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Advice to HM Government

Introduction

1. I am asked to advise on measures that would alleviate, if not remove, the backlog of criminal cases in the Crown Court of England and Wales ('the backlog').
2. This advice is sought at a time when the backlog is particularly acute, standing at 73,105 cases as of September 2024¹ having steadily risen from 31,916 in March 2019.² The causes of the backlog are well documented and bear no repeating here³ but I urge HM Government to carefully reflect on those causes when considering any potential solutions. I also note from the outset that my advice is given in the context of the current funding restraints on the Criminal Justice System ('CJS').
3. In summary, I advise against the abrogation of the right to trial by jury (see further below related advice in respect of 'intermediate courts', magistrates' sentencing powers and human rights challenges). I instead advise HM Government to consider allowing defendants to elect trial by judge alone in the

¹ MOJ Criminal court statistics quarterly: July to September 2024:

<<https://www.gov.uk/government/statistics/criminal-court-statistics-quarterly-july-to-september-2024/criminal-court-statistics-quarterly-july-to-september-2024>> (accessed 27th February 2025).

² MOJ Criminal court statistics quarterly: January to March 2019:

<<https://assets.publishing.service.gov.uk/media/5d1481e7ed915d318c4ae63d/ccsq-bulletin-q1-2019.pdf>> (accessed 27th February 2025).

³ Criminal Bar Association, Submissions to Independent Review of Criminal Courts 2025,

<<https://www.criminalbar.com/wp-content/uploads/2025/02/CBA-Response-to-the-Independent-Review-of-Criminal-Courts-January-2025.pdf>> (accessed 27th February 2025), [9] – [10].

Crown Court in certain classes of case and I endorse the recommendations of other professional organisations.

A. Is jury trial to be abolished in a particular class of case?

4. The right to trial by jury⁴ has been a fundamental part of the constitutional settlement of the United Kingdom for around 800 years.⁵ In a democratic society, where public participation is vital, the use of juries means that every single day ordinary people are involved in decisions which affect the life and liberty of their fellow citizens.
5. Most importantly in the context of this advice, the use of juries (in and of itself) is not a cause of the backlog. The backlog has fluctuated over time owing to factors completely unrelated to the use of juries.
6. Any inefficient aspects of jury trials have little to do with juries themselves and it is likely that any replacement mode of trial will suffer the same inefficiencies. For example, it is well recognised amongst legal practitioners that a very common cause of delays is the lateness of prison transports for defendants on remand.⁶ Unless the failure of the third-party contractors responsible for conveying defendants to court on time is addressed separately, the problem will persist whether that defendant is tried by jury or not.
7. Given the fundamental nature of the right to trial by jury, and the corresponding lack of impact that juries in and of themselves have on the backlog, I advise against any abrogation of a defendant's right to trial by jury (where it presently exists) because such a constitutional shift cannot be justified in the name of efficiency.

⁴ Recognised as such in *R v Twomey* [2009] EWCA Crim 1035; [2010] 1 W.L.R. 630 at [10].

⁵ Criminal Law Solicitors' Association, Submission to Independent Review of Criminal Courts, <<https://www.clsa.co.uk/wp-content/uploads/2025/02/CLSA-Leveson-submission.pdf>> (accessed 27th February 2025), see Section 3.

⁶ Bar Council, Response to Independent Review of Criminal Courts, <<https://www.barcouncil.org.uk/asset/86B0F6FE%2D6FCD%2D4463%2DAE9CBB172F3E4A3D/>> (accessed 27th February 2025), [90] – [96].

B. Is jury trial to be replaced by an 'intermediate court' in particular cases?

8. One option often discussed is the creation of 'intermediate courts' which would likely be made up of District Judges flanked by two lay magistrates and would deal with cases which were neither the least nor the most serious.
9. I advise against the creation of such a court. Although there is some conditional support from the Magistrates' Association for the idea,⁷ several other professional organisations strongly oppose the idea for the following reasons:⁸
 - (a) An entirely new tier of criminal court would inevitably require time and resources which the CJS does not currently have;
 - (b) The lawyers, judges, court staff, physical court rooms, equipment, etc. needed would have to be diverted from the current magistrates' courts and Crown Court centres;
 - (c) Such a court is unlikely to reduce the backlog in real terms and at most may move the problem elsewhere. There is no reason in principle that a trial by such a court would take much less time than the same trial by a jury. The same volume of evidence would need to be presented, procedural matters addressed and speeches made. Indeed, any gains in efficiency are likely to be lost in time spent on appeals from the new court.
10. The efficiency gains from an 'intermediate court' are speculative at best. What is certain is that thousands of defendants would be deprived of their constitutional right to trial by jury for no principled reason and that in the short-term enormous amounts of money, parliamentary and logistical time would be spent creating this new court, resources which could be far better spent addressing the problems with the current system rather than reinventing it.

⁷ Magistrates' Association, Response to Independent Review of Criminal Courts, <<https://www.magistrates-association.org.uk/wp-content/uploads/2025/02/MA-cr-criminalcourtsreview2025.pdf>> (accessed 27th February 2025), [29].

⁸ CBA Submissions (n 3), [89] – [91]; CLSA Submission (n 5), Sections 4.17 and 6; BC Response (n 6), [21], [23] & [49]; Law Society, Submission to Independent Review of Criminal Courts, <<https://prdsitecore93.azureedge.net/-/media/files/campaigns/consultation-responses/response-of-law-society-to-independent-review-criminal-courts.pdf?rev=6eb4d8bb89934e5a92e37e0c869c0802&hash=C49F44B1ACDD54711D1B695DCC864C96>> (accessed 27th February 2025), Page 4.

C. Should magistrates be given greater sentencing powers?

11. Plainly, since I have advised against an ‘intermediate court’, I do not advise that magistrates’ sentencing powers be increased for that purpose. However, if HM Government pressed on with the creation of such a court, an increase in sentencing powers may be required if the new court sat structurally within magistrates’ court.
12. In any event, I advise that an increase in sentencing powers for magistrates’ courts should be considered in conjunction with other proposals, for example, an increase in sentencing powers could be combined with a restriction on the ability to commit cases to the Crown Court for sentence after summary trial to encourage defendants to elect summary trial.⁹
13. Any increase in sentencing powers should not exceed a maximum of 24 months’ imprisonment.

D. Would reforms affecting the right to jury trial be likely to face challenge on human rights grounds? Would removing legal aid to bring such challenges be an option?

14. I advise that human rights challenges are likely to follow any reforms affecting the right to trial by jury. As mentioned above, the right to trial by jury has a long and celebrated history and it has often been argued that the use of juries is one of the pillars of the fairness of the CJS.¹⁰ In particular, any abrogation of the right to trial by jury will be met by professional organisations with negative responses ranging from scepticism to strong opposition.¹¹
15. Trial by jury is important to maintaining public trust and confidence in the CJS. Recent polling suggests that a majority of people prefer juries to make decisions over judges,¹² and trust the jury system to deliver the right verdicts.¹³

⁹ CLSA Submission (n 5), Sections 7.6 – 7.10. Another option would be to combine with reclassification of some offences, see BC Response (n 6), [87].

¹⁰ See for example, R v Abdroikov [2007] UKHL 37; [2007] 1 W.L.R. 2679 at [6] – [7].

¹¹ CBA Submissions (n 3), [91]; CLSA Submission (n 5), Section 3.13; BC Response (n 6), [51], [57]; LS Submission (n 8), Page 4.

¹² YouGov Poll, 20th June 2023, <<https://yougov.co.uk/topics/politics/survey-results/daily/2023/06/20/1c989/3>> (accessed 27th February 2025).

¹³ YouGov Poll, 4th March 2024, <<https://yougov.co.uk/topics/politics/survey-results/daily/2024/03/04/51f36/1>> (accessed 27th February 2025).

16. As it is likely that the reforms would require new legislation from Parliament, it is also likely that any human rights challenge would take the form of an invitation to the courts to exercise their supervisory jurisdiction under Sections 3 and 4 of the Human Rights Act 1998 ('HRA 1998'). Because of the importance of such a legal challenge, I would expect it to reach the UK Supreme Court.
17. Section 3 HRA 1998 requires courts to give effect to legislation in a way compatible with rights conferred by the European Convention on Human Rights ('ECHR'). Section 4 HRA 1998 gives relevant higher courts in the UK a discretion to issue a declaration of incompatibility where that court is satisfied that a relevant provision of legislation is incompatible with an ECHR right.
18. In this context the most relevant ECHR right is Article 6, the right to a fair trial. Without knowing precisely what reforms are proposed and how they would affect trial by jury, it is impossible to advise on the merits of any legal challenge. However, whilst only a starting point, I make the following observations:
- (a) The European Court of Human Rights ('ECtHR') has consistently held that compliance with Article 6 does not require a particular type of trial.¹⁴ The overarching requirement is that the overall proceedings are fair. This includes having procedures in place to ensure impartiality, independence and the rights of the defence;¹⁵
 - (b) The question of when the right to trial by jury can be abrogated was considered by the UK Supreme Court in *Re: Hutchings*.¹⁶ The Court held that where Parliament had clearly legislated to allow the DPP for Northern Ireland to issue a certificate for trial by judge alone in certain circumstances, it did not result in unfairness to the defendant.¹⁷

¹⁴ *Taxquet v Belgium* (2012) 54 E.H.R.R. 26, [83] – [84].

¹⁵ See for example: *Piersack v Belgium* (1983) 5 E.H.R.R. 169; *Al-Khawaja v United Kingdom* (2012) 54 E.H.R.R. 23.

¹⁶ [2019] UKSC 26.

¹⁷ The Court of Appeal has reached a similar conclusion in the context of Article 6 ECHR when considering provisions around trial by judge alone in the context of jury tampering, *R v Twomey* [2009] EWCA Crim 1035; [2010] 1 W.L.R. 630.

19. Therefore, if legislation was passed altering the availability of trial by jury, it is possible that it could be drafted in such a way as to survive judicial challenge under HRA 1998 or in respect of the common law right to trial by jury.

20. I have also been asked to advise on the possibility of removing legal aid to bring such human rights challenges. In short, I advise against this because to do so would likely lead to a human rights challenge of its own on the basis of Article 6 (right to a fair trial) and / or Article 13 (right to an effective remedy) ECHR.

21. Whilst the ECtHR has not gone so far as to require states to provide legal aid for individuals to bring human rights challenges, financial barriers are a relevant consideration when deciding whether there has been a violation of Articles 6 or 13 ECHR.¹⁸ It is far from guaranteed that if such a challenge were brought against the removal of legal aid, it would be decided in favour of HM Government.

E. What other proposals should be considered and would they survive judicial scrutiny?

22. There are a number of alternative proposals suggested by professional organisations for alleviating the backlog which I advise are adopted:

- (a) Introduce automatic diversion for certain offences under particular conditions e.g. for first time offenders / where addiction is a cause;¹⁹
- (b) Increase appropriate incentives for defendants to elect summary trial, e.g. by restricting committals for sentence;²⁰
- (c) Increase incentives for defendants who accept their guilt to plead early, e.g. by preserving credit for guilty pleas longer;²¹ and
- (d) Consider various minor practical reforms e.g. triaging cases, trial or sentence blitzes, reintroducing stand-down probation reports.²²

¹⁸ *Airey v Ireland* (1979-80) 2 E.H.R.R. 305, [27] – [28].

¹⁹ BC Response (n 6), [124] – [140]; LS Submission (n 8), Pages 7 – 8.

²⁰ CBA Submissions (n 3), [53]; CLSA Submission (n 5), Sections 7.6 – 7.10.

²¹ CBA Submissions (n 3), [18], [48] & [69], CLSA Submission (n 5), Sections 7.4 – 7.5; BC Response (n 6), [244], [258] – [262]; Bar Council, Response to Independent Sentencing Review, <<https://www.barcouncil.org.uk/static/ba7a490a-cf09-414c-b5bd8f7edc0d4654/Bar-Council-response-Independent-Sentencing-Review-call-for-evidence-FINAL.pdf>> (accessed 27th February 2025), [123] – [142], [161] – [164].

²² CBA Submissions (n 3), [39]; BC Response (n 6), [108] – [116], [122], [143] – [144].

23. In addition to the above suggestions, if HM Government remains interested in exploring reforms to reduce the number of jury trials as a means of alleviating the backlog, I would advise that legislation be tabled which allows for a defendant to elect trial by judge alone in the Crown Court in certain circumstances.

24. It is noted that earlier in my advice I stressed that the right to trial by jury should not be abrogated. This alternative instead offers defendants an opportunity to waive that right if they so wish (rather than taking it away from them altogether).

25. This approach also has a number of advantages over the creation of 'intermediate courts' considered above:

- (a) It would be an option within the existing Crown Court and would not require the creation of a new court tier with the associated costs;
- (b) Existing lawyers, judges and court staff etc could be used; and
- (c) It may save court time that would otherwise be spent on empanelling, homilies, legal directions, summing up and jury deliberation.

26. In a number of states in Australia, the option for trial by judge alone has existed since 1990 with some success. Following a similar model, it is suggested that the option could be offered to defendants in complex cases (e.g. corporate fraud) or cases where the defendant may perceive a risk of jury bias (e.g. child sexual offences). A recent study found that in New South Wales "Judge-alone trials are associated with an increased probability of acquittal, shorter trials and a shorter prison sentence".²³ If these results could be replicated in England and Wales, the backlog would be alleviated without compromising the rights of defendants.

27. This proposal is also likely to survive judicial scrutiny for the reasons outlined in paragraph 18 above and because there already exists similar legislative

²³ NSW Bureau of Crime Statistics and Research, Crime and Justice Bulletin No. 264, March 2024, <<https://bocsar.nsw.gov.au/content/dam/dcj/bocsar/documents/publications/cjb/cjb251-300/CJB264-Report-Effect-of-judge-alone-trials.pdf>> (accessed 27th February 2025).

provision for trial by judge-alone in cases where there is a risk of jury-tampering.²⁴

Conclusion

28. In conclusion, I advise against the abrogation of the fundamental right to trial by jury and instead urge HM Government to allow defendants in certain cases to elect trial by judge alone and adopt the other proposals from professional organisations endorsed above.

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28th February 2025

²⁴ Criminal Justice Act 2003, Sections 44 – 49.