Society of Labour Lawyers
The legal think tank of the Labour Party

Covid-19 and the Justice System

Society of Labour Lawyers

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About the Society of Labour Lawyers

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Foreword by Rt Hon David Lammy MP

Covid-19 is causing huge difficulty and challenges for people across the country. At a time like this, people desperately need a functioning and fair justice system, whether to ensure that victims see justice for offenders, employees can assert their employment rights or that family courts can help promote the wellbeing of children.

Like many other areas of society, the justice system was already under strain before the Covid-19 pandemic, having been undermined by the Conservatives' programme of cuts over the past decade. Covid-19 has further revealed the challenges that the justice system is facing, but it is not the root cause of them.

The Society for Labour Lawyers' publication is an important contribution from lawyers working within the justice system, looking at the challenges and innovations in the justice system before and during the Covid-19 pandemic. The Labour Party justice team will examine each of the insights and proposals closely, while formulating our own front bench position on each of the issues it raises. What is beyond doubt is that it shows urgent action is needed by the government to deal with the backlog of cases and to support effective remote operation of the justice system where appropriate.

The backlog of cases had been building up long before Covid-19, due to a decade of court closures and cuts. Now that the virus has compounded the problem even further, the government must take urgent action.

It is within the power of the government to deal with many of the challenges that the justice system faces without rolling back fundamental rights such as jury trials. Labour has been telling the government for months that it should be co-opting empty public buildings to act as temporary courts during the pandemic.

Justice delayed becomes justice denied. Justice should not have to wait for a Labour government, but a Labour government would put in measures to ensure a justice system that delivers justice for all.

Rt Hon David Lammy MP

Shadow Lord Chancellor and Shadow Secretary of State for Justice

Preface

Covid-19 has put enormous strain on the justice system. It did not fall upon a resilient and fully functioning justice system. Every part of the criminal justice system had been subject to cuts, including the police, Crown Prosecution Service, legal aid and court buildings and infrastructure. The justice system has essentially been hit with a double whammy of austerity and Covid-19.

Before Covid-19 disrupted the criminal courts, there was already a backlog of 39,000 criminal cases in the Crown Court. Like the criminal justice system, the family justice system was also in crisis prior to the Covid-19 pandemic. Family courts were plagued by long delays, not helped by legal aid cuts that led to an increase in litigants in person, further slowing down the system.

The Coalition Government's legal aid cuts hit a wide range of vital areas of social welfare law, including employment and housing law, which people especially need due to the impact of Covid-19.

While Covid-19 has heaped new pressures on the justice system, it has also allowed scope for innovation, in particular in relation to remote hearings. Despite the challenges, solicitors, barristers, judges and court officials have in many cases successfully implemented radical changes to their ways of working to help keep the justice system functioning. Some of these changes may remain and improve the justice system long after Covid-19 has passed.

This publication aims to share the experiences of lawyers working on the "frontline" during the Covid-19 pandemic of the challenges, successes and areas for reflection. It includes the following contributions:

- **Criminal court backlog:** Stephen Cooke writes about the pressures on the criminal justice system, which is suffering under a backlog of at least 40,000 cases. This means that the innocent are detained longer and that prosecution of the guilty is delayed and made more difficult. Cooke argues that the backlog was a pre-existing problem caused by lack of funding and should not be used as an excuse to reduce the fundamental right to a jury trial.

- **The Crown Court:** Puneet Grewal writes about her experience having been instructed in three post-lockdown trials of the benefits and challenges of using new technology for criminal trials.

- **Remote police station attendance:** Dan McCurry writes about the practice of remote attendance at police stations by duty solicitors. This includes challenges and risks, such as making it harder for solicitors to monitor improper behaviour by the police or support vulnerable clients, as well as opportunities in terms of efficiency.

- **Forensic evidence:** Dan McCurry writes about how the widespread use of masks and gloves during the Covid-19 period, and potentially after it passes, poses challenges to policing.

- **The family justice system:** Hannah Gomersall and Jake Richards write about how the family justice system is adapting to Covid-19, including the limits of remote hearings, the technological challenges and the backlog of family court cases that exists.

- **Employment Tribunals:** Grahame Anderson writes about the parlous state of the employment tribunal system prior to Covid-19, and the deleterious effect the pandemic is having on workers' access to employment justice.

- **Housing and homelessness:** Nick Bano, Liz Davies and Rosalee Dorfman Mohajer write about the anticipated rise in evictions after 20 September 2020, and how that can be mitigated by the abolition of s.21 no fault evictions and other mandatory grounds. They examine the government's instructions during lockdown that rough sleepers should be accommodated by local housing authorities and argue that, with political will and funding, the scourge of homelessness can end and that no one should be forced to sleep rough.

- **Legal aid:** Matthew Turner writes about the Coalition Government's destruction of the legal aid system, how this is impacting people during the Covid-19 period by denying them access to justice and the changes that are needed to ensure a legal aid system that delivers justice.

An effective and fair justice system is the mark of a civilised society. The justice system was already under great strain before the Covid-19 pandemic and was not providing justice for many. The situation has been made worse as a result of Covid-19. It is clear that as we emerge from the Covid-19 pandemic we need to build back with a justice system that delivers justice for all.

Omar Salem

Editor and Vice-chair, Society of Labour Lawyers

1. The criminal cases backlog and the threat to jury trials (Stephen Cooke)

Nature and scale of the problem

There is a backlog of criminal cases awaiting trial in the Crown Court, which has been estimated recently by the Lord Chief Justice to be at least 40,000 cases,[1] although as this is a worsening problem, by the time of reading it is very likely that number will have grown further.

This was not an issue that arose due to Covid-19, although that will inevitably have exacerbated the pre-existing problem. There is a similar problem in the Magistrates' courts as well, with greater numbers of cases; this note particularly focuses on the more serious cases in the Crown Court. Before Covid-19 hit, there had been system-wide cuts at every stage of the pipeline – police, CPS, court buildings and infrastructure – but crucial to the backlog was the reduction in the amount of court sitting days. Before Covid-19 struck the backlog was already 39,000.[2] This issue was therefore not, largely, due to Covid-19.

The senior presiding judge has reported that 40% of Crown courtrooms were sitting idle in 2019; she described the decision as 'political' on the 27 August 2019, and she confirmed Crown Court sitting day allocations had fallen from 97,400 in 2018/2019 to 82,300 in 2019/2020.[3]

This had meant that by the last quarter of 2019, before Covid-19, there were already, by way of example, 7,034 offences of violence against the person awaiting trial, 2,953 sexual offences awaiting trial, and 1,596 robberies awaiting trial.[4]

Problems caused by the backlog

Accused people spend longer in custody

Custody time limits (CTLs) are the way of ensuring that accused people who have been refused bail do not spend too long in custody before trial (a trial at which they might be acquitted) and if the CTL is breached, without having been extended, the person must be released. They are a key safeguard in our system; they can be extended, on application, but the Crown needs to persuade the court that it is due to the illness or absence of the accused, a necessary witness, judge or magistrate, due

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[1] O. Bowcott, 'England and Wales face backlog of 40,000 criminal cases due to coronavirus', *The Guardian*, 24 May 2020, https://www.theguardian.com/law/2020/may/24/uk-faces-backlog-of-400000-criminal-cases-due-to-coronavirus (accessed 2 August 2020).
[2] Robert Buckland QC MP, Hansard, 9 June 2020, Volume 677, Column 146.
[3] M. Fouzder, 'Crown court sitting days decision 'political' - senior presiding judge', *The Law Society Gazette*, 9 September 2019, https://www.lawgazette.co.uk/news/crown-court-sitting-days-decision-political-senior-presiding-judge/5101368.article (accessed 2 August 2020).
[4] 2nd June Criminal Bar Association 'Monday Message', citing Criminal Court statistics October to December 2019 quarter.

to ordering separate trials or some other good and sufficient cause, and that the Crown have practised all due diligence and expedition. The longest period of time a person may normally spend in custody, awaiting a trial in the Crown Court, is 182 days. During the Covid-19 period, however, CTLs have been extended far more routinely than before.

Impact on witnesses and victims

Delays do not just impact defendants. Delays are frequently very difficult for victims, waiting to move on with their lives or anxious about giving their evidence, and who now have the prospect of giving evidence hanging over them for a long time. It may also be that a floating trial date is reached, which means that victims and witnesses actually come to court, thinking the ordeal is going to be over, only to be told they all have to go away again and wait for several more months.

Impact on successfully convicting the guilty

Justice delayed can sometimes be justice denied. Cases do not stay equally strong, in aspic, for years. Memories decay, key witnesses leave the jurisdiction, stop supporting the prosecution, or even (especially where the offence is defrauding the elderly or vulnerable) die or become ill.

Impact on crime

Some who are accused of crimes and not tried for a long period may commit further crimes during the delay without the original matter ever coming to trial.

Trials being delayed should not simply be seen as solely a liberal issue concerning accused defendants being imprisoned for too long ahead of trial (though it can be that); it is also a law and order and a victims' rights issue. Delayed trials deny closure, and justice, for victims.

Problems moving forward

Many court centres have now re-commenced jury trials; but at the time of writing not all have, and most court centres are operating markedly fewer court rooms than before Covid-19. To say this is not intended as a criticism of court staff and judges who have worked very hard (in co-operation with the Bar) to try re-open courts in a safe manner, despite the difficulties. It also seems that 'socially distanced trials' may take more than one courtroom, and may be at least somewhat slower than jury trials that do not have to take precautions around social distancing and cleaning.

In the future, if there are 20,000 more police officers this will, potentially, mean more arrests, charges and prosecutions in due course, further extending the backlog without additional funding for the courts. There needs to be funding through the pipeline. A joint study by the Institute for Government and the Chartered Institute for Public Finance and Accountancy estimated that after lockdown there could be a more than

70% increase to waiting times (albeit they were working off an estimated 6-month lockdown). This would mean the highest average waiting times ever recorded. [5]

Possible solutions

The government has been discussing 'Nightingale courts' (there were 10 proposed locations at the time of writing) using other physical spaces as emergency court rooms. This would go some way to solve one of the problems, though there has been a lack (as the Rt Hon David Lammy MP has pointed out) of action and urgency.

Also, these new spaces may be of limited use for criminal trials; it seems, as they will have no facilities to hear trials where the defendant is in custody, nor where a custodial sentence is expected and thus a secure dock is needed. They are therefore not likely to be able to assist greatly with the Crown Court backlog. They apparently will hear civil, family, tribunal and non-custodial criminal cases.

Virtual trials were explored in a pilot project by Justice, but with mixed reviews. What fundamentally needs to change, it is suggested, is a consistent period of paying for enough court sitting days, with enough Recorders, in enough physical spaces, especially those with custodial facilities, to reduce the backlog over a prolonged period.

The backlog will require continuing focus, more urgent and innovative action, and funding of Recorder days, by the government, drive it down. The Institute for Government/CIPFA study suggested the government would need to spend an extra £55 to £110 million, per year, over two years, to ensure that the extra trials to clear the backlog could take place.[6]

Jury trial

The Lord Chancellor Robert Buckland QC MP has spoken before the Justice Committee and stated that a 'last resort' would be limiting jury trial for some either-way offences, with perhaps a judge sitting with two lay magistrates. Other ideas explored have been a reduced number of jurors (this option was previously used in World War II).

Placing restrictions on jury trial was opposed by, on a recent CBA survey of over 2000 barristers, some 94% of the criminal bar. Juries are generally more diverse than Judges, were praised in the Lammy report, and represent a fundamental constitutional right to trial by one's peers. Their decisions carry a unique authority and trust. The backlog of cases is an important issue, requiring vigorous tackling, but it was caused primarily through underfunding. The facts do not show it was created by Covid-19, and Covid-19 should not be an excuse for attacking fundamental rights, rather than providing proper funding.

Remote hearings in general

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[5] N. Davies, T. Pope and B. Guerin, *The criminal justice system: how government reforms and coronavirus will affect policing, courts and prisons*, The Institute for Government, 2020.
[6] Ibid.

During the Covid-19 period very many hearings, other than trials, have been conducted remotely. Nothing above should be taken as an argument against greater use of remote technology, where it is appropriate. This is a possible opportunity arising from the Covid-19 crisis. These remote hearings have included bail hearings, mentions, administrative hearings and (with slightly more mixed success) sentences and PTPHs (hearings where defendants plead guilty or not guilty and directions are made to manage the case). Very many of these remote hearings have worked smoothly, and the greater use of remote hearings, provided it does not impede justice, is positive and could be continued. Certainly, for more administrative hearings, where a defendant is not present, remote hearings are a useful innovation. Insisting needlessly that barristers must attend in person for a short administrative hearing means a reduced ability for trial advocates to attend every hearing on their own cases; it leads to less case ownership and more time and energy spent needlessly travelling, often at public expense, rather than preparing cases and ensuring that they proceed smoothly. Insisting that prisoners needlessly attend in person at administrative hearings leads to increased costs and delays.

One barrier preventing remote hearings from being as effective as they could be is the limited number of PVL (prison video link) slots. As solicitors are largely denied physical access to clients in custody at the time of writing, this means that court hearings and conferences with solicitors are actually in competition over limited PVL slots, which in turn means a number of court hearings are not effective simply because a defendant has not yet been able to speak with his solicitors. If remote hearings and remote working is to grow and continue to flourish, especially if there is a second wave of infections or local lockdowns in certain prisons, more thought needs to be given to ensuring that more defendants can remotely, and confidentially, contact their representatives. This may mean more PVL booths in prisons, or it may mean finding more efficient ways to use the existing booths, or exploring new technological solutions.

2. Managing Lockdown: A perspective from the Criminal Bar (Puneet Grewal)

Working life for barristers completely changed on Monday 23rd March at 07:00 when the Lord Chief Justice announced that there would be no jury trials until it was safe for them to resume. At 20:30 the Prime Minister went on to announce the start of the lockdown with an initial period of three weeks.

Criminal barristers transitioned from being in court every day, conducting conferences with clients face-to-face in the cells or in person at court if on bail, to routinely informing the court that no progress could be made in cases because conferences had not been possible with either clients not produced or there being no way to gain access to them in prison in advance of the hearing. Clients were told that they would remain in custody until the foreseeable future, custody time limits extended as a norm with the explanation being given of the pandemic, the delay caused and the backlog.

The Crown Courts started using Skype/Zoom fairly early on for most hearings and the Cloud Video Platform (CVP) was rolled out in May 2020. CVP is a video conferencing technology provided to Crown Courts in England & Wales. It connects securely to the existing justice video network, which links police stations and prisons to courts.

The use of new technology certainly eased the pressure of dealing with Covid-19. It meant that we were able to make progress with matters before the court, to speak to clients in custody before hearings and conduct more than one hearing a day in locations that otherwise would have been impossible to travel between.

However, the new system did not come without its challenges and when using technology that was almost to be expected. Below are just a few general issues being encountered with the system:

- the prison establishments do not always respond when CVP links have been set up (for the CVP system to connect successfully, a prison officer is required to accept the call on the other side and this does not always work);
- the CVP link does not appear on the front page of the digital case system (DCS) or anywhere else within the side bar of the DCS. Court staff are required to insert a link for counsel to use on the front page of the digital case system or alternatively place a link to the conference in the side bar so that it can be copied and pasted. Without this, counsel cannot get the access they need to CVP;
- defendants sometimes wait all day to be produced via the prison video link in court but are not due to issues within the prison. This is generally because the prison conference facility is either being used or booked by another court/counsel in another case or alternatively a conference has not been set up; and

- different courts have different practices as to when CVP hearings are appropriate and when they are not and when counsel must attend. This can cause confusion and inefficiency.

This is not an exhaustive list but it goes to show that the system remains one that is a work-in-progress. It is a system that is up and running and one, which ultimately will have far-reaching advantages for those within it and those new to it.

Many although not all Crown Courts are now able to conduct jury trials. The ones that can only have a reduced number of trials running at the same time. It is clear that more will need to be done to clear the backlog. The hope is that if and when the guidance changes, courts will be able to hear more trials at the same time.

The writer has been instructed in three post-lockdown trials (which is unusual given current working practices) at the Central Criminal Court, Luton Crown Court and most recently at Peterborough Crown Court. It was a different experience and one that will need getting used to. However, the judge and the court staff did all that they could to make it work and to ensure that it was safe for all users each day. The courtroom was constantly being cleaned, jurors were selected from a waiting area via a linked-screen in the courtroom, they were spaced out, bundles were prepared and disinfected and left in the appropriate places in advance. Overall, it worked well.

The hope is that CVP hearings will continue to be used when they can be and for courts to avoid the need for counsel to attend in matters which can properly be dealt with virtually. This will free up time for trials and it will save time and expense on the part of counsel and the system.

This new way of working forced by Covid-19 has taught us that we must continue to be willing to adjust our practices and move forward in these unusual times.

3. Remote attendance at police stations for criminal defence (Dan McCurry)

If a client is detained by the police, it is unheard of for a duty solicitor to represent them only on the phone and refuse to attend in person. Duty solicitors have a historic mistrust of the police and would be deeply uncomfortable with allowing an interview take place without being personally present. This is because of concerns about unsecure lines, reduced ability to observe the bad or illegal behaviour of police and to check the vulnerability of their clients.

Covid-19 has forced a change whereby solicitors who wanted to self-isolate insisted that they do the work over the phone (or on Zoom) while the police have resisted, fearing that the matter may end up in the court of appeals if the suspect later argues that he did not receive proper legal advice. The police eventually relented and the practice of remote attendance became normalised.

Sometimes client consultations are done with the client using the public phone in the middle of a busy custody suite. Solicitors cannot be confident that the police are not listening in, although the assumption is that if it is not a serious case then they would not bother.

During the interview the police officer places her mobile phone on speaker mode on the table so that the solicitor can listen and speak. This presents a number of practical issues. The concrete and steel structure of custody suites makes wireless/phone signals unreliable. Sometimes in the middle of an interview the signal disappears and the solicitor is cut off. The officer may well choose to carry on with the interview knowing the solicitor is no longer connected.

However, the system does have some advantages for solicitors. Late night attendances can be dealt with from home. Rural solicitors no longer have to travel great distances. Solicitors would want to continue with remote attendances after Covid-19 has passed, but there would need to be wired-in computer screens so that the solicitors and interpreters can see and hear everything in the interview without fear of the signal dropping out. It would also be important for consultations to be private, as the current situation sometimes requires clients to speak to the solicitor on a public phone, possibly within earshot of the police.

There is also the question of when it is appropriate to represent a client remotely. Should we represent the vulnerable and juveniles over a video link? If a 13-year-old tells a solicitor on the computer screen “Don’t worry about me. I can handle it”, is the solicitor able to judge whether this show of confidence is misplaced bravado? How about serious matters like murderers and rapists? Would a manipulative defendant later argue for appeal, saying that he was not given appropriate legal advice because he could not hear the solicitor on the dodgy phone line?

The police officer is often best placed to make a judgement on whether the case can be done remotely. If the officer has lots of documents to produce in interview, or extensive CCTV clips, she might insist on it. If the custody sergeant considers the

suspect to be emotionally vulnerable, then they could insist on the solicitor being present. Both the police and solicitors need guidance but it is essential that rules do not trump common sense.

Solicitors attending police stations were given greater status and power following a number of wrongful convictions in the 1970s and 80s. The very presence of solicitors tends to have an effect on police officers, because they know that bad behaviour is likely to be challenged. The writer regularly speaks with appropriate firmness to officers whose behaviour is unacceptable and possibly illegal. Most recently, an officer threatened to “chuck out” the writer from the police station for advising a client to answer no comment in an interview. This matter became heated and was raised with the custody sergeant and a note was made on the custody record. The writer is fully confident that it would have been raised with a superior officer and training needs would have been identified.

If solicitors are permanently removed from the police station then bad behaviour will take root because solicitors who are acting remotely have no power over the situation on the ground. An officer can simply switch off the phone and later say that the signal was lost.

We need to insist on at least a proportion of solicitor attendances being in person so that the police do not stray from good practice.

Remote interviews have thrown up a number of issues, but they are a good thing. Solicitors and police officers need guidance on when it is and is not appropriate and what proportion of attendance needs to be in person. There is also the vital issue of adequate equipment being installed. Nonetheless, there is a long-term role for remote police station attendance by duty solicitors.

4. ID and forensic evidence following Covid-19 (Dan McCurry)

The investigation of crime will be hindered by the normalised use of face masks and gloves following the Covid-19 period due to face masks and gloves obscuring CCTV and forensic evidence.

The police have had a good lockdown. Crimes and violent incidents have been conspicuous and therefore easy to solve. Criminals have been unable to disappear into the crowd. Major drug deals usually require a car full of accomplices as backup, but social distancing makes this difficult to do.

However, as the lock-down eases, criminals will benefit from being able to cover their face without suspicion and carry gloves in the middle of summer.

Imagine in the days before Covid-19, and the police are investigating a spate of local burglaries where the back door is forced open by a tool. No fingerprints have been found and the only household CCTV shows a suspect in a balaclava. Police happen to stop a suspicious man who has a large screwdriver. He explains that he found the screwdriver on the street five minutes ago and decided to take it home and keep it. This is a reasonable explanation, but then the police search his pockets and find a latex glove and a balaclava. It is the middle of summer and he has no excuse. This is enough to arrest in order to search his home, where they find items stolen in a burglary.

Although CCTV became a major tool of crime investigation, the criminals have continually adapted to evade the cameras. The strategy of local authorities, who are responsible for many CCTV cameras, has not adapted to counter these changes in criminal behaviour.

Cameras are placed high in the air, looking down on a wide area with operators viewing the streets and following likely suspects or monitoring busy areas. This “high and wide” strategy maximises the coverage of view, which helps if an incident is filmed, but has become useless for ID purposes.

In general, there are two types of CCTV evidence – “incident view” or “ID view”. The incident view shows a wide shot that can capture the whole of an incident (e.g. a fight happening where the incident view shows a clear shot of who hits who first etc.). The ID view is a shot of the face which not only allows the police to name their suspect, but also allows a jury to compare the CCTV picture to the suspect in the dock and satisfy themselves if this is the same person.

High and wide cameras were good for ID purposes in the early days, especially when the local authority operator zoomed in to get a close up. But criminals have since acted to reduce the effectiveness of CCTV.

Criminals began to wear hoodies with baseball caps. The peak of the cap would shade the face, so that the criminals could bend their head forward when passing a known CCTV camera, or entering a shop or other place where a camera might be expected.

With criminals adapting to avoid their face being captured, the police began noting the clothing worn by criminals. This can be useful if there is a distinct design on the clothing, or a distinct combination of track shoe and T-shirt.

Criminals reacted to this by dressing all in black from head to foot, including their hoody and baseball cap, making it impossible to tell one from another. If an incident happens and a group of suspects scatter in all directions, the investigating officer, on viewing the CCTV, has no way of knowing which is the main suspect and which direction they went.

Not all crimes are so well organised, and criminality tends to be associated with chaos and a lack of planning, so it is not the end for CCTV as an evidential source, but it would help investigators if the authorities recognised the difficulties and adjusted their policies to assist.

If some CCTV cameras were positioned at eye level, then a clear shot of the face of suspects would be gained. It may be that local authorities are concerned that cameras may be vandalised if they are within reach, but they could deploy eye level cameras at key locations such as at traffic lights, pedestrian crossings, bus stops, and tube station entrances. And these cameras could be covert or disguised to avoid attracting attention.

Since the SARS pandemic it has been a common sight in London to see Asian tourists wearing face masks on the street or tube, which demonstrates that people who become accustomed to face masks in an epidemic will often continue to wear them once the emergency is over. This creates an opportunity for criminals as it will be normal to cover the face and offers an excuse for carrying gloves.

The question for public policy is whether face masks and gloves should be discouraged in future? Should the courts forbid people who have a relevant criminal record from wearing a mask or carrying gloves, perhaps with the use of the “Criminal Behaviour Order”?

If tube and bus passengers continue to wear face masks, then we can expect a considerable rise in pickpockets moving around undetected. We can expect a lower clear up rate for acts of violence and theft, as CCTV evidence will be less effective. Burglars will find it far easier to carry the tools of their trade, so there will also be an increase in that crime.

We previously encouraged masks and gloves for public safety, but policy makers now need to recognise the danger that the common use of masks and gloves will pose. Some clear thoughts about discouraging them may be required.

5. Covid-19 and the family justice system (Hannah Gomersall and Jake Richards)

Introduction

This paper aims to offer some analysis of the practical effects of remote hearings in (predominantly public) family proceedings during the lockdown. It is hoped that this will be helpful for the shadow justice team to understand the realities 'on the ground'. The authors both practise in public family law (amongst other areas).

Remote court hearings

Essential reading to understand the success and failings of remote hearings in the family courts is the *Nuffield Family Justice Observatory report: "remote hearings in the family justice system: a rapid consultation"*. This consultation was undertaken in the space of three short weeks, having been commissioned by the President of the Family Division.

Over 1,000 people (including judges, barristers, solicitors, magistrates, the Children and Family Court Advisory and Support Service (Cafcass), court intermediaries and some parents/carers) responded to this consultation. It is clear that professionals working in the system (including many judges) hold significant concerns. These were especially profound where parties were vulnerable: cases involving domestic abuse, parties with a disability or cognitive impairment or where an intermediary or interpreter is required.

Even where parties did not fall into vulnerable categories, there were real concerns about the ability of parents, carers and family members to meaningfully participate in remote court hearings. Many do not have access to IT facilities sufficient to support video hearings. From the writer's own experience it is not unusual for a parent to have difficulty accessing a working phone with sufficient credit. Often, parties in care proceedings will be in small accommodation and have to 'attend' court in the close proximity of the children who are the subject of the proceedings. This is clearly unsatisfactory.

In some circumstances, remote hearings have been effective. Many case management hearings can occur remotely – and Labour should embrace the use of technology when fairness can be ensured. This is especially the case in financial cases and many private children cases – where the issues are narrow and clear, and instructions from parties can be taken before the hearing. The difficulties are more likely to emerge in public family cases, where parties are often vulnerable and a large part of the advocates' job is engaging with them to ensure that they fully understand the proceedings and that the advocate is fully instructed. In reality this can often only occur in person.

It is clear that some urgent remote hearings have been unfair – especially when removal of a child is being applied for by a local authority. As soon as it is safe for the

hearings to take place in person, it will be essential that remote hearings are no longer attempted in these instances.

Care proceedings

Nearly all care proceedings involve vulnerable parties: concerns around mental health, learning disabilities, domestic abuse or substance misuse are the very reasons for the proceedings. These are inherently difficult cases to conduct (even during an in-person format) and participation and understanding may be severely compromised/ unchecked in the remote format. However, these are also the cases where child protection risk requires urgent decisions and, in some cases, decisions cannot be delayed.

The types of remote hearing which cause most concern amongst professionals are interim care orders – where the local authority is seeking to remove children from their parents' care on an immediate basis. Whereas interim removal would often be accompanied by a high package of contact between parent and child (until conclusion of proceedings), the closure of local authority contact centres and practicalities of foster care mean that interim contact is now often not an option. This is especially troubling with the removal of newborns – preventing bonding between mother and child and options for breast-feeding. Whilst video contact might be offered by a foster carer, this is a very poor replacement for babies and young children. Further, the pandemic has meant that the support and monitoring structures that might have been offered to keep a mother and baby safely together, may not be practically available.

The writer's own experience of an emergency protection order hearing by telephone echoes the concerns raised in the Nuffield Consultation about remote hearings determining whether to remove children. At court, the advocate is required to work through the parents' distress and anger, quickly build trust and obtain crucial instructions on what may be a plethora of allegations made by the local authority at short notice. Having built that trust, the advocate may creatively explore the parents' willingness to co-operate with less draconian support/monitoring measures and propose an alternative to separation to the court. This process is a great deal harder (and often not possible) in a remote format.

Such draconian decisions being condensed to a phone call, without the parent feeling they have had the chance for the judge to *see and hear* them and recognise the gravity of the decision, raises ethical and moral questions. One judge reported to the Nuffield Consultation page 18] that: "*in one case I had to speak to the parents who were sitting in a car outside the hospital where the mother had that day given birth and I conducted a hearing removing their baby from them*".

This raises another important point about the parties' perspective of the justice system. It is of paramount importance that they respect, understand and feel as if justice is being done, and that they are fully engaged participants. Without this, there is an undermining of the process for the parties who are less likely to work with professions within the proceedings if they do not respect the process. The writers' experiences also reveal that the role of the judge, as an authoritative figure, is often critical in

parties' attempts to impress them by, for example, making changes to their behaviour or engaging with professional support. This can be undermined if the judge is merely a voice on the telephone.

Judicial comment

The Court of Appeal offer useful guidance as to the appropriate use of remote hearings in public family proceedings. The comments are helpful in understanding the limit of remote hearings from a judicial perspective.

In *Re P* [2020] EWFC 32, the Court of Appeal decided that a remote final hearing should not proceed, because it would be unfair on the parents. Of interest was the emphasis Lord Macfarlane put on observing the parties' behaviour and body language in court.

> "The judge who undertakes such a hearing may well be able to cope with the cross-examination and the assimilation of the detailed evidence from the e-bundle and from the process of witnesses appearing over Skype, but that is only part of the judicial function. The more important part, as I have indicated, is for the judge to see all the parties in the case when they are in the courtroom, in particular the mother, and although it is possible over Skype to keep the postage stamp image of any particular attendee at the hearing, up to five in all, live on the judge's screen at any one time, it is a very poor substitute to seeing that person fully present before the court. It also assumes that the person's link with the court hearing is maintained at all times and that they choose to have their video camera on. It seems to me that to contemplate a remote hearing of issues such as this is wholly out-with any process which gives the judge a proper basis upon which to make a full judgment."

In *Re A* [2020] EWCA Civ 583, Lord Macfarlane stated:

> "In the present abnormal circumstances, the fundamental principles of substantive law and procedural fairness are unchanged. Alongside other courts and tribunals, the Family Court continues to discharge its duties, particularly in urgent child protection cases. The effective use of communication technology is indispensable to this ability to continue to deliver justice. A remote hearing, where it is appropriate, can replicate some but not all of the characteristics of a fully attended hearing. Provided good practice is followed, it will be a fair hearing, but we must be alert to ensure that the dynamics and demands of the remote process do not impinge upon the fundamental principles. In particular, experience shows that remote hearings place additional, and in some cases, considerable burdens on the participants. The court must therefore seek to ensure that it does not become overloaded and must make a hard-headed distinction between those decisions that must be prioritised and those that must unfortunately wait until proper time is available."

Private children proceedings

In cases where the parents are seeking the court's determination of child arrangements, they will have initially found their case subject to delays and adjournments. At the outbreak of the pandemic, nearly all private children hearings were vacated as priority was made for urgent care proceedings. Although some directions hearings have now resumed by telephone, families are likely to be waiting many months to receive determination on child arrangements applications. For example, one of the writers of this report represented a father who made an application for a child arrangements order in January. The matter has only now been heard for the purposes of case management. It is likely any substantive decision will be at the end of the year.

For children subject to lengthy or difficult proceedings, this may mean having no contact with one of their parents, conflict around their arrangements being increased, or having to be the subject of court disputes for much longer periods of their minority. With school support and CAMHS or therapeutic input being on hold, this may also have a profound emotional impact on children subject to the family justice system.

It is notable that the situation has not been made any easier for children subject to ongoing proceedings or parental dispute by the confusing advice initially provided by the government as to whether travelling to drop off/pick up children to the other parent was a reasonable excuse to leave home. Further, many contact centres are presently closed and previous arrangements which provided for contact to be 'supported' by a trusted family member may no longer be possible, leaving many children currently unable to have safe contact with a parent.

Whilst some dispute resolution appointments have now taken place by telephone, in the writer's experience, these have been of limited success compared to 'in-person' hearings. The opportunity for negotiation before the hearing is reduced. The prevalence of litigants in person in private proceedings also makes such negotiation and scope for agreement by telephone difficult, and where the judge attempts to assess if there is a way forward, the process can be very lengthy, with the judge struggling to ensure 'turn-taking' in the remote format.

Financial remedy proceedings

Again, the court has tended to 'de-prioritise' financial remedy cases during the pandemic period, resulting in many financial cases being adjourned indefinitely. Again, there were already significant delays in parties waiting for FDR and final hearings in these cases – in particularly bleak cases, sometimes delays of up to a year in waiting for final hearings.

It has been demonstrated that it is *possible* for financial dispute resolution hearings to take place in a remote format where clients have access to adequate technology. These hearings are particularly essential as they provide an opportunity for settlement without incurring the costs and court-time of a final hearing. However, these hearings require the judge to have had a proper opportunity to get to grips with the facts of the case and the argument in order to give a useful indication. The current remote hearing arrangements are time-consuming and do not lend themselves to judges having

sufficient time to read, consider and hear arguments on the multiple FDRs. It is a slower, more exhausting process to conduct hearings remotely and judges will not be able to hear cases at the same rate as in person (when they were already faced with over-burdened lists of up to 10 cases in a single day).

Social work, Cafcass and the safeguarding structures around family justice

The task of judges in the remote format has been made more difficult by limits on work and assessments that can be undertaken by Cafcass or social workers.

Cafcass statistics demonstrate that in April 2020 there was a decrease of 8.8%[7] in new public law cases received in April 2019. Anecdotally, the writers suspect that the ability of social workers to undertake home visits to children on a CP plan, and the reduction in vulnerable children being seen by professionals at school and in other contexts, has led to opportunities for safeguarding being missed. Whilst there appeared to be an initial 'rush' in local authorities making applications where a case was 'on the edge' before lockdown and it was felt that the required monitoring could no longer be ensured, there now appears to be a decrease in cases. The May 2020 public law figures will be important in informing whether there is a worrying trend which could demonstrate a potential gap in child safeguarding work.

Where children cases are in proceedings, it has been difficult for professionals to undertake assessments and work with the family. Although there have been some attempts to conduct welfare reports remotely in private proceedings, the ability of a Cafcass Officer or Guardian to build a rapport with a child is, in the writers' view, significantly compromised by the remote format. It is also more difficult to ensure the child is uninfluenced by their environment/parents present than such meetings taking place at school or other neutral venues as previously. This means that where such reports are being produced, they are more likely to be open to challenge.

Most parenting or special guardian assessments are not being undertaken at all at the present time. These are assessments that typically require 10–12 weeks to produce and multiple observations between carers and children. It is therefore inevitable that there will be significant delay in achieving permanency decisions for children subject to public law proceedings.

Adequacy of technology

The inadequacies of the judiciary's IT systems were immediately apparent at the start of 'lockdown'. It seemed some judicial laptops were not advanced enough to cope with updated video conferencing programmes and the 'standard' video conferencing facility used has been 'Skype for business', a programme which is no longer supported by Microsoft (causing significant difficulties for professionals with updated computer systems such as Mac Catalina).

There was confusion amongst the judiciary as to whether it was permissible to use 'Zoom', which has been the preferred forum by most professionals (and is particularly

[7] Cafcass's public law data can be accessed via the following link: https://www.cafcass.gov.uk/about-cafcass/research-and-data/public-law-data/

useful in having a 'break-out room' function which enables professionals to take instructions from their clients in private or to have advocates' discussions). This led to numerous judicial guidance documents being published as to what was the correct technology to use, leading to widespread confusion. Anecdotally, the writer has heard of some judges' frustrations in using the HMCTS provided equipment is such that they have resorted to using their own personal equipment.

Further, there appears to be extortionate fees levied by some telecommunications companies to connect prison video links to a remote hearing system. One quote received in a case of one of the writer's in early April 2020, was £2,392 *per day* to ensure secure software connection from the prison with other remote participants. It is a significant failure of court IT that such software and connections are not already provided by HMCTS.

There also appeared to be much inconsistency across individual courts: the High Court was issuing advice about a '*smorgasbord*'[8] of remote hearing options (including Zoom); the central family court in London had informed that hearings would *not* take place by video conferencing but only by telephone; Croydon County Court initially demanded 'in person' attendance of parties and advocates in some cases days after 'lockdown' had commenced.

Labour should call for a review of technology across the board in courts, in an attempt to have uniform platforms that all can use easily.

Administration and functioning

The reduction in court staff (as a result of years of HMCTS cuts and further exacerbated by staff illness/caring responsibilities during the pandemic) led to initial confusion and delay. Some court centres still had no facilities for accepting electronic applications and electronic bundles at the outset of this pandemic. An overstretched body of court staff has struggled to manage correspondence from parties enquiring whether their hearing is going ahead. For example, the writer and her client expected to be attending a court telephone hearing with Hastings County Court at 10am only to find out hours later that the hearing had been vacated the previous day but the order vacating the hearing had been sent out *by post* less than 24 hours before the listed hearing.

It is also understood that both district and circuit judges (even where they are physically sitting in the courtrooms for remote hearings) have been offered very limited administrative support in setting up the hearings. The judges must themselves manually dial all parties and representatives into the conference call system. In several instances, this has taken up to 30 minutes due to technical difficulties, the court not having all parties' telephone numbers or human error. In court lists of 5 or 6 cases each day, this system is unworkable.

[8] Mr Justice MacDonald, 'The Remote Access Family Court', Courts and Tribunals Judiciary, Version 4, 16 April 2020, https://www.judiciary.uk/wp-content/uploads/2020/04/The-Remote-Access-Family-Court-Version-4-Final-16.04.20.pdf (accessed 2 August 2020).

Adjournment and delay

Given that the overwhelming majority of contested final hearings have been adjourned due to the pandemic, there is likely to be a significant 'backlog' of family cases which require determination upon the courts resuming 'in person' hearings. Although some courts have gradually made arrangements for some trials to take place in person, the courts' capacity to hear these safely means that even upon resuming hearings, there will be a 'bottle neck' of cases (for instance, HHJ Tolson QC recently announced that "perhaps as many as 10" courts would reopen at the CFC in June 2020. This is a busy court centre which normally has 27 courts in operation).

It is worth noting that before 'lockdown', the family courts were already struggling to meet the target of determining public children cases within the statutory target of 26 weeks (the national average in Q3 of 2019–20 was 34 calendar weeks[9]). It also seems likely that upon schools and social work resuming, there will be a higher level of safeguarding and an increase in care proceedings once again.

The consequences of delay are profound. In children cases, this means babies and young children who ultimately cannot return to their parents' care being delayed in placements for adoption. In some cases, it may mean that the 'adoption window' is missed for children; in other cases, it may mean extended periods in interim foster care and delay in rehabilitating children to their families.

In private children cases delay may mean a child losing the opportunity to develop a relationship with a parent or it may mean children continuing to live in situations of high conflict or exposed to abusive situations.

In financial remedy cases, it may mean former partners being trapped living in the same home (sometimes in abusive or very unhealthy situations), unable to reach resolution and move on with their lives without court determinations. The delay may also mean one party struggling to financially survive or getting into significant and irreversible debt whilst they await the court's financial order.

The answer to dealing with this significant backlog will surely involve proper funding of the courts' systems including its staffing structures, paying part-time judges to sit and investing in proper IT systems and equipment. Further, it will be essential that the government ensures that it is financially viable for barristers and solicitors (particularly those working in the legal aid sector) to remain in the profession.

The 'backlog' of cases is most profound in the criminal justice system, but further capacity will be required for children cases too. This could mean new temporary courts opening, and the use of recorders/part-time judges for longer periods.

[9] See https://www.cafcass.gov.uk/about-cafcass/research-and-data/public-law-data/

6. Covid-19 and the Employment Tribunal system (Grahame Anderson)

Employment Tribunals were in a bad state prior to Covid-19. There has been legacy underfunding: Employment Tribunals are not a political priority and the effect of LASPO in 2012 compounded a long trend of defunding legal help for workers, entraining the cost (to the system), delay and anxiety of employees having to try to represent themselves.

The introduction of fees in July 2013 saw cases drop off substantially. The Ministry of Justice publishes official statistics on the gov.uk website for all Tribunals.[10] They show that the average number of cases brought in a month in 2012 was 4,998. In 2014, it was 1,641.[11]

The Supreme Court ruled those fees unlawful in the *Unison* judgment of 26 July 2017 (a full explanation of the downfall of fees is set out in a House of Commons Library briefing).[12]

The system did not adapt nimbly to the predictable uptick in claims that followed: as at 31 March 2015, the backlog of individual claims (an individual employee bringing a case against an employer) stood at 8,781. In the last quarter before the demise of fees, it stood at 13,355. As at 31 March 2020, it stood at 31,693.

Despite a drive to recruit new employment judges (on a full and part-time basis), judicial resources remain an issue. The practice, which will be familiar to any courtroom advocate, is to overbook the tribunal list in the (not unreasonable) assumption that some of the cases will settle or otherwise not be effective. But with the numbers involved, that very often means parties are told the night before that a hearing they have been preparing for (practically and emotionally) for months, cannot happen. Anecdotally, at present and depending on the region and length of the hearing, that can mean a delay of well over a year.

The effect of the crisis on employment justice

To adopt Matthew Turner's phrase in the final section, Covid-19 has piled "a crisis on a crisis".

In some parts of the country, the Employment Tribunal's capacity to hold hearings has all but stopped. Substantive hearings have to be held in public and the system has struggled to implement technology to allow hearings to be held remotely.

The Presidents of Employment Tribunals (England and Wales and Scotland) have carried out a second review of their Joint Direction, first issued on 19 March 2020,

[10] https://www.gov.uk/government/collections/tribunals-statistics
[11] Ibid.
[12] House of Commons Library, 'Employment tribunals after R (Unison) v Lord Chancellor', Briefing Paper Number CBP 8296, 5 November 2018.

amended on 24 March 2020 and reviewed on 29 April and 29 May 2020, regarding the listing of Employment Tribunal cases during the Covid-19 pandemic.

On 1 June 2020, as part of an updated document of FAQs, a "Road Map"[13] was issued setting out the system's plans for allowing hearings to go ahead more substantially.

The extent of the backlog is not yet clear, but it is to be expected that it will see a very substantial increase. Justice has, in effect, not been being done since the end of March 2020. There is also the additional challenge that the pandemic may have had the effect of causing more employment disputes, in particular in relation to furlough, pay and redundancies.

Remote technology will not allow cases to be disposed of at the same rate as would be usual: some cases are simply not suited to remote technology, in particular discrimination cases which will require extensive live evidence, or cases involving vulnerable and unrepresented litigants.

Unless the government answers the following questions, the extent of the problem will not be visible until the end of September, when the next set of statistics will be produced.

The effect on workers and businesses

It goes without saying that it will now take a very long time for a complaint against an employer to be heard. That is damaging both to a Claimant (who may well still be employed and trying to work for an employer she has sued) and to a Respondent, which has potential liability hanging over its head. The nature of many Employment Tribunal cases is that they are rarely about a specific incident but rather about the history of a close, sometimes long-standing, relationship.

Even "low value" claims often require days of detailed oral evidence about the way a person acted in the workplace, and their motivations for doing so. It is important, therefore, that evidence is not allowed to atrophy by inordinate delay and that memory is not compromised by festering senses of grievance. Arguably, that is one of the reasons why most causes of action must be brought in the Employment Tribunal within 3 months of arising.

It will be important to analyse carefully the next round of MoJ statistics on Employment Tribunal claims: it would not be surprising if there had a been a substantial drop-off in certain jurisdictions as a proportion of the total case load. For example, one could imagine a Claimant deciding that, although they feel that they have a strong claim against their employer, it is not worth bringing the claim because it will take over two years to get an answer. That disincentive to seeking justice is not acceptable in and of itself, and because it provides comfort to unscrupulous employers.

[13] Tribunals Judiciary, 'The Employment Tribunals in England and Wales and in Scotland: FAQs arising from the Covid-19 pandemic', 1 June 2020.

7. Housing and homelessness in a time of coronavirus (Nick Bano, Liz Davies and Rosalee Dorfman Mohajer)

The immediate response

Lockdown produced extraordinary interventions by government. All possession claims and pending evictions were stayed, from 27 March 2020 originally to 25 June 2020, and then extended to 23 August 2020. After widespread publicity and concern about possession claims resuming, in a very last-minute announcement on 21 August the government extended the moratorium to 20 September 2020.[14] The Minister for Homelessness, Luke Hall MP, issued guidance to local authorities that they should be providing accommodation to all those who were sleeping rough, or at risk of sleeping rough, with no qualifying conditions of priority need, or being eligible for homelessness assistance.[15]

As lockdown eases, subsequent letters have confirmed that people should be assisted to move from emergency accommodation into longer-term accommodation and the government has made resources available to help local authorities.[16] These measures were taken to protect rough sleepers and the public from the risks of the virus spreading amongst the homeless population, but they have shown what is possible with resources and political will. The government has also published legislation increasing notice periods for possession claims on the grounds of rent arrears where the arrears are less than six months or in s.21 cases to six months.[17]

Housing: The problem

For tenants, and owner-occupiers struggling to pay their mortgages, the problem arises from 20 September 2020, when possession claims can be processed. The economic effects of lockdown are well-known. As of 21 April 2020, less than a month into lockdown, the number of individuals making clams for universal credit was 500% more than those in the previous year.[18] Shelter has calculated that more than 227,000 private renters have fallen into arrears during lockdown.[19]

The government committed itself, in the Queen's Speech in December 2019, to abolishing s.21 no fault evictions in a Renters' Reform Bill. Regrettably, that legislation

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[14] Practice Directions 51Z and 51ZA and Civil Procedure Rules 55.29. Extension on 21 August 2020 by the Master of the Rolls at https://i2.wp.com/nearlylegal.co.uk/wp-content/uploads/2020/08/MR.png

[15] Luke Hall MP, *Letter to Local Leaders,* 26 March 2020.

[16] Luke Hall MP, *Letter to Local Authority Chief Executives,* 28 May 2020 and 24 June 2020.

[17] https://www.gov.uk/government/news/jenrick-extends-ban-on-evictions-and-notice-periods. Coronavirus Act 2020 (Residential Tenancies: Protection from Eviction) (Amendment) (England) Regulations 2020/914, in force from 29 August 2020.

[18] Department for Work and Pensions, *Management Information: 1 March to 12 April 2020 supporting explanatory note*.

[19] Shelter, *230,000 renters at risk of 'Covid-eviction' when government ban lifts*, 6 July 2020.

has not yet been published. The government does not appear to have plans to introduce it before 20 September 2020, saying only that "*The proposals for tenancy reform would represent the largest change to renting in 30 years and it is only right that these reforms are taken forward in a considered manner*".[20]

Housing campaigners and politicians have all warned of a "*tsunami*" or "*cliff edge*" of evictions after 20 September 2020,[21] as landlords want possession where a tenant has fallen into rent arrears and the Courts, faced with claims for possession under s.21 Housing Act 1988 or Ground 8, Schedule 2 Housing Act 1988, have no discretion but to make possession orders.[22] Local authorities are concerned that their homelessness services will be overwhelmed.[23]

Shelter, Crisis and other campaigners have been calling for increases in benefit, so that renters can be assisted to pay their rent: specifically a return of local housing allowance to median levels, an end to the five-week waiting period for universal credit, increased discretionary housing payments and a suspension (permanent or temporary) of the benefit cap. These proposals would allow tenants to remain in their homes, and landlords to continue to receive rent.

There are also calls for s.21 either to be abolished immediately or to be made discretionary in the short-term, and for Ground 8 rent arrears claim to be made discretionary.[24] The Labour Party agrees with these calls. Generation Rent has produced a plan for government to compensate certain landlords for loss of rent if rent arrears are written off.

Unless these protections are implemented, even with the benefit of six month notice periods, tenants will subsequently lose their homes, some will be forced to sleep rough and others will be accommodated in emergency accommodation by local housing authorities. Emergency accommodation, whilst better than rough sleeping, is offered on a "no choice" basis, is precarious, is not of a high standard and is often located away from the local housing authority's district, so that residents struggle to maintain employment, education or links with their families or other support. There is a body of

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[20] *Government Response to House of Commons Housing, Communities and Local Government Select Committee Interim Report on Protecting Rough Sleepers and Renters*, June 2020.
[21] House of Commons Housing, Communities and Local Government Select Committee, *Interim Report on Protecting Rough Sleepers and Renters*, 22 May 2020 and Mayor of London, 'Mayor calls on Housing Secretary to turn tide on 'tsunami' of eviction', 10 July 2020, https://www.london.gov.uk/press-releases/mayoral/mayor-warns-of-impending-eviction-tsunami, (accessed 2 August 2020).
[22] Both s.21 and Ground 8, Schedule 2 Housing Act 1988 are mandatory grounds for possession. This means that the Court cannot consider whether it is reasonable to make an order for possession and has no power to make a suspended order upon terms.
[23] Local Government Association 4 June 2020: https://www.local.gov.uk/lga-responds-crisis-report-rise-homelessness
[24] House of Commons Housing, Communities and Local Government Select Committee, *Interim Report on Protecting Rough Sleepers and Renters*, *Draft Coronavirus (Protection of Assured Tenants) Bill*, 22 May 2020 and Crisis, *Homelessness and the Prevention of Homelessness (Covid-19 Response) Bill*, 30 June 2020, https://www.crisis.org.uk/get-involved/home-for-all/noticeboard/home-for-all-emergency-legislation/, (accessed 2 August 2020).

literature on the effects on children in particular of living in temporary accommodation.[25]

Homelessness: The problem

The government's instruction to house all rough sleepers was widely welcomed. Resources were made available, and local authorities are recorded as having accommodated around 15,400 rough sleepers across England. As lockdown eases, there are reports of new rough sleepers – generally people who had accommodation but lost their jobs as a result of Covid-19, and who would not be entitled to homelessness duties under Part 7 Housing Act 1996.

The guidance to help former rough sleepers move into settled accommodation is welcome, but requires political assistance. Many rough sleepers have a No Recourse to Public Funds condition on their leave to remain in the UK. Without being able to claim benefit, they cannot pay their housing costs. The high cost of renting, particularly in London, other cities and the South East, means that private renting is unaffordable to those who can claim benefit, not least because the increase in local housing allowance has resulted in more people becoming subject to the benefit cap.

If local housing authorities no longer provide emergency accommodation for those at risk of sleeping rough, there is a risk that a second surge in Covid-19, particularly over the winter, will hit rough sleepers hard and will have public health consequences.

Crisis has published draft legislation in the form of the *Homelessness and the Prevention of Homelessness (Covid-19 Response) Bill*. It proposes that, for a period of one year, local housing authorities are under a duty to secure emergency accommodation to all those who are homeless, or at risk of homelessness, and who would not be helped under the existing homelessness duties at Part 7 Housing Act 1996. Homeless people who do not have a priority need, or are not eligible for assistance because of their immigration status, would be entitled to emergency accommodation. During their time in emergency accommodation, they would be assisted to find longer-term suitable accommodation. The duty would last for one year from Royal Assent. Crisis proposes that anyone accommodated under this duty should be entitled to claim benefit so that housing costs would be paid by central government.[26]

The government instruction to house all rough sleepers in March shows that, with political will and funding, the scourge of homelessness can end and no one should be forced to sleep rough.

[25] Shelter, G*eneration Homeless*, December 2019.
[26] By way of suspending No Recourse to Public Funds or right to reside conditions.

8. Covid-19 and legal aid (Matthew Turner)

Legal aid: A human right and a public service

Legal aid is the provision of legal advice and representation funded by the government and free for those who are unable to pay for legal advice privately. It was introduced by the Legal Aid and Advice Act 1949 by Clement Attlee's post-war Labour government. In 1950, 80% of the population were entitled to means-tested legal aid and it was principally used for criminal cases and divorce. With the inception of law centres in the 1970s, it was increasingly used for family and employment cases. However, by 2008 only 29% of the population was entitled to means-tested legal aid.

Access to justice is a human right and legal aid is a public service.[27] Article 8 of the Universal Declaration of Human Rights states "*Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law*". Therefore, in order to realise this right, governments must ensure that individuals can obtain effective remedies in their national courts.

Legal aid is integral to this, which is what makes it a public service (like healthcare or education). It is not the same as an industry in the private sector, which can be left to succeed or fail. The government has a moral and legal duty to maintain a legal aid system which ensures access to justice. Not only is legal aid critical to the rule of law, it also brings economic benefits and makes the overall justice system more efficient and cost-effective, as well as fair and just.

LASPO and cuts that hurt: The state of legal aid today

Despite the importance of legal aid, in 2013 the Coalition Government launched a devastating attack on the legal aid system. This came in the form of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) which entered into force in April 2013. This vastly reduced the scope of legal aid and removed many areas of law partially or entirely from its scope, including the majority of civil and social welfare cases. Seven years on, LASPO is widely recognised – both inside and outside the legal sector – as having been an unmitigated disaster.

As long ago as 2016, Amnesty International published a detailed report, Cuts That Hurt,[28] which examined the effects of LASPO. It concluded that, in human rights terms, the cuts to legal aid were "a retrogressive measure" which led to fewer people accessing free legal help and representation in a wide range of cases. The report also highlighted the disproportionate impact on vulnerable and disadvantaged groups, such as children and refugees.

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[27] Labour Campaign for Human Rights, 'Making the case for legal aid: Update', March 2019.
[28] Amnesty International, 'Cuts that hurt: The impact of legal aid cuts in England on access to justice' October 2016.

However, since 2016 things have got worse, not better. Here are some of the worst statistics:

- The annual legal aid budget has fallen by 37% between 2010 and 2018, from £2.5 billion to £1.6 billion;
- The overall MOJ budget has been cut by over 40% between 2010 and 2020, more than any other government department;
- Half of all law centres and not-for-profit legal advice services in England and Wales have closed in the past six years;
- The number of civil cases started involving legal aid fell by 82% between 2010 and 2018;
- Around a million fewer claims for legal aid are being processed each year, compared with 2011; and
- Legal advice centres in England and Wales halved since 2013 and 'legal deserts' have appeared all over the country.

This has led to a two-tier system, where rights are only available to the few who can afford to pay for them. This has had a devastating impact on the poorest, most vulnerable and most in need of protection, and has also made the whole justice system less efficient and more expensive. LASPO has made the rule of law and access to justice illusive for the majority of the population.

The impact of Covid-19: A crisis on a crisis

When Covid-19 struck, the legal aid system was already on the brink of collapse. Now Covid-19 and the lockdown have made things even more difficult for legal aid providers. The President of the Law Society, Simon Davis, recently wrote an article in the Law Society Gazette entitled 'Understanding won't save legal aid firms – we need action, now'.[29] He warns that the legal aid sector is about to collapse.

To date, the government support has been insufficient. Whilst some government schemes are available – such as the furlough scheme, rates relief for small businesses and the Business Interruption Loan scheme – they are unlikely to be enough. This is because many firms are not just facing cash flow problems but suffering permanent loss of income. With lockdown and social distancing measures, the volume of work for legal aid solicitors has significantly decreased. Legal aid practices are particularly vulnerable because the amount of work has fallen as courts are limited to urgent cases. Effectively, legal aid firms are deciding whether to close right now, in an orderly fashion, or to continue to struggle and then implode in a few months' time.

As well as the risk of legal aid firms going bust, the effect on practitioners has been devastating. The Young Legal Aid Lawyers (YLAL) group recently published a report on the impact of Covid-19 on its members' professional lives.[30] It found that 78.8% were worried about their job security with 51.9% saying they were 'extremely' or 'quite'

[29] S. Davies, 'Understanding won't save legal aid firms – we need action, now', *The Law Society Gazette*, 29 May 2020.
[30] Young Legal Aid Lawyers, 'Second COVID-19 Report', 25 May 2020.

worried. A further 13.5% said they were undertaking work beyond their level of experience.

We cannot afford for legal aid firms to collapse or practitioners to leave the industry. After the pandemic is over, in what is predicted to be the most significant recession in a century, the provision of legal aid will be more important than ever to guarantee workers' rights, protect renters from exploitative landlords, help the most vulnerable overturn unjust welfare decisions, and more. Without a functioning legal aid system, millions of people will be left unable to seek redress where their rights are violated.

Immediate solution: Restore funding

Immediate action is required to prevent sectoral collapse. The Law Society has called for: (1) further help with cashflow via the Standard Monthly Payment scheme; (2) relief from business rates; and (3) the reversal of some of the previous legal aid cuts under LASPO.

The legal aid minister, Alex Chalk MP, has suggested that legal aid firms should make sure they are billing because "*there is something like over £100m worth of work that has been completed but unbilled*".[31] This is not just patronising but, as Shadow Minister Karl Turner MP pointed out,[32] completely misses the point. Well-managed businesses will already have maximised their claims, and funding is simply not available to certain parts of the sector, such as private children proceedings. Some legal aid firms are limited to two claims per year and will already have made them. So, the government should start by urgently lifting the annual two-claims limit.

The Legal Aid Practitioners Group (LAPG) recently provided a briefing to the Lord Chancellor,[33] Robert Buckland, suggesting three immediate measures: (1) press the Treasury to extend business rate relief for legal aid practitioners; (2) change current remuneration schemes to allow for payments on account of up to 100% of work carried out as well as monthly claims; and (3) create a grant-based crisis fund.

They have pointed out that under LASPO the Lord Chancellor has wide discretionary powers to "*do anything which is calculated to facilitate, or is incidental or conducive to, the carrying out of the lord chancellor's functions*", including authorisation to make "*grants or loans to enable persons to provide services or facilitate the provision of services*".

This existential crisis is entirely a result of the desperate, fragile state of the legal aid system before Covid-19 struck. It is not a situation where a handful of badly managed firms might go under. Rather, it is the potential loss of the entire legal aid sector as a result of this government's destructive policies over the last seven years. The costs of rebuilding the system from scratch will of course be much greater than providing immediate support right now.

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[31] J. Hyde, 'Claim £100m in outstanding fees, minister tells legal aid firms', *The Law Society Gazette*, 4 May 2020.
[32] M. Fouzder, 'Shadow legal aid minister calls for claims limit to be lifted', *The Law Society Gazette*, 11 May 2020.
[33] M. Fouzder, 'Buckland 'should use LASPO powers' to save firms' *The Law Society Gazette*, 15 May 2020.

The long-term solution: A right to justice

The Bach Commission on Access to Justice published its final report[34] in September 2017. This found that the justice system was in crisis with problems "*so deep-rooted, commonplace and various that piecemeal reforms alone would simply be papering over the cracks*".

It made a number of recommendations, the most important of which was to introduce a **Right to Justice Act** that would establish a new right to reasonable legal assistance, which would be legally enforceable through the courts as well as monitored by a Justice Commission.

The report sets out the ways in which the right to justice would be enforced. These include enabling judges to halt proceedings and issue a certificate stating that a party should be granted legal aid in the interests of justice. Or introducing a declaration of incompatibility procedure similar to that contained in the Human Rights Act, whereby courts can declare that legislation is incompatible with the right to justice. The proposed Justice Commission would be an independent non-departmental public body with a board of legal practitioners and experts, led by a chief commissioner appointed on a cross-party basis.

The report also set out a 25-point plan for the government to make short-term policy changes. This covers four key areas of need:

1. Reforming the eligibility rules i.e. the rules that determine who is eligible for legal aid;
2. Broadening the scope of civil legal aid (in particular, bringing back early legal help);
3. Reforming the operation of legal aid to deal with administrative problems in the system, including by replacing the Legal Aid Agency; and
4. Introducing a national public legal education and advice strategy to improve the provision of information, education and advice in schools and the community.

The government needs to provide immediate funding now. But once the crisis is over, it is critical that it starts to implement these recommendations to rebuild our broken legal aid system. Access to justice is a human right and legal aid is a public service. They both need to be treated as such.

[34] Bach Commission, 'The right to justice: the final report of the Bach Commission', *The Fabian Society*, September 2017.