**RBC0003**

# Written evidence submitted by Transform Justice

## Background

Transform Justice is a charity which advocates for a fair, humane, open and effective justice system. We have published reports[1] on topics including virtual courts and diversion from prosecution.

We have previously given oral and written evidence to PAC on the HMCTS digital court reform programme. During the pandemic we have observed magistrates' courts, monitored social media, and analysed data.

## Causes of the backlog and effectiveness of the court recovery plan

The Crown Court backlog is now extensive, despite heroic efforts by judges, staff and lawyers to keep the wheels of justice going at the peak of the pandemic and to increase the speed of the wheels since social distancing measures have been relaxed.

One reason for the existing backlog is HMCTS' pre-pandemic approach to case management. HMCTS believes that having a level of backlog improves efficiency, so cases have been subject to intentional "delays" for many years. The problem with this policy is that, even pre-pandemic, HMCTS has struggled to accurately predict future workload and thus was caught out in March 2020 with a bigger Crown Court backlog than normal. This exacerbated the extent of the backlog directly caused by pandemic issues.

Three other factors (below) exacerbated the backlog during the pandemic, and imperfect information and incorrect assumptions on these issues will also undermine the effectiveness of the Covid-19 recovery programme.

1. Over-reliance on new technology, particularly audio and video links, to improve efficiency.

Video and phone links were used in criminal courts before the pandemic. Their use was ramped up considerably during the pandemic, particularly for lawyers appearing from their home/office and for defendants appearing from prison or police custody. Clearly these links protected some court participants from acquiring or spreading infection and thus enabled hearings to take place, but it is less clear that they had any efficiency benefit beyond this. No evaluation was done before the pandemic on whether video links increased the speed and throughput of criminal hearings, though previous studies of "video remand" hearings suggested they lead to more adjournments[2]. The pandemic was a real-time experiment and, although data was not systematically collected, anecdotal evidence suggested that remote links in fact often slowed down hearings. A link is only as good as the strength and reliability of the internet connection at both ends, and one of these frequently failed or was weak. Often sound quality was poor, leading to speakers needing to repeat themselves. It took time for each link to come up when multiple links were involved in one hearing.

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[1] https://www.transformjustice.org.uk/reports/

[2] https://www.gov.uk/government/publications/virtual-courts-pilot-outcome-evaluation-report https://www.sussex-pcc.gov.uk/media/4862/vej-final-report-ver-12.pdf

The judiciary and the court service never said openly that remote links were reducing the average number of hearings per day in magistrates' courts (particularly for "video remand" hearings from police custody) but judges have encouraged lawyers and other court users to attend court in person as soon as guidance has allowed. The use of remote links is still cited as an essential part of the recovery plan, but there is no explanation as to how and in what circumstances remote links improve efficiency. One case where they may is administrative hearings where the defendant is either not present or has no active role. Allowing lawyers to appear remotely in such circumstances makes sense, particularly given lawyers' current workload, but is not always facilitated by judges. It may be that listings systems simply cannot cope with the complexities of switching between virtual and in-person appearances.

While the jury is out on whether remote links improve hearing throughput, there is a wealth of evidence that they have a negative effect on the effective participation and judicial outcomes of defendants, particularly those with mental health and neuro-divergent conditions. As the National Audit Office has pointed out, these effects have not been properly researched or monitored by HMCTS either before or during the pandemic. If the recovery is to be compatible with human rights and contribute to increased trust in the criminal justice system, we need to know more about how remote links impact the client-lawyer relationship, effective participation and judicial outcomes. There is a parallel here with the debate on virtual doctor-patient appointments. The pandemic has proved that phone/video consultations can work technically. But a study by Cambridge University found that greater convenience came at a price with "telemedicine being seen as less diagnostically accurate than in-person consultations and as having the potential to increase health inequalities and barriers to accessing appropriate care".[3.]

Digital information systems offer the potential to make court processes more efficient. The Common Platform is a new digital filing system for the magistrates' courts. It has been in development since 2017 and was launched in some regions in early summer 2021. The rollout was paused in August and September due, according to the Lord Chief Justice, to "some difficult problems and setbacks" that code-writers and IT specialists responsible for the project were trying to resolve. In November 2021 the main union for court staff, the PCS, said the Common Platform was "not fit for purpose" and has caused considerable anxiety and stress among members. The PCS is threatening to strike about the redundancies they predict will follow the full rollout. However much a digital filing system was needed, it is questionable whether launching it while trying to fight the backlog was ideal timing.

2. A shortage of judges, lawyers and court staff

At the beginning of the pandemic, few courts were running so there were no staff resource issues for judges or lawyers. But as social distancing has been relaxed and more hearings have been listed, lack of manpower has become a huge problem, one which was not predicted at the beginning of the pandemic. Some months in, documents such as the statement from the Lord Chief Justice in July 2020[4] began to refer to shortages of judges, but two other critical manpower problems have also contributed to the backlog more recently – lack of court staff and lawyers.

The digital court reform programme involved the recruitment of many head office staff to strategise, design and research the new services. At the same time, it was announced there would be a reduction in the number of court staff since it was envisaged fewer would be needed in the new technology-based court. In July 2019, HMCTS had 16,000 FTE staff but predicted that staff numbers

[3] https://www.cam.ac.uk/research/news/concerns-over-medical-consultations-by-phone-and-video-study
[4] https://www.judiciary.uk/announcements/courts-and-tribunals-recovery/

would reduce to 11,300 by the end of the reform programme[5]. In fact, there has been no significant reduction in staff[6] and the court service has recently launched a recruitment drive for court staff to cover the increase in hearings and expansion of venues used. Recruitment has been challenging given staff shortages nationally and the relatively low pay on offer. Capacity issues involving skilled staff cannot necessarily be resolved short-term; some potential extra Saturday sittings in magistrates' courts could not be held because there were insufficient legal advisers.

Perhaps the bigger personnel problem in the Crown Courts is now the shortage of lawyers, both prosecution and defence. There has been a long-term decline in the number of criminal defence lawyers, a decline which anecdotal evidence suggests has accelerated over the Covid-19 period. There now appears to be a dearth of lawyers to cover the increased number of hearings in Crown courts, with many tweets suggesting that trials have had to be delayed due to a lack of counsel. The demand on counsel is exacerbated by the demand for judges. To plug the gap in full-time judges, the courts are booking up recorders – part-time judges whose time would otherwise be used acting as defence/prosecution counsel.

It seems the government does not really know the capacity of their potential defence/prosecution workforce, nor whether any levers can change that capacity in the short term. Meanwhile, the capacity of the existing workforce is frequently wasted preparing for trials that are not effective, or in travelling considerable distances for administrative hearings.

3. Too much focus on court-room capacity

Much of the recovery has been focussed on nightingale courts. These are new/newly assigned court-rooms which HMCTS leased in order to provide extra space while social distancing measures were in force. However, few of the nightingale courts have been used for criminal hearings and it is not clear whether staffing is not a greater problem than space. If lawyers, judges and/or court staff are not available, an extra courtroom is redundant. Since social distancing regulations have been eased, their utility has been even less clear.

## How the court backlog could be reduced

Unfortunately, it is likely the backlog will reduce for the wrong reason - because key witnesses, including alleged victims, will decide not to cooperate with delayed Crown Court proceedings.

There are three ways the current backlog could be significantly reduced.

1. Focus the courts on serious cases and resolve the rest outside court.

There is a finite number of bodies to service all the criminal courts – both lawyers and court staff. Every prosecution case, including single justice procedure, requires some resource from HMCTS and the judiciary. Every magistrates' court case uses considerable resources, particularly those involving defendants remanded by the police. If more cases had been and continued to be resolved out of court since March 2020, resources could have been freed to focus on the most serious cases - extra counsel and court staff capacity could have been created to deal with the Crown Court backlog. This would have involved significant culture change and strong leadership from the top.

The opportunity

[5] https://publications.parliament.uk/pa/cm201919/cmselect/cmjust/190/19008.htm
[6] HM Courts & Tribunals Service Annual Report and Accounts 2020-21

The majority of defendants in the magistrates' court plead guilty, and the most used sanction is the fine. Many such low level offences could instead be dealt with by the police out of court, using the conditional caution, or other diversionary measures. A person who accepts responsibility for a low level crime and the sanction of a conditional caution must abide by the conditions, which could be to pay a fine or to complete a rehabilitation programme. So the outcome of having someone pay a fine can be achieved without using the resources of the court. Those who don't comply with caution conditions face prosecution.

The use of cautions is in long-term decline, a decline not halted by the pandemic[7]. Overall, those who receive cautions are less likely to reoffend than those who receive court fines. It is not clear why cautions have declined in usage more than court disposals in the ten years pre-pandemic, but the pandemic offered an opportunity to completely change the police approach to lower level offences. It seems that approach was seriously considered but not consistently implemented.

The interview and interim charging protocols

The opportunity to change course and significantly save magistrates' court resources was presented by the interim charging protocol[8] which is still in force and the police custody interview protocol[9], which has been subject to many revisions. These were agreed by the Crown Prosecution Service, the National Police Chiefs Council and other stakeholders as a way of keeping the wheels of justice moving when the country was in the first lockdown and the priority was limiting infection spread. The courts and the judiciary had already decided that only the most serious cases should be heard and, in magistrates' courts, only those defendants who had been remanded by the police would appear. In normal times police detain a wide variety of suspects, most of whom are released on bail, RUI or not charged. They remand (detain post charge) a minority of those they detain in custody for interview. Police remand is subject to broad criteria outlined in PACE section 38. Only those charged can be remanded and they need to be sent immediately to court. If enforced, the protocols would have radically reduced the number of defendants detained, charged and remanded by police, thus also reducing the required capacity of magistrates' court cells.

A potential barrier to hearing any cases at all was presented by PECS, the service which transports police detainees to court and looks after them in court cells. In March 2020 PECS contractors in most regions refused to transport police detainees since they said the courts were not covid-safe. So the police stepped into the breach to offer police custody suites as an extension of courts. To the delight of HMCTS, the police started to look after defendants up to and after their first court appearance and to link them by video to the court ("video remand" courts), all for free. This offered a short-term solution to the PECS issue and prevented pressure on police to restrict numbers they remanded. The police then had sufficient resource to arrest and detain in custody more-or-less as usual, and the custody suites had space to deal with the defendants detained pre and post charge and those awaiting their video court appearance.

Did the charging and interview protocols make a significant difference to the mix of cases presented to the remand court? My observations of magistrates' courts in the pandemic and an analysis of the data suggests that the interview and charging protocol were more honoured in the breach than in the observance. Thousands of defendants accused of summary and either way offences were

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[7] https://www.gov.uk/government/statistics/police-recorded-crime-open-data-tables#history

[8] https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/Interim-CPS-Charging-Protocol-Covid-19-crisis-response.pdf.

[9] https://www.cps.gov.uk/legal-guidance/coronavirus-interview-protocol-between-national-police-chiefs-council-crown

charged and many were remanded by police and dealt with by the courts, who could potentially have been bailed or been given an out of court disposal. Y/e March 2021 the CPS proceeded against 721,086 people for summary (the least serious) offences, and 541,297 were sentenced to pay a court fine – a sentence which is not rehabilitative. Of all recorded crime dealt with by the police the percentage of cautions was unchanged y/e March 2021 versus the year before. In y/e March 2021 32,523 people were arrested and remanded in police custody for summary offences and 67,063 people for either way offences[10]. It is unlikely that most of those remanded for summary offences met the criteria set out in the charging protocol. An opportunity was thus missed during that first lockdown and subsequently to focus the courts on indictable only and some either-way offences (the most serious) and to triage most others, diverting as many possible to out of court disposals. There was a decrease in numbers arrested and prosecuted for summary offences, but no one checked whether the interview and charging protocols were being rigorously applied.

If the police, the CPS and the government had abided by the spirit of the interview and charging protocols, they could have radically reduced the work of the magistrates' court, thus freeing up HMCTS, CPS and counsel resources to devote to the Crown Court backlog. This may also have supported efforts to reduce reoffending given the effectiveness of out of court disposals in this regard. There is still time to free up these resources if political and police will was focused on resolving low level crimes without going to court.

2. Improve the effectiveness of trials

Despite many reports and initiatives aimed at improving efficiency, huge resources pre-pandemic were spent preparing for trials which never happened. The pandemic offered an opportunity to step back and try to radically reduce the number of ineffective trials, thus freeing up resources for those most likely to be effective.

Before the pandemic only 46% of magistrates' court and 50% of crown court trials were effective ie they went ahead as planned on the day they were due to start. Of these 39% of magistrates' and 34% of Crown Court trials were cracked - "on the trial date, the defendant offers acceptable pleas or the prosecution offers no evidence. A cracked trial requires no further trial time, but as a consequence, the time allocated has been wasted, and witnesses have been unnecessarily inconvenienced thus impacting confidence in the system"[11].

The reasons for such a high proportion of trials not being effective are complex but many of them relate to resourcing earlier in the process. High-quality police investigation needs resourcing, as does prosecution preparation. Late disclosure leads to trials being delayed or cracked.

The pandemic saw no significant improvement in the proportion of effective trials in the magistrates' and Crown Courts. There was a reduction in the proportion of cracked trials in the Crown Court, but still over a quarter (4,067) were cracked y/e June 2021[12]. Given that so many fewer trials were taking place, it is a pity that stakeholders did not find a way to prevent so many trials being prepared for and not held either at all or on the planned day. It may be that Covid-19 cases amongst court participants contributed to trials being vacated or ineffective, but even Covid-19 could not have caused the cracked trials. If greater resource had been freed up to increase the proportion of effective trials, maybe the backlog could have been reduced more quickly?

[10] Criminal Justice Statistics y/e March 2021

[11] https://www.judiciary.uk/wp-content/uploads/2010/04/cit_guidance_v3_1007.pdf

[12] https://www.gov.uk/government/statistics/criminal-court-statistics-quarterly-april-to-june-2021

3. Temporarily change the way defence lawyers are paid

Barristers and solicitors' firms are paid for the work they complete. Criminal legal aid is not designed to fund the preparation and investigation of cases in real time. During the pandemic there were few cases being heard in the courts and very few Crown Court trials. Crown Court trials are the means by which criminal defence firms make a profit - most other defence activities simply meet the costs incurred or are loss-making. So, many criminal solicitors were furloughed during the pandemic.

It would have involved a big adjustment, but it might have made sense, and still would make sense, for criminal legal aid to be paid in a different way. Instead of paying to furlough criminal defence staff, the government could have paid lawyers the equivalent amount to investigate and prepare cases, and thus increase the effectiveness of future trials. At the same time, it would have been necessary to provide more resources for the CPS since, without early disclosure, defence lawyers cannot properly prepare. At the beginning of the pandemic when criminal barristers had very little or no work, maybe they could have been temporarily employed by the CPS to triage cases, to provide full disclosure and to cull those cases that were likely to be ineffective?

Conclusion

The government and the judiciary did keep the wheels of justice moving, but in keeping them moving within the existing frame, they missed an opportunity to radically reduce the caseload in the magistrates' courts and to improve the effectiveness of trials. CPS, HMCTS and legal profession resources were and are used in processing low level cases when the priority, serious cases are subject to long delays. Some cases have been diverted from prosecution but not enough. To divert more cases from prosecution would have required political leadership and significant police and CPS behaviour change, and a willingness for resources to be shifted from magistrates' to Crown Court work; but it could have reaped the rich reward of significantly reducing the Crown Court backlog. And those diverted would not have been getting away with their crimes. They could have been sent on rehabilitation programmes, made to pay a fine or to take part in restorative justice, all out of court.

# November 2021