



## Leader's Report to AGM

In writing this report, I have reflected on the difficult times we have faced together this year, and that we have begun to overcome. 2020 exemplifies just how professional and hard-working the Bar is, rapidly learning new skills to keep the justice system going despite financial hardship. We have helped construct a system that is relatively "Covid-secure". And as we begin to digest the announcement about the first effective vaccine, we can see that the current social distancing measures are going to be with us until at least next Easter even if all goes smoothly.

### **Before Covid ("BC")**

Last November, we thought we were "in crisis" across all jurisdictions. Court centres and rooms were being closed, judicial sitting days were down, staff numbers reduced and back-logs were growing. In the county court there was little or no sign of an effective modernisation programme, and waiting lists in Tribunals were expanding. The election approached, dominated by Brexit, and I suspect we all felt a sense of frustration about a Justice System long ignored and underfunded.

In February, I clearly tempted fate by referring to the odd "early green shoot" of hope for the justice system – we had received confirmation from Susan Acland-Hood, CEO of HMCTS, that sitting days for the rest of 2020 and 2021 would be increased. The media had started to give some attention to the problems following a decade in which some 20-25% had been cut from the unprotected MoJ budget. The consultations on "Accelerated Asks" and "Pre-Charge Bail Legislation" were imminent, and the Conservative Manifesto had promised a Royal Commission, albeit of uncertain scope.

I also wrote in February, *"I fear that the next two months until the end of this financial year are not going to be easy as list officers juggle impossible demands imposed upon them"* – little did we know what was coming. But that of course is the point – the Justice System had been creaking for years before Covid and the pandemic has made a bad situation worse.

## **The Gathering Storm**

On March 4<sup>th</sup> the Circuit Leaders met the Lord Chief Justice and the President of the Queen's Bench Division. We asked about planning for the epidemic that was building in Italy at the time (and was probably already circulating widely in the UK). Later over dinner we mulled over what might be about to hit, but without really anticipating what we would all face in the dark days ahead. By mid-March, Covid-19 had appeared in my messages and in our lives. On 23<sup>rd</sup> March the Prime Minister closed the country. We now know that this decision was taken late that afternoon in Downing Street and very little, if anything, had been communicated to the court service in advance.

Within another week, remote hearings were taking place. We used various systems, mostly successfully. Family courts were at the forefront of the move to use technology, civil courts struggled because of their reliance on paper files and criminal courts were probably in the middle. I am extremely grateful to Mark Seymour, Andrew Johnson and Josh Normanton for producing excellent User Guides and running training sessions for the Circuit both for Skype for Business and Teams in the early days and, later, for CVP. HMCTS is to be applauded for the speed at which they rolled out this CVP especially as it had been intended originally only as a link for some remand hearings. There are of course always going to be problems with bandwidth, operator error and a lack of capacity in some places (importantly prisons). But it was easy to use and made all the difference during lockdown, allowing PTPHs, sentences and bail hearings to go ahead and giving some a chance to keep earning a little from the limited court hearings. Many of us have probably been surprised by how much we can actually achieve through a video platform. And we all hope that we can retain the best of what "digital" offers when we emerge from this torrid year.

But in spite of the sunshine and lengthening days, April was a dark time. All those barristers who depend on court work, particularly in the Crown Court, were left exposed and uncertain, without light at the end of the tunnel. Furlough schemes and rent holidays helped Chambers to an extent but the Treasury was unmoved by the results of the Bar Council survey in April and financial help for the Bar was all but non-existent. In the end Government help largely came down to grants for a handful, deferral of tax liabilities and more debt – "Bounce Back Loans" - for others. One bright moment at the end of April came in an early mass zoom call with three Resident Judges, exploring how we were all coming to terms with the changed world. We obviously had

to cancel all of our current educational and social plans for the summer (including sadly Keble) and autumn and begin to reimagine how the Circuit might conduct its business and serve its members.

I would like to express all our thanks to the four Inns of Court and The Barristers' Benevolent Association. The Inns were very generous with their grants to the BBA emergency fund which was set up to help those in urgent need. The Inns also set up hardship funds, designed primarily to assist pupils and other junior barristers who were not eligible for either the Government assistance for the self-employed or for help from the BBA. We are by no means out of the woods and if you are aware of someone who needs help, please bring these funds to their attention.

### **The Path Back to Court**

We faced a new disease, debate over modes of transmission and impact, and all struggled to assess the risk each of us (and our friends and families) now faced. The frightening daily news reports unsettled many, perhaps long used to modern medicine coping with known challenges.

We urged HMCTS to deep clean the courts, and they did. By and large the courts have been cleaner since the reopening than they have for some years. But there will always be recurring problems and things that need fixing and HMCTS wants to be told about the problems so they can act.

Family lawyers led the way in conducting emergency work remotely. The way that hybrid trials are broadly working is a tribute to all. Of course we all have reservations about digital justice, but I am in the camp of some justice being better than none at all. By and large, the better resourced "high end" civil work found ways to use modern technology swiftly and successfully. The story in the County Court was very different, largely because HMCTS had failed to move away from paper files and due to reductions in back office capability. In the Tribunal system the huge pre-existing backlog in employment has only been compounded by the events of 2020. The Bar responded to "rapid reviews" in family and civil work which were able to absorb some important early lessons and adjust some listing practices. But overall it was no surprise to discover that the wealthy and represented fared much better than the poor and unrepresented. It is vital that we all remember these lessons each time we hear that digital might be an answer. It may be part of the answer, but it is no substitute for face to face justice.

Digital works very well for those with the resources and skills to use the most advanced platforms and technology. It is no good for the unrepresented litigant who is struggling to understand what is happening. Those who speak from experience about contested hearings in county courts in the early days were very unimpressed with HMCTS' ability to cope with technology. There are real concerns about the poor quality of "remote justice" for all but the simplest of contested county court hearings. The CVP link to a prison is fantastic if it works, and the operator in "HMP Slade" knows what he is doing. It is less than useless when a lawyer is offered the next available appointment which is months away and long after the key listed hearing.

At the start of May, the Jury Trials Working Group was formed to look at restarting jury trials. This became known colloquially as the "Edis Group" because it was chaired by our lead President. Mr Justice Edis has worked tirelessly and effectively to coordinate, nudge, prompt, lead, urge on, instruct the multitude of actors required to make sure the courts can operate safely. We all owe him a considerable debt of thanks for his leadership. But he would be the first to say that he has been only a small part of the work that has been done and that everyone else, including fellow Presidents, Residents, countless officials, Judges, court staff, the professions, has played a crucial role. I know you will all wish to join me in congratulating him on his imminent appointment to the Court of Appeal.

From the outset the Bar has written papers, made suggestions, lobbied and urged action on linking multiple courts, "Nightingale Courts", testing, use of technology, listing, s28, staffing levels, and repairing and re-engineering the court estate. Government, HMCTS, began to respond. A system that had been underfunded and undermined for a decade or more had lost resilience and was hard to turn around. I have been staggered (though unsurprised) by how hard it is to secure new funding from government for new work that is outside conventional budgets. Even if you convince everyone at the MoJ of a course of action, then they have to start work on the Treasury and Downing Street. So we have seen Perspex, Portakabins©, some Nightingale Courts, staff recruitment, better use of technology, no limitation on sitting days. We must applaud the progress and real achievements, while maintaining the pressure to keep up the hard work that is needed to repair the CJS. As I have warned throughout the year, there are no easy solutions and we will continue to be rolling large rocks up steep hills for some time to come.

Nonetheless it was a big moment when the first jury trials (re)started in May. Showing people what was possible was important. Judges and court staff at the CCC and Reading worked exceptionally hard to make their courts safe in line with PHE advice. It is no exaggeration to say that Resident Judges and court managers everywhere were on their hands and knees with tape measures, mapping out different 2m and 1m+ configurations of their court buildings. The advocates and jurors who then took tentative steps back into court began to grow in confidence. Of course we rapidly learned that trials in the Covid era demanded more resources than BC: more space, more staff, better tech, more cleaning, more time... and all the while the Crown Court backlog grew.

One of the running themes of the year has been the inadequacy of data available to HMCTS. It has been galling to read of proposals and ideas that are not underpinned by reliable evidence. Analysis and proper understanding of the true position is critical before commitments are made to setting policy in any particular direction.

### **Money and the Criminal Legal Aid Review (“CLAR”)**

I know all those who practise criminal law were grateful for the swift action taken by the CPS to restructure the fees scheme to allow for some advance payments. The LAA, constrained by legislation, did not have the flexibility to make similar changes, but work continued to bring home the “accelerated” asks” by late summer.

It remains intensely frustrating that we await appointment of the independent Chair for the next stage of the CLAR. We have been told repeatedly that an independent process is a vital step to persuading the Treasury that more money should be invested in the CJS. This may be so, but even in an era of global warming the progress feels glacial and painfully slow.

### **Remote vs In Person**

The dilemma about which hearings can or should take place in person or remotely will continue to rage. Local courts retain the autonomy to make their own decisions. Many in our ageing profession hope that, through this winter, remote can be used more widely for non-contentious work. The listing principles recently adopted by the North Eastern and Western Circuits that I published last week have, I think, much to commend them.

## **Black and Brown Lives Matter**

Many of us deal with the horror of death and violence in our work. We often watch appalling events on CCTV or mobile phone footage. We do not expect to see police officers kill a man. We in the justice system have an obligation not just to deploy fine words and demonstrate our liberal and well-meaning credentials, but to act. Of course, how you choose to do it is an intensely personal matter. In January I had the great pleasure of attending a screening of “Just Mercy” organised by Urban Lawyers. The stars were joined on stage afterwards by Bryan Stevenson, the lawyer who wrote the autobiography on which the film was based. Seldom have I listened to a more impressive and moving man. It was quite an experience to be one of a small number of white people in an overwhelmingly black audience. I understood, briefly, what it was like to be in the minority.

Against the background of a summer of dignified protest, it was more than surprising to hear rumours circulate about a threat to jury trial. Please take time to read Professor Cheryl Thomas’s work on jury trials, most recently published in the CLR. If, as she has previously written, the jury system is the only part of the criminal justice system that is fair to defendants from ethnic minorities, why would we be looking to restrict the right to trial by jury?

On 26 June, a letter was published in The Times from all Circuit Leaders. This is what we said:

*‘The solution to a backlog of criminal trials, which has built up over decades of underfunding is not to slash and burn the criminal justice system. The solution is proper funding. There is no need to replace jury trials, which are the only part of the criminal justice system which is representative of the population and is fair to BAME defendants. We only prosecute about 3% of crimes in this country, so we should at least do that properly. The decade of brutal cuts to the Police, Crown Prosecution Service, Courts, the Prison estate, Probation Service and legal aid lawyers has brought the system to its knees, but it can be fixed. That fix in the short-term requires “Nightingale” courts: we have identified empty buildings for the Court Service and now they need to open them up for trials so that victims, witnesses and defendants do not have to wait for even longer than they did before this crisis hit us.’*

### **Progress through the Autumn?**

In July, HMCTS/ MoJ floated various ideas as to how the Crown Court backlog might be tackled. We were told about modelling and working assumptions and so forth. At every opportunity we have asked for access to the data and evidence upon which any proposals are based. Sometimes this has been granted. Across the Circuit there are around 200 crown court rooms. By late July around 25 trials a day were being listed at the start of each week. By September this had risen to the 40s. By late October and into November, courts were managing to list in excess of 100 trials (starting, part heard or as backers/ floaters). I suspect that these numbers are an improvement on the restricted days of 2019. HMCTS met its nationwide goal of 250 court rooms safe for jury trials by the end of October. They aim for 300 or so by the end of this year, out of a national estate of around 500.

HMCTS is to be congratulated on the roll-out of section 28 across the country. The last wave will be complete by the end of the year. There is much to be done, but this may enable some of the most vulnerable witnesses exposed to the CJS to be able to give their evidence and get on with their lives. I am very grateful to HHJ Lodder QC and HHJ Cahill QC for joining us as our guests at an SEC Q&A on “s28 practicalities” in September. This was one of a number of such events where Resident Judges have made themselves available to discuss everything from remote working, through to Covid Operating Hours. The response has been universally grateful, and I would like to thank HHJ Norton, HHJ Zeidman QC, HHJ Dean, HHJ Edmunds QC, HHJ Kinch QC, HHJ Karu, and HHJ Laing QC for their contributions and willingness to answer almost any question. I very much hope that such events will continue into 2021.

Of course what matters to the public now is what next for jury trials and how can the backlog be reduced. Perhaps the most controversial current debate is over Covid Operating Hours. Pilots on varying models have been tried around the country and we await data, evidence, previous reports and evaluation, and of course the MoJ proposals as to what may come next. Opinions at the Bar are divided: many are happy to be back at work and earning money again, others fear the discriminatory nature of the proposal. Preliminary indications are that the split shift scheme diverts resources, is expensive to run and that court staff are not keen to work the later shift. But nonetheless I would be surprised if the MoJ does not at least try to roll it out in a limited way in some courts and for some categories of smaller cases that might not otherwise be seen as a listing priority.

Back in the summer I started asking for backer trials to be listed in every open court room every day of the week, maybe with parties present, but witnesses not to attend, remaining on standby. We all know that many trials would crack if listing was more ambitious and the threat of a real jury concentrated minds on both sides. The blunt truth is that many smaller cases will only ever resolve after the defendant has seen whether the witnesses have showed up or not. Even the finest judicial triage in the world is not the answer to everything.

### **A new Legal Year and Lockdown 2**

This year ceremonial robes were not on show in Parliament Square, shiny shoes remained in cupboards and full-bottomed wigs went unborrowed. But the reimaged day ended with a socially distanced service at Temple Church. The congregation was not allowed to sing, but a small choir was permitted and the music was truly glorious. It was never going to be as good as having a packed church and everyone participating, but it was much better than nothing. The Lord Chancellor delivered the address in which he pointedly remarked on the importance of lawyers doing their jobs, in welcome contrast to the reported remarks of the Prime Minister and Home Secretary. Amongst the readers were the President of the American Bar Association, the Chairman of the Hong Kong Bar Association, The President of the Council of Bars and Law Societies of Europe and the President of the Pan African Bar Union, beamed in from the four corners of the world. It is not just the courts which have undergone a digital revolution in 2020! It was a reminder that our legal system has a worldwide role, and we are going to have to fight to maintain that. As a nation we have spent a lot of time over the last three years arguing about what we do not like, but rather less deciding what we might want in the future and how we see the UK's role in the world.

Perspex and the like everywhere has enabled the Criminal Justice System to function during this second national lockdown. Jurors and witnesses appear willing to come to court. There will be problems with occasional outbreaks of Covid and the interruption to longer trials that will inevitably arise until at least testing has improved and any vaccines begin to be rolled out in 2021. Until then every single one of us needs to follow the PHE guidance and hope that infections at court are kept to the bare minimum.

### **Valedictories**

This year has been cruel in many ways. One of them has been the restriction on our ability to say goodbye to Judges who have served the public so well. I very much hope that we can make some kind of amends next spring / summer

and hold a Circuit dinner at which many can attend as our guests. Please also keep in your thoughts those dear friends who have suffered ill health and worse this year.

### **A few “thank you’s”**

I hope your Heads of Chambers have found it useful to meet regularly over zoom. I have certainly found their input and support to be invaluable through the more uncertain and daunting moments of the year. I am enormously grateful to many of them for their thoughtful contributions and ideas. You are lucky that so many good men and women perform what can be a thankless role.

The SEC Wellbeing programme has continued, thanks to the hard work of Valerie Charbit and Nicola Shannon, with a number of excellent sessions. Many of you volunteer and help others – both Kalisher and Advocate have featured in SEC Updates this year and both organisations would be grateful for your support.

The 2020 Circuiteer will be published in December – a bumper edition to make up for its absence during the earlier stages of the pandemic. I am very grateful to all who have contributed, but particularly to the Editor, Karim Khalil QC, who has nobly chased up and edited articles since 2015, and to Leon Kazakos QC who assumes the mantle from next year. Please do let him know if you would like him to include your writing in his inaugural issue.

Thanks to all those circuit members, associations and organisations who emailed me with suggestions, experiences and problems. I would also like to thank the SEC Executive Committee, especially the Recorder, Donal Lawler, and the Treasurer, Paul Cavin QC, who have both been a source of sage advice on many occasions through the year. Thank you too to the Committee members whose terms are coming to an end: Noel Casey, Anthony Eskander and Adam Morgan.

All the leaders of the SBAs deserve our thanks. They have worked tirelessly for you all seeking to minimise the harm done by this pandemic. It is always invidious to pick out anyone, but can I please pay particular tribute to Amanda Pinto QC and her staff at the Bar Council. A wise leader told me many years ago that one should always be wary of criticising – our job is one that is of course so easy to criticise and so hard to do. No one could have worked harder for you than Amanda. She has had an impossible brief. Throughout the

turmoil of the year she has handled it with great elan and as much success as anyone could have had. She deserves our thanks.

Aaron and Harriet, what can I say? You have kept me organised and (relatively) sane. No organisation could wish for two more patient and dedicated and hardworking people.

Finally, I must pay tribute to my fellow Circuit Leaders. I was quite fond of them before March, but since then they have been exceptional. From that long night of 23<sup>rd</sup> March and the almost constant meetings that followed through the spring and summer, Lisa, Kate, Richard, Mike and David have been fantastic sources of advice and support as we have compared notes and ideas on almost everything.

### **Future-ology**

What does next year have in store? Nothing so exciting I hope. Chambers will have to continue to reinvent themselves and take a long hard look at their cost base. On a personal note, I know how much of a relief it has been for my Chambers to move out of an expensive big building which was massively underused before the pandemic, and to leave the commercial property market and return “home” to an Inn.

The Bar’s culture is under threat like never before. The more we do remotely, the less opportunity we have to learn from each other. The less we see of each other at court or in chambers, the less we can benefit from each other’s views and advice. Old-timers may be able to muddle along, but where does this leave our ability to train and mentor our pupils and junior barristers? How do we make sure we maintain our standards? It is one thing to be able to maintain existing relationships through video-platforms, quite another to build new ones. I venture to suggest that the Circuit has a valuable role to play.

Several jurisdictions suffer from a lack of Judges. Surely it must be possible for more and better use of part-timers? As unemployment rises, financial difficulties develop, people cannot pay rent and families come under increasing pressure, the skills of the Bar will be in ever-increasing demand. In crime the police used lockdown to try to eat into the scandalous backlog of “RUI” investigations and the CPS has put an enormous effort into catching up. There is likely to be as much work as anyone can cope with in 2021 and for the next few years. Our problems will flow from timing and how we can juggle it all.

It is also now extremely clear that the consequence of the pandemic will be most damaging for the most disadvantaged. The Bar has made great progress in improving diversity across the profession. But the pandemic threatens to reverse this, with hugely damaging long-term consequences. How we respond as a Circuit to these issues, seeking to build on and complement the work of others, will be critically important in the years ahead.

It has been my privilege to lead this great Circuit for the last two years, and I pass on my best wishes to the new Leader. I can confidently say you will be in safe hands.

Mark Fenhalls QC  
Leader, South Eastern Circuit