"A Tissue, A Tissue, It All Falls Down": A Review of the Impacts of Covid-19 on the English Criminal Court System Between March 2020 and March 2021

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ABSTRACT

"A Tissue, A Tissue, It All Falls Down": A Review of the Impacts of Covid-19 on the English Criminal Court System Between March 2020 and March 2021

Amy Elizabeth Nerou

The COVID-19 pandemic brought the criminal court system to a grinding halt on 17 March 2020, as it did much of life in England; this was the starting point for drastic and sudden change across the criminal court system. There were three primary categories of change: increased the delays in criminal proceedings; wide-ranging changes to the use of live links and the administration of remote justice; and a revaluation of approaches to open justice. This thesis addresses each of these categories in turn, evaluating the degree of impact they have on the actors involved in these matters – the defendants, victims, and even legal professionals. It does this by using a range of primary sources, such as Twitter posts, the Courts and Tribunals Service court data, caselaw and legislation, alongside the use of secondary sources, including reports from Non-Governmental Organisations, contemporary news articles and blogs, and academic commentary. The thesis finds that COVID-19 resulted in widespread and detrimental changes to the criminal court system in England, and that recovery from them is lacking. This has had a directly negative impact on the experiences of actors involved in that system. Many of the detrimental changes were an exacerbation of flaws in an already overburdened and vulnerable system. The importance of these changes cannot be overstated, nor can the need for them to be remedied. Ultimately, without attention, and funding, being given to resolving the impacts that have developed as a result of COVID-19, there may be implications for the very integrity of the criminal court process in England.

“A TISSUE, A TISSUE, IT ALL FALLS DOWN”:

A REVIEW OF THE IMPACTS OF COVID-19 ON THE ENGLISH CRIMINAL COURT SYSTEM BETWEEN MARCH 2020 AND MARCH 2021

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A thesis submitted for Master of Jurisprudence

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2022

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LIST OF ABBREVIATIONS & GLOSSARY

BTMM – BT Meet Me – The software used for the conduct of telephone hearings.

COH – COVID-19 Operating Hours – A pilot scheme explored during COVID-19 that amended the court sitting hours.

CTL – Custody Time Limit – The duration a defendant can be remanded into custody without further judicial approval

CVP – Cloud Video Platform – The bespoke MoJ platform designed to host video hearings. In other jurisdictions Teams, Skype and Zoom have also been used.

DVPO – Domestic Violence Protection Order - Where there is insufficient evidence to charge a perpetrator and give protection to a victim via bail conditions, a DVPO can prevent the perpetrator from returning to a residence and from having contact with the victim for up to 28 days. Similar orders can include Non-Molestation orders from the Family Jurisdiction.

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

FOH – Flexible Operating Hours – A pilot scheme exploring amending court sitting hours, having run at various intervals between 2002 and 2017. Also called Extended Operating Hours (EOH)

ICCPR – International Convention of Civil and Political Rights

Nightingale Courts – Buildings from outside of the court estate that have been repurposed by the government to host courtrooms. Examples include Peterborough Cathedral.

PCSC Bill – Prison, Crime, Sentencing, and Courts Bill 2021

PTPH – Plea and Trial Preparation Hearings

PVCL – Prison Video Conferencing Link – The video link used by prisons for a prisoner to remotely attend court. They can also be used for pre-hearing conference. The PVCL software is able to connect with CVP.

VHS – Video Hearing System – the new virtual hearing platform, intended to replace CVP , and to be rolled out over 2022

STATEMENT OF COPYRIGHT

ACKNOWLEDGEMENTS

I would like to thank my supervisor Jessie Blackbourn for your incredible help and support throughout the thesis. Without your continuing kindnesses and encouragements, this thesis would not have been completed.

I would also like to thank my partner, who read every section, chapter, and nearly final draft more times than I can count and without complaint. You have been there for me at every step. Thank you.

CHAPTER 1: INTRODUCTION

The 2019 novel coronavirus – COVID-19 – pandemic had an immeasurable impact on every aspect of everyday life. Even as it grew in the English public consciousness from early 2020,[1] no one foresaw the sheer magnitude of a pandemic that still gripped the world over two years later. The criminal court system was no exception, in that it was affected significantly by the COVID-19 pandemic. COVID-19 was identified by the Lord Chancellor and the Lord Chief Justice as "the biggest peacetime challenge facing our justice system";[2] and the Justice Inspectorates' "greatest concern" was the court system as affected by COVID-19.[3] The court system was described as "a system under strain", insufficiently resilient in the face of the pandemic.[4] This thesis delves into the substance behind these statements, and explores how, and how significantly, the criminal court system was impacted by the pandemic. This is a question of vital import, because, due to the ongoing nature of the pandemic, there has been very little academic review of the impact of COVID-19 on the criminal justice system.

The COVID-19 pandemic brought the criminal court system to a grinding halt on 17 March 2020, when the Lord Chief Justice announced that no new trial over three days would start.[5] This was the first tangible impact of COVID-19 in the criminal court system. Less than one week later, on 23 March 2020, the Lord Chief Justice announced that all jury trials were suspended.[6] This is the same date that the Prime Minister announced the first lockdown

[1] Rich Preston, "Exactly 9 months ago, just after 5am UK time on the 12 January, the first BBC TV report ran about the death of a man in central China from a peculiar new disease. Officials insisted it was all under control and would be nothing like the 2008 SARS outbreak which killed 770 people." (Rich Preston, Twitter, 12 10/2020) <https://twitter.com/RichPreston/status/1315502453391937536?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1315502453391937536%7Ctwgr%5E%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.indy100.com%2Fnews%2Fcoronavirus-first-bbc-news-report-wuhan-china-tv-9721326> accessed 15/02/2022

[2] HMCTS, "COVID-19 Update on the HMCTS response for Criminal Courts in England and Wales" (6/09/2020)

[3] Criminal Justice Joint Inspection, "Impact of the pandemic on the Criminal Justice System: A join view of the Criminal Justice Chief Inspectors on the Criminal Justice System's Response to COVID-19" (13/01/2021), para 5.4

[4] House of Lords Select Committee on the Constitution, "COVID-19 and the Courts" (30/03/2021, HL Paper 257, 22nd Report of Session 2019–21), 3

[5] Lord Burnett of Maldon, Lord Chief Justice "Coronavirus (COVID-19) Jury Trials, message from the Lord Chief Justice" 17/03/2020 < https://www.judiciary.uk/announcements/coronavirus-jury-trials-message-from-the-lord-chief-justice/> accessed 27/01/2021

[6] Lord Burnett of Maldon, Lord Chief Justice, "Review of court arrangements due to COVID-19, message from the Lord Chief Justice" 23/03/2020, < https://www.judiciary.uk/announcements/review-of-court-arrangements-due-to-COVID-19-19-message-from-the-lord-chief-justice/> accessed 27/01/2021

measure, which took effect three days later, on 26 March 2020.[7] Court buildings were closed.[8] This was the first rush of COVID-19 activity affecting the criminal justice system.

In the year that followed, a raft of measures were introduced across the criminal court system. Indeed, every new measure that was explored during the pandemic, with the intention of mitigating its effects, was first introduced between March 2020 and March 2021. This includes COVID-19 Operating Hours (COH),[9] an arrangement that extended the court sitting day in a number of pilot courts, which was attempted, and later abandoned[10] when it was extensively criticised by professionals.[11] Custody Time Limits (CLTs), the period a defendant may spend in custody without further judicial oversight, was extended through both protocol[12] and law.[13] These measures then expired. Nightingale courts,[14] spaces beyond the court estate that were rented by the government in order to have additional rooms and space to run hearings, were introduced and used extensively for the entire window of March 2020 to March 2021. Justice was moved 'online'[15] with the vast majority of hearings being heard remotely through telephone and video conferencing software.[16] Indeed, so great was the concern regarding the

[7] Prime Minister's Office, 10 Downing Street and The Rt Hon Boris Johnson MP, "Speech: Prime Minister's statement on coronavirus (COVID-19): 23/03/2020" 23th 03/2020 < https://www.govuk/government/speeches/pm-address-to-the-nation-on-coronavirus-23-march-2020 > 09/02/2022

[8] Ministry of Justice and HM Courts & Tribunals Service, "Coronavirus recovery in Her Majesty's Court and Tribunal Service" 1/07/2020 <https://www.govuk/government/news/coronavirus-recovery-in-her-majesty-s-court-and-tribunal-service> accessed 09/02/2022

[9] HMCTS, "COVID-19 Operating Hours Crown Court Jury Trial Pilot" (30 July 2020)

[10] Jemma Slingo, "Criminal barristers 'will take action' over COVID-19 operating hours" 1/12/2020 < https://www.lawgazette.co.uk/news/criminal-barristers-will-take-action-over-COVID-19-operating-hours-/5106621.article> accessed 13/02/2021

[11] HMCTS, "COVID-19 Operating Hours (COH) Crown Court Pilot Assessment Final Report: User Experience and Insight" (25/11/2020), 11 & 16; Garden Court Chambers, "Garden Court Criminal Defence Team Statement on Extended Operating Hours - An Unworkable and Discriminatory Scheme" 4/09/ 2020 < https://www.gardencourtchambers.co.uk/news/garden-court-criminal-defence-team-statement-on-extended-operating-hours-an-unworkable-and-discriminatory-scheme> accessed 13/02/2021; Women in Criminal Law, "Women in Criminal Law Survey on Extended Operating Hours Executive Summary" (28/09/2020), Junior Lawyers, "Extended Crown Court operating hours – JLD response" 16/07/2020 <https://www.lawsociety.org.uk/en/topics/junior-lawyers/jld-consultation-responses/extended-Crown-court-hours> accessed 13/02/2021

[12] Coronavirus Crisis Protocol For The Effective Handling Of Custody Time Limit Cases In The Magistrates' And The Crown Court Between The Senior Presiding Judge (Spj), Hm Courts & Tribunals Service, And The Crown Prosecution Service 27/03/2020

[13] The Prosecution of Offences (Custody Time Limits) (Coronavirus) (Amendment) Regulations 2020

[14] HMCTS, & MoJ, "10 'Nightingale Courts' unveiled" 19/07/2020 <https://www.govuk/government/news/10-Nightingale-courts-unveiled> accessed 17/02/2021; HMCTS & MoJ, "More courts to speed up justice" 17/02/2021 <https://www.govuk/government/news/more-courts-to-speed-up-justice > accessed 17/02/2021

[15] Chris Philip MP, "New tech will help keep the criminal justice system moving during COVID-19-19 pandemic" 30/04/2020 < https://www.govuk/government/news/new-tech-will-help-keep-the-criminal-justice-system-moving-during-COVID-19-19-pandemic> accessed 25/01/2021

[16] HMCTS, "Management Information: HMCTS Weekly Operational Management Information – Audio and Video Hearings May 2020 to January 2021" 11/02/2021

impact of COVID-19 on the criminal court system, serious consideration was given to reducing the size of a jury,[17] or even removing it altogether.[18] However, this was ultimately not acted upon. Eventually, changes included the successful, if piecemeal, reopening of the court estate.[19] By March 2021, the "new normal" had emerged and stabilised.

Due to the ongoing nature of COVID-19, and the persistence of long-term impacts, this thesis limited itself to events in that first year of the pandemic: from March 2020 to March 2021. There were three primary means by which COVID-19 impacted the criminal court system, and they are considered in the next three chapters. Chapter Two examines an exacerbation of the existing delays in the system, causing them to reach unprecedented levels. Chapter Three focuses on the significant and drastic transition to fully remote and partially remote justice. Chapter Four looks at the changes to the practical achievement of the principles of open justice. Ultimately, each of these changes in the criminal court system represents an exacerbation of an already worrying trend, an opportunity for future improvement, but an overall failure to reach that improvement. In sum, the impact of COVID-19 on the criminal court system was an incredibly concerning one, and results in real questions about the effectiveness of the English criminal court system and concerning impacts on the integrity of the criminal trial process.

The thesis focuses on how these changes impact the individual actors and participants engaged in the criminal justice system. Primarily these are defendants and victims, but witnesses and professional actors such as barristers are also touched upon. This fills a gap in the literature in two ways. The first is in providing an in-depth review on the impact of COVID-19 on the criminal justice system, through the three lenses of delay, remote and virtual justice, and open justice. Insufficient time has passed since the beginning of the pandemic for a large variety of academic literature to have been written. Therefore, this thesis exists as one of very few academic comments on the situation of the COVID-19 impacted criminal court systems. The second is in providing a holistic review of the criminal court system. The limited current academic literature that exists primarily focuses on single issues, there is an absence of review

[17] Sinead Wilson, "Coronavirus: Cut Jury Size to Clear Courts Backlog – Labour" (26/012021, BBC) < https://www.bbc.co.uk/news/uk-politics-55813636> accessed 17/02/2021; BBC, "Coronavirus: Robert Buckland warns over court case backlog" 19/06/ 2020 < https://www.bbc.co.uk/news/uk-politics-53107109> accessed 17/02/2021

[18] Gazette Newsdesk, "Limits on Jury Trials may be needed says LCJ" (16/06/2020, The Law Society Gazette) < https://www.lawgazette.co.uk/law/limits-on-jury-trials-may-be-needed-says-lcj/5104649.article > accessed 17/02/ 2021

[19] HM Courts & Tribunals Service, "List of Crown Courts Hearing Jury Trials" < https://assets.publishing.service.govuk/government/uploads/system/uploads/attachment_data/file/957325/Current_full_list_of_Crown_Courts_resuming_JTs_29.01.21.pdf> accessed 30/01/2021; MoJ and HMCTS, n8, accessed 30/01/2020; House of Lords Select Committee on the Constitution, n4, para 3

of the overall impact of COVID-19 on the criminal court system. The thesis draws predominantly on primary research by government agencies, such as the justice inspectorates and parliamentary committees, or pressure groups and non-government organisations (NGOs), such as JUSTICE or Fair Trials International. In this thesis, that primary research has been supplemented by the use of tweets from the public twitter accounts of authoritative and reliable barristers and court reporters, such as The Secret Barrister and Tristian Kirk.[20] The combination of these two source types, supplemented where possible by the limited academic literature on the topic, ensures an accurate picture of the situation in the criminal court system.

Due to the contemporary nature of the topic of this thesis, very little has been written on it in the academic field. Much of what has been written takes the form of short reviews and comments, rather than in depth evaluation. It also often focuses on a specific component of the impact of COVID-19, rather than a holistic overview. Riddle offers one of the only pieces that addresses a wide range of the effects of COVID-19,[21] but it serves primarily to identity the issues, including delays and the use of remote courts, and of future questions to be resolved rather than an in-depth review. On the specific issue of the changes to delays, Ormerod identified the exacerbatory nature of COVID-19 on the already growing backlog of the criminal courts, before going on to identify the practical impacts this has on the actors within the criminal court system.[22] Chapter Two of this thesis echoes many of the arguments put forward by Ormerod, whilst seeking to add depth and detail. Collier comments on the delays in the criminal court system, situating it within the context of his own practical pre-pandemic experience.[23] This contrast between before and after March 2020 is similarly echoed. However, much of the academic commentary pre-dates March 2020,[24] and thus whilst it can discuss the impact of delays on actors in the criminal court system, it cannot extend that comment to the changes caused by COVID-19. Hoyano highlights the challenges arising out of COVID-19 induced remote justice, highlighting vulnerable parties in particular, whilst also giving consideration to the long-term effects as a result of the Police, Crime, Sentencing and Courts

[20] Ethical approval given for the use of primary data: LAW-2021-06-21T16_07_04-hmvp44, granted 23/06/2021.
[21] Howard Riddle CBE, Anthony Edwards, Matthew Hardcastle, "COVID-19 and the Criminal Courts" (2021) 3 Criminal Law Review 159-162
[22] David Ormerod, "Tackling the Backlog" 2022 1 Criminal Law Review 1-4
[23] Peter Collier "Fewer Sitting Days, More Delay and the Failure of Criminal Justice" (2021) 3 Archbold Review 7-10
[24] EG Suzanne Galand-Carval "The European Court of Human Rights Declares War on Unreasonable Delays" (1996) 1996 St Louis-Warsaw Transatlantic LJ 109-126; John Jackson & Jenny Johnstone "The reasonable time requirement: an independent and meaningful right?" (2005) Jan Criminal Law Review 2-23; Richard Moules, "The Right to Trial Within a Reasonable Time" (2004) 63(2) Cambridge Law Journal 265-268

Bill 2019.[25] Rossner and Tait address both the classical concerns associated with video-links and contrasts them with the COVID-19 associated video-links.[26] The primary factors raised by both Hoyano and Rossner align closely with the approach taken in Chapter Three of this thesis and combine to result in a comprehensive review of the past and future changes in this area. McCann addresses video-links and COVID-19 specifically[27] and identified a number of issues that this thesis goes on to explore in greater depth, such as the interests of justice test as applied to video-links and poor link quality. Wood focuses more specifically of the changes in the crown court.[28] As above, the vast majority of academic commentary on the use of remote hearings predates March 2020.[29] Turning to the changes to open justice that have been caused by COVID-19, the only academic comment is Magrath[30] who notes and explores the challenges in accessing court hearings when they are remote and the varying levels of access according to the level of proceedings. Whilst there has been academic debate on the potential need for a derogation from the European Convention on Human Rights (ECHR),[31] in light of the COVID-19 pandemic, little attention has been given to it in this thesis as it does not impact the court actors, as is the focus of this thesis. This thesis does not challenge any of the conclusions of the existing literature, rather it adds detail and depth to those commentaries and contributes a holistic approach.

It is of vital importance that this lack of literature is remedied. The criminal court system is of extreme importance in society. It is a vehicle for justice, convicting criminals and protecting society. It is an arena for law to be enforced, explored and challenged. It provides the state a

[25] Laura Hoyano, "Postage stamp justice? Virtual trials in the Crown Courts under the Police, Crime, Sentencing and Courts Bill" (2021) 12 Criminal Law Review 1029-1050
[26] Meredith Rossner & David Tait, "Presence and Participation in a Virtual Court" (2021) Criminology and Criminal Justice 1-23
[27] Adam McCann, "Virtual Criminal Justice and Good Governance during COVID-19" (2020) 7 European Journal of Comparative Law and Governance 225-229
[28] Lana Wood, "The Coronavirus Act 2020 and its impact in the Crown Court" 2020 4 Archbold Review 4-10
[29] EG Samantha Fairclough ""It doesn't happen... and I've never thought it was necessary for it to happen": barriers to vulnerable defendants giving evidence by live link in Crown Court trials" (2017) 21(3) International Journal of Evidence and Proof 209-229; Samantha Fairclough, "The consequences of unenthusiastic criminal justice reform: A special measures case study" (2021) 21(2) Criminology and Criminal Justice 151-168; Helen Howard "Effective participation of mentally vulnerable defendants in the magistrates' courts in England and Wales - the "Front Line" from a legal perspective" (2021) 85(1) Journal of Criminal Law 3-16; Rabiya Majeed-Ariss, et al, "'Could do better': Report on the use of special measures in sexual offences cases" (2021) 21(1) Criminology and Criminal Justice 89-106
[30] Paul Magrath "Coronavirus, the Courts and Case Information" (2020) 20(3) Legal Information Management 126-132
[31] Kanstantsin Dzehtsiarou, "Article 15 derogations: are they really necessary during the COVID-19 pandemic?" 2020 4 European Human Rights Law Review 359-371, Alan Greene "Derogations, deprivation of liberty and the containment stage of pandemic responses" 2021 4 European Human Rights Law Review 389-402 and Tom Hickman QC, "The coronavirus pandemic and derogation from the European Convention on Human Rights" 2020 6 European Human Rights Law Review 593-609

means by which to deprive an individual of their liberty. It is a system core to any functioning society and of vital importance to anyone engaged within it. In light of its significance, any widespread, systematic, and long-term changes to it must be fully explored and evaluated. When changes are made under the pressures of an emerging pandemic, implemented quickly with limited review or scrutiny, that evaluative need is increased. COVID-19, and the responses to it, impacted the court system immensely. Commentary on those changes is essential and this thesis offers that.

CHAPTER 2: DELAYS

One of the first and most immediately visible impacts of the pandemic was the adjournment of all hearing types; any trial that was due to commence in the first months of the pandemic was adjourned. Subsequent hearings and trials have been subject to a mix of remote, hybrid, and attended hearings, with a large number of further adjournments.[32] The impact of this was the conclusion rate at the Magistrate's court fell by two thirds in the first quarter of 2020 compared to the last of 2019, and at Crown fell by 40%, a rate that would have been higher if not for sentencing and guilty plea finalisations.[33] Whilst many factors may have changed this rate to a small degree, such a large change can only be attributable to the pandemic. This meant that there was a drastic increase in the number of cases that remained live, and thus the backlog, when they would have otherwise been concluded, if not for the effects of COVID-19.

The number of outstanding cases awaiting attention in the criminal justice system was significant prior to the pandemic.[34] It has long been criticised and is an oft bemoaned, hardly unknown, feature of the criminal courts. The more outstanding cases there are, the longer the delay for all involved: defendants, victims, and practitioners. An example of the impact of an excessive backlog can be seen in that the average non-guilty plea at Crown Court took 323 days from receipt of the matter by the courts to completion.[35] This timeline increased in correlation with the increased backlog. [36] In the 12-month window prior to COVID-19, the Crown courts backlog rose by 16% and the Magistrates backlog rose by 10%.[37] By the end of 2020, 18% of cases had been outstanding for over a year,[38] which means they would have entered the system before the impacts of the pandemic had been felt there. This represents a significant change from a decade ago, where 78% of all cases – both custody and non-custodial

[32] Justice, "JUSTICE COVID-19 response" < https://justice.org.uk/our-work/justice-COVID-19-response/ > accessed 02/02/2022
[33] CPS, "CPS data summary Quarter 1 2020-2021" 22/10/2020 < https://www.cps.govuk/publication/cps-data-summary-quarter-1-2020-2021> accessed 13/09/2021
[34] Jemma Slingo, "Criminal court backlog reaches two-year high" (Law Gazette, 27/03/2020) <https://www.lawgazette.co.uk/news/criminal-court-backlog-reaches-two-year-high/5103650.article> accessed 20/02/2022
[35] Ministry of Justice, "Criminal court statistics quarterly: October to December 2020" (25/03/2021) < https://www.govuk/government/statistics/criminal-court-statistics-quarterly-october-to-december-2020/criminal-court-statistics-quarterly-october-to-december-2020#timeliness> accessed 24/04/2021
[36] Ministry of Justice, ibid
[37] HMCTS, "HMCTS weekly operational management information March 2019 to March 2020: Crown Courts" (14/05/2020)
[38] Ministry of Justice n35

- were expected to be dealt with within six months, and largely were.[39] Therefore, the backlog was a significant problem prior to COVID-19. There was a persistent problem of the backlog worsening, hinting at underlying vulnerabilities in the criminal court system.

Understandably, between March 2020 and March 2021, the backlog rose significantly, due to the reduction in finalisation. It rose at a rate higher significantly than prior to the pandemic. In March 2020 there were 39,331 outstanding Crown cases[40] and 407,129 outstanding Magistrates' cases.[41] As of the end of March 2021, the end date of the scope of this thesis, there were 57,516 outstanding Crown cases[42] and 476,451 outstanding Magistrates cases.[43] This represents an increase of 46% in the Crown courts and 17% increase in the Magistrates over a one-year period. The increase was unsurprising due to the complete cessation of criminal trials in March 2020[44] and the continued under capacity operation even one year later,[45] due to the need for socially distanced courtrooms and isolation requirements of individuals involved in proceedings. The sheer size of the difference in the rate of increase between March 2019 to March 2020 and March 2020 to March 2021 demonstrates the importance of COVID-19 in causing this increase and in exacerbating a pre-existing problem.

In March 2021, a number of cases that involved serious charges, including child abuse, were adjourned and relisted to trial in 2023.[46] This demonstrated the significance of the delay problem that results from an increased backlog, as exacerbated by one year of COVID-19. Examples of relisted cases included a number of alleged offences committed as long ago as 2017 that had trials listed in 2022, which included serious and complex issues involving "traumatised teenage victims" and issues of consent, and the simpler issues of possession offences.[47] It is unacceptable that trials were being listed over two years ahead. However,

[39] Peter Collier, n**Error! Bookmark not defined.**, 8
[40] HMCTS, "HMCTS weekly operational management information March 2020 to January 2021: Crown Courts" (11/02/2021)
[41] HMCTS, ibid
[42] HMCTS, n37
[43] HMCTS, "HMCTS weekly operational management information March 2019 to March 2020: Magistrates Courts" (14/05/2020)
[44] Courts and Tribunals Judiciary, n6. The halting of Jury Trials was done under the Lord Chief Justice's statutory power under section 7(1) of the Constitutional Reform Act 2005
[45] HMCTS, Courts and tribunals additional capacity during coronavirus outbreak: Nightingale courts, (11 03/2021): https://www.govuk/guidance/courts-and-tribunals-additional-capacity-duringcoronavirus-outbreak-nightingale-courts accessed 25/03/2020
[46] Jonathan Ames & Catherine Baski, "Abuse trials pushed back to 2023 as backlog grows" (5/03/2021, The Times) https://www.thetimes.co.uk/Article/abuse-trials-pushed-back-to-2023-as-backlog-grows-8766pk79g> accessed 23/04/2021
[47] Owen Bowcott, "COVID leading to four-year waits for England and Wales court trials" (The Guardian, 20/01/2021) < https://www.theguardian.com/law/2021/jan/10/COVID-leading-to-four-year-waits-for-england-and-wales-court-trials> accessed 18/04/2021

compounding this problem, there were also reports of creative listing approaches. For example, a number of court centres refused to list trial dates, and instead listed review dates.[48] This had the resultant effect of reducing the number of trials being listed into 2023 but not effectively resolving the cases that needed trials. Therefore, whilst the snapshot of delays provided in March 2021 was concerning, it may not have fully illustrated the severity of an already worrisome position. Furthermore, it is important to note that trials are not listed immediately after the matter enters the criminal court system – this means that they had already likely been in the court system for a number of months, if not years. That trials were relisted to 2023 in the window of March 2020 – March 2021 means that any new matter entering the court system will not be listed in the 2023 lists identified, but on a far later date. This problems of delays was one that increased at an exponential rate due to this.

As of April 2021, it was estimated that it would cost £500 million and take a period of three years to return the backlog at March 2021 to a pre-lockdown level.[49] Even in April 2021, the backlog was still rising,[50] and the costs to remedy it were rising alongside. This was due to the continued requirements for social distancing, isolations, and impacts of lockdowns. However, this increase was also in spite of a range of measures such as the Nightingale Courts, remote justice mechanisms, and the COVID-19 operating hours pilot, all introduced to keep the spiralling backlog under control. It suggests further questions about the accuracy of a prediction of costs and time to remedy the situation, when that prediction is based upon a status quo of worsening conditions.

This chapter explores the impact of this factual matrix of an increased backlog and resultant delays caused by the COVID-19 pandemic. It starts by exploring the rights associated with delays, and the general standards the state is held to regarding the expected speed of justice, before looking at the impact on the various individuals – defendants and victims primarily – involved in the court system. This allows the subsequent evaluation of the impact on

[48] CrimBarrister, "Happening at several Crown Courts, along with the practice of not giving a trial date following NG pleas, but instead periodically listing the case for mention thereafter. No doubt makes the figures not look quite so bad..." (Twitter, 5/03/2021) < https://twitter.com/CrimBarrister/status/1367793946009690112> accessed 19/04/2021, retweeting Kerry Hudson, "At least one Crown Court I know of is/was giving out a "ticket number" instead of a trial date. This would have skewed how many trials listed 2022 & beyond in the figures. A quick count of the backlog & it's obvious if given listings, these cases would stretch well into 2022/23." (Twitter, 5/03/2021) < https://twitter.com/HudsonKerry/status/1367787677450395649> accessed 19/04/2021

[49] National Audit Office, "Reducing the backlog in criminal courts" (Session 2021-22, 22/10/2021, HC 732) para 3.10

[50] CPS, "CPS data summary Quarter 2 2021-2022" (CPS, 20/01/2022) < https://www.cps.govuk/publication/cps-data-summary-quarter-2-2021-2022> accessed 20/02/2022

individuals of delays on their own merit. The use of adjournments will then be explored to see the additional impacts on individuals of delays when they are caused by adjournments. It will then turn to the additional concerns that arise in custody time limit (CTL) cases. CTL cases require additional and separate attention due to their unique features including deprivation of liberty. Ultimately, this chapter concludes that the damage done by the immense growth in delays and backlog caused by the COVID-19 pandemic was unacceptable, incalculable in its vastness, and hugely damaging.

2.1 RIGHTS REGARDING CRIMINAL COURT DELAYS

"Justice delayed is justice denied" is a classic legal maxim. For this reason, the notion that the court system should not leave parties in the elongated limbo of protracted proceedings is well established and well protected. This was echoed in Article 6 of the European Convention on Human Rights (ECHR)[51] requiring a "hearing within a reasonable time" and in the International Covenant on Civil and Political Rights (ICCPR)[52] requiring defendants "to be tried without undue delay".[53] It has been confirmed that "reasonable time" is not merely a component of a fair trial but an independent right of its own that must be protected.[54] This is in order to maintain a fair criminal court process and safeguard defendants. Whilst fair trial[55] rights in English law far predate any obligations under the ECHR, Article 6 does provide a clear and succinct starting point for defining the rights surrounding delays that must be maintained in the criminal process. That there will always be a time elapse between the charging of a crime and the trial to determine guilt is both inevitable and necessary – both sides require time to compile and collect evidence and compose argument. Speed is desirable, but it cannot be at the expense of the proper care being given by the authorities to protect the other fair trial requirements,[56] such as

[51] 1950
[52] 1966. It is important to note that the ICCPR has been ratified but not incorporated.
[53] Article 14(3)(c) ICCPR
[54] Porter v Magill [2001] UKHL 67, [2002] 2 AC 357, 497
[55] It is important to note that whilst the term "trial" is used frequently used, these rights apply to all hearings within the criminal court process.
[56] Boddaert v Belgium (1992) Application Number 12919/87

the fair obtaining of evidence[57] and adequate time to prepare a defence.[58] As such, there must be assessment to determine what degree of delay is acceptable.

In order to do this, the start and end points of the court process must first be defined. Article 6 ECHR provides clear boundaries for this purpose. The time period starts with the day the person is charged,[59] which can be broadly defined as the moment the defendant "has been substantially affected by actions taken by the authorities as a result of a suspicion against him."[60] The time period then ends after the final judgement determining the result of the charge, whether this be by the court of first instance or the Supreme Court.[61] The definitions of these start and end points are relatively uncontroversial in law.[62] The start and end time are centred on the window the defendant feels the effects of the criminal court system. It illustrates the importance of assessing how defendants are impacted by changes to that system and the value held in protecting it. A reasonable duration is then assessed on a case-by-case basis, and depends on the complexity of the case, the conduct of the applicant and national authorities,[63] and what is at stake for the defendant.[64] The right is clearly based very much in the position and vulnerability of the defendant, however the rights included in Article 6 benefit beyond that targeted recipient.

With case-by-case assessments, the wealth of jurisprudence from the European Court of Human Rights (ECtHR) can provide a helpful framework.[65] When a case completes within two years, thus far it has always been deemed to comply with the Article 6 requirements, and when it "lasts longer than two years but goes uncriticised by the European Court, it [was] nearly always the applicant's behaviour that is to blame."[66] More than two years, and there is scrutiny by the court, although compliance of the state with Article 6 was still frequently found after a weighing of the factors above. The practice of listing to 2023 meant that nearly every set of

[57] Ayetullah Ay v Turkey (2000) Applications nos. 29084/07 and 1191/08
[58] Article 6(3b) ECHR
[59] Neumeister v Austria (1968) Application Number 1936/63
[60] Liblik and Others v Estonia (2019) Application Number 173/15 para 90, citing Ibrahim and Others v the United Kingdom (2016) 50541/08, 249
[61] Neumeister v Austria (1968) n59, para 19 & Wemhoff v Germany (1968) Application Number 2122/64 at para 18
[62] Enforcement proceedings have been given more attention and have been subject to more disputes, however, this goes beyond the remit of this thesis.
[63] Neumeister v Austria (1968) n59
[64] König v FRG (1978) Application no. 6232/73
[65] European Commission for the Efficiency of Justice, "Length of court proceedings in the member states of the Council of Europe based on the case law of the European Court of Human Rights" (2018) CEPEJ(2018)26, 75
[66] European Commission for the Efficiency of Justice, ibid, 73

proceedings with a relisted trial fell into the category that demanded scrutiny should it have come before the ECtHR. This was a concerning position to be held on a system wide basis and demonstrates the precarious position for violating rights the criminal court system was in.

Between 1987 and 2004, 19 complex criminal cases were determined to have exceeded the reasonable time frame; they all had a duration of more than five years of proceedings when before one to two court instances, with one exception of a case duration of only two years before one court.[67] It is, therefore, a high threshold before a duration becomes unreasonable. Nonetheless, applied to the adjournments and delays mentioned above, the English criminal court system is getting closer to that five-year point on a widespread and systematic scale. By March 2021, delays had grown so great a number of cases fall into a category where an article 6 violation may well be found.

The COVID-19 pandemic was seen as a 'national emergency' in the eyes of many. However, for the purposes of Article 6 standards, no Article 15 declaration was ever made. Such a declaration would have allowed the state to briefly derogate from the standards of these rights due to a state of emergency. Whether such a derogation is needed is the subject to debate,[68] however, the government chose not to make such a declaration. As such, the Article 6 standards had to be maintained as if in normal times. In non-derogated, but unique, times, the ECHR still outlines a clear standard for states. In *Milasi*[69] the Italian criminal justice system was faced with a sudden excessive workload, and there were significant efforts to resolve it, which included "giving priority to the trials of those defendants who were in custody and by appointing more judges and court staff."[70] This is a very similar approach to the policy of the English criminal courts during the first year of the pandemic. However, the ECtHR found that after a certain length[71] of time blame could no longer be laid at the feet of a "passing crisis".[72] Therefore, it was integral that the backlog and delays were reduced as a matter of urgency;

[67] European Commission for the Efficiency of Justice, ibid, 76
[68] See the debate between Kanstantsin Dzehtsiarou, "Article 15 derogations: are they really necessary during the COVID-19 pandemic?" 2020 4 European Human Rights Law Review 359-371, Alan Greene "Derogations, deprivation of liberty and the containment stage of pandemic responses" 2021 4 European Human Rights Law Review 389-402 and Tom Hickman QC, "The coronavirus pandemic and derogation from the European Convention on Human Rights" 2020 6 European Human Rights Law Review 593-609
[69] Milasi v Italy (1987) Application Number 10527/83, para 17-18
[70] Milasi v Italy (1987) n69, para 17
[71] 10 years in this instance. Whilst the pandemic is not 10 years old, claims could certainly be made for over 10 years of legal system underfunding. EG The Secret Barrister, "Stories of the Law and How It's Broken" (2018, Picador). Additionally, due to the case by case analysis, 10 years cannot be seen as a floor by which nothing short of that would be a violation.
[72] Milasi v Italy (1987) n69, para 18

there was a significant risk in the longer term that the English criminal court system would fail to adequately mitigate the increased backlog that resulted from the pandemic, and it could echo the facts and violations as found in *Milasi.*[73]

When states do plead a crisis in defence of delays, without derogating, the ECtHR may find "the crisis situation…which was due to the excessive workload of the courts could scarcely be regarded as temporary."[74] As detailed above, the excessive workload of the English courts is well known and well documented. It is unlikely that the ECtHR would give any allowances to Article 6 liability due to the pandemic exacerbating delays that were already embedded due to chronic underfunding of the criminal court system. It is an example of a common feature of this chapter that there was very little new caused by the pandemic regarding delays. Rather, it was largely an exacerbation of existing structural issues. Furthermore, when there is a commonplace and foreseeable backlog, even if the state is trying to address it, and even when exacerbated by a sudden unforeseeable increase, the state retains their obligations and are still held to the standard Article 6 requirements.[75] This only compounds the position that the courts will have no defence in the crisis of the COVID-19 pandemic to absolve liability regarding undue delays. Therefore, the standards the court system were held to, and the protections offered individuals in regard to delays, were as if it was business as usual.

2.1.1 ADDITIONAL RIGHTS INVOLVING PRE-TRIAL REMAND IN CUSTODY

Almost all criminal cases have a first appearance before the Magistrates' court.[76] The Magistrates[77] then have the power to remand the defendant into custody or allow them to remain in the community,[78] until their trial. At that point, the Magistrates make the determination as to whether or not to impose the highest curtailment of liberty on an innocent individual, by keeping them imprisoned until verdict. This decision can also be made at any subsequent point in proceedings. It is not a decision to be made lightly, and the significance of

[73] Milasi v Italy (1987) ibid, para 17-18
[74] Baggetta v Italy (1986) Application No 10256/83, para 22
[75] Union Alimentaria Sanders S.A. v Spain (1989) Application Number 11681/85
[76] Courts and Tribunals Judiciary, "Magistrates' Courts" < https://www.judiciary.uk/you-and-the-judiciary/going-to-court/magistrates-court/ > accessed 19/09/2021
[77] Or District Justice sitting in the Magistrate courts. The shorthand of magistrate will continue to be used to incorporate both.
[78] Magistrates' Courts Act 1980, Part VII, s128

deprivation of liberty pre-trial can be well seen across human rights instruments. This is because "everyone has a basic right to personal liberty"[79] which may only be abrogated in the strictest of circumstances. That is a right respected by the common law, can be seen in Article 9 ICCPR[80] and is expressed in the ECHR through Article 5(3) which concisely states:

> "Everyone arrested or detained…shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial."[81]

The population subject to pre-trial remand is small; only 4% of Magistrates' matters and 38% of Crown matters[82] involve a defendant remanded into custody prior to their trial. Although only a small population, the importance of protecting their rights is significant - there is a clear and unequivocal desire for defendants to be remanded into custody for as little time as possible before a verdict. This exists in addition to the Article 6 reasonable time requirement above.[83]

When evaluating the permissibility of the duration of pre-trial detention, "liberty is the rule, detention the exception."[84] There is no absolute or objective threshold[85] at which point the state has violated the defendants' Article 5 rights. Rather, much like Article 6 delays, it must be assessed on a case-by-case basis, "according to its special features".[86] It was decided early in the history of the ECHR that "it is not feasible to translate this concept into a fixed number of days, weeks, months or years, or into various periods depending on the seriousness of the offence."[87] To this end, as little as 14 months and 26 days of pre-trial detention was once deemed a violation,[88] and four years and three days was found to be a non-violation.[89]

The starting point for pre-trial detention is that "reasonable suspicion" is enough to authorise arrest and detention.[90] However, this factor alone does not justify continued detention, after a

[79] R v Manchester Crown Court ex parte McDonald [1998] EWHC 319, para 2
[80] "It shall not be the general rule that persons awaiting trial shall be detained in custody": International Covenant on Civil and Political Rights
[81] Article 5(3) ECHR
[82] Ministry of Justice, "National Statistics: Criminal Justice Statistics Quarterly: March 2020"
[83] There are a number of instances where the ECtHR has found a violation of Article 5, but not of Article 6, eg I.A v France 28213/95 [1998] ECHR 89 (23 09/ 1998); B. v Austria (1990)
[84] W v Switzerland 1993 Application No. 14379/88, dissenting opinion of Judge Pettiti
[85] Monica Macovei, "The right to liberty and security of the person: A guide to the implementation of Article 5 of the European Convention on Human Rights" (Council of Europe, Human Rights Handbook, No.5), 34-35
[86] Jėčius v Lithuania (2000) Application No. 34578/97
[87] Stögmüller V Austria (1969) Application No. 1602/62 Para 4 of "As To The Law"
[88] Jėčius v Lithuania (2000) n86
[89] W v Switzerland (1993) n84
[90] Stögmüller V Austria (1969) n87

certain lapse of time, and further reasons, which demonstrate "specific indications of a genuine requirement of public interest"[91] must be given.[92] Reasons can be varied, such as the danger of absconding, collusion, or repetition of offences;[93] or tampering with evidence or suborning witnesses.[94] There is no exhaustive list of reasons. Even when the reasons given for continued detention have been determined to be "relevant and sufficient"[95] the state must also display "special diligence"[96] to deal with the matter expeditiously, due to the seriousness of pre-trial detention. Overall, the system of pre-trial remand in England has rarely been found to be in violation of Article 5.[97] At this time, there have been no applications to the ECtHR, from any signatory, surrounding extended pre-trial detention in light of delays caused by the COVID-19 pandemic.

2.2 IMPACT OF DELAYS ON THE INDIVIDUAL

The impact of delays is felt most strongly by the individuals involved in the criminal justice system – the defendants, victims of crime, witnesses, and even professionals. Defendants are protected from undue delays by the more formal, rights-based protections, such as Article 6 described above. These formal rights protecting defendants are held in high esteem: they are, according to one judge "as near to an absolute right as any which I can envisage";[98] the "birth right of every British citizen";[99] and "axiomatic".[100] In both domestic and international law, they are held in high regards and have been titled "the most fundamental of all freedoms".[101] By contrast, victims are not a party to criminal court proceedings – that is an exchange between

[91] Contrada v Italy (1998) Application No. 27143/95, para 54
[92] Stögmüller V Austria (1969) n87
[93] W v Switzerland (1993) n84 – four years and three days. Noting the praise by the court of the state: "The authorities had neglected nothing… There had also been substantial technical resources" (para 41); the court "finds no period during which the investigators did not carry out their inquiries with the necessary promptness, nor was there any delay caused by possible shortage of personnel or equipment" (para 42)
[94] Contrada v Italy (1998) n91
[95] Toth v Austria (1991) Application No 11894/85, para 73
[96] Matznetter V Austria (1969) Application No 2178/64, para 12
[97] Fair Trials International, "Detained without trial: Fair Trials International's response to the European Commission's Green Paper on detention" (10/2011), 50. The most recent Article 5(3) claim taken to the ECtHR against the UK is 2015 (Magee v UK (2015) Application No. 26289/12)
[98] R v Lord Chancellor ex parte John Witham [1997] EWHC Admin 237
[99] R v Bentley [2001] 1 Cr App R 21, 308 & 304
[100] Attorney General's Reference (No 2 of 2001) [2003] UKHL 68, [2004] 2 WLR 1, para 13 & R v Horseferry Road Magistrates' Court, Ex p Bennett [1994] 1 AC 42, 68
[101] Estes v Texas (1965) 381 U.S. 532, 540

the state and the defendant. This manifests in an imbalance: the "overriding objective"[102] of the Criminal Procedure Rules is "recognising the *rights* of a defendant"[103] contrasted with "respecting the *interests* of…victims."[104] Inherently, the defendant has a wider range of legal claims to protection and care, because they are the ones at risk of punishment and deprivation of liberty. Although, some, very limited, victim's rights have been read into Article 6,[105] the rights of victims in the context of delays are only considered regarding the impact on their ability to bring a civil claim,[106] which is not the subject of this thesis. This is because, by some, a victim was conceived as lowly as nothing more than "evidentiary cannon fodder"[107] to assist the state. In many narratives however, the notion "of 'victims' *rights'* has been catapulted to the forefront of policymaking,"[108] through the "steady stream of "rebalancing" initiatives"[109] as seen in documents such as the HM Governments "Victim's Strategy."[110] In response to the pandemic, the government has said "supporting victims and witnesses is a top priority for the Government."[111] Notably the defendant remains unmentioned. As such, whilst not subject to the highest formal protections, a victim is not utterly without protection during the criminal court process and has been a policy priority, and thus the impact on them is due consideration. Practitioners and professionals exist as an unmentioned afterthought at best or are criticised and denigrated at worst.[112] The first portion of this section looks at the impact of an increasing backlog of each on these sets of individuals.

[102] Criminal Procedure Rules 2013 (SI 2013/1554) Part 1, s1.1 (1)
[103] Criminal Procedure Rules 2013 ibid, s1.1(2)(c). Emphasis added.
[104] Criminal Procedure Rules 2013 ibid, s1.1(2)(d). Emphasis added.
[105] Doorson v Netherlands (1996) Application No. 20524/92, 22 EHRR 330, para 70
[106] Tomasi v France (1992) Application no. 12859/87
[107] Jonathan Doak, "Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties" (2008, Hart Publishing, 1st Edition) Chapter 1: Evolution of Victims' Rights, 35, citing John Braithewaite & Kathleen Daly (1998), 154
[108] Jonathan Doak, ibid, 1. Emphasis added.
[109] David Ormerod, "Getting it Right for Victims and Witnesses" 2012 5 Criminal Law Review 317-319, 317
[110] HM Government, "Victims Strategy" (09/2018, Cm 9700)
[111] Chris Philip, "Courts: Questions for Ministry of Justice" (UIN 902035, 24/06/2021) <https://questions-statements.parliament.uk/written-questions/detail/2021-06-24/902035/> accessed 18/02/2022
[112] EG Charles Hymas, "Barristers accused of 'irresponsible and unwarranted' plans to strike over pay row" (The Telegraph, 18/01/2022) < https://www.telegraph.co.uk/news/2022/01/18/barristers-accused-irresponsible-unwarranted-plans-strike-pay/ > accessed 20/02/2022; David Gauke, "When it attacks 'lefty lawyers', this government takes aim at the rule of law" (The Guardian, 20/10/2020) < https://www.theguardian.com/commentisfree/2020/oct/20/attacks-lefty-lawyers-rule-of-law-boris-johnson-priti-patel> accessed 20/02/2022

2.2.1 DEFENDANTS

In the criminal court, Lord Steyn outlined the rationales for the "reasonable time" requirement: it prevents defendants "remain[ing] too long in a state of uncertainty about his fate".[113] It placed the defendants' mental state at the centre of this right. Lord Woolf echoed the impact of delays on the defendant's mental health position, speaking to the unnecessary suspense and distress[114] that is caused, as a result of awaiting the possible imposition of punishment.. As delays increased due to COVID-19, the time a defendant remains under the burden of a prosecution increased greatly. This resulted in a greater, longer, mental health burden on defendants. Furthermore, when addressing the mental health impacts of defendants, it is vital to remember that a number of defendants may be suffering the impact of victimhood in parallel. Domestic abuse victims, who commit a crime in response to that abuse, [115] are notable examples. Equally concerning are human trafficking victims who commit crimes.[116] Even defendants putting forward a self-defence defence may be suffering feelings of victimhood due to the actions that provoked their self-defence. This further evidences the rationale behind, and need for, swift justice.

The ECtHR similarly determines that ensuring "accused persons do not have to lie under a charge for too long" is the aim of the speedy justice requirements.[117] The impacts of prolonged proceedings are significant even without the imposition of pre-trial custody, with "the defendant's life… blighted" [118] by the charge. This is, in part, due to the "major (such as being held in custody and losing one's family and one's job) or more minor"[119] losses, such as a curfew, a defendant may feel. This impact on the individual is so significant that "there is no need for prejudice to be shown by the accused resulting from the delay"[120] for it to still be seen

[113] Stögmüller v Austria (1969) n87, 191, para 5, quoted by Lord Steyn in Mills v HM Advocate [2004] 1 AC 441; [2002] 3 WLR 1597 at para 14
[114] Attorney General's Reference (No 2 of 2001) [2001] 1 WLR 1869
[115] E.G R v Ahluwalia (1993) 96 Cr App R 133
[116] United Nations Office on Drugs and Crime, "Female Victims Of Trafficking for Sexual Exploitation as Defendants: A Case Law Analysis" (12/2020)
[117] Wemhoff v Germany (1968) Application Number 2122/64 at para 18
[118] H.M. Advocate v R [2002] UKPC D3, [2003] 2 WLR 31, Lord Rodger para 151. Although this is from the minority opinion, this statement as to the impact was not disputed
[119] John Jackson & Jenny Johnstone, "The reasonable time requirement: an independent and meaningful right?" 2005 Jan Criminal Law Review 2-23, 9
[120] Andrew Ashworth & Michelle Strange "Criminal law and human rights" 2004 2 European Human Rights Law Review 121-140, 130

as unacceptable. Defendants suffer enough from the mere existence of delay for it alone to be worthy of remedy. That suffering was protracted as the delays increased due to COVID-19.

When a delay was determined to have been unreasonable, the question of remedy for the defendant becomes relevant. Delay to conviction, established after conviction, does not automatically require the conviction be quashed.[121] The remedies available to these defendants are limited – with financial compensation to an acquitted defendant or reduced sentence for the convicted defendant[122] being the only remedies likely to be felt and appreciated by defendants.[123] Both of these possibilities would have significant policy implications should they be claimed on the same widespread scale as those who were impacted by the pandemic.

For live proceedings, although the courts have the capacity to halt live criminal proceedings as a result of excessive delay,[124] more recently they constrained themselves. When faced with excessive delay, the question is now "if (a) a fair hearing is no longer possible, or (b) it is for any compelling reason unfair to try the accused"[125] due to the delay. This appears to contrast with the clear position that reasonable time is a right in and of itself rather than merely a component of the fair trial rights. It can be submitted that this is a logical reading "since the primary rationale of the right is to avoid defendants being prejudiced by the effects of delay rather than to avoid defendants having to face trial." [126] However, it is important to note that the reasoning behind the right is far wider, in that it protects the defendant from additional punishment of protracted delay[127] from the distress of proceedings, and from the informal social impacts associated with tarnished name.[128] This approach is also acknowledged to contrast with the approaches of Scotland,[129] the United States, Canada and New Zealand,[130] where an unreasonable delay alone has been used to grant a stay of proceedings.

[121] Dyer v Watson [2004] 1 AC 379, Lord Hutton at para 121
[122] Attorney General's Reference (No. 2 of 2001) n114, Lord Bingham at para 24
[123] Public acknowledgement of the breach is unlikely to significantly impact the defendants directly, and whilst holding a trial as expediently as possible is clearly desirable the currently backlogs mean that this is already being done and still resulting in multi-year waits.
[124] Bell v DPP of Jamaica [1985] AC 937
[125] Attorney General's Reference (No. 2 of 2001) n114
[126] John Jackson & Jenny Johnstone, n119, 22
[127] Wemhoff v Germany (1968) n117 at para 18 and cited in Attorney General's Reference (No. 2 of 2001) n114 Lord Bingham at para 16
[128] Richard Moules, "The Right to Trial Within a Reasonable Time" 2004 63(2) Cambridge Law Journal 265-268, 265
[129] H.M. Advocate v R, n118
[130] Attorney General's Reference (No. 2 of 2001) n114, Lord Bingham at para 18

The English approach to the appropriate remedy for a breach of reasonable time requirements of a live matter "may be a public acknowledgement of the breach, action to expedite the hearing to the greatest extent practicable and perhaps, if the defendant is in custody, his release on bail."[131] In the context of a pandemic stricken criminal court system, the effectiveness of these remedies was in large part undermined. It was impossible to expedite a hearing when the lists extended to 2023, and the delays were so system wide. The number of hearings to be expedited was too high. The release of a defendant on bail, as discussed below, was undermined by changes to the CTL procedures. The policy implications of widespread release of defendants previously deemed unable to reside in the community pre-trial would be immeasurable and in direct contrast to contemporary government policy of being "tough on crime."[132] In order to reduce the likelihood of defendants being able to claim these remedies, it would not be unreasonable to be concerned that there may be a further emphasis on the *AG-Ref (2 of 2001)*[133] reasoning of focusing only on the impact on the trial, rather than focusing on the impact on the individual. Should that be the case, COVID-19 may cement the reformulation of the right to limited delays into a far less independent right and result in a long term reduction in defendants rights in this arena.

The importance of speedy justice for defendants is reiterated time and time again: individuals, whether or not they are eventually found innocent or guilty, [134] should not be subject to the uncertainty and social punishment, or even pre-trial detention, for a prolonged period of time. Delays in their own right are harmful to the mental health of defendants. COVID-19 has made the time between charge and verdict more extreme – more delays, more adjournments, more extreme mental health impacts.

The Article 6 threshold is high for a violation to be found, generally in excess of five years. In March 2021, there were no listings that far in advance. However, it is increasingly likely that this window will be exceeded on a widespread basis. Moreover, the time duration includes any, and all, appeal rights the defendant has; should any of these individuals seek to explore those avenues, there is a very real possibility that the time elapsed will exceed even the generous allowance by the ECHR. The policy impacts – widespread possible compensation or reduction in sentences – would be incalculable. Moreover, although the time allowance of the ECHR is

[131] Attorney General's Reference (No. 2 of 2001) n114, Lord Bingham at para 24
[132] EG Home Office, "Policy Paper: Beating Crime Plan" (6/09/2021) <https://www.govuk/government/publications/beating-crime-plan/beating-crime-plan> accessed 20/09/2021
[133] Attorney General's Reference (No. 2 of 2001) n114
[134] R v Darmalingum [2000] 1 WLR 2303, at 2307

rather generous, and not generally exceeded, this does not mean that the delays caused by COVID-19 were acceptable and nor was the impact of prolonged litigation minimal. If the backlog, and window between charge and trial, is not significantly reduced with urgency and immediacy the English criminal court system will be at real risk of undermining one of the core tenants of the right to fair trial, despite its status as "as near to an absolute right as [can be] envisaged."[135]

2.2.2 VICTIMS

Being engaged in the criminal justice process as a victim of crime is a trying and a challenging experience, even during the most ideal of circumstances. Being the victim of a crime can have extraordinarily wide-ranging implications on the victim's mental health. This can be as significant as the development of post-traumatic stress disorder (PTSD); Kilpatrick found nearly a quarter of female victims suffered some form of PTSD after a crime, with victims of rape suffering the highest rates at 58%.[136] Secondary mental health effects can be wide ranging and can include the development of depression,[137] suicidal thoughts and attempts,[138] alongside a battery of other impacts such as fear, reduction in self-esteem, anxiety, and poorer inter-personal functioning.[139] Many of these symptoms are then worsened by engagement in an adversarial legal system. Herman commented that "if one set out intentionally to design a system for provoking symptoms of traumatic stress, it might look very much like a court of law."[140] With the system of delays, adjournments, and adversarial cross examination, it is unsurprising this conclusion was drawn. This thesis now discusses how delays caused by the pandemic further damage the mental health position of the victim.

[135] R v Lord Chancellor ex parte John Witham n98
[136] Dean Kilpatrick et al, "Criminal Victimization: Lifetime Prevalence, Reporting to Police, and Psychological Impact" (1987) 33(4) Crime & Deliquency 479-489, 487
[137] Beverly Atkeson, "Victims of rape: Repeated assessment of depressive symptoms" 1982 50(1) Journal of Consulting and Clinical Psychology 96-102
[138] Patricia Resick, "Psychological Effects of Victimization: Implications for the Criminal Justice System" (1987) 33(4) Crime & Deliquency 468-478, 470
[139] Patricia Resick, ibid, 471
[140] Judith Herman, "Justice from the Victim's Perspective" (2005) 11(5) Violence Against Women 571-602, 574

The time between the offence and the eventual conclusion of proceedings[141] is a period of great uncertainty or indeed fear for victims of crime. Although the Victims Code[142] does not speak to a need for expediency or lack of delay in proceedings,[143] much like defendants, victims should not be held in the state of uncertainty, suspense, and distress that manifests in criminal proceedings. Ideally, cases should be dealt with "efficiently and expeditiously".[144] However, both the pre-pandemic and post-pandemic court system include delays of such a long period that are "doubtless causing a considerable increase in the stress placed on victims."[145]

For victims suffering mental health repercussions of a crime, talking therapies such as Cognitive Behaviour Therapy (CBT) have been found to be the most effective form of treatment.[146] The National Institute for Health and Care Excellence (NICE) recommends that such interventions should occur within 1-3 months of the traumatic incident.[147] However, when placed within the context of an effective criminal prosecution, it is vital to consider the CPS guidance in addition to the clinical advice. It states "some types of therapeutic work are more likely to be seen as prejudicial…[as they may] influence memory of the witness as to events or the account they give."[148] More specifically, "any detailed recounting or re-enactment of the offending behaviour may be perceived as coaching…[and]…the criminal case is almost certain to fail as a consequence of this type of therapeutic work."[149] Victims have, therefore, been placed in a position where they may be forced to choose between the benefits of swift clinical intervention and the benefits of preserving the possibility of an effective criminal trial. However, this is a position that victims have been in long prior to COVID-19.

The impact of the COVID-19 pandemic is that it has drastically increased the duration of the court proceedings; proceedings are now spanning multiple years, victims are kept in a state of holding for far longer than desirable from a clinical perspective. For some, this increased

[141] This may be through a guilty plea, a verdict, or the conclusion of all appeal avenues.
[142] Code of Practice for Victims of Crime in England and Wales (Victim's Code), Statutory Guidance (Updated 21/04/2021) Issued by the Secretary of State for Justice under section 32 of the Domestic Violence, Crime and Victims Act 2004
[143] It speaks only to a lack of delay in the recording of the details of the crime (Right 2)
[144] Criminal Procedure Rules 2013 n102, s1.1(2)4
[145] Rt Hon Sir Brian Leveson, "Review of Efficiency in Criminal Proceedings" (Judiciary of England and Wales, Jan 2015), para 318
[146] Hege Korner et al, "Early trauma-focused cognitive-behavioural therapy to prevent chronic post-traumatic stress disorder and related symptoms: a systematic review and meta-analysis" 2008 BMC Psychiatry 8(81)
[147] National Institute for Health and Care Excellence, "Post-traumatic stress disorder" (5/12/2018) < https://www.nice.org.uk/guidance/ng116> accessed 19/08/2021 para 1.6.6 & page 32
[148] CPS, "Therapy: Provision of Therapy for Vulnerable or Intimidated Adult Witnesses) Legal Guidance, Sexual Offences, < https://www.cps.govuk/legal-guidance/therapy-provision-therapy-vulnerable-or-intimidated-adult-witnesses> accessed 19/08/2021
[149] CPS, ibid, para 11.11

duration changed the balance of the decision-making process for victims, in favour of disengaging with the criminal justice process.[150] For victims that have balanced the competing factors, and determined legal engagement was the correct course for them, on the assumption that proceedings were likely to have concluded in 2020, the pandemic has now undermined that balancing exercise. Those entering the criminal justice system may well be aware that they are likely to wait four years before the conclusion of proceedings and may decide not to engage at all. Such disengagement may deprive the victim of legal acknowledgement of their victimhood and reduces[151] the chance of the defendant being punished. Such victim attrition would also have widespread impacts on the wider criminal justice system, which is discussed in more depth below.

Of course, it is important to note that some victims do not suffer any mental health difficulties that rise to a level of severity as to require treatment. This does not mean that they are unimpacted by the delays caused by the COVID-19 pandemic. In fact, extensive delays and protracted proceedings were "the associated sense of one's life being 'on hold' pending the agency of others [which was] liable to have a detrimental impact upon psychological and emotional well-being."[152] Increased delays also "increase the likelihood of defendants pleading not guilty."[153]An increased number of not guilty pleas results in a greater number of victims subjected to the mental health challenges of a drawn-out court process and the challenges of being required to give evidence. The severity of the impact of the growing delays was seen by the Victims Support charity, which found some victims "have attempted suicide due to court delays, due to not feeling able to live in limbo for an extended period."[154] Research by Burman and Brooks-Hay[155] found sexual offences victim spoke of the delayed proceedings as "three

[150] The rates of "Evidential Difficulties" due to the victim no longer supporting action has increased consistently from 6.9% in 03/2015 to 21.7% in Dec 2020. Home Office, "Crime Outcomes in England and Wales, year ending 12/2020: Data tables" (07/2020) < https://www.govuk/government/statistics/crime-outcomes-in-england-and-wales-2019-to-2020> Table 2.3. This correlates with the consistent increase in time duration of criminal proceedings. This was also noted in Rachel Almedia, "Crime and COVID-19: How Victims and Survivors have been Impacted by the Pandemic" (11/2020, Victim Support), 22 and reported in The Guardian: Michael Savage, "Victims of crime suffer as backlog of court cases hits 'crisis level'" (4/04/2021, The Guardian) < https://www.theguardian.com/law/2021/apr/04/victims-of-suffer-as-backlog-of-court-cases-hits-crisis-level> accessed 18/08/2021

[151] It is important to note that victim disengagement is not a sole factor that can prevent prosecution.

[152] Louise Ellison & Vanessa Munro, "Taking trauma seriously: critical reflections on the criminal justice process" (2017) 21(3) International Journal of Evidence and Proof 183-208, 194

[153] Rt Hon Sir Brian Leveson, n145, para 318

[154] Rachel Almedia, "Crime and COVID-19: How Victims and Survivors have been Impacted by the Pandemic" (11/2020, Victim Support), 21

[155] Michele Burman & Oona Brooks-Hay, "Delays in Trials: The Implications for Victim-Survivors of Rape and Serious Sexual Assault" (The Scottish Centre for Crime and Justice Research, 07/2020), It is acknowledged that

years of traumatization"[156] and how the mental health impacts of the delayed trial were even more significant than any concerns about the COVID-19 virus itself.[157] This demonstrates how significant the mental health impacts of COVID-19 delays were on victims – not only were the pre-existing impacts of slow justice exaggerated, but they were also extended to impact more victims.

The social health measures imposed through the first year of the pandemic further exacerbated the general mental health problems associated with delays. Limitations on social interactions stripped many people of their support networks: "Lockdown [was] hard enough, never mind putting [the extended court process] in the mix".[158] Victims had "more time to think about their situation and are saying they are experiencing higher anxiety and stress due to isolation at home."[159] The existence of lockdown and isolation measures made the waiting process significantly harder on victims. In the case of domestic abuse victims, the "deterioration in their mental health during lockdown has resulted in individuals affected by domestic abuse feeling they need the perpetrator for support…[with]… incidences when individuals have got back together with the accused."[160] Not only did this undermine the victim's long-term mental and physical wellbeing, but it could have also undermined any prosecution of the abuser. This may have been through the victim withdrawing support for a prosecution, or the integrity of the trial being undermined due to a resumed relationship. This isolation imposed on victims can be traced back entirely to the pandemic measures. It had hugely detrimental effects on the victim's mental health, and is one of the few changes with such an absolute causative link.

A further concern of, and risk to, victims is the possibility for reoffending by defendants that are not remanded into custody. This concern was further exacerbated by the extensive delays caused by COVID-19. As stated above, the vast majority of defendants are not remanded into custody post charge by the police.[161] Rather, the "majority of those remanded in police custody are given bail or released by the court."[162] This results in a pre-trial detainee population of

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this research is conducted on the Scottish legal system, however, it is submitted that the legal systems and delays faced are similar enough that the experiences of Scottish victims are comparable to the experiences of English victims.

[156] Michele Burman & Oona Brooks-Hay, ibid, 3

[157] Michele Burman & Oona Brooks-Hay, ibid, 4

[158] Michele Burman & Oona Brooks-Hay, ibid, 1

[159] Victims Taskforce, "Impact of COVID-19 on Victims, Witnesses and Survivors – Evidence from Support Organisations" (10/06/2020), 5

[160] Victims Taskforce, ibid

[161] Penelope Gibbs and Fionnuala Ratcliffe, "24 hours in police custody — is police detention overused?" (06/2020, Transform Justice), 24

[162] Penelope Gibbs and Fionnuala Ratcliffe, ibid, 26

approximately 10,000, which remained consistent for the past five years.[163] This means that most defendants remain in the community prior to their trial, but subject to a number bail conditions. When applying for bail conditions, "any conditions requested [must] prioritise the safety of the complainant."[164] Appropriately, the safety of the victim is an incredibly high priority. This was not something impacted by the pandemic. Inherently, although the innocent state of pre-trial-defendants must always be respected and considered, defendants in the community have an opportunity to reoffend that is not available to those on remand. Due to the increased time period between offence and verdict, defendants with proceedings that were live after March 2020 had a larger time period to reoffend than they would have in a pre-COVID-19 impacted criminal court system.

The clearest evidence of how delays caused by COVID-19, and the increased possibilities for reoffending, increased the fear and risk to the safety of victims,[165] is through the lens of domestic abuse offences.[166] COVID-19 Charging Guidance classed "high risk domestic abuse" as a case where "it should be anticipated that the defendant will be placed before the next available court, for an application to remand them in custody."[167] This was because of the considerations of the seriousness of the offence, risks of further offending, and possibility for interference with witnesses.[168] However, "other domestic abuse" generally falls into the category of being a bail case.[169] This means a not-insignificant number of domestic violence perpetrators remained in the community for an extended window of time, prior to any verdict.

The nature of the pandemic increased the potential ability of those defendants to inflict further harm on their victims. The public health measures as a result of COVID-19, whether fully imposed lockdown or advised shielding, left many individuals spending most of their time in the home. As a result, some victims of domestic abuse felt "worried that an accused knows that

[163] Tom Smith, "'Rushing Remand'? Pretrial Detention and Bail Decision Making in England and Wales" 2020 60(1) The Howard Journal of Crime and Justice 46-74, 48
[164] CPS, "Domestic Abuse Guidelines for Prosecutors" Updated 28/04/2020 < https://www.cps.govuk/legal-guidance/domestic-abuse-guidelines-prosecutors> accessed 20/08/2021
[165] Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS), "Review of policing domestic abuse during the pandemic – 2021" (23/06/2021) < https://www.justiceinspectorates.govuk/hmicfrs/publication-html/review-of-policing-domestic-abuse-during-pandemic/> accessed 30/07/2021
[166] These could include Controlling or Coercive Behaviour Offences, Sexual Offences, Stalking and Harassment Offences, Non-Fatal Offences Against the Person in a domestic setting ect
[167] National Police Chiefs' Council and Crown Prosecution Service, "Interim CPS Charging Protocol--COVID-19 crisis response' (31 03/2020) < https://www.cps.govuk/sites/default/files/documents/legal_guidance/Interim-CPS-Charging-Protocol-COVID-19-crisis-response.pdf>, para 6
[168] National Police Chiefs' Council and Crown Prosecution Service, ibid, para 10. Considerations identified from Bail Act 1976
[169] National Police Chiefs' Council and Crown Prosecution Service, ibid, section B

they are unable to leave the home during isolation, and…that they are easy targets." [170] This contrasted with the pre-pandemic situation where victims would leave the house for working obligations and social interactions, or to stay with friends and family. Adding to this, COVID-19 drastically impacted all support services, including domestic abuse support, such as refuge provision.[171] This made it more likely that the victim was forced to remain in a location known to the defendant, which increased the vulnerability, and feelings of vulnerability, experienced by the victim.

Additionally, to defendants on bail, the pandemic offered a range of new means to exert control over the victim. The Home Affairs Committee found that as early as April 2020 "incidents [were] becoming more complex and serious, with higher levels of physical violence and coercive control."[172] Defendants used lockdown restrictions to control their victims without ever making contact: "abusers have called police to report domestic abuse survivors, using lockdown measures to control children's and women's movements even when the latter had valid reasons for going out."[173] Whilst the precise numbers are not known, the COVID-19 lockdown and restrictions caused a significant worsening of the position of victims of domestic abuse. Further, awareness of this potential contributed to fear of further offences for many victims.

Positively, DVPO (Domestic Violence Protection Orders) hearings were reported to be far more efficient in a virtual courtroom[174] - the use of the virtual courtrooms is explored further in Chapter 3. This has resulted in more protection orders and a greater level of legal protection for victims. This should be of benefit to the mental and physical wellbeing of victims, and reduce the increased fear described above. However, due to the pressures of the pandemic, some victims have spoken of a "fear about reporting breaches…feeling that it would not be likely that individuals would be remanded because of the pressure put on the prisons by COVID-19." [175] This means that whilst the legal protections were being put in place more

[170] Victims Taskforce, n159, 2
[171] Sarah Davidge, "A Perfect Storm: The Impact of COVID-19 Pandemic on Domestic Abuse Survivors and the Services Supporting Them" (Women's Aid, 2020) 18-20; House of Commons Home Affairs Committee, "Home Office preparedness for COVID-19 (Coronavirus): domestic abuse and risks of harm within the home" (27/04/2020, HC 321), 18
[172] House of Commons Home Affairs Committee, "Home Office preparedness for COVID-19 (Coronavirus): domestic abuse and risks of harm within the home" (27/04/2020, HC 321), 4
[173] Victims Taskforce, n159, 3
[174] Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS), n165
[175] Victims Taskforce, n159 , 11

effectively as a result of the pandemic, victims still felt less safe, due to the combination of higher vulnerability and a perception of lower accountability.

The cumulative effect of the worsening position of victims as a result of the COVID-19 pandemic is an increased level of victim attrition. 'Attrition' is the process by which the number of cases reported to the police is significantly higher than the number of cases concluded in the criminal courts.[176] It has long been a source of concern, especially within the sphere of rape and sexual offences.[177] Victim attrition, or victim withdrawal, occurs when victims of crime drop out of the criminal justice process, whether by actively withdrawing their support for prosecution or simply ceasing to engage with authorities. Victim withdrawal is not the only pathway to attrition, but one study found that it accounted for nearly half of the overall case attrition. [178] Although victim attrition may be caused by a variety of factors, such as poor treatment by the police[179], "a major factor is delay."[180] As such, the increase in delays aggravated by COVID-19, and the increased impact on victim mental health this may cause, was likely to exacerbate the issue of victim attrition. The rates of prosecutions concluding because of a victim not supporting action, with a suspect identified, has correlated with the rates of increasing case backlog for the past five years.[181] It would follow that the drastic increase in backlog induced by COVID-19 may also result in a drastic increase in victim attrition.

The rate of victim attrition shows significant problems with the criminal justice system and how it treats victims. In 2011, 90% of victims stated that they would be willing to repeat their experience in the criminal court process should they be a victim again.[182] By 2015, this had dropped to 52%.[183] Over this time, one of the biggest changes to the victim experience had been

[176] Home Office, "The Stern Review: A Report By Baroness Vivien Stern Cbe Of An Independent Review Into How Rape Complaints Are Handled By Public Authorities In England And Wales" (2010), 10
[177] Anthony Murphy et al, "Lessons from London: a contemporary examination of the factors affecting attrition among rape complaints" 2022 28(1) Psychology, Crime & Law 82-114
[178] Katrin Hohl & Elizabeth Stanko, "Complaints of rape and the criminal justice system: Fresh evidence on the attrition problem in England and Wales 2015 12(3) 324-341, 333
[179] Aliraza Javaid, ""Walking on egg shells": policing sexual offences against men" 2017 90(3) Police Journal 228-245, 240
[180] Victims Commissioner, "One in Four Cases, Victims Withdraw Support for Prosecution" (29/10/2020) <https://victimscommissioner.org.uk/news/one-in-four-cases-victims-withdraw-support-for-prosecution/> accessed 15/08/2021
[181] Home Office, "Crime Outcomes in England and Wales, year ending 12/2020: Data tables" (07/2020) < https://www.govuk/government/statistics/crime-outcomes-in-england-and-wales-2019-to-2020> Table 2.3.
[182] Commissioner for Victims and Witnesses in England and Wales, "Victims Views of Court and Sentencing: Qualitative Research with WAVES victims" (10/2011), 31
[183]Martin Wood, Katriina Lepanjuuri and Caroline Paskell, "Victim and Witness Satisfaction Survey" (CPS, 2015), 10 & 34

the increased delays. As such, it is likely that the increased delays from the pandemic will only worsen this statistic. The increasing rate of victim attrition showed that proceedings with the criminal justice system were increasingly not worth the anxiety it caused.

A victim withdrawing their support for a continued prosecution should not be a determining factor in whether or not a prosecution goes ahead, with 'evidence-led prosecutions' to be considered in that event.[184] Unfortunately, however, "there were disappointingly mixed reports about the extent to which forces and the CPS are pursuing evidence-led prosecutions."[185] Domestic violence cases specifically have a notedly high attrition rate, and extremely low evidence-based prosecution rate.[186] In part, this is because "it is harder to secure a conviction of the guilty without the engagement or the support of the victim."[187] Victim non-engagement may also undermine the evidential test[188] that prosecutors must meet before deciding to prosecute, as the victim is the key source of evidence. This has immense impacts on the wider criminal justice system. Fewer prosecutions and fewer guilty verdicts arising from the remaining prosecutions reflects "the limited ability of a system to solve crimes…[and indicates] the inefficiency of the system."[189] The treatment of individuals is a key standard used to determine trust and confidence in the criminal court system.[190] Therefore, when victims experience delays to a degree that one in four no longer wish to engage, they are not being treated in the best manner, and it is likely to have a widespread impact on trust in these institutions. [191]

A lack of trust can be devasting on the effectiveness of the criminal justice system, it manifests in statistics such as that 20% of victims did not inform the police about a crime, because they "don't think the police would have bothered or been interested."[192] It is impossible for the criminal court system to fulfil its functions if increasing numbers of crimes are not reported

[184] Justice Inspectorates, "Meeting the needs of victims in the criminal justice system: A consolidated report by the criminal justice inspectorates" (12/2015), 39
[185] Justice Inspectorates, ibid, 43
[186] Vanessa Bettinson, "Restraining orders following an acquittal in domestic violence cases: securing greater victim safety?" 2012 76(6) Journal of Criminal Law 512-527, 513
[187] Justice Inspectorates, n184 , 42
[188] CPS, "The Code for Crown Prosecutors" 26 10/2018 <https://www.cps.govuk/publication/code-crown-prosecutors> Para 4.6 accessed 10/08/2021
[189] Julien Chopin & Marcelo Aebi, "The level of attrition in domestic violence: A valid indicator of the efficiency of a criminal justice system?" 2020 17(3) European Journal of Criminology 269-287, 270
[190] Francis Boateng, "Trust and Confidence in Media and Criminal Justice Institutions" 2019 63(12) International Journal of Offender Therapy and Comparative Criminology 2213-2233, 2213
[191] Julian Molina & Sarah Poppleton, "Rape Survivors and the Criminal Justice System" (10/2020, Victims Commissioner), 22 & 25
[192] Victims Commissioner, "Victims Statistics" (25/03/2020), 2

due to lack of trust. Worsening this – through things like the COVID-19 exacerbated delays – will lead to further failure to engage in future and a self-perpetuating cycle of criminal justice system failures. This undermines principles that impact all of society, that serious crime should be effectively investigated and prosecuted."[193] The Gillen Report even raised rule of law implications resulting from under-reporting and high attrition.[194] As such, this may be one of the most detrimental and widespread impacts as a result of the pandemic. Increased victim attrition undermines the entire criminal justice system. It demonstrates the COVID-19 stricken court system was not meeting victims' needs and worsens their future position.

It is important to acknowledge the efforts that were made to reduce the backlog and mitigate the delay experienced by victims. Nightingale courts and additional funding were framed as supporting and assisting victims, rather than defendants.[195] Additional funding financed more court sitting days, improved technology for virtual hearings, and additional support staff. It is hoped that this additional funding, allocated due to the pandemic, may be continued to allow the position of victims to be improved beyond the pre-pandemic level. However, it is too early to make any determinations with confidence.[196] Lammy claims the support and government statements amount to little more than "false hope" given to victims.[197] If this accusation is found to be true, this could be damaging to victims in a similar manner to adjournments are harmful to their mental health, as is discussed below.

[193] Attorney-General's Reference (No 3 of 1999) [2001] 2 AC 91, 118 cited with approval by the House of Lords in R v H [2004] 2 AC 134,145–6

[194] Sir John Gillen, "Gillen Review: Report into the law and procedures in serious sexual offences in Northern Ireland: Part 1" (04/2019), 5

[195] "We are spending £450m to deliver speedier justice for victims and this is already having an impact – outstanding magistrates' cases have fallen by 50,000 since last summer, and more jury trials are being heard every week. Scores of Nightingale courts have been opened alongside a 4,000% increase in video hearings to drive this recovery further, while we are investing record amounts in victim support and reviewing the entire response to rape and sexual violence to bring more offenders to justice." – MoJ - Michael Savage, "Victims of crime suffer as backlog of court cases hits 'crisis level'" (4/04/2021, The Guardian) < https://www.theguardian.com/law/2021/apr/04/victims-of-suffer-as-backlog-of-court-cases-hits-crisis-level> accessed 18/08/2021

[196] Note the dispute between recent promises of increased funding and the assessment of its sufficiency. Richard Pohle, "Raab accused of 'masterclass in deception' over legal aid boost" (The Times, 24/03/2022) < https://www.thetimes.co.uk/article/raab-accused-of-masterclass-in-deception-over-legal-aid-boost-wb67crtdg > accessed 28/03/2022

[197] Michael Savage, n195

2.2.3 IMPACTS OF ADJOURNMENTS

Adjournments are not uncommon in the criminal court system and predate the pandemic. Warned lists, floating lists, and back-up fixtures are all measures commonplace across the court system. This is a listing technique that lists a trial with a fixed date that is due to be heard on that specific date, whilst having multiple others "on standby". These 'warned' or 'floating' backup cases are given a window, during which the case may be called on at any point, should a Judge, Jury and courtroom become available. All parties involved in those proceedings must be available for the entire window. Should the warned cases not be heard, they will be relisted to a future date, and possibly a future warned list, to go through the process again.[198] With the number of short notice guilty pleas and cracked cases, the warned lists ensure that when a Judge and courtroom are available, so too is a criminal trial to be heard. Listings – including the decision to list into a warned list and to adjourn – is a judicial decision. Adjournments may be seen as representative of the differing priorities in the criminal justice system. Ensuring the maximum efficiency of the court estate is the priority and is achieved with this listing technique. However, it is done so at the time and mental health expense of all actors in the criminal justice system.

The use of warned lists and their resultant adjournments was "justifiably criticised for failing to consider the needs of [victims and witnesses] and for creating uncertainty… [they] are expected to put their lives on hold for a fortnight with no guarantee of the case being heard."[199] There was a similar impact on defendants, who would be expecting an end to the uncertainty. Defendants' lives were also put on hold for the warned window, with external obligations – such as work – having to fall to the side. Victims may have been seeking an end to proceedings, but defendants will be seeking an end to all forms of restrictions on their liberty. It has been noted that "adjournment of trials means that complainants will often experience the anticipatory stress and preparation regarding testifying, only to be sent home to prepare again at a later date".[200] It is this emotional turmoil that impacted on parties above the general effects of protracted proceedings. Leverson found that "adjournments of court hearings are frustrating

[198] National Audit Office, "Efficiency in the criminal justice system" (Ministry of Justice, HC 852 Session 2015-16) para 3.16
[199] Woolrich Judges, "Woolwich Crown Court Listing Pilot 2020: Briefing Paper" (2020) < https://www.lccsa.org.uk/wp-content/uploads/2020/01/Woolwich-Listing-Pilot-Briefing.pdf> accessed 20/08/2021
[200] Louise Ellison & Vanessa Munro, n152, 194

and stressful for victims"[201] and lead to "dissatisfaction."[202] This can develop to such an extent that victims consider "withdrawing from the process altogether rather than endure this uncertainty."[203] There is no reason that defendants have not suffered the same preparatory anxiety and frustration, however, they are rarely mentioned in the literature.[204] Adjournments place a significant mental health strain on all participants. The repeatedly quashed anticipation of an end to proceedings caused an additional strain beyond delay and in its own right.

At the start of the COVID-19 pandemic, there was a mass adjournment of all criminal trials.[205] Whilst necessary in the interests of public health, this widened the mental health challenges of adjournments to nearly all engaged in the criminal court process. Moreover, due to the uncertain nature of the pandemic, the effects of uncertainty due to adjournments were worsened. There was no known end date to the pandemic, trials were adjourned with no clear return dates or concluding dates. In March 2020, it was unknown when the social distancing restrictions would lift, or what measures could be implemented to allow hearings to run. Even after the removal of official restrictions,[206] listing had not returned to the pre-pandemic normal. This made listing realistic return trials incredibly challenging and removed any feeling of confidence in the listing. There is an increased level of uncertainty resulting from this, which resulted in an increased strain on individuals.

The impacts of the listing challenges were seen across court centres. For example, rather that attempt to predict when a trial could be listed, "some magistrates' courts fixed [a] single future date for all trials…[as]… there needed to be a court date for all parties to plan for" even though the case would not likely be heard on that date.[207] It was a desperate listing approach that does not take into account the needs of the individual. As a result, the anxiety and distress felt because of the adjournments is exacerbated, as actors are stripped of any certainty,[208] or even appearance thereof. Furthermore, these adjournments built upon the pre-existing system of warned lists. Many victims who faced adjournment in 2020 "had already reached their second

[201] Rt Hon Sir Brian Leveson, n145, para 128
[202] Rt Hon Sir Brian Leveson, n145, para 144
[203] Victims Taskforce, n159, 9
[204] EG in Criminal Justice Joint Inspection, n3 .The position of defendants is never explored in isolation, rather with other actors, and is only done so 3 times. Victims are referred to around 3 times more often.
[205] The Lord Burnett of Maldon, Lord Chief Justice, n6
[206] Hazel Shearing & Joseph Lee, "19 July: England COVID restrictions ease as PM urges caution" (19/07/2021, BBC) < https://www.bbc.co.uk/news/uk-57882029> accessed 12th 08/2021
[207] Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS), n165
[208] Victims Taskforce, n159 , 7

or third set of dates."[209] As such, the impact of the pandemic on adjournments is that it has widened the scope of those facing the challenges of adjournment, it has compounded the degree of effects being felt, alongside being a vehicle for additional delay.

Beyond the lay parties, the impact of COVID-19 listing was immense on practitioners in the criminal court. Due to the degree of adjournments, 85% of criminal chambers saw a loss of fee income over 40%.[210] The loss of income was to such a degree that there was concern that a significant proportion of chambers may have had to close within a year.[211] When hearings are adjourned at last minute, as is often the practice, counsel lose both the fee they could have claimed and the short notice leaves them unable to complete other fee paying work with the time.[212] Inevitably, this results in an exodus of practitioners willing to remain at the criminal bar. By mid-2021, nearly one-fifth of barristers had considered leaving the profession, primarily due to the impacts of the COVID-19 pandemic on practice and income.[213] The impact of this extends far beyond the individual practitioner leaving the bar. Even with the current level of barristers, ready-to-hear trials were being adjourned due to lack of available counsel.[214] An insufficiently populated bar also greatly reduces the pool of Recorders, undermining efforts to increase sitting days as there are fewer additional part-time judges to call upon to fill those days. If the level of counsel between March 2020 and March 2021 already exacerbated the delays caused by the pandemic, measures that simply increase the amount of sitting time were likely be insufficient and will only move the bottleneck point. Should the criminal bar begin to

[209] Victims Taskforce, n159 , 7

[210] The Bar Council, "Bar Council Heads of Chambers Survey – Summary Findings: 06/2020" (06/2020) < https://www.barcouncil.org.uk/uploads/assets/0e406828-62d3-4b06-b04451266d3213fa/HoC-Survey-Summary-Findings-June-2020.pdf> accessed 21/09/2021, 2

[211] The Bar Council, ibid, 2

[212] Rose Harvey-Sullivan, "The court just pulled my 10am hearing. At 11.07am. This keeps happening lately and IT IS NOT OK. Clients build themselves up for these hearings, even if they're remote or case management only. Counsel lose days in their diary. Don't know what we can do about it. Blurg." (Twitter, 3/09/ 2021) < https://twitter.com/rose_h_s/status/1433734496298414085> accessed 19/09/2021

[213] The Bar Council, "New survey from Bar Council finds barristers at "breaking point"" (22/01/2021) < https://www.barcouncil.org.uk/resource/new-survey-from-bar-council-finds-barristers-at-breaking-point.html> accessed 15/09/2021

[214] Jaime Hamilton, "Other than when large numbers of counsel have been refusing cases due to issues over the fee schemes, I have rarely heard of struggles to find counsel to conduct cases. I now frequently hear of cases being vacated due to no advocates being available to do the job. Worrying." (Twitter, 23/07/2021) < https://twitter.com/jaimerh354/status/1418529603790979074> accessed 20/09/ 2021; Steve Wedd, "Warned list case Monday 16.8.21. We tell listing that we cannot find Counsel south of London, not even for ready money, please don't list it. Of course, you know what happens. We still cannot find Counsel for Monday. Suggestions please? /2" (Twitter, 13/08/2021) < https://twitter.com/worldwidewedd/status/1426248910897655813> accessed 20/09/2021; Catherine Baksi, "Crown court backlog fuelled by a shortage of legal aid barristers" (The Times, 29/07/2021) <https://www.thetimes.co.uk/Article/crown-court-backlog-fuelled-by-a-shortage-of-legal-aid-barristers-zw6qz2p2b> accessed 20/09/2021

shrink, as is anticipated, the delays will continue to grow significantly, worsening the situation for defendants and victims.

2.3 CUSTODY TIME LIMITS (CTL)

Custody Time Limits (CTLs) are the amount of time that a defendant can be held in custody, starting from the day of the first court appearance after remand, without further judicial approval. Prior to the COVID-19 pandemic, the CTL for a summary only offence was 56 days,[215] and for either way and indictable offences[216] it was 182 days (approximately 6 months).[217] When this time elapsed, there was a burden on the prosecution to apply for an extension, the legality of which is decided by a judge. In order to allow an extension of the CTL the need must be due to "the illness or absence of the accused, a necessary witness, a judge or a magistrate";[218] postponement due to the listing of separate trials for separate offences;[219] or, the most frequently[220] used, a "good and sufficient cause."[221] The prosecution must have also "acted with all due diligence and expedition."[222]

CTL extensions cannot be approved simply with the consent of both parties, the court has an additional duty to explore the request and ensure that it is itself satisfied the criteria are met,[223] demonstrating the acceptance of the need for close review of CTLs.[224] The requirement of a "good and sufficient cause" is dependent on the factual circumstances of the case. Whilst there are some things that are explicitly excluded, such as the seriousness of the offence,[225] a general

[215] CPS, "Custody Time Limits, Including Coronavirus Protocol" 17/11/2020 < https://www.cps.govuk/legal-guidance/custody-time-limits-including-coronavirus-protocol> accessed 15/02/2021
[216] Voluntary bills of indictments or retrials after an appeal are subject to short CTLs, however, they are the minority of cases.
[217] Claire Brader, "Prosecution of Offences (Custody Time Limits) (Coronavirus) (Amendment) Regulations 2020" 13th 10/2020 <https://lordslibrary.parliament.uk/prosecution-of-offences-custody-time-limits-coronavirus-amendment-regulations-2020/> accessed 06/02/2021
[218] Prosecution of Offences Act 1985, Part 3, Section 22(3)(a)(i)
[219] Prosecution of Offences Act 1985, ibid, Section 22(3)(a)(ii)
[220] Note that in R v Manchester Crown Court ex parte McDonald [1998] n79, the Lord Chief Justice only refers to this requirement when discussing CTLs
[221] Prosecution of Offences Act 1985, n218 Section 22(3)(a)(iii)
[222] Prosecution of Offences Act 1985, n218 , Section 22(3)(b)
[223] R v Sheffield Justices ex parte Turner [1991] 2 QB 472 at 477
[224] See also Bazorkina v Russia [2006] ECHR 751, Para 146: Article 5 contains "a corpus of substantive rights intended to ensure that the act of deprivation of liberty is amenable to independent judicial scrutiny and secures the accountability of the authorities for that measure"
[225] R v Governor of Winchester Prison ex parte Roddie [1991] 1 WLR 303

need to protect the public,[226] or the shortness of the extension,[227] the court has determined that it is "neither possible nor desirable to attempt to define"[228] the term and "all must depend on the judgement of the court".[229] One factor that consistently fell within the definition, is that the unavailability of a judge or courtroom is a "good and sufficient cause"[230] to extend a CTL of the defendant, although this was reluctantly done.[231] It is important to note that even prior to the pandemic, CTL extensions were "routinely granted"[232].

It is vital that the impact of COVID-19 on CTL cases is reviewed in addition to the general impact of delays. This is because CTL cases involve a defendant held on remand prior to any verdict or guilty plea – an innocent individual. Thus, the risks to the rights of that individual are significantly higher than non-CTL cases, and accordingly, so are the protections that are offered to them. Between March 2020 and March 2021, there were two measures implemented that affected CTL cases: a CTL protocol and a legislative CTL change. These are explored in turn in this section.

2.3.1 THE COVID-19 PROTOCOL

The first indication that the COVID-19 pandemic was impacting the way the courts dealt with CTLs was in the Coronavirus Crisis Protocol[233] published on 27 March 2020. Importantly, each decision as to extension remained solely within the realm of judicial discretion and the law as to those decisions remained unchanged,[234] although there was further emphasis that CTL cases must be listed as priority. The protocol did not fetter the judge's discretion.[235] Instead, the protocol spoke to listing and application procedure. In an effort to retain judicial supervision over the immense quantity of adjourned and delayed cases, the protocol required no CTL case

[226] R v Central Criminal Court ex parte Abu-Wardeh [1998] 1 WLR 1083
[227] R v Governor of Winchester Prison ex parte Roddie n225
[228] R v Manchester Crown Court ex parte McDonald n79
[229] R v Manchester Crown Court ex parte McDonald n79
[230] R v Central Criminal Court ex parte Abu-Wardeh n226
[231] R v Central Criminal Court ex parte Abu-Wardeh n226, at 1090
[232] House of Lords, "Drawn to the special attention of the House: Prosecution of Offences (Custody Time Limits) (Coronavirus) (Amendment) Regulations 2020" (Secondary Legislation Scrutiny Committee, 27/Report of Session 2019-2021), para 5
[233] Coronavirus Crisis Protocol, n12
[234] Coronavirus Crisis Protocol, n12, para 5
[235] R v Crown Court at Leeds [2020] EWHC 1867 (Admin), para 50

be adjourned without a return date.[236] The protocol stated that "the adjournment of CTL trials as a consequence of government health advice and of directions made by the Lord Chief Justice amounts to good and sufficient cause to extend the custody time limit."[237] It is acknowledged, however, that judges may have seen the pandemic as good and sufficient reason without the protocol[238]. This protocol expired on 3 September 2020.[239] Concerningly, whilst the protocol has now expired, the CPS website continued to present it as a live protocol, despite the page being updated after the revocation of the protocol.[240]

Contextualised in the pre-existing listing practice,[241] and Article 5 obligations for special and additional diligence for custody trials, this protocol offered very little practicable impact on the experience of defendants in custody. Furthermore, even with this requirement, in March 2020, more than 3,600 defendants had already been held in custody beyond six months, and 2,551 of those had been held beyond eight months.[242] Whilst 6-8 months falls short of even the shortest ECHR example of "excessive"[243] it certainly fell far from the realm of acceptable. One member of the bar spoke anecdotally on twitter about a client "who has done the equivalent of 20 months in custody for simple possession of class A drugs"[244] prior to his trial. This time in custody was made all the more alarming as the sentencing range for possession of a controlled drug is a fine to 51 weeks' custody.[245] The organisation Fair Trials spoke with another defendant who had been on remand since October 2019 on a drugs charge.[246] Without more detail as to the case,

[236] Coronavirus Crisis Protocol, n12, para 7
[237] Coronavirus Crisis Protocol, n12, para 15
[238] Explanatory Memorandum to The Prosecution of Offences (Custody Time Limits) (Coronavirus) (Amendment) Regulations 2020 No 952 (2020) para 12.7
[239] The President of the Queen's Bench Division and The Senior Presiding Judge "Direction from the President of the Queen's Bench Division and the Senior Presiding Judge" 2/09/2020
[240] CPS, n215
[241] Blackstones, "Criminal Practice Directions" (2021, 31st Edition) Division XIII: Listings, A.3: Key Principles of Listing
[242] Ben Quinn, "Third of remand prisoners in England being held beyond legal time limit for trials" (The Guardian, 17/03/2021) < https://www.theguardian.com/uk-news/2021/mar/17/third-of-remand-prisoners-in-england-being-held-beyond-legal-time-limit-for-trials> accessed 25/04/2021
[243] Suzanne Galand-Carval, 'The European Court of Human Rights Declares War on Unreasonable Delays' (1996) 1996 St Louis-Warsaw Transatlantic LJ 109-126, 93 & See in particular Tryumbach v Ukraine, No. 44385/02, 12 01/2012 (2 years 1 month); J.M. v Denmark, No. 34421/09, 13 11/2012 (1 year 4 months)
[244] Natalie Berman, "Today I represent a man who has done the equivalent of 20 months in custody for simple possession of class A drugs as his case was only properly reviewed by the CPS a week before his trial. How has our system got this bad!" (25/03/2021, Twitter) < https://twitter.com/nataliecberman/status/1375048344695898113> accessed 25/03/2021
[245] Sentencing Council, "Possession of a Controlled Drug" < https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/possession-of-a-controlled-drug/> accessed 16/06/2021. Note that the maximum sentence is 7 years.
[246] Fair Trials, "UK: Thousands held in prison for longer than legal time limit while awaiting trial" (17/03/2021) <https://www.fairtrials.org/news/uk-thousands-held-prison-longer-legal-time-limit-while-awaiting-trial> accessed 23/09/2021

it is impossible to determine whether this remained in line with the Article 5 requirements, however, on the face of these examples, there is certainly cause for concern as to the possibility of violation. Such anecdotal examples provided support for Fair Trials concern that due to the number of challenges in bringing an ECHR claim, the vast majority of defendants who suffered excessive pre-trial detention will never be known, and that the cases heard of were "only the tip of the iceberg."[247]

As part of the protocol, the courts were obliged to consider extending the CTLs even without an application from the parties.[248] This instruction was unlikely to impact defendants directly – the considerations as to whether or not to approve an extension CTL remain the same whether the application is brought by the prosecution or the court's own initiative. However, it demonstrated an acceptance that the extended CTLs would be required across the criminal court system. This must also be viewed in the context of the protocol's statement on "good and sufficient cause", which states "The coronavirus pandemic is an exceptional situation and the adjournment of CTL trials…amounts to good and sufficient cause to extend the custody time limit."[249] Whilst in *McKenzie* it was found that the protocol does not fetter the judge's discretion as to extending a CTL,[250] one limb of the test now had a heavily persuasive protocol attached to it. The ECHR jurisprudence on the extended pre-trial remand is very consistent in that it must be case specific and generalised reasons are not sufficient.[251] It was, therefore, concerning that the new application form for CTLs came with the submissions on "good and sufficient cause" pre-completed.[252] Whilst it could be submitted that the COVID-19 pandemic did affect each individual, and therefore became an individualised reason, and satisfied these requirements, it is also more than possible that it was too generalised, and failed to meet the specificity need. The protocol, therefore, had a two-pronged impact, both of which increased the extensions of CTLs; the impact on defendants during the protocol period was immense. This combination of accepting a widespread need for extensions and the, in practice, removal of the "good and sufficient cause" requirement resulted in a real risk of a "rubber-stamp

[247] Fair Trials International, "Detained without trial: Fair Trials International's response to the European Commission's Green Paper on detention" (10/2011), para 90
[248] Coronavirus Crisis Protocol, n12, para 6
[249] Coronavirus Crisis Protocol, n12, para 15
[250] R(McKenzie) v Crown Court at Leeds [2020] n235, para 50
[251] Merabishvili v Georgia (2017) Application Number 72508/13, para 222 & McKay v UK [2006] ECHR 820 Para 42
[252] Coronavirus Crisis Protocol, n12, Annex A: Notice Of Application To Extend A Custody Time Limit

approach"[253] to extending CTLs for the duration of the protocol.[254] This could, in effect, have removed the protection from indefinite detention that is was present in the legislation.[255]

The further risk to defendants in the future is also substantial. The protocol resulted in 6 months of easily obtained CTL extensions. Those were justified under the extreme backlog burden the court system faced because of the immediate court closures of the pandemic. It is entirely possible that there will be a fundamental change in attitudes towards the granting of CTL extensions; an acceptance that excessive burdens means CTL extensions will be approved by the court. If that attitude is developed, by either practitioners or the judiciary, a six-month protocol may well gut the substance of protections, and undermine the effective preservation of rights, offered to defendants held on remand prior to trial.

Extended remand can have "extremely detrimental effects on the mental health of the individual and on the welfare of their families."[256] Over the pandemic, these mental health impacts of pre-trial remand were all the more significant due to the COVID-19 safety restrictions: "One prisoner who had been on remand since October 2019…told of being locked up for 23 hours a day, apart from a shower and half an hour of exercise."[257] Another claimed the impact of remand during COVID-19 was so "horrible, so much so that I was going to plead guilty to get a transfer out of here … my mental health was suffering and I was severely depressed."[258] Defendants suffered exponentially more as a result of being held in custody prior to trial as a result of COVID-19, and this was exacerbated by the increased duration they were held on remand due to the delays. As such, whilst the 'right' to spend as little time as possible in custody prior to trial remains in place, defendants are suffering excessively and additionally as a result of delays caused by the pandemic. This suffering not only impacted the defendants themselves but undermined the integrity of the criminal justice process; innocent individuals should not feel that pleading guilty is their only option to progress beyond remand in custody. The Protocol remained the only active measure in regards to CTLs for the worst of the

[253] David Bruce, "COVID-19 and the extension of the custody time limit in the Crown Court: A Defence Perspective" accessed 25/04/2021 < https://www.9sjs.com/assets/Uploads/COVID-19-Custody-Time-Limit-Extension.pdf>
[254] It is unfortunate that no data appears to have been kept on the number of CTL extension approvals during this window
[255] R (Bannister) v Guildford Crown Court [2004] EWHC 221 (Admin). The court expresses concern of this effect if limited resources is used to readily and easily to justify a CTL extension.
[256] House of Lords, n232, para 9
[257] Ben Quinn, n242
[258] Ben Quinn, n242

pandemic and its efforts to protect the liberty rights in regards to pre-trial custody fell far short of anything that may have assisted defendants in having a swift resolution to their court process.

It is also important to note that with the system wide delays to the duration of proceedings, proceedings would more often exceed the CTL for defendants remanded into custody prior to their trial. This meant that CTLs had to be considered for extension not only due to the immediate court closures, but also due to lengthening times between charge and verdict. Whilst the CTL extension process during COVID-19 could be compared with a "rubber-stamp process", this did not mean that every defendant would be retained in custody. Excessive time before trial that reaches a window where pre-trial detention can no longer be justified results in a defendant being released into the community. This posed a real risk to the mental wellbeing and safety of the victims of the defendant. One example of this is "a survivor of sexual violence who had a trial date set but then the accused individual was released from remand when the decision was made to adjourn the trial."[259] Whilst such a decision respected the rights of the defendant, it gave an opportunity to harm the victim that would have otherwise been absent if the court proceedings had completed within the CTL window. The concerns regarding the opportunities for reoffending outlined above are repeated here. Whilst this may have occurred prior to the pandemic, COVID-19 made the delays far more significant and widespread, and thus made the chance of this occurring higher than in the pre-pandemic situation.

2.3.2 LEGISLATIVE AMENDMENTS TO CTL EXTENSIONS

Subsequent to the above protocol, an amendment was passed to the CTL legislation that extended the CTL duration prior to extension application.[260] The pre-review CTLs of summary offences remain unchanged, however for either way offences it was extended to 238 days.[261] The intention behind this was to ensure the "courts [had] sufficient powers to effectively manage these unavoidable delays"[262] and to give "more certainty for victims and the public in cases where there is a risk that defendants may abscond or commit offences."[263] With these extensions, there was a reduction in the need for short appointments to deal with CTL

[259] Victims Taskforce, n159, 9
[260] The Prosecution of Offences (Custody Time Limits) (Coronavirus) (Amendment) Regulations 2020
[261] ibid, s. 2(b)
[262] Explanatory Memorandum, n238, para 2.3
[263] Explanatory Memorandum, n238, para 2.4

applications, freeing court time to focus on trials and reduce the backlog. This extension is inextricably linked to the COVID-19 pandemic, and the measures automatically expired on 28 June 2021.[264]

The memorandum to this legislative change explored a number of factual scenarios in an effort to understand the impact of the legislation. Firstly, it looked at the position that Judges would have continued to accept the pandemic as a good and sufficient reason to extend the CTL; the impact of the legislation was only to achieve in law what would otherwise require a short appointment to approve.[265] It was more likely than not that defendant would have remained in custody for the same length of time regardless of this legislation, as the courts already had the power to extend CTLs to this duration and under this factual scenario would have done so. Removing the need for these short CTL listings freed up court time and removed the stressor of court attendance on the lay parties, by removing the need for a hearing. The CTL protocol already preferred CTLs to be extended by consent in unattended hearings",[266] or without the defendant present in even opposed applications.[267] Although the protocol had been revoked, there was approval and desire to continue measures like this that made the process more efficient.[268] There can be genuine questions as to how significant that efficiency benefit was. Under ideal circumstances a single courtroom could deal with 12 short hearings in a day, and that under less ideal circumstances, some courts listed up to 20.[269] Removing the need for additional CTL application hearings does little to free up court time, as they take very little court time. As such, the benefit of such a legislative extension, under this factual scenario, was likely only a small reduction in anxiety over attending a court hearing. In exchange for this small benefit, there was a departure from the preferred position to have close judicial oversight of time in pre-trial custody, which could have significant impacts on attitudes in the long term.

The alternative counterfactual scenario is that Judges would have ceased to approve CTL extension applications on the grounds of COVID-19, and its impacts, as good and sufficient

[264] The Prosecution of Offences (Custody Time Limits) (Coronavirus) (Amendment) Regulations 2020, s1.2
[265] Explanatory Memorandum, n238, para 12.9-12.10
[266] Coronavirus Crisis Protocol, n12, para 28
[267] Coronavirus Crisis Protocol, n12, para 28
[268] HMCTS, "Withdrawal of Custody Time Limits Protocol of 9 April 2020" (02/09/2020) < https://www.judiciary.uk/announcements/withdrawal-of-custody-time-limits-protocol-of-9-april-2020/> accessed 20/04/2021
[269] Judiciary of England and Wales, "The Better Case Management Handbook" (8 01/2018) < https://www.judiciary.uk/wp-content/uploads/2018/02/bcm-guide-for-practitioners-20180207.pdf> accessed 22/09/2021

cause.[270] This can be seen in notable example of HHJ Raynor's approach in *Tesfa.*[271] The timing of the legislation was especially alarming as there were accusations that the legislation was passed partly in response to this HHJ Raynor's judgment in this hearing.[272] In essence, the purpose of the legislation was to increase the duration of CTLs against the will of the court,[273] effectively undermining the judicial body tasked with protecting defendants' rights against excessive pre-trial remand.[274] This counterfactual scenario does not just appear in the abstract, as implied by the memorandum, but rather appears the deliberate intention of the government. The legislation was therefore implemented to specifically undermine the existing protections surrounding CTLs. This may have been due to the "scale and seriousness" of the impact of the pandemic[275], however, the ECtHR is clear, even in serious periods of upheaval, the duty to adhere to Article 5(3) remains as strong as it would in any other time.[276] Again, although this measure did not automatically extend CTLs to a degree that they would violate Article 5(3), they relaxed the protections against long pre-trial custody in a manner that goes against the spirit of the protections. Overall, this legislation formed part of the worrying trend of the government seeking to cross the boundary of an independent judiciary,[277] and undermine their ability to preserve fair trial rights. The impacts of this are extraordinarily far reaching and may undermine the notion of a fair and impartial criminal justice system.

2.4 CONCLUSION

Delays, sadly, are not uncommon in the criminal court system. However, the impact of COVID-19 has undoubtedly increased the duration of delays and compounded the affects all individuals involved in the criminal court system already felt. A key theme throughout this chapter has been exacerbation – the COVID-19 pandemic had not created or caused anything

[270] Explanatory Memorandum, n238, para 12.15
[271] T20190789 and T20200442 R-v- Tesfa Young-Williams (8/09/2020)
[272] Tom Smith, "Protection of Suspects and Defendants' Rights in England and Wales during COVID-19" (Fair Trials, 20/01/2021) < https://www.fairtrials.org/news/protection-suspects-and-defendants%E2%80%99-rights-england-wales-during-COVID-19> accessed 25/04/2021
[273] Explanatory Memorandum, n238, para 12.15
[274] Buzadji V The Republic Of Moldova 2016 Application Number 23755/07, para 91
[275] Explanatory Memorandum, n238, para 2.2
[276] Zimmerman & Steiner v Switzerland (1983) (Application no. 8737/79), para 31. European Commission for the Efficiency of Justice, n65, 38 speaks to how the reunification of Germany did not protect it from liability for violating Article 5(3).
[277] Clive Coleman, "Judge Makes Formal Complaint over COVID Custody Waits" (BBC 11th 09/ 2020) < https://www.bbc.co.uk/news/uk-england-london-54109098> accessed 20/04/2021, Q40

new in the criminal court system. It simply added a significant stressor to pre-existing pressure points.

Whilst awaiting the conclusion of criminal proceedings, defendants suffer uncertainty about their fate and futures, they experience stigma, social punishment, and likely bail conditions as a result of the charge. This is despite their innocent status. As a result of the COVID-19 delays, these experiences have been extended and exacerbated for all defendants involved in the justice system due to the increased time period before the criminal proceedings conclude. When also considering defendants pre-trial remand, the concerns that arose are even more significant; these individuals face the most absolute form of deprivation of liberty. During COVID-19, this deprivation of liberty was made even harder for defendants due to visiting and social limitations imposed due to COVID-19 measures. The delays suffered by defendants could be sufficient for a case to be made that the state has failed to meet its international fair trial obligations and domestic fair trial rules. Even if that threshold was not made out, or claimed by defendants, the current standards are far from satisfactory. Such failings, whilst unlikely to impact the ability of the court to reach its conclusion, undermine the integrity of the system and trust in it.

Whilst the primary subject of formal protections, defendants are not the only actors involved in a criminal case. The victim and witnesses of an offence were similarly poorly treated by the COVID-19 criminal court system. Concerns about their treatment, even under normal circumstances, have long been raised by interest groups and government enquiries. The uncertainty over repetitive adjournments, the limitations in therapy techniques due to the need to protect the quality of oral evidence, and the requirement to live and relive the crime they experienced, are all issues that harm a victim engaged in the criminal court process. COVID-19 has once again exacerbated those concerns – growing delays leads to growing dissatisfaction by the victim and a higher likelihood of attrition or disengagement. This leads to a poor outcome for the victim and a worsening ability of the criminal justice system to meet its purpose.

The stressor of the pandemic was so significant, even professionals had not escaped unscathed. The listing responses resulted in even higher numbers leaving the profession, to such a degree that hearings were being adjourned due to a lack of available counsel, and a lack of counsel able to sit as Recorders. In exacerbating the damage to the profession, the COVID-19 pandemic created further hurdles to any remedy to the delays being effectively implemented, which contributed to a secondary cause of further delay.

Whilst delays in the criminal justice system have undoubtedly had a significant impact on those involved, it is one aspect of the challenges and changes faced by the criminal court system due to COVID-19. In the next chapter, this thesis explores how the transition to remote justice impacted the court system. Whilst this section has been damning of the backlog that has accrued during COVID-19, the damage would have been far more significant without the resumption of hearings in the virtual realm. However, that adaptation to remote working has resulted in impacts and changes easily as significant as the delays discussed so far. The next chapter expands these.

CHAPTER 3: REMOTE JUSTICE

During the first year of the pandemic, the vast majority of hearings were conducted either partially or fully remotely, in both the Magistrates[278] and Crown courts. By April 2020,[279] just one month after the 'start' of the pandemic, only 6% of Crown hearings were being conducted primarily face to face and 83% were being conducted primarily on the Cloud Video Platform (CVP).[280] As court centres reopened, the number of primarily face-to-face hearings rose, however, between March 2020 and March 2021, it never exceeded 58% and the vast majority of dates in this window had primarily face-to-face hearings in a proportion far below that.[281] The shift to remote hearings was an effort to reduce footfall in the court centres, promoting social distancing and working from home where possible, in line with the government guidance of the time.[282] They were seen to be an efficient alternative to in person attendance subject to the COVID-19 restrictions and allowed the justice system to continue to function. These remote hearings were telephone hearings (BTMM), video hearings (CVP), or a hybrid combination of remote methods and in person attendance. This chapter uses the term "remote link" when referring to these measures in general, however, the primary focus is on video-links, due to their dominance.

In March 2020, video-links were not new technology. In the years preceding the pandemic, the courts had been increasing the use of video-hearings.[283] Examples include the defendant attending from a prison video-link suite for short appointments, or vulnerable witnesses and victims giving evidence from a separate video-link room. The most recent, pre-pandemic, Criminal Practice Directions speak to extensive use of video-links for defendants for administrative and remand hearings.[284] In short, "unless a judge otherwise directs, all Crown

[278] The Young Criminal Bar Association, "The CBA have asked for clarification for months on attendance at the Magistrates' Court via CVP. Senior mags judiciary guidance below. It is clear "remote attendance of all or some of those involved in hearings is the default position in all jurisdictions"." (Twitter, 27/01/2021) < https://twitter.com/TheYoungCBA/status/1354366969156431872> accessed 16/06/2021
[279] The first window data is provided
[280] HMCTS, n16, table 3
[281] HMCTS, n16, table 3
[282] Rosemary Rand, "Inside HMCTS: Remote hearings: their role in extending access to justice" (9 06/2021, HMCTS & MoJ) < https://insidehmcts.blog.govuk/2021/06/09/remote-hearings-their-role-in-extending-access-to-justice/> accessed 05/11/2021
[283] Joshua Rozenberg QC, "The Online Court: will IT work?" (07/2020) < https://long-reads.thelegaleducationfoundation.org/ > accessed 28/03/2022 for an effective summary.
[284] Criminal Practice Directions (2015) Consolidated with amendments 1-8. < https://www.judiciary.uk/wp-content/uploads/2019/03/crim-pd-amendment-no-8-consolidated-mar2019.pdf> : Video-links are a priority for

Court hearings prior to the trial will be conducted by video-link for all defendants in custody."[285] This also applies to the Magistrates courts.[286] However, in these hearings, it was only the defendant that appeared via video and all other participants were in court. The defendant was not given the final say on their mode of attendance[287] although they could ask their counsel to make submissions on the topic. For witnesses and victims giving evidence, video or live links were allowed since 1999 for vulnerable witnesses.[288] It was expanded to regular witnesses in a pilot scheme for sexual offences in 2003,[289] before being extended to all witnesses, for all offences in 2010.[290] Section 28[291] pre-recorded video evidence was available in every crown court centre by late 2020.[292] Remote evidence measures were very rarely used for defendants,[293] who sit under a separate and more restrictive legislative framework.[294]

Due to this longstanding history of the use of video-links, they have already been subject to ample evaluation and research. For the defendant, much of it is critical.[295] In one study, 44% of respondents found that video hearings "make it significantly more difficult for defendants to participate in the proceedings [296] For victims, research has indicated that video attendance is considered a far more favourable, although not perfect solution.[297] Prior to the pandemic, it was

any high risk prisoners (3L.1); prior to any application for attendance consideration must be given for the use of video-links (3M.8); Any Crown Court with video-link equipment but have arrangements in place for it to be used for PCMHs, Pre-trial hearings and sentencing (G.5)

[285] Criminal Practice Directions (2015) ibid para 16

[286] Criminal Practice Directions (2015) ibid 2.1(1)(a) and (c)

[287] Adam McCann, n27, 226

[288] Youth Justice and Criminal Evidence Act 1999, s24

[289] Section 51 of the Criminal Justice Act 2003. CPS, "Live Links" (01/2019) < https://www.cps.govuk/legal-guidance/live-links> accessed 18/08/2021

[290] The Criminal Justice Act 2003 (Commencement No. 24 and Transitional Provisions) Order 2010

[291] Youth Justice and Criminal Evidence Act 1999

[292] Ministry of Justice, "Press release: New courtroom protections for vulnerable victims available nationwide" (23/11/2020) < https://www.govuk/government/news/new-courtroom-protections-for-vulnerable-victims-available-nationwide > accessed 27/03/2022

[293] Samantha Fairclough, ""It doesn't happen... and I've never thought it was necessary for it to happen": barriers to vulnerable defendants giving evidence by live link in Crown Court trials" 2017 21(3) International Journal of Evidence and Proof 209-229

[294] Criminal Justice Act 2003, s51 & Youth Justice and Criminal Evidence Act 1999 s33A

[295] EG Meredith Rossner & David Tait, n26; Penelope Gibbs, "Defendants on Video – Conveyor Belt Justice or Revolution in Access" (10/2017, Transform Justice); Abenaa Owusu-Bempah, "The interpretation and application of the right to effective participation" (2018) 22(4) International Journal of Evidence & Proof 321-341, 338-339

[296] Adam McCann, n27, 227

[297] EG Martin Wood, n183, 48; Helen McNamee, Frances Molyneaux & Teresa Geraghty, "Key stakeholder evaluation of NSPCC Young Witness Service Remote Live Link (Foyle)" (01/2012, NSPCC Northern Ireland) & Rabiya Majeed-Ariss, Alice Brockway, Kate Cook & Catherine White, "'Could do better': Report on the use of special measures in sexual offences cases" 2021 21(1) Criminology and Criminal Justice 89-106

incredibly rare for counsel to appear by video. As a result, there was very little attention given to this in the research.

This chapter will detangle the general concerns or commendations surrounding video-links in general from how the pandemic impacted the criminal court system through its use of these technologies. It first looks to the practical changes felt by the actors in the criminal court system as a result of pandemic induced virtual attendance compared to the pre-pandemic arrangements. It then turns to the specific rights surrounding defendant participation, and examines whether these changes rise to a level of violating fair trial rights. Finally, it turns to the long-term impacts of the transition, not only beyond the end of the first year of the pandemic, but beyond the end of pandemic influenced working. It will ultimately determine that, whilst this chapter recognises far more potential for positive change, there remains significant concerns for all actors in the criminal court system.

3.1 PRACTICALITIES OF JOINING A REMOTE LINK

In order to assess the impact of the transition to remote justice on actors, as caused by the pandemic, this section will explore the changes to the practical experience of joining a criminal hearing. The pandemic induced transition to extensive remote justice resulted in huge practical changes to the experience of all actors in the criminal court system. Where the growing delays in the criminal court system had been an exacerbation of a pre-existing problem, a worsening of a known issue in the criminal court system, the COVID-19 transition to fully remote justice used a pre-existing language and foundation, but the changes wrought represented a rather significant departure from the pre-existing problems and concerns surrounding traditional remote justice. These included changes to the consistency in the use of the remote links,[298] the new hardware and software now required to use them, and about the venues used in lieu of a courtroom. As such, whilst live links are not unknown to the criminal court system, the remote

[298] Compare previous rules over remote attendance in Criminal Practice Directions (2015) n284 with the most recent calls by the criminal bar for a national protocol: EG see The Criminal Bar Association, "'Monday' Message 15.06.21" 15/06/2021 < https://www.criminalbar.com/resources/news/monday-message-15-06-21/> accessed 29/10/2021 addressing the need for a national protocol. Reiterated again on Twitter: The Criminal Bar, "! There must be a national CVP Protocol! We are seeking an urgent meeting with the senior judiciary in an effort to address the issues of listing & remote hearings. We will offer to help produce guidance that brings transparency to when such technology can & should be used." (Twitter, 28/09/2021) < https://twitter.com/TheCriminalBar/status/1442924446210088960> accessed 28/09/2021

attendance of COVID-19 has resulted in changes on such an expansive scale, it caused a number of unique impacts, of mixed benefit.

3.1.1 DETERMINING IF A HEARING IS SUITABLE FOR REMOTE LINK

Between March 2020 and March 2021, when conducting a hearing through remote link, consideration was first given as to whether a live link was suitable for the hearing. As a result of the pandemic, any person[299] may attend a number of hearing types through a live link provided it was found to be in the "interests of justice" to do so.[300] There were some limitations to these sweeping changes: the exhaustive list[301] of hearing types for which remote attendance may be ordered left some of the "daily workload" of the court requiring in person attendance for no discernible reason.[302] However, overall, the majority of pretrial hearings – largely legal discussions where the lay parties have little meaningful involvement – were suitable to be conducted on a remote platform, and have been done so.[303] For more substantive or contested issues, a defendant could not give evidence by audio link only, nor could a jury attend through a remote link.[304]

The interests of justice test had a mixed response, with widespread criticism that judges failed to apply it correctly.[305] Even after over a year of remote hearings, HHJ Cahill QC felt the need to reiterate that remote hearings must always prioritise justice, rather than simply efficiency.[306] This repeated the position of the Judicial College in May 2020.[307] However, the Lord Chief Justice maintained the position that the "efficient despatch of business" was in the interests of

[299] With limited exceptions, such as the Jury
[300] Coronavirus Act 2020, Schedule 23, 4(4)(a)
[301] Criminal Justice Act 2003 c. 44 s. 51 Live links in criminal proceedings & Schedule 3a (2)
[302] Lana Wood, n28, 8
[303] John Hyde, "Many lawyers prefer remote hearings, and they shouldn't be muted" 19 03/2021 < https://www.lawgazette.co.uk/commentary-and-opinion/many-lawyers-prefer-remote-hearings-and-they-shouldnt-be-muted/5107877.article> accessed 1/11/2021
[304] Coronavirus Act 2020, Schedule 23, 2(2)(1A) & 2(2)(1B)
[305] The Criminal Bar Association, "The "Interests of Justice" Test in the Coronavirus Act" (21/06/2021) < https://www.criminalbar.com/wp-content/uploads/2020/06/21062020_Interest-of-Justice-test-in-the-Coronavirus-Act.pdf> accessed 11th 06/2021
[306] Tristian Kirk, "Important message from Judge Sally Cahill QC on when courts should/shouldn't - use remote hearings "We have to remember what we're there to do is deliver justice, not necessarily efficiency. Justice must prevail" She can't see where remote tech in jury trials is appropriate" 20/11/2021 < https://twitter.com/kirkkorner/status/1462008018695073795 > accessed 20/11/2021
[307] Judicial College, "Good Practice for Remote Hearings" 05/2020 < https://www.judiciary.uk/wp-content/uploads/2020/03/Good-Practice-for-Remote-Hearings-May-2020-1.pdf > accessed 4/11/2021

justice.[308] This brought into question how the interests of justice test was being applied, if there was a clear understanding and direction as to how it should be applied, and if actors could expect any consistency to their mode of attendance. Interestingly, in order to facilitate the efficiency that results from remote justice, the Lord Chief Justice also endorsed remote attendance, "whether backed by the regulations or not."[309] Statements such as these caused further significant questions over how any consistency over remote attendance could be achieved when there are no national guidelines and even the regulations were not seen as a constraining decision-making factor. Therefore, as a result of the changes brought about by the Coronavirus Act 2020, where there had previously been consistency in the use of these technologies,[310] there was now none.[311]

This lack of consistency had serious impacts for defendants and professionals especially. One concerning example, demonstrating the impact of these changes on the defendant, involved an instance where the trial judge determined that it was acceptable to have three young defendants, one of which had not reached his 18th birthday, attend their murder trial through video during the prosecution case.[312] This decision does not appear to be in line with the Lord Chief Justice's views[313] on remote jury trials, and would not have been approved by the Judge should this have been proposed at the first, pre-pandemic, trial.[314] Instead, this position arose from a prison policy that limited defendant attendance,[315] effectively forcing the court into remote attendance or an adjournment. It raised significant questions as to whether this would have been found to be appropriate without the pandemic, and implies that the pandemic subjected defendants, including potentially vulnerable ones, to remote hearings, and their difficulties, where it would

[308] Lord Chief Justice, Lord Burnett of Maldon, "Message from the Lord Chief Justice: Courts Recovery" (17 03/2021) < https://www.judiciary.uk/announcements/message-from-the-lord-chief-justice-courts-recovery/ > accessed 19/11/2021
[309] Lord Chief Justice, Lord Burnett of Maldon, "Message from the Lord Chief Justice: latest COVID-19 restrictions" 5 01/2021 < https://www.judiciary.uk/announcements/message-from-the-lord-chief-justice-latest-COVID-19-restrictions/ > accessed 15/10/2021
[310] Criminal Practice Directions (2015) n284
[311] EG see The Criminal Bar Association, "'Monday' Message 15.06.21" 15/06/2021 < https://www.criminalbar.com/resources/news/monday-message-15-06-21/> accessed 29/10/2021 addressing the need for a national protocol. Reiterated again on Twitter: The Criminal Bar, "! There must be a national CVP Protocol! We are seeking an urgent meeting with the senior judiciary in an effort to address the issues of listing & remote hearings. We will offer to help produce guidance that brings transparency to when such technology can & should be used." (Twitter, 28/09/2021) < https://twitter.com/TheCriminalBar/status/1442924446210088960> accessed 28/09/2021
[312] R v A, B & C 23/06/2020 CrimPRC(20)40(a), redacted judgement.
[313] Catherine Baksi, "Split despite 'success' of remote trial" (The Times, 16/04/2020) < https://www.thetimes.co.uk/article/split-despite-success-of-remote-trial-tp383b3sh> accessed 29/10/2021
[314] R v A, B & C (2020) n312, para 61
[315] R v A, B & C (2020) n312, para 10

have otherwise been deemed to be not acceptable or ideal. It also raised questions over the influence of non-judicial parties, who may not have consideration for the appropriate balances and rights that must be respected. Whilst the organisation JUSTICE may have successfully conducted a number of 'mock' remote trials[316] and received some positive feedback, the software used far exceeded the quality of CVP, and even with this software they did not recommend virtual trials for complex cases, including ones with defendants with vulnerabilities. Therefore, the urgent COVID-19 transition to remote justice left a lot of uncertainty as to its use, and questions over how defendants fair trial rights remain protected.

The question over determining whether a hearing was suitable for remote justice also had significant impacts on the professionals acting before the court. Towards the start of the pandemic, remote attendance was the "default position".[317] As the pandemic progressed, however, anecdotal evidence suggests that judicial attitudes changed, against this presumption of remote attendance.[318] One barrister reported being criticised for attending remotely, despite having permission to do so,[319] and another stated they were refused permission to attend a hearing via CVP despite having tested positive for COVID-19.[320] Whilst these are all anecdotal recounts, published on Twitter, Women in Criminal Law identified it to be such a widespread and significant problem for the profession that they conducted further research on 'unreasonable refusals' for CVP attendance, results of which have not yet been published.[321] The Secret Barrister identified that at the start of the pandemic, and the beginning of remote attendance, there was a very strong preference for long-term and material change to the

[316] Justice, n32
[317] Lord Chief Justice, Lord Burnett of Maldon, n309
[318] Diana Wilson, "A friend recently asked to appear via CVP for a short administrative hearing, the judges response 'it's about time counsel get off their backsides and back into court'. Not helpful. Barristers are at breaking point. CVP saves us travel time we can use instead for case prep." (Twitter, 15 04/2021) < https://twitter.com/DianaWilson165/status/1382744067465969671 > accessed 28/10/2021
[319] Legal Aid Lawyer, "Interesting hearing today where the Judge criticised me for not attending despite the same Judge deciding, without representations, that D, P and me to attend via CVP. D produced in error so my failure to attend my fault due to crystal ball failure" (Twitter, 28/09/2021) < https://twitter.com/tired_lawyer/status/1442952668603842561> accessed 27/10/2021, retweeted by Gordon Exall, Kerry Hudson and Idle Courts among others.
[320] Liam Walker, "1. Dear @TheCriminalBar I tested positive for COVID yesterday. I have a hearing on Monday. My clerks asked Southwark CC for me to be able to appear via CVP for the client I have represented from the outset. Answer: No. We need a protocol." (Twitter, 1/10/2021) < https://twitter.com/LiamWalker_7/status/1443947123326717953 > accessed 15/11/2021
[321] Women in Criminal Law, "Use of CVP for short administrative/other suitable hearings is clearly beneficial to the profession as a whole. We are hearing of advocates being required to attend in person despite no discernible necessity. WICL will soon be surveying members on CVP & use of remote technology… In the meantime, if you encounter issues with unreasonable refusals for requests to use CVP for appropriate hearings, please do keep us updated/let us know, by contacting womenincrimlawpolicy@gmail.com. All reports will be kept completely anonymous." (Twitter, 15 04/2021) < https://twitter.com/WomenInCrimLaw/status/1382765378565181441 > accessed 15/10/2021.

expectations of attendance by counsel, in favour of remote attendance, and yet one year later, individual court centres were unilaterally issuing edicts against that.[322] All of these inconsistencies existed against the same legal backdrop and framework and once again caused serious questions over how the court determined whether a hearing was suitable for remote attendance, and what factors were being prioritised. Barristers have spoken extensively to the benefits of remote attendance – it is more convenient,[323] and reduces their wasted costs, waiting time, and travel time. All of these benefits were essential in an era where there is a growing burden to do more hearings in order to assist with the reduction of the backlog detailed above. In the move away from remote attendance towards the end of March 2021, not only were these benefits being stripped back in an irrational and inconsistent manner, but they were also subject to the rather condescending and derisory position of the Lord Chief Justice that barristers seeking remote attendance are not acting "in the interests of justice,"[324] despite all statements in favour at the start of the pandemic. Such attitudes only make the role of the barrister harder and may have been a contributing factor to the exodus of counsel from the profession, undermining the entire criminal justice system.

As such, the transition to widespread remote justice, as caused by the pandemic, was a change that was made without clarity or consistency in the application of the tests. Whilst this may have been understandable in the first days of a transition arising out of emergency, it most certainly should have stabilised after over a year. Even within this single year, the approaches changed in dramatic swings according to the mood of the day. When the core test is whether remote attendance is "in the interests of justice", this should be a sufficiently core concept that there is a degree of consistency. A lack thereof will only undermine that justice that is so essential to the criminal court system and undermine the effectiveness of defendants and professionals especially. A lack of certainty over the tests and the approach meant more cases, for whom remote justice is less than ideal, slip through onto the remote platforms. This was an incredibly detrimental outcome of the abrupt transition to near full remote justice.

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[322] The Secret Barrister, "Left: The Lord Chief Justice in 2020, welcoming video ("CVP") hearings in the criminal courts. Right: The Crown Courts in 2021, requiring lawyers to travel for an hour or two, wait around and then deploy arguments for half an hour before travelling back. Anyone else a bit fed up?" (Twitter, 12 08/2021) < https://twitter.com/BarristerSecret/status/1425887440217251849> accessed 29/10/2021

[323] Derek Sweeting QC in Hansard, "Police, Crime, Sentencing and Courts Bill (Second sitting) Debated on Tuesday 18 05/2021" 18 05/2021 < https://hansard.parliament.uk/commons/2021-05-18/debates/0bc53cdb-fb0c-4333-ab7b-a5a1343cd7c6/PoliceCrimeSentencingAndCourtsBill(SecondSitting) > accessed 1/11/2021

[324] John Hyde, "Burnett: Lawyers like remote hearings so they can do more" (Law Gazette, 18 11/2021) < https://www.lawgazette.co.uk/news/burnett-lawyers-like-remote-hearings-so-they-can-do-more/5110588.article > accessed 18/11/2021

3.1.2 TECHNOLOGICAL CHALLENGES

Despite the inconsistency in determining what hearings are suitable for remote attendance, when they are determined to be suitable, some of the most significant challenges to a successful remote link were the technological difficulties. These could have included everything from a complete inability to join the hearing to poor audio and video quality. Sadly, the cause of these difficulties was often double sided, both on the part of the remote attendee and on the part of the court. When combined, this presented real challenges to a hearing taking place, and had a real impact on those involved in them. This section will explore both sides in turn.

Between March 2020 and March 2021, the court video-link hardware was far from perfect. The degree of court induced technological challenges can be seen in the use of pre-pandemic live links used for victims giving evidence. Pre-pandemic live links were conducted nearly exclusively between two rooms within the court building. Therefore, they provided an ideal platform for demonstrating the failures of the court estate in regards to remote links, and will form a substantive portion of the evidence on this point. As a result of their longevity of use, there were ample reports of trials beset with technical issues due to court technology.

Research makes clear that technological challenges were rife: "equipment failure had become an accepted fact of life at many courts"[325] and "poor quality visual and audio quality of feeds for video-evidence generally"[326] was not uncommon. There are reports that due to the chronic underfunding of the court estate, there have been instances where there was only one working microphone in the courtroom, with all legal professionals having to move closer to use it, even then, the defendant followed proceedings "vaguely"."[327] There have been other instances where the audio is so poor, a defendant has had to indicate part way through a hearing they could not hear or follow proceedings.[328] In 2009, nearly half of victims using a live link experienced problems and delays resulting from them.[329] These issues could be so severe that sometimes this resulted in the link being abandoned and a witness having to give evidence in court.[330] In the decade since, the picture has not changed. Only 30% of professionals interviewed by the

[325] Joyce Plotnikoff and Richard Woolfson, "Measuring up? Evaluating implementation of Government commitments to young witnesses in criminal proceedings" (NSPCC, 07/2009) , 98
[326] Samantha Fairclough, "Special Measures: Literature Review" (Victims Commission, 07/2020), 37
[327] Penelope Gibbs, "Defendants on video – conveyor belt justice or a revolution in access? (Transform Justice, 10/2017) < https://www.transformjustice.org.uk/wp-content/uploads/2017/10/Disconnected-Thumbnail-2.pdf > accessed 13th 06/2021, 8
[328] Penelope Gibbs, ibid, 8
[329] Joyce Plotnikoff and Richard Woolfson, n325, 96
[330] Joyce Plotnikoff and Richard Woolfson, n325, 97

National Society for the Prevention of Cruelty to Children (NSPCC) described delays due to technology as "rare", and 5% found it to 'almost always' be a cause of delay.[331] Smith corroborates this, with live links causing delays in all but two of the observed 28 trials, with an average of 75 minutes special measures-related delay per trial.[332] Alarmingly, this study was conducted at a court centre that had "won awards for witness facilities, making it an example of best practice"[333] and yet it was still far from an acceptable standard. Such delays and technical difficulties were extremely challenging for all lay attendees; it held them in suspense longer than needed. It undermined their ability to understand proceedings fully and easily.[334] During evidence, it may have resulted in examination being stretched over two days when one would have previously sufficed, holding witnesses and victims alike under oath overnight. The quality of court hardware for remote hearings was clearly insufficient prior to the pandemic.

Even when the technology works appropriately, there remain a number of concerns surrounding the live of live link technology. Plotnikoff and Woolfson found only 67% of judges "almost always had a clear view of the witness's facial expressions" when they were giving evidence through a live link and only 59% "could almost always hear the witness clearly."[335] Something as simple as increasing the screen size can have such an impact on increased visibility that it increased the conviction rate by over 10% when live link evidence was viewed by a Jury. [336] A concern raised by victims is that they felt incredibly uncomfortable with the defendant being able to see their evidence, broadcast on large screens for all to see. [337] Compounding this anxiety was that many victims were not informed of this in advance.[338] Poor camera arrangements also mean that victims were able to see the defendant through the live

[331] Joyce Plotnikoff and Richard Woolfson, "Falling short? A snapshot of young witness policy and practice: A report for the NSPCC, revisiting 'Measuring up? Evaluating implementation of Government commitments to young witnesses in criminal proceedings' (2009)" (NSPCC, 02/2019), 35
[332] Olivia Smith, "The practicalities of English and Welsh rape trials: Observations and avenues for improvement" 2018 18(3) Criminology and Criminal Justice 332-348, 338
[333] Olivia Smith, ibid, 340
[334] Carolyn McKay, "The Pixelated Prisoner: Prison video links, court 'appearance' and the justice matrix" (2018, Routledge)
[335] Joyce Plotnikoff and Richard Woolfson, n331 61
[336] Dr Samantha Fairclough, n326 , 36: 49% of young witness trials resulted in a conviction where the jury watched the child's testimony on large plasma screens compared with 36% where the jury saw it on a small screen.
[337] Joyce Plotnikoff and Richard Woolfson, n325, & Rabiya Majeed-Ariss, Alice Brockway, Kate Cook & Catherine White, "'Could do better': Report on the use of special measures in sexual offences cases" 2021 21(1) Criminology and Criminal Justice 89-106
[338] Helen Beckett and Camille Warrington, "Making Justice Work Experiences of criminal justice for children and young people affected by sexual exploitation as victims and witnesses" (03/2015), 39

link, despite wishing not to.[339] All of this demonstrated the inadequacies in the courts pre-pandemic video-link arrangements.

The impact of the pandemic on the challenges imposed by the court estate in regards to live links was a mixed one. Fully remote hearings had the advantage of a very minimal reliance on the court estate – parties, counsel, and even judges, may all have attended from home. Even a hybrid hearing benefitted from reduced reliance on the court estate, as fewer parties were in court. Each party that attended remotely then relied on their own personal device to provide a microphone and camera and reduced the dependence on the court estate. As such, professionals, defendants, victims and observers enjoyed a reduced impact of the limited court estate for as long as fully remote hearings persisted.

However, the use of hybrid hearings meant the difficulties in hearing those in court was extended to a greater number of attendees. Victims and general observers wishing to view proceedings remotely were impacted by the audio and video challenges previously confined to a remotely attending defendant. However, unlike defendants who may be able to speak up either directly or through their counsel, or counsel who would naturally interject when they cannot hear, an observer or victim is relegated to silence, unable to speak or contribute.[340] This is the group most likely to be impacted most significantly from poor court link quality, from their own experience of the hearing, although it did not the have most significant impact on the administration of court proceedings.

Whilst there was significant benefit to reducing the reliance on the court estate to provide suitable video-hearing hardware, this then shifted the burden to the individuals involved in the hearing. The technology was no longer sole the domain of the court and justice infrastructure. As noted above, prior to the pandemic, remote links were nearly exclusively conducted between two court buildings to facilitate a witness attendance, or between a prison and a court to facilitate remanded defendant attendance. However, as a result of the pandemic, far more attendees were joining through a device of their own, which, whilst offered the benefit of lower reliance on the problematic court hardware, presented significant issues to many individuals that would not have existed but for the pandemic.

[339] Joyce Plotnikoff and Richard Woolfson, n331, 62
[340] Penelope Gibbs, n327, 8

Unsurprisingly, there is a strong link between poverty, criminality,[341] and victimhood.[342] Equally, there is an inevitable link between poverty and digital exclusion.[343] Although the Justice Select Committee noted that this overlap of poverty, digital exclusion, and digital hearings was concerning,[344] those concerns appeared to have been forgotten when it came to implementing the pandemic hearing guidance.

Attending a telephone hearing required that the attendee has a private telephone, that they are guaranteed to have access to, with sufficient signal to answer a phone call. It is more likely than not that the majority of defendants could have this. However, when the need for privacy largely excluded the use of the hallway landline phone, there was 5% of the adult population that did not meet this threshold.[345] This made it far more difficult for those individuals to make arrangements to attend their court hearing, in comparison to attending a court building. In Family Court there were reported instances "where the parents were calling into the hearing from the side of the motorway on pay-as-you-go mobiles."[346] It is unfortunate that there was no equivalent review into criminal court proceedings, but it is not unlikely that the same issues were faced. Naturally, this is not conducive for effective concentration and understanding of proceedings by anyone engaged in the court process.

The digital exclusion was only worsened with CVP hearings. A CVP hearing required the use of a smartphone, computer or tablet. That device must have a camera and a microphone and must be able to connect to an internet connection of sufficient strength. There were "1.9 million households with no access to the internet and tens of millions more reliant on pay-as-you-go services,"[347] and a disproportionally large number of those involved in the court system fall

[341] Lizzie Dearden, "Young people drawn into lives of crime by 'offences of despair' linked to poverty, trauma and discrimination" (22/08/2020, The Independent) < https://www.independent.co.uk/news/uk/crime/crime-young-people-poverty-uk-trauma-discrimination-racism-a9682881.html> accessed 19/06/2021
[342] Louise Grove, Andromachi Tseloni and Nick Tilley, "Crime, inequality and change in England and Wales" (2012) in Jan van Dijk, Andromachi Tseloni, Graham Farrell "The International Crime Drop: New Directions in Research" (Palgrave Macmillan, 2021) 182-199.
[343] University of Cambridge, ""Pay the wi-fi or feed the children": Coronavirus has intensified the UK's digital divide" < https://www.cam.ac.uk/stories/digitaldivide> accessed 17/06/2021
[344] Justice Select Committee, "Coronavirus (COVID-19): The impact on courts: Technology and the Courts" (30/07/2020) < https://publications.parliament.uk/pa/cm5801/cmselect/cmjust/519/51907.htm> accessed 15/06/2021
[345] Office of National Statistics "Mobile Phone Usage Survey" (2015), 3
[346] Nuffield Family Justice Observatory, "Remote Hearings in the Family Justice System: A Rapid Consultation" (05/2020), 13
[347] Annie Kelly, "Digital divide 'isolates and endangers' millions of UK's poorest" (The Guardian, 28/04/2020) < https://www.theguardian.com/world/2020/apr/28/digital-divide-isolates-and-endangers-millions-of-uk-poorest> accessed 15/06/2021

into this category.[348] This made hearing attendance prohibitively expensive to those who attended on pay as you go, or even impossible. Even beyond this, there were practical questions as to how these requirements could be met by individuals involved with offences that require devices to be seized by the police,[349] whether as a victim or defendant. These technological requirements widened the poverty justice gap between how the rich and poor experience the criminal justice system, where previously the courtroom would have acted as an equaliser. This digital hurdle had an immensely significant impact on the position of the defendant and may have undermined a victim's efforts to remain engaged and informed about the criminal process. Whilst professionals were unlikely to suffer from this level of digital exclusion, there was a significant impact on them when seeking to interact with their clients, who were no longer attending court, which will be discussed further below.

The CVP video link also painted an incredibly poor picture in regards to technical difficulties, even when the parties had appropriate hardware and internet connections. Issues spanned "the availability of digital support officers… poor sound, video quality, internet connections, placement of screens"[350] among a multitude of others. When technical difficulties occurred in the court building, there were a number of administrative support staff in the building who can try to assist; when technical difficulties occurred at home, support is limited to over the phone.[351] For attendees with limited technical skills, this was often not enough, especially when that attendee only had one device to be used to reach support staff and join the hearing. Whilst it must be acknowledged that the quality of video-links had been noted to improve over the course of the pandemic,[352] this represents a damning review of the pre-pandemic live-links, rather than a positive review of CVP and current remote hearings.

In benefit, however, when giving evidence remotely an individual giving evidence remotely had a single camera, focused directly on them, often at close range from a personal device such as a phone or laptop. This allowed the victim to arrange their device in a manner that ensured they can be seen clearly. With the growth in virtual working and socialising due to lockdown,[353]

[348] Nuffield Family Justice Observatory, n346 , 18, notes how in family court CVP has had to be substituted for BTMM because of lack of technology
[349] Nuffield Family Justice Observatory, n346, 25
[350] Victims Commissioner, "Next steps for special measures: A review of the provision of special measures to vulnerable and intimidated witnesses" (05/2021), 48
[351] HMCTS, "Guidance: How to Join Cloud Video Platform (CVP) For a Video Hearing" (29/07/2021) < https://www.govuk/government/publications/how-to-join-a-cloud-video-platform-cvp-hearing/how-to-join-cloud-video-platform-cvp-for-a-video-hearing#troubleshooting> accessed 12th 08/2021
[352] Victims Commissioner, n350, 48
[353] EG Cristina Criddle, "Coronavirus: Ways to stay social online while in self-isolation" (20/03/2020, BBC) < https://www.bbc.co.uk/news/technology-51966087 > accessed 13/08/2021

many are now incredibly comfortable and capable of ensuring the best arrangement for video communication. Collectively, this resulted in an improved quality of video stream from witnesses. Unfortunately, this control over the camera also resulted in participants presenting inappropriately, such as lying back in bed,[354] and failing to demonstrate an appropriate respect for the court process. This illustrates that remote attendance was not without its drawbacks.

However, it has since been noted that towards March 2021, the use of CVP had begun to decline. The benefits produced by it are such that this decline was called a "missed opportunity" to improve the criminal justice system.[355] Whilst the concerns and drawbacks have been outlined here, they do only apply to a minority of participants. Unfortunately, due to the pandemic causing the closure of courtrooms, there were also very few mitigating measures that can overcome an inability to join or attend a virtual hearing. Parties have once again returned to court and once again become reliant on the court technology to be heard by any remote attendees.

Whilst of mixed impact for the duration of the pandemic, it appears the long-term impacts of COVID-19 were more limited. However, due to the also high levels of "hybrid hearings", the courts had additional funding to improve the technology.[356] This, alongside a great deal more experience with that technology, may result in a long-term improvement to the quality of court video-links. Whilst the funding and experience benefits may not be felt immediately, it will provide a long-term gain for the justice system and hopefully reduce the problems discussed above. It is impossible to confidently determine overall how the use of remote hearings due to the pandemic will impact the experience of parties in the long term, however, there is possibility for a net positive change.

Whilst a fully remote hearing was no longer reliant on the poor court hardware, this shifted a significant burden to the actors of the criminal court system, rather than the court itself. It may have benefitted actors to have a reduced reliance upon the court estate, however this benefit

[354] Josh Mellor, "CVP at it's finest - an alleged rapist appeared at court from his bedroom and seemed to be lying on his back asleep by the end of the hearing. Judge: 'See this is what happens when we allow people to treat their bedrooms as a court.'" 29/03/2021 < https://twitter.com/jshmellor/status/1376556939325415428> accessed 15/08/2021. Whilst this tweet does describe a defendant, a victim would be just as able to act in the same manner.
[355] Criminal Justice Chief Inspectors, n3, 18
[356] Ministry of Justice & The Rt Hon Dominic Raab MP, "Press Release: Largest funding increase in more than a decade for justice system" 28 10/2021 <https://www.govuk/government/news/largest-funding-increase-in-more-than-a-decade-for-justice-system> accessed 11/11/2021

was only fully realised when the technology used by them was of higher quality. This presented an extensive array of new challenges for individuals, whether due to technological exclusion, or being subjected to one of the many CVP technical difficulties. There was a not insignificant number of individuals who were unable to meet this threshold and experienced a lower quality hearing as a result. This lower quality may not have been prohibitive to a hearing going ahead, considering the lack of reliance upon the defendant for short pre-trial hearings. This resulted in a decreased direct engagement by affected participants and an increased reliance on counsel for defendants to fully understand proceedings. When the technology worked, the participants were not detrimentally affected by the change to a virtual court, their position may even be improved due to better audio and video quality. Acknowledging there are many hearings where a lay party did not need to be fully engaged, the loss caused by their difficulties to join a hearing may be minor to the overall progression of the hearing and the case, but may well have been major to their experience of the criminal court system.

3.1.3 ATTENDEE LOCATION

When courtrooms were closed, or it was determined that the hearing was to be conducted remotely, in addition to using their own devices to attend a hearing, actors involved in the matter had to locate an alternative location to attend the hearing from. There were two main impacts from this, of mixed consequences. The first is in regard to general attendance: a courtroom is a location free from distraction, with the files accessible, and no technology requirements. It allowed attendees to pay sufficient attention to the hearing, and many may not have had a suitable alternative space that offered the same benefit.[357] This was a significant challenge, and negative impact, of the pandemic on the functioning of the criminal courts. The second impact appears more specifically to those who attended court to give evidence. A witness, and for the purpose of this thesis particularly a victim, no longer had to attend court to give evidence – an experience widely accepted to be incredibly stressful. However, this benefit was not without detriment, as there were concerns about safety and appropriateness of giving evidence from non-courtroom locations.

In addition to the challenges regarding technology that were being faced by far more attendees than prior to the pandemic, for many there were also significant challenges in finding a suitable

[357] Howard Riddle CBE, Anthony Edwards, Matthew Hardcastle, n21, 160-161

location to attend a hearing from, as the courtroom was not available. Whilst this was most important for those who are actively engaged in proceedings, for example professionals, defendants, or victims actively giving evidence, even passive observers joined hearings with the intention of being engaged and focused. This is something that once again has a significant impact on all actors engaged in the criminal justice system.

When attending a video hearing, the attendee had to be in a place without disruptions, to allow them to focus on the hearing, with remote attendance there were additional challenges to this. Between March 2020 and March 2021, there were extensive regulations that limited an individual's ability to leave their home.[358] It was very tricky when confined to your home due to the coronavirus regulations, and your children were unable to attend school[359] to have sufficient space, time, and privacy to attend a hearing. This was such a widespread issue that even legal professionals were being forced to reduce their attendance at court[360] in order to balance the competing interests. Lay attendees did not have this 'luxury', and whilst professionals did suffer a reduced income because of this, lay parties were nonetheless forced to attend hearings and adapt. This was incredibly challenging, and even with best efforts, there was an instance of a naked child running through the background[361] at a hearing and lay parties joined hearings from the "garden shed as there was nowhere else private".[362] This demonstrates

[358] EG Coronavirus Act 2020; The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020, No 1045; The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, No 350; The Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 2) Regulations 2020, no 500; The Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 3) Regulations 2020, No 558; The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020, no 684
The Health Protection (Coronavirus, Restrictions) (England) (No. 3) Regulations 2020 no 750; The Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment) (No. 4) Regulations 2020, No 986; The Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment) (No. 5) Regulations 2020, No 1029; The Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium) (England) Regulations 2020 No 1103; The Health Protection (Coronavirus, Local COVID-19 Alert Level) (High) (England) Regulations 2020 No 1104; The Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations 2020, No 1200; The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020, no 1374; The Health Protection (Coronavirus, Restrictions) (All Tiers and Obligations of Undertakings) (England) (Amendment) Regulations 2020, No 1611,

[358] The Health Protection (Coronavirus, Restrictions) (All Tiers and Obligations of Undertakings) (England) (Amendment) Regulations 2020, No 1611

[359] At its lowest, there were multiple weeks were only 11-13% of children were attending school in state schools. Department of Education, "Attendance in education and early years settings during the coronavirus (COVID-19) pandemic" 2/11/2021 https://explore-education-statistics.service.govuk/find-statistics/attendance-in-education-and-early-years-settings-during-the-coronavirus-COVID-19-outbreak/2021-week-44> accessed 5/11/2021 : Table 1b Daily Attendance in State Schools During COVID 19

[360] Women in Criminal Law, "The Impact of COVID-19 on Female Practitioners" 5/06/2021 < https://www.womenincriminallaw.com/post/the-impact-of-COVID-19-on-female-practitioners> accessed 1/11/2021

[361] HHJ Alice Robinson "Virtual Hearings: Criminal Cases" (Gray's Inn 13th 07/2020) < https://www.youtube.com/watch?v=BwNkoKYHWtc> accessed 10/06/2021

[362] Nuffield Family Justice Observatory, n346, 16

the challenges of attending a hearing from home, when the courtroom was not available due to the pandemic. Moreover, whilst criminal proceedings exist in the public eye, and are open to public observation, it is entirely understandable, and commendable, that attendees would try to protect their privacy from those in their household or shield their children from hearing inappropriate content. Often, home venues were entirely inappropriate for the defendant to feel confident in their privacy and only concentrate on proceedings. This difficulty was entirely due to the predominance of virtual hearings as a result of the pandemic.

Beyond the challenges of finding a suitable location to attend a hearing, further concerns were raised about the impact on vulnerable defendants of attending from home: it was argued that **"**many do not grasp the importance of proceedings without physically having 'their day in court' and that much of what happened 'may go over their heads'."[363] Whilst the threshold for engagement and understanding of proceedings may be low for defendants, which will be discussed below, the changes to attendance caused by the pandemic worsened the position of these defendants. Due to the inconsistency of determining whether a hearing should be remote, the prevalence of this remains largely unknown, and the full scope of impact on vulnerable defendants having to attend from home is unclear.

Beyond the general challenges of attendance, there are additional hurdles associated with non-court attendance for oral evidence. Oral evidence is central to any trial, and with the criminal trial having undergone drastic change as a result of the pandemic, it was inevitable that the experience of giving evidence likewise changed. The importance of supporting witnesses in giving evidence can be seen in that in 2020, 25% of prosecutions were suspended due to evidential difficulties as the victim no longer supported action, and no longer wished to give evidence.[364] Therefore the evaluation of the changes to the venue of attendance to give evidence, and how that impacts the witness experience, must be conducted.

There are many means by which a witness can be supported in the giving of evidence, coming under the umbrella of 'special measures'. Special measures were introduced with the lofty goal of being enacted to assist with "the humane treatment of such vulnerable individuals within the

[363] Institute for Government, "Criminal Courts" < https://www.instituteforgovernment.org.uk/publication/performance-tracker-2020/criminal-courts> accessed 17/02/2021

[364] Home Office, "Crime Outcomes in England and Wales, year ending 12/2020: Data tables" (07/2020) < https://www.govuk/government/statistics/crime-outcomes-in-england-and-wales-2019-to-2020> Table 2.3.

criminal justice system." [365] They do this by supporting the witness and protecting them, for example shielding them from seeing another party, or having an intermediary assist with their understanding. Live links are a key and common part of the special measures offerings, being able to assist in a myriad of ways, and are the focus of the changes that arose due to COVID-19. Due to the pandemic, and the introduction of CVP, witnesses were able to join a hearing and give evidence remotely, often from home, in a live link equivalent. The widespread use of remote victim evidence may be one of the most mixed outcomes of March 2020 – March 2021 in the criminal court system, with significant benefits and detriments. Nonetheless, the provision of evidence live links being seen as having the strongest area of improvement over the pandemic, above the pre-pandemic standard.[366]

Appearing in a criminal trial as a witness has been described as "'terrifying', 'intimidating', 'confusing' and 'stressful'"[367] and this was true for the vulnerable and intimidated victim as much as it was for the 'normal' witness.[368] By giving evidence through a traditional live link, and being in a separate room, victims were assisted in that they no longer had to enter a formal courtroom; they did not have to see the public gallery – possibly filled with the defendant's friends and family; nor did they have to see the defendant in person, all of which can be incredibly stressful.[369] As such, the benefits to using a live link were that the actor giving evidence was "much less stressed [and] more relaxed."[370] By feeling "secure and less intimidated" they were more able to give their best evidence.[371]

The impact of this extended beyond the victims' mental health; such stress could also impact the quality of the evidence given and the strength of the case. It enabled witnesses to give their best evidence, that they may have been otherwise unable to do, which could ultimately facilitate a conviction.[372] When used, the benefit of a live link was immense. Wood found that 89% of

[365] Samantha Fairclough, "The consequences of unenthusiastic criminal justice reform: A special measures case study" 2021 21(2) Criminology and Criminal Justice 151-168, 151
[366] Victims Commissioner, n350, 44
[367] Allison Riding, "The Crown Court Witness Service: Little Help in the Witness Box" (1999) 38(4) The Howard Journal 411-420, 411-412
[368] Mandy Burton, Roger Evans and Andrew Sanders, "Vulnerable and intimidated witnesses and the adversarial process in England and Wales" 2007 11(1) International Journal of Evidence and Proof 1-23, 2
[369] Seeing these individuals is often a source of intimidation to a witness: caused by the defendant (68%) and their friends and family (44%): Becky Hamlyn, Andrew Phelps, Jenny Turtle and Ghazala Sattar, "Are special measures working? Evidence from surveys of vulnerable and intimidated witnesses" (06/2012, Home Office Research Study 283), 21
[370] Helen McNamee, Frances Molyneaux & Teresa Geraghty, "Key stakeholder evaluation of NSPCC Young Witness Service Remote Live Link (Foyle)" (01/2012, NSPCC Northern Ireland), 9
[371] Helen McNamee, Frances Molyneaux & Teresa Geraghty, ibid
[372] Helen McNamee, Frances Molyneaux & Teresa Geraghty, ibid

witnesses who used a live link felt it helpful.[373] This was supported by Franklyn, at 79% of witnesses finding it helpful.[374] The assistance offered to victims by live links was so great that 39% would be unwilling to give evidence any other way.[375] This positive impact was similarly beneficial in that that there was a noticeable reduction in the rate of cases collapsing when special measures – notably live links – were in place,[376] benefiting the wider criminal justice system in general, as well as the witness.

The vast majority of live links were conducted from the same court building as the trial, but in a separate room.[377] and even when linking outside of the building, they remained confined to certain locations – often other court, police or specialist approved buildings. As a result, witnesses still had to enter the court building, wait at security, and walk the court corridors to get to the room where they gave evidence – collectively, these steps felt unnerving and unsettling.[378] Victims risked seeing defendants at the court building entrance, the café, or in the corridors.[379] Many were effectively trapped in the witness live link room as they waited to give evidence for risk of seeing the defendants. Although additional special measures could also be sought, such as alternate waiting rooms and entrances, these were not always available.[380] It was also raised that the protected court space "might be immediately after getting off the same bus or train as the defendant coming to court, because the area [was] rural and public transport limited."[381] Even when contact is highly unlikely, anticipation and fear of such contact may have negatively impacted the victims' mental health position. Although these possible exposures were largely outside of the courts control, they undermined the effectiveness of the protection given by a live link. The negative impacts of these possible contacts could have been mitigated by a greater use of separate buildings for live links, such as having the victim give evidence from another court building. However, this option, despite being available pre-pandemic, was very rarely used, possibly because it was more administratively demanding to arrange. This is despite the fact it "overc[ame] problems of

[373]Martin Wood, et al, n183 , 48
[374] Ramona Franklyn, "Satisfaction and willingness to engage with the Criminal Justice System Findings from the Witness and Victim Experience Survey, 2009–10" (Ministry of Justice, 2012), 27
[375] Joyce Plotnikoff and Richard Woolfson, n331, 10. Similar numbers were found by Becky Hamlyn, Andrew Phelps, Jenny Turtle and Ghazala Sattar, n369
[376] Kevin Brown & Faith Gordon, "Improving Access to Justice for Older Victims of Crime: Older People as Victims of Crime and the Response of the Criminal Justice System in Northern Ireland" (2019, Commissioner for Older People for Northern Ireland), 166
[377] Joyce Plotnikoff and Richard Woolfson, n331, 55
[378] Helen McNamee, Frances Molyneaux & Teresa Geraghty, n370 , 10
[379] Louise Ellison & Vanessa Munro, n152, 192
[380] Victims Commissioner, n350, 50
[381] Victims Commissioner, n350, 50

witness intimidation or confrontation with the defendant."[382] Prior to March 2020, whilst special measures were available to make the victim feel more comfortable, the consensus appeared to be that they did not remedy all concerns or fears.

Additionally, the rooms in the court-building available to for live-links were subject to significant criticism These rooms had been described as "bleak and minimalist";[383] small and claustrophobic;[384] and oppressive and "like a cupboard."[385] The latter comment was made about a court building that had even won prizes for its facilities.[386] It is of no surprise that non-court and police based facilities received a far better response by victims,[387] and should be used as a standard for court facilities. In some instances, the court video link rooms were so insufficient that support workers, interpreters and intermediaries were unable to fit in the room with the vulnerable witness.[388] This would have been greatly exacerbated with the implementation of social distancing, which further restricted the number of people that can be in the room to assist the victim. Therefore, the room itself was something that has great scope for improvement when utilizing the live link facilities.

However, from March 2020 to March 2021, due to the pandemic, witnesses began to give evidence from home.[389] This meant that the victims were "not going to come into the [court] and encounter those whom they might be giving evidence against or those associated with them - that undoubtedly offered a comfort to them."[390] The court facilities, or lack thereof, became irrelevant. In giving evidence from home, victims were in a safe and secure environment, and the concerns regarding travel or seeing the defendant in person were removed. This undeniably supported victims in giving their best evidence.[391] As such, giving evidence from home may well have augmented the positive effects of a live link, having further reduced the stress on victims, and improved the impact of special measures. Furthermore, where defendants had previously been tied to the courtroom to give their evidence, a fully remote trial, including a remote defendant for their own evidence, gave them the same benefits. For the first time, the

[382] Joyce Plotnikoff and Richard Woolfson, n325, 12
[383] Helen McNamee, Frances Molyneaux & Teresa Geraghty, n370, 16
[384] Rabiya Majeed-Ariss, Alice Brockway, Kate Cook & Catherine White, "'Could do better': Report on the use of special measures in sexual offences cases" 2021 21(1) Criminology and Criminal Justice 89-106, 102
[385] Olivia Smith, n332, 339
[386] Samantha Fairclough, n326 35
[387] Helen McNamee, Frances Molyneaux & Teresa Geraghty, n370; or Rabiya Majeed-Ariss, Alice Brockway, Kate Cook & Catherine White, n384, 101
[388] Rabiya Majeed-Ariss, Alice Brockway, Kate Cook & Catherine White, n384, 102
[389] Coronavirus Act 2020, s53 - 56
[390] Helen McNamee, Frances Molyneaux & Teresa Geraghty, n370, 9
[391] Helen McNamee, Frances Molyneaux & Teresa Geraghty, n370, 8

court placed the victim and defendant on equal footing in the giving of evidence,[392] which may have assisted the defendant in putting forward their best defence also.

However, giving evidence from non-court-centres was not a perfect solution. There were examples where giving evidence from home resulted in significant issues. In one instance in America, it was discovered that a defendant was in the same room as the victim whilst she was giving evidence against him.[393] This risk was compounded by the nature of lockdown, which means that inappropriate individuals - such as defendants or their supporters - were more likely to be able to find the victim at home. This had wider implications for the integrity of the trial. In instances of domestic abuse, a victim could have had to give evidence from the same home as the defendant resided. This must be contrasted with giving evidence from a court building, or other pre-pandemic approved location, where the victim was guaranteed safety and privacy in the room they gave evidence from. The court needed to be able to trust that evidence given is true and not influenced by external parties. The court could assure themselves of this, as far as possible, when evidence is given in a courtroom or live link room. However, such assurances were much harder to match in a remote home setting. One suggestion to protect the witness involved the court "check[ing] on whether parties are alone by asking them to do a camera sweep of the room."[394] This could be quite easily circumvented, with the defendant leaving the room during the check and returning immediately after, or simply standing behind the camera. There were, therefore, real concerns about the potential for influenced evidence in the trial.

Indeed, even when there were no physical intrusions into the location the witness gave evidence from, remote evidence gave potential for intrusion nonetheless. Sir Andrew McFarlane identified:

> For some victims, participation in a video conference can be invasive, (re)traumatising and endangering. It enables the perpetrator to see and note details of their private, safe space, which may also be used to track them down, break into their home, continue the exercise of coercive control, or harass or intimidate them in other ways. The perpetrator may take photos or screenshots of the victim's image to facilitate this. Often, the only 'private' space from which to attend a hearing may be the victim's bedroom, and

[392] Laura Hoyano, n25
[393] David Li, "Virtual court hearing takes turn after prosecutor spots assault suspect in victim's home" (NBC, 11 03/2021) https://www.nbcnews.com/news/us-news/virtual-court-hearing-takes-turn-after-prosecutor-spots-assault-suspect-n1260698 accessed 18/08/2021
[394] Nuffield Family Justice Observatory, n346, 38

> allowing the perpetrator to virtually enter and see into this space can be highly distressing.[395]

Although this was a comment on the family jurisdiction, it was equally applicable to the criminal court division. In both courts, there are frequent power imbalances between defendant, or perpetrator, and victim, and both have high risks and concerns of retraumatising the victim through engagement in the court process.

This intrusion may have exacerbated the feelings of vulnerability felt by victims, alongside posing an actual threat to victim safety as a result of the trial. However, as CVP developed, there were mechanisms created for the court to hide the video stream of the victim and the defendant from each other, whilst still being viewable to all other parties.[396] Whilst this did not protect the witness from feelings of intrusion by having the court in their private spaces, it may have mitigated some of the additional concerns regarding the defendants' view, and increased the benefits of giving evidence from home. It would likely depend on the victim as to whether giving evidence from home would have offered a net benefit to their experience. CVP meant that giving evidence can be done from the home, but the reducing COVID-19 threat towards March 2021 meant that victims were also increasingly able to attend court. The risks to the victim in giving evidence from home produced significant risks to the trial itself. It is likely that policy will have to be established to maintain consistency across circuits. This had not been done so by March 2021. The location benefits offered by giving evidence from home – complete separation of parties – can likely be matched by measures that predated the pandemic. The window of March 2020 – March 2021 may have illustrated the significance of the benefits of complete separation of parties. Therefore, if giving evidence from home offers a discernible benefit to the victim experience and the quality of evidence they give, it is possible that greater efforts will be made to use additional locations in order to assist victims, and there may be the extension of non-court evidence.

In sum, the location of attending a hearing changed for all court hearings towards the beginning of the pandemic, and remained a significant number as time progressed. Most participants attended from their own home, due to COVID-19 regulations confining them there. This was a change with the transition to remote justice that had a number of benefits to the actors

[395] Sir Andrew McFarlane, "Safety from Domestic Abuse and Special Measures in Remote and Hybrid Hearings: Foreword by the President of the Family Division" (11/2020, Family Justice Council), 4
[396] HMCTS, "Guidance: What to expect when joining a telephone or video hearing" 30 10/2020 https://www.govuk/guidance/what-to-expect-when-joining-a-telephone-or-video-hearing > accessed 1/11/2021

involved. Attending from home allowed lay parties to feel more comfortable and less anxious about the court process and the giving of evidence. For victims, it improved the pre-existing special measures provision of giving evidence from another room. However, it is not a perfect change, with real concerns being raised about parties having a suitable, private location to join from; feelings of intrusion or of being exposed; and participants no longer respecting or understanding the seriousness of proceedings. The degree of improvement or harm depended entirely on the position of the actor themselves, however, with the opening of court centres, it is hoped that both court and remote attendance will remain possibilities, according to the needs of each actor, to the benefit of all. Whilst there is no centralised guidance,[397] and mode of attendance was still a judicial decision, it can be hoped that victims will have an increased voice in how they are able to give evidence.

3.2 EFFECTIVE DEFENDANT PARTICIPATION

In the context of practical attendance, the transition to remote justice impacted all actors in the criminal justice system; being able to observe, attend, or give evidence was a global problem for any actor, the section above has discussed this in depth. However, much as the questions surrounding delays engaged the rights of defendants specifically, questions around the transition to remote justice engaged targeted rights of the defendant not required by any other party. This section will explore these.

One of the key components of the right to fair trial is the right of the defendant to participate effectively. Although the "effective participation" of a defendant in the criminal court process is "implicit in the very notion of an adversarial procedure,"[398] "the term 'effective participation' is frequently…[used]…with little or no explanation of what it means to participate effectively in criminal proceedings".[399] It is often discussed in the context of vulnerable defendants, their fitness to plead, and any special measures that can be used to allow individuals to effectively participate. However, it remains a right of all defendants. At the core of the right to effective participation is ensuring the defendant is able to understand the proceedings[400] and able to

[397] Criminal Justice Chief Inspectors, n3, 18
[398] Stanford v UK (1994) Application no 16757/90, at para 26
[399] Abenaa Owusu-Bempah, "The interpretation and application of the right to effective participation" (2018) 22(4) International Journal of Evidence & Proof 321-341, 322
[400] R v Lee Kun [1916] 1 KB 337 at 341 at common law, SC v UK (2005) 40 EHRR 10 at 29 under the ECHR

actively engage with and instruct counsel.[401] This is one of the most central rights where the defendant is able to play an active part in protecting his own position, as "it can ensure that the defendant is treated as the autonomous subject of the proceedings, and not simply as an object for the imposition of conviction and punishment."[402]

3.2.1 UNDERSTANDING PROCEEDINGS

The threshold of comprehension and understanding proceedings is not a high one. At the ECtHR Loucaides claimed "the demands of a "fair hearing" do not require that an accused person…be enabled to comprehend all the events and complexities of his trial. This is impossible and unrealistic."[403] Rather, they must understand the "general thrust" of the hearing.[404] Furthermore, it has been established that these rights can be upheld through counsel; even when the defendant cannot hear the evidence, the comprehension threshold is met by a counsel able to hear proceedings, even if that counsel chooses not to actively confer with the defendant[405] – their right to fair trial and effective participation was met if their counsel can hear.[406] This is because the solicitor and barrister have the opportunity to note and dispute any factual inaccuracies or conflicts.[407] It is unclear how the standards change for unrepresented individuals,[408] who make up 7% of defendants at first hearing.[409]

Due to the pandemic, counsel were far more rarely in a courtroom between March 2020 and March 2021. It was noted above that when a remote hearing was beset with audio issues, remote counsel may have struggled to hear in the same way defendants had been struggling. Whilst counsel were more able to speak up and interject when they could not hear proceedings well, information may well still be lost in moments when the link breaks up. When the quality of line was poor, this inherently inhibited the ability of the defendant to understand proceedings,

[401] R (TP) v West London Youth Court [2005] EWHC 2583 (Admin), at 7
[402] Abenaa Owusu-Bempah, n399, 323
[403] V & T v United Kingdom (24888/94) (2000) 30 EHRR 121 ECtHR., Dissenting opinion of Mr L Loucaides. Although this is in a dissent, this portion of the judgement does not appear to be disagreed with. It is supported by 3 further judges.
[404] SC v UK (2005) 40 EHRR 10, at 29
[405] Stanford v United Kingdom (1994) n398, at 30
[406] Stanford v United Kingdom (1994) n398
[407] Stanford v United Kingdom (1994) n398, at 30
[408] Julie Miller, "A Rights-Based Argument Against the Dock" 2011 3 Criminal Law Review 216-226, 223
[409] Owen Bowcott, "Jump in unrepresented defendants as legal aid cuts continue to bite" (24/11/2019, the Guardian) < https://www.theguardian.com/law/2019/nov/24/legal-aid-cuts-prompt-rise-in-unrepresented-defendants> accessed 17/06/2021

and for his counsel to compensate for that. Moreover, even when the link worked as intended, and even allowing counsel to compensate and explain what has happened after proceedings, remote conduct "makes it harder for lawyers to brief their clients and to explain what is happening." [410] Remote hearings made all modes of comprehension harder, and the compensation of counsel engagement weaker in its protection of defendant rights.

3.2.2 ENGAGING WITH COUNSEL

In contrast to, or maybe in compensation for, the low threshold for a defendant's comprehension, the threshold for engaging with counsel is high. During trial, the defendant should be able to "explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence."[411] The importance of this can be seen in the Youth Practice Direction, that speaks to the additional efforts that can be made to allow for this: "A young defendant should…be free to sit…in a place which permits easy, informal communication with his legal representatives."[412] It is an example of a right that the courts have been willing to implement special measures to ensure that not only is the defendant able to confer easily with their counsel, but does not feel inhibited from doing so. This demonstrates how far the courts were willing to go to ensure that the practical protection of this right, rather than only the theoretical right. Despite this value shown, there have been concerns surrounding its effectiveness in practice, for instance, critiquing how the defendants' place in the dock inhibits communication.[413]

Prior to the pandemic, when a defendant was on bail, it was expected that they would meet their counsel prior to the hearing in order to have conference. However, for remote hearings during the pandemic, counsel and the defendant were no longer expected to be in the same location – this placed an additional burden on both parties to make alternative arrangements for these discussions to take place. For these defendants, a number of factors – such as digital

[410] Institute for Government, n363
[411] Stanford v United Kingdom (1994) n398, at 29
[412] Crown Ct: Trial of Children and Young Persons [2000] 1 WLR 659 Sup Ct
[413] Julie Miller, n408

exclusion[414] or lack of a private space – offered significant impediments to conference, much as they did for remote court attendance.

There were also ample problems faced by defendants trying to interact with their counsel during their hearing. For those who had an attended trial,[415] a defendant's ability to communicate with their counsel is unaffected by the pandemic. However, for those who had a remote trial, or for any remote administrative appointments, there was a significant impact on bailed defendants. Remote attendance made is significantly harder for defendants to communicate with counsel easily and discretely. One barrister described the challenge: "if [the defendant] has a problem during the hearing, or needs to speak to [counsel], he needs to have the cojones to interrupt the court in full flow. Detached and on a screen, he is more likely to be reluctant to do so."[416] In the widespread usage of virtual hearings, this has subjected defendants to additional challenges when trying to communicate with their defence counsel that they would not have faced prior to the pandemic. This naturally undermines the effectiveness of their defence. Whilst this was a criticism of the impact of COVID-19 on the running of the criminal court system, and a reduction in the ease of a hearing, it was not criticised as violation of defendants' rights. This is because between March 2020 – March 2021, defendants in the community were now facing the same struggles as those on remand had faced for many years. Whilst not desirable it is accepted practice.

Although it was not uncommon, before the pandemic, for counsel to use the video-link to speak with their in-custody clients, the pandemic meant that this was now being sought for all criminal hearings. This placed enormous strain on the limited video-link facilities that were available; "lawyers were struggling to communicate with clients before and after trials, largely due to limited access to video facilities in prisons".[417] The limits on the number of prison video-link facilities was judicially noted and critiqued as a factor undermining the fairness of the hearing process.[418] How could a defendant effectively engage with proceedings, through their counsel, if they were not given adequate time or opportunity to speak with counsel. In order to compensate, Police forces were allowing access to their own videoconferencing facilities in order to assist with the shortfall, however, this access was revoked in October 2020 due to high

[414] Justice, "Justice Response to HMCTS Survey on Conducting Video Hearings" 04/2020 <https://justice.org.uk/wp-content/uploads/2020/04/JUSTICE-Response-to-HMCTS-Survey-updated-images.pdf> accessed 16/02/2021
[415] When a defendant is in attendance, it is expected their counsel will be too.
[416] Penelope Gibbs, n327, 8
[417] Institute for Government, n363
[418] T20190789 and T20200442 R-v- Tesfa Young-Williams (2020) para 42

costs.[419] With the high demand, it was then found that "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."[420] This only worsened the situation for defendants, and further limited the ability of counsel to speak with defendants. Although the case law is clear that the participation rights can be partially exercised by counsel on behalf of the defendant,[421] surely questions must arise when the defendant is no longer assured the right or opportunity to interact with their counsel and receive the information or understanding missed.

Due to this lack of prison facilities, "ill or potentially ill prisoners…being produced in person in the cells" [422] for their hearing as there were not the facilities to have them attend remotely. This may have even be in the face of a direct and explicit request that they remain at the prison.[423] Whilst this then allowed those defendants to interact more freely with their counsel, it results in a huge imbalance between the hearing experiences of those chosen, at random, to attend in person. It also harmed the defendants by increasing their risk of exposure to COVID-19 in a way that arises only because of insufficient video-links during the pandemic.

Effective participation is one of the core rights of a defendant. However, with the pandemic closing court centres, the shift to virtual hearings has had an immense impact on a defendant's ability to effectively participate in their own hearing. Without the use of a court building, every stage of the court process is made harder for the defendant. It may not arise to the level of an Article 6 infringement, but it negatively impacts the ability of the defendant to put forward their case. It is clear that "Defendants must perceive their own effective participation, and feel properly engaged by the process."[424] However, when that engagement has only been met through counsel, and the technical difficulties faced by defendants in joining a hearing further

[419] Monidipa Fouzder, "Police Forces Pull Support for Virtual Remand Hearings" (19/10/2020, Law Society Gazette) < https://www.lawgazette.co.uk/news/police-forces-pull-support-for-virtual-remand-hearings/5106062.article> accessed 12th 02/2021
[420] Fair Trials, "Justice Under Lockdown: A Survery of the Criminal Justice System in England and Wales between March and May 2020" (2020), 8
[421] Stanford v United Kingdom (1994) n398
[422] Howard Riddle, n21, 160
[423] Women in Criminal Law, "Day 14 of the Mags and Police station diary. Client produced at court despite repeated requests for a videolink at the height of the pandemic. Solicitors and clients risking their health unneccessarily. https://t.co/8snFsFOPDA" (Twitter, 26/07/2021) <https://twitter.com/WomenInCrimLaw/status/1419686685340753923 > accessed 5/11/2021
[424] Transform Justice, "Is Remote Justice Slowing the System Down?" 25/07/2020 <https://www.transformjustice.org.uk/is-remote-justice-slowing-the-system-down/> accessed 10/02/2021

reduced their own ability to attend and fully participate, there are serious questions as to how defendants perceive their own trial process and the fairness within.

3.3 LONGEVITY OF REMOTE JUSTICE

Thus far, this chapter has addressed the immediate impacts – how the experience of actors changed when attending a hearing during this first year of the pandemic. It is in the transition to remote justice, however, that there is significant potential to see long term and substantial change to the criminal court system. Whilst the delays in the criminal court system are undeniably detrimental, and must be reduced as a matter of urgency, there have been sufficient benefits to the transition to remote justice that parliament sought to concretise these arrangements beyond the end of the pandemic recovery measures, through the Police, Crime, Sentencing and Courts Bill,[425] currently before the Committee Stage of the House of Lords.[426] This section will explore what elements of remote justice will be enshrined in permanency. It will then turn to the less official long-term changes resulting from the wholesale transition to remote justice – in this case, a possible change in attitudes towards remote evidence.

3.3.1 POLICE, CRIME, SENTENCING AND COURTS BILL

The Police, Crime, Sentencing and Courts Bill is the very epitome of a "Christmas tree bill", seeking to address an enormous variety of issues in the criminal law. Ormerod criticises bills of this size, fearing its lack of coherence and focus will impede any detailed scrutiny,[427] and the House of Lords echoes this concern.[428] The area of interest to this thesis is paragraphs 167 and 169, which address observing remote proceedings and the remote proceedings themselves.

This Bill seeks to replace the temporary measures of the Coronavirus Act with a permanent change allowing remote justice in the criminal court system. The explanatory notes speak to

[425] 2021, HL Bill 40
[426] UK Parliament: "Police, Crime, Sentencing and Courts Bill: Government Bill" 19/11/2021 < https://bills.parliament.uk/bills/2839 > accessed 20/11/2021
[427] David Ormerod, "The Police Crime, Sentencing and Courts Bill 2021" 2021 12 Criminal Law Review 1003-1007
[428] House of Lords, "House of Lords Select Committee on the Constitution 7th Report of Session 2021–22" 9/09/2021 < https://committees.parliament.uk/publications/7225/documents/75867/default/ > accessed 1/11/2021, para 5

the benefits to the efficiency of the court process, reducing delay and unnecessary travel.[429] In the first debate of this bill, Home Secretary Priti Patel MP spoke of the benefits to achieving the principles of open justice, facilitated by remote justice.[430] This thesis will address the open justice benefits of remote justice in the next chapter, but does largely agree that online access to hearings facilitates improved open justice access.

In Parliamentary debate, it was raised that the motives behind the bill are confused, mentioning both COVID-19 and modernisation as motives.[431] This is despite the fact the bill is designed to create measures beyond the pandemic,[432] and adds to the fear that the pandemic is being used as an excuse to create permanent changes without sufficient consultation.[433] It is vital to note that not only does the Bill permanentize the remote justice provisions of the current regulations, it expands them, by allowing juries to attend a trial remotely, where they currently cannot.[434] It is interesting to note that the government seeks to endorse remote justice despite the extensive concerns and detrimental impacts considered above.

This bill "rightly leaves untouched…virtual pretrial hearings such as "mentions" and Plea and Trial Preparation Hearings."[435] Many of these hearing types were partially remote prior to the pandemic, and as a result of the pandemic, they have become fully remote. They improve the efficiency of professionals,[436] which assists in the overwhelming goal of reducing the court backlog without increasing available resources. This benefits the long-term position of defendants and victims across the criminal court system, even if there are significant questions as to whether their effective engagement in these hearings is undermined. One of the main questions that remains live is how these permanent footing of pre-existing measures will apply

[429] Parliament, "Police, Crime, Sentencing And Courts Bill - Explanatory Notes" < https://publications.parliament.uk/pa/bills/lbill/58-02/040/5802040en03.htm> accessed 1/11/2021, para 203
[430] Hansard, "Police, Crime, Sentencing and Courts Bill Volume 691: debated on Monday 15/03/2021" 15 03/2021 < https://hansard.parliament.uk/commons/2021-03-15/debates/3F59B66E-E7A1-484B-86E3-E78E71D0FE0F/PoliceCrimeSentencingAndCourtsBill > accessed 1/11/2021
[431] Hansard, "Police, Crime, Sentencing and Courts Bill (Eighth sitting) Debated on Thursday 27/05/2021" 27 05/2021 < https://hansard.parliament.uk/commons/2021-05-27/debates/d88cae79-fcf3-4818-beda-9c17d8b679e8/PoliceCrimeSentencingAndCourtsBill(EighthSitting)> accessed 1/11/2021
[432] Hansard, ibid
[433] Justice Committee, Coronavirus (COVID-29): The Impact on Courts (Sixth Report, Session 2019–21, HC 519), para 300
[434] Police, Crime, Sentencing and Courts Bill, 2021, HL Bill 40, Part 12 & schedule 19, part 3
[435] Laura Hoyano, n25, 1036
[436] Derek Sweeting QC, "Roadmap to the Hybrid Bar" 2021 5 Counsel; Hansard, "Police, Crime, Sentencing and Courts Bill (Fourth sitting) Debated on Thursday 20 05/2021" 20/05/2021 < https://hansard.parliament.uk/commons/2021-05-20/debates/b3f3bcaa-d48a-415c-8ea1-b35d19d9f184/PoliceCrimeSentencingAndCourtsBill(FourthSitting) > accessed 1/11/2021

in practice, given apparent eagerness of the Lord chief Justice and many of the Judiciary to get counsel back into court.

When moving onto the provisions surrounding the trial, however, significant concerns arise. The bill removes the prohibition on fully remote trials, previously present.[437] Sweeting QC raises the important question: even "if we can do [a fully remote jury trial], whether we should….that fact that we can is not really a reason for necessarily doing it."[438] Where there is professional support for pretrial hearings being conducted remotely, this support drops away when considering the final trial.[439] Despite over a year of remote trials, there is no evidence beyond the anecdotal on its impacts.[440] This is an insufficient foundation to such sweeping changes as in the PCSC Bill Not only does this bill concretise a measure with insufficient evidence as to its affects, it broadens them by allowing remote juries, even in the face of staunch professional opposition.[441] Of course, the bill does not address any of the practical ramifications, such as the management of non-digitised exhibits,[442] which may result in an echo of the pandemic induced scramble to quickly find a new way of working, despite the fact this is a permanent piece of legislation, created without urgency. Even with a reliance on judicial discretion, to determine when a remote trial is suitable, this thesis has already detailed the ways in which there are serious concerns about the application of that discretion in this arena. Ultimately, seeking to enshrine remote trials, and expand them, without detailed and thorough investigation would result in extraordinarily high risks to defendants and victims involved in the criminal court system.

It is inevitable that COVID-19, and the measures used to adapt to it, will live in the public consciousness for a significant long-term. Nevertheless, the long-term practical impacts of the

[437] House of Lords, n428, para.29.
[438] Hansard, "Police, Crime, Sentencing and Courts Bill (Second sitting) Debated on Tuesday 18/05/2021" 18/05/2021 < https://hansard.parliament.uk/commons/2021-05-18/debates/0bc53cdb-fb0c-4333-ab7b-a5a1343cd7c6/PoliceCrimeSentencingAndCourtsBill(SecondSitting) > accessed 1/11/2021
[439] EG Equality and Human Rights Commission, "Findings and Recommendations: Inclusive justice: a system designed for all" 06/2020; Helen Howard, "Effective participation of mentally vulnerable defendants in the magistrates' courts in England and Wales - the "Front Line" from a legal perspective" 2021 85(1) Journal of Criminal Law 3-16; Hansard, "Police, Crime, Sentencing and Courts Bill (Fourth sitting) Debated on Thursday 20/05/2021" 20 05/2021 < https://hansard.parliament.uk/commons/2021-05-20/debates/b3f3bcaa-d48a-415c-8ea1-b35d19d9f184/PoliceCrimeSentencingAndCourtsBill(FourthSitting) > accessed 1/11/2021
[440] Hansard, n431
[441] Joshua Rozenberg, "Reinventing the Law", (BBC, 18 06/2020), https://www.bbc.co.uk/programmes/m000k2m4 , quoted by the joint briefing by the Bar Council and the Law Society, Police, Crime, Sentencing and Courts Bill: Committee Stage Briefing for MPs—Pt 12, cl.168: Remote Juries. The Bar Council, "Joint statement on jury trials, court capacity and dealing with the backlog", (The Bar Council, 3/07/2020) <https://www.barcouncil.org.uk/resource/joint-statement-by-the-bar-council-and-the-law-society-on-jury-trials-court-capacity-and-dealing-with-the-backlog.html> accessed 1/11/2021
[442] Laura Hoyano, n25, 1037

COVID-19 working arrangements were less inevitable. The Police, Crime, Sentencing and Courts bill, however, makes substantial efforts to make the current arrangements permanent and long term, even expanding them further in the name of efficiency. It is becoming increasingly inevitable that the new ways of remote working in the criminal court is going to become permanent in law at least. However, there are significant reservations and questions in regards to how this will be actioned in practice. This is due to the behaviour and attitudes of judges and court centres towards these live links. Furthermore, the practical enforcement of these long term changes will also be inevitably influenced by the expected release of a new "Video Hearing Platform"[443] about which little is known and none experienced, and may change everything that is known and experienced in a CVP video hearing.

3.3.2 MYTHS SURROUNDING LIVE LINK EVIDENCE

Prior to the pandemic, one of the greatest general concerns by professionals surrounding the use of live link evidence was that "witnesses are never as effective on the video-link".[444] Professionals felt that "evidence given by video-link has less of an impact on jurors and is therefore avoided" by the prosecution[445] or makes things easier for the defence[446] because "the emotion with which they deliver evidence can be very compelling on a jury which is sometimes lost if it's over a video feed".[447] General feelings that live links "stifle it a bit"[448] further added to a reluctance to use them. The prevalence of these beliefs is such that it may influence judicial and advocate decision making, acting as an unofficial barrier to the making of an application for live links,[449] with some judges actively discouraging their use.[450] All this is despite the fact that there is no evidence to support this fear.[451] Practitioners had further concerns about the impact of live links on the believability of the witness. Once again, this is despite the fact there

[443] Monidipa Fouzder, "LCJ reveals new platform for remote hearings" (Law Gazette, 11/10/2021) < https://www.lawgazette.co.uk/news/lcj-reveals-new-platform-for-remote-hearings/5110121.article > accessed 08/11/2021
[444] Laura Hoyano, "Video and live-link evidence: state of play" (Counsel Magazine, 28 09/ 2018) < https://www.counselmagazine.co.uk/articles/video-and-live-link-evidence-state-of-play> accessed 20/08/2021
[445] Jane Gordon & Alison Gordon, "The role and rights of victims of crime in adversarial criminal justice systems: Recommendations for reform in England & Wales" (Victims Commission, 12/2020), 18
[446] Helen McNamee, Frances Molyneaux & Teresa Geraghty, n370 ,13. Supported by Joyce Plotnikoff and Richard Woolfson, n331, 61
[447] Kevin Brown & Faith Gordon, n376, 165
[448] Kevin Brown & Faith Gordon, n376, 165
[449] Samantha Fairclough, n326, 36
[450] Laura Hoyano, n444
[451] Laura Hoyano, n444

was "little evidence" to substantiate this.[452] They feared that remote evidence "sends a signal to jurors about an inability to face the accused, which can either be seen to suggest that the allegations are true or, conversely, that the witness is deliberately lying."[453] Victims feared they may look like they are "hiding"[454] from the defendant. All of these incorrect perceptions combined to result in a reluctance to use the special measure of remote evidence, stripping victims, witnesses, and on rare occasions defendants of a protection they could claim. Although these fears are already unfounded, as a result of the online work and socialisation between March 2020 and March 2021, "modern jurors are accustomed to speaking to people on small screens through Skype or FaceTime" and thus are increasingly unlikely to discredit, disbelieve or fail to engage purely due to a remote presentation.[455] This means that even if there had been some weight to the fear that video evidence changes juror perception, that is increasingly unlikely with individuals increased experience with video technology.

The significant advantage of compulsory remote attendance is that practitioners had far less of a choice in the use of remote evidence. Victims could no longer be pressured into giving evidence in the courtroom because of professional belief in these myths.[456] The first year of the pandemic could be conceivably considered a national pilot study into the use of remote evidence. It resulted in all practitioners developing hands on experience with the process of remote evidence, ensuring they saw that there is no discernible negative affect about believability or emotional impact of a witness. It allowed practitioners to have ample experiences with success whilst relying on remote evidence, and even feel the possible benefits of better-quality evidence and fewer collapsed cases that have been outlined above. Although it is impossible to say definitively, there is not an unreasonable chance that, with the experiences of success with live links, practitioners will no longer be as reluctant to apply for a live link special measure. Such a position would greatly improve the victim witness experience, long term, regardless of how long the direct impacts of the pandemic are felt.

It is the unofficial long-term changes that will offer far more benefits to the actors of the criminal court system, and are far more likely to affect the practical experiences of those attending a court hearing. It is hoped the experience with remote video evidence will reduce practitioner reluctance to use it and expand the benefits of the already embedded special

[452] Kevin Brown & Faith Gordon, n376, 166
[453] Cashmore & De Haas in Samantha Fairclough, n326
[454] Rabiya Majeed-Ariss, Alice Brockway, Kate Cook & Catherine White, n384
[455] Laura Hoyano, n444
[456] Joyce Plotnikoff and Richard Woolfson, 325, 91

measures arrangements. Should this reduced reluctance coincide with flexible arrangements allowing witnesses to give evidence from home, or from improved facilities, the long-term benefits to evidence, and thus the wider justice system could be immense.

3.4 CONCLUSION

Whilst the previous chapter of this thesis sought to explore the impacts of delays in hearings and in getting to trial, this chapter has explored the changes that have arisen at the hearings themselves. The image of the court system that emerges is a much more mixed one than the overwhelming negativity of the delays. An inevitable benefit of the transition to remote justice was that it allowed the administration of justice to continue. Whilst the remote hearings themselves may have been of mixed success, the situation would have been far worse had no hearings, or only the very few attended hearings, had run. Beyond that, this chapter has explored the three distinct impacts of the pandemic on the actors of the criminal court system: the changes in practical attendance; the impacts on the rights of participation; and the long-term changes. Whilst this thesis makes many assertions about the practical changes to the experiences of joining a hearing, thus far, there has been no comprehensive government inquiry into how effective and fair these virtual hearings are as there was in the family jurisdiction.[457] It is unsurprising, however, that Fair Trials found that "60% of respondents expressed that the use of video-link or telephone had a noticeably negative impact on the overall fairness of the hearings"[458] due to the issues of remote justice.

Despite this rather damning review, there are some benefits to the actors of the criminal justice system that have arisen due to the widespread implementation of remote justice, although each is limited in a unique way. Counsel were able to act in a wider geographical variety of cases, taking on a greater workload, benefiting efforts to reduce the backlog, however this was gradually being inhibited by inconsistent use of this remote technology. Actors were no longer suffering the troubles of the court infrastructure, however, this places a heavy burden on actors to be responsible for their own technology. The non-court location may offer a more relaxed and calming atmosphere but may by undermined by lack of available privacy or space.

[457] Nuffield Family Justice Observatory, n346
[458] Fair Trials, n420, 7

The impact of the pandemic on victims giving evidence is equally mixed, with both significant highs and lows. The use of live links to give evidence is designed to assist a witness, reducing their stress, anxiety, and concern at giving evidence in court. Their use was not widespread before the pandemic. As a result, there is a significant improvement in that the vast majority of victims have now been able to benefit from giving evidence remotely. However, the change from live link to CVP evidence has a mixed impact – a victim may feel more comfortable in a familiar place or they may feel more exposed; a victim may feel safer at home, or they may be at higher risk to their safety. The benefit will likely be in giving a victim the power to choose. However, the potential for improvement for the victim experience and the resultant quality of their evidence is significant.

This chapter has demonstrated the immense change the criminal court has undergone between March 2020 and March 2021 due to COVID-19. In times of such change, it is vital that the justice system is open and subject to scrutiny and accountability, to ensure these changes do not unduly harm the position of any actor in the court system. The next chapter will explore how open justice and scrutiny was maintained during this period of immense change, and how this was impacted, largely because of the virtual hearings of this chapter.

CHAPTER 4: OPEN JUSTICE

Open justice and public scrutiny are essential to the criminal court system. That "justice must be seen to be done"[459] is a long standing and essential part of the criminal court system. As a result, trials have been conducted in public since "time immemorial."[460] It is spoken of with the highest respect. Indeed, open justice is "a hallmark and a safeguard" of the rule of law.[461] In *Scott*[462] Lord Halsbury speaks to the irrefutable nature of the principles of open justice:

> I am of the opinion that every court of justice is open to every subject of the King…I believe that this has been the rule, at all events for some centuries, but…it, has been the unquestioned rule since 1857, unquestioned by anything which I can recognise as an authority.[463]

This is all to such a degree that Townend notes that the principle is "so well embedded it is often accepted uncritically."[464] Heavily enshrined and valued in common law judgements, open justice is also a right confirmed by Article 6 ECHR.[465] The court has confirmed time and time again that it is a "fundamental principle", protecting defendants against secret administration of justice.[466] Inherent in the reasoning of this right is that open justice allows observers to hold the court accountable, calling out judicial, police, procedural and legislative errors and missteps. Doing so also ensures public confidence in the fairness of the criminal justice system.[467] Failure to maintain open justice and scrutiny leaves all individuals involved in the court process more vulnerable to mistakes or abuses and results in lesser accountability.

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[459] Rex v Sussex Justices [1924] 1 KB 256, Lord Hewart
[460] Edward Jenks, The Book of English Law (6th revised edn, PB Fairest (ed), Murray, London, 1967) 73-4, cited in Lord Neuberger, "Open Justice Unbound?' (2011) TJR 259, 260.
[461] Guardian News and Media Ltd v Erol Incedal [2014] EWCA Crim 1861
[462] Scott v Scott [1913] AC 417
[463] Scott v Scott [1913] ibid, 440
[464] Judith Townend, "Positive Free Speech and Public Access to the Courts" in Andrew Kenyon & Andrew Scott "Positive Free Speech: Rationales, Methods and Implications" (2020, Hart Publishing), 136, footnote 7
[465] Re S (A Child) (Identification: Restrictions on Publication [2005] 1 AC 593, para 15, Lord Styen confirms the similar approaches of the ECtHR and Article 6.
[466] Riepan v Austria (2000) Application Number 35115/97, at para 27; Krestovskiy v Russia (2010) Application Number 14040/03, para 24; Sutter v Switzerland (1984) application number 8209/79, para 26. It is interesting to note that the exact same wording is used independently in each case, reinforcing how consistently this is valued.
[467] Krestovskiy v Russia (2010) Application Number 14040/03, para 24

Although there are many components to open justice – disclosure of material to the media[468] and the effectiveness of that media in maintaining effective open justice,[469] reporting restrictions due to anonymity orders for victims[470] or witnesses,[471] and national security limitations[472] - this section will focus on the access to the hearing component of open justice, as this is the component identified to be most affected by the pandemic.

Although well enshrined in the common law, the Article 6 open justice requirement provides a succinct summary of the floor standard of this right. The right is broad, even as Article 6 allows for open justice to be subject to a number of potential qualifications: "the press and public may be excluded from all or part of the trial ... where the interests of juveniles or the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."[473] This is because the use of these qualifications must be fully reasoned[474] and are rarely used to prevent access to the court in adult-defendant criminal[475] hearings. Once again, it is important to note that there was no derogation from this standard in Article 6, and the courts must continue to meet this standard, even if it requires adaptations and new ways of working.

This chapter explores how the changes caused by the COVID-19 pandemic impact the court system's ability to meet these standards. It first looks at the impacts on practical access of the public to the courts. It then turns to the use of the Single Justice Procedure for the COVID-19 criminal regulations, which demonstrated the importance of public scrutiny, and the heightening importance of it during a swiftly changing COVID-19 legal backdrop.

4.2 PUBLICICTY OF HEARINGS DURING THE PANDEMIC

Under normal circumstances, the threshold for open justice is simply summarised: a hearing "complies with the requirement of publicity only if the public is able to obtain information

[468] BBC v Secretary of State for Transport [2019] EWHC 135 (QB); [2019] 1 WLUK 285:
[469] Jason Bosland and Judith Townend, "Open justice, transparency and the media: representing the public interest in the physical and virtual courtroom" 2018 23(4) Communications Law 183-202
[470] R. (on the application of Press Association) v Cambridge Crown Court [2012] EWCA Crim 2434; Birmingham City Council v Riaz [2015] EWHC 1857 (Fam).
[471] Kalma v African Minerals Limited [2018] EWHC 120 (QB)
[472] Criminal Procedure Rules and Practice Directions (2020) part 6.1
[473] Article 6(1) ECHR
[474] Chaushev v Russia (2016) (Applications nos. 37037/03, 39053/03 and 2469/04) para 24
[475] Although terrorism offences are frequently subject to such restrictions

about its date and place and if this place is easily accessible to the public."[476] Prior to March 2020, this could be practically and effectively "fulfilled by the simple fact that a hearing is held in a regular courtroom large enough to accommodate spectators."[477] This is how open justice was maintained under normal circumstances and the standards that were expected of the criminal justice system. However, the first year of the pandemic was far from 'business as usual'. As detailed in the chapter above, the vast majority of hearings have been conducted partially or wholly online; as a result, many physical courts have been closed to the public;[478] and social distancing has limited courtroom capacity, when open.[479] This has meant that the normal, easily met standard for the access requirement of open justice required active adaptation to still be met. Largely where active change has been required to maintain open justice, the criminal court system has failed to effectively do so, but there is clear evidence of potential. Where more limited adaptation was needed, the criminal court system thrived in this arena, which improved the availability of open justice beyond pre-pandemic levels.

The higher courts felt the benefits and successes of the online transition: in person access may be restricted, but the opportunities for online access were sufficiently compensatory to ensure that defendants were still offered the protections of scrutiny. It is unfortunate, and concerning, that the lower courts were not having similar success. There were additional hurdles of justifying attendance and requiring technological competence that were hard to achieve. The scrutiny potential was lower in these jurisdictions.

4.2.1 THE SUPREME COURT

It is important to note that the Supreme Court building was closed to the public for the entirety of the scope of this thesis.[480] Therefore, it relied completely upon online access to its hearings in order to allow observation of them during the first year of the pandemic. The Supreme Court was well accustomed to providing online access to its hearings. The Supreme Court live streamed its own hearings[481] and media outlets such as Sky News broadcast live footage.[482]

[476] Riepan v Austria (2000) Application 35115/97 para 29
[477] Riepan v Austria (2000) ibid
[478] HMCTS, "Courts & Tribunals Tracker" 16/10/2020
[479] EG see the need for new "Super Courtrooms" to have the space for multi-handed hearings: HMCTS & MoJ, "Press Release: 'Super courtroom' opens in Manchester" 10/09/ 2021 < https://www.govuk/government/news/super-courtroom-opens-in-manchester > accessed 12/11/2021
[480] The Supreme Court, "The Supreme Court" <https://www.supremecourt.uk/> accessed 17/07/2021
[481] The Supreme Court, "Supreme Court Live" < https://www.supremecourt.uk/live/> accessed 20/03/2021
[482] Sky News, "Supreme Court Live" < https://news.sky.com/supreme-court-live> accessed 20/03/2021

The Court also offered an 'on-demand' service, where the proceedings and judgment video recording remained online for one year after the hearing.[483] Written judgments were also always published online with no sunset date, providing a simple means of scrutiny of judgment, if not process, as allowed by active observing of the hearing. Online access to the Supreme Court was well established, and thus the measures implemented to reduce court footfall had very little impact on any individual seeking to observe proceedings, many of whom were already accessing the court online

The transition was very effective, and the ease by which it was done was not surprising. A review of the courts response to the pandemic noted that the Supreme Court was especially well placed to adapt: "the judiciary and practitioners are generally well-resourced, the issues for determination are often focussed on specific points of law, litigants are rarely in court, and there is generally no live evidence to test."[484] The issues that plagued the lower courts – parties struggling to connect, hear, or engage – impacted the Supreme Court less because of this. As a result, not only were the hearings themselves easy to access, but that access will allow the observer to fully hear, see, and follow proceedings. This allowed the ideal combination of a hearing running as smoothly as it would during normal times, and a well-established infrastructure of online access meant that nearly nothing has changed in regard to online access to the Supreme Court. It could even be argued that the ability of external viewers to observe proceedings was improved; rather than watching only through the court camera lens, each and every party had a camera focused on them directly. It was a minor change to an already very virtual court. However, it must be acknowledged that the Supreme Court hears only a very small number of cases, only hearing 81 in the 2019-2020 judicial year.[485] Many of these are not cases in the criminal jurisdiction. Therefore, whilst the success of the Supreme Court is important to acknowledge and may provide an example of a high standard of open, online, justice, it has little impact on the running of the criminal courts in England.

In the chapter above, this thesis addressed the risks associated with remote hearings and digital exclusion. These concerns are likewise applicable to observing remote hearings. Online only access to hearings does exclude members of the public who do not have the appropriate level of technology or internet access and literacy from observing hearings. There was no way for

[483] The Supreme Court "Watch Video on Demand" 5/05/2015 < https://www.supremecourt.uk/news/catch-up-on-court-action-supreme-court-launches-video-on-demand-service.html> accessed 20/03/2021
[484] House of Lords, n4, para 42
[485] The Supreme Court, "FAQs" < https://www.supremecourt.uk/faqs.html#1h> accessed 28/03/2022

these members of the public to access hearings in person. Whilst digital exclusion is not ideal, the overall scrutiny of the court was not significantly impacted. Therefore, due to the increased ease of remote observation, overall, there was a minor net benefit to the ease of access virtual hearings at the Supreme Court.

4.2.2 THE COURT OF APPEAL

Much like the Supreme Court, the Court of Appeal was allowed to broadcast, and have certain individuals broadcast,[486] its proceedings since 2013.[487] In the Civil Division, from November 2018, the court increased transparency and access to recordings by live streaming selected cases themselves.[488] The Criminal Division did not do the same and was reliant on external broadcasters. As such, online access to hearings was not as smooth or effortless as in the Supreme Court.

Rather than a simple live stream, the Court of Appeal published its daily lists online, and then offered to send the details on how to join a hearing at the email request of interested parties.[489] It seems that this process, as was also adopted by the High Court, was rather successful, with flattering Judicial comments as to its open nature. At the RCJ, "the list record[s] that the hearing was to be a telephone hearing and an email address was given by which any person could contact the court to request dial-in details."[490] Such a set-up allows for a clear means for any individual to seek access to a hearing, much as they could during normal hearings. Access was deemed to be sufficient that Mr Justice Fordham found no "derogation from the open justice principle" at all.[491] This thesis would go one step further. Due to the changes wrought by the pandemic, the Court of Appeal, Criminal Division, was no longer reliant on external broadcasters and their choices. That agency was given to the public, who could request access

[486] The Court of Appeal (Recording and Broadcasting) Order 2013, No. 2786 S6-9
[487] The Court of Appeal (Recording and Broadcasting) Order 2013, ibid
[488] Courts and Tribunals Judiciary, "The Court of Appeal (Civil Division) – Live streaming of court hearings" < https://www.judiciary.uk/you-and-the-judiciary/going-to-court/court-of-appeal-home/the-court-of-appeal-civil-division-live-streaming-of-court-hearings/> accessed 20/03/2021
[489] HMCTS, "Royal Courts of Justice daily cause list 18 06/2021" < https://www.govuk/government/publications/royal-courts-of-justice-cause-list/royal-courts-of-justice-daily-cause-list#court-of-appeal-criminal-division-daily-cause-list> accessed 18/06/2021
[490] Walaszczyk v Regional Court of Law In Czestochowa, Poland [2020] EWHC 849 (Admin).
[491] Walaszczyk v Regional Court of Law In Czestochowa, Poland [2020] ibid para 2

to any hearing being conducted. Such a transition can only improve the openness and accessibility of this court and expand the resultant benefits and protections.

The fully virtual courtroom, in its ideal, was demonstrated by these higher courts. They evidence how the Police, Crime, Sentencing and Courts Bill will greatly assist open justice, as purported, by maintaining the current arrangements. Here, it posed no problems to the principles of open justice. When "the hearing and its start time were listed in the cause list published online, with contact details available to anyone who wished to have permission to dial in"[492] there are nearly no barriers to access, although there are the same concerns surrounding technological exclusion.

4.2.3 THE CROWN COURTS

It is unfortunate that the lower levels of the criminal court system were not commended in the same way for their online provisions. As a starting point, it must be acknowledged that the largest study into open justice during COVID-19 "found that no one had been denied access to a hearing that they wanted to report on."[493] It is important to note the focus on 'reporting' – it suggests a very strong focus on journalists and professional observers, rather than lay observers. Unfortunately, there are also a number of anecdotal recounts of journalists being refused online access to hearings,[494] which does demonstrate the limitations of such studies. For example, Mellor found that when requesting the details to join a CVP hearing, his request had to be made by 12 noon on the day prior, due to the high workload on administrative staff. However, court lists are not published until 3-4pm, and therefore, such a requirement is not

[492] Jablonski (aka Marcin Nowakowski) v District and Provincial Courts In Lublin (Poland) [2020] EWHC 1334 (Admin).
[493] House of Lords Select Committee on the Constitution, "Uncorrected Oral Evidence: The Constitutional Implications of COVID-19" (10/06/2020) < https://committees.parliament.uk/oralevidence/501/html/> Q45
[494] Tristian Kirk, "Coroners facing legal action after 'irrational' decision to block remote access to inquest for journalist" (Evening Standard, 12th 05/2021) < https://www.standard.co.uk/news/uk/coroners-inquest-journalist-remote-access-dr-george-julian-b934796.html?utm_medium=Social&utm_source=Twitter#Echobox=1620839303-1> accessed 16/06/2021. Note that the journalist was allowed to attend in person, and thus the prohibition on online attendance was not because the hearing was being conducted in chambers.

practicable.[495] This resulted in inconsistent admission to report on court hearings and evidences an incomplete picture from the studies.

Of course, it is essential to acknowledge the benefits to open justice of the virtual hearing when access was given. Virtual hearings could be observed from any location, which allowed court reporters to cover a wider geographical remit. With virtual hearing attendance, there were no geographical limitations or barriers to reporting on regional court centres, and the benefits of open justice could be felt more strongly by those regional court centres. Previously individuals would have either had to travel, or hope the case was of sufficient public interest that the court system would offer regionalised "secure locations" to view the hearing.[496] Viewing a hearing virtually from home offers no such limitation.

An example of the possibilities associated with virtual viewing of hearings is the extradition trial of Julian Assange. This was a hearing of huge public interest and a model of high level of observation, that would not have been achievable without the use of virtual viewing. It was unfortunate that even this hearing included technical challenges such as "temporary loss of sound, video glitches, and interruptions including the sound of a dog barking somewhere on the line."[497] This degraded the quality of the hearing stream, making it more challenging to observe. Moreover, the virtual attendance at this trial was so high, other court centres were negatively affected. The CVP servers removed people from other hearings at random in order to accommodate the burden of the Assange trial. This hearing demonstrated all of the potential of the virtual courtroom for open justice, as caused by the pandemic, whilst also illustrating its limitations.

Sadly, this position of immense benefit of access was not matched when looking at the ability of the general public to virtually view a normal hearing. The largest study on the issue found "there were real issues with members of the public and researchers being able to join"[498]

[495] JMellow (Josh Mellor) "Kingston-upon-Thames Crown Court requires remote access (CVP) requests to be sent before 12pm for a hearing the next day. But their court lists are published at 3-4pm. The result? Less cases reported, higher footfall in court and more public transport during lockdown @HMCTSgovuk" 16/02/2021 < https://twitter.com/jshmellor/status/1361604204821950467?s=19 > accessed 18/02/2021

[496] EG the trial of Hashem Abedi, the Manchester Arena Bomber, was broadcast to Manchester, Newcastle, Leeds and Glasgow criminal courts for individuals to attend to watch proceedings. CPS, "Brother of Manchester Arena bomber guilty of murder" 17/03/2020 < https://www.cps.govuk/cps/news/brother-manchester-arena-bomber-guilty-murder> accessed 16/06/2021

[497] Tristian Kirk, "My ringside view in the case of Julian Assange" (Evening Standard, 2/10/2020) < https://www.standard.co.uk/news/crime/julian-assange-case-ringside-view-a4561961.html> accessed 10/06/2021

[498] House of Lords Select Committee on the Constitution, n493, Q45

hearings, unlike reporters and journalists. Vitally, the Article 6 rights of open justice speaks to the access of the "public" rather than just journalists. However, there is an increasing tendency of the courts to conflate these two terms. An example of this can be seen in the Civil Procedure Rules, which state "where a media representative is able to access proceedings remotely while they are taking place, they will be public proceedings."[499] Moreover, even when addressing the wider range of public access mechanisms envisaged by the Master of the Rolls only "accredited journalists" were explicitly spoken of as being allowed to log onto the remote hearings.[500] Whilst acknowledging that these rules apply to civil proceedings rather than criminal, the principles of open justice are a core tenant of both, and a conflation in one realm would likely be mirrored in the other.

For true open justice, it is incredibly important that it is not only journalists that are able to access and observe hearings, but also members of the public and interested parties. Unlike the higher courts, with consistent and reliable access to the lists and contacts for requesting the joining details, "only a minority of county courts [were] publishing open justice notices which give people the information they need to join hearings. [501] Whilst journalists may be in direct receipt of the lists, much like legal professionals, lay attendees have no such access and were reliant on publicly available information. Failure to make this information public completely undermines the requirement that "the public is able to obtain information about [a hearings'] date and place."[502] This was especially concerning when court buildings were closed and lists could not be accessed in person.

In response, it could be submitted that Xhibit,[503] and websites like it, were useful in informing individuals of the list of the day. Xhibit is a software that publicises details of case numbers, defendant, listing times and hearing progression on a daily basis. However, in only providing information for today's list, it failed to give parties sufficient notice to make the appropriate requests to gain access to a hearing through online means. It also had rather limited functionality. Xhibit allows the user to select a court centre and view those lists, but does not allow the user to search by case number or defendant name to determine where it is being heard. This is not a critique levelled at the higher courts due to their existence as a singular court entity – the information for all hearings is viewable on the same page. However, Crown Courts sit

[499] Civil Procedure Rules (2021), Practice Direction 51Y, para 3
[500] Protocol (Civil Justice: COVID-19: Remote Hearings) [2020] 1 WLR 1334
[501] House of Lords Select Committee on the Constitution, n493
[502] Riepan v Austria (2000) n476, para 29
[503] Xhibit, < http://xhibit.justice.govuk/> accessed 12/11/2021

across 77 different regions,[504] which results in 99 separate pages[505] to view if an individual is unsure which crown court a matter is being heard at. Therefore, Xhibit does nearly nothing to mitigate the failures of the court system to ensure "the public is able to obtain information about [a hearings] date and place"[506] and reduces the benefit of no longer requiring a geographical nearness in order to easily find and attend a hearing. Admittedly, the uninformative nature of online court listings was not caused by the COVID-19.[507] However, this was overcome by the printed lists in the court-building that could be easily viewed and then used to gain instant access to the hearing. In an era of virtual hearings and closed court-buildings, this is no longer a compensatory measure.

Magrath reported that when requesting the joining details, the public also had to "overcome the hurdle of justifying why they might want it".[508] This directly contrasts with in person attendance, where individuals could enter and leave courts without needing to provide reasons. This may even have had the impact of dissuading interested parties, such as those supporting the defendant, from joining over perceived stigma over their position. The struggles at the lower courts to provide effective virtual access, with an ease matched by in person attendance, was a significant negative impact caused by COVID-19 when it comes to accountability and open justice. With dropping numbers of court reporters, open justice and accountability was limited to only those hearings that are newsworthy unless a public observer seeks to be involved.[509] It is essential that virtual hearings do not become the remit of reporters only.

Finally, it is uncertain whether the failings of the lower courts to accommodate non-journalist observers was a result of deliberate intention or pandemic chaos. The MoJ reported "Judges fear that those granted access might record proceedings illegally or disrupt proceedings remotely."[510] Such a statement has worrying implications about the attitude surrounding public attendance. It also fails to address how concerns of recording in person were previously

[504] Courts and Tribunals Judiciary, "Crown Court: What is the Crown Court?" < https://www.judiciary.uk/you-and-the-judiciary/going-to-court/crown-court/> accessed 12/11/2021
[505] Xhibit, < http://xhibit.justice.govuk/> accessed 12/11/2021
[506] Riepan v Austria (2000) n476, para 29
[507] Paul Magrath, n30, 130
[508] Paul Magrath, n30, 130
[509] The Justice Gap, "Open letter from NGOs and academics on open justice in the COVID-19 emergency" 29/05/2020 < https://www.thejusticegap.com/we-need-to-protect-open-justice-during-the-COVID-19-emergency/> accessed 10/06/2021
[510] Owen Bowcott, "Has coronavirus changed the UK justice system for ever?" (The Guardian, 24/05/2020) < https://www.theguardian.com/law/2020/may/24/has-the-uk-justice-system-been-changed-for-ever-by-the-coronavirus> accessed 15/06/2021

accommodated, nor does it acknowledge the powers given to court staff and Judges to prevent interruptions and control the virtual courtroom.

In contrast to the higher courts, some crown courts were partially open to in person attendance, for some of the window of March 2020 to March 2021, for the few hybrid hearings that were administered. This allowed for in person open justice, but in a way was impacted by the restrictions of the pandemic. It is firstly important to acknowledge that for the majority of the pandemic, individuals were restricted to "essential travel" only.[511] There was never any statements as to whether travelling to observe a court is an essential activity, despite extensive rules that allowed even those with a positive test to attend court in person when they were involved in proceedings.[512] At most, the Courts and Tribunals Service (HMCTS) have stated "Media and members of the public will be also able to attend court hearings in person if safe to do so."[513] The standards of "safe to do so" were not expanded upon and are likely entirely at the discretion of the local court centre. Moreover, in light of the "huge amount of unlawfulness with the wrong application of [non-enforceable] guidance"[514] it is unsurprising that individuals would have been cautious about the risks of trying to attend a hearing. As a result, "there has been reduced physical attendance of the public at court – even in courts that have remained open."[515] Such physical attendance results in a lower number of observers and thus limited the accountability and scrutiny of the court for these hearings

Even after successfully attending the court building, the pandemic has resulted in a requirement[516] for social distancing in the courtroom. This meant that the capacity of the gallery was reached far sooner than in pre-pandemic times. One reported incident states that "Isleworth crown court has refused entry to a number of family and friends of two defendants who are being sentenced - because the court is at capacity… Judge Jonathan Ferris asks for his apologies

[511] The Health Protection (Coronavirus, Restrictions) (No. 3) and (All Tiers) (England) (Amendment) Regulations 2021, No 8 2(2)
[512] The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020
[513] HMCTS & MoJ, "Coronavirus (COVID-19): courts and tribunals guidance" 13th 03/2020 < https://www.govuk/guidance/coronavirus-COVID-19-courts-and-tribunals-planning-and-preparation> accessed 8/06/2021
[514] Joint Committee on Human Rights, "Oral Evidence (Virtual proceedings): The Government's response to COVID-19: Human Rights Implications of Long Lockdown" (24/02/2021), 5
[515] House of Lords Constitution Committee, "Inquiry into the Constitutional Implications of COVID-19: The Council of Her Majesty's Circuit Judges – written evidence (CIC0039)" para 29< https://committees.parliament.uk/writtenevidence/10736/html/> accessed 20/02/2022
[516] Administrative rather than legislative

to be passed on…"[517] Beyond limiting the number of observers for accountability purposes, this had serious repercussions on the mental health position of any parties attending court. Friends and family are a well acknowledged support system that is essential to the wellbeing of all individuals – victims may wish for emotional support from friends and support networks, and defendants are well assisted by strong and consistent networks.[518] Such a strict capacity limit in court thus deprived actors of their support system that would have clearly been otherwise in place. HHJ Ferris' apology to the family in this instance, saying that "We have a principle of public justice in theory and usually in practice anyone can come in"[519] illustrates how the pandemic created a disconnect between the right of open justice and its practical provision at that time. It further compounds that the degree of access being provided may not meet the Article 6 requirement that clearly states these rights are not "theoretical or illusory but… practical and effective,"[520] and Judge Ferris' comments may indicate that the current arrangements leant towards the former.

Looking beyond March 2021, when combined with post-pandemic open physical courtrooms, it is very likely the virtual viewing offered huge benefits to the principles of accountability and open justice. The positive response of journalists to the news that the Police, Crime, Sentencing and Courts Bill[521] included a provision for the continuation of virtual viewings of hearings[522] does imply that the use of virtual viewing of a hearing was a net positive. This thesis absolutely supports the position that virtual viewing of hearings assisted journalists in attending and observing hearings, which significantly improved the benefits derived from open justice.

[517] Josh Mellor, "Isleworth crown court has refused entry to a number of family and friends of two defendants who are being sentenced - because the court is at capacity. No solution appears to have been offered, Judge Jonathan Ferris asks for his apologies to be passed on... 1/" (Twitter 27/01/2021) <https://twitter.com/jshmellor/status/1354385327285301250> accessed 18/06/2021, 4

[518] Ministry of Justice, "Before Court: Going to Criminal Court as a Defendant" (Ministry of Justice) <https://assets.publishing.service.govuk/government/uploads/system/uploads/attachment_data/file/852436/before-court-criminal-court-defendant-eng.pdf >

[519] Josh Mellor "He said: "We have a principle of public justice in theory and usually in practice anyone can come in, family and friends are a priority. "My apologies to those who have been left outside due to a rule which I have no power to overrule." 2/2" (Twitter, 27/01/2021) <https://twitter.com/jshmellor/status/1354386694351560704> accessed 15/06/2021

[520] Airey v Ireland (1979) (Application no. 6289/73), para 24

[521] 2020

[522] Lucy Reed, "This is excellent news for open justice post-pandemic! And it will apply it seems to the #familycourt" (Twitter, 9/03/2020) < https://twitter.com/Familoo/status/1369315305831432194> accessed 8/06/2021 & Tristan Kirk, "Virtual attendance at court to be made a permanent feature, under the govt's new Justice Bill. Great news for #openjustice as a whole range of criminal & civil courts will be able to utilise the technology, and it looks to be open to press and public." (Twitter, 9/03/2021) < https://twitter.com/kirkkorner/status/1369300344812040196> accessed 8/06/2021

However, until the positive virtual experience of the higher courts is matched by the crown courts, a reliance on virtual attendance to ensure open justice is insufficient at the lower levels.

Whilst an absence of in person attended hearings at the highest court levels was not overly detrimental to achieving the goals of open justice, due to the rather poor picture painted for virtual access of Crown and Magistrates courts, the addition of in person attendance is important in these centres to compensate for the virtual deficits. However, with an increased movement towards attendance in the Crown courts, and a reduction in social distancing requirements, this duality of access may become a beneficial feature of these hearings.

4.3 USE OF SINGLE JUSTICE PROCEDURE

The Single Justice Procedure only applies to summary-only, non-imprisonable offences. A magistrate is allowed to deal with the case on the basis of the papers alone, without parties, when no not-guilty plea is entered. Importantly, for the purposes of open justice, it has "no obligation to sit in open court."[523] This is because "it is simply the magistrate and a lawyer in a room going through case files on a computer".[524] Examples of the offences the SJP traditionally deals with include driving without insurance, exceeding a 30mph speed limit and TV licence evasion.[525] Many of these crimes are seen as "victimless".

The SJP was "vital"[526] during the pandemic, with over £3.5 million issued in fines over this first year.[527] The very nature of the SJP made it well-suited to remote working.[528] It continued in a largely 'business as usual' way and was one of the only criminal courts to do so. Additionally, the COVID-19 offences were squarely within its remit of low-level summary-only offence – the high number of charges could not be dealt with nearly as quickly should it have been placed before a fuller magistrate's court. However, the very fact that it was so

[523] Criminal Justice and Courts Act 2015, Explanatory Notes, Part 3, para 426
[524] House of Commons Justice Committee, "Oral Evidence: COVID-19 and the criminal law, HC 1316" (20/04/2021), q39
[525] Criminal Justice and Courts Act 2015, Explanatory Notes, Part 3, para 421
[526] Katie Dean, "Adapting the single justice procedure for Coronavirus (COVID-19)" (Inside HMCTS, 1/04/2021) < https://insidehmcts.blog.govuk/2021/04/01/adapting-the-single-justice-procedure-for-COVID-19/> accessed 8/06/2021
[527] Tristian Kirk, "Written evidence from Tristan Kirk, Courts Correspondent, London Evening Standard: Supplementary Evidence to the Justice Select Committee" (Justice Select Committee) <https://committees.parliament.uk/writtenevidence/26045/pdf/> accessed 17/06/2021
[528] Katie Dean, n526

suitable for the pandemic – with no need for a courtroom or public access and a high turnover of convictions – caused many concerns to arise, especially within the arena of open justice.

The decision to use the SJP for COVID-19 offences lacked transparency in and of itself. "There appears to have been no public announcement of this decision, and no consultation wider than justice partners."[529] Despite the fact it appears the SJP had been used since the start of the pandemic,[530] Kirk has reported that the first case listing including COVID-19 offences did not arrive until September 2020, "tacked onto the same email [with the SJP traffic offences list]…that many of the journalists sent the lists would not look too closely at them, expecting them to contain low-level traffic offences."[531] The decision to use the SJP appeared to have largely flown under the awareness of the public and the media. It is impossible to have open justice and accountability when the public is not even informed of the court level the procedure is being conducted at. When considered alongside the fact 60% of defendants never respond to their SJP notice[532] it was also entirely possible that defendants do not know the procedure level either. Such an arrangement made it impossible for any of these proceedings to be subject to any degree of public oversight or accountability, undermining any protections offered by open justice and public scrutiny.

In this section, the use of the SJP during the pandemic is explored in regard to the new COVID-19 offences. There is already ample literature detailing the issues of the SJP in isolation,[533] and as such this section will confine itself to COVID-19 developments. This will illustrate further the potential harms done to individuals when there is insufficient scrutiny of court process and a lack of open justice.

[529] Tristian Kirk, n527
[530] Katie Dean, n526
[531] Tristian Kirk, n527
[532] Owen Bowcott, "Over 60% of 'fast-track justice' defendants never enter plea" (The Guardian, 19/08/2019) < https://www.theguardian.com/law/2019/aug/19/defendants-face-conviction-by-not-entering-plea> accessed 17/06/2021
[533] EG APPEAL, "Conveyor Belt Justice: The case against the Single Justice Procedure" (4/10/2021); Owen Bowcott, n532, Jane Donoghue, "The Rise of Digital Justice: Courtroom Technology, Public Participation and Access to Justice" 2017 80(6) Modern Law Review 995-1025

4.3.1 LEGAL CLARITY FOR OFFENCES

Between March 2020 and March 2021, 410 COVID-19 related statutory instruments were laid before parliament, covering a wide range of topics.[534] These included the range of regulations that dictate the lockdowns and tier-based system, and new obligations such as to self-isolate or wear a mask. These regulations also introduced a range of offences to support the new rules and powers. All the new offences were "non recordable" offences and had no custodial risk. They were only punishable by fines.[535]

The core act of the COVID-19 pandemic was the Coronavirus Act 2020. It remained in effect through each stage and change of phasing. Offences created in this act can be generally categorised as failing to comply with COVID-19 powers. This contrasts with later, phase specific regulations that impose active restrictions. The Coronavirus Act 2020 created significant powers over those who are "potentially infectious."[536] They included powers to enforce attendance at a COVID-19 testing or screening location[537], powers to then enforce the test itself,[538] and then powers to impose restrictions, such as on movement, or requirements, such as to provide information, on those individuals.[539] These powers were then supported by a number of criminal offences with liability of summary conviction up to a level 3 fine.[540] Section 52 outlined the powers given to the government to "prohibit or restrict events and gatherings"[541] and close premises or impose restrictions on entry.[542] Failure to comply with these restrictions had liability for a summary conviction and fine.[543]

The House of Commons Research Library categorised the first year of COVID-19 into six phases,[544] each with drastically different restrictions, powers, and thus offences. Phase 1, from March 2020 to June 2020, was the first national lockdown. Phase 2, from July 2020 to

[534] Hansard Society, "Coronavirus Statutory Instruments Dashboard" last updated 26/03/2021 < https://www.hansardsociety.org.uk/publications/data/coronavirus-statutory-instruments-dashboard#total-coronavirus-sis> accessed 26/03/2021
[535] Liberty, "Coronavirus: Criminal Penalties" 5/02/2021< https://www.libertyhumanrights.org.uk/advice_information/coronavirus-criminal-penalties/> accessed 25/03/2021
[536] Coronavirus Act 2020, Schedule 21, 2
[537] Coronavirus Act 2020, Schedule 21, 6-7
[538] Coronavirus Act 2020, Schedule 21, 8-13
[539] Coronavirus Act 2020, Schedule 21, 14-17
[540] Coronavirus Act 2020, Schedule 21, 23(2)
[541] Coronavirus Act 2020, Schedule 22, Part 2, 5
[542] Coronavirus Act 2020, Schedule 22, Part 2, 6
[543] Coronavirus Act 2020, Schedule 22, Part 2, 9
[544] Jennifer Brown, "Coronavirus: A history of English Lockdown Laws" (3/12/2020, House of Commons Library Briefing Paper No 9068), 2-3

September 2020, had minimal lockdown restrictions, with guidance that was stricter than the law itself. The Research Library classified Phase 3 as "reimposing restrictions", from September 2020 to October 2020, included the creation of the tier system. Phase 4 consisted of a second national lockdown for the month of November 2020. Phase 5 reintroduced the Tier System, with a 4th tier introduced part way through, under which 74% of the country remained. The final phase was the third national lockdown, from January 2021 to March 2021. Although the "roadmap" to ease restrictions was announced in February 2021,[545] its bulk came into effect after the end of the scope of this thesis, as such, it will not be considered here. The outline of the numerous stages illustrates the constantly changing legal framework under which the SJP had to operate. The right of the government to implement these regulations was challenged in *Dolan*,[546] however all three grounds of challenge – that the regulations were made ultra vires, that the Secretary of State fettered his own discretion, and that the regulations were incompatible with a range of ECHR rights – were rejected to the extent they were called "impossible"[547] and "no[t] arguable".[548]

One of the most significant concerns regarding the SJP during COVID-19 was the inconsistent application and interpretation of the rules. Offences such as failure to purchase a TV licence[549] are clear, unambiguous, and well understood. They could be heard, relatively uncontroversially, in the SJP. The same cannot be said for the COVID-19 based offences, where the application of law was erratic at best. There were far too many instances where guidance and law were conflated. One incident included women who "were also told the hot drinks they had brought along were not allowed as [their activity was now] 'classed as a picnic'"[550] rather than a walk. Whilst it is true that in the law of the day a picnic was not an essential activity[551] it is hard to understand where the police have grounded their determination that hot drinks means the activity is no longer classed as exercise. Further examples include the Temporary Assistant Chief Constable, Julie Wvendth, who said "The 'stay at home' rule is

[545] Prime Minister's Office, "Prime Minister sets out roadmap to cautiously ease lockdown restrictions" 22/02/2021 < https://www.govuk/government/news/prime-minister-sets-out-roadmap-to-cautiously-ease-lockdown-restrictions> accessed 22/03/2021
[546] Dolan, Monks & AB v Secretary of State for Health and Social Care & Secretary of State for Education [2020] EWCA Civ 1605
[547] Dolan, Monks & AB v SoS for Health and Social Care & SoS for Education [2020] ibid, 90
[548] Dolan, Monks & AB v SoS for Health and Social Care & SoS for Education [2020] ibid, 114
[549] Communications Act 2003, part 4
[550] Caroline Lowbridge, "COVID: Women on exercise trip 'surrounded by police'" 8/01/2021 < https://www.bbc.co.uk/news/uk-england-derbyshire-55560814> accessed 28/03/2021
[551] The Health Protection (Coronavirus, Restrictions) (No. 3) and (All Tiers) (England) (Amendment) Regulations 2021, No 8

clear. You should only leave your home for a reasonable excuse such as…for one form of exercise a day."[552] This is concerning because of automatic conflation of the regulations and the guidance by the police. Whilst it is recommended that exercise is only taken once a day,[553] this is not required in the regulations. A further example involved, on 8 January 2021, two women were fined under the restrictions.[554] They had driven five miles to take a walk. At the time, the guidance stated, "you should not travel outside your local area"[555] however nothing in law required this. The local police declared it "not in the spirit" of the rules and issued the fine.[556] Interestingly, Derbyshire Police maintained that it is only "cases of blatant breaches of the regulations then fines will be issued by officers."[557] It is hard to understand how it could have been a 'blatant breach of the regulations' when nothing in the regulations had been breached. Compound this with a bicycle ride seven miles from home, taken by the Prime Minister, not being a violation of the rules less than a week later,[558] it is clear that a better understanding of the rules was required.

The government could not be relied upon to provide this clearer understanding – for example, Secretary of State for Health and Social Care Hancock explicitly supported the police in issuing this fine, despite it going beyond what the law prescribed.[559] The Landlord involved in the "scotch egg" debacle was fined over the "substantial meal" rules[560] despite explicit government ministers' statements to the contrary.[561] It was clearly the responsibility of the courts to provide clarity, something that cannot be done when offences are confined to such a closed arena. In

[552] BBC, "COVID-19: Horsey seal sightseeing couple fined for 130-mile trip" 8/01/2021 < https://www.bbc.co.uk/news/uk-england-norfolk-55588086> accessed 27/03/2021
[553] Cabinet Offence, "National Lockdown: Stay at Home" version published 6/01/2021 < https://www.govuk/guidance/national-lockdown-stay-at-home?priority-taxon=774cee22-d896-44c1-a611-e3109cce8eae#history> accessed on < https://webarchive.nationalarchives.govuk/20210107024247/https://www.govuk/guidance/national-lockdown-stay-at-home?priority-taxon=774cee22-d896-44c1-a611-e3109cce8eae#summary-what-you-can-and-cannot-do-during-the-national-lockdown> accessed on 28/03/2021
[554] Caroline Lowbridge, n550
[555] Cabinet Offence, n553
[556] Caroline Lowbridge, n550
[557] Caroline Lowbridge, n550
[558] BBC, "COVID: Johnson's bike ride 'didn't break rules'" (BBC, 12 01/2021) < https://www.bbc.co.uk/news/uk-politics-55630164> accessed 10/11/2021
[559] Tony Diver, "Matt Hancock backs police after £200 fine for women who drove five miles for a walk" 10/01/2021 < https://www.telegraph.co.uk/politics/2021/01/10/matt-hancock-backs-police-200-fine-women-drove-five-miles-walk/> accessed 28/03/2021
[560] Tristian Kirk, "Pub landlord caught up in scotch egg 'substantial meal' confusion fined for COVID-19 breach" (Evening Standard, 1/11/2021) < https://www.standard.co.uk/news/crime/scotch-egg-substantial-meal-michael-gove-COVID19-landlord-b963667.html> accessed 12/11/2021
[561] Archie Bland, "Scotch egg is definitely a substantial meal, says Michael Gove" (The Guardian, 1/12/2021) < https://www.theguardian.com/world/2020/dec/01/scotch-egg-is-definitely-a-substantial-meal-says-michael-gove > accessed 12/11/2021

order to provide a clearer understanding of the rules, hearings that explored them needed to be held in public and with scrutiny. Without that, police, government, and the public were left with significant misunderstandings as to what the law entailed.

Beyond misunderstandings of the law, there was also significant misapplication of the law. Kirk reported that individuals have been prosecuted under the Welsh regulations for offences committed in London and fines in excess of the prescribed maximum.[562] Kirk has gone on to report that the Coronavirus Act had been widely misused, and a number of individuals have been convicted of offences that do not match the action they were doing.[563] Derbyshire Police were also criticised for releasing drone footage of those walking in the Peak District,[564] which to many demonstrated an over eagerness to use powers they did not have.[565] These are all instances that should have been commented on and criticised in the legal arena. Doing so would have protected future defendants and member of the public from incorrect prosecutions arising from mistakes rather than misunderstandings. However, because these offences were dealt with under the SJP, with no scrutiny, it did not come to light with any immediacy.

As a result of incidences like this, and many others, police forces accepted that they have misinterpreted the regulations and acted unlawfully.[566] It has since been found that all charges brought under the Coronavirus Act and at least a third of those brought under the wider COVID-19 regulations were unlawful.[567] Whilst the extent of the errors has now been brought to light as a result of CPS reviews, the first of its kind,[568] it has taken over a year from the start of the COVID-19 regulations to do so. Open justice exists in order to protect defendants, and

[562] Tristian Kirk, "COVID Rules Breakers Targeted in Secret London Prosecution" 16/10/2020 < https://www.standard.co.uk/news/london/COVID-rule-breakers-secret-london-prosecutions-a4571843.html> accessed 27/03/2021

[563] Tristian Kirk "Curious goings-on at Westminster magistrates in prosecutions for breaking the first coronavirus lockdown: - Convictions for offences ppl weren't prosecuted for - Hefty fines handed out which 05/exceed the legal maximum - Police allowed to try again when paperwork is botched" (Twitter, 11th 11/2020) < https://twitter.com/kirkkorner/status/1326470321180987392> accessed 28/03/2021

[564] BBC, "Coronavirus: Peak District drone police criticised for 'lockdown shaming'" 27/03/2020, < https://www.bbc.co.uk/news/uk-england-derbyshire-52055201> accessed 26/03/2021

[565] Big Brother Watch, ""Arbitrary policing will not help the country fight this pandemic". We're on the front page of the Times today warning against excessive, unlawful policing. Again: the new regulations in place as of yesterday *do not* prohibit driving to a place for the purpose of exercise." (Twitter, 27/03/2020) < https://twitter.com/BigBrotherWatch/status/1243463286688890882> accessed 25/03/2021

[566] Damien Gayle, "Bristol police admit protest ban under COVID powers was unlawful" (The Guardian, 22/04/2021) < https://www.theguardian.com/world/2021/apr/22/bristol-police-to-pay-damages-for-arrest-of-activists-using-COVID-powers> accessed 18/06/2021

[567] Lizzie Dearden, "All 270 charges brought under Coronavirus Act wrongful, official review finds" (The Independent, 14/05/2021) < https://www.independent.co.uk/news/uk/home-news/coronavirus-act-prosecutions-wrongful-cps-review-b1847194.html> accessed 12/06/2021

[568] Caoilfhionn Gallagher QC, "Open Justice During Lockdown" 7/05/2020 < https://insights.doughtystreet.co.uk/post/102g6r7/open-justice-during-lockdown> accessed 26/03/2021

wider society from this exact form of abuse and missteps of process. By dealing with these offences under the SJP, a court arena outside of the scope of observers, the protections offered by open justice are absent.

The impact of this arrangement was significant. In using the SJP, out of view of the public, for regulations whose boundaries are yet unclear, thousands of defendants have been subject to incorrect prosecutions. With SJP guilty and non-response decisions generally made without access to legal advice, the starting position was even more vulnerable than in the other levels of court. It was a worrying combination of uncertainty and inscrutability, with the degree of uncertainty exacerbated by the habit of ruling by decree by the pandemic government.[569] The nature of SJP made issues more likely, the closed nature meant that it remained out of the public view for a year. Furthermore, the CPS are not involved in the SJP,[570] unless a not-guilty plea is entered which means even though the CPS was conducting internal reviews over the prosecutions of Coronavirus Act prosecutions since May 2020,[571] there was no real review of how the SJP was dealing with the new offences. Furthermore, even with the CPS conducting their reviews consistently throughout the pandemic, with consistently negative statistics, there was no real discussion of this until May 2021 by journalists.[572] It demonstrates the need for open justice and for the public to attend the hearings themselves, for publication of the statistics is not sufficient to draw the eye. As such, due to the SJP, an immeasurable number of defendants were subject to unlawful prosecutions and incorrect implementation of justice. It is this kind of overstep that open justice is designed to prevent and demonstrates a real failing.

[569] EG The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, No 350, which came into effect before being laid before parliament.
[570] House of Lords Constitution Committee, "Inquiry into the Constitutional Implications of COVID-19: Crown Prosecution Service – written evidence (CIC0483)" (2020) para 34
[571] CPS, "CPS announces review findings for first 200 cases under coronavirus laws" 15/05/2020 < https://www.cps.govuk/cps/news/cps-announces-review-findings-first-200-cases-under-coronavirus-laws> accessed 13/06/2021
[572] Monidipa Fouzder, "Three in 10 COVID prosecutions wrongly charged" (Law Gazette, 14/05/2021) < https://www.lawgazette.co.uk/news/three-in-10-COVID-prosecutions-wrongly-charged/5108503.Article> Tristian Kirk, "Nearly one third of Coronavirus prosecutions in last year were wrongly charged" (Evening Standard, 13th 05/2021) < https://www.standard.co.uk/news/crime/third-COVID-prosecutions-wrongly-charged-cps-lockdown-fines-b934974.html> ; Haroon Siddique, "Legal fears raised over England and Wales fast-track COVID procedure" (The Guardian, 18/06/2021) < https://www.theguardian.com/world/2021/jun/18/legal-fears-raised-over-england-and-wales-fast-track-COVID-procedure> accessed 18/06/2021

4.3.2 SCRUTINY OF THE SINGLE JUSTICE PROCEDURE

There is one element of the SJP that allows scrutiny of decisions. Members of the media have the right to access all the documentation that is put before the magistrate.[573] However, Kirk reported to the Justice Committee that this right of access is not being provided in any useful manner:

> he "was told by multiple members of staff that no documents existed. A week after the request was made, a court manager said they could only provide an 'extract' ie. the basic sentence imposed. Astonishingly, it was November 3 before the extracts actually arrived, almost two months after the cases had been heard. Three days later, the full paperwork from the cases finally arrived.[574]

This demonstrates that even when the media were made aware of the lists, with minimal notice,[575] being able to effectively conduct any scrutiny function was incredibly challenging, and near impossible to do so in a window that prevented defendants from being subject to judicial overstep. It further exacerbated the vulnerability faced by defendants subject to the SJP and demonstrated the open justice failings of using this system for COVID-19 offences.

By contrast, HMCTS maintained that SJP proceedings are "more transparent and accessible" than other hearings, due to reporters' abilities to request access to the papers themselves.[576] This failed to take into account any access of the public. Whilst the public can ask for the outcome of a case, there is a serious failing in the availability for the public to "obtain information about its date and place,"[577] and with SJP disengagement, even if there was a hearing to take place. Moreover, it appears to disregard the difficulties faced by reporters in

[573] HMCTS, "Protocol on sharing court lists, registers and documents with the media" < https://assets.publishing.service.govuk/government/uploads/system/uploads/attachment_data/file/869795/HMCTS_Protocol_on_sharing_court_lists-registers_and_docs_with_media_March_2020.pdf > accessed 19/06/2021
[574] Tristian Kirk, n527
[575] EG HMCTS, "Single Justice Procedure Court List – 18/06/2021" <https://assets.publishing.service.govuk/government/uploads/system/uploads/attachment_data/file/994835/SJS_hearings_for_18_June_2021_English.pdf> accessed 18/06/2022, where the court list was generated at 4am the morning of the list.
[576] Sian Jones, "Inside HMCTS: Exploring misconceptions about the Single Justice Procedure" (HMCTS, 2/11/2021) <https://insidehmcts.blog.govuk/2021/11/02/exploring-misconceptions-about-the-single-justice-procedure/> accessed 2/11/2021
[577] Riepan v Austria (2000) n476 para 29

being notified about proceedings and receiving requested documents. Any assertion that SJP is a more open process than conventional court hearings is absurd.

The decision to use the SJP for COVID-19 offences was one that had serious implications for the protections offered by public and media scrutiny. The SJP presented an even more concerning picture of scrutiny and accountability, that, whilst pre-dated the pandemic, the damage to the position of defendants was worsened by the slowdown in administrative responses and the uncertainty surrounding the current law. The SJP itself had limited accountability, justified by the fact they are low level offences, and the SJP only applies to guilty pleas or no response cases. However, the convictions resulting from the SJP must still be subject to scrutiny, to ensure that new, untested, offences are being dealt with correctly. Without such scrutiny, mistakes continued to be made and defendants continued to be subject to incorrect prosecutions for over a year. The position of the SJP also demonstrates how defendants could be harmed should the lower courts not improve the access to their courts in short order.

4.4 CONCLUSION

The principles of open justice and scrutiny are ones that benefit all actors in the criminal justice system, as a "means to an end, but not an end in itself."[578] In easing the means of accessing hearings, virtual and attended, it increased the ease by which the benefits of open justice are achieved. Over the course of the pandemic, three distinct tiers developed, for assessing how the pandemic has impacted the practical achievements of open justice, resulting in a mixed outcome of both extremes.

At the highest courts, access and scrutiny have been improved immeasurably. Already at a high standard for virtual access, the pandemic gave them the opportunity thrive. Whilst there was a small detriment in that in person access was not allowed for the entirety of the first year, this is now beginning to change, and the benefits of in person attendance have become available

[578] Sharon Rodrick, "Achieving the Aims of Open Justice? The Relationship between the Courts, the Media and the Public' (2014) 19 Deakin LR 123, 123, citing West Australian Newspapers Ltd v Western Australia [2010] WASCA 10, [30]

again.[579] Newer conceptions of open justice require "courts adopt practices and procedures that seek to enhance…public access to information about proceedings before the courts, including through the use of technology,"[580] and it would appear these courts have been able to achieve this. Long term, there is only benefit to the pandemic's impact on open justice at the highest levels.

The second tier is the Crown courts. Without the pre-existing infrastructure for online open justice, many of the Crown courts struggled to effectively maintain open justice for all hearings. These challenges ranged from an appropriate release of the lists, to administrative delays in actioning requests, to unclear physical limitations for those seeking to observe in person. However, in light of the success at the higher court levels, and the intention of the government to endorse continued remote court working and remote access to allow scrutiny, there is significant potential, albeit yet unrealised, for these courts to match their higher court counterparts. Until this point is reached, during the first year of the pandemic, open justice was severely limited to these courts due to a lack of both in person and online access, and the reopening of court centres is welcomed in order to mitigate the long-term impacts of this.

The final tier is the SJP. The use of SJP for COVID-19 related regulations was far below acceptable for the entirety of the first year of the pandemic. This is unlikely to change in any long term time frame, due to the apparent position that as few people choose to attend hearings to observe, there is no damage done to open justice when they can't.[581] Whilst it cannot be denied that observing court hearings is no longer "a common mode of "passing the time"",[582] this cannot be used as an excuse to fail to meet the requirements of open justice. Until the COVID-19 regulations are removed from the remit of the SJP, or the SJP improves its accessibility offerings, there is an enormously detrimental impact to the ability of the public to scrutinise the new COVID-19 offences.

[579] The Supreme Court, "Arrangements during the Coronavirus (COVID-19) Pandemic" (The Supreme Court, 28/09/2021) <https://www.supremecourt.uk/news/arrangements-during-the-coronavirus-pandemic.html> accessed 05/11/2021
[580] Jason Bosland and Judith Townend, n469, 190
[581] Sian Jones, n576
[582] Richmond Newspapers, Inc v Virginia, 448 US 555, 564 (1980).

CHAPTER 5: CONCLUSION

The COVID-19 pandemic predominantly affected the criminal court system in three ways between March 2020 and March 2021. Firstly, it greatly and seriously it increased the delays in proceedings. Secondly, it caused wide-ranging changes to the use of live links and the administration of remote justice, something that impacted the practical experiences of court and all court actors. Finally, it resulted in the wider changes to open justice principles as applied to the criminal court system. The overarching trend of all three changes was not a positive one; significant concerns were raised in all of them. The concluding remarks of the Justice Inspectorates review into the impact of the pandemic found that the courts were "already facing significant failings"[583] and it was "a real testament…[that]…*any* service was maintained."[584] However, the standard of "any service" is not enough. This thesis has shown that the changes to the court system brought about by the COVID-19 pandemic had a serious impact on defendants, victims, witnesses, and professionals. With defendants, this was through protecting their fair trial rights, both procedural and substantive. With victims, witnesses, and professionals, there is a responsibility to acknowledge their value to an effective criminal trial, noting that without their engagement, the system is as equally undermined as when it fails to meet the rights of the defendants.

The fair trial rights of a defendant, contributing to the criminal trial have been grossly undermined by the response of the court system to the COVID-19 pandemic between March 2020 – March 2021. In June 2020, the organisation Fair Trials looked at the effectiveness of justice under the first lockdown. They concluded that "the rights of the defendant, and considerations for the defendant, are being eroded to the point where they are non-existent."[585] Extending this evaluation in time, this statement remains worryingly accurate. Defendants were waiting longer, possibly in custody. When attending hearings, there were a number of additional hurdles to be faced to effectively participate. The protection of having their proceedings scrutinised and open to the public was significantly reduced for the vast majority. This created a hugely negative impact on each defendant. More concerning, however, is the attitudinal changes in regard to defendants' rights as a result of the pandemic. The caselaw consistently speaks to the need for individualised case-by-case analysis to ensure that the rights

[583] Criminal Justice Chief Inspectors, n3, para 1.40
[584] Criminal Justice Chief Inspectors, n3, para 1.38. Emphasis added.
[585] Fair Trials, n420, 3

of each defendant are effectively protected. The responses to the pandemic resulted in swathes of generalised applications to abrogate those rights: CTL extension forms came pre-filled in and extensions were being rubber-stamped; remote hearings were being heard for vulnerable individuals without evidence they were still able to fully engage. In the new remote hearing guidance, it was announced that "the interests of justice are…wider than the circumstances of the individual case and holding an effective hearing."[586] In the need to keep the overall criminal court system running, the precedence of defendants' rights was reduced in the minds of the decision makers. That is the most concerning impact of the COVID-19 pandemic on the criminal court system, because that has the highest potential to undermines the integrity of the entire criminal court trial and system.

The responsibilities of the court system to the victims involved in it have also not been met to a sufficiently high degree as a result of the pandemic. Much like defendants, the growing length of proceedings hurt them. However, the position of the victim during trial that represented the greatest potential for long term improvement to the trial process and criminal court system. The system was improved by the use of remote evidence. Whilst it may not have been an unequivocal success, the benefits of giving evidence from home and remotely were significant. It is hoped that the changes in attitude forced by the pandemic in regard to the use and benefits of remote evidence will outlive the COVID-19 era. However, at this time, that cannot be conclusively claimed. Many of the negative impacts, such as isolation and vulnerability, felt by victims were exacerbated by the active lockdown restrictions in place between March 2020 – March 2021. This means that whilst some negative impacts of the pandemic will remain significant, such as duration, a number of them will alleviate as time progresses. Indeed, if the court system is able to make significant progress in reducing the length of the criminal process the integrity of the criminal trial has not been undermined as a result of the impact of the COVID-19 measures on victims, and the strength of cases may be improved as a result of better-quality evidence. This would make the long-term impact of the COVID-19 measures on victims a positive one, even as there were significant negative affects between March 2020 – March 2021.

Even professionals were significantly affected by the COVID-19 measures in the criminal court system. Barristers and Solicitors were leaving the profession at unprecedented rates. It was

[586] Lord Chief Justice, "Message from the Lord Chief Justice – Remote Attendance by Advocates in the Crown Court" (14/02/2022) < https://www.judiciary.uk/announcements/message-from-the-lord-chief-justice-remote-attendance-by-advocates-in-the-crown-court/ > accessed 18/02/2022

acknowledged that by their good will and efforts the criminal court system was able to continue to function,[587] but they have faced significant losses and additional challenges between March 2020 – March 2021. As that good will comes to an end,[588] there will be serious repercussions for the entire criminal court system. A criminal court system with insufficient professionals will be one with significantly more delays; it will be impossible to remedy the challenges that have been caused by the pandemic. Professionals underpin the administration of the court system, and thus the impacts on them are seen across all other participants. With matters swiftly changing, with the new remote guidance and legal aid reviews, it is impossible to determine how quickly the negative impacts of the pandemic can be remedied for these actors. However, the challenges of March 2020 – March 2021 are not fully addressed quickly, the consequences are severed for the court system and criminal trial.

The protection of the criminal trial, through scrutiny and open justice was concerning between March 2020 and March 2021. In the time and jurisdictions when the most significant issues were arising the opportunity for scrutiny was also most limited. It is the arena where the impacts on the court system will be felt most fleetingly – courtrooms are open to the public, and all remaining COVID-19 restrictions and offences have been revoked.[589] However, this does not undermine the seriousness of the lack of scrutiny during the first year of the pandemic. The sheer multitude of errors that arose in the prosecution of COVID-19 offences emphasised the need for open justice, with the increased understanding of offences and procedural mistakes it provides. The March 2020 – March 2021 window may well be one of the best illustrators of the importance of open justice, not only to maintain the integrity of court processes, but of the wider criminal justice system.

Whilst this thesis has focused on the first year of the pandemic, March 2020 to March 2021, the longer-term position of the criminal court system must also be acknowledged. By September 2021, the backlog had been reduced by a mere 0.2% on the previous quarter, but had still increased from March 2021.[590] That backlog continued to correlate with increased pre-trial remand periods, with 4,185 individuals on remand for longer than 6 months, with 480

[587] Monidipa Fouzder, "News focus: Criminal barristers are poised for action over pay - what about solicitors?" (Law Gazette 21/01/2022) < https://www.lawgazette.co.uk/news-focus/news-focus-criminal-barristers-are-poised-for-action-over-pay-what-about-solicitors/5111323.article> accessed 22/01/2022
[588] Dominic Casciani, "Criminal courts face possible lawyer strike" (BBC, 16/02/2022) < https://www.bbc.co.uk/news/uk-60406345 > accessed 17/02/2022
[589] Prime Minister's Office, 10 Downing Street and The Rt Hon Boris Johnson MP, "Prime Minister sets out plan for living with COVID" (Govuk, 21/02/2022) <https://www.govuk/government/news/prime-minister-sets-out-plan-for-living-with-COVID> accessed 24/02/2022
[590] CPS, n50

having been held for longer than two years in December 2021.[591] This worsening situation means the anticipated expenditure and time it would take to resolve the problem of delays is likely now a gross under-estimation. The risks identified, Article 5 and 6 violations for defendants and of victim suffering and attrition, continue to grow, as yet unresolved. The use of remote hearings in the criminal courts, remained in a state of great inconsistency. It was only as of 14 February 2022 that the Lord Chief Justice provided national guidance on the use of CVP and other remote platforms.[592] The position appears to be that many short administrative hearings are to remain by live-link, whilst Pre-Trial and Preparation Hearings (PTPH's) and trials are returning to the pre-March 2020 position. It is too soon to fully evaluate the impact of this guidance although clarity it welcomed. Finally, the principles governing open justice and scrutiny of the courts have remained unchanged since March 2021. Indeed, in practice open justice has further improved with the reopening of courtrooms, in person observation is now available in the majority of cases. The use of the SJP and the lack of clarity surrounding COVID-19 offences had remained unchanged, but there is now an immense amount of public focus on this issue,[593] despite the lack of access to SJP courts.

In sum, the COVID-19 pandemic had a devastating impact on the criminal justice system between March 2020 and March 2021. It was a year of uncertainty for all and resulted in a significant reduction in the quality of the English criminal court system. There has been a consistent theme throughout each of the chapters. The pandemic created very few new problems. Instead, it exacerbated and evolved pre-existing problems: with delays, they were worsened and extended; remote justice, with its pre-identified flaws, was expanded to impact all participants, rather than just defendants; and the concerns regarding access to proceedings to the SJP became far more significant as it became the jurisdiction of COVID-19 offences. This demonstrated the pre-COVID-19 vulnerability of the English court system to the concerns that were laid out. These problems were already in existence. This illustrated how the position of all individuals involved in the court system had been suffering even prior to the pandemic. The negative impacts that arose in the court system were likely greatly exacerbated due to this vulnerability. This lack of resilience in the English court system is the result of over a decade

[591] UK Parliament, "Remand in Custody: Question for Ministry of Justice" (UIN 122646, 10/02/2022) < https://questions-statements.parliament.uk/written-questions/detail/2022-02-10/122646> accessed 12/02/2022
[592] Lord Chief Justice, n586
[593] Due to the controversies surrounding following of lockdown rules by Prime Minister Boris Johnson MP and his government and party. Tom Edgington, "Downing Street parties: What COVID rules were broken?" (BBC, 14/02/2022) <https://www.bbc.co.uk/news/uk-politics-59577129> accessed 27/02/2022

of underfunding the court estate[594] and legal aid.[595] The updating information demonstrates that the measures implemented between March 2020 – March 2021 were insufficient. They were enough to ensure that "the administration of justice does not grind to a halt"[596] but not enough to ensure that that quality of justice did not deteriorate. Therefore, until the underlying problems, the relevant of which have been identified in each chapter, are resolved, it is unlikely the COVID-19 exacerbated ones will either.

However, looking forward, the picture, whilst not ideal, is less bleak. There are significant efforts to reduce the backlog and their associated delays. There is growing clarity and consistency in the use of remote technology. The uncertain and unclear COVID-19 offences will no longer be incorrectly applied due to a lack of understanding and scrutiny. Ultimately, the impacts explored in this thesis still apply to the criminal justice, even one year later. However, there is potential for improvement, not only to a pre-pandemic criminal court system, but to an effective and resilient one. Should this be achieved, the integrity of the criminal trial will be protected and maintained, and the position of all actors, and their rights, will be improved.

[594] Jonathan Ames & Rosa Ellis "Courts in crisis: Third of courthouses sold off" (The Times, 31/01/2021) <https://www.thetimes.co.uk/article/courts-in-crisis-third-of-courthouses-sold-off-bqtm5m57j> accessed 02/02/2022

[595] Asher Flynn, "Access to justice and legal aid : comparative perspectives on unmet legal need" (2017, Oxford UK), 68; Jane Croft, "COVID court closures in England and Wales add to pressure on barristers" (FT, 4/02/2021) < https://www.ft.com/content/977f49ce-0b64-4e17-8e9f-8af9127224ba?segmentId=3f81fe28-ba5d-8a93-616e-4859191fabd8> accessed 5/02/2021

[596] Lord Burnett of Maldon, Lord Chief Justice "Coronavirus (COVID-19) update from the Lord Chief Justice" 17/03/2020 < https://www.judiciary.uk/announcements/coronavirus-update-from-the-lord-chief-justice/> accessed 27/01/2021

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