The Bar Council

Bar Council Leveson Review Submission

Executive Summary

Background and considerations

Although the COVID-19 pandemic is the principal cause of the dramatic rise in the Crown Court backlog in recent years, the backlog itself is by no means a recent development. The issue is not the backlog itself but the 'deficit' in the system's ability to deal with it. A 'normal' level of cases waiting to be tried (somewhere around the figures experienced pre-pandemic) is inevitable and indeed expected in ordinary times to allow proper preparation of cases.

We welcome the government's recent decision to raise the sitting days cap to 110,000 in the next financial year. However, to ensure justice can be delivered in a timely and appropriate manner, there must be adequate resources to ensure that these new available sitting days can be properly utilised. The number of Crown Court receipts (cases coming in) have routinely exceeded disposals (cases being concluded by means of verdicts, etc.). In Q3 of 2024, there were 31,683 cases received into the Crown Court, representing a 4% increase on Q2 2024, and a 12% increase on the previous year. We attribute this in part to the increase in police officer numbers under the last government. The lack of consideration that investment in police officers may lead to more arrests, and thus more criminal cases is emblematic of the siloed approach previous governments have taken towards the criminal justice system. Whilst there was an investment in detection there was no investment in the court system to deal with any potential increase.

As a result of these factors, the number of cases in the 'backlog' has continued to steadily increase over time, despite all the work done to improve the number of cases leaving the system. This is what has left us with nearly 74,000 cases still open and with that figure continuing to increase. This is a conservative estimate, and does not reflect the number of people involved, or the complexity of cases, owing to the fact that the Ministry of Justice collects data in the form of cases, rather than number of defendants, and the backlog is not modelled according to case complexity. Models that do account for complexity have been developed, such as that of the Institute for Government[1].

It is for this reason that the new government appointed Rt. Hon. Sir Brian Leveson KC to carry out an independent review into the criminal courts, which we welcome.

[1] https://www.instituteforgovernment.org.uk/publication/performance-tracker-2023/criminal-courts

Bar Council Recommendations to the Leveson Review

We believe that any attempts to tackle the Crown Court backlog must consider these points:

On intermediate Courts

- An 'intermediary court' must be opposed. The Bar Council opposes the introduction of an intermediary court both on principle (the right to trial by jury), and in practical terms.
- We absolutely accept that innovative thinking is required to solve the crisis in our criminal justice system and, in particular, to reduce the backlog so that waiting times between charge and trial are reduced.
- We put forward a number of potential alternative approaches below to increase efficiency. All of them should be tried before making structural changes that remove the right to trial by jury for allegations of greater severity than are already tried in the magistrates court and in the absence of any clear modelling or evidence to show that intermediate courts will bear down on the backlog. An intermediate court is not the answer.
- We instead suggest that the government adopt the following recommendations:

On diversion

- A new model for rerouting criminal cases, building on the models already found in Deferred Prosecution Agreements and referral orders see Appendix A. We believe that the experience of victims is also likely to be improved by such a change, which would improve the current situation wherein a victim may wait four years to give evidence in a criminal trial at the end of which a defendant, if convicted, receives a community order or suspended sentence whose terms could be mirrored in a diversion order.

On preventative measures:

- The government should allow greater use of cautions and conditional cautions for low-level offending by those of good (or relatively good) character in circumstances where offences are not admitted in interview.
- For cases of insanity where all medical practitioners agree that a defendant is insane, a judge – upon hearing oral evidence of insanity from two registered medical practitioners – should be able to enter such a verdict and recommend the appropriate disposal.

For efficiency of the Crown Courts and justice system

- The court estate must be utilised to full capacity.
- The criminal procedure rules should be amended to provide greater flexibility for hearings and to allow virtual courts which do not require a court room.[2]
- The cap on sitting days for the Crown Court must be removed, and sufficient sitting days must be provided for in all jurisdictions.

[2] If a virtual court could be used for all short matters, other than sentences involving custody where the defendant is on bail, this would free up the court rooms for the trials, those cases that need a physical court room. This would allow them to be completed more quickly, whilst the short matters are dealt with by all parties attending remotely.

- All available judges, including judges who have retired but are below the age of 75, should be allowed to sit as many days as they are available.
- Consideration should be given as to whether the prosecution of an either-way offence is necessary, where a summary-only offence (a criminal offence that is only triable (summarily) in the magistrates' court) is likely to provide sufficient sentencing powers.
- As a short-term measure, credit up to one third could be offered to any defendant who pleads guilty, where their case has not reached trial.
- Defendants awaiting trial should be remanded to the most conveniently located prison to the court at which they face trial.
- The mandatory minimum term for third-strike offences must be removed.
- Further opportunities should be explored for more efficient and creative listing schemes such as the 'Trial Blitz' in Greater Manchester and whether and how they could be rolled out further.[3]
- List trials Monday to Thursday only so all short matters are dealt with in one day, namely Friday, minimising disruption for all other court users such as jurors, witnesses and defendants.

For the Criminal Bar

- An immediate uplift of 15% to criminal prosecution and defence fees to provide enough publicly funded barristers to meet the demand.
- Establish an independent fee review body to properly reward and sustain a publicly funded Bar.

[3] One approach would be to allocate court time for specific periods to deal with a large number of cases already within the system, that would otherwise be heard at a significantly later date. One such scheme was adopted in Greater Manchester in 2023, known as the "Trial Blitz". Cases that were identified as suitable for inclusion in the scheme were listed for trial during a two-week window in December 2023 or a three-week window in January 2024. Two courtrooms being allocated for trials of these cases, with each court having two trials listed each day.

Appendix A

A possible new model for Diversion

As we outline above, the fundamental issue in bringing down the backlog at present is currently that receipts into the Crown Court are outstripping deposits despite rates of disposal being higher than they were pre pandemic.

In our experience as practitioners, and in the views of many expert and informed observers, far too many people enter the criminal court system unnecessarily.

As such, in the interest of reducing deposits and preventing situations in which a defendant may wait four years for a conviction for which they receive a community order or suspended sentence whose terms could be mirrored in an alternative to criminalisation, we would like to see greater emphasis placed on diversion across the whole of the criminal justice system.

We consider that it would be possible to devise a model similar to that reflected in the schemes providing for Deferred Prosecution Agreement DPAs and referral orders that could apply more widely in the criminal justice system.

The following outline of what such a model might look like is presented for consideration of potential viability, rather than as a fully realised scheme. Our ultimate suggestion is that, if such a model were thought to have some merit, a focused consultation with key stakeholders could be conducted, along with some detailed research as to financial costs and benefits, including in relation to the potential impact on the Crown Court backlog.

Key components of a new Diversion Order could be:

1. Sign-off by a suitably senior Crown Prosecutor.
2. A requirement for legal advice and representation at any hearing related to such an order (perhaps modelled on the existing PTPH, for Crown Court cases).
3. A requirement for judicial approval.
4. Monitoring – this would be essential.
5. Community / restorative justice / rehabilitative requirements.
6. The ability to deal with any breach with a further, or modified order (akin to extending the terms of a post-sentence community order).
7. The ability to prosecute for any breach (as there is, for example, for breaches of civil orders such as non-molestation orders, as well as community orders or suspended sentences of imprisonment).
8. The ability to prosecute for the underlying offence if the order is breached (as with DPAs).

Scope

Limitations on the use of such orders could include one or more of the below:

1. A requirement that the offender admit responsibility for the underlying offence (akin to a guilty plea). That could be reflected in an agreement which the offender would be required to sign.

2. That it only apply to first time offenders, or those with spent convictions.
3. That it only apply to offenders who would, if convicted, be unlikely to receive an immediate custodial sentence (on a straight reading of the Sentencing Council guidelines).
4. That it not apply in respect of (all or a specified class of) sexual or violent offences.
5. That the victim - if one can be identified – consents to the making of such an order.

Conditions

Conditions to comply with under a Diversion Order might be expected to include those relating to:

1. Compensation / other financial orders.
2. Education / vocational training.
3. Offender behaviour management (e.g. anger, driving issues).
4. Drug / alcohol rehabilitation.
5. Engagement with any identified victim or a relevant / representative community body (as with Referral Orders).

Structure for the consideration and making of such an order

Note: the below structure relates to Crown Court-level offending. A more streamlined approach could be adopted for summary offending, in order to avoid the paradox of offenders charged with ABH being offered diversionary options that were not available to, for example, those charged with common assault.

1. This could be modelled on the existing criminal justice framework. A defendant would be charged as usual, and triaging for eligibility could take place in the magistrates court (*i.e.* Are they a first time offender? Is this an excluded offence?).
2. If eligible, or potentially eligible, they would be sent to the Crown Court for what might be called a Diversion Hearing.
3. Stage 1 of the process at the Crown Court would be akin to a PTPH, save that, crucially, rather than pleading Guilty (and acquiring a conviction) a defendant would simply indicate at that stage whether they were in principle prepared to agree that they had committed the offence. (That indication would be inadmissible as evidence of guilt in any future proceedings.) The prosecution would indicate whether they considered the case suitable for diversion, and would confirm the views of the victim, if identified. The judge would then express a preliminary view on the appropriateness of the course. The matter would be adjourned for a diversion report - something akin to a probation pre-sentence report – before Stage 2.
4. Stage 2 would be modelled on a sentencing hearing. The defendant would need to formally accept they had committed the offence and perhaps sign an agreement to that effect upon the order being made. The requirements of any order derived from what might be terms a diversion report would be discussed with the assistance of legal representatives, and appropriate submissions made as to duration and terms. Finally, the order would be approved (or not, if for some reason it was considered not appropriate) by the court.

5. A fee scheme could easily be devised, modelled on AGFS for the Crown Court, with a fee for the stage 1 hearing in line with a fee for a guilty plea, and one for stage 2 in line with a fee for a sentence hearing.

Possible impact

6. While overall receipts to the Crown Court would not necessarily be reduced trial receipts would be. That would save money in that part of the system, which would likely far outweigh the additional probation resources that would properly be required.
7. In line with research around referral orders, there would likely be greater victim satisfaction as well as improved rehabilitation prospects for the offender, who would not receive a conviction.
8. As with referral orders, a diversion order could be deemed spent upon completion and there would be no expensive tweaks to the structure of the criminal justice system required (cf. intermediate courts).

Costs and benefits (financial)

9. Some rough modelling suggests that 10,000 cases could be removed from the Crown Court backlog through a model such as this confined to first-time offenders or those with spent convictions, who are facing prosecution for non-sexual offences and who are not expected to receive a sentence of immediate custody.
10. While any new diversion order would come with costs – for example within the CPS at an early stage of the process, and more obviously within the probation service – the benefits in terms of savings in court time and costs, legal costs, and delay to the retained Crown Court caseload would likely far outweigh these.
11. The experience of victims is also likely to be improved with an outcome being arrived at much sooner.
12. In order to build and retain confidence in the system and to guard against arbitrariness, guidance or a code of practice would be required.