



**SUBMISSION OF EVIDENCE TO THE  
PUBLIC ACCOUNTS COMMITTEE INQUIRY  
'REDUCING THE BACKLOG IN THE CRIMINAL COURTS'**

**This is a preliminary submission of evidence by the Criminal Bar Association.**

## INTRODUCTION

1. The Criminal Bar Association (CBA) represents the views and interests of practicing members of the Criminal Bar in England and Wales.
2. The CBA's role is to promote and maintain the highest professional standards in the practice of criminal law; to provide professional education and training and assist with continuing professional development; to assist with consultation undertaken in connection with the criminal law or the legal profession; and to promote and represent the professional interests of its members.
3. The CBA is the largest specialist Bar association, with over 3,500 subscribing members; and represents all practitioners in the field of criminal law at the Bar. Most practitioners are in self-employed private practice, working from sets of Chambers based in major towns and cities throughout the country. The international reputation enjoyed by our Criminal Justice System owes a great deal to the professionalism, commitment, and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy all guarantee the delivery of justice in our courts, ensuring that all persons receive a fair trial and that the adversarial system, which is at the heart of criminal justice in this jurisdiction, is maintained.
4. **The work of our members is primarily in the Crown Court. Consequently, it is the Crown Court backlog that we address in this submission and in relation to which we are best placed to provide evidence to the Inquiry. Albeit some of our members also work in the magistrates' court, those courts are primarily served by the solicitor profession, from whom we encourage the Inquiry to take evidence.**

## SUMMARY

5. The Criminal Bar is experiencing a crisis of retention and recruitment. For the first time in the CBA's memory, we are no longer able to service the work of the criminal courts. In recent months cases, including trials of serious sexual offending and violence, have been "stood out" (vacated) for want of either prosecuting or defence counsel. Clearing the backlog means increasing the volume of judicial sitting days and must grapple with this reality: trials can only proceed at the pace at which barristers are available to undertake the work. At present, there is flight from the profession.
6. Consequently, the necessary increase in judicial sitting days can only be achieved if the crisis of retention and recruitment for the Criminal Bar is addressed in parallel and with the same degree of urgency. At present the volume of work is beginning to exceed the capacity of the profession. Addressing the crisis requires an immediate increase in remuneration, an improvement in working conditions and a long-term strategy to secure the viability of criminal legal aid work, relative to other areas of legal practice.
7. At present, the quality of justice delivered by the criminal courts is being impeded, as are efforts to reduce the backlog. Both impediments will continue unless there is investment in the human capacity of the criminal courts: the women and men who work within them.
8. Our submission focuses on:
  - a) Remuneration: the legal aid settlement for criminal barristers (AGFS) in both the short and long term. Proposals are imminently awaited in the publication of the Criminal Legal Aid Review (at time of writing scheduled, further to delay, for 13<sup>th</sup> December 2021) which we understand will be followed by publication of Government's response and a subsequent consultation process. **Our point is a stark one, without fee increases that are sufficient to stem flight from the profession and promote recruitment, the systemic failure that the criminal justice system is presently experiencing will become endemic, rendering reduction and elimination of the unacceptably high backlog, unachievable.**

- b) Working conditions: we reject Covid Operating Hours as a flawed policy ill-suited to reducing the backlog. **CVP (remote working) where the interests of justice are not impeded (CVP is not suited to trials and some other types of hearings) is the single most important and available resource to promote an improvement in working conditions at this juncture. From an efficiencies perspective CVP facilitates multiple hearings for a single barrister in a day and promotes case ownership, both of which contribute to efficient progression of cases through the system to reduce the backlog.**

#### **RETENTION AND RECRUITMENT CRISIS AT THE CRIMINAL BAR**

9. The Bar Council of England and Wales monitors the practice areas, working conditions, income and demographic of barristers in this jurisdiction and publishes the available data annually. Data presently is available up to 2020.
10. From 2016/17 to 2019/20 the numbers of junior barristers practicing exclusively in crime declined 11% from 2,553 to 2,273. We predict the same rate of attrition either continued, or likely increased, over the course of the pandemic, because of the financial implications of trying to maintain a self-employed income during the widespread cessation of trials in 2020, resulting in a predicted reduction of not less than 22% of juniors practicing exclusively in criminal law between 2016/17 and 2022.
11. Queen's Counsel practicing in crime declined 22% from 266 to 207 between 2015/16 to 2019/20. Again, it seems likely that the rate of attrition for Queen's Counsel will have followed the rate experienced by juniors resulting in a predicted reduction of not less than 44% of Queen's Counsel practicing exclusively in criminal law between 2016/17 and 2022.
12. Over the course of the last 3 years the number of new practitioners (0-2 years call) leaving a crime only practice increased by 86%.

13. This is the stark reality of the scale of the flight from criminal practice and difficulties of recruitment that we presently are experiencing as a profession. It is an urgent and grave crisis.

14. The Bar Council put the figures into context at pages 23 – 24 of its submission to the CLAR review earlier this year and drew the following conclusions<sup>1</sup>:

*“Retention of experienced barristers is a significant problem. The data confirms that retention is a serious problem.*

- *The number of barristers practicing any amount of crime in 2019/20 was 3,680 (22% of practising barristers in England and Wales). Of those, 2,273 (62%) were full practice criminal barristers.*

- *Although in decline for the past two years, the overall number of New Practitioners (barristers 0-2 years in practice) has grown by 12% since 2015.*

- *From 2016/17 to 2019/20 the pool of full practice criminal barristers shrank by 11%, from 2,553 to 2,273.*

- *The number of full practice criminal QCs has gradually reduced by 22% since 2015.*

- *In 2019/20, 27% of barristers who had been engaged in full practice criminal work in 2018/19 were no longer full practice criminal barristers. It is currently unknown how many of those leavers went into part time criminal practice; another specialisation; or left practice.*

- *The number of New Practitioners (barristers 0-2 years in practice) who have come into full criminal practice has decreased each year for the past 3 years. In this same period, the number of New Practitioners who have left full criminal practice has increased by 86%.*

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<sup>1</sup> <https://www.barcouncil.org.uk/uploads/assets/7bb32f9d-ffce-4ce0-aa50239091e2713f/CLAR-Bar-Council-submission-final.pdf> (see pages 23-24).

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*The full practice criminal Bar has an aging population that is not being replaced.*

- *45% of full practice criminal barristers are aged 45 or over.*
- *As of 2019/20:*
  - o *The Young Bar (0-7 years of practice) makes up 27% of the pool.*
  - o *Barristers in their middle practice years (8-22) make up 35% of the pool.*
  - o *Barristers in their later practice years (23+) make up 38% of the pool.*
  - o *The overall number of Young Bar barristers has grown by 17%*
  - o *The number in their middle years has shrunk by 33%.*
  - o *The number in later years has grown by 12%.*
- *Breaking down the figures for those in their middle years of practice at the Bar, from 2015/16 – 2019/20:*
  - o *Full practice criminal barristers at 8-12 years of practice have seen the largest proportional drop off in numbers at 50%.*
  - o *The number of barristers at 13-17 years of practice reduced by 26%.*
  - o *The number of barristers at 18-22 years of practice reduced by 28%.*

*The data suggests an exodus from the middle of the profession, with barristers after 8 years of practice moving away from dedicated criminal practice, to either diversify into other areas of law or leave the profession entirely. This data raises concerns about the pool of specialist criminal barristers who will be available in the future to meet legal need, provide a pool of high calibre candidates for future judicial appointment, replace outgoing barristers who retire, and who will be available to train and mentor newly practising barristers.”*

15. The consequence is a diminishing profession, with an aging profile, which is not renewing itself sustainably and which is presently unable to service the work of the criminal courts.
16. Since summer 2021 trials are being stood out, including for violent and sexual offences, for lack of available counsel. We have received a number of reports of solicitors (both within the CPS and at defence firms) being unable to find available counsel despite contacting upwards of 40 sets. The trials that are running are exacting an unsustainable toll on those who remain in criminal practice at this juncture and who are presently working without adequate (and often without any) breaks between trials, impeding family time, without regard to health, and without adequate preparation time for forthcoming trials. The combination of the recruitment and retention crisis at the Criminal Bar and the backlog has created a perfect storm, long in the making.

#### **THE CAUSE OF THE BACKLOG AND THE NEED TO INCREASE SITTING DAYS**

17. On 31 March 2020 the outstanding case load in the Crown Court was recorded as 41,045, a rise of 23% in just one year on what the MOJ then reported as a “series low” of 33,290 on 31 March 2019. Inevitably, the Crown Court always has a backlog, because trials take time to pass through the system, but 41,045 was, comparatively, already too high and indicative of a system which was already in difficulty. The case backlog has now grown to 60,692 as of 30th June 2021 (the most recent available data provided by the MOJ).<sup>2</sup>

The National Audit Office figures are similar. The backlog spiked by 23% in the year leading up to the pandemic, and a further spike on top of that of 48% after its onset, with rape and serious sexual offences (RASSO) cases disproportionately affected. In

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<sup>2</sup> <https://www.gov.uk/government/statistics/criminal-court-statistics-quarterly-april-to-june-2021>

the second quarter of 2021 alone, the National Audit Office reported that the number of sexual offence cases stuck in the Crown Court for over a year leapt by 435%.<sup>3</sup>

18. Whilst clearly covid has exacerbated the situation, the underlying cause of the backlog, pre-pandemic, was a reduction in sitting days and, significantly, a disproportionate cut to Crown Court sitting days in the financial year 2019/20, relative to the previous year. The Crown Court sitting day budget hovered between 100,000 and 110,00 for most of the previous decade. However it was cut by 15,100 days from 97,400 in 2018/19 to 82,300 for 2019/20, a reduction of 15%.
19. At the time, cases coming into the system were at a record low. 105,782 cases completed in the Crown Court in the calendar year 2018, which exceeded receipts in that year of 99,845, reducing the backlog to 33,302. In calendar year 2019 case receipts totaled 104,487 but because of the imposition of the 15% cut to 2019/20 for court sitting days that had taken effect from 1 April that year, case disposals fell to just 99,654, causing the backlog to soar to 38,308 by 31 December 2019 and leaving a case backlog of 41,405 by 31 March 2020, after the suspension of Crown Court trials on 23<sup>rd</sup> March 2020 due to the pandemic.
20. Within the total case backlog, it is important to distinguish the number of trials from, for example, cases that conclude in other ways (guilty pleas or the offer of no evidence by the crown, for example). This is because trials impact not just defendants, but also witnesses and complainants.
21. The total case backlog for 30 June 2021 of 60,692 includes an outstanding trial component of 49,789. That represents a near doubling of outstanding trials in just 27 months from the 26,447 trials backlog as of 31 March 2019 (when the total case backlog was 33,290).
22. The available data also allows for analysis of the impact of the delay on specific offence categories. For example, between 1 January 2021 and 30 June 2021, a total of 4,149

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<sup>3</sup> (National Audit Office, *Reducing the Backlog in Criminal Courts* (Session 2021-22, HC 732, 22 October 2021 p 4, and para 9.)



sexual offence trials were stood out in the Crown Court, comprising 463 ineffective trials and 3,686 vacated trials (trial vacated from an anticipated fixture date, often at short notice, and put back to a later date). That compares with 3,132 sexual offence trials concluded, comprising 2,813 effective and 319 cracked, over the 18-month period to June 2021. Five years ago, in just six months between 1 April and 30 September 2016, the Crown Court concluded 3,539 sexual offence trials.

- 23. The Inquiry is invited to admit into evidence our submission to the Home Affairs Select Committee's Investigation into the Investigation and Prosecution of Rape which references (p.1-6 and see Annex B) the particularly grave impact of delays, including the backlog within the Criminal Justice System, on this cohort of cases:**

**<https://www.criminalbar.com/wp-content/uploads/2021/11/CBA-Submissions-to-the-Home-Affairs-Select-Committee-22.11.21.pdf>**

24. The average time for offence to completion of all cases to conclude in the Crown Court during the second quarter of 2021 was 622 days, compared to 490 days for cases that completed in the same period two years previously (the second quarter of 2019). The Crown Court is on track to receive around 100,000 cases during 2021. In 2014 the Crown Court received over 135,000 cases and the average offence to completion time for cases that year was 484 days.

25. The Criminal Bar Association first raised concerns about the risk of delays to trials caused by a reduction in sitting days in February 2019 when the budget for Recorders (part time judges) was cut. That cut lasted into the financial year 2019/20 and the scale of what transpired to be a 50% cut to the budget for Recorders by 2019/20 was only fully disclosed in November 2020.<sup>4</sup>

26. The backlog was consequently primarily caused by systemic neglect and under resourcing with a particular contributing factor being the limitations placed on Crown

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<sup>4</sup> <https://questions-statements.parliament.uk/written-questions/detail/2020-11-16/115649>

Court sitting days, including the budget for Recorders to sit, immediately prior to the pandemic, rendering the system unable to cope with the exacerbation caused by the necessary cessation of trials. Reducing the case backlog and, crucially, addressing the delays within the mounting trials component of the case backlog, therefore involves grappling not just with the 'covid factor' but with the underlying under investment in capacity. The number of Crown Court sitting days needs to be significantly increased relative to the previous high (in the last decade) of 109,321 (2010/11), and to continue at a sustainable level until the system stabilizes, having regard to anticipated year on year trends in the numbers of prosecutions to better inform those estimates. Self-evidently, without a retention of criminal barristers, and the ability to recruit going forward, sitting days can move no more swiftly than the rate at which barristers are available to prosecute and defend. To train a barrister and for their career to progress sufficiently to attain the seniority and expertise required to undertake serious sex and violence cases, for example, takes years. The rank of Queen's Counsel, to whom murder cases are primarily reserved, is rarely achieved in less than approximately 20 years of criminal practice.

27. On 16 November 2021 the Lord Chief Justice said this in response to a question from the House of Commons Justice Committee<sup>5</sup>:

*"MARIA EAGLE MP: You have told us a little bit already about the constraint that judicial capacity has. In the past ten or 11 years you have increasing limits on sitting days that have been a constraint. Now that you are allowed unlimited sitting days to tackle some of the backlog, to what extent does that lack of judges and the lack of availability and the criminal judges being the ones that were not recruited in the last round, to what extent does that stop you tackling the crown court backlog? Is it a big problem or is it a decreasing problem?"*

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<sup>5</sup>[Lord Burnett Justice Select Committee evidence session transcript 2021 \(judiciary.uk\)](#) at page 11 and see page 2 where the Lord Chief Justice refers to the capacity of the criminal bar ... *"The other capacity factor which has taken us a little bit by surprise is the capacity of the legal profession, both solicitors and barristers, in some parts of the country to manage to do the work that we are listing to do, and so capacity is one of these things that has many different facets and there are other important features of capacity which include the staffing levels in HMCTS, the ability of probation to keep up, the CPS to keep up and so on..."*

*THE LORD CHIEF JUSTICE: At the moment it is quite a big problem. So, just to get the numbers in one's head, the sitting day allocation for 2019/2020 in the crown court was 82,600 days. It was increased by a small margin later in the year when it became apparent that the projections for work were not being borne out by events, but 82,600. This year, that is 21/22, we expect to sit just over 100,000 days. So that is a big percentage increase, a very big percentage increase, and that is why we are having to find so many of those days by encouraging our recorders to sit. There is an irony in that because before COVID when the days were being cut, cut, cut, we were finding it difficult to find the days for our recorders to sit. So, having been told two years ago we are struggling to find you your 15 days which we would like you to do, now we are begging them to do more, and I emphasise that many of them are sitting more, and the new ones are sitting. But we expect this year, that is before the end of the financial year, to fit around 100,000, maybe 101. We will do our best to sit more, and the rates are going up. Next year, so 22/23, I would be very disappointed if we cannot find the judicial resources to sit 105 or 106,000 days and I hope that the money will be made available to do that. After that, we think... when I say "we", these are projections that have been done by HMCTS and the MoJ, we think that we will be able to sit at a rate considerably beyond 105, maybe as many as 110,000. If we can get to that sort of rate, and if we get the funding to sit at that sort of rate, then there is a realistic prospect of bringing the outstanding caseload down. But that too depends upon what happens to the incoming work, and there are huge uncertainties about that and looking into the future is always difficult, but there are lots of variables which mean that it is difficult to predict exactly what is going to happen."*

28. Consequently, the recruitment and retention crisis at the Criminal Bar impacts the pace at which the backlog reduces in two ways. Criminal barristers defend and prosecute cases. Recorders are appointed primarily from amongst our ranks and are relied upon heavily in the Crown Court to supplement the full-time judiciary, who alone cannot provide the volume of judicial sitting days required for the Crown Court to run at, or even close to, the capacity the Lord Chief Justice indicates will be required. Increasing

judicial sitting days creates a tension between the numbers of barristers available to represent the parties, and the numbers of Recorders available to sit on trials. Unless that is taken into account, and unless the factors impacting flight from the profession and difficulties in recruitment are addressed concomitant to, and with the same degree of urgency as, the increase in sitting days, the Criminal Bar will be unable to service the work at the pace and volume of sitting days that are required to reduce the backlog within an acceptable timescale, or at all. Those factors are: remuneration and working conditions.

### **REMUNERATION AND THE CRIMINAL LEGAL AID REVIEW (CLAR)**

29. The Criminal Legal Aid Review is the long-awaited report, Chaired by Sir Christopher Bellamy, into the functioning and, specifically, the funding of the Criminal Justice System.
30. The date of publication is, at present, 13<sup>th</sup> December, further to which we understand there will be a consultation period in relation to the Governments' response to the proposals.
31. The CBA and the Bar Council, along with representative bodies for our sister profession (CLSA, LCCSA and SAHCA) and other agencies within the Criminal Justice System, have all contributed evidence to the Review.
32. **We can summarise the present position shortly and succinctly: without both a short term and long-term investment policy for AGFS (barristers criminal legal aid fees are called the 'Advocates Graduated Fee Scheme') criminal legal aid work is not sustainable. CLAR is a once in generation opportunity to put the sector onto a sustainable footing. If the opportunity is not taken, publicly funded criminal practice as a financially viable sector, relative to other areas of legal practice, will continue to fail and the scale of the crisis we are presently experiencing as a profession and as a Criminal Justice System will continue to grow.**

33. The review is already very delayed: further delay to implementation of an appropriate and necessary fees increase contributes to an ever more frustrated and demoralized workforce making it even more difficult for us to retain and recruit. This in turn reduces the pool of candidates available for recruitment into Recorder and Judicial positions and to take Silk (become a QC), further diminishing our ability and efficiency as a profession, and the ability and efficiency of the courts in the future, to prosecute and defend the most serious crimes.

34. At paragraphs 15 and 16 of our submission to CLAR we said this:

*“15. The revised AGFS10 scheme, introduced in April 2018, resulted in immediate action as a result of the effect of the new scheme in reducing remuneration overall, and the savage cuts to the most complex and demanding cases. The fee levels, in real terms, remained historically low compared to 1997 and 2007. Modest changes were introduced in late 2018 (AGFS11) and again in 2020 (AGFS11 with the new measures) which made small incremental increases to daily trial rates and brief fees, as well as increasing the fees for some ancillary hearings. However, those changes were only introduced after further action was threatened by criminal barristers.*

*16. The sad reality is that, in the last 10 years, criminal barristers have only been able to prevent cuts or secure modest incremental increases in fees by taking or threatening action. The threat of action has never gone away. Even in 2018 when the revised AGFS11 was proposed by the government, criminal barristers approved postponing further action by the barest of majorities (51.55%). It was the promise of reform in late May 2018, as part of a Criminal Legal Aid Review which was to be conducted within 18 months, that persuaded just enough criminal barristers to postpone the action. This was followed in 2019 by a further ballot and mandate for action with regard to the AGFS supported by 94% of criminal barristers. This action has been in suspension since June 2019 when 60.72% voted to await the ultimate outcome of the promised independent Criminal Legal Aid Review. It is notable that 39.28% voted against doing so.”*

35. This is the background against which we continue to wait as a profession; having waited since May 2018 for a review then scheduled to complete in 18 months, for an indication that our concerns about the viability of criminal legal aid as a viable area of legal practice are being taken seriously by Government.
36. By way of a recent practical example, the fee for all work by prosecution counsel in a case involving multiple rapes of a young child, which resulted in guilty pleas and a sentence of 22 years, was £876. This worked out at approximately £43 per hour *before* Chambers rent/fees, tax and national insurance. The rate per hour for junior counsel in criminal cases works out at £39.50 per hour, before expenditure to chambers, travel, tax and national insurance and pension contributions.
37. Our full response to CLAR can be found here: <https://www.criminalbar.com/wp-content/uploads/2021/07/CBA-Submission-to-CLAR-07.07.21.pdf>.
38. **We ask the Inquiry to admit our submission to CLAR into evidence and in due course admit our response to the publication of the CLAR proposals and Government's response, into evidence.**

## WORKING CONDITIONS IN THE CROWN COURT

### *COVID OPERATING HOURS - A FLAWED POLICY*

39. During the earlier stages of the pandemic the issue for the criminal courts was primarily one of physical capacity. We lobbied for extension of the court estate on a temporary basis to relieve the bottleneck. 'Nightingale' courts were established, some continue to sit. Further to introduction of covid adjustments to the court estate, combined with a relaxation of social distancing rules, bringing more courtrooms into use and allowing for jurors to return, albeit the issues caused by a diminished physical capacity continue they have been relieved to some extent.
40. Nonetheless, HMCTS has repeatedly tried to introduce a policy of extended sitting hours to address the inefficiencies of the physical court estate: referred to variously as 'Extended Operating Hours', 'Flexible Operating Hours', Temporary Operating

Hours' and 'Covid Operating Hours'. The profession, and more recently the Judiciary (Covid Operating Hours have not yet been introduced at any court centre) have stood firm. The CBA remains of the view this is a wholly misguided policy, discriminatory in its impact on the working conditions of carers amongst our ranks, but also unable to deliver a substantial increase in sitting time. The issue is now exacerbated by the fact that barristers are so demoralized and overworked that further deterioration of working conditions will push yet more out of the profession altogether, further undermining the ability of the profession to work through the backlog and further skewing the gender imbalance at the Criminal Bar (covid operating hours is a discriminatory system of work because it impacts disproportionately on carers within the profession and women continue to undertake the majority of caring work).

41. **Our concerns about the issues that flaw the rejected policy of 'Extended/Further/Temporary/Covid Operating Hours' were fully documented in the report of the Criminal Bar Association Working Group on Court Capacity dated December 2020 and available on our website: <https://www.criminalbar.com/wp-content/uploads/2020/12/Combined-Report-of-the-CBA-Working-Group-on-Court-Capacity-2.12.20-Further-Diversity-Data-updated-14.12.20-1.pdf>**
42. **We ask that the report of our working group be admitted as evidence for the Inquiry.**

#### ***REMOTE WORKING (CVP)***

43. We endorse the use of remote working where appropriate to maximise efficiencies and to allow our members to work through as many cases as they have remote capacity to undertake, on any given day. The system for remote working in the Crown Court is called 'CVP', and albeit it is sometimes blighted by connectivity and technical issues on the whole it is a workable system that was crucial to keeping the Criminal Justice System operating when physical access to courtroom was limited at the height of the pandemic. As we work through the backlog it continues to have a crucial role to play.

44. Barristers can cover a greater number of hearings on any given day if not required to physically travel between courts. Further, CVP contributes to improving working conditions, particularly for carers, by relieving travel time, thereby increasing our time efficiency in terms of the number of hours available in the working day for productive work as opposed to commuting and reduces carbon emissions. Barristers have more time to work on the preparation of other cases reducing stress and anxiety and improving the presentation of cases in court, all of which makes a valuable contribution to minimizing a number of the issues which currently contribute to driving younger barristers, and particularly younger women, out of the profession. Further preparation time is crucial to reducing the amount of court time that is expended because it allows time for agreement to be reached where possible, disputed areas to be narrowed and for legal conferences, which are imperative to allow defendants to be advised by trial counsel at an early stage in a case in order to minimize late pleas. All of which better assists the efficient and effective use of valuable court time.
45. **In May 2021 we published a paper on the benefits of remote working in the Crown Court on efficient use of human capacity. The report can be accessed on our website here: <https://www.criminalbar.com/wp-content/uploads/2021/11/CBA-Remote-Working-Response-30.05.21.pdf>. We invite the Inquiry to admit our report into evidence.**
46. **Our Chair reiterated the continued support of the profession for CVP in his message to members on the 8<sup>th</sup> November 2021 which can be accessed here: <https://www.criminalbar.com/resources/news/monday-message-22-11-21/>.**
47. Our position remains that CVP is a welcome modernization in the criminal courts and appropriate for hearings where the administration of justice is not impeded. It is not appropriate for trials or any hearings where a defendant, witness or complainant is required to attend in person. It is well suited to administrative hearings concerned with procedural issues of case progression. However, at present the use of CVP is inconsistent. Different Crown Courts operate their own policies which creates confusion for all parties and impedes our ability to work efficiently through the



backlog. Cases are best served and best expedited by consistency of representation wherever possible: CVP can deliver this. Diversity and retention within the profession is best served by improved working conditions: CVP can deliver this. However, CVP would better deliver if the system itself had better technological facilities (for conferencing between counsel and clients pre- hearing and quality of sound (sometimes a problem at some courts) and if it was used according to a National Protocol, so that there was a consistency of approach. We have repeatedly called for introduction of a National Protocol but at present protocols remain localized and variable. Some courts continue to require attendance in person for hearings that other courts deem suitable for CVP.

48. A further issue is lack of communication by listing offices with clerks who are attempting to fix barristers' diaries. Also, some courts insist on 48 hours' notice for a CVP hearing to be facilitated. This does not reflect the reality of the caseload that clerks are being required to manage; 48 hours' notice often is not realistic resulting in additional pressure then being placed upon clerks who have to find a barrister who will accept a returned case and also travel to a court (often for remuneration of £90 with travel costs and chambers' percentage being paid out of that sum).

## CONCLUDING SUBMISSIONS

49. **Increasing capacity in the Criminal Justice System in order to clear the backlog is a multi-faceted problem and will require a multi-faceted solution.**
50. The criminal courts are presently experiencing systemic failure born out of endemic neglect. Every aspect of the system is impacted, as is every agency working within it. We have focused in this submission on the issue of the unavailability of counsel as an impediment to efficiency. The working hours, unpredictability of working lifestyle, remuneration and working conditions make it extremely difficult for the Criminal Bar to compete with other areas of legal practice when we recruit. It will require an emergency injection of funding into barristers' fees in the short term to retain those still willing to persevere in spite of the present working conditions, and a long-term

fees settlement and improvement to working conditions, to stabilize the profession. This is required not just to reduce the backlog, but to maintain it at an acceptable level in the future without resorting, as at present, to a continuation of emergency legislation to detain defendants without trial for unacceptably long periods of time, which in turn impacts the time victims wait for resolution of cases and impacts the willingness of victims to cooperate with prosecutions. For years to pass between commission of a crime and trial, as we are experiencing at the moment, is not a functioning, or fair, Criminal Justice System. It is on the road towards becoming a failed Criminal Justice System, such as can be observed in many other nations where crimes go unpunished, and suspects wait years for a trial.

51. To address the volume of sitting days without addressing the issue of the crisis of retention and recruitment at the Criminal Bar, and the need to properly fund the agencies and people that contribute to the daily running of the courts, from solicitors to court staff, is to fail to grapple with the complexity of the problems facing the criminal courts.
52. Systemic failure extends to every branch of the system: the Crown Prosecution Service is under-funded and under-staffed, similarly the probation service, private contractors (eg SERCO) repeatedly fail to bring prisoners to court on time, which delays trials, wastes endless amounts of time, and impedes the efficiency of the courts, prison staffing levels are, as the POA have repeatedly warned, problematic, as the remand population continues to grow, making it harder for the prisons to maintain humane conditions and, relevant to the backlog, facilitate legal conferences which are crucial to the pace of disposal of cases. The overall prison population has fallen back from its record highs over the past 18 months, that has been driven by the sentenced population declining to 10 year-lows as result of the slow-down in trials. But the remand population as on 30 September 2021 sits at highs not seen for over a decade and now accounts for 16% of the total prison population of 78,756.<sup>6</sup>

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<sup>6</sup> <https://www.gov.uk/government/statistics/offender-management-statistics-quarterly-april-to-june-2021/offender-management-statistics-quarterly-april-to-june-2021>

53. We trust that the Inquiry will take detailed evidence from representative bodies that speak to the difficulties in each area of the Criminal Justice System, which have combined in a perfect storm to mitigate against a rapid reduction in the backlog unless there is sufficient funding of and recruitment into the system in its present iteration at all levels, and in all areas, to allow it to work.
54. In relation to the categories of defendant and the nature of the work that the Criminal Justice System undertakes going forward; including but not limited to youths, the drug addicted, the mentally ill, the socially excluded, whilst much progress has been made to deal more humanely with the complex societal issues that push people from these demographics into the Criminal Justice System, there is much more that could be done. Systemic failure in other areas of the Welfare State impacts the Criminal Justice System which acts as a barometer for the health of a nation. Domestic and gender-based violence is an area where education and zero tolerance within society (cultural change) is the long-term objective, combined with robust punishment of perpetrators. Punishment alone will not eradicate the phenomenon. We could cite many more such examples. As a society once again we are reconsidering, further to publication of the Government's strategy to increase funding for rehabilitation from drug addiction (in order to reduce the disproportionate public health impact and cost of drug addiction, and the disproportionate impact and cost for the Criminal Justice System of the associated acquisitive offending) the purpose and most effective use of the Criminal Justice System in relation to that cohort of offenders.<sup>7</sup> We welcome all strategies that divert people before they offend, mitigating the associated harms for society and for the lives of those individuals.
55. The Criminal Justice System will always remain, should always remain, a limited system, contained to its purpose and objective. It cannot cure society's ailments. Strategies to prevent offending are a necessary and welcome adjunct to it and, for example, in relation not just to drug addiction, but also, for example, vulnerable youths, are a more effective, and preferable, way of reducing the associated costs and

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<sup>7</sup> <https://www.gov.uk/government/news/largest-ever-increase-in-funding-for-drug-treatment>

harms relative to the greater difficulty of, and greater associated cost of, successful intervention post-conviction. Consequently, the Criminal Justice System and the scale of the work required of it mirrors society's investment in tackling a multitude of problems, which makes projections of the capacity that is needed for the future difficult (but achievable, using projections based on annual trends) and means the system must have the flexibility and capacity to be able to absorb year to year fluctuations.

56. The purpose of the Criminal Justice System merits emphasis at this juncture, when it is under immense pressure, and priorities for its use must be identified and achieved within a realistic timescale.

57. Criminal justice is inseparable from, and fundamental to, a safe and functioning democratic state. That is its' fundamental purpose: to uphold the rule of law and ensure that the state can deliver on its' core duty: the safety and security of its' citizens. That objective must not be diluted. Overburdening and under resourcing the women and men whose daily job it is to deliver justice risks not only the functioning of the system but the maintenance of law and order. In seeking to make recommendations to reduce the backlog, we invite this Inquiry to pay heed to the overriding importance and priority of the criminal justice objective. This objective cannot be separated from the barristers who constitute its fundamental component parts.

**CRIMINAL BAR ASSOCIATION**

**8th December 2021**