



## Court capacity

### Fair Trials submission to the Justice Committee

5<sup>th</sup> October 2020

#### About Fair Trials

Fair Trials is a global criminal justice watchdog with offices in London, Brussels and Washington, D.C., focused on improving the right to a fair trial in accordance with international standards. Our work combines: (i) helping suspects to understand and exercise their rights; (ii) building an engaged and informed network of fair trial defenders (including NGOs, lawyers and academics); and (iii) fighting the underlying causes of unfair trials through research, litigation, political advocacy and campaigns.

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#### 1. Introduction and summary

- 1.1 We welcome the opportunity to submit evidence to the Justice Committee's inquiry into court capacity. Courts across the country are experiencing extraordinary capacity challenges that have been exacerbated by the COVID-19 pandemic, and it is crucial that urgent attention is given to address the underlying causes of this crisis
- 1.2 The COVID-19 pandemic, and responses to it, have had an unprecedented impact on criminal justice infrastructure and processes in the UK, and they have put criminal courts under serious pressure. For several months following the 'lockdown', many courts closed fully, others partially, dealing with only 'urgent' cases, resulting in a backlog of more than 500,000 cases before magistrates' and crown courts.<sup>1</sup> The court capacity challenge however, is by no means a new

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<sup>1</sup> Gadher, D. 'Coronavirus backlog sentences judges to a full day's work', in *The Times*, 9 August 2020.  
<<https://www.thetimes.co.uk/article/coronavirus-backlog-sentences-judges-to-a-full-days-work-50g9kkvns>>

challenge created by COVID-19. Crown courts already had a backlog of 39,000 cases before the lockdown, caused by existing challenges faced by the criminal justice system.<sup>2</sup>

- 1.3 The government has recognised the urgent need to tackle this challenge, and in its recent Criminal Courts Recovery Plan, it has set out a range of measures to help criminal courts 'return to normal business', through *inter alia* increasing the courts' operational and physical capacity, and promoting the use of video technology. While we welcome the government's decision to significantly increase investment in court infrastructure, we believe that these measures do not sufficiently take into consideration the rights of defendants, and that they are inadequate given the scale and nature of the challenge.
- 1.4 A main aspect of the government's proposed solutions to the court capacity challenge is a focus on 'digitalisation', including increasing the use of telephone and live link in court hearings. However, there is evidence that these measures have a negative impact on the right to a fair trial, that they are disproportionately affecting vulnerable defendants, and that they may result in defendants disproportionately being given custodial sentences.
- 1.5 The government's plans are also failing to address the risk that the lack of court capacity and the related delays result in legally innocent people being held in detention for extensive periods, awaiting their trial. Defendants are facing prolonged, and in some cases, indefinite pre-trial detention, because delays in criminal proceedings are causing repeated extensions of custody time limits. This is not a challenge that should be disguised by extending legal custody time limits – specific measures are needed to tackle the overuse of pre-trial detention.
- 1.6 In order to address the issue of court capacity, proper funding of the infrastructure of the justice system, including legal aid, is desperately needed. However, the current size of the case backlog requires more structural solutions: reducing the number of people in the criminal justice system, and therefore the pressure on the courts, overall.
- 1.7 This submission includes the results of a survey conducted of individuals at the frontline of the criminal justice system, over a period of 2 weeks in May 2020, including defence solicitors, barristers, accredited legal representatives, judges, magistrates, police officers, Crown Prosecution Service (CPS) staff, and appropriate adults.<sup>3</sup> They were asked to share their opinion

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<sup>2</sup> BBC News, 'Coronavirus: Robert Buckland warns over court case backlog', 19 June 2020.

<<https://www.bbc.co.uk/news/uk-politics-53107109>>

<sup>3</sup> Fair Trials, 'Justice Under Lockdown: A survey of the criminal justice system in England & Wales between March and May 2020', 2020.

<[https://www.fairtrials.org/sites/default/files/publication\\_pdf/Justice%20Under%20Lockdown%20survey%20-%20Fair%20Trials.pdf](https://www.fairtrials.org/sites/default/files/publication_pdf/Justice%20Under%20Lockdown%20survey%20-%20Fair%20Trials.pdf)>

of how COVID-19 had impacted fair trial rights in England & Wales since the lockdown began. The results of the survey paint a deeply worrying picture of the criminal justice system in England & Wales under lockdown. This submission also includes responses to Freedom of Information requests to the Ministry of Justice and Crown Prosecution Service. Fair Trials' COVID-19 Justice Project has also actively monitored and tracked the way justice systems have addressed court capacity issues globally, and we bring this comparative perspective and expertise to this submission.<sup>4</sup>

## **2. Digital or remote justice**

- 2.1 The government has announced a focus on 'digitalisation' to solve the backlog and reduce physical contact for health purposes, pledging £142m to 'digitally upgrade and maintain around 100 courts', and equip 750 more courtrooms to hold remote hearings, within 6 months.<sup>5</sup> We welcome the fact that the government is taking extraordinary measures to keep the criminal justice system operational, with the aim of preventing even longer delays in criminal proceedings and ensuring that urgent matters, such as pre-trial detention hearings, are not postponed for significant periods of time.
- 2.2 However, the digital solutions proposed by the government are inadequate to deal with the size of the case backlog, and the method of conducting justice may itself cause significant injustice and human rights infringements, resulting in more appeals, further increasing the courts' caseload. Research, explained below, shows that remote justice can have a negative impact on the right to a fair trial. Remote hearings can interfere with defendants' right to access effective legal assistance, to participate effectively at their own hearings, and to review and challenge information and evidence relevant to the proceedings. There is also evidence suggesting that they disproportionately result in custodial sentences.
- 2.3 Any decision on the extent and practicalities of using remote justice tools beyond the emergency period should be taken cautiously, after a full assessment of their impact on the right to a fair trial, and only where strictly necessary, where, after full consideration on a case-by-case basis, it can be deemed not to have a negative impact on defendants' rights.

### *Communication*

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<sup>4</sup> Fair Trials, 'COVID-19 Justice Project', 2020. <<https://www.fairtrials.org/covid19justice>>

<sup>5</sup> Fouzder, M 'Johnson pledges £142m to improve 100 courts' in *The Law Society Gazette*, 30 June 2020. <<https://www.lawgazette.co.uk/news/johnson-pledges-142m-to-improve-100-courts/5104830.article>>

- 2.4 Defendants' rights are being undermined on account of the difficulties in communicating with their lawyers and the court, and in reviewing and challenging information relevant to the proceedings, via remote proceedings. Responses to Fair Trials' May 2020 survey clearly show that client-lawyer communications have been badly affected, meaning that defendants are finding it more difficult to consult with their lawyers, and to seek advice before, during, and after court hearings.<sup>6</sup>
- 2.5 44% of respondents to our survey believed that remote hearings make it significantly more difficult for defendants to participate in the proceedings (with a further 19% saying that the impact on effective participation had been moderately negative). 67% of respondents thought that the remote hearings had a significant negative impact on the ability of defendants and their lawyers to communicate before and during hearings. A further 25% thought that there had been at least some or moderate negative impact.<sup>7</sup>
- 2.6 While some defence lawyers appear to attribute these difficulties to the poor quality or unreliability of the technology used to facilitate client-lawyer consultations, it was also highlighted that some courts are not appropriately set up to facilitate effective, confidential conversations between defendants and their lawyers. Courtrooms, for example, had to be vacated so that lawyers could speak to their clients in private, and when they were, minimal time was allowed for those conversations.
- 2.7 We were also concerned to learn from survey respondents that in some cases, judges were explicitly preventing post-hearing client-lawyer consultations from taking place via video-link or telephone, leaving defendants in custody stranded, with severely restricted access to legal advice. One respondent to the survey informed us:

*"The Resident Judge at our local Crown Court has now forbidden post-hearing conferences in circumstances where the defendant is sent into custody (either sentenced or remanded in custody) and instead we have been told that we need to conduct post-hearing conferences by letter. It is outrageous that somebody is supposed to be legally represented and yet they are being sent into custody without the opportunity to see the representative straight after. How can anyone be sure that they've understood what has happened (particularly for those with language barriers, learning difficulties, mental health issues) and what the next steps are?"<sup>8</sup>*

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<sup>6</sup> Fair Trials (n 3), p. 8.

<sup>7</sup> *Ibid.*, p. 7.

<sup>8</sup> *Ibid.*, p. 8.

- 2.8 A study carried out by the Ministry of Justice in 2010 into video-justice, conducted over a year in two magistrate's courts, also evidenced issues with remote justice. The report found that *"the physical separation of defendants... made it harder for defence and CPS advocates to communicate before and during hearings"* and that the time pressures of fixed video 'slots' resulted in *"hasty justice"*.<sup>9</sup>
- 2.9 A March 2020 report on 'video-enabled justice' funded by the Home Office, and carried out by the Sussex Police and Crime Commissioner in conjunction with the University of Sussex, reinforced many of these same concerns, especially with regards to defendants' and lawyers' experiences of the process. The report found that defendants appearing via video-link were less likely to have legal representation. Even when they did, there were serious issues. The report stated that *"loss of face-to-face contact in video court can create challenges in terms of advocates developing trust and rapport with their clients"* and *"appearing over the video link could make defence advocates less effective, particularly in relation to bail applications."*<sup>10</sup> Defendants who were questioned as part of the report said they felt like *"caged animals"*, with one adding that they felt *"treated a bit more like a human being"* in a physical court hearing.<sup>11</sup>
- 2.10 75% of respondents to our survey believed that remote hearings had made it harder for defendants and their lawyers to obtain, present, and challenge evidence. Respondents to our survey explained that lawyers were often receiving information relevant to their hearings very late, and that it was more difficult to ask the relevant people for the right information without attending court. Technical issues were also cited as reasons for it being more difficult to adequately present evidence.<sup>12</sup>
- 2.11 A 2017 study conducted on video hearings in the United Kingdom by Transform Justice found that defendants appearing via video-link are more likely to be unrepresented and thus unable to navigate the proceedings.<sup>13</sup> The study also found that lawyer-client consultations on video are frequently overheard by others because the rooms in which they are held are not properly soundproofed, and because either or both sides sometimes need to shout to be heard, due to

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<sup>9</sup> Terry, M., Johnson, S. and Thompson, P. 'Virtual Court pilot: Outcome evaluation', in *Ministry of Justice Research Services 21/10*, December 2010. <<https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/virtual-courts.pdf>>

<sup>10</sup> Fielding, N., Braun, S. and Hieke, G. 'Video Enabled Justice Evaluation', March 2020. <<http://spccweb.thco.co.uk/media/4807/university-of-surrey-video-enabled-justice-final-report-ver-11.pdf>>

<sup>11</sup> Dearden, L. 'Coronavirus: Defendants more likely to be jailed in video hearings, research warns amid rise of remote justice', in *The Independent*, 5 May 2020. <<https://www.independent.co.uk/news/uk/home-news/coronavirus-court-hearings-jail-sentence-remote-lockdown-a9500101.html>>

<sup>12</sup> Fair Trials (n 3), p. 8.

<sup>13</sup> Gibbs, P. 'Defendants on video – conveyor belt justice or a revolution in access?', *Transform Justice*, October 2017. <<http://www.transformjustice.org.uk/wp-content/uploads/2017/10/Disconnected-Thumbnail-2.pdf>>

the poor sound quality of the connection.<sup>14</sup> These same poor connection issues, and resulting effects on s defendants' ability to communicate, receive advice and give instructions, and have confidential discussions, are also the case in police stations and prisons.

- 2.12 While not directly analogous to the criminal context, the Civil Justice Council's review of the impact of the COVID-19 pandemic on the civil justice system, particularly the swift expansion of the use of remote hearings, also found that measures mandated by the pandemic have reduced the availability and accessibility of legal advice. The review found that the impact of reductions in advice disproportionately affected those on low incomes. Almost half of all hearings in their sample experienced technical difficulties, with little or no technical support to deal with the issues.<sup>15</sup>

### *Vulnerable defendants*

- 2.13 The evidence on the use of remote justice measures and their effect on the fairness of trials for vulnerable defendants is largely damning.

- 2.14 The Equality and Human Rights Commission ('EHRC') published an interim report on video hearings and their impact on effective participation in April 2020.<sup>16</sup> It concluded that video hearings are unsuitable for disabled people, such as those with learning difficulties, cognitive impairment or a mental health condition.<sup>17</sup> Many of those interviewed *"strongly urged that disabled defendants should be able to attend remand or interim hearings in person, where relevant, by way of an adjustment"*.<sup>18</sup> The report also noted that *"opportunities to identify impairments and make adjustments"* were lost or reduced where defendants appeared in court by video link. The EHRC were concerned that the emergency use of remote justice may *"place protected groups at further disadvantage and deepen entrenched inequality."*<sup>19</sup> The full EHRC report, published on 11 July 2020, stated that video hearings are *"not suitable for people who need support with communication"*, that *"poor connections cause important information to be*

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<sup>14</sup> *Ibid.*

<sup>15</sup> Byrom, D., Beardon, S. and Kendrick, A. 'Report and recommendations: The impact of COVID-19 measures on the civil justice system', *Civil Justice Council and The Legal Education Foundation*, May 2020. <<https://www.judiciary.uk/wp-content/uploads/2020/06/CJC-Rapid-Review-Final-Report-f.pdf>>

<sup>16</sup> Equality and Human Rights Commission, 'Inclusive justice: a system designed for all: Interim evidence report', April 2020. <[https://www.equalityhumanrights.com/sites/default/files/inclusive\\_justice\\_a\\_system\\_designed\\_for\\_all\\_interim\\_report\\_0.pdf](https://www.equalityhumanrights.com/sites/default/files/inclusive_justice_a_system_designed_for_all_interim_report_0.pdf)>

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> Equality and Human Rights Commission, 'Preventing the health crisis from becoming a justice crisis', 22 April 2020. <<https://www.equalityhumanrights.com/en/our-work/news/preventing-health-crisis-becoming-justice-crisis>>

missed”, and they “can cause disconnection and separation from people and legal process”,<sup>20</sup> significantly reducing vulnerable people’s ability to access justice equally. Most damningly, the report concluded that:

*“Almost all the criminal justice professionals in England and Wales who we interviewed felt that use of video hearings does not enable defendants or accused people to participate effectively”.*<sup>21</sup>

2.15 The Law Society has also reported that more than 80% of UK solicitors believe that remote hearings are unsuitable for vulnerable defendants.<sup>22</sup>

#### *Disproportionately severe outcomes*

2.16 One of the most concerning issues with the use of video or other remote justice measures has been the evidence that it has a negative impact on criminal justice outcomes, especially the evidence that it increases the likelihood of a custodial sentence.

2.17 The March 2020 report on ‘video-enabled justice’ funded by the Home Office concluded that individuals whose cases were handled remotely are more likely to be jailed and less likely to receive a community sentence. The proportion of unrepresented defendants receiving custodial sentences was higher than the rate for represented defendants. Moreover, those sentenced in the more traditional court setting were more likely to receive fines or other community sentences.<sup>23</sup> In addition, the 2010 MOJ study into video justice also found that the rate of guilty pleas and custodial sentences were higher in the video pilot than in traditional courts.<sup>24</sup>

2.18 In our survey, 60% of respondents expressed that the use of video-link or telephone had a noticeably negative impact on the overall fairness of the hearings.<sup>25</sup> The results show that the majority of lawyers have significant concerns about remote hearings’ impact on defendants’ rights. It is not acceptable that the Government is promoting remote hearings as a way to address the backlog of criminal cases (the majority of which precede the lockdown) without adequately addressing these concerns.

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<sup>20</sup> Equality and Human Rights Commission (n 17).

<sup>21</sup> Equality and Human Rights Commission, ‘Findings and recommendations. Inclusive justice: a system designed for all’, April 2020, p. 9.

[https://www.equalityhumanrights.com/sites/default/files/ehrc\\_inclusive\\_justice\\_a\\_system\\_designed\\_for\\_all\\_june\\_2020.pdf](https://www.equalityhumanrights.com/sites/default/files/ehrc_inclusive_justice_a_system_designed_for_all_june_2020.pdf) >

<sup>22</sup> The Law Society, ‘Law under lockdown: the impact of COVID-19 measures on access to justice and vulnerable people’, 25 September 2020. <https://www.lawsociety.org.uk/topics/research/law-under-lockdown-the-impact-of-covid-19-measures-on-access-to-justice-and-vulnerable-people> >

<sup>23</sup> Fielding, N., Braun, S. and Hieke, G. (n 10).

<sup>24</sup> Terry, M., Johnson, S. and Thompson, P. (n 9).

<sup>25</sup> Fair Trials (n 3).

### *Lack of safeguards and the need for impact assessment*

- 2.19 The serious concerns raised by reviews and reports about the impact of remote justice on defendants' rights and justice outcomes need to be thoroughly analysed before video-link hearings become commonplace in ordinary criminal proceedings.
- 2.20 Most government guidance so far focuses on putting in place the technology necessary for carrying out remote hearings and responding to immediate needs in terms of equipment malfunction and user guidance.<sup>26</sup> There is no requirement for an impact assessment of the new measures; there is no requirement or mechanism within the Coronavirus Act for the court to assess the vulnerability of defendants and its impact on their ability to participate in remote justice.
- 2.21 The Coronavirus Act 2020 gives the courts in England & Wales power to direct the remote attendance of almost anyone (from judges to interpreters, but excluding jurors) to almost any type of hearing, including where an individual's liberty is at stake.<sup>27</sup> However, within the "interests of justice" test laid out by the Coronavirus Act, the views of the defendant are just one factor to be considered.<sup>28</sup> The defendant's views are not determinative, and they may hold only as much weight as the views of the Crown Prosecution Service.
- 2.22 The "safeguarding" provisions within the Coronavirus Act do not properly safeguard the defendant. Instead they mostly provide safety blankets as to when proceedings can or cannot take place "wholly" by video or audio link. The problem with these safeguards is that for a hearing to take place "wholly" by video link every person involved must be involved remotely. If just one participant is physically present, the safeguard is rendered meaningless. This lack of meaningful protection and consideration of defendants' rights in the justice process raises serious concerns as to whether remote justice is fair justice, and these concerns need to be thoroughly analysed before video-link hearings become commonplace in ordinary criminal proceedings.
- 2.23 Government must take proactive steps to carry out its own impact assessment, in addition to the data collected by non-governmental organisations, academics, lawyers and international organisations. The Ministry of Justice is in the best position to collect and analyse the vast amount of data available.<sup>29</sup> With remote justice systems currently being introduced on a massive scale,

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<sup>26</sup> GOV.uk, 'HMCTS telephone and video hearings during coronavirus outbreak', 18 March 2020. <<https://www.gov.uk/guidance/hmcts-telephone-and-video-hearings-during-coronavirus-outbreak>>

<sup>27</sup> Coronavirus Act 2020, Schedule 23.

<sup>28</sup> *Ibid.*

<sup>29</sup> Fair Trials, 'Commentary: Impact assessment of remote justice on fair trial rights', 5 May 2020. <<https://www.fairtrials.org/news/commentary-impact-assessment-remote-justice-fair-trial-rights>>



this presents a unique opportunity to collect data and gain more understanding on the impact of these systems on the fairness of criminal proceedings, as well as their usefulness in terms of time and cost savings.<sup>30</sup>

- 2.24 The need to carry out a proper impact assessment of virtual justice was highlighted by the House of Commons Committee of Public Accounts in its November 2019 report. This noted that HM Courts and Tribunals Service *“risks undermining public confidence in the fairness of the justice system by proceeding with its reforms without sufficiently demonstrating it understands the impact on justice outcomes or people.”*<sup>31</sup>
- 2.25 Government needs to set clear objectives in terms of the benefits this move intends to achieve before considering moving remote justice systems beyond the emergency period, and the perceived time and cost savings need to be properly calculated and weighed against the potential impact on the fairness of criminal proceedings and justice outcomes.<sup>32</sup>
- 2.26 Fair Trials has produced a set of recommendations on remote justice impact assessments which may be of assistance.<sup>33</sup>

#### ***Safeguarding the right to a fair trial in remote justice proceedings***

- 2.27 It is essential that the criminal justice system continues to function, including the processing of criminal cases, while safeguarding the rights and welfare of criminal defendants, especially those who are detained. However, it is also essential that England and Wales does not rush to adopt remote justice measures without properly considering their impact on criminal justice, and any decisions to make them more permanent should be based on sound evidence.
- 2.28 **Remote participation in criminal proceedings cannot be treated as equivalent to physical participation. Courts should only order remote hearings so that proceedings can be held without the physical presence of the suspect or accused person in court, in exceptional circumstances.**
- 2.29 Defendants should be able to exercise their rights fully and effectively, even when they are not physically present in court, and are unable to meet their lawyers in person. It is crucial that any decisions to introduce or expand the use of remote court hearings are informed by human rights concerns, and accompanied by appropriate safeguards to protect the rights of defendants. Fair

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<sup>30</sup> *Ibid.*

<sup>31</sup> [House of Commons Committee of Public Accounts, ‘Transforming Courts and Tribunals: progress review’, 4 November 2019, p. 5. <https://publications.parliament.uk/pa/cm201919/cmselect/cmpubacc/27/27.pdf>](https://publications.parliament.uk/pa/cm201919/cmselect/cmpubacc/27/27.pdf)

<sup>32</sup> Fair Trials, (n. 30).

<sup>33</sup> *Ibid.*

Trials has produced a guide to safeguarding the right to a fair trial during remote justice proceedings, attached as an appendix to this submission, which sets out clear and detailed recommendations that should be followed in order to ensure and protect fair trials in the context of remote justice.<sup>34</sup> In the context of remote justice, the key recommendations are as follows:

**When determining whether or not a court hearing should take place remotely, the following factors *inter alia* should be taken into consideration:**

- **the length of delays and their likely impact on the rights of defendants (particularly where the defendant’s period in pre-trial detention is likely to be prolonged);<sup>35</sup>**
- **the nature of the hearing, including:**
  - **the complexity of the case and the matter being dealt with;**
  - **the need to call witnesses; and**
  - **the likely impact of the hearing on the rights of the defendant (for example, if it puts the defendant at risk of deprivation of liberty);**
- **the availability and quality of equipment and systems used for communication between the court and the defendant; and**
- **the existence of impairments or other factors that could negatively affect the defendant’s ability to participate effectively in court proceedings. Where there are strong justifications that mandate the use of remote justice procedures, remote hearings should only take place if there are adequate safeguards in place that address various threats to the right to a fair trial.**

### **3. Trial delays and defendants held in custody awaiting trials**

3.1 There is widespread recognition that court capacity challenges need to be addressed to prevent delays and inefficiencies in the criminal justice system. Delays undermine the fair and effective administration of justice, and they cause serious anguish and uncertainty for both defendants

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<sup>34</sup> Fair Trials, ‘Safeguarding the Right to a Fair Trial During the Coronavirus pandemic: Remote Criminal Justice Proceedings’, 30 March 2020.  
<<https://www.fairtrials.org/sites/default/files/Safeguarding%20the%20right%20to%20a%20fair%20trial%20during%20the%20coronavirus%20pandemic%20remote%20criminal%20justice%20proceedings.pdf>> See Appendix I.

<sup>35</sup> Fair Trials, ‘The Public Health Need to Keep People out of Detention Practical Guidance’, March 2020.  
<<https://www.fairtrials.org/sites/default/files/The%20Public%20Health%20Need%20to%20Keep%20People%20Out%20of%20Detention%20Practical%20Guidance.pdf>>

and complainants. However, the impact of delays is particularly severe for defendants in pre-trial detention, for whom prolonged criminal proceedings result in more time spent behind bars as legally innocent people.

- 3.2 The additional delays caused by the closure of courts and resulting cessation of trials due to COVID-19 have exacerbated pre-existing challenges for defendants held in remand custody. Defendants are facing prolonged pre-trial detention as custody time limits are extended, with COVID-19 now given as the reason for such extensions.
- 3.3 **Any solutions to the issue of court capacity must address the fact that trial delays are likely to result in defendants being held in pre-trial detention for the period of delay.** However, it is doubtful that the government shares our concerns about the need to tackle excessive, prolonged pre-trial detention. In April 2020, the government announced that 4,000 ‘low-risk’ prisoners would be temporarily released to control the spread of COVID-19,<sup>36</sup> but this did not appear to include any of the legally innocent defendants in prison awaiting trial.
- 3.4 More recently, the government announced on 6<sup>th</sup> September that it would amend the current Custody Time Limit (‘CTL’), from 182 days to 238 days, by way of regulation made under the Prosecution of Offences Act 1985. The Prosecution of Offences (Custody Time Limits) (Coronavirus) (Amendment) Regulations 2020 took effect from Monday 28<sup>th</sup> September and will have effect until 28<sup>th</sup> June 2021.<sup>37</sup> This raises the prospect that someone, if subject to a CTL on the final day of operation of this Regulation, could be imprisoned under the excuse of ‘Coronavirus’ until February 2022.
- 3.5 In the explanatory note to the Prosecution of Offences (Custody Time Limits) (Coronavirus) (Amendment) Regulations 2020, it is stated that *“A full impact assessment has not been produced for this instrument as no, or no significant, impact on the private, voluntary or public sectors is foreseen.”*<sup>38</sup>
- 3.6 In 2019, nearly 3000 people and 1 in 10 of those remanded in prison awaiting trial were acquitted in the Crown Court at trial. Overall, a quarter of those held on remand awaiting trial were not sent to prison following their trial.<sup>39</sup> In addition, those remanded in custody awaiting trial are

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<sup>36</sup> Taylor, D. and Frierson, J. ‘Up to 4,000 inmates to be temporarily released in England and Wales’, in *The Guardian*, 4 April 2020. <<https://www.theguardian.com/society/2020/apr/04/up-to-4000-inmates-to-be-temporarily-released-in-england-and-wales>>

<sup>37</sup> Prosecution of Offences (Custody Time Limits) (Coronavirus) (Amendment) Regulations 2020. <<https://www.legislation.gov.uk/uksi/2020/953/contents/made>>

<sup>38</sup> Prosecution of Offences (Custody Time Limits) (Coronavirus) (Amendment) Regulations 2020, Explanatory Note. <<https://www.legislation.gov.uk/uksi/2020/953/note/made>>

<sup>39</sup> Ministry of Justice, ‘Criminal justice system statistics quarterly: December 2019, Remands: Crown Court data tool’, 21 May 2020.

disproportionately Black, Asian and from other ethnic minorities. In 2019, Black, Asian and minority ethnic ('BAME') individuals made up 6,408 (20.2%) of the 31,680 people who were remanded in custody - a clearly disproportionate amount. Since 2015, BAME people have consistently made up at least 20% of those remanded in custody awaiting trial.<sup>40</sup> This amendment to the current Custody Time Limit will directly lead to a disproportionate amount of BAME people being held for longer on remand awaiting trials.

- 3.7 This increase of the Custody Time Limit is a counter-productive response to the current challenges faced by the criminal justice system in England & Wales. It gives legal legitimacy to the failings of the criminal justice system, normalises excessive deprivations of liberty, and further undermines the presumption of innocence. Legalising lengthy pre-trial detention ignores its underlying causes, and it is only likely to worsen delays in criminal proceedings, given that this is likely to reduce incentives for courts to prioritise and expedite cases of defendants in custody. Although described as a 'temporary' measure, court capacity challenges are likely to be a long-term challenge, and we are extremely concerned that lengthier criminal proceedings, and therefore lengthy periods of pre-trial detention, could quickly become a norm that is difficult to reverse.

#### ***Fair Trials' survey***

- 3.8 The Government has so far refused to provide information on how many defendants have been subject to one – or several – applications to extend Custody Time Limits and how many people have been held in custody beyond the statutory time limit, despite being asked both in Parliament,<sup>41</sup> and by Fair Trials via Freedom of Information Request to the Ministry of Justice. However, our survey of defence solicitors, barristers, accredited legal representatives, judges, magistrates, police officers, Crown Prosecution Service (CPS) staff, and appropriate adults indicates the extent of the problem.<sup>42</sup>
- 3.9 Nearly half the respondents to our survey told us that, in their view, defendants were less likely to be remanded into custody during lockdown, and their responses seemed to suggest that judges were more likely to grant bail where possible, in an effort to reduce numbers of people in

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<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/888657/remands-crown-court-tool-2019.xlsx](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/888657/remands-crown-court-tool-2019.xlsx)>

<sup>40</sup> *Ibid.*

<sup>41</sup> Written questions, answers and statements to Chris Philip MP, 19 May 2020, UIN 48994

<<https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-05-19/48994/>> and UIN 48993

<<https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-05-19/48993/>>

<sup>42</sup> Fair Trials (n 3).

custody. However, where a defendant is already remanded in custody, they were more likely to spend longer in detention.

- 3.10 63% of respondents thought that the amount of time defendants spend in detention is likely to be 'higher' or 'much higher'. Responses suggest that Custody Time Limits are being extended routinely as a direct result of delays to trial proceedings, and some defence lawyers expressed concern that judges were granting extensions with little regard for the necessity of continued pre-trial detention, whenever a trial was adjourned due to COVID-19. One respondent made their view clear:

*“Quite frankly, [custody time limits] may as well not exist. They are extended as a matter of routine in our local courts and any argument against extending them is met with incredulity that one has dared advance an argument.”*

- 3.11 This propensity to extend Custody Time Limits whenever there is an adjournment is particularly worrying, given that delays are often lengthy and adjournments can be indeterminate. Many respondents told us that trials are being delayed for over than a year, and that where there is an adjournment, there is often no new date set for hearings. This is creating confusion and uncertainty for defendants, especially for those in detention, who have little to no idea when their trial will take place, and how much longer they will be detained.

- 3.12 Several lawyers provided examples of cases in which defendants were facing inordinate delays in their criminal proceedings. We were particularly concerned to learn about the case of a 14 year-old-defendant, whose Custody Time Limit was recently extended despite his very young age. Other examples included:

- An 18-year-old defendant arrested last year, whose trial for murder was due to take place in March. He is remanded in custody with no indication of when his new trial will take place;
- A trial that was due to be held in July, but now re-listed for October, where the defendant is unable to access his case papers due to COVID-19;
- A case of an 18-year-old defendant charged with robbery, who is still waiting for his retrial despite the fact that his legal proceedings began 2 years ago; and
- A trial that was due to begin in May 2020, that has now been adjourned to June 2021, meaning that the defendant will be on bail for over a year.

### ***Judicial independence***

3.13 While there are not yet clear figures, as noted above, it has become apparent that the government is seeking to hold defendants in custody for completely unacceptable lengths of time awaiting trials. Increasingly details of cases are emerging where the Crown Prosecution Service is seeking extensions of Custody Time Limits, often repeat extensions for the second or third time, for trials that are not set to begin until 2021 or even 2022. This raises the prospect of legally innocent people being held for up to two years in prison. In addition, there have even been allegations of judicial pressure to grant Custody Time Limit extensions.

3.14 In a judgment given on 22<sup>nd</sup> July 2020 at Woolwich Crown Court, HHJ Raynor ordered the release of a defendant held already for almost 9 months since 2<sup>nd</sup> December 2019 on non-violent drugs charges, after prosecutors sought to extend his imprisonment awaiting trial for the third time. The judge ruled that the lack of money provided by Parliament and the delays in bringing cases to trial were not a good enough reason to deprive someone of their liberty and extend the Custody Time Limit for a third time, and it is worth considering his rationale for the decision:

*“34. My reasons are as follows:*

*a. In the current situation, the lack of available courtrooms to hear jury trials for defendants in custody is neither a good nor a sufficient cause to extend the custody time limit in this case;*

*b. 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;*

*c. 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;*

*d. The Protocol was a temporary measure;*

*e. The Protocol does not override independent judicial discretion and every case must be decided on its own merits. The Protocol contains rules of practice only and the relevant law is unaffected. The judge responsible for deciding each application will apply the law. In making this ruling I am applying the law.*

*f. Paragraph 15 of the Protocol (which is a rule of practice only) has been used to extend custody time limits, by reference (a) government health advice AND (b) directions from The Lord Chief Justice. The government health advice has*

*changed since the Protocol was first published and I am not satisfied that the current government health advice continues to amount to a good and sufficient reason to extend a custody time limit.*

*g. Members of the public can (or soon will be able to) go into a restaurant to eat and use a gym. Jurors have been undertaking their duties in the existing criminal trials that are taking place. 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.*

35. Accordingly the defendant will be released from custody” (Original emphasis).<sup>43</sup>

3.15 In a further judgment given in September 2020 in the unreported case of *R v Tesfa Young-Williams*,<sup>44</sup> HHJ Raynor again refused to grant a CTL extension for the 19-year-old defendant, Tesfa Young-Williams, who was arrested in October 2019 and charged with drugs offences. At that point, the defendant had already been held in custody for 321 days – 139 days longer than the usual 182-day limit – and even 83 days longer than the incoming extended 238-day limit, considered in more detail below.

3.16 HHJ Raynor made several noteworthy comments in his ruling refusing the CTL extension. He noted that: *[The defendant] is innocent until proven guilty. That is at the forefront of my mind.*” He said neither the lack of available courtrooms to hear jury trials nor the *“lack of money provided by parliament to provide sufficient space for trials to be conducted”* presented a good enough reason to further extend the custody time limit in this case. He also noted that the President of the Queens Bench Division stated in 2012 in *R. (McAuley) v Crown Court at Coventry (Practice Note)* [2012],<sup>45</sup> that the *“lack of money provided by Parliament in circumstances where the custody time limits are unchanged, will rarely, if ever, provide any justification for the extension of a CTL.”*<sup>46</sup>

3.17 He also questioned:

*“Has the State, failed to organise its legal systems so as to allow the courts to comply with the requirements of Article 6(1) [ECHR] to ensure trials within a reasonable time of unconvicted defendants remanded into custody, whether the appropriate test is “regardless*

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<sup>43</sup> *R v Graham*, Woolwich Crown Court, 22 July 2020 (Unreported).

<sup>44</sup> Judgement in *R v Tesfa Young-Williams*, Woolwich Crown Court, 8 September 2020.  
<[https://www.25bedfordrow.com/cms/document/8sep20\\_hhj-raynor\\_yw\\_ctl-ruling-1.pdf](https://www.25bedfordrow.com/cms/document/8sep20_hhj-raynor_yw_ctl-ruling-1.pdf)>

<sup>45</sup> EWHC 680 (Admin)

<sup>46</sup> *Ibid.*, para 25.

*of cost” or even a lesser requirement of “ high cost” or “cost proportionate to the exceptional situation”?”<sup>47</sup>*

To which he answered “Yes”<sup>48</sup>

- 3.18 HHJ Raynor concluded that *“the lack of available courtrooms to hear jury trials for defendants in custody is neither a good nor a sufficient cause to extend the custody time limit in this case”* and that *“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”*.<sup>49</sup>
- 3.19 In a further, extremely concerning development, HHJ Raynor also alleged that there had been judicial interference and pressure to grant Custody Time Limit extensions. In the judgment in *R v Tesfa Young-Williams*, HHJ Raynor repeated a section from the ‘*Direction from the President of the Queen’s Bench Division and the Senior Presiding Judge for the Withdrawal of Custody Time Limits Protocol of 9 April 2020*’ which acknowledged independent judicial decision- making:
- “[The Protocol] did not seek to constrain the independent judicial decision necessary in all extension applications. Decisions will continue to be made on the merits of each case with the restricted availability of courts an important factor.”<sup>50</sup>*
- 3.20 However, HHJ Raynor published communications he had had with a senior judge, HHJ Christopher Kinch, the most senior judge at Woolwich Crown Court, who he said had *“reminded him”* of the government’s plan to keep the courts running during the pandemic,<sup>51</sup> and in an email to barristers involved in the case he alleged HHJ Kinch had made him feel *“pressurised into granting the CTL extension application”* and that he *“was subjected to improper and undue influence to make a ruling extending the CTL in the case of R v Tesfa Young-Williams”*.<sup>52</sup>
- 3.21 HHJ Raynor has also claimed that *“within hours”* of the ruling in the above case, a third CTL hearing was subsequently removed from him and heard by a High Court judge, Whipple J, despite the fact that he was overseeing the case and had dealt with other hearings relating to it.<sup>53</sup> A barrister for

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<sup>47</sup> *Ibid.*, para 1.

<sup>48</sup> *Ibid.*, para 80.

<sup>49</sup> *Ibid.*

<sup>50</sup> Courts and Tribunals Judiciary, ‘Withdrawal of Custody Time Limits Protocol of 9 April 2020’, 2 September 2020. <<https://www.judiciary.uk/announcements/withdrawal-of-custody-time-limits-protocol-of-9-april-2020/>>

<sup>51</sup> Baksi, C and Ames, J., ‘I was put under pressure to keep teenage suspect in cells, says judge’, in *The Times*, 10 September 2020. <<https://www.thetimes.co.uk/article/i-was-put-under-pressure-to-keep-teenage-suspect-in-cells-says-judge-2q5rrlgfj>>

<sup>52</sup> Coleman, C., ‘Judge makes formal complaint over Covid custody waits’, in *BBC News*, 11 September 2020. <<https://www.bbc.co.uk/news/uk-england-london-54109098>>

<sup>53</sup> Baksi, C., ‘Campaigners: we will take action over custody limits’, 24 September 2020.

<<https://www.thetimes.co.uk/edition/law/campaigners-we-will-take-action-over-custody-limits-gdtgdgfslv>>



one of the defendants in the case, Ms Sarah Forshaw QC, claimed that HHJ Raynor had been removed because senior judiciary were:

*“unhappy with [his] previous decisions, they have an agenda to prevent further judgments from Judge Raynor in the same vein as his previous two, that the senior judiciary is forum-shopping to achieve the result that it wants”.*<sup>54</sup>

- 3.22 Ms Forshaw QC made an application for Whipple J to recuse herself from dealing with the case, arguing that it created a perception of bias. However, Whipple J declined to recuse herself and remanded the defendant, who is charged with attempted murder, to custody. He has already been held in prison awaiting trial for more than a year, and by the time of the current trial date in January 2021 he will have been held for 505 days, or 16 months, without trial.<sup>55</sup>
- 3.23 These allegations are extremely serious. The independence of the judiciary, free from political interference, is a fundamental part of the separation of powers and the governance of a democratic state. Justice must not only be done, but it must be seen to be done, and even a hint of impropriety or bias must be thoroughly and publicly discounted, to ensure that there is no perception of unfairness and subsequent loss of trust in the criminal justice system. **Any interference, or the perception of interference, whether directly by the executive or indirectly through senior members of the judiciary, must be properly investigated.**

#### ***Detention during the pandemic***

- 3.24 It must also be noted that the conditions experienced by those held in prison – whether under sentence or on remand – have been excessively punitive. Detained people are reliant on the state for their health and safety, and it is not possible to follow Government advice on COVID-19 in prison and immigration detention settings. Lockdown restrictions in prisons have meant that tens of thousands of prisoners were held in what amounts to prolonged solitary confinement, kept in a cell for 23 hours a day.<sup>56</sup> Others were locked up without access to showers for weeks at a time.<sup>57</sup>

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<sup>54</sup> Rawlinson, K., ‘Judge refuses to stand aside amid row over UK Covid trial delays’, in *The Guardian*, 18 September 2020. <<https://www.theguardian.com/law/2020/sep/18/judge-refuses-to-stand-aside-amid-row-over-uk-covid-trial-delays>>

<sup>55</sup> Baksi, C. (n 55).

<sup>56</sup> Swinford, S., ‘Coronavirus: Prison concern forces ministers to look for more cell space’, in *The Times*, 28 March 2020. <<https://www.thetimes.co.uk/article/coronavirus-prison-concern-forces-ministers-to-look-for-more-cell-space-fb3pgpbrg>>

<sup>57</sup> HM Chief Inspector of Prisons, ‘Report on short scrutiny visits to local prisons’, 28 April 2020. <<https://www.justiceinspectors.gov.uk/hmiprison/wp-content/uploads/sites/4/2020/05/Locals-SSV-web-2020.pdf>>

Moreover, HM Inspectorate of Prisons has reported that children at young offender institutes have been kept in their cells for more than 23 hours a day.<sup>58</sup>

- 3.25 Other countries have reduced prosecutions, released significant numbers of people from pre-trial detention, or chosen not to detain people pre-trial, without detriment. In Greece, minor offences carrying a sentence of up to 1 year were not prosecuted,<sup>59</sup> and in Italy prosecutors and judges worked actively to reduce the number of people held in pre-trial detention.<sup>60</sup>
- 3.26 In the US, across 40 states and Washington D.C., a study by the National Association of Pretrial Services Agencies showed that there was a 65.17 percent increase in ‘cite and release’; where someone is cited for an offence but is not arrested or held in detention, a 67.98 percent increase in release on personal recognisance in nonviolent cases, where an individual is granted bail on undertaking to return to court at a later date, and an 81.46 percent increase in releases from jail for persons awaiting trial.<sup>61</sup> Importantly, in the majority of the jurisdictions where these reforms were implemented, crime rates remained relatively stable, and even decreased in relation to some serious offences.<sup>62</sup>
- 3.27 **The backlog of cases built up as a result of COVID-19 lockdown and delays are likely to have a long-lasting impact, resulting in inordinate delays to criminal cases, and prolonged pre-trial detention for many detained defendants. Criminal justice systems cannot function properly and cannot be expected to deliver justice in all cases if it is stretched far beyond capacity, and legally innocent defendants should not be stuck in punitive detention settings on account of administrative failures and underfunding.**
- 3.28 **It is essential that urgent action is taken to find solutions to this challenge, including by increasing funding for the courts, and increasing their capacity to cope with increasing caseloads. More importantly, however, specific measures aimed at reducing the use of pre-trial detention are needed, including through pro-active efforts to release low-risk defendants,**

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<sup>58</sup> Shaw, D., ‘Coronavirus: Young offenders out of cells for 40 minutes a day’, in *BBC News*, 7 May 2020. <<https://www.bbc.co.uk/news/uk-england-kent-52573415>>

<sup>59</sup> Fair Trials, ‘Short Update: Greece enacts new law to relieve congestion in the criminal courts upon the lifting of their temporary closure’, 27 May 2020. <<https://www.fairtrials.org/news/short-update-greece-enacts-new-law-relieve-congestion-criminal-courts-upon-lifting-their>>

<sup>60</sup> European Prison Observatory, ‘COVID-19: What is happening in European prisons?, Update #9’, 5 June 2020, p. 5. <[http://www.prisonobservatory.org/upload/05062020European\\_prisons\\_during\\_covid19n9.pdf](http://www.prisonobservatory.org/upload/05062020European_prisons_during_covid19n9.pdf)>

<sup>61</sup> National Associate of Pretrial Services Agencies, ‘COVID-19 Policy Response Survey’, 19 June 2020. <<https://drive.google.com/file/d/1-jkFffQRmTTcqQ0V0EJWlmyyJl--gExB/view>>

<sup>62</sup> Gelb, M. ‘‘Dramatic’ Reforms to Pretrial Practice Triggered by Pandemic: Survey’, in *The Crime Report*, 2 July 2020. <<https://thecrimereport.org/2020/07/02/dramatic-reforms-to-pretrial-practice-triggered-by-pandemic-survey/>>

**more stringent judicial reviews of detention, and greater use of alternatives to pre-trial detention.**

#### **4. Long term solutions**

- 4.1 Most of the solutions put forward by the government for addressing court capacity challenges are aimed at giving a temporary boost to court capacity, such as through increased resources, and 'nightingale' courts. At best, these are short-term solutions that fail to address the pre-existing, underlying causes of the backlog. In the long-term, court capacity challenges can only be addressed through structural solutions aimed at reducing the number of people coming into contact with criminal court proceedings.
- 4.2 During the lockdown, the Crown Prosecution Service announced that it would bring fewer prosecutions, prioritising the most serious cases, putting on hold 'lower priority' cases and using out of court disposals (cautions).<sup>63</sup> This approach to prosecutions, if implemented effectively, will no doubt play a crucial role in reducing the backlog. However, it should also be considered as a part of a longer-term plan for criminal justice which will continue beyond the duration of the pandemic, that will prevent court capacity challenges in the future.
- 4.3 Other countries have also turned to similar measures to deal with court capacity and caseload issues. In certain jurisdictions in the US, the pandemic has forced radical changes to the way crimes were prosecuted, with a huge reduction in overall prosecutions, as well as a huge decrease in pre-trial detention. A joint statement in March 2020 by elected prosecutors from 21 US states and the District of Columbia called for a reduction in prosecutions of non-violent or low-risk offences.<sup>64</sup> Since then, US prosecutors across the country have declined to bring charges or prosecute in relation to low-level and non-violent offences, such as burglary, theft or drug possession and distribution offences, in order to reduce the number of people appearing in court. Community service or other community sentences have instead been favoured.<sup>65</sup>

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<sup>63</sup> Crown Prosecution Service, 'Prosecutors to prioritise serious cases to manage impact of coronavirus pandemic', 14 April 2020. <<https://www.cps.gov.uk/cps/news/prosecutors-prioritise-serious-cases-manage-impact-coronavirus-pandemic>>

<sup>64</sup> Fair and Just Prosecution, 'Joint Statement from Elected Prosecutors on COVID-19 and Addressing the Rights and Needs of those in Custody', March 2020. <<https://fairandjustprosecution.org/wp-content/uploads/2020/03/Coronavirus-Sign-On-Letter.pdf>>

<sup>65</sup> See Kruse, B. 'Dozens of King County prosecutors want office to ignore some burglary, drug and assault cases', *Q13 Fox Seattle*, 22 July 2020 <<https://www.q13fox.com/news/dozens-of-king-county-prosecutors-want-office-to-ignore-some-burglary-drug-and-assault-cases>>; Marfin, C. 'Texas prosecutors want to keep low-level criminals out of overcrowded jails. Top Republicans and police aren't happy', 21 May 2019 <<https://www.texastribune.org/2019/05/21/dallas-district-attorney-john-cruezot-not-prosecuting-minor-crimes/>>; Rollins, R. 'Charges to be Declined', *Rollins4DA* <<https://rollins4da.com/policy/charges-to-be>>

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<<https://www.brennancenter.org/our-work/research-reports/prosecutors-responses-covid-19>>

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