹⁷ which will help rectify these problems quickly and effectively:
 - a. Create 42 additional Nightingale Courts to help ensure that courts can progress hearings safely during the pandemic and help clear the backlog (to bring overall numbers to 60);
 - b. Invest £55m for HM Courts & Tribunals Service (HMCTS) to recruit and retain more staff to help respond to increased demand on court staff as a result of Covid-19.

The Bar Council
February 2021

¹⁶ <https://committees.parliament.uk/writtenevidence/12126/pdf/>

¹⁷ <https://www.barcouncil.org.uk/resource/bar-council-budget-submission-january-2021-pdf.html>