

Exacerbating Long-Term Problems: Covid-

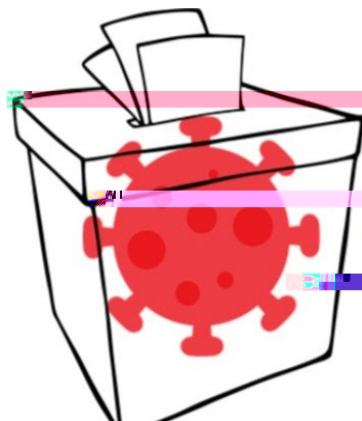
A Note on Method, Aims and Context

This e-briefing paper is an output of *The Covid-19 and Democracy Project*. Since Spring 2020, this project has explored the intersection between the Covid-19 pandemic and democratic politics and policy. Project outputs thus far include a comparative [report](#), a previous briefing paper on the 2020 US [electoral cycle](#), comment [pieces](#), and a [podcast](#). The project is led by Principal Investigator Dr Peter Finn and Co-Investigator Associate Professor Radu Cinpoes.

Rather than provide a comprehensive documentation of events pertaining to the Covid-19 pandemic and the English and Welsh Criminal Justice System, this e-briefing paper provides selective discussions to draw out key themes. In short, this brief aims to provide a first-cut analysis which acts as a bridge between the reflective writing that develops from the academic peer review process and the more immediate analysis and information found in (the undoubtedly essential) media coverage of the operation of the English and Welsh Criminal Justice System. As such, it is hoped it provides important food for thought for those involved in the analysis of, and policy response to, the Covid-19 pandemic as it relates to the English and Welsh Criminal Justice System. It should also be of interest to those impacted by, or working within, this system.

For democracy to thrive, accountability is key. Core to this accountability is an understanding of how democratic states, or groups of states such as the United Kingdom, act to protect their citizens against a myriad of threats. Since Spring 2020, perhaps the largest of these threats has been the Covid-19 pandemic. Understanding how the pandemic has impacted policy areas such as justice systems is key to ensuring such accountability is maintained.

An audio version of this e-briefing can be found [here](#)



Foreword

The problem with the justice system generally is that few people care about it. Unless you work in the justice system or are a user of it: people don't think they need it. Those who earn a living from working in the criminal justice system (CJS) may cynically be thought to be asking for greater resourcing out of personal greed.

As David Green in this important and timely paper highlights: a well-functioning CJS is the cornerstone of a democratic society. The consequences of a failing CJS is, as this paper remarks, anarchy or authoritarianism. The failure over the last 2 decades by government on both sides of the political spectrum is an indictment of the near contempt with which the CJS is treated by government: something seen starkly in the fall in pay for highly skilled practitioners. Yet, government cannot be blamed entirely for failing to make the CJS a priority when it is not one for the electorate.

This paper highlights the downward spiral the CJS was going in before the Covid-19 pandemic reached our shores because of a failure to value the proper administration of, and access to, justice. So, by the time Covid-19 came, like many other areas of the State, the CJS was ill equipped to deal with it.

It is worth comparing the response of the Executive to the pandemic insofar as the CJS is concerned with the effect on those facing the loss of their home in the civil courts. Instead of ensuring there was more resource for the work of the criminal courts to continue, the answer was to incarcerate innocent people for longer. And when members of the independent judiciary determined that a failure by the State to fund the justice system was not a proper reason to lock people up for longer, awaiting trial: the Executive changed the law to extend custody time limits.

In the Civil Justice System, my own natural habitat, the Executive's response was to make it harder for people to be evicted and to increase the protections for those who faced possession proceedings. Whilst this response has no doubt affected the financial viability of providers undertaking publicly funded civil housing work (the medium-term consequences of which will unlikely be good from an access to justice point of view), it did mean that vulnerable people were protected from homelessness.

David Green shows that victims of crime, those accused of crime and others who must give evidence will wait longer for their day in court. The human cost of this cannot be underestimated. More structurally, solicitors who represent people accused of crime are getting older and on account of pay and working conditions, younger lawyers often don't want to do this work. This raises serious concerns about what will happen to the CJS when these middle-aged solicitors retire.

Despite being a Housing Solicitor specialising in representing people who rely on the State to afford legal representation, I learnt a lot from this paper. I hope you do too. The figures show that the pandemic alone is not responsible for the problems the CJS now faces. Policy makers must begin to respect and value the importance of a well-functioning CJS. As must voters: before it's too late. Without respect for the work all parts of the CJS does, money alone may not be enough.

Ranjit Bains, University of Law, October 2021

1. Key Policy Learning Points:

- x A well-functioning Criminal Justice System is essential to maintaining the Rule of Law. If, on one hand, the State removes citizens' liberty without due process; or on the other, if those guilty of crimes are seen to avoid justice, the fine balance between authoritarianism and anarchy will be upset.
- x Over recent years, the entire Criminal Justice System in England and Wales has been subject to systematic cuts in funding, personnel and physical resources. This led to it being unable to cope with the sudden and unexpected impact of the Covid-19 pandemic.
- x This lack of elasticity in the system led to delays and, in some cases, a prolonged loss of liberty.
- x Three urgent areas now need addressing: reducing delays; re-building a network of local courts; and re-creating a sustainable system of legal aid.
- x These three priorities can only be achieved by the Government properly funding the Criminal Justice System.

Key Facts

Historic Position	Position Prior to and During the Covid-19 Pandemic
Number of Magistrates' Courts in 2010: 320	Number of Magistrates' Courts in 2020: 156
Number of Crown Court Sitting Days in 2010: 108,536	Number of Crown Court Sitting Days in 2020: 82,300
Hourly Legal Aid Rate for a Solicitor in London Preparing a Magistrates' Court case in 1996: £47.25	Hourly Legal Aid Rate for a Solicitor in London Preparing a Magistrates' Court case in 2020: £45.35
Total Criminal Legal Aid Spend in 2010: £1.4 billion	Total Criminal Legal Aid Spend in 2020: £897 million
Backlog in the Magistrates' Court in early 2020: 314,592 cases	Backlog in the Magistrates' Court in early 2021: 412,494 cases
Backlog in the Crown Court in early 2020: 35,383 cases	Backlog in the Crown Court in early 2021: 57,625 cases

2. Introduction

England and Wales form a single legal jurisdiction.¹ The Criminal Justice System (CJS) in England and Wales comprises numerous parties and agencies – Her

Majesty's Courts and Tribunals Service (HMCTS) (responsible for the provision and administration of Magistrates' and Crown Courts); the judges and magistrates who sit in those courts; the Crown Prosecution Service (the independent agency responsible for prosecuting most offences); the Legal Aid Agency (LAA) (an executive agency of the Ministry of Justice responsible for the provision and administration of legal aid services); defence solicitors and barristers (the vast majority of whom are independent professionals who provide their services on both a private basis and through contracts with the LAA); and the National Offender Management Service (an executive agency of the Ministry of Justice responsible for the provision of prisons and probation services).

Despite the myriad parties involved in the CJS, with their competing interests, all ultimately rely on state funding which can be manipulated in different ways. For example, the volume spent on legal aid can be restricted by failing to increase fees, or the level of the means test, in line with inflation. Crown Court funding is controlled by a system of "sitting days" – the total number of days that all Crown Court rooms open each year. In the years preceding 2020, all agencies saw their levels of funding restricted, but it was the courts and the defence solicitors and barristers who felt this most keenly. In the 10 year

This led to a CJS in March 2020 that was unable to cope with unexpected demands on its resources. Then came a global pandemic. Although most people will go through their entire lives having no involvement with the CJS, it is an essential part of our democracy. In few other areas of society does the State wield as much power over the individual as in the CJS – the power to compel the individual to attend court; to present evidence against them and, ultimately, to remove their liberty - on occasion, for life. Equally, society depends on the State to provide a CJS which acquits the innocent, convicts the guilty and provides sentences which deter, punish and rehabilitate. As described above, all agencies involved in the CJS depend on the State for their funding. It is submitted that there is little argument that the State is therefore under a duty to resource the CJS in such a way that an individual can be brought to trial within a reasonable period of time and is provided with the means to defend themselves against the might and resources of the State.

Image 1: A Legal Headpiece, 2016

3. Political, Institutional and Policy Context and Response

At the start of 2020, there were 314,592 outstanding cases in the Magistrates' Courts and 35,383 outstanding cases in the Crown Court.⁹ Before moving on to discuss the policy response to the pandemic, it is important to note that there will always be some outstanding cases in the court system, due to the time it takes for cases to be dealt with.

Initial Response

The Ministry of Justice's initial response to the outbreak, in line with the Government's wider national response, was slow. On 16 March, Parliamentary Under-Secretary at the Ministry of Justice, Chris Philp, tweeted, "Courts will be operating normally tomorrow... for those not in isolation, Justice will continue and Jurors should attend Court tomorrow as per their Summons". On 17 March, The Lord Chief Justice, issued a conflicting statement saying, "It is not realistic to suppose that it will be business as usual in any jurisdiction, but it is of vital importance that the administration of justice does not grind to a halt."¹⁰ This at a time when the Gbu(s)4 u10 C(a)10 (hal)6 (()10 (s)

Crown Court fell by 63% from 8,400 to 3,123.¹² The number of outstanding cases in both courts therefore began to rise.

The Subsequent Response - Coronavirus Act 2020

The Coronavirus Act contained numerous measures affecting all parts of society designed to deal with the consequences of the Covid-19 pandemic. It formed the first of three key limbs to the Government's response to the issues outlined above. Ss.53-55 of the Act greatly expanded the range of hearings for which video or audio links could be used in place of some or all of the parties attending court in person, subject to an 'interests of justice' test. Crown Court trials still required a jury to attend court in person.

The Subsequent Response – Nightingale Courts

As the number of outstanding cases grew and it became clear that socially-distanced court proceedings required more physical space, HMCTS announced that they would open a series of "Nightingale Courts" – non-court buildings which would now host court proceedings. In total 20 Nightingale Courts were opened.¹³ The first on 3 August 2020 and the most recent on 12 April 2021.¹⁴ The buildings chosen were many and varied – some, such as Huntingdon Magistrates' Court, were existing court buildings being re-purposed. Others were currently unused public buildings, such as The Lowry Theatre in Salford. Yet more (in a case of dark irony) were, like Cirencester Courthouse, former court buildings that had been closed during the last decade and were still standing empty.

The Subsequent Response – Custody Time Limits (CTLs)

While their case is ongoing, most defendants will be granted bail, however a sizeable minority will be remanded in custody. The majority of these defendants will not have been convicted and some never will be. CTLs exist to restrict the amount of time that the State can hold a defendant in custody awaiting trial. They vary depending on the nature of the case, but for the most serious, prior to the pandemic it was 182 days. It is possible for the court to extend CTLs. The test is whether the need for the extension is due to a good and sufficient cause *and* that the prosecution has acted with all due diligence and expedition.¹⁵

After Crown Court trials were paused and it became clear that the subsequent delays may lead to CTLs being exceeded, a joint protocol was issued on 7 April 2020

by the Senior Presiding Judge, HMCTS and the CPS.¹⁶ While making clear that the protocol did “not override independent judicial discretion and every case must be decided on its own merits”, it went on to state that the delays caused by compliance with health advice and the pausing of Crown Court trials did amount to a “good and sufficient cause” to extend CTLs.

As the year progressed and the immediate response period passed, applications to extend CTLs continued to be made. Some judges ruled that delays relating to the pandemic no longer amounted to grounds to extend CTLs and therefore began refusing to extend them.¹⁷ In an excoriating ruling at Woolwich Crown Court, HHJ Raynor noted, “The lack of money provided by Parliament to provide sufficient space for trials to be conducted does not amount to a good nor a sufficient cause to extend the custody time limit in this case... The delays in bringing cases to trial which are being experienced by the courts will not be alleviated by the current steps that are being taken by Her Majesty’s Court Service... If sufficient investment had been made to create dozens (not ten) additional courts to undertake criminal trials then the situation regarding CTL extensions might be different. But it is not. The reality is that many defendants in custody will not be tried until well into 2021.”¹⁸ In response to this, on 7 September, the Secretary of State for Justice, Robert Buckland, increased the maximum period of a CTL to 238 days.¹⁹

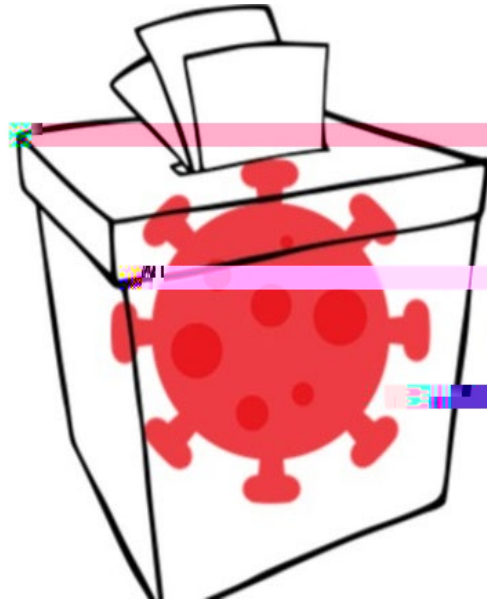
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The Covid-19 and Democracy Project: Kingston

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The Covid19 and Democracy Project

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