

SLYNN LECTURE
SOLICITORS ASSOCIATION OF HIGHER COURT
ADVOCATES
15 JUNE 2022

1. It is a great pleasure to be able to join you this evening for the 2022 Slynn memorial lecture to the Solicitors Association of Higher Court Advocates. It is many years now since solicitors gained rights of audience in the higher courts. It happened in my relatively early days in practice. Looking back from the perspective of 2022 it seems extraordinary that the changes were so long in coming.

2. Solicitor advocates in the higher courts make an enormous contribution to the administration of justice and their contribution is reflected in increasing numbers successfully seeking appointment to fee-paid and then salaried judicial office. That is something I hope to see continue and grow in the coming years.

3. There was a time when solicitors had rights of audience in a small number of Crown Courts because those courts were remote from towns and cities in which barristers practised. The only way to ensure the efficient and

effective disposal of business was to encourage local solicitors to develop advocacy skills. Now, of course, solicitors appear as advocates in all our Crown Courts, both as prosecutors and on behalf of the defence. They have become an integral part of the criminal justice system.

4. This evening, I would like to say something about the Crown Court, the problems it faces, and the prospects for reducing the outstanding caseload in the relatively near future. Solicitors will have an important part to play.

5. There is a good deal of discussion in the media, political and legal worlds about the state of the Crown Court. I fear that much of it is not well informed because of a lack of detailed understanding about what many of the publicly available statistics both mean and suggest. I have encouraged the wider publication of statistical information about what is going on in all our courts. As far as the criminal courts are concerned, the quarterly official statistics remain an authoritative and extremely useful source of information. In addition, Her Majesty's Courts and Tribunals Service ("HMCTS") makes available more of what used to be internal management information which tracks activity on a week-by-week basis.

6. The statistic most widely bandied about is the outstanding caseload in the Crown Court. I put it that way because a caseload is different from a backlog. A backlog is more accurately described as the number of cases ready to be heard but which cannot be heard promptly because the system is unable to do so. Cases take some time to be ready for hearing.

7. Before the first lockdown brought about by COVID in March 2020, the outstanding caseload in the Crown Court was, in round terms, 40,000. It is now about 58,000, having reached a peak last year of around 61,000. These figures are useful because they compare like with like and indicate, again in round terms, that the outstanding caseload is about 50% more than it was before lockdown. That outstanding caseload had been reducing until 2019 because of a falling caseload coming into the courts and vigorous action being taken at the instigation of the judiciary to improve the efficiency of the Crown Court. That reduction was notwithstanding the allocation of sitting days also reducing.

8. For the financial year 2019 to 2020, the initial allocation of sitting days for the Crown Court from the Ministry of Justice was 82,600. To put that in context, in the early years of that decade the sitting day allocation was in

the region of 109,000. Contrary to the expectations of the statisticians the volume of work coming into the courts increased and the result was that the outstanding caseload in that year rose by 23% even before COVID arrived.

9. But what does the outstanding caseload represent? It has three elements. First, cases sent by the Magistrates' Court to the Crown Court for sentence. They are quite substantial in number, although the number is expected to reduce because of the recent increase in magistrates' sentencing powers, but they are dealt with very rapidly. Secondly, there are appeals against sentence or conviction from the Magistrates' Court which are heard in the Crown Court. The volume of these appeals is relatively small and in most parts of the country the Crown Courts can hear them expeditiously. The third and largest category is trial cases. Of the outstanding caseload we have 47,000 are categorised as trials.

10. As I said recently to the Constitution Committee of the House of Lords, anyone seeing that figure could be forgiven for thinking that there will be 47,000 trials to be found slots in the Crown Court. Happily, that is not the case. Around two thirds of those trial cases will turn into guilty pleas. Many do so at the first hearing in the Crown Court, known as a plea and trial

preparation hearing [“PTPH”]. Others result in pleas at some point between that first hearing and a date on which the trial is listed. Then, it remains the case that about one quarter of all trials listed to start on any given day in the Crown Court “crack” because the defendant pleads guilty. A much smaller number of cases sent by the Magistrates’ Court for trial in the Crown Court evaporate because the prosecution decides not to proceed.

11. While the outstanding caseload figures are useful to illuminate the nature of the extent of the problem that we have in the Crown Courts, as I have been saying now for some years, the more pressing issue is not the number of outstanding cases, particularly trials, but how quickly they are being disposed of.

12. Timeliness was deteriorating in the year leading up to the first COVID lockdown because the outstanding caseload was maintained at an artificially elevated level by the government decision to reduce sitting days. Money was not provided for the Crown Court to sit at anything like full capacity. Once more, some comparative figures provide an insight into the change that has occurred in the last three years. In June 2019 23% of cases that arrived in the Crown Court were not dealt with within six months. That

figure is now 57%. The proportion of cases outstanding for more than 12 months in the same period has grown from 7% to 28%.

13. The ravages of COVID had a profound impact on the ability of the Crown Court to deal with cases. As you may remember, shortly before lockdown in March 2020 I directed that Crown Court trials should be paused¹. That was because it was not possible to ensure the reasonable safety of the very many participants necessary for Crown Court trials. Of course, the Crown Courts continued with other work, especially to deal with the outstanding sentence cases. I set up a judicially led Crown Court recovery group which brought together all the main players involved in criminal work. That group, working with the Ministry of Justice and Her Majesty's Courts and Tribunal Service, developed plans which enabled Crown Court trials to start again in the middle of May 2020² a gap of only seven weeks. The precautions adopted initially in the first courts to recommence jury trials were subsequently rolled out across much of the court estate. But even with the welcome addition of Nightingale courts, until recently it was not possible to utilise all our courts for trials. The problem was not only related

¹ <https://www.judiciary.uk/announcements/coronavirus-jury-trials-message-from-the-lord-chief-justice/>

² Trials restarted on 11 May 2020.

to the courts themselves but also to the jury assembly and retiring areas, the public parts of the Crown Courts and the cells. Nonetheless, the work of that group and the continued efforts of government, HMCTS, the judiciary, the legal profession and all others involved resulted in a remarkable success in continuing to dispose of jury trials. I shudder to think where we would be now without all that collaborative and successful hard work.

14. Even in the months before Easter this year, the Crown Court was losing significant numbers of trials because someone critical to a trial starting or continuing had succumbed to COVID. Many more trials were extended because of delays caused by COVID. For now, COVID is not having a measurable adverse impact on work in the Crown Court. We all earnestly hope that continues to be the case.
15. During the darkest COVID related days the major constraint on increasing the volume of Crown Court trials was space. Many courts could not be used and many trials required the use of more than one court.
16. What now are the major constraints on increasing the volume of trials in the Crown Court? It is no longer space. There remain some parts of the

country where the available courts are being used to capacity, but court capacity is not the major problem. That said, keeping as many of the Nightingale courts available as the commercial realities of their owners will allow, remains important.

17. The two greatest constraints we have now in disposing of cases more quickly are a shortage of judicial resources and, increasingly, a shortage of lawyers to conduct the cases. I shall say a little about each.

18. It is ironic to compare the situation today with what was happening in 2019 and early 2020. The number of Crown Court judges had diminished as the sitting days and volumes of cases were reduced in the preceding years. But in 2019 to 2020 the severe cut in sitting days in the Crown Court meant that we had a surplus of judicial resources. We encouraged Crown Court judges to diversify and also to sit in family. We made Crown Court judges available to the Parole Board. For the first time I can remember there was no concern about the operational impact of judges spending time engaged in the work of the Judicial College or assisting the Judicial Appointments Commission. Even so, we struggled fully to occupy some of our Crown

Court judges and struggled even more to provide the minimum desirable sitting for all our recorders.

19. The position has now reversed. In the financial year 2021 to 2022 we sat a shade under 99,000 days in the Crown Court. That represents an increase of 20% over the allocated days in 2019 to 2020.
20. The last two competitions run by the Judicial Appointments Commission for the Circuit Bench fell short in providing salaried judges for the Crown Court. To help make up the shortfall, limits on the number of days that recorders can sit have been raised with the result that recorders are making a greater contribution. I have also authorised many retired judges to sit, which was something that happened very rarely in the Crown Court before COVID.
21. There will be no limit on the number of days that the Crown Court can sit during this financial year, but the reality is that with current judicial resources it is unrealistic to suppose that the Crown Court will sit more than 105,000 days in this financial year. To enhance the availability of judicial resources, about 50 District Judges from the Magistrates' Courts will be

trained to sit in the Crown Court. Deputy High Court judges authorised to sit in the Queen's Bench Division will also be offered the opportunity to sit in the Crown Court. The Judicial College is running training courses for both groups later this year. I hope that these initiatives will augment the judicial capacity in the Crown Court by between 1,500 and 2,500 sitting days. But the key will be significantly to increase the overall salaried Crown Court judges so that we have sufficient judicial capacity for the future. Meanwhile, we are doing everything we can to maximise the judicial resources we have.

22. At the same time as the judicial capacity of the Crown Court has diminished in recent years, so too has the capacity of the legal profession to service the cases that we would wish to list. Of course, I shall say nothing of the current dispute between the criminal bar and the government and its potential to increase the outstanding caseload and reduce timeliness. But as the volumes of work in the Crown Court reduced over a period of about ten years and at the same time the remuneration available to both solicitors and barristers was either frozen or failed to keep pace with even modest inflation, the number of specialist practitioners on both sides of the profession diminished. We are now running the Crown Courts at about 25% greater a

rate than we were three years ago. The legal profession has struggled to keep up in many parts of the country since the Crown Courts returned to pre-COVID levels of work during 2021. A growing number of cases in recent months listed for trial have been adjourned because either the prosecution or the defence have been unable to find suitable representation. That is a capacity issue and to my mind both the legal profession capacity issue and the judicial capacity issue demonstrate how important it is to ensure that any system that is vulnerable to ebbs and flows of work has sufficient resilience to deal with an increase in demand. The legal profession does not appear to have that resilience at the moment. Sorting out remuneration difficulties is an obvious first step. But it will take time for solicitors' practices around the country to react and increase the capacity of their criminal teams. It will take time for the bar to reverse the trend of drift away from criminal law and increase the number of barristers willing and able to undertake criminal cases. There is an additional problem. The pool of suitably qualified lawyers is not only small, but it is being fished by many. HMCTS needs to recruit more lawyers as legal advisers in the Magistrates' Court and elsewhere in the courts and tribunals service. The Crown Prosecution Service has been increasing its number of lawyers by

recruiting heavily from HMCTS and the private sector. There do not seem to be enough criminal lawyers to go round.

23. There is much, however, that can be done to improve the efficiency of the way in which criminal cases are dealt with in the Crown Court. Those here who have practised in crime for a few years will remember the Better Case Management initiative introduced by the judiciary following the report of Sir Brian Leveson in 2015³. One of its principal aims was to ensure that the PTPH was effective either in securing appropriate guilty pleas at the beginning of the process in the Crown Court or that all necessary directions were given to enable the trial to proceed at the next hearing. It also envisaged cases being tried within six months of entering the Crown Court unless, for good reason, they were not ready. That initiative delivered measurable results in the years that followed but during COVID the attention of all concerned was on keeping the system going as best we could, with an inevitable shift in focus away from the Better Case Management programme.

³ <https://www.judiciary.uk/wp-content/uploads/2015/01/review-of-efficiency-in-criminal-proceedings-20151.pdf>

24. The Crown Court is a complex environment and the effective use of its time depends upon a wide range of different organisations and groups working well and efficiently together. Last summer, when the optimistic view was that COVID might recede in the autumn, I established what became known as the Crown Court Improvement Group, initially chaired by the Senior Presiding Judge but since September chaired by the Deputy Senior Presiding Judge. Its remit was to bring together all the players whose activities contribute to the smooth running of work in the Crown Court in a confidential environment to discuss their own and others' problems with a view to ironing out difficulties that impede the efficient disposal of business. I asked it to refresh the principles of Better Case Management. Its membership includes experienced Resident Judges from the Crown Courts and senior representatives from the key agencies in the criminal justice system: HMCTS, the Ministry of Justice, Her Majesty's Prisons and Probation Service, the police, Crown Prosecution Service, the Legal Aid Agency and the legal professions. Its deliberations are informed by up-to-date analysis of data collected by HMCTS.
25. The improvement group has concentrated on two key issues: the effectiveness of the PTPH and listing practices.

26. My aim is to restore the effectiveness of the PTPH. For that to be realistic, defendants must be able to make informed decisions about plea by the time of that hearing which is usually 28 days after the case is sent by the Magistrates' Court. That requires the prosecution thinking to be advanced and for appropriate disclosure to have taken place. That enables advice to be given to defendants by their own lawyers. Facilities must be available for timely visits by lawyers to those in custody or the enhanced use of video links. Too many guilty pleas are only entered after the PTPH. The improvement group has worked collaboratively to get all parts of the system functioning together and to shift the decision making into the first 28 days of the life of the case. One of the recommendations of the review of criminal legal aid by Sir Christopher Bellamy was to ensure that the structure of legal aid payments encouraged this positive outcome. That is clearly important. I am confident that all the agencies represented on the improvement group have worked towards achieving these shared objectives.

27. Listing of cases is a judicial function. Those who suggest otherwise misunderstand the cardinal importance of the executive not exercising control over the listing of cases. The separation of powers and judicial

independence require that the judiciary controls what happens on a day-to-day basis in the courts. The executive is, after all, a party in many cases – think judicial review - and the Crown is almost always the prosecutor in criminal cases. Listing should not be subject to prevailing political whim. It is for these reasons, which I sought to explain more fully in the Cohen lecture I gave a fortnight ago⁴, that listing was recognised as a judicial function in the Concordat agreed between the judiciary and the government in advance of the legislation that became the Constitutional Reform Act 2005.

28. The listing of cases in the Crown Court is carried out on a day-to-day basis by the Resident Judge who works closely with the listing officers. Any decision to list one case necessarily imports unspoken decisions to delay other cases. The case mix varies from court to court, as does the capacity to deal with longer trials and cases involving multiple defendants. The Resident Judges make decisions which are sensitive to the mix of cases they have outstanding for trial in the light of statutory requirements which impose time limits on the period during which defendants may be held in

⁴ <https://www.judiciary.uk/announcements/lionel-cohen-lecture-2022-lord-chef-justice/>

custody before trial. In the Crown Court, the statutory custody time limit is six months. It may be extended but only in limited circumstances. Custody cases must be given some priority. Thereafter, the judges are especially concerned to give some priority to cases involving vulnerable complainants and witnesses, serious sexual cases and cases involving youths. But none of these cases can be given absolute priority because the consequence would be that some other types of cases might never be tried.

29. Listing must also take account of the fact that many cases due to start on any given day are not effective. There are three reasons why a case might not be effective. I have mentioned the first already. The case cracks because the defendant pleads guilty on the day of trial. About 25% of cases listed and called on do not result in a trial for that reason. Roughly the same proportion of cases are adjourned on the day of trial because either the prosecution or the defence persuades the judge that there is a good reason why the trial cannot go ahead. It follows that if all cases received a fixture and there was nothing in reserve, that Crown Courts would sit idle for a great deal of their time because the case the court was due to hear was not effective.

30. One of the most difficult tasks for the Resident Judge and listing officers is to have sufficient work in reserve to keep the court busy whilst not causing too many trials which are expected to start on a particular day to be vacated. The outstanding caseload would be much greater and timeliness much worse were that not to happen.

31. The improvement group has been focussing on the problem of what might be called inappropriate over-listing. Judges, of course, recognise that any over-listing which results in a case not being reached causes problems. That is sometimes unavoidable, but the adverse consequences must be kept to a reasonable minimum. Amongst the welcome steps initiated by the improvement group in January this year was to collect data relating to this phenomenon, which was used to identify problems and inform solutions. The comparative data from April is being examined to see whether and where the steps taken have had a positive impact. This work has led to a planned judicial assessment of the best way to use warned lists to achieve a balance between avoiding inappropriate over-listing whilst maximising the use of courtrooms and judges.

32. At the same time, a series of modest improvements have been agreed and are being put into place, each of which I hope will have a positive impact on the efficiency of the Crown Court and collectively a significant impact.

33. Work is being done by the prison service to optimise the use of prison video links to enable discussions between defendants remanded in custody and their lawyers. Work is also underway to introduce an online booking system. The prison service and court service have established a single point of contact system between each court and its relevant prisons to iron out problems that cause delay. The police have undertaken an exercise in training and management to improve the quality and timeliness of the cases they submit to the CPS which in turn will make it more likely that the defendant will be properly advised. The CPS has also committed to supporting case ownership and early engagement with defence lawyers.

34. The perennial problem of prisoners being delivered late to courts, and thereby wasting court time, is being looked at.

35. The CPS has initiated a pilot in four areas to recruit paralegal officers to manage the administration of cases in the Magistrates' Courts. This will

assist with the early service of material and improved case progression. The improvement group is also working on plans to improve the quality of information available to the Crown Court and to the parties from an early stage.

36. Changes introduced five or six years ago to the way in which police bail was dealt with resulted in many defendants being released under investigation, sometimes for many months or longer, and then receiving a postal notification to attend court. The police are piloting a system to notify any lawyer previously involved in the case on the behalf of the defendant at the same time which will reduce the problem of lack of engagement.

37. Those representing defendants have identified a series of blockers that make it difficult to conduct cases in accordance with Better Case Management principles, the rules and practice directions. All participants in the improvement group, including the Legal Aid Agency, have worked together to make operational recommendations to resolve some of these problems. The aim is to produce efficiency gains at the start of a case.

38. The court service is undertaking work to focus the use of case progression officers on the first 28 days of the life of a case in the Crown Court. They will encourage engagement between prosecution and defence and be able to advise the judge on whether that engagement has been effective and so enable the PTPH to be dealt with remotely in accordance with the guidance I issued in February 2022⁵.

39. These initiatives demonstrate both the utility and the success of the improvement group. Its work continues and it will next report to me in September. I wish publicly to express my profound gratitude to all those who have been involved in its work and for each participant's willingness to look not only at how other parts of the system might improve their contribution to the throughput of cases in the Crown Court but, critically, to their own.

40. The work of the improvement group will increase the speed at which cases pass through the system. It will encourage early guilty pleas in cases where that is appropriate. It will contribute to ironing out some of the problems

⁵ <https://www.judiciary.uk/announcements/message-from-the-lord-chief-justice-remote-attendance-by-advocates-in-the-crown-court/>

which delay cases. It will encourage them to be dealt with in accordance with Better Case Management principles. At the same time, my expectation is that the problems associated with excessive over-listing will reduce. The improvement group will help reduce the outstanding caseload and, critically, improve timeliness in the Crown Court.

41. At the same time, the core issues of judicial capacity and the capacity of the legal profession need attention.
42. As the volume of work increases in the Crown Court the time will soon come when questions again will arise about whether the estate has capacity to deal with the caseload. Beyond the new courts in the City of London, there are no plans to increase the number of available courtrooms in the Crown Courts.
43. A growing concern is the poor condition of too many of our Crown Courts with an increase in days being lost because of the failure of equipment, particularly heating and cooling equipment, and lifts. Sheffield Crown Court was recently closed because of a serious leak. Only this week

electrical problems in Portsmouth interrupted the work completely for a day.

44. Despite the various problems, the outstanding caseload is coming down slowly as volumes of work undertaken in the Crown Courts increase and the rate of sitting grows. But there is a serious issue which does not receive sufficient attention in my view and which could blow all plans and predictions off course.

45. The volume of work coming into both the Magistrates' Courts and the Crown Courts remains substantially below pre-COVID levels: 8% below in the Crown Court in the last financial year. During the periods of lockdown the opportunity for many crimes to be committed reduced because people were at home and not going out. Street crime, crime associated with pubs and clubs, burglaries and much else, fell substantially. That provided an opportunity for police forces to concentrate on difficult intelligence-led work and organised crime. There has been an increase in the complexity of some of the work coming into the courts. But it remains a mystery, at least to me, why the levels of work coming into the courts remain depressed.

46. How would the system cope were the caseload to return to pre-COVID levels or go beyond? The short answer is that the outstanding caseload would grow and timeliness would inevitably suffer. There is much public discussion about the disparity between the levels of crime reported to the police and the proportion that results in a charge. The focus of that discussion in recent times has been on serious sexual offending but the issue has wider salience. The police and CPS are working to increase the charge rate. Additional resources have been provided to both and they are under considerable political and public pressure to do so.
47. It is only when a suspect is charged that the case enters the courts. In my view, the entire system needs to have a better understanding of future workflows and must plan for the inevitable increases. If the conclusion is that there will be a significant increase in the flow of work into the courts and that current resources, of all sorts, will be unable to cope with it then more radical thinking about how cases are dealt with will be needed. That conclusion seems probable.
48. It is over 20 years since Sir Robin Auld conducted his review of the criminal courts, their practice and procedure, the distribution of work between the Magistrates' Court and the Crown Court and whether the structure of the

criminal courts required revision. Many of us have returned to his report. Much has changed in the last twenty years with tangible improvements in practice and procedure. Those will continue. But when we are provided with better estimates of the level of work we can expect in the Crown Court over the next five years renewed and profound thinking about how to deal with it will inevitably be required.