

Exacerbating Long-Term Problems: Covid-19 and Justice in England and Wales

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*Covid Policy Briefs: E-Briefing Papers from The Covid-19 and
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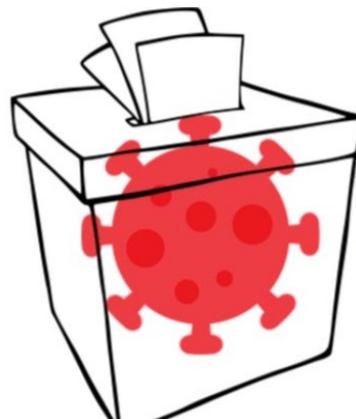
A Note on Method, Aims and Context

This e-briefing paper is an output of *The Covid-19 and Democracy Project*. Since Spring 2020, this project has explored the intersection between the Covid-19 pandemic and democratic politics and policy. Project outputs thus far include a comparative [report](#), a previous briefing paper on the 2020 US [electoral cycle](#), comment [pieces](#), and a [podcast](#). The project is led by Principal Investigator Dr Peter Finn and Co-Investigator Associate Professor Radu Cinpoes.

Rather than provide a comprehensive documentation of events pertaining to the Covid-19 pandemic and the English and Welsh Criminal Justice System, this e-briefing paper provides selective discussions to draw out key themes. In short, this brief aims to provide a first-cut analysis which acts as a bridge between the reflective writing that develops from the academic peer review process and the more immediate analysis and information found in (the undoubtedly essential) media coverage of the operation of the English and Welsh Criminal Justice System. As such, it is hoped it provides important food for thought for those involved in the analysis of, and policy response to, the Covid-19 pandemic as it relates to the English and Welsh Criminal Justice System. It should also be of interest to those impacted by, or working within, this system.

For democracy to thrive, accountability is key. Core to this accountability is an understanding of how democratic states, or groups of states such as the United Kingdom, act to protect their citizens against a myriad of threats. Since Spring 2020, perhaps the largest of these threats has been the Covid-19 pandemic. Understanding how the pandemic has impacted policy areas such as justice systems is key to ensuring such accountability is maintained.

An audio version of this e-briefing can be found [here](#)



Foreword

The problem with the justice system generally is that few people care about it. Unless you work in the justice system or are a user of it: people don't think they need it. Those who earn a living from working in the criminal justice system (CJS) may cynically be thought to be asking for greater resourcing out of personal greed.

As David Green in this important and timely paper highlights: a well-functioning CJS is the cornerstone of a democratic society. The consequences of a failing CJS is, as this paper remarks, anarchy or authoritarianism. The failure over the last 2 decades by government on both sides of the political spectrum is an indictment of the near contempt with which the CJS is treated by government: something seen starkly in the fall in pay for highly skilled practitioners. Yet, government cannot be blamed entirely for failing to make the CJS a priority when it is not one for the electorate.

This paper highlights the downward spiral the CJS was going in before the Covid-19 pandemic reached our shores because of a failure to value the proper administration of, and access to, justice. So, by the time Covid-19 came, like many other areas of the State, the CJS was ill equipped to deal with it.

It is worth comparing the response of the Executive to the pandemic insofar as the CJS is concerned with the effect on those facing the loss of their home in the civil courts. Instead of ensuring there was more resource for the work of the criminal courts to continue, the answer was to incarcerate innocent people for longer. And when members of the independent judiciary determined that a failure by the State to fund the justice system was not a proper reason to lock people up for longer, awaiting trial: the Executive changed the law to extend custody time limits.

In the Civil Justice System, my own natural habitat, the Executive's response was to make it harder for people to be evicted and to increase the protections for those who faced possession proceedings. Whilst this response has no doubt affected the financial viability of providers undertaking publicly funded civil housing work (the medium-term consequences of which will unlikely be good from an access to justice point of view), it did mean that vulnerable people were protected from homelessness.

David Green shows that victims of crime, those accused of crime and others who must give evidence will wait longer for their day in court. The human cost of this cannot be underestimated. More structurally, solicitors who represent people accused of crime are getting older and on account of pay and working conditions, younger lawyers often don't want to do this work. This raises serious concerns about what will happen to the CJS when these middle-aged solicitors retire.

Despite being a Housing Solicitor specialising in representing people who rely on the State to afford legal representation, I learnt a lot from this paper. I hope you do too. The figures show that the pandemic alone is not responsible for the problems the CJS now faces. Policy makers must begin to respect and value the importance of a well-functioning CJS. As must voters: before it's too late. Without respect for the work all parts of the CJS does, money alone may not be enough.

Ranjit Bains, University of Law, October 2021

1. Key Policy Learning Points:

- A well-functioning Criminal Justice System is essential to maintaining the Rule of Law. If, on one hand, the State removes citizens' liberty without due process; or on the other, if those guilty of crimes are seen to avoid justice, the fine balance between authoritarianism and anarchy will be upset.
- Over recent years, the entire Criminal Justice System in England and Wales has been subject to systematic cuts in funding, personnel and physical resources. This led to it being unable to cope with the sudden and unexpected impact of the Covid-19 pandemic.
- This lack of elasticity in the system led to delays and, in some cases, a prolonged loss of liberty.
- Three urgent areas now need addressing: reducing delays; re-building a network of local courts; and re-creating a sustainable system of legal aid.
- These three priorities can only be achieved by the Government properly funding the Criminal Justice System.

Key Facts

Historic Position	Position Prior to and During the Covid-19 Pandemic
Number of Magistrates' Courts in 2010: 320	Number of Magistrates' Courts in 2020: 156
Number of Crown Court Sitting Days in 2010: 108,536	Number of Crown Court Sitting Days in 2020: 82,300
Hourly Legal Aid Rate for a Solicitor in London Preparing a Magistrates' Court case in 1996: £47.25	Hourly Legal Aid Rate for a Solicitor in London Preparing a Magistrates' Court case in 2020: £45.35
Total Criminal Legal Aid Spend in 2010: £1.4 billion	Total Criminal Legal Aid Spend in 2020: £897 million
Backlog in the Magistrates' Court in early 2020: 314,592 cases	Backlog in the Magistrates' Court in early 2021: 412,494 cases
Backlog in the Crown Court in early 2020: 35,383 cases	Backlog in the Crown Court in early 2021: 57,625 cases

2. Introduction

England and Wales form a single legal jurisdiction.¹ The Criminal Justice System (CJS) in England and Wales comprises numerous parties and agencies – Her

¹ Although the United Kingdom parliament usually passes legislation affecting the entire UK, Scotland and Northern Ireland are distinct legal jurisdictions.

Majesty's Courts and Tribunals Service (HMCTS) (responsible for the provision and administration of Magistrates' and Crown Courts); the judges and magistrates who sit in those courts; the Crown Prosecution Service (the independent agency responsible for prosecuting most offences); the Legal Aid Agency (LAA) (an executive agency of the Ministry of Justice responsible for the provision and administration of legal aid services); defence solicitors and barristers (the vast majority of whom are independent professionals who provide their services on both a private basis and through contracts with the LAA); and the National Offender Management Service (an executive agency of the Ministry of Justice responsible for the provision of prisons and probation services).

Despite the myriad parties involved in the CJS, with their competing interests, all ultimately rely on state funding which can be manipulated in different ways. For example, the volume spent on legal aid can be restricted by failing to increase fees, or the level of the means test, in line with inflation. Crown Court funding is controlled by a system of "sitting days" – the total number of days that all Crown Court rooms open each year. In the years preceding 2020, all agencies saw their levels of funding restricted, but it was the courts and the defence solicitors and barristers who felt this most keenly. In the 10 years prior to the pandemic, the total spent on criminal legal aid fell by 35% in real terms.² The total number of Crown Court sitting days fell by 24%.³ In addition, 51% of all Magistrates' Courts were closed completely.⁴

The average age of a legal aid duty solicitor doing criminal work is going up by one year each year and is currently at 49.⁵ This is reflective of a profession that can no longer attract new entrants. The London Criminal Courts Solicitors Association recently highlighted that hourly rates had not risen since the mid-1990s, meaning that solicitors had suffered an effective 50% reduction in fees.⁶ In addition, the parlous state of legal aid funding no longer allowed for the recruitment, retention or career progression of appropriately qualified solicitors.⁷ The Law Society mapped the number of duty solicitors in each area of England and Wales by age, which painted a stark picture. In mid-Wales (an area roughly 1/3 of the geographic area of Wales) there were 11 duty solicitors, 64% of whom were over 50. In Worcestershire 63% were over 50, in Cornwall 61%.⁸

² House of Commons Library, *Spending of the Ministry of Justice on Legal Aid* (21 October 2020). Available at <https://commonslibrary.parliament.uk/research-briefings/cdp-2020-0115%20> [Accessed on 10 May 2021] 3.

³ The Bar Council, *Written Evidence from the Bar Council*, (September 2020). Available at https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjKpN6diZXwAhUDShUIHRO9C8MQFjADegQIExAE&url=https%3A%2F%2Fcommittees.parliament.uk%2Fwrittenevidence%2F12126%2Fdefault%2F&usq=AOvVaw2FQ9G0ikzcf_NAfnrlogEL [Accessed 10 May 2021] 2.; UK Parliament *Written questions, answers and statements* (17 January 2020). Available at <https://questions-statements.parliament.uk/written-questions/detail/2020-01-17/4764> [Accessed on 10 May 2021].

⁴ House of Commons Library, *Constituency Data: Magistrates' Court Closures*, (13 May 2020). Available at <https://commonslibrary.parliament.uk/constituency-data-magistrates-court-closures/> [Accessed 10 May 2021].

⁵ Ministry of Justice, *Summary Information on Publicly Funded legal Services*, (February 2021). Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/960290/data-compendium.pdf [Accessed on 10 May 2021] 49.

⁶ The London Criminal Courts Solicitors Association, *Response to the Independent Review of Criminal Legal Aid Call for Evidence* (5 May 2021) Available at <https://www.lccsa.org.uk/wp-content/uploads/2021/05/LCCSA-response-to-CLAR-Call-for-Evidence.pdf> [Accessed 13 May 2021] 21.

⁷ *Ibid.* p.7.

⁸ The Law Society, *Criminal duty solicitors: a looming crisis* (7 July 2021). Available at <https://www.lawsociety.org.uk/en/campaigns/criminal-justice/criminal-duty-solicitors> [Accessed 18 September 2021].

This led to a CJS in March 2020 that was unable to cope with unexpected demands on its resources. Then came a global pandemic. Although most people will go through their entire lives having no involvement with the CJS, it is an essential part of our democracy. In few other areas of society does the State wield as much power over the individual as in the CJS – the power to compel the individual to attend court; to present evidence against them and, ultimately, to remove their liberty - on occasion, for life. Equally, society depends on the State to provide a CJS which acquits the innocent, convicts the guilty and provides sentences which deter, punish and rehabilitate. As described above, all agencies involved in the CJS depend on the State for their funding. It is submitted that there is little argument that the State is therefore under a duty to resource the CJS in such a way that an individual can be brought to trial within a reasonable period of time and is provided with the means to defend themselves against the might and resources of the State.



Image 1: A Legal Headpiece, 2016

3. Political, Institutional and Policy Context and Response

At the start of 2020, there were 314,592 outstanding cases in the Magistrates' Courts and 35,383 outstanding cases in the Crown Court.⁹ Before moving on to discuss the policy response to the pandemic, it is important to note that there will always be some outstanding cases in the court system, due to the time it takes for cases to be dealt with.

⁹ House of Commons Library, *Court Statistics for England and Wales* (22 December 2020). Available at <https://commonslibrary.parliament.uk/research-briefings/cbp-8372/> [Accessed 10 May 2021].

Initial Response

The Ministry of Justice's initial response to the outbreak, in line with the Government's wider national response, was slow. On 16 March, Parliamentary Under-Secretary at the Ministry of Justice, Chris Philp, tweeted, "Courts will be operating normally tomorrow... for those not in isolation, Justice will continue and Jurors should attend Court tomorrow as per their Summons". On 17 March, The Lord Chief Justice, issued a conflicting statement saying, "It is not realistic to suppose that it will be business as usual in any jurisdiction, but it is of vital importance that the administration of justice does not grind to a halt."¹⁰ This at a time when the Government had issued guidance that people should avoid non-essential travel and should work from home where possible.

Just a week later, on 23 March, the Lord Chief Justice issued a direction that all trials in the Crown Court should be 'paused' and that cases in the Magistrates' Court should only continue if it was safe to do so.¹¹ Although it was initially said this would be for a short period of time, in the event no new Crown Court trials would start until 18 May.

Complexities in Dealing with Criminal Cases During the Pandemic

There is no escaping the fact that criminal cases involve a lot of people. In the Magistrates' Court, there will usually be three magistrates, a court legal advisor, an usher, solicitors representing the CPS and a number of defendants, a Probation Officer, representatives of the press, members of the public and of course the defendant, with dock officers if they are in custody. If the hearing is a trial, then additionally there will be witnesses and their supporters. In a Crown Court trial, there will also be twelve jurors. A typical Magistrates' Court room will deal with many cases each day, with a constant turnover of those parties.

The vast majority of participants would traditionally have been required to attend in person. There are good reasons for this. Many defendants (and to a lesser extent witnesses) in the CJS experience communication difficulties caused by their youth; learning difficulties; mental health problems; language barriers; or alcohol or drug addiction. For them, being physically present at court ensures that they can communicate clearly with their legal representatives, can participate fully, and that the resultant proceedings are fair. There is a strong argument that when a court needs to assess the truthfulness of a witness or the weight that they should place on their evidence, they need to have that witness physically present.

These complexities meant that, even though hearings other than Crown Court trials were permitted to continue, far fewer cases were dealt with than would normally be the case. Between February and April 2020, case disposals in the Magistrates' Court fell by 80% from 121,000 to 25,000. During the same period, disposals in the

¹⁰ J. Hyde, 'Lawyers alarmed by courts 'operating normally' claim', *The Law Society Gazette*. 17 March 2020. Available online: <https://www.lawgazette.co.uk/news/lawyers-alarmed-by-courts-operating-normally-claim/5103503.article> [Accessed 10 May 2021].

¹¹ The Lord Burnett of Maldon, Lord Chief Justice *Review of court arrangements due to COVID-19, message from the Lord Chief Justice* (23 March 2020). Available at: <https://www.judiciary.uk/announcements/review-of-court-arrangements-due-to-covid-19-message-from-the-lord-chief-justice/> [Accessed 10 May 2021].

Crown Court fell by 63% from 8,400 to 3,123.¹² The number of outstanding cases in both courts therefore began to rise.

The Subsequent Response - Coronavirus Act 2020

The Coronavirus Act contained numerous measures affecting all parts of society designed to deal with the consequences of the Covid-19 pandemic. It formed the first of three key limbs to the Government's response to the issues outlined above. Ss.53-55 of the Act greatly expanded the range of hearings for which video or audio links could be used in place of some or all of the parties attending court in person, subject to an 'interests of justice' test. Crown Court trials still required a jury to attend court in person.

The Subsequent Response – Nightingale Courts

As the number of outstanding cases grew and it became clear that socially-distanced court proceedings required more physical space, HMCTS announced that they would open a series of "Nightingale Courts" – non-court buildings which would now host court proceedings. In total 20 Nightingale Courts were opened.¹³ The first on 3 August 2020 and the most recent on 12 April 2021.¹⁴ The buildings chosen were many and varied – some, such as Huntingdon Magistrates' Court, were existing court buildings being re-purposed. Others were currently unused public buildings, such as The Lowry Theatre in Salford. Yet more (in a case of dark irony) were, like Cirencester Courthouse, former court buildings that had been closed during the last decade and were still standing empty.

The Subsequent Response – Custody Time Limits (CTLs)

While their case is ongoing, most defendants will be granted bail, however a sizeable minority will be remanded in custody. The majority of these defendants will not have been convicted and some never will be. CTLs exist to restrict the amount of time that the State can hold a defendant in custody awaiting trial. They vary depending on the nature of the case, but for the most serious, prior to the pandemic it was 182 days. It is possible for the court to extend CTLs. The test is whether the need for the extension is due to a good and sufficient cause *and* that the prosecution has acted with all due diligence and expedition.¹⁵

After Crown Court trials were paused and it became clear that the subsequent delays may lead to CTLs being exceeded, a joint protocol was issued on 7 April 2020

¹² HMCTS, *HMCTS management information - February 2021* (8 April 2021). Available at: <https://www.gov.uk/government/statistical-data-sets/hmcts-management-information-february-2021> [Accessed 10 May 2021].

¹³ This figure only relates to Nightingale Courts hearing criminal cases, further Nightingale Courts have opened for civil and family cases.

¹⁴ HMCTS, *Courts and tribunals additional capacity during coronavirus outbreak: Nightingale courts* (13 April 2021). Available at <https://www.gov.uk/guidance/courts-and-tribunals-additional-capacity-during-coronavirus-outbreak-nightingale-courts> [Accessed 10 May 2021].

¹⁵ There are other reasons which can form the basis of an application to extend CTLs, but 'good and sufficient cause' is the only one relevant to this discussion.

by the Senior Presiding Judge, HMCTS and the CPS.¹⁶ While making clear that the protocol did “not override independent judicial discretion and every case must be decided on its own merits”, it went on to state that the delays caused by compliance with health advice and the pausing of Crown Court trials did amount to a “good and sufficient cause” to extend CTLs.

As the year progressed and the immediate response period passed, applications to extend CTLs continued to be made. Some judges ruled that delays relating to the pandemic no longer amounted to grounds to extend CTLs and therefore began refusing to extend them.¹⁷ In an excoriating ruling at Woolwich Crown Court, HHJ Raynor noted, “The lack of money provided by Parliament to provide sufficient space for trials to be conducted does not amount to a good nor a sufficient cause to extend the custody time limit in this case... The delays in bringing cases to trial which are being experienced by the courts will not be alleviated by the current steps that are being taken by Her Majesty’s Court Service... If sufficient investment had been made to create dozens (not ten) additional courts to undertake criminal trials then the situation regarding CTL extensions might be different. But it is not. The reality is that many defendants in custody will not be tried until well into 2021.”¹⁸ In response to this, on 7 September, the Secretary of State for Justice, Robert Buckland, increased the maximum period of a CTL to 238 days.¹⁹



Image 2: Statue of ‘Lady Justice’, 2017

¹⁶ HM Judiciary, *Coronavirus Crisis Protocol for the Effective Handling of Custody Time Limit Cases in the Magistrates’ and the Crown Court* (27 March 2020). Available at [27032020 Protocol-for-CTL-cases FINAL-signed-1.pdf \(judiciary.uk\)](#) [Accessed 13 May 2021].

¹⁷ See discussion below in relation to the cases involving HHJ Raynor.

¹⁸ *R v Tesfa Young-Williams (2021)* Ruling by HHJ Raynor dated 8th September 2020 refusing an extension of the custody time limit on Counts 4-7 of the trial indictment. Available at [8sep20_hhj-raynor_yw_ctl-ruling-1.pdf \(25bedfordrow.com\)](#). [Accessed 13 May 2021].

¹⁹ The Prosecution of Offences (Custody Time Limits) (Coronavirus) (Amendment) Regulations 2020.

4. Discussion

As the name of this brief suggests, the current crisis in the CJS isn't simply the result of the mishandling of the effects of the Covid-19 pandemic. It has its roots in the systemic underfunding of all branches of the system by governments of every hue over the last two or more decades. This in turn, it is submitted, arises from a failure by successive governments to recognise the importance of the Rule of Law and the role that the CJS plays in upholding it.

How did we get here?

At its simplest, the Rule of Law is the notion that all of us are subject to the laws of the nation, created by the legislature and enforced by the courts. It maintains the balance of power and stops us slipping in one direction towards dictatorship and in the other towards anarchy. In a representative democracy, we entrust our MPs to create laws to keep society safe, peaceful and just. We entrust them to create a CJS which deals fairly with alleged transgressions of those laws. Individual complainants are not required to pursue individual defendants. Instead, the State takes on the responsibility (through the police and CPS) of investigating and prosecuting criminal cases. The State does this in recognition of the importance to the wider democracy of alleged breaches of criminal laws being dealt with in a way that is fair to both the accuser and the accused.

It's clear that in the CJS where the State generally brings the prosecution; funds the representation of the defendant; provides the courts to hear the case; and supplies the prison and probation services responsible for punishment and rehabilitation, that the State has to be trusted to fund and manage those services properly. Unfortunately, the State has been found wanting.

In overseeing the decline of the court estate, judicial sitting hours and the legal aid system, the State allowed the CJS to reach a point where an acute crisis, as a result of the Covid-19 pandemic, became inevitable, regardless of whatever belated steps were taken to try to alleviate the issues.

How successful was the subsequent response?

This chapter has highlighted three parts of the Government's response:

- i) Allowing greater use of remote hearings;
- ii) Nightingale Courts; and
- iii) Extending CTLs.

There can be no doubt that increasing the use of remote hearings allowed many more cases to progress that otherwise would not have been able to during the periods of lockdown, with all the travel restrictions and social-distancing measures that they brought. Due to the complexities inherent in dealing with criminal cases, not all cases could be dealt with remotely. There have been plaintive voices making the point that

the nature of the participants in the CJS means that remote hearings may well not be delivering “justice”.²⁰ Anecdotal evidence suggests that remote hearings are beset by technical issues. There is, however, an argument that this is the natural and perhaps acceptable result of adopting new technology so quickly. On a crude measure of ‘cases progressed that otherwise wouldn’t have been’, the greater use of remote hearings has been a success.

If a sympathetic view of remote hearings is one of success, that sympathy dissipates as we turn to examine Nightingale Courts. It is here that the impact of the decimation of the court estate over the last 10 years is laid bare. The rising backlog of cases prior to the pandemic demonstrates that the CJS couldn’t cope with ‘business as normal’. The impact of the pandemic has been devastating to those witnesses and defendants now caught in the resulting delays. By February 2021, there were 412,494 outstanding cases in Magistrates’ Courts and 57,625 in the Crown Court – year-on-year increases of 29% and 47% respectively. The maxim “justice delayed is justice denied” is apt. Over time, witnesses’ memories fade; they get fed up and decide not to support the case; complainants lose faith in the justice system; defendants are left in limbo, their jobs, relationships and reputations lost while charges hang over them; some of them will languish in custody – innocent until proven guilty, but waiting for the State to provide the resources necessary for their trial. In that context, 20 Nightingale Courts dealing with criminal work is a figure worthy of derision. The location of some of those Nightingale Courts in former court buildings is evidence of the folly of closing so many. It is far too little and took far too long.

Rather than investing heavily in many more Nightingale Courts, the Government responded by extending the maximum period defendants could be kept in custody. In the press release announcing the change, blame was laid squarely at the feet of the pandemic – “It addresses the delays to jury trials that have been caused by the pandemic”²¹ – ignoring the backlog and lack of court space caused by the reductions in funding and court closures.

The Government also deployed a familiar tactic, setting the ‘good’ members of the public who would supposedly benefit from these measures against the ‘bad’ people who would have their liberty curtailed. Under the heading, “Ministers act to keep dangerous suspects off our streets”, the Minister for Justice, Robert Buckland, said, “This temporary extension to custody time limits will keep victims and the public safe, and we should not apologise for making that our priority.”²² The apparent justification was clear – ‘yes we are keeping presumed innocent defendants in custody for longer, but don’t worry, this won’t affect you.’ This ignored the emotional effects on complainants and witnesses having to wait longer for their days in court. It further ignored the risk posed to the public if the defendants in custody were in fact innocent and the true culprits were still at large.

²⁰ J. Slingo, ‘Markedly inferior’: Bar councils warn against virtual justice’, *The Law Society Gazette* 4 May 2021. Available at <https://www.lawgazette.co.uk/news/markedly-inferior-bar-councils-warn-against-virtual-justice-5108351.article> [Accessed on 13 May 2021].

²¹ Ministry of Justice, HMCTS, The Rt Hon Robert Buckland QC MP, *Suspected criminals held for longer as criminal courts recovery plan announced* (6 September 2020) Available at: <https://www.gov.uk/government/news/suspected-criminals-held-for-longer-as-criminal-courts-recovery-plan-announced> [Accessed 13 May 2021].

²² *Ibid.*

5. Conclusion

It is submitted that, given the importance of the Rule of Law in the maintenance of democratic society, the Executive should hold the justice system in the same regard that they purport to hold the health and education systems.

When the Covid-19 pandemic came, it struck a CJS in decay, starved of funding, staffed by disillusioned personnel, where goodwill was nigh on exhausted. The Government's response was, in the most part, too little, too late. It sought easy solutions at the expense of the lives and liberty of those caught up in the CJS.

Whilst it is easy to call for more money, there does need to be an injection of funding sufficient to keep legal professionals doing the work and to attract new entrants; to keep a network of local courts open; and to deliver justice in a reasonable period of time. If this call is answered, the Government can demonstrate that it still cherishes and seeks to maintain the Rule of Law.

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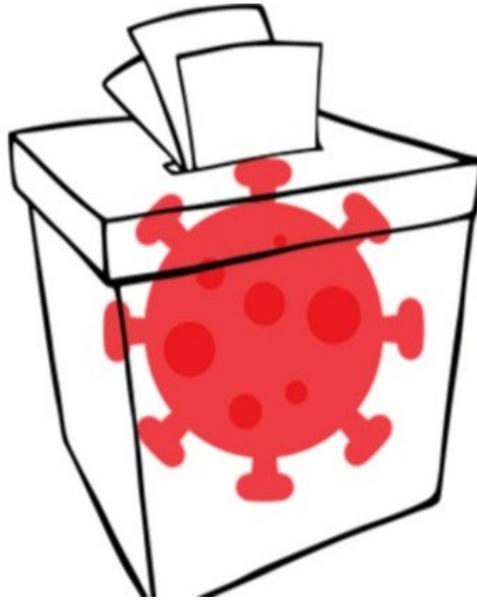
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Biographies

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