



**Justice Committee
Court Capacity Inquiry**

Written Evidence of Justice

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Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK section of the International Commission of Jurists.
2. We welcome the Committee's inquiry into whether the number of sitting days available will be sufficient to clear the backlog of cases and what long-term solutions, including digital hearings, may be possible.
3. JUSTICE is concerned that the current backlog of cases in the courts requires more creative exploration of available solutions, embracing technology where it enables effective participation of the lay parties to take place and using alternatives to traditional court-based resolution processes where appropriate.

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

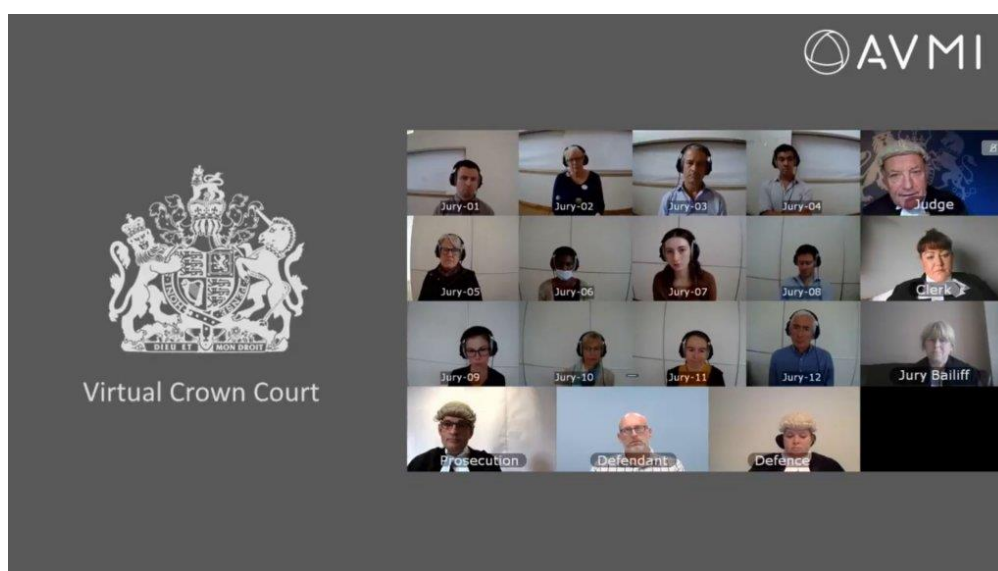
4. While the current solutions for responding to the pandemic across courts and tribunals have generally taken significant steps to put as much work online as possible, and therefore keep people safe, there are unfortunately still significant areas where the work is not progressing at anywhere near the rate required, particularly in the Crown and family courts. The reasons for this are fundamental concerns with trials and hearings being conducted by way of video link.
5. We understand these concerns and agree that ensuring hearings can take place fairly is fundamental. However, during this pandemic, it is also important that those proceedings can take place safely and without unconscionable delay. With the virus yet again increasing, HMCTS must consider the possibility of virus spreading in physical courtrooms, notwithstanding the introduction of plexiglass and other distancing measures. It is hard to imagine how contaminated air will not circulate in a closed courtroom where an infected person is breathing for the duration of a trial, irrespective of these measures.
6. It is also unacceptable to expect people to travel, often on public transport, to courts and tribunals to attend hearings when they are anxious about catching the virus, if there is a viable alternative. Moreover, it is wholly unacceptable to adjourn proceedings, causing increased uncertainty, hardship, distress and incarceration for people waiting for a case resolution. In particular, blanket extension of custody time limits is not a necessary and proportionate response to the pandemic, when there is a viable alternative. To do so is in violation of Article 5 ECHR.¹
7. Creative and imaginative solutions are necessary to resolve these problems. We are concerned by any attempts to distribute the courtroom which would place lay parties on a video link while court professionals or other lay parties are in the hearing room. We would be concerned that for a lay participant, joining by video link will be a diminished experience and be harder to follow or take part in the proceedings. This would be especially the case if the room is not carefully configured to enable the video participants to be able to clearly see all participants in the room. To do so fairly

¹ See our press release of 7th September 2020 <https://justice.org.uk/justice-press-release-on-extending-custody-time-limits/>

requires, at a minimum, multiple cameras and microphones.² But it may be possible for some participants to join certain kinds of proceedings by video link, and for procedural hearings where only legal professionals are required, this approach would be by far the most sensible.³ We are aware that Scotland has started to hold jury trials with the jury in adapted cinemas. We will be monitoring closely the effectiveness of this approach.⁴

8. A fully virtual proceeding places all participants on an equal footing in the hearing space so that everyone is able to see and hear each other clearly. We consider that there is merit in exploring this vehicle for contested hearings, not only procedural hearings, as many courts and tribunals are already doing. While we consider that the basic model of the Cloud Video Platform (CVP) requires improvement – not least in being able to place participants in static positions rather than jumping around every time someone speaks – we understand that HMCTS is moving quickly to roll out an upgraded service that offers a solution similar to that used in the Tax Chamber pilot which, following extensive testing, is much more user friendly.

JUSTICE mock virtual jury trial



9. No platform as yet has contemplated virtual jury trial. In March, at the start of the lockdown, we were concerned as to how court business would be progressed with court centres having to close and the proposal made in Scotland at the end of March (but promptly abandoned) to bring in judge alone trials. We foresaw a very real prospect of judge alone trials being seriously considered in England & Wales, as then happened, but has also since been abandoned. Since we were moving into holding meetings online, it seemed sensible to see if a video platform might work to replicate the courtroom in a jury trial. We connected with audio visual solutions firm AVMI (now merged with Kinly which provides the CVP solution), which already works on provision of video links and digital bundles in trials. From there we sourced volunteers to play

² See D. Tait and others, 'Towards a Distributed Courtroom', available at <https://researchdirect.westernsydney.edu.au/islandora/object/uws:51755/>

³ For example, where a judge and prosecutor are required in court for a list of cases, defence practitioners could all join remotely, vastly reducing the number of people required to attend court.

⁴ See <https://www.scotcourts.gov.uk/about-the-scottish-court-service/scs-news/2020/09/28/first-cinema-remote-jury-centre-trial-set-to-start>

the various required roles in a mock trial (including legal professionals) and developed a platform.

10. It was critical to ensure that this was properly evaluated and at the outset we engaged academics already working on use of video technology and court design, expert in evaluating the experience of court users. These discussions emphasised key features that would be necessary for the platform to include – formality of process, positioning on screen, clarity of sound and vision and pre-court familiarisation. Professor Linda Mulcahy and Dr Emma Rowden agreed to evaluate the project, through observations and surveys of participants. They have now produced three reports on their observations and survey data, available on our [website](#).
11. We conducted four tests, each one developing the platform capability and information provided to participants. Over the iterations we also sought jurors with experience of the justice system and of prior jury service to compare with the current system. While feedback from the first three tests was positive, and far better than we might have expected, the fundamental obstacle was concern for jurors appearing from their homes. This would limit the available pool because of a lack of suitable technology and quiet space. There would also be the risk of distraction, interference and possibly internet research about the case.
12. Therefore, the fourth and final test placed the jury in a “jury hub” – a community hall within walking distance of their homes. Jurors were provided with two screens – one with the hearing video and one with the documents bundle - operated remotely by technicians who were on site to provide support if needed. They could ask a question through a tablet directly to the judge and then deliberate in person in the room together. Careful thought was given to the design of the room – both for infection control and for creating the sense that this was a court proceeding. HMCTS supplied court posters, free standing banners of the court crest and we created an introductory video about the virtual court played to the jurors (and witnesses) ahead of the court sitting. In the virtual court, participants wore court dress and the court crest was visible behind the judge. The platform also created “screen savers” for each participant when their camera was off (for a confidential client conference/for a break/pending the arrival of a witness) of the court crest and this was replicated on the public gallery documents feed. It had breakout rooms for the jury and client consultation.
13. We have engaged with HMCTS throughout the development of the platform. In the fourth test HMCTS staff played their roles and a prison link was tested to HMP Leeds for the defendant (played by a custody officer).
14. On Tuesday 23rd June the Lord Chancellor gave evidence to this Committee regarding court administration during the pandemic. He thanked JUSTICE and the volunteers for all the work done on the platform, said the work was impressive and that he was more inclined towards it than he had been. He also said that he was not ruling it out as an option to contribute to addressing the backlog of cases. He indicated that more evaluation was required.
15. Mulcahy and Rowden have since analysed survey data from almost 100 participants across the four test trials, alongside their own observations. They concluded that:

The findings of the survey results analysed in this report would support the contention that the partial virtual trial model piloted in the fourth JUSTICE experiment has the most potential to contribute to ameliorating the backlog. This is largely due to the stabilising effect that reducing 12 different internet

speeds, software and hardware configurations to a single system managed on-site had.

Levels of satisfaction across the sample in relation to a large number of measures suggests that the model developed by the fourth trial is worthy of consideration for further piloting and testing by HMCTS as a solution to a serious problem during the pandemic.⁵

16. In JUSTICE's view this could be used for short cases of one or two days, with one or two defendants, few documentary exhibits and single or limited issues. This would be suitable for a considerable amount of Crown Court work and make a significant dent in the backlog.⁶
17. We have also engaged with HMCTS and First-tier Tribunal Immigration and Asylum Chamber judges to share our learning, along with immediate and long-term suggestions for improvements required to the CVP. This has included:
 - (1) the need for hardware provision for appellants;
 - (2) the need for tribunal space to adapt hearings and hybrid hearings, prioritising the physical presence of the appellant if proceedings are not fully virtual;
 - (3) the various software developments which will enhance effective participation; and
 - (4) the wrap around support, technical and otherwise, which will enhance effective participation.
18. We have impressed upon HMCTS the need to consider effective participation in all the adapted hearings and will continue to do so.⁷

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

⁵ L. Mulcahy, E. Rowden, W. Teeder 'Virtual courtroom experiment: Data report; Third evaluation of a virtual trial pilot study conducted by JUSTICE' (October, 2020), paras 34 and 35, available at https://justice.org.uk/wp-content/uploads/2020/10/FINAL-JUSTICE-III_Exploring-the-case-for-Virtual-Jury-Trials-during-the-COVID.pdf The authors recommended further piloting and testing by HMCTS for a large scale roll out. They further concluded that: "If adopted on a larger scale, the concerns raised in this report about the jury hub model and previous iterations would need to be addressed by HMCTS in the next iteration of the virtual jury trial tests. These include: •threats to juror safety, •anonymity and the increased potential for jury nobbling; •the potential for witness intimidation is addressed; •measures are in place to ensure that the press can access court staff;•participants being sufficiently supported and informed of what to do when technical difficulties arise and of what is happening in the court; and •sufficient trained technicians on hand to address participant's needs and concerns." We consider that each of these is surmountable.

⁶ Court statistics for the past 5 years suggest that for triable either way not guilty plea trials held in the Crown Court, the average hearing time was 9 hours. Although case numbers have been falling, this accounted for around 10,000 cases over the last few years (which is over half of the not-guilty plea trial volume heard in the Crown Court), see https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/897698/cc_waiting_hearing_tool.xlsx

⁷ See JUSTICE Response to HMCTS Survey on Conducting Video Hearings April 2020, available at <https://justice.org.uk/wp-content/uploads/2020/04/JUSTICE-Response-to-HMCTS-Survey-updated-images.pdf> much of which remains relevant six months on from lockdown restrictions coming into effect.

19. The court estate has significantly reduced as a result of austerity, meaning that courts are further apart and harder to reach for people using them. In 2016 JUSTICE published the Working Party report *What is a Court*⁸ which recommended reconfiguration of the physical court estate into justice spaces, that are flexible to the needs of the hearing. Our approach was to identify what kinds of proceedings needed the rigidity and formality of our existing estate and what could be held peripatetically in other locations. We concluded that many proceedings could be held in other venues, so long as there were two entrances to the room and separate waiting facilities for the parties. The most recent Court Design Guide accepts our recommendations for flexible configuration within the existing estate. We recommend further attention be paid to ad hoc arrangements that will make use of community spaces to administer justice, alongside use of video hearings where appropriate to the case and parties. Current usage of video hearings is providing rich empirical data on how these proceedings can be made fair and effective and where they are not appropriate.⁹
20. Our response to the Justice Committee inquiry into the access to justice implications of the HMCTS Reform Programme touched in more detail on the changing face of how justice is administered in our courts.¹⁰

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

21. Innovations in the creation of the digital court file, reducing re-keying of data, analysing and producing digital evidence and also making claim and response filing a more accessible and seamless process have much to offer in reduction of delay to court proceedings. No doubt the Committee will receive evidence on the advancements underway for each of these areas, and recommendations for change in the capture of digital evidence recently made in the updated Attorney General's Guidelines on Disclosure in criminal cases.¹¹
22. JUSTICE has increasingly been looking at the value of alternative dispute resolution across our work streams in recent years. Working parties have recommended diversion in appropriate cases involving a defendant with mental ill-health or neurological disability,¹² for first and no-contact offences involving indecent images of

⁸ Available at <https://justice.org.uk/wp-content/uploads/2016/05/JUSTICE-What-is-a-Court-Report-2016.pdf>

⁹ We are aware of a number of research reports underway into the adapted criminal courts and family and tribunal proceedings making use of video hearings.

¹⁰ Available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/hmcts-court-and-tribunal-reforms/written/97832.pdf>

¹¹ See <https://www.gov.uk/government/publications/consultation-on-revisions-to-the-attorney-generals-guidelines-on-disclosure-and-the-cpia-code-of-practice>

¹² *Mental Health and Fair Trial* (2016), pp 52-57, available at <https://justice.org.uk/wp-content/uploads/2017/11/JUSTICE-Mental-Health-and-Fair-Trial-Report-2.pdf> See also updated CPS guidance, which considers diversion <https://www.cps.gov.uk/legal-guidance/mental-health-suspects-and-defendants-mental-health-conditions-or-disorders>

children,¹³ and in relation to youth crime.¹⁴ Diversion programmes that are tailored to strengthening positive life styles and meaningful support for people engaging in risky behaviour have the potential to rehabilitate or avoid criminal pathways, which traditional court and prison routes are failing to achieve. Reducing crime and reducing cases being prosecuted through the courts will, likewise, reduce the delays for the cases that must be formally prosecuted.

23. Aside from criminal justice, we have also seen the benefits of alternative dispute resolution in our recent work on property cases.¹⁵ Alternative dispute resolution that seeks to address the underlying reasons a person is at risk of losing their home rather than simply ordering repossession for non-payment or other grounds, is a more effective solution to avoid homelessness and keep properties inhabited and income generating. The recommencement of possession courts this month is attempting to introduce a mechanism of this kind to prevent mass homelessness due to the effects of Covid-19 on employment.
24. The efficacy of ADR cannot be properly maximised, and the benefits felt by the courts in terms of reduced demand, if people enter ADR processes blind. It is essential therefore that all initiatives to encourage ADR are accompanied by accessible advice provision. Those who use ADR processes must be notified of their rights and responsibilities and assisted to make an adequate assessment of the benefits of out of court settlement.
25. While these processes could add length to matters that cannot be resolved through mediation or diversion, we still consider the possibilities for pre-court resolution outweigh the potential delays that might ensue. Greater resort to ADR, which utilises paper processes, video meetings, and in-person meetings in community spaces, has the potential to significantly ease the burden on the court estate to hear more swiftly complex matters that require a judicial resolution.

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¹³ *Prosecuting Sexual Offences* (2019), pp39-45, available at <https://justice.org.uk/wp-content/uploads/2019/06/Prosecuting-Sexual-Offences-Report.pdf>

¹⁴ *Racial Disparity in Youth Justice*, forthcoming. See evidence to the Justice Committee inquiry on youth justice, July 2020 <https://justice.org.uk/wp-content/uploads/2020/07/JUSTICE-written-evidence-to-Youth-Justice-Inquiry.pdf>

¹⁵ *Solving Housing Disputes* (2020) <https://justice.org.uk/wp-content/uploads/2020/03/Solving-Housing-Disputes-report.pdf> The majority of the working party support a recommendation for a new model of dispute resolution through a Housing Dispute Service (HDS). The HDS would be an entirely new and distinct model for dispute resolution. It would fuse elements of problem-solving, investigative, holistic and mediative models utilised elsewhere in the justice system. The proposal offers a new approach premised not just on dealing with individual disputes, but rather on remedying underlying issues that give rise to housing claims and sustaining tenant-landlord relationships beyond the life of the dispute. The proposal for a fully formed HDS is bold, ambitious and will require significant time and investment. It will need rigorous evaluation through a pilot phase. If the pilot shows positive results, in the longer term the HDS will need to be integrated with and replace elements of the current system.