

Written evidence from the Bar Council

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.

Summary

- 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.
- 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.
- 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.
- 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.

Question 1: The impact of Covid-19 on court sitting days and the backlog of cases, including whether the one-off additional funding and 4,500 additional days provided for 2020/21 is sufficient and staffing and recruitment issues

Criminal

1. The short answer is that 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. Significant and sustained extra investment in the whole criminal justice system is required.
2. We applaud the vast amount of work that was done to reopen/sanitise the court estate so that some jury trials could be resumed in May and the continued work to expand the number of court rooms available for safe hearings. Nonetheless, the profession is deeply concerned about the damage to confidence across the justice system that has been caused by the huge delays that continue in crime. Although cases, including

Crown Court trials, are being heard, the vast majority of witnesses and complainants have had their cases pushed off into the distant future.

Crown Courts

3. Covid-19 has made the already unacceptable backlog of criminal cases, especially trials, worse. The restriction on sitting days in 2019 underlies the current crisis and was largely responsible for the pre-existing backlog. The extra 4,500 sitting days for 2020/21 was acknowledged to be a first step that would be insufficient on its own to get rid of the backlog before the pandemic struck and will clearly not solve the current challenges.
4. The drop in the allocation of Crown Court sitting days from 97,400 in 2018/19 to 82,300 in 2019/20 represents a 16% reduction. Even if Crown Court receipts for 2019/20 had fallen by approximately 10-14%, that drop in sitting days outstrips the fall in receipts. The Lord Chancellor's announcement of further Crown Court sitting days for the first half of the 2020/21 financial year¹, only brought the net projected reduction in sitting days to 11%. In other words, this still does not bring the number back to 2018/19 levels.
5. We understand that the Committee has asked the Lord Chancellor and HMCTS to answer questions about the available data. Q1 data (January – March) has been published. We await publication of Q2 data, due at the end of September. However, HMCTS has subsequently published some management information² so now has a clearer idea of the backlog in trials. We believe that each Resident Judge knows what the snapshot of outstanding trials is at their court and how many new cases are being received each week. Across the nation in recent days a number of court centres have been fixing trials in the summer of 2022 and later. These cases include some where the defendants are in custody. Recently the government has announced the extension to custody time limits from a maximum of 6 to 8 months; in other words a 25% increase in time a defendant can spend in custody awaiting trial “to help aid the criminal courts’ recovery from the coronavirus pandemic” according to the Lord Chancellor. That delay affects not just the innocent accused but the victim and witnesses. Cases must be positively driven forward to trial and final hearings.
6. Anecdotal evidence from the Crown Court Judiciary suggests that disposal of cases that do not involve trials is under control and does not present a problem. Any statistical analysis must distinguish between jury trials and everything else. We suggest that the most telling statistics are those relating to jury trials and that is where the focus of the Committee should be.
7. Staffing of courts. The current levels of staffing are inadequate to meet the needs of the justice system in, and after, the pandemic. In their Criminal Court Recovery Plan, September 2020, the need to hire 1600 staff to support the recovery is a significant acknowledgement that trained people are at the heart of the recovery. We are pleased to see it, but it is late and not enough to ensure there are sufficient HMCTS staff³ to ensure that trials and hearings run smoothly whether remotely or in person.

Magistrates Courts

¹ MoJ (2020) “Twitter Feed” <https://twitter.com/MoJGovUK/status/1224301180525871105?s=20> Accessed 11 February 2020

² <https://www.gov.uk/government/statistical-data-sets/hmcts-weekly-management-information-during-coronavirus-march-to-may-2020>

³ CVP operators, ushers and court clerks, digital support officers and building champions.

8. Anecdotal evidence from practitioners suggests that custody trials are taking place in magistrates courts and that there is a push to get these cases heard. We are not currently in a position to assess whether there is sufficient capacity to address the backlog of magistrates' court trials, not least since the extent to which the backlog consists of trials is not clear. Bail trials and other non-CPS cases are subject to very considerable delay. Whilst it may be understandable and appropriate to prioritise custody cases, the detriment to parties arising from delay, in particular the impact on defendants in the Youth court, should not be underestimated.

Family

9. HMCTS statistics show that, from June 2019 to May 2020, outstanding private law family cases rose by over 16,000. Disposals were at a yearly low in April, at approximately half their level in June of last year. In the period between June 2019 and May 2020, outstanding public law cases had risen by over 4,500 and disposals had almost halved.

Civil

10. In civil courts, while the claims received decreased, the time to first full hearing for small claims rose by 6.2 weeks⁴.

Employment

11. On 14 July 2020, the Employment Lawyers Association (ELA) hosted a webinar with Judge Barry Clarke, President of Employment Tribunals in England and Wales and Judge Shona Simon, President of Employment Tribunals in Scotland. The Presidents provided a shared roadmap of the projected listings and hearings for 2020. Owing originally to the desire to avoid in-person hearings during the coronavirus pandemic, the President jointly issued guidance, a direction, an FAQs document and a road map regarding how proceedings will be operating in employment tribunals in England, Wales and Scotland until further notice.
12. President Judge Clarke stated in the ELA webinar that the issues with the raising case load and backlog which attributed were due to three reasons:
 - a. the backlog of cases is increasing at approximately 1% per week; and the reality is that this is worse than the 2009 recession which hit around 36,000 cases;
 - b. pandemic-related cases: legal issues relating to job-subsidy schemes, return to work etc. which involve important public interest issues to be determined;
 - c. future anticipated reality with the winding up of the job-retention scheme when a significant number of employers will be making redundancy decisions.
13. HMCTS has also published data demonstrating the increase in the backlog of employment tribunal cases over lockdown and since Covid-19⁵.

Immigration

14. On 23 March 2020, all First-tier Tribunal immigration appeal hearings in London were vacated with the indication that a telephone Case Management Review (CMR) would be listed. New Directions were imposed. Many legal representatives failed to comply with the new Directions because of social distancing measures or due to

⁴ <https://www.gov.uk/government/statistical-data-sets/hmcts-management-information-june-2020>.

⁵ <https://www.gov.uk/government/statistical-data-sets/hmcts-management-information-june-2020>

misunderstanding the new Directions. For many months, no CMRs were heard by telephone. Courts in London are operating at a very much reduced level. Consequently, the income of immigration barristers has been dramatically reduced.

Question 2: Practical experience of delay in Crown and other courts among lawyers, witnesses, victims and defendants and whether there is appropriate access to justice

15. Due to adjournments and the shortage of hearings, there has been a significant decline in work for barristers (particularly junior barristers) across all jurisdictions, though less so in family, where hearings have not been listed or been adjourned without good reason.

Criminal

16. 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. Every adjourned trial will have caused distress to victims of crime, witnesses, defendants and family members of all concerned. Many of those involved will also have experienced delay prior to the adjournment of their trials, as a result of pre-existing backlogs and systemic underfunding.
17. The following examples show some of the serious cases which have been affected, both by Covid-19 related delays and by the existing backlog. They can provide no more than a snapshot of those affected. 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. As they refer to ongoing cases, only limited details have been provided. Further information can be provided in confidence to the Committee if this would assist.
 - a. **Domestic violence:** Allegations of false imprisonment and making threats to kill by previous partner. Complainant is vulnerable. The case should have started its court process on 3 April 2020 but did not reach the Magistrates' Court until June 2020. At Plea and Trial Preparation Hearing (PTPH) in July the court had no trial dates to offer at all. In August a provisional trial date was provided in May 2022, with no guarantee that the trial would take place. Given that the defendant's custody time limit will expire in December 2020 it appears likely that he will be released on bail at some point well in advance on trial.
 - b. **Sexual offences:** Allegation of rape, occurring and reported in 2016. First appearance in the magistrates' court did not take place until 2019, with trial listed for July 2020. The trial is now listed in April 2021, more than 5 years after the reporting of the allegation.
 - c. **Murder:** The deceased was a 15-year-old, who was killed more than two years ago. There are four defendants, all under 18 and in custody. The bereaved family and the defendants expected and anticipated that the trial would take place in June 2020. The court removed the trial from the list at short notice because it did not have enough space. It is hoped that the court will have room for the trial to take place in October 2020.

- d. **Drugs offences:** A multi-defendant drugs conspiracy, in which some defendants pleaded guilty in August 2019. Those who pleaded guilty are in custody. They cannot be sentenced until the outcome of the trial is known. The trial should have taken place in Spring 2020. It was taken out of the list and has not been put back. More than a year after the defendants pleaded guilty, they still do not know when they will be sentenced.
- e. **Less serious cases,** particularly bail cases are being regularly put off for trial until 2021 or 2022. [Specifics can be provided upon request].

Civil

- 18. 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. They appear to be with fast track trials, Ministry of Justice Stage 3 hearings, small claims and possession hearings.
- 19. On the Western Circuit, there was an uptick in capacity in May and June as Deputy District Judges/Recorders returned to work, and there was a modest increase in work. Work that has been going ahead tends to be small claims (often by paper so no work for the Bar) and interim telephone hearings. This benefits more senior practitioners the most. That leaves a significant gap at fast track level. The Cloud Video Platform (CVP) has helped but is limited.
- 20. The Junior Chancery Bar Association conducted a survey of junior practitioners in early June. The overall picture given by the overwhelming majority of respondents was that there has been a significant decline in the number of enquiries and instructions since the pandemic. There were a few exceptions to this. The adverse impact on instructions cannot solely be attributed to the lack of remote hearings; however, it is likely to have been a significant contributing factor. The loss of possession hearings was flagged as a particular issue for very junior practitioners.
- 21. For the Property Bar, there was particular concern about the blanket stay of possession proceedings, and adjournments in the County Court and First Tier Tribunal. The general sense was that the courts had not dealt with this well, especially the County Court(s) and the First Tier Tribunal. Whilst it is accepted that many possession proceedings could not go ahead by remote hearings, there is a concern that even commercial property disputes and high-value residential property disputes have been the subject of the stay on possession proceedings. In terms of how COVID-19 has affected members' practice, the general tendency was a very significant reduction in court work and a significant reduction in paperwork.
- 22. For the Planning and Environmental Bar, a significant portion of work was conducted online, as most court proceedings were paused at the beginning of the outbreak.
- 23. For the Personal Injury Bar, a survey of practitioners was conducted in May and July (the latter focussing on junior members). The general feeling is that more cases are starting to be listed for hearings but still far, far fewer than before lockdown. Cases are still being adjourned. Video technology in county courts is not working well. There is still a very real disparity between how the Court of Appeal and High Court are dealing with cases and how the County Court is managing. Responses to the May 2020 survey by the Personal Injury Bar Association (PIBA) show that, across all

circuits and among predominantly Personal Injury (PI) sets, overall hearings have reduced by just over 40%

24. Junior tenants are still not having Fast Track trials, Small Claims cases, Stage 3 assessments and interim hearings listed in any real number in the county courts.
25. There are still county court hearings being adjourned without good cause e.g. Croydon County Court sent notice of a fast track hearing less than two weeks in advance of a scheduled hearing in June that it would be adjourned due to COVID-19, but did not give any specific reasons as to why COVID-19 had caused the adjournment. This was felt particularly unnecessary as in a telephone application hearing on the same case in May it was specifically stated by the district judge that the trial would still continue on the scheduled date in June.
26. There still appears to be regional inconsistencies in how remote hearings are to be assessed going forwards and dealing with hearings both in person and remotely. It looks like this is partly due to lack of resources both in terms of judicial and court staffing, as well as actual equipment and hardware to deal with remote hearings.
27. There have been a number of examples of short notice of remote hearings in the County Courts. This late notice can cause a number of problems. The parties may be left uncertain until the last minute as to whether the hearing is due to take place at all; and the late notice can lead to a significant increase in costs, as legal representatives are required to drop other matters to deal with the urgent hearing. Late notice is also a real problem for the parties and their legal representatives who have caring responsibilities, and vulnerable parties or Litigants in Person.

Family

28. At the beginning of lockdown, most family work was conducted remotely. As courts have begun to reopen, reports have been mixed. In Midlands courts like Derby, Nottingham and Sheffield reports have been fairly positive, with some issues. But they are all ahead of London in that they make more use of remote justice and seem to have greater judicial capacity.
29. A key decision on what should be considered when determining whether a case should be heard remotely came from the Court of Appeal on a family case, *Re A (Children)(Remote Hearing: Care and Placement Orders)* [2020] EWCA Civ 583. This might explain why work for family barristers has not declined so precipitously, as the Family Bar began to embrace remote hearings where possible as early as mid-March.

Immigration

30. It has been said that there is a North/South divide i.e. some hearings cannot be heard because of a shortage of judges in London, whereas in Derby they were having remote hearings on day two of lockdown.
31. But it cannot be said that lack of judges is the reason for the shortage of immigration cases, as during the beginning of lockdown fee-paid judges were told they would not be required.
32. Taylor House immigration tribunal has in excess of 20 courtrooms, normally every courtroom will have a minimum of 2 cases, but other courts would have at least 4 cases [Human Rights appeals]. Bail courts will have maybe 8 hearings. Right now,

it's not that they operate at half capacity; it's much, much less. Probably 10 cases are heard, whereas there are normally around 50.

Question 3: The extent to which courts have appropriate capacity post-Covid-19, including the extent to which courtrooms are idle across England and Wales

Criminal

33. We welcome the announcement by HMCTS that it expects to have 250 court rooms capable of hearing jury trials by November. Assuming this is delivered, it will be a considerable achievement. We urge HMCTS to provide as much information as possible, with detail at a local level as to the capacity of each of its trial courts and the extent to which this will address the local backlog of trials.
34. Multi-handed trials present a particular challenge as it appears that there are relatively few court rooms which permit the trial of indictments with more than four defendants and social distancing, particularly with defendants in custody (because of lack of space in the dock). Such cases can be amongst the most serious in the Crown Court. We understand that thought is being given to how to resolve this pressing issue, but little has been said publicly. If the current estate cannot cope, the Government must procure additional capacity to meet the particular challenge of multi-handed cases. The police, CPS, witness groups, solicitors, barristers and Judges all agree there is a pressing need for trial spaces that can be adapted to hold multi-handed trials with defendants in custody. Access to justice cannot be delayed indefinitely because there are too many defendants to hold a socially distanced trial in available courtrooms. A solution must be found.
35. In the initial stages of restarting jury trial, two or even three court rooms were required for each trial. That restriction of capacity is likely to become less of an issue as solutions (such as plexiglass screens and/or portacabins) are rolled out across the estate, but increasing the available courtrooms is only part of the solution. Jury trials in Covid-19 require far more staff than usual, as many as five where there might have been one or two. They must supervise or operate technology, marshal witnesses and the jury in a socially distanced and safe way. Moreover, the clerks cannot multi-task as they used to - in court but also answering emails and performing other administrative tasks. Everyone has to be patient, and many tasks take longer. Trials are much more demanding of human resources than pre-Covid-19.
36. In the Criminal Court Recovery Plan September 2020⁶ it is said that 110 court rooms are capable of taking jury trials. This is to improve to 200 by the end of the month and 250 by November. This demonstrates the number of rooms currently lying empty. It does not include those court rooms that will be incapable of taking jury trials through lack of space. Better use of the existing court estate would enable those rooms that cannot be used for jury trial nonetheless to be used for e.g. Section 28 and other non-trial hearings. Full use must be made of them. In addition, there must be sufficient Nightingale Courts and robust technology to allow for large multi-hander trials to be safely held. A significant part of the solution is the effective and sympathetic listing of cases with sufficient notice for instructions to be taken, advocates and witnesses to be prepared and available. Another is the use of plexiglass screens and portacabins to

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/915493/HMCTS401_recovery_overview_for_crime_WEB.pdf

house the jury in retirement. These ways of maximising the existing estate are crucial to ensuring that it is all used to maximum effect.

37. Pilot schemes for “Covid Operating Hours (COH)” to add capacity will be run at seven Crown Court centres across the country. Two consecutive court sessions of 4 hours each (9-13.00; 14-18.00, including a ½ hour break) will occupy one court room while at least one other room in the court centre operates normal hours. The Recovery Plan regrettably overstates the available time for the COH court and underestimates the time for the normal operating court. In reality, taking into account breaks, the most time likely to be retrieved from the 2-shift court is 7 hours and from the standard court a standard day is usually 5 ½ hour day. Because most pilots are starting in September for 6-8 weeks, with volumes being monitored, it is not possible to say whether they will help sufficiently in getting through cases to merit the extra cost and inconvenience for all concerned (including court staff and witnesses). Again, they can only work effectively if they are listed in consultation with legal professionals.

Civil

38. By early July it was hoped that the entire court estate would be fully open for public use. This has not yet happened. However, where they have, reports on court hygiene and safety have been positive. We have been informed that Risk Assessments have been carried out and safeguards have been introduced to meet Public Health requirements. Restrictions include limiting the number of people allowed in each court room and in the public areas of the building, meaning a limited number of court rooms in each building will be used.
39. Therefore, courts will not be working to “full capacity” for some time. Nightingale Courts should be identified to bridge this gap.
40. Additional use of Recorders and part-time judges could help ease this log jam with work being conducted remotely by Judges while the reduced use of the Estate was also used – this would enable a “doubling up” of court time but would require careful evaluation of support staff time and resources.

Immigration

41. York House at Hatton Cross and Taylor House each have at least 20 court rooms, each usually hearing at least 2 substantive appeals (sometimes up to 6) or between 4 to 20 CMRs:
- a. Taylor House: 6 out of 27 court rooms operational on 11 August 2020.
 - i. 1 CMR (in person),
 - ii. 1 CMR (in person)
 - iii. 1 Asylum substantive appeal. (in person)
 - iv. 1 Remote HR appeal
 - v. 1 Remote HR appeal
 - vi. 1 Remote Asylum appeal

 - b. York House: 7 out of 20 court rooms operational on 11 August 2020.
 - i. 4 CMRs (in person),
 - ii. 1 HR substantive appeal (in person),
 - iii. 4 Remote CMRs,
 - iv. 5 Remote CMRs,
 - v. 3 Remote CMRs.
 - vi. 1 Remote substantive appeal,

vii. 3 Remote bail hearings.

42. Update for 1 September 2020: Both courts still hearing limited number of substantive appeals.
- a. Taylor House: 6 courts operating in person hearings and 6 courts operating remotely.
 - b. York House: 3 courts operating in person hearings and 8 courts operating remotely.

Question 4: Long-term solutions to reduce delay in cases coming to trial, including the move to the digital transformation of the court estate

Criminal

43. Technology: more robust and reliable technology is vital for future court business. We applaud HMCTS for the remarkably rapid roll-out of new technology, including Cloud Video Platform (“CVP”). But there are two brakes on efficacy that must be addressed: prison video end point capacity and digital inequality. CVP was only ever intended to improve quality, not capacity.
44. The planned expansion of prison video endpoints is simply not keeping up with demand. By way of example, HMP Wormwood Scrubs (a Category B prison holding up to 1279 adult male prisoners) serves Harrow and Isleworth Crown Courts and 2 large Magistrates Courts. In May, there were 6 video booths available for conferences, meetings with probation etc. 9 more are planned as well as the provision of tablets and reintroduction of face to face conferences. Currently the first opportunity for a lawyer to see a client over CVP is two months ahead, often after the case should be listed. This is not an isolated instance. Far greater capacity as well as a return to in person visits to take instructions is vital, if the criminal justice system is to operate smoothly. If there is sufficient capacity, CVP might also allow more multi-handed trials to be heard if prisoners can elect to watch some of their trials from custody. The robustness of the technology, including bandwidth, across all users is crucial if real progress is to be made in using remote facilities to allow for greater throughput of cases.
45. The correct balance between remote and in person hearings: this is still being calibrated. In some cases, remote hearings take longer to conduct. This can be for a variety of reasons - not least is simply getting used to using it; but, also, court staff levels, the robustness of the technology and bandwidth. Inefficiencies often increase when the court is trying to juggle a list of remote hearings. Many of these problems are ironed out with practice, patience, better staffing, and court users (including advocates) sorting out their own tech problems at home. By keeping the best of the digital progress, we have made at such pace in the pandemic, we will reduce footfall at court enabling those cases where many people must attend court, such as jury trials, to go ahead. We must not abandon the benefits of technology in criminal courts. We refer to listing Guidance provided by some Crown Courts where the balance seems to be correctly struck. We have urged that there be nationwide guidance on listing. Although the senior judiciary has declined to provide that, we believe that best practice is being shared and acknowledged by those operating the courts to make for better listing.

46. We consider that hearings in person are usually essential whenever there are significant contentious issues to resolve, particularly those requiring contested evidence. Advocacy is at heart a face-to-face profession. Whilst remote hearings were better than none during the emergency, we need to preserve in person advocacy. Partly it improves experience and career progression. We all learn by seeing how others do our job especially when junior. Young barristers learn by watching people in different cases in their court do an excellent plea in mitigation, handle a difficult situation or Judge, or by talking through a problem in the robing room. Professionals in other cases can watch the excellence of an advocate they do not know in court; and, in one's own case, it is often easier to agree things face to face with one's opponent, to cut down areas of contention, thereby saving court time.
47. Witnesses might want to give evidence remotely either because they are entitled to special measures, or because they have Covid-19 related concerns. A possible solution is to equip buildings (court or elsewhere) so that they can take evidence safely and properly without the witness having to attend the court room itself. There is no reason why a witness could not appear in such a specially equipped room in building A, and have their evidence seen and listened to in a court room in building B.
48. S28 – pre-recorded cross examination: the Commencement Order extending those courts that can conduct s28 hearings was recently signed and the nationwide roll out should be complete by year end. More vulnerable witnesses (usually children) will be able to give their pre-recorded evidence at an earlier stage in proceedings than ever before. Subject to certain strictures, s28 powers can be used on cases already in the system. This will enable vital evidence in old cases to be taken soon, even if the trial cannot be listed in its entirety for some time. These cases should be prioritised. That requires lawyers to have taken instructions, prosecution disclosure to have been completed, sufficient staff and technical support to operate the system at court; these must be prioritised too, to drive cases forward towards completion.
49. Adequate staffing of courts: this is crucial. There are simply not enough staff to support the criminal justice system at the moment. Those who are needed to run the courts must be properly trained. Without these measures, the courts simply will not be able to tackle the backlog let alone new cases coming into the system. We welcome the fact that HMCTS is hiring 1600 staff to support the recovery measures it is taking but insufficient staff must not be a reason for limiting access to justice. If more are needed, more must be hired.

Family

50. A report from one junior family practitioner stated that, on remote hearings, it is preferable to be there in person for anything being contested, but Case Management Hearings, Issues Resolution Hearings etc. have been much more efficiently conducted remotely. They believe the family court is where the hybrid hearing steps in. That is how the family court is remedying the problem of both counsel and parties being available.

Personal Injury

51. The personal injury bar has found that remote hearings can be effective for Costs and Case Management Conferences (CCMCs) and applications but considerable care needs to be taken in their listing because any cases with Litigants in Person risk a significant barrier to justice and the resources of the remote user are critical – any hearing with witnesses or significant documents etc. requires access to reliable

internet connection and often two or three screens, as well as a quiet dedicated workspace/ hearing space. There are significant access to justice issues in these requirements and it is near impossible to evaluate the user-endpoint infrastructure. A Litigant in Person or witness using a smart phone is at a serious disadvantage.

Recommendations

52. Proper infrastructure for courts and tribunals to deal with remote hearings is of prime importance. Judges require sufficient court staff to deal with and manage the technology.
53. Training on the use of platforms and preparation (including producing e-bundles properly in accordance with the relevant guidance) for remote hearings to give participants sufficient confidence. Further, there should be training for the younger Bar possibly in conjunction with the Inns.
54. Every effort must be made to send out remote hearing details with the notice of listing of a hearing, and the notice itself ought to be at least 7 days prior to the hearing where at all possible. This is necessary to allow parties and legal representatives to prepare electronic bundles and more extensive written submissions that are often required for remote hearings, and not to put those with caring responsibilities at a disadvantage.
55. There needs to be some attempt to standardise remote hearing preparations and requirements. There has been an ad hoc approach to remote hearings leading to many different and local practices at various county courts. The preparation of the e-bundles and paperwork is all left to the parties with an expectation that legal representatives will liaise prior to the hearing to ensure all technological issues are resolved. This is not always possible or practical but means that the success of the court hearings are left to the parties with little or no input from the court before the hearing. This often leads to wasted time on the day of the hearings.
56. Longer listing times are required for all remote hearings to allow for setting up/ technological issues and also for breaks and for the longer time it takes to find documents etc. Remote hearings/ screen use also affects immediacy of interaction and leads to greater tiredness. There are also perception differences and difficulties – emerging work on “zoom fatigue” should be borne in mind.
57. There should be no restriction on the type of hearing which might potentially be heard remotely. This point has arisen in the context of possession proceedings under CPR 55. At the date of this submission there is a stay on such proceedings, which covers all types of hearing, whether residential or commercial and whether both parties are represented or not. Whilst such a blanket response might have been appropriate as an early and emergency response to COVID-19, there is a concern that all possession hearings are being treated equally, when they might cover very different subject matter. Going forward it is believed there is no reason why possession cases in which both parties are legally represented, or in which the issues are of a commercial nature, would not be suitable for remote hearing.

Employment

Recommendations

58. Improve infrastructure for Courts and Tribunals to deal with remote hearings, including lifting restrictions on the type of hearing which might potentially be heard remotely;

59. Make the most of existing tribunal buildings and minimised social distancing 1m; use retiring rooms for hybrid or remote hearings, consider other venues like hotels (Abergele Employment Tribunal sat in a hotel conference room for many years. Investigate whether such facilities could be accessed at reduced rates given the lack of demand for large events);
60. Make greater use of hybrid hearings;
61. Direct more resources into listing – effective triaging of lists to identify in good time the cases that are suitable for video or telephone or hybrid hearings. Standard orders should go out to the parties requiring them to identify how the case might be heard remotely or in hybrid form were a judge to conclude it is suitable;
62. Prioritise rolling out the new case management system: HMCTS staff cannot work effectively from home because they cannot access the current case management system (ETHOS) from home;
63. Greater use of fee-paid employment judges (FPEJs): working from home, and relax regional structure and strictures on FPEJs: consider a national pool of remote working FPEJs and members which could hear cases from any region;
64. Greater use of Alternative Dispute Resolution;
65. Assistance for unrepresented parties: self-represented litigants who are not familiar with the process often have an understandably limited appreciation of the strengths and weaknesses of their case, funding should be available to support existing ‘duty’ advice type schemes (such as the Employment Tribunal Litigant in Person Support Scheme (ELIPS)) or to develop new ones to assist these litigants;
66. Make greater use of Judicial Assessment / a Judicial ‘Sift’.

Immigration

67. Video Hearings via Microsoft Teams seems to be going well. The system for Judicial Review hearings is working well, and in the Administrative Court and Court of Appeal remote hearings are working well. It seems fair to say that a significant long-term solution to delays and the backlog is the finessing and expansion of the digital court estate, and remote hearings where possible.
68. On telephone hearings, connectivity and procedure needs to be improved. The difficulty is that it is the judge connects everyone to the hearing by dialling everyone’s number. If there is a public law case, there may be 8 or 9 people to call. If anyone is disconnected during the hearing, you are not aware they have been disconnected, so that person must text someone else to ask to be reconnected. So, the hearing stops, and the judge dials them in again. If that happens more than once, it is disruptive.

September 2020