

## **Written evidence submitted by the Law Society of England and Wales**

### **Introduction**

1. The Law Society of England and Wales is the independent professional body that works globally to support and represent 200,000 solicitors, promoting the highest professional standards and the rule of law.

### **Summary**

2. Though worsened and exacerbated by recent events, the backlog in the criminal courts predates the pandemic. The backlogs primarily lie in prolonged underinvestment in the justice system, including capping the number of court sitting days, reductions in court capacity and court rooms remaining idle in recent years.
3. The Law Society has welcomed measures to address the backlog, including Nightingale courts, additional investment in the justice system and removal of the cap on sitting days. Measures announced at the Autumn Budget and Spending review are very welcome, including the £477 million that has been allocated to address the backlog of cases in the Crown Court.
4. To increase physical capacity, the Government should consider reopening recently shut courts. Courts act as a hub for legal firms and businesses, so restoring more local courts may also help drive economic renewal too. The Government should also commit to fully funding court repairs so existing court rooms are not closed due to maintenance issues.
5. As pandemic safety measures are loosened physical space is becoming less of an issue in the courts, with the focus turning to capacity among court staff, judges, prosecutors and defence firms. The shortage of judges, court staff and practitioners to attend cases is becoming a serious concern that will affect efforts to lower the criminal courts backlog if it is not addressed through long-term investment. Because the system has been underfunded for so long, it will not be possible to generate the necessary additional capacity quickly, but if left unaddressed the problem will only grow.

### **The backlog in the criminal courts**

6. Official criminal court statistics for April to June 2021 published on 30 September show an estimated 60,692 outstanding cases in the Crown Courts and 364,122 outstanding cases in the magistrates' courts at the end of the quarter.
7. These statistics show the backlog in the Crown Court is up 40% compared to the previous year and one per cent on the previous quarter. This is the highest level of

outstanding cases since the series began in 2014. Around 19% of these cases have been outstanding for a year or more, delaying justice for victims, witnesses and defendants alike.

8. Research by the Institute for Government (IFG) has shown that returning backlog in the magistrates' courts to pre-pandemic levels could be deliverable by 2022/23 at the latest. However, in the Crown Court, due to the complexity of cases, the IFG suggests returning the backlog to pre-pandemic levels will require 44% of 2019/20 crown court capacity and will cost around £300m to fund judges, court space and for court staff costs. This suggests the additional funding recently announced at the Budget should help to bring the backlog down.
9. It is important to note that while the Covid-19 pandemic has exacerbated the backlog of cases in the criminal courts, it did not cause it. The recent National Audit Office (NAO) report published in October 2021 on 'Reducing the backlog in criminal courts' found that the Crown Court backlog increased by 23% in the year leading up to the pandemic, increasing by a further 47% since the onset of the pandemic. The Law Society was raising concerns that underinvestment in the criminal justice system was pushing the system into a state of crisis in our 'Justice on trial' report published in 2019.
10. Court closures before the pandemic have significantly contributed towards today's backlog. Since 2010, 295 court facilities have closed, and many of the remaining courts are in a state of disrepair.
11. We regularly receive reports from members of operational and structural issues: The Isle of Wight Combined Court is not alone in having issues with leaks, resulting in carpets swelling and being unable to close doors, other courts have seen falling masonry. This has a significant impact on the health and safety of court users, staff and practitioners, and contributes to the backlog as trials need to be delayed or relisted, often at short notice, providing further disruption.
12. The Law Society has received feedback from practitioners that cases are being listed into late 2023, or have no date set at all and are therefore likely to remain unheard until 2024. In many cases this is years after an alleged offence has been committed.
13. A practitioner gave an example of a case they are involved in. An alleged fraud offence took place between August 2018 and February 2019. The defendant was arrested in April 2019, with the case listed for a Crown Court trial in March 2021, which was originally delayed to October 2021. However, the trial was again vacated and has been listed for May 2022. The complainant has passed away, while the defendant has been unable to work and has been kept in limbo as the case has dragged on due to delays.
14. In another case, an alleged offence took place in January 2017. Following an interview in 2018, a written charge was authorised in 2020, with a first court appearance in 2021. The trial has been fixed for October 2022; assuming no further delays this will be over five and a half years after the alleged offence took place.
15. Issues with listing are also causing disruption. Practitioners have reported that trials are often moved at the last moment due to shortages of court staff. In one instance, a case was listed for an in-person hearing, and the day beforehand was switched to a remote hearing due to staff shortages. This causes disruption for firms as practitioners have to

rearrange work around trials they expect to attend in-person and makes workload planning extremely difficult.

16. Advocates can find themselves waiting around in court, unsure if a case will take place or not. This means they are unable to work on other cases and in turn wastes both time and resources, and has an extensive impact on victims, witnesses and defendants who also have to work around the disruption.

### **Capacity among defence firms**

17. Capacity among defence firms will limit efforts to tackle the backlog. Practitioners have told us that many firms are working at their full capacity and do not have additional advocacy resources to support a greater number of cases. There is no pool of advocates to draw from to increase capacity and much of their recruitment now comes from other local firms, rather than new entrants to the profession.
18. Firms also have to compete with the Crown Prosecution Service when it comes to recruiting and retaining staff and are often unable to compete with the higher salaries on offer.
19. Practitioners that sit as Deputy District Judges or Recorders are being pressed to sit more cases, and while increasing judicial capacity is welcome, this further draws down defence capacity and increases pressure on firms.
20. With the easing of pandemic restrictions, physical capacity has become less of a concern, but the ability to run criminal courts is being affected by a lack of judges, court staff, prosecutors and defence lawyers.
21. In the long term, issues of capacity of defence lawyers need to be addressed through the ongoing Independent Review of Criminal Legal Aid. The Law Society in its submission put forward a number of ideas to tackle this, including trainee grants to attract talent into criminal legal aid work, along increasing fees so that rates for legal aid reflect the work done by practitioners. Judicial recruitment also needs to be increased.

### **Responding to the backlog**

22. The Ministry of Justice have taken welcome steps to address the backlog in the criminal courts. Nightingale courts were an effective way to boost court capacity at a time when social distancing lowered the amount available. They were also a cost-effective measure when suitable sites were identified. Setting up the former Fleetwood Magistrates' Court and Telford County Court as temporary Nightingale Courts came to £150,312 and £251,421 respectively.
23. However, there have been reports that some Nightingale courts were being underused and saw few sitting days. They still have a role to play in addressing the backlog and the Ministry of Justice must ensure they are maximising court capacity through all available avenues and using resources effectively.
24. At the recent Autumn Budget and Spending Review, further funding was announced by the Government to help address the backlog in the criminal courts. This is intended to

reduce the backlog in the Crown Court from 60,000 cases to 53,000 cases. While welcome, the Government should make clear how this funding will be used and how the backlog will be reduced from 53,000.

25. The removal of the cap on sitting days by the Government is also a welcome step, with an unlimited number of sitting days in 2021/22. The cap significantly limited court capacity before the pandemic and has contributed to the backlog. The Law Society had previously called for its removal to create additional capacity.
26. The Law Society welcomed the Autumn Budget commitment to increase the Ministry of Justice's budget by £2.2 billion over the spending round, which represents an average 3.3% real terms increase per year. To address the backlog and bring it down to manageable levels, this level of investment must continue, and must extend to all parts of the criminal justice system.
27. The hiring of 1,600 staff for Her Majesty's Courts and Tribunals Service (HMCTS) is also a welcome measure that will hopefully go some way to addressing the issues our members have reported.
28. Further steps are needed if the backlog is to be tackled. Increased investment in the courts estate focused on maintenance would be another relatively inexpensive way of boosting capacity in the courts. Ensuring repairs are properly funded and carried out would mean fewer delays to trials caused by this issue.
29. The Government could also look to reopen courts that have recently closed but have not been sold yet. These could potentially be opened at a minimal cost. There are 11 court buildings that could be utilised in this way, including:
  - Hartlepool Magistrates' and County Court (closed 2017)
  - Scunthorpe Magistrates' and County Court (closed 2017)
  - Torquay Magistrates' Court (closed 2017)
  - Chichester Combined Court (closed 2018)
  - Maidenhead Magistrates' Court (closed 2018)
  - Sunderland County Court (closed 2018)
  - Chorley Magistrates' Court (closed 2019)
  - Harlow Magistrates' Court (closed 2019)
  - Fleetwood Magistrates' Court (closed 2019; currently being used as a temporary Nightingale Court)
  - Telford County Court (closed 2017; currently being used as a temporary Nightingale Court)
  - Chichester Magistrates' Court (closed 2017; currently being used as a temporary Nightingale Court)
30. As well as providing additional capacity, the reopening of these courts would also contribute to their local economies, combining economic renewal and access to justice. Courts tend to act as hubs for law firms and legal businesses, creating clusters that contribute to the local community and economy. As well as providing investment, this will also incubate the creation of professional jobs in these areas too.

31. The Ministry of Justice and HMCTS have given judges the option of opening court rooms for longer through a 'temporary operating hours model'. We do not believe this will provide any significant additional capacity. Although more cases have been disposed of during pilots of extended hours, it appears to have been largely due to the fact that shorter, less complex cases are allocated for these times, which means that a greater number of cases can be allocated, of which a greater number "crack" (i.e. are resolved on the day by a guilty plea or the withdrawal of charges rather than a full trial).
32. Extended operating hours could create additional costs for law firms, as well as making it difficult for firms to recruit and retain staff in the face of the negative impact on work/life balance this step will have. At a time when firms are facing significant struggles to attract new entrants and talent, this step could worsen staffing and retention issues, further depleting the numbers of criminal legal aid practitioners and their ability to handle cases.
33. Better data collection is also needed to support recovery in the criminal courts. The Law Society supports the NAO's recommendation for a joined-up approach to court recovery and a plan to tackle barriers to efficient collection and sharing of data. This should include data around the experience of vulnerable court users and how they engage and are affected by remote hearings.
34. The impact of the Government's target to hire 20,000 extra police officers on the courts must also be considered holistically as it will lead to a greater number of arrests, hearings and trials. The Government should set out how it intends to manage the increased demand upon the criminal courts. This should include how it will manage the need for additional judges, court staff and practitioners for these cases.

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