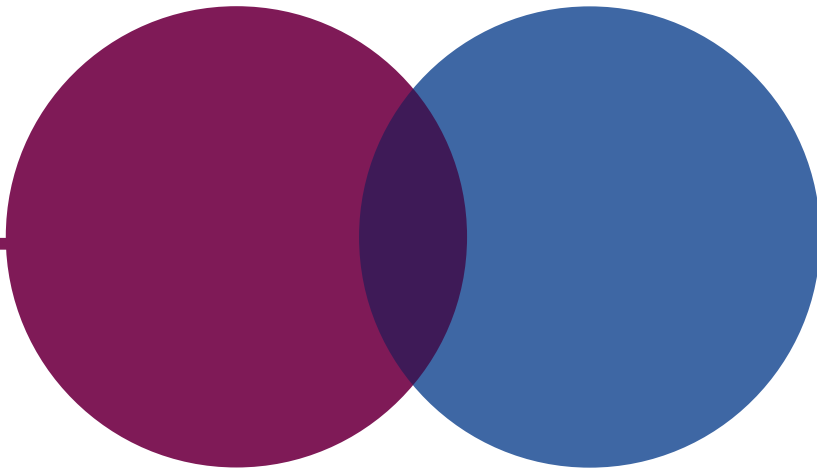




National Audit Office



# Reducing the backlog in criminal courts

Ministry of Justice and HM Courts & Tribunals Service

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**REPORT**

**by the Comptroller  
and Auditor General**

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**SESSION 2021-22  
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HC 732**

## Key facts

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**60,692**

backlog of cases in the Crown Court, 30 June 2021

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**48%**

percentage increase in the Crown Court backlog between 31 March 2020 and 30 June 2021

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**302%**

increase in the number of cases waiting longer than a year in the Crown Court, from 2,830 as of 31 March 2020 to 11,379 as of 30 June 2021

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**£63 million** spent by Her Majesty's Courts & Tribunals Service (HMCTS) on pandemic response and recovery in the criminal courts in 2020-21, in addition to that spent on expected operational activities

**£2.2 billion** the estimated system-wide costs of delivering the criminal justice action plan, 2022-23 and 2023-24

**48,000 to 52,000** range of estimates modelled by the Ministry of Justice for the size of the backlog in the Crown Court by November 2024

**435%** increase in the number of sexual offence trial cases in the Crown Court backlog for longer than a year, from 246 as of 31 March 2020 to 1,316 as of 30 June 2021

**27%** increase in the number of defendants held on remand in custody between 31 March 2020 and 30 June 2021

# Summary

## Introduction

**1** The Ministry of Justice (the Ministry) is headed by the Lord Chancellor and is accountable to Parliament overall for the effective functioning of the court system. Her Majesty's Courts & Tribunals Service (HMCTS), an agency of the Ministry, provides the system of support, including infrastructure and resources, for administering criminal, civil and family courts in England and Wales and tribunals nationally. The judiciary, headed by the Lord Chief Justice, is constitutionally independent from government.

**2** In the year to 30 June 2021, criminal courts dealt with 1.24 million cases, including more than 90,000 in the Crown Court, which hears the most serious cases. Cases enter the system when a defendant is charged with an offence and are allocated a court date through a process called 'listing,' which is a judicial function. By the end of June 2021, there were around 61,000 cases received and not yet completed in the Crown Court, and more than 364,000 cases received and not yet completed in the magistrates' courts. HMCTS does not distinguish between the outstanding caseload it says is required to run criminal courts efficiently and effectively and what it considers a 'genuine backlog' of cases. For this report, we have defined the backlog as all cases waiting to be heard or completed. There are limitations to this definition, set out in Appendix Two.

**3** The COVID-19 pandemic significantly affected the work of the criminal justice system and necessitated extensive changes in criminal courts to keep judges, court staff, and users safe. The accumulating backlog in criminal court cases has been the subject of significant Parliamentary, media and wider public interest. This report assesses the Ministry and HMCTS's plans for, and progress, in reducing the backlog in criminal courts. It examines:

- trends in the backlog up to and since the onset of the pandemic and the impact on victims, witnesses and defendants (Part One);
- HMCTS's emergency response and pandemic recovery programme (Part Two); and
- the Ministry's forecasts for the backlog, the long-term action plan to address it and the risks to long-term recovery (Part Three).

**4** This report primarily focuses on the Crown Court where the backlog is acute and the cases are more serious. We do not look at HMCTS's court reform programme, ongoing since 2016, or examine in detail the work of other criminal justice agencies, such as the Crown Prosecution Service (CPS) and the police. This report looks at HMCTS's efforts to increase capacity as part of its recovery programme and does not look in detail at work within HMCTS or other agencies to improve efficiency. Our audit approach is described in Appendix One and evidence base in Appendix Two.

## **Key findings**

### Trends in the backlog

**5 The Crown Court backlog increased by 23% in the year leading up to the pandemic.** The number of cases in the backlog increased from 33,290 on 31 March 2019 to 41,045 on 31 March 2020. The Ministry allocated 16% fewer sitting days in 2019-20 than in 2018-19 because it expected the number of cases entering the court system (receipts) to continue to decline. It did so despite acknowledging the possibility of a long-term increase in demand as a result of increasing police funding. This lower allocation proved insufficient to meet demand and the then Lord Chancellor allocated 850 additional sitting days. In October 2019, the government announced its programme to recruit an additional 20,000 police officers, which the Ministry expects will lead to an increase in court receipts from 2021-22 (paragraphs 1.10, 1.11 and 1.15, and Figure 2).

**6 The Crown Court backlog has increased a further 48% since the onset of the pandemic.** Between 31 March 2020 and 30 June 2021, the Crown Court backlog increased from 41,045 to 60,692 cases. The Lord Chief Justice suspended all jury trials between 23 March and 18 May 2020, and HMCTS could not safely use large parts of its court estate without modifications. The Crown Court backlog grew slowly at first as cases were initially held up in the magistrates' courts, where the backlog grew 29% during the first national lockdown alone. The backlog in the magistrates' courts has been recovering since a peak in June 2020. The Crown Court backlog continued to increase up to June 2021, albeit at a much slower rate since March 2021. Cases waiting for trial account for more than 90% of the increase (paragraphs 1.14 to 1.16, 1.20 and Figure 3).

**7 Victims, witnesses and defendants are waiting longer for their cases to be heard as the number of cases older than a year increased from 2,830 to 11,379 (302%).** Cases in the backlog on 30 June 2021 had been waiting an average of 230 days, 84 days (57%) longer than cases in the backlog on 31 March 2020. Delays could mean more victims and witnesses withdraw from the process, increasing the likelihood of cases collapsing. In September 2020, the government temporarily extended the maximum time limit a defendant could be held before trial by 56 days. Between 31 March 2020 and 30 June 2021, the number of people held on remand in custody increased by 27% at a time when the prison population declined by 6% (paragraphs 1.19 to 1.22 and Figure 5).

**8 Waiting times vary considerably by region.** The pandemic exacerbated the regional variation in backlogs and waiting times: between 31 March 2020 and 30 June 2021, the Crown Court backlog increased the most in London, by a further 72%, compared with only 18% in the South West. There is also significant variation in waiting times, with the average age of a case in London increasing by 63% to 266 days throughout the pandemic, more than any other region. London is closely followed by the Midlands where the average age of cases increased by 62% to 256 days (paragraphs 1.17 and 1.18, and Figure 4).

**9 Rape and serious sexual offence cases have been acutely affected.** Defendants accused of rape or serious sexual offences are typically more likely to plead not guilty compared with other offences. Cases with not guilty pleas typically take much longer to complete in the courts than cases where a defendant has pleaded guilty. Delays to jury trials have therefore disproportionately affected victims of these crimes: between 31 March 2020 and 30 June 2021, the number of sexual offence trial cases in the Crown Court backlog rose by 71% from 3,606 to 6,173, with cases waiting longer than a year increasing 435% from 246 to 1,316. The criminal justice action plan, which looks at long-term recovery, includes initiatives to tackle rape and serious sexual offences. Robbery and weapon possessions cases have also seen relatively large increases in waiting times (paragraphs 1.20, 1.21 and 3.5).

HMCTS's recovery programme

**10 HMCTS responded quickly in the early stages of the pandemic, prioritising staff and court user safety and access to justice for urgent cases.** It quickly introduced emergency governance structures and rolled out audio and video technology to enable remote hearings. It worked with the judiciary to prioritise cases that were time-critical or urgent, including those relating to national security (paragraphs 2.2 to 2.4 and 2.12).

**11 HMCTS's recovery programme increased criminal court capacity by 30% in the Crown Court and 7% in magistrates' courts between September 2020 and July 2021.** HMCTS launched a courts recovery programme in May 2020 that focused on increasing court capacity to hear criminal cases, including through greater use of remote attendance at hearings and adaptations to existing court buildings. Between July 2020 and June 2021, it opened 72 temporary courtrooms (Nightingale courtrooms), 38 of which (53%) handled Crown Court cases. HMCTS also modified 71 courtrooms to hear cases with multiple defendants, increasing its overall capacity for these larger cases by 28% by 31 March 2021. HMCTS spent £63 million on its response and recovery work in criminal courts in 2020-21, in addition to that spent on expected operational activities (paragraphs 2.5 to 2.8, 2.10, 2.11 and 2.14 to 2.16, and Figures 7 to 11).

**12 The Ministry's latest models indicate the Crown Court backlog could be between 17% and 27% higher than pre-pandemic levels by November 2024.** In July 2021, to inform Spending Review negotiations with HM Treasury, the Ministry set out two scenarios – an 'ambition' and a 'cautious' approach – that forecast a backlog of 48,000 and 52,000 respectively by November 2024. These scenarios forecast a much quicker recovery than the Ministry's previous central estimate in April 2021, even though considerable uncertainty remains about demand flowing into the courts following the pandemic and the pace of new police recruitment and deployment. Both scenarios assume increasing the use of part-time judges to unprecedented levels. Since the two sets of projections are very similar, it is difficult for decision makers to understand the reasonable range of potential outcomes from their funding and other strategic decisions. The Ministry later developed a third scenario to support its 2021 Spending Review discussions, which assumed maintaining the funding that was agreed in the 2020 Spending Review and forecast a backlog of 72,000 cases by November 2024. In the magistrates' courts, the Ministry expects to recover to pre-pandemic levels by November 2021 (paragraphs 3.2 to 3.4, and Figures 13 and 14).

**13 The Ministry and HMCTS have a poor understanding of how the pandemic and recovery programme have affected vulnerable and ethnic minority users.** Despite a series of commitments on supporting users who are vulnerable because of their age, mental disorders or a physical impairment, we found slow progress in collecting data and evaluating evidence on how vulnerable users have been affected by, for example, remote access to justice. We also found no evidence that the Ministry and HMCTS have any data on users' ethnicity to carry out meaningful analysis on whether ethnic minority groups have been disadvantaged by the pandemic or the recovery programme. The Ministry is therefore unable to assure itself that it is meeting its objective to "build back fairer" (paragraphs 3.19 to 3.22).

## Risks to long-term recovery

**14 The Ministry's progress with the ambitious long-term plan to support recovery in criminal courts hinges on securing funding and resources.** In April 2021, with the support of the Cabinet Office's National Economic Recovery Taskforce, the Ministry led the production of a criminal justice action plan that recognises the need for a whole-system approach to recovery. The plan requires the resolution of significant systemic issues that the criminal justice system has been grappling with, including improving handovers between the police, CPS and courts, and issues around how different agencies categorise and record cases in their systems. The Ministry recognises that it still needs to assess the whole-system costs of the various proposed recovery initiatives, collect more evidence to understand what supports better case quality and court effectiveness, and to develop new data technology and recruit more analysts (paragraphs 3.5, 3.6, 3.17 and 3.18).

**15 The Ministry and HMCTS are not yet working towards shared, strategic objectives for recovery in criminal courts.** Without this clarity, it is difficult for the Ministry and its agencies to align their plans effectively or understand and measure performance at a system level. They are also less able to make informed strategic choices in managing demand across the criminal justice system. For example, the lack of a shared objective and clear trajectory for reducing the criminal court backlog makes planning and managing prison places more challenging. The Ministry did not set or share objectives for recovery until it led the development of the criminal justice action plan in April 2021. The plan's objectives to improve timeliness and victim engagement are still immature and not aligned with those set out in the Ministry's 2021-22 outcome delivery plan and HMCTS's 2021-22 business plan (paragraphs 3.8, 3.9, 3.14 and 3.15).

**16 The Ministry has removed the limit on the number of Crown Court sitting days, but their use relies on courts having enough physical and judicial capacity.** In April 2021, the then Lord Chancellor announced he was removing the funding cap on sitting days in 2021-22 to support reducing the Crown Court backlog. At the time, the Ministry's best-case scenario estimated using 111,500 judicial sitting days in 2021-22, but this was contingent on a range of assumptions, including 33 additional Nightingale courts. HM Treasury approved funding to extend the contracts of existing Nightingale Crown courtrooms until the end of 2021 but did not approve HMCTS's request for 33 additional courtrooms. The Ministry revised its forecasts in July 2021, and its 'ambition' scenario anticipated 103,500 sitting days in 2021-22. In July 2021, the Ministry announced that implementing COVID operating hours is at the discretion of local judges and subject to local consultation. HMCTS expects take-up locally to be very low. To use more sitting days, HMCTS is relying on part-time judges (recorders) agreeing to work more hours (paragraphs 2.16, 2.19 and 3.11 to 3.13).

**17 Other significant risks remain to the Ministry and HMCTS's long-term efforts to reduce the backlog.** These include:

- **funding uncertainty:** as part of the 2021 Spending Review, the Ministry is in discussions with HM Treasury over additional funding to deliver the criminal justice action plan. Estimates that the Ministry produced in April 2021 suggest the action plan would cost around an additional £500 million for criminal courts and £1.7 billion for legal aid, prisons and probation services. The Ministry estimates its 'ambition' scenario produced in July 2021 would require more than 4,000 additional prison places by the end of 2023, over and above the planned new places that HM Treasury has agreed to fund. The Ministry is continuing to update these estimates as it prepares for the 2021 Spending Review;
- **the availability of judges:** the Ministry and HMCTS recognise the challenge of securing enough judges, particularly in 2022-23 and 2023-24, despite their initiatives, which include recruitment; and
- **the capacity of other criminal justice agencies and support services:** the Ministry and HMCTS have a limited understanding of system capacity, including that of CPS and the legal professions. Without this, they cannot be confident of the robustness of their recovery planning or whether they can make full use of increased judicial and courtroom capacity (paragraphs 3.10 to 3.15).

**18 Long-standing data limitations obscure the Ministry and HMCTS's understanding of future demand.** In 2019, the HMCTS-commissioned report, *Digital Justice* set out wide-ranging findings on the extent of HMCTS's data limitations. HMCTS has yet to implement the recommendations in full. The pandemic has exacerbated these long-standing data challenges, bringing into focus the data the Ministry and HMCTS need to develop to better understand and manage flow through the system. This includes through more systematic working with the judiciary who have a strong understanding of how long cases are likely to take. The Ministry recognises that it will need substantial investment in analytical capability to resolve other data issues, including disjointed data across the system. It is aiming to publish, in autumn 2021, a new scorecard to make national performance more transparent (paragraphs 3.17 and 3.18).



## Conclusion on value for money

**19** The COVID-19 pandemic presented the criminal justice system with an unprecedented challenge. It has had an acute impact on criminal courts, which were already strained in the year leading up to the pandemic. HMCTS responded effectively to the crisis as it unfolded and to changing operational requirements, including the suspension of all jury trials, and their resumption when conditions allowed.

**20** Despite the concerted efforts of HMCTS and the Ministry to increase capacity in criminal courts quickly and safely, the Crown Court backlog looks likely to be a pervasive issue beyond 2024. This means more victims, witnesses and defendants will continue to be severely affected. In their work to recover, the Ministry and HMCTS cannot afford to lose sight of the impact that both the backlog and their recovery programme have on court users, particularly those who are vulnerable or have traditionally faced discrimination, including ethnic minorities.

**21** Given the complexity and interdependencies in the criminal justice system, the Ministry is right to take a whole-system view of recovery. But if sustainable recovery in criminal courts is to be effective, the Ministry will need to improve its leadership of the system, including by agreeing clear, shared objectives for recovery and significantly improving the quality of its data. Without this, there is a risk that further investment will not support long-term value for money, ensure timely access to justice, or improve the experiences of victims, witnesses and defendants.

## Recommendations

The Ministry should:

- a** **agree with other criminal justice agencies a set of shared, published objectives for recovery in criminal courts** that explicitly consider the implications for the rest of the criminal justice system. It should use these shared objectives to:
  - align recovery funding, planning and reporting across criminal justice agencies; and
  - set reasonable expectations around waiting times by case type, acknowledging the responsibility of the judiciary.
- b** **develop a shared understanding of the capacity and capability of other parts of the criminal justice system**, including the CPS and the legal professions, to support recovery in criminal courts.

- c identify and obtain the data that it needs to understand the diversity of user experience**, including for vulnerable users and ethnic minorities. It should use this to:
- inform how it implements the criminal court recovery programme and all key initiatives in the criminal justice action plan and capture this in their performance monitoring; and
  - identify learning, particularly for aspects of the recovery programme that will endure through the court reform programme.
- d support improvements in data it needs for recovery by:**
- devising and implementing a plan to tackle the systemic barriers to collecting, using and sharing data effectively across the criminal justice system; and
  - strengthening its work with the judiciary and regional offices to capture local intelligence systematically and consistently.