

## Written evidence submitted by 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.

### Background

The criminal justice system of England and Wales is at tipping point. Many challenges have existed across the system for years and have only been worsened by the pandemic. Tackling the mounting backlog remains a key priority for the Prime Minister, yet it remains the case that too many victims are unable to achieve justice quickly or effectively.

Public experiences of this vital service include severe delays, insurmountable backlogs, crumbling buildings and chronic underfunding – a position which has seen further decline over the past decade. The detrimental impact on individuals – victims, witnesses, defendants and their families – is avoidable and unacceptable.

The Chancellor's announcement as part of the recent Spending Review is a step in the right direction however much more needs to be done, particularly to reduce the mounting backlog in courts and tribunals and to ensure that those serving the criminal justice system are able to play their vital part in achieving this.

### Key Facts and Figures

Outstanding caseloads in the criminal jurisdiction:

	Magistrates' Court	Crown Court
August 2020	444,536	48,683
August 2021	366,410	60,561

Source: HMCTS MI, August 2021 [<https://www.gov.uk/government/statistical-data-sets/hmcts-management-information-august-2021>]

Although backlogs also exist in other jurisdictions, criminal courts remain the area of key concern, with the backlog mainly in the Crown Court where more serious, complex cases are

mounting. Not only is the current backlog high, but it is comprised of a disproportionate number of complex and potentially lengthy cases that will require a trial. Some analysts have suggested that the current backlog, when adjusted for these factors, is very much higher<sup>1</sup>. This may well be the case as data collection and its reliability across the criminal justice system has long been piecemeal and poor.

### **National Audit Office report, Reducing the backlog in criminal courts**

The NAO highlighted the context and challenges in reducing the backlog in criminal courts in their report published in October 2021.<sup>2</sup> The report states that the Ministry of Justice's (MoJ) latest models indicate the Crown Court backlog could be between 17% and 27% higher than pre-pandemic levels by November 2024.

Key findings include:

- **£63 million spent by Her Majesty's Courts & Tribunals Service (HMCTS) on the pandemic response and recovery in the criminal courts in 2020-21**, in addition to that spent on expected operational activities.
- **£2.2 billion is the estimated system-wide costs of delivering the criminal justice action plan, 2022-23 and 2023-24**. The range of estimates modelled by the Ministry of Justice for the size of the backlog in the Crown Court by November 2024 are 48,000 to 52,000.
- There has been a **435% increase in the number of sexual offence trial cases in the Crown Court backlog for longer than a year**, from 246 as of 31 March 2020 to 1,316 as of 30 June 2021.
- **There has been a 27% increase in the number of defendants held on remand in custody** between 31 March 2020 and 30 June 2021.
- **The Crown Court backlog increased by 23% in the year leading up to the pandemic** then increased a further 48%.
- **Victims, witnesses and defendants are waiting longer for their cases to be heard as the number of cases older than a year increased from 2,830 to 11,379 (up by 302%)**.
- **Waiting times vary considerably by region**. The pandemic exacerbated the regional variations in backlogs and waiting times. The average age of a case in London increased by 63% to 266 days throughout the pandemic (more than any other region) closely followed by the Midlands where the average age of cases increased by 62% to 256 days.
- **Rape and serious sexual offence cases have been acutely affected**. Defendants accused of rape or serious sexual offences are typically more likely to plead not guilty compared with other offences. Cases with not guilty pleas typically take much longer to complete when compared to cases in court where a defendant has pleaded guilty. Delays to jury trials have therefore disproportionately affected victims of

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<sup>1</sup> "Adjusting the new backlog to account for the fact that it includes a higher share of jury trials, we estimate that by the end of May 2021 the backlog was equivalent to 75,000 cases, almost double the pre-pandemic backlog and by far the largest on record". [Criminal courts | The Institute for Government](#)

<sup>2</sup> [Reducing the backlog in criminal courts \(nao.org.uk\)](#)

these crimes: between 31 March 2020 and 30 June 2021, the number of sexual offence trial cases in the Crown Court backlog rose by 71% from 3,606 to 6,173, with cases waiting longer than a year increasing 435% from 246 to 1,316. The criminal justice action plan, which looks at long-term recovery, includes initiatives to tackle rape and serious sexual offences. Robbery and weapon possession cases have also seen relatively large increases in waiting times.

- HMCTS's recovery programme increased criminal court capacity by 30% in the Crown Court and 7% in Magistrates' Courts between September 2020 and July 2021. HMCTS launched a courts recovery programme in May 2020 that focused on increasing court capacity to hear criminal cases, including through greater use of remote attendance at hearings and adaptations to existing court buildings. Between July 2020 and June 2021, it opened 72 temporary courtrooms (Nightingale courtrooms), 38 of which (53%) handled Crown Court cases. HMCTS also modified 71 courtrooms to hear cases with multiple defendants, increasing its overall capacity for these larger cases by 28% by 31 March 2021. HMCTS spent £63 million on its response and recovery work in criminal courts in 2020-21, in addition to that spent on expected operational activities.

### **Rape and Serious Sexual Offences (RASSO)**

The Government has prioritised tackling RASSO cases and wants to ensure that victims feel confident to report, and that their experiences through the criminal justice system are swift and taken seriously.

Despite this ambition, the latest Crown Prosecution Service figures (Oct 2021)<sup>3</sup> show that the number of days it takes from receipt to charge has been increasing quarter on quarter. It takes 10.4 more days from receipt to charge in Q1 21/22 when compared to the same quarter last year, increasing from 27.3 days to 39.5. Rape investigation timeliness had been on a positive downward trend but has significantly increased from 125.4 days in Q2 20/21 to 170.2 days in Q1 21/22.

### **Spending Review**

The Bar Council put forward recommendations in our Spending Review submission<sup>4</sup> aimed to help restore confidence in the justice system and clear the backlog of trials. The specific proposals included:

- Investment in the justice system by an additional £2.48bn each year – an extra 22p per person per day.
- Increase the number of court and tribunal buildings in England and Wales so the justice system is adequately equipped to hear cases remotely and in person.
- Urgently launch a recruitment drive for judges, recorders, and magistrates to meet the level of demand and help clear the backlog of cases.

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<sup>3</sup> <https://www.cps.gov.uk/publication/cps-data-summary-quarter-1-2021-2022>

<sup>4</sup> <https://www.barcouncil.org.uk/uploads/assets/9510f10c-477f-402d-a6021eb0c64d7046/Bar-Council-Spending-Review-submission-2021.pdf>

- Invest in ‘tech ushers’ to help court and tribunal users with technology in all courts by 2023.
- Produce modelling to demonstrate how and when the court backlog will be cleared and provide a clear assessment of what an acceptable standing backlog in each jurisdiction will look like.

The Chancellor announced<sup>5</sup> £650m for criminal justice system (for Courts, Legal Aid, Probation, Prisons, and victims) and an additional £500m over the next three years specifically for the courts backlog and to reduce waiting times caused by the pandemic. It is worth noting that the Government aims to use this £500m to reduce Crown Court backlogs caused by the pandemic from 60,000 today down to 53,000.

Until we see the breakdown of how the overall sums will be spent it is difficult to ascertain how much of an impact this money will make, though we recognise that this investment is a step in the right direction. Without further support and sufficient investment, the court reform project will fail in its objectives and the backlog will continue to rise.

The Bar Council also believes also it is unhelpful to consider the matter solely in terms of “the backlog”. As we set out above, the historic backlogs in the Crown Courts are not directly comparable to the figures seen today because of the disproportionate number of cases which will require a trial. We have not seen any clear indication that this has been factored into the calculation of the intended reduction, and we would stress that it is vital that the reduction is a *real* reduction. There is a risk of the creation of perverse incentives, for example to fast-track simpler cases in order to fulfil the metric.

For this reason, we would suggest that the MoJ’s focus (and the focus of the Committee’s ongoing scrutiny) should be on the time taken for cases to reach disposal. This is more likely to be a metric which accurately measures the extent to which progress is being made. It also has the advantage that it is more clearly focussed on the impact of delays on court users.

## Personnel

This brings us to the final, and in many ways, most important point. The huge volumes of work which will have to pass through the criminal courts in the coming years to reduce waiting times for victims, witnesses and defendants from their current unacceptable levels will only be achieved by a criminal justice system which is working at full capacity. There is ample evidence that it is not equipped to do so at present: not because of a deficit in courtroom space, but because of a deficit in personnel – there are not enough judges and legal professionals.

The NAO had this to say about the modelling produced by the MoJ on this crucial aspect (emphasis added):

*3.13 The Ministry and HMCTS have recognised that securing enough judges will be challenging. In 2021-22, they are relying on a number of recorders (part-time judges) agreeing to work more hours, alongside additional sitting days from high court judges. HMCTS believes it will be more challenging to secure enough judges in 2022-23 and 2023-24. Recruiting new judges is a protracted process that takes about two years. The Ministry and HMCTS*

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<sup>5</sup> <https://www.gov.uk/government/publications/budget-2021-documents>

have attracted lower than expected numbers of judges into criminal court postings and expect a shortfall. In the short term, they have focused on recruiting fee-paid judges and recorders. They have also extended the mandatory retirement age for judges from 70 to 75 years.

**3.14 The Ministry and HMCTS have a limited understanding of the capacity of other partners in the criminal justice system, including the CPS and the legal professions. Aside from judicial capacity, the Ministry's modelling does not account for these other potential constraints to recovery. Without this, the Ministry and HMCTS cannot be confident that their recovery planning is robust or can utilise increased judicial and courtroom capacity. Additionally, the Ministry will lack a system-view of funded and unfunded costs.**

The availability of Recorders and the capacity of the legal professions are, of course, two sides of the same coin. If Recorders are required to sit additional days<sup>6</sup>, those practitioners will not be available to provide representation in other cases. Both of these personnel issues are, and will be, affected by the reduction in the numbers of those in the criminal legal professions. These problems were grave before the pandemic (for example, the number of criminal barristers shrank by 11% in the three years prior to the pandemic) and are now critical (it is estimated that by 2022 the number of QCs available for the most serious criminal trials will be down to almost 50% of the numbers in 2015)<sup>7</sup>.

This drastic contraction of the criminal bar is the direct result of years of underfunding and neglect. It is vital that the Criminal Legal Aid Review recognises and rights this wrong. A failure to do so will lead to a continuing exodus of talented and hardworking individuals from the criminal bar. There will be no prospect of attracting a diverse and committed cohort of young barristers to continue the vital publicly funded work that the criminal bar does if the rates of remuneration do not allow people to make ends meet, and their working conditions do not allow them to balance the demands of work and life.

We are grateful to the Criminal Bar Association for the following two examples (see Annex A) that show the detrimental impact of the widespread delays in the criminal justice system. These examples focus on the impact on RASSO cases, where delays are particularly damaging. However, the detrimental impact of delays, and the consequent waste of precious resources, in terms of court/police time and the time of the CPS and legal professionals, applies across the whole of the criminal justice system.

## **The Bar Council December 2021**

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<sup>6</sup> The MoJ's "ambition" scenario involves Recorders sitting for an average of 43 days in the next financial year (see NAO report, Figure 14), i.e., for two whole months of the year.

<sup>7</sup> Figures provided by the Criminal Bar Association, quoted in [Clearing backlogs in the courts: are there enough lawyers, judges and court staff to do it? \(crestadvisory.com\)](https://www.crestadvisory.com/clearing-backlogs-in-the-courts-are-there-enough-lawyers-judges-and-court-staff-to-do-it/)

## Annex A

### **Example #1: multiple historic alleged offences with several complainants**

The defendant is charged with 25 counts of serious sexual assaults on seven females, most being children at the time.

The investigation began in 2015. The defendant was interviewed for the first time in June 2015, then later in 2016 and 2017. The defendant first appeared in the Magistrates Court in the first week of November 2020.

Prosecuting counsel was instructed at an early stage, on 21 September 2020, and given access to the digital case on 11 November 2020. She first advised in writing, including advice on the drafting of the indictment, on 14 November 2020.

The Plea and Trial Preparation Hearing [PTPH] took place on 3 December 2020, when a trial date of 13 October 2021 was fixed for 15 days.

At a hearing on 25 June 2021 the court informed parties that a murder case took priority, so the October trial date could not be maintained. All parties urged the court to look for other courts that could accommodate the October trial date. The court indicated if this was not possible, the next available date was 23 June 2022.

There was a further hearing on 9 July 2021 because the Crown had informed the court that its witnesses were dismayed at losing the October trial date, particularly as some had significant health issues. The court secured a slot for the trial at a 'Nightingale Court' on 4 October 2021. Both trial counsel rearranged their diaries to make themselves available for this new trial date, returning other briefs because they felt this trial took priority. Witnesses were informed, and arrangements made. No doubt the defendant too made suitable preparations.

A vast amount of work was undertaken in relation to trial preparation including the consideration of hundreds of items of third-party material, conferences with CPS and officers, the editing of multiple ABE interviews, preparation of a lengthy prosecution opening note, order of witnesses, jury bundle, discussions between counsel to resolve legal issues etc.

At the Pre-Trial Review hearing [PTR] on 24 September 2021, the last hearing before the scheduled 4 October trial date, the court advised that there was no Judge available at the Nightingale court to sit for the length of the trial, so the fixture would be postponed again. The trial was refixed for 24 October 2022 [a slightly earlier date was possible, but neither counsel was available].

As a result of this further delay, two complainants have suffered mental ill health and have totally withdrawn their co-operation from the case. One has asked for no further communication of any kind. Others are considering their position. One is so unwell that the prosecutor is considering a s.28 application to secure her evidence in case she dies before the October 2022 trial date. The anxiety it is causing cannot be put into words.

The defendant is in a wheelchair; his condition will no doubt further deteriorate. The stress a criminal case places on defendants and their families should not be under-estimated.

If the trial goes ahead in October 2022, it will be **seven years** from the start of the investigation and **two years** since the defendant's first court appearance.

Both counsels prepared the trial to the point of readiness once and will have to do so again a year later, for no extra fee. They lost other briefs in order to do this trial.

No fee whatsoever has yet to be paid to either counsel despite a vast amount of work and hearings, and the fee will not be paid for at least another year. This is why this work is such an unattractive proposition for so many at the Bar. Each time there is a hearing, counsel travel to court, pay to do so, all the while knowing there will be no payment for at least another year.

It would be wrong to assume that nothing happens in the gap between the case being adjourned and the new trial date – this week alone prosecuting counsel has received four emails regarding this case, each requiring a careful response. This is just one of many such examples in counsel's professional diary.

### **Example #2: Alleged recent sexual assaults of a teenaged stepdaughter**

The defendant faces allegations of serious sexual abuse of his stepdaughter between February-August 2017 when she was 14.

She provided her two video interviews to police in November 2017 and May 2019. She was 15 at the date of her first interview.

The defendant was postal requisitioned on 29 May 2020 and had his first Magistrates court appearance on 8 February 2021.

Counsel was instructed to prosecute on 4 March 2021. She advised on 5 March 2021. At the PTPH on 8 March 2021, not guilty pleas were entered, and a trial date fixed for 22 November 2021.

Two video interviews were edited by the parties on 5 June 2021, and prosecuting counsel prepared an opening note, witness order and jury bundle on 23 September 2021. There was a further case management hearing on 15 September 2021.

On 18 November 2021, two working days before the trial was set to begin, the parties were advised no court/Judge was available to try the case, and instead the case would be listed for a 'mention' on 22 November to re-fix the trial. Enquiries reveal the court is looking at dates in June 2022, which will be after defence counsel, who has had conduct of the defendant's case from the outset, will have retired. It will be **4.5 years** after the complainant first provided her account to police.

## **December 2021**