



LORD CHIEF JUSTICE
OF ENGLAND AND WALES

BAR COUNCIL BAR AND YOUNG BAR CONFERENCE: Delivering Justice in 2021

18 November 2020

It is a great pleasure to be able to join you on the first day of the annual Bar and Young Bar Virtual Conference. I have been asked to speak to you on the topic of delivering justice in 2021.

Last Tuesday I was asked a question about generalised attacks on sectors of the legal profession at the start of my session before the Justice Select Committee. I explained that a vibrant independent legal profession is vital to the rule of law and that lawyers should not be attacked for doing their jobs. This is an important issue but it is outside the scope of my topic today. I nonetheless echo what I said last week because it is important and would encourage those with a few spare minutes to look at the detail of my comments – very easy to do on the Parliament website.

I propose to say a few words about three related issues. First, the response of the justice system to the Covid emergency. Secondly, the capacity of the courts to deal with the volumes of work we expect in all jurisdictions in the coming year whilst at the same time coping with increased backlogs. Thirdly, the need for proper funding in the immediate future.

The last eight months have been extraordinary for the administration of justice. In many parts of the world the operation of the courts came to a standstill. I was determined that nothing of that sort should happen in England and Wales. Even before lockdown I had encouraged judges to use technology as much as possible to support hearings, where it was in the interests of justice to do so. There was long experience of using telephones for procedural and interlocutory hearings in all jurisdictions and the use of video technology had been rolling out slowly across the system. In the early days after lockdown there was a shift to the increased use of telephone, particularly in Civil and



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Family. That said, in March this year few judges were equipped with telephones capable of being used for conference calls. That deficiency was made good quickly. Courts in all jurisdictions also moved to the use of commercially available online video platforms. In some courts we already had better systems, but not in many.

It was as a result of the use of such technology in the early days of lockdown that it was possible in all jurisdictions to continue not only with urgent work but also with some of the more routine work. In the Crown Court jury trials were paused for obvious reasons of safety; but very quickly a group was established under the chairmanship of Mr Justice Edisto look at restarting them. In the meantime, there was a substantial increase in the listing of non-trial work, with the use of remote attendance when consistent with the interests of justice. Jury trials restarted on 18th May, less than two months after lockdown, and gradually increased in volume in the months that followed. The key to enhancing the volume of jury trials was prosaic. Careful attention was paid to social distancing in the courtroom itself. That has entailed the widespread installation of plexiglass, and the moving of fixed furniture to ensure distancing as advised by Public Health England. Additionally, in many Crown Court buildings, the proceedings have been transmitted to a second courtroom to enable public and press to attend. Retirement rooms have been provided for juries which comply with guidance but one of the most difficult aspects of increasing the number of jury trials has been to make appropriate provision for general footfall within the building. Additional space has been created in some Crown Courts by installing portacabins. Problems also need to be confronted in the cells. All that said, HMCTS developed a plan which envisaged 250 Crown Court rooms being fitted out by the end of October with the necessary ancillary changes in the buildings, so that at any one time 250 simultaneous Crown Court trials could be held. That goal was achieved. Indeed, by Monday 2nd November 2020, there were



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255 such courts within the Crown Court estate, the figure today is 260, together with about a dozen Nightingale courts. The plan is to continue to increase the number of court rooms available within the estate and also the Nightingale courts. By the beginning of next year, I would be disappointed if our Crown Courts were unable to accommodate 300 simultaneous trials. That is more than were being conducted last year. The other courtrooms will continue to be used for non-jury work in the Crown Courts.

The position in the magistrates' courts has been a success story. Trials were paused for a while, but all other work continued. Alarming reports of backlogs building in the magistrates' courts with suggestions in the press that they would take five years to clear were always complete nonsense. Trial work in the magistrates' courts has grown steadily over the summer and into the autumn. More trials are being listed now than were being listed pre-COVID-19. In some areas of the country there are no real backlogs in the magistrates' courts and I am assured that things will be back to normal for the most part by the beginning of the next financial year or shortly thereafter, barring any further unexpected shocks.

The High Court and Court of Appeal, in both its divisions, carried on almost as normal, pivoting to much greater use of technology.

The Family Court has achieved a remarkable volume of business over the last eight months but the number of incoming cases, which were on an inexorable rise even before Covid, is continuing to rise with concerning accumulating backlogs.



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In the County Court, there was a reduction in new cases during lockdown and in the months that followed, but the disposal of business was also reduced. The backlogs in the County Court, which were a worry before Covid, have also risen.

The increased use of technology has been vital in enabling the wheels of justice to continue to turn. I do not underestimate the difficulties that the use of technology has caused for all those involved. It required many to use unfamiliar equipment often in very difficult circumstances. Many people, judges included, were working from home. The physical environment and the equipment available were often far from ideal. There were difficulties in setting up remote and hybrid hearings using the telephone or online platforms, not least because of a shortage of staff. All of us have learned over the last eight months that the quality of our equipment and the way in which it is set up, the physical environment in which we try to work, including having dedicated space and tranquilly, are vital to the effective use of technology. We learned that using technology to conduct remote hearings was often more tiring than dealing with hearings face to face. It was also a mistake to suppose that remote or hybrid hearings are necessarily shorter hearings. On the contrary, the general experience is that such hearings take longer, not least because all the normal cues that we rely upon when in each other's presence are lost. Importantly, it became clear that many participants, particularly litigants in person, found the experience difficult.

In the early stages the reality was that all were struggling to find their way with sub-standard technology and surroundings. The Cloud Video Platform which has been introduced is an improvement on what went before but it is not the end-state system that HMCTS is developing. There has been a system under development for more than two years which is being piloted in a small



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number of courts and tribunals that is a good deal better than CVP. It will provide a much better experience.

One thing we soon learned was that those parts of the system which had benefited from the modernisation programme were more resilient. It is vital to see the reform programme through to its conclusion, including both digitisation of the County Court and the video hearing project. The public law side of Family is being digitised as I speak. The private law side will follow. The reform programme and recovery are not separate but intertwined.

As a result of the Covid emergency we have been engaged in the biggest pilot project ever in the courts and have taken three steps forward. We are likely to take one step back but there is no going back to February 2020. Careful scrutiny of the experience of using technology over the last eight months, and scrutiny of the experience we will have over however many more months the Covid emergency endures, will inform the extent to which the use of technology to allow fully remote hearings or hybrid hearings will be baked into the system. There is a wide range of views about the extent to which that should be so, which often reveals underlying attitudes to technology and the individual's comfort in using it. But it is clear already that many procedural hearings can be conducted perfectly well remotely. The days of two lawyers travelling for an hour or two, sitting around outside court and then going in to argue for 15 or 20 minutes over a procedural matter are gone for good. So, too, for many short appeals and other hearings which do not require the attendance of witnesses. There are some circumstances in which witnesses might properly be heard remotely. That has been going on for decades, but clearly it will not be universal.



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There are unlikely to be hard lines drawn. Whatever the future holds, judges must be able to decide where the interests of justice lie in any particular case. There are always competing views about where the interests of justice lie but they are not the same as the interests of judges, still less the interests of the legal profession. One should not forget that attendance at court is often necessary, not for the business transacted during the hearing itself, but for the important business transacted outside the courtroom between the lawyers and their clients. But in 2021, it is clear that both during a continuing Covid emergency and beyond, the use of technology in support of hearings will continue to be important. I say in support of hearings because technology is our servant and should never become our master. Those who look in from the outside and who are not familiar with the dynamics of legal proceedings are too often tempted to suppose that the use of technology to conduct hearings is simple and effective in all circumstances. Neither is the case.

When people talk of capacity in the courts, their focus is often on the capacity of courtrooms in which hearings can take place. That is an important aspect of the concept of capacity, but it is not the only one. There are at least four others. First, the capacity of the courts in every jurisdiction to transact business depends upon the availability of judges and magistrates. Secondly, capacity depends upon sufficient HMCTS staff to support hearings for which there is physical and judicial capacity. Thirdly, capacity in each jurisdiction depends upon the ability of the major external players to support the hearings. Fourthly, capacity depends upon sufficient financial resources being made available by Her Majesty's Treasury through the Ministry of Justice to the courts.

Before saying a few words on each, might I indicate some of our thinking about future volumes of work in some of the jurisdictions?



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Crime first. There has been much reporting on the reduction in some types of crime during the initial lockdown. But during that period, the police were not idle. They were able to follow up intelligence leads and concentrate on gangs and organised crime. The mix of Crime coming into the system as a result of all of that activity is likely be more complex and time-consuming. It is a mistake to look only at the number of cases outstanding without trying to understand the nature of the mix of those cases. Volumes of crime rose again after the end of lockdown. Add to that the well-publicised planned increase in the number of police officers and the recruitment by the Crown Prosecution Service of hundreds of lawyers and one can see that the magistrates' and Crown courts are likely to be dealing with substantially increased volumes of work in the next year and beyond, quite apart from the additional backlog built up during Covid.

Then Family. Figures available only last week comparing outstanding cases in Family show the increasing volumes of work. As compared with October last year outstanding public law Family work has grown by 17% and private law by 22%. Volumes were growing before Covid. There is a statutory target for the completion of public law cases of 26 weeks. The timeliness of such cases has stretched well beyond 26 weeks and is expected to continue to grow.

In Civil, at both High Court and County Court level, and for a variety of reasons, the volume of work is expected to grow. In many respects Brexit will lead to increased work. In addition, the economic impacts of Covid will inevitably lead to increased volumes of work.



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In the tribunals it is inevitable that the volume of cases issued in the employment tribunal will increase significantly in the near and medium-term future with the current backlogs already at an unsustainable position.

I return to physical capacity. So long as Covid is with us there will be constraints upon the ability in all jurisdictions to provide physical space for hearings which accommodate social distancing. The position is improving as adjustments are made in our courts and additional space is found. Once we are through Covid, or living with its residual effects, space in our court buildings is unlikely to be a constraining factor. The continued enhanced use of technology in some circumstances will help.

Judicial resources are an important factor in disposing of business, made up of salaried judges, fee paid judges and magistrates. Judicial resources will not be a constraint on recovery in the Crown Court, nor in the magistrates' courts. The same is not true in the Civil and Family courts where much of the work is undertaken by District Judges. In recent years the Judicial Appointments Commission has been unable to recommend as many new District Judges as were needed. I hope that the competition underway will go some way to reversing that trend. But appointments will not come through until well into next year. In the meantime, deputy District Judges, both part time practitioners and retired District Judges, are increasingly being deployed to cope with the work. Last year 350 or so deputy District Judges were appointed and this year well over 100, who are still being trained. Judicial resources could be an issue in Family and Civil at least until the new deputies and the new District Judges come on stream.



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Court hearings require staff to support them and to manage people in the buildings. HMCTS is funded by reference to an odd unit of currency called the “sitting day”. The number of sitting days in each jurisdiction dictates the number of support staff within HMCTS. The substantial recent reductions in sitting days in Crime and some tribunals resulted in a commensurate reduction in the number of staff supporting the work of the Crown Courts. In recent years the number of staff employed by HMCTS was reduced in any event. There is no spare capacity within the system. That has become apparent during Covid when it has been difficult for the available staff to support remote and hybrid hearings.

The Lord Chancellor has secured sufficient funding to employ an additional 1600 members of staff in HMCTS for this financial year. Recruiting those staff members has been painfully slow. The capacity of the system to deal with enhanced volumes of work will be placed in jeopardy if funding for necessary additional staff is not forthcoming.

The ability of others who play a crucial part in each jurisdiction to support hearings is another constraint on capacity. An obvious example is the ability of the legal profession to support hearings. I expect no problems with that. But in Crime the prison service, police, CPS, witness support and probation service are all key players whose ability to play their part in proceedings is critical. In Family, work is sustainable only if CAFCASS and local authorities have the capacity to provide the necessary support. These examples can be multiplied in tribunals.

Then finally, and importantly, the question of capacity in the courts is critically affected by funding. You have asked me to focus on 2021. The Lord Chancellor and I have made it clear that sitting days will not be a constraint on capacity in this financial year. The Lord Chancellor cannot for now go



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beyond that date because the process of budget settlements between spending departments and the Treasury is not yet complete.

In my view, the correct way to determine the financial needs for 2021 to 2022 is to look carefully at the anticipated volumes of work coming into the system, coupled with the accumulating backlogs as a result of Covid, and then make financial provision with that in mind. There must be sufficient resources to enable the courts and tribunals to work to full capacity, having regard to all capacity factors, otherwise backlogs will not be tackled.

That is a political choice.

It would be damaging to return to the position last year where in Crime there were court rooms and judges available to hear Crown Court cases and cases ready to be heard but for financial reasons it was decided by Government to maintain or increase backlogs, with trial dates going out further and further into the future. Our aim is to see cases tried as soon as the parties are ready, or shortly thereafter. In recent years that has not been happening and the impact of Covid has made the position worse. The number of the cases in the system is an important measure but as important is information about how far out into the future cases are being listed. Non-custody cases in many parts of the country are being listed towards the end of 2022. That is worrying. The longer it takes for a case to come to trial the more likely it is that something will go wrong with it. It is simply not acceptable to keep all those involved in a Crown Court trial waiting for longer than is reasonably necessary.

The position in Family is also not sustainable. Artificial financial constraints which limit the work that can be done in the Family Court make little sense. They would also be a false economy. Resolving



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family disputes and dealing with the heartrending circumstances of public Family work quickly saves expenditure elsewhere. The budgets of local authorities are eaten up by care cases. More widely, dysfunctional families engaged in endless dispute haemorrhage public funds. Resolving underlying disputes and problems saves public money. Families distracted by outstanding disputes are likely to be less productive; and the consequences of failing quickly to deal with problems involving children generally feeds not only into the work of local authorities, damages their education and employment prospects and as we all know can feed into the criminal justice system.

The Civil courts exist to resolve mostly financial disputes. For very large numbers of individuals and small businesses who find themselves as claimants in the County Court, which deals with 95% of civil disputes, the amount at stake can make the difference between an individual or business making a profit or loss, indeed remaining solvent. The civil courts provide essential underpinning of the whole economy, not only providing the forum in which disputes are resolved but the fallback against which most disputes are resolved out of court. Why would people settle a claim if they know that growing backlogs in the civil courts mean that it will take years for the system to provide the answer? It has been striking during the Covid emergency that some of the support provided by the government, for example business rates relief, has made the difference for many small businesses between survival or not. The sums claimed in relatively small litigation in the County Court can do the same.

Litigants in the civil courts pay for the whole civil justice system through their fees. They are entitled to a modernised civil justice system and one that delivers answers relatively speedily.



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I finish by offering this thought. As far as I am aware, no attempt has ever been made to quantify the economic benefits to the United Kingdom of having an efficient court system. It is easy to add up the total revenues of the legal profession and then add on ancillary services and so on. But the economic benefits are much wider and include attracting investment to this country. Such an economic calculation is long overdue. Few will be keen to invest in a country that has dysfunctional courts – look around the world and talk to business people – because there needs to be a fallback mechanism to resolve disputes if things go wrong. But the economic value is not limited to the civil courts. It extends across all jurisdictions.

By comparison, the cost of the courts and tribunals including the judiciary is modest indeed. Last year resource spending of just under £1.9 billion gross, and almost exactly £1 billion once fees were taken into account. Neither the Ministry of Justice nor HMCTS gets credit for fines, the proceeds of deferred prosecution agreements or confiscation orders. That all goes to the Treasury. So in the end the real net cost of our justice system is small.

The additional funding necessary to enable us to deal with incoming work and eat into backlogs would be little more than a rounding error in many departments.

So, what of justice in 2021? Continued hard work to deal with the effects of Covid. Consolidation of technology gains. And then, critically, the funding to utilise our resources to the full to tackle increased flows of work expected in almost all areas of activity and make a meaningful and rapid attack on backlogs.