



Criminal Barristers and the Judiciary

Introduction

In response to the extraordinary circumstances facing complainants, support agencies, and the criminal justice system (CJS) during the Covid-19 pandemic, JiCSAV set out to identify specific impacts of the pandemic on criminal justice policies and practices in sexual offences cases. It enabled consideration of how Covid-19 has exacerbated existing problems and created new ones, as well as documenting innovations that could improve the experiences of complainants of sexual violence and abuse engaging with the CJS. This briefing, the fifth in a series, emphasises the views and experiences of criminal barristers and members of the judiciary.

What did we do?

We interviewed six criminal barristers based in chambers across England and Wales all of whom were RASSO prosecutors. We also interviewed 19 members of the judiciary (circuit and resident judges holding authorisation to hear serious sexual offences cases) with representation from across all six circuits within England and Wales. Preliminary findings based on these interviews were presented at two online workshops held on 25th November 2021 (CPS and criminal barristers) and 31st January 2022 (the judiciary) which were attended by a total of over 70 professionals, policymakers, and CJS stakeholders. Additional data gathered at these workshops were integrated with interview data in the analysis.

Findings

1. Impacts of Covid-19 on the courts

Exacerbation of delays

Prior to the Covid-19 pandemic, there were already significant delays occurring in the courts, particularly the Crown Court. This worsened during the pandemic. All jury trials in England and Wales were temporarily suspended in the first lockdown (March, 2020), with some Crown Courts closed to the public for up to six months. When trials resumed, compliance with Covid-19 safety measures (discussed below) reduced court capacities and slowed down trial processes, further exacerbating delays and case backlogs.

The requirements for self-isolation associated with Covid-19 meant that trials had to be adjourned or abandoned if trial participants tested positive (and initially, also if they were close-contacts of a positive case). Judges and barristers described the negative impacts on those involved, as well as the additional pressures on re-listing cases that had often already faced substantial delays in getting to court.

“If there are Covid problems with a witness or a defendant, trials are having to go out, they can’t come back in for another five or six months which has an impact on complainants, witnesses, and defendants”

- Judge 15.

Implementation of Covid-19 safety measures

Several Covid-19 safety measures were implemented within court buildings when jury trials recommenced after the period of court closures, including mask wearing, increased cleaning schedules, social distancing, and the installation of clear screens around courtrooms.

Social distancing requirements meant that courtrooms had to be reconfigured to ensure that jurors were able to sit two metres apart. In some courts, this meant using two courtrooms for one case. Many jury retirement rooms were not large enough to accommodate jurors in accordance with social distancing requirements and this resulted in using courtrooms as jury deliberation rooms. This further restricted the number of trials that could be listed.

“The jury rooms where they would retire are just standard one table, 12 chairs around it, and there’s no way you could socially distance there. So they often were using another courtroom as their jury room. Well, that’s then two courtrooms down straightaway, for one trial”

- Judge 5.

Social distancing requirements meant that proceedings took longer as a result of ensuring that jurors remained socially distanced during empanelling, when entering and leaving the courtroom, and during breaks in the trial when points of law were raised.

“Pre-COVID, you would have just said will you just pop outside into the room next door and we’ll deal with this [point of law raised] that wasn’t possible because they couldn’t socially distance, so the delays were quite huge. Every time there was something that needed to be dealt with they had to go all the way downstairs and be called in order” – Judge 22.

Jurors were often spread around the courtroom, rather than sitting altogether in the jury box. For barristers, this was felt to pose a particular challenge when addressing the jury.

“Social distancing made presentations very difficult ... finding somewhere where you can engage every single member of the jury from has proved to be difficult and we’ve been trying opening and closing from different parts of the court” – Barrister 15.

Clear plastic screens also posed challenges around effective communication in the court room, including impacting barristers’ advocacy, the delivery of evidence, and witnesses being heard.

“Everybody’s image is distorted, and you can barely see the defendant in the dock, quite a lot of the time counsel have their back to at least some members of the jury, and if you’ve got a witness behind screens, that’s really difficult for jurors to actually have any view of that witness, at all, which is not satisfactory” – Judge 13.

Special measures

Covid-19 safety measures also reduced the ability of some courts to deliver special measures for complainants and witnesses. For example, some socially distanced courtrooms could not accommodate requests to put privacy screens around the witness box due to the physical positioning of relevant trial participants around the room, which meant they would not work effectively.

“We can’t, geographically, erect screens so that they shield the dock and the jury can all see because the expanded size of the jury has made just the physics of it impossible. We have in one of the courts got - but it’s not good - something like five or six screens in a sort of Jenga, setup and so, the witness is looking down a tunnel” – Judge 1.

Staffing

During the pandemic more barristers have left the Criminal Bar, reducing the amount of counsel available to prosecute sexual offences cases. In some instances, trials have been adjourned due to a lack of prosecution counsel. Barristers reported being incredibly busy with a backlog of cases, a high level of new instructions, and fewer colleagues available to share workload. This has increased working hours and negatively impacted upon work-life balance and wellbeing for many barristers.

“I’ve been a barrister 35 years. I’ve never been this busy. It’s manic, that’s the only word I can describe. I can get up to 100 emails a day, about different cases. So, for me, my brain is always going and I find it very difficult to relax and forget about work. Which is why like this morning I worked until half past four because there was a deadline that I needed to do and get on with other work and it’s like that all the time. I’m seeing a lot more people burning out” – Barrister 8.

The shortage of both full-time and fee-paid judges was also mentioned by several interviewees. Indeed, the shortage of barristers, coupled with the backlog of trials, means that it is much more difficult than it used to be to fill judicial vacancies.

“And it means there are no recorders, it goes both ways. So no counsel for us, and no counsel for judges to effectively make up recorders. Say, [county] at the moment, I think they should normally have about five judges in [county], they’ve got 2.6, 2.4 cannot get any recorders” – Barrister 13.

Judges also reported larger workloads, with increased case management demands and administration associated with large numbers of requests to appear via the Cloud Video Platform (CVP).

Shortages of court staff have also increased, whilst their workloads have simultaneously increased due to, for example, the implementation of Covid-19 safety measures and additional case management and listing pressures. Judges recognised the increased pressures on court staff and universally praised their hard work during the pandemic, which was central to the ongoing functioning of the courts.

“I think people have been amazing, really practical and employing lateral thinking and trying to get things going... it’s been... more collegiate maybe, you’ve got the court staff [and] judges working together trying to work things out” – Judge 4.

2. Innovative practices

Cloud Video Platform (CVP)

The introduction of CVP enabled courts to continue hearing cases during the pandemic, allowing advocates, complainants, witnesses, and defendants to virtually attend court, and hearings to take place completely virtually if necessary. The criminal barristers we spoke to were universally positive about the use of CVP, which allows them to work more flexibly and attend multiple hearings in a day without having to travel to multiple courts around the country. This has been critical in enabling barristers to cope with increasing workloads for those working on sexual offences cases.

“Hearings are absolutely brilliant [via CVP] they save you the time of going to a court for a half hour hearing, that will take you a day basically. You’re usually travelling miles” – Barrister 7.

Judges recognised these benefits of CVP and appreciated its importance in enabling cases to progress during the pandemic. However, they raised concerns about technology issues, e.g. poor Wi-Fi connections, that can prevent effective communication of important information, and impacts on relationship building between advocates, as well as between defendants and their representatives. There was almost universal agreement amongst judges that CVP was appropriate in some instances for administrative hearings, but should not be otherwise used unless absolutely necessary.

“I don’t mind if it’s just a little administrative hearing fixing a date or something, but if it’s legal submissions or opening a case sentence or mitigation or something like that, I don’t want them on CVP because I might hear one word in three”

- Judge 4.

Nightingale Courts

Several of the judicial participants had sat in Nightingale Courts with most reflecting on these experiences positively. They particularly focussed on the more modern state of buildings being used in comparison to the current court estate, the flexibility of the space that meant Covid-19 safety measures were easier to implement, and that these additional courts eased case backlog issues in areas where they were used most effectively.

“We’d taken over all of their [a hotel’s] conference rooms some of them had been turned into courts, some of them into jury rooms, excellent facilities, the court rooms work really, really well” - Judge 9.

However, challenges were also recognised. For example, there are no docks or cells in Nightingale Courts so only cases with defendants on bail can be heard, with any custodial sentences having to be issued within a traditional court room. The time-limit on accessing Nightingale Courts was also raised, with some judges explaining they no longer had access since the Nightingale Court was being provided to other courts for use on a rotational basis depending on the scale of case backlogs.

Additional case management

Several judges commented on how additional case management processes had been introduced to keep cases on track, allowing them to progress as quickly as possible and preventing avoidable delays. Whilst in some instances it was noted that this had created extra workload for parties involved, including judges themselves, these were considered effective ways to help to address the court backlog and were likely to continue for some time.

“We were listing all cases for further case management hearings. So all the judges were checking between us maybe four or five weeks before the trial date, we are still being given a list of cases that are coming for each of us to check. Does the case need to be listed for a further case management hearing to make sure that there were no hiccups?” - Judge 11.

Recommended actions

- 1. Urgently address the staffing issues within the courts and Criminal Bar.** Effective short- and long-term strategies, supported by appropriate funding are quickly needed to address the shortage of staff within the courts, the judiciary, and the Criminal Bar. Without addressing these issues staff workloads will continue to increase, the backlog within the courts will increase, and case delays will continue. Insufficient responses to workforce difficulties may see further losses of staff.
- 2. Immediate and longer-term investment is needed within the court estate.** Some Nightingale Courts closed in March 2022. Investment is now needed within the court estate to ensure that there are sufficient facilities and that they are fit for purpose and able to sufficiently address and accommodate the case backlog. The possibility of re-opening closed Nightingale Courts where appropriate should also be considered.
- 3. Continue flexible use of CVP to maximise case efficiency.** Guidance has now been provided by the Lord Chief Justice on remote attendance by advocates in the Crown Court. CVP has an important role in responding to the ongoing Covid-19 pandemic, as well as enabling attendance of participants where it would otherwise not be possible. CVP should continue to be used flexibly in appropriate circumstances to support the progression of cases.
- 4. Evaluate effectiveness of, and different approaches to, additional case management processes and consider widespread implementation where appropriate.** Where additional case management processes have been introduced these should be documented and evaluated. Best practices that emerge can be considered for scaling up across Courts.