MoJ favours ‘Nightingale’ crown courts to tackle huge backlog of cases

So reports Owen Bowcott, the legal affairs correspondent for The Guardian today. ‘Nightingale’ courts being venues which have been identified as suitable for trials utilising public spaces such a civic centres or university moot halls; apparently to be renamed Blackstone Courts.

Last week the Justice Secretary and Lord Chancellor, Robert Buckland QC, had told MPs on the Justice Select Committee that emergency legislation would be prepared to allow for a single judge to sit alongside two magistrates, without a jury, to decide some trials, “those less serious either way matters with a maximum sentence of 2 years imprisonment”. He cited that this option would be a “last resort” and “if it is done, it would be temporary and not be the basis for a permanent change”. He added that with the 200 extra sites required to clear the backlog this option would provide an extra 40% capacity.

Another option is also being looked at, reducing the numbers of jurors from 12 to 7 but this would only increase capacity by 5 – 10%. This had appeared to be Robert Buckland’s preferred option and one he described as “very attractive” when speaking to Nick Robinson on BBC Radio 4’s Political Thinking in June. This measure is not without precedence having been employed as a temporary measure after the second world war.

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2 The Law Society Gazette article 23rd June 2020 John Hyde Legislation to abolish some jury trials could be passed within weeks: https://www.lawgazette.co.uk/news/legislation-to-abolish-some-jury-trials-could-be-passed-within-weeks/5104739.article
3 'The Robert Buckland One' aired 19th June 2020
4 See our earlier article on the Thomas More COVID hub – Justice in the time of Coronavirus: considering Diplock courts and majority verdicts in light of COVID - 19
Committee that the Government aimed to implement one of the measures by September, which would require primary legislation to be brought forward before parliament goes into summer recess on 21st July.

Increasingly the number of court centres are open and being opened with current numbers quoted as being 184 court and tribunal buildings open for essential face-to-face hearings, representing 54% of the 341 Crown, Magistrates, County and Family courts and Tribunals across England and Wales. The Lord Chief Justice of England and Wales, Lord Burnett of Maldon, commented that “Reopening all of the court estate, using additional accommodation and continuing to use technology imaginatively will enable us to return to and surpass pre-lockdown volumes, helping manage the growing caseload”.

Whilst some crown court centres in England and Wales have started to hold jury trials given the social distancing rules a single trial is necessitating the use of several court rooms and thus each court centre’s capacity is greatly reduced. Military courts martials are beginning to be held to but with much more use of remote means of bringing in witnesses and defendants along with counsel; the hybrid hearing which the Family Courts have endorsed as being suitable where necessary. Whilst a reduction of social distancing could mean that single defendant jury trials may be able to go back to a single court room this would not be the case in multi–handed cases where multiple defendants and defence legal teams would require several court rooms with video links to continue to enable these trials to be heard. This is of course not forgetting that the jury need a suitable retiring space which can accommodate their number.

What must not be forgotten is that there was a backlog of trials before the COVID pandemic and this backlog has been greatly exacerbated with the closure of courts and ceasing of jury trials since 23rd March. The backlog was in the region of 37,000 before the COVID-19 and is now in the region of 40,000 cases with widespread reporting of the backlog and time it will

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5 MoJ and HM Courts & Tribunals Service press release ‘More face-to-face hearings as courts re open published 8th June 2020
6 Ibid
7 See BBC News report on how Bristol Crown Court was to conduct trials aired 18th May 2020 [https://www.bbc.co.uk/news/av/uk-england-bristol-52710438/how-court-trials-are-coping-with-coronavirus]
take to work through it. A report by the watchdog, Her Majesty’s CPS Inspectorate says that the current social distancing rules “will not allow” the existing backlog to be reduced. The report continues “Some estimates show that the current scale of increase in the backlog would take 10 years to clear at pre – pandemic rates”. The Criminal Bar Association draws attention to the fact that a backlog existed due to cuts in the budget causing some court rooms to remain empty as there were no sitting days for Judges. Bill Waddington, Chair of the Criminal Law Solicitors’ Association told Legal Action that the backlog of cases is increasing by around 1,000 per month and that the backlog “was massive before lockdown”. The MoJ asserts that the backlog is not exceptional and has fallen markedly in the past 10 years. They add that there were plans in place before the pandemic to increase the number of days the courts sit to reduce the cases awaiting conclusion. The figures quoted for the crown court to the committee being 39,214 in March to 40,526 in May. The increase in the Magistrates court being much higher.

As well as government appetite to tackle the issue and get trials back into court centres and seeing the backlog reduced that appetite is mirrored by the Bar. The Criminal Bar Association Chair Caroline Goodwin QC saying “With a total crown court case load of over 107,000 cases last year, the Criminal Bar shares the judiciary’s concerns as to how to address the growing backlog safely, so that the hundreds of thousands of people involved in cases left in limbo, are not left waiting in uncertainty any longer”. Greeting the opening of some court centres for trials in mid-May Amanda Pinto QC, Chair of the Bar Council stated “it is very encouraging to see that jury trials will start up again from mid – May. Jury trials are essential to our criminal justice system and to the rule of law.”

8 BBC article ‘Please don’t forget us: coronavirus adds to court cases backlog’ https://www.bbc.com/news/uk-532381163
11 Chair of the CBA Caroline Goodwin QC “The crown court backlog had arisen months before COVID–19 reared its head”.
12 LAG article More courts open as concerns grow over safety and hearings backlog http://www.laf.org.uk/article/208430/more-courts-open-as-concerns-grow-over-safety-and-hearings-backlog
13 406,610 in March to 484,000 in May
15 Ibid
There is broad agreement across those who have an interest in the Criminal Justice System that the issue needs tackling and that it will take unusual steps to tackle an issue brought around in part, that at least is agreed, by the COVID pandemic. Robert Buckland commenting to the Committee, “I am absolutely duty – bound to look at measures that deliver the capacity we need. Two – thirds capacity isn’t going to cut it – I am going to need at least 100% capacity not just to manage the case load but to get ahead of it as well”.

What is not agreed is the most effective, the fairest and the most just way of tackling the backlog and increasing the court’s capacity to do so.

Dispensing with a jury, even if temporary and for the less “serious cases” in the Crown Court, has met with widespread objection. The Criminal Bar Association said that in their view the jury trial was under “imminent threat” and a survey of its members showing 90% dismissed plans to scrap jury trials. Caroline Goodwin stating “The Criminal Bar has stood firm even in these impecunious times for criminal barristers. We have rejected the proposed idea of interfering with the 800-year-old principle of jury trials” and “Public confidence in law and order requires the ordinary public’s participation in criminal justice via juries. The notion of scrapping jury trials is an assault on justice, a blow to the common man”. Their sister organisation, The Law Society, through its president Simon Davis stating that to “interfere with such a bedrock of the criminal justice system was an extreme measure that required extreme justification”. He echoed the position that there was a backlog before the pandemic as a result of budgetary constraints on court sitting days. The Shadow Justice Secretary, David Lammy, has criticised the removal of jury approach, “Robert Buckland is wrong to consider proposals to limit jury trials for certain offences. The right to trial by your fellow citizens is fundamental to our democracy. It would be wrong of the government to abandon this valuable tradition for short -term benefit”.

The announcement of the Courts’ Recovery Plan is to be welcomed as was the MoJ’s announcement that there would be £142 m spending on court maintenance and technology to enable more courts to be heard remotely. This is already working quite well in most

16 Survey results published 29th June 2020
17 https://www.theguardian.com/law/2020/jun/30/criminal-cases-backlog-could-take-a-decade-to-clear-watchdog-warns
centres and is certainly one way to continue, even after the COVID world whenever that may be, efficient hearings; intelligent use of time; improved work/life balance; reduction of journeys and resultant lessening of environmental impact; and reduced financial burden in term of travel costs to the tax payer. Many court users would agree with Robert Buckland’s assertion that “the standard of video technology continues to improve, with new tech being rolled out across all courts from this week”.

The sites for 10 ‘nightingale’ courts have been identified but those locations not yet made public and the Circuits have identified other location. These sites would allow for better social distancing and it is assumed trials to be conducted in one large room. We must remember those that in excess of 200 are needed and in excess of 200 court buildings have been left empty and sold by the MOJ in the recent past.

The possibility of longer sitting days and weekend sittings has also been aired by Robert Buckland. Again barristers and solicitors appear united and meet this part of the solution with caution, Simon Davis on behalf of the Law Society whilst welcoming the recovery plan and the fact that it gave legal professionals and court users some idea of that the future shape of the courts would be remarked, “introducing extended working hours for already beleaguered judges, practitioners and court staff needs to be treated with utmost caution – as they pose risks for all involved, including of course the victims of crime…” There appears to be no new Government funding for this proposal.

One notable obstacle to the increase in the number of trials being heard is the concurrent need to improve access to clients in prison so that their solicitors can prepare their cases and so their advocate can have a conference with them to ensure the trial is ready to be heard. Organisations and individuals are reporting delays in prison access which of course means that even if the courts have capacity to list more trials the number of cases trial ready may not fill them. The Guardian article quotes the tweet of Kerry Hudson, president of the London criminal Courts Solicitors’ Association where the next video slot to HMP Wormwood Scrubs was 1st October and the next video slot to Thameside was 10th August. Again, a combination of underfunding and COVID was cited as the sources of this issue.
lack of access, not just timely access, was highlighted by the organisation Fair Trials in a highly critical report based on defence teams experience reporting lack of private access to their clients during the pandemic.

It would appear that the MoJ has changed tact from juryless trials in favour of ‘nightingale’ courts. We await with keen interest to see where these will be, when they will be operational and how the trial process within them will work. No barrister or solicitor wants to be sitting at home extending custody time limits for clients in custody or seeing a further adjournment to a trial with a worried and vulnerable victim. We all want to see a solution and have and will continue to work alongside and with the MoJ to achieve courts getting back to a capacity where the backlog of trials can start to be eaten into. Robert Buckland praised lawyers for their “heroic efforts” in trying to keep trials going through the pandemic prior to lockdown halting them. We look forward to getting back into court and conducting trials at the same volume and ideally a higher one than before the lockdown.

3 JULY 2020

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