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London Criminal Courts Solicitors' Association

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LONDON CRIMINAL COURTS SOLICITORS' ASSOCIATION

LCCSA Response to HMCTS 'Consultation with legal professionals on COVID operating hours in the Crown Courts.'

Executive Summary

On 29 November 2020, HMCTS produced its consultation on COVID Operating Hours ("**COH**") in the Crown Court and invited responses from legal practitioner stakeholders by 10 December 2020[1]. The COH consultation document has been accompanied by a COH Operating Hours Crown Court Pilot Assessment (the "**COH Report**") and a Public Sector Equality Duty Statement ("**PESD statement**").

Whilst the COH consultation is only concerned with the Crown Court, our experience is that many Magistrates Courts have already extended their operating hours on a discretionary basis without consultation and to the detriment of practitioners, many of whom are members of the LCCSA. For the avoidance of doubt, the arguments advanced in this document would equally apply to any proposed rollout to the Magistrates Court.

For most practitioners, any time physically in court represents a fraction of the working day, with preparation (often unpaid), travel (extended due to court closures) and client consultation required before the morning session, during the lunchtime recess and well after court rises. Solicitors often oversee multiple cases in court on a single day, which will span both morning and evening sessions. In reality, the rollout of COH would expand the court-centric working day for practitioners to 08:00-19:00, not taking into account the additional morning and evening work connected to maintaining a practice. Even for those without additional caregiving responsibilities, this is an impossible situation to maintain.

The current 'backlog' of Crown Court cases is not a consequence of the COVID-19 pandemic. Years of underfunding in the criminal justice system, reducing judicial sitting days and allowing court buildings to stand empty and unused has been highlighted, not caused, by the current crisis. HMCTS' current response represents an attempt to shift the burden of those catastrophic failings onto practitioners who themselves are straining under the weight of keeping practices afloat whilst being repeatedly betrayed by the legal aid system and vilified by those in government.

It is notable, in our opinion, that the current government has previously proposed extending court operating hours (in 2010, 2012 and 2017) but failed to do so in the face of overwhelming opposition. The current proposals represent a cynical attempt to use the COVID pandemic to force through measures with no proper evidential assessment, and to the widespread detriment of legal practitioners.

The consultation document invites answers to five questions concerning the 'improvement' of the proposed COH model. The LCCSA will not be responding to those questions, as it does not consider the COH model to be a proportionate, rational or properly evidenced response to the current crisis. Furthermore, the questions presuppose the introduction of the very system being consulted upon whilst failing to acknowledge the critical lack of evidence demonstrating a tangible increase in efficiency. This,

[1] Later extended to 14 December

on our opinion, casts doubt on the legitimacy of the entire process, which was already undermined by the original 13 day response window.

Our principal concerns in respect of the COH model are as follows:

1. Discriminatory impact on the basis of gender, race religion and disability contrary to s.149 Equality Act 2010;
2. Impact upon solicitor workload;
3. The lack of any enforceable guarantees as to the temporary nature of COH;
4. No clear benefit to COH courts;
5. Increased risk of COVID transmission.

We urge HMCTS to immediately cease any ongoing COH courts and not to implement a wider rollout of the scheme. HMCTS should feel obliged to immediately seek its own legal advice and refer the matter to the Equality and Human Rights Commission for proper assessment of the discriminatory impact.

We have serious concerns about the distorted nature of the data collected by HMCTS as part of this consultation. Whilst we understand that time is of the essence, and that there are restrictions on the ability of HMCTS to conduct a more thorough data collection exercise, we consider that the data is narrow and skewed, and cannot properly be relied upon as evidential support for the COH proposal, particularly in light of contradictory evidence from other sources.

Discriminatory impact

HMCTS is bound by the Equality Act 2010, and has produced its PESD statement which acknowledges the potential for indirect discrimination because of COH, particularly on those with caregiving responsibilities, but also for those with religious observance requirements. Despite referring to the issue of childcare as a "frequently cited concern,"[2] the approach of HMCTS appears to be on how to mitigate the discrimination rather than attempting to ensure it does not exist.

The views of 52 legal practitioners were canvassed. 68% were male and 33% were female. 77% of the legal practitioners canvassed had in fact participated in the pilot scheme COH courts, and were therefore clearly able to do so. This data does not adequately take into account the views of those for whom it is impossible (for caring or other responsibilities) to work COH.[3] However, the pilot scheme clearly reflected the struggles associated with an early start, as it demonstrated COH cases as being particularly susceptible to delay (p11 - 85% of COH cases being delayed at the start of the sitting day).

The questions asked during the survey of legal professionals, in our view, demonstrates a deliberate attempt to avoid obtaining quantitative data on the impact of COH on those with caregiving responsibilities. The following enquiries were made of survey respondents:

- Whether they had any issues arriving at court for trial start time;
- Whether they had sufficient time to meet witnesses and other parties before trial;
- Whether they had sufficient time to take instruction from the defendant before trial;
- Whether trial start was delayed;
- Reasons for a delayed start;
- General view (very good – very poor) of being involved in a COH trial;
- Whether or not they had childcare responsibilities.

At no stage were respondents asked whether their childcare responsibilities were impacted by COH or whether COH had affected their ability to take on a case. Furthermore, in the question about "reasons

[2] PESD para 32

[3] To date, the only survey to canvass all views of COH/EOH is that published by 'Women in Criminal Law' on 28 September 2020. This survey was unique in that it was open to all practitioners (solicitors, barristers and others) regardless of gender, and resulted in 480 total responses. We will refer to this survey as the "**WICL EOH Survey.**" We are aware that the Bar has conducted surveys of its own members, and we support the analysis of that data as provided in the Criminal Bar Association response to the present consultation (dated 2 December 2020).

for a delayed start,"[4] none of the answer options available to respondents included struggles with morning childcare or other personal responsibilities. No information as to what was included in the "Other" answer option has been provided, but it is noted that 13 of the 40 COH respondents marked this option as relevant.

It is conceded by HMCTS that no consideration has been given to whether later court sitting hours disproportionately affected women with caregiving responsibilities (para 17 of the PESD statement).

Despite clear statements from participants as to the negative impact on work-life balance, no adequate safeguards have been put in place by this consultation. Whilst it is proposed that advocates would not be required to participate in both sessions, it is clear from the pilot scheme that this did take place, and it is entirely unrealistic to suggest that listings would be organized sufficiently to accommodate this principle if rolled out more widely.

HMCTS proposes that any discriminatory impact can be mitigated by the exercise of judicial discretion regarding allocation of a case to COH or standard court via "the usual channels". Firstly, we do not understand HMCTS' reference to "the usual channels." There is no formal process by which practitioners can request (or properly expect) listing changes for their convenience, and no protocol governing the assessment of such requests. Indeed, it is highly unusual for trial dates to be moved once listed, so we would infer from this that requests to move from COH to standard court would be treated with a similarly low level of deference. Where this is relied upon as a way of mitigating the discriminatory impact of COH, there would need to be a far more comprehensive safeguarding mechanism in place to ensure a consistent and transparent approach.

Secondly, it is suggested that those with problems working COH should make "representations" to the judge about why it would pose a problem. This is entirely unsatisfactory. If (as is conceded by HMCTS) women make up the majority of caregivers, this places them at a disproportionate disadvantage, having to publicly justify details of their personal lives to a judge and face returning cases or disadvantaging clients as a result of the decision.

This represents a significant step backwards in terms of gender, race and disability equality within a profession which already struggles with endemic diversity problems. Indications from the recent WICL survey are that the imposition of COH could have a negative long-term impact on the retention of women within the profession. 48% of respondents stated that they would have to return trials, 71% were concerned about a loss of instructions, 57% anticipated a loss of earnings, 91% were worried about the impact on their private/family life and 35% contemplated a change in employment as a result of extended operating hours.

There has been very little data collected relating to the views or capacity of witnesses to give evidence in COH courts. We have particular concerns about the capacity of defence witnesses, who often require particularly careful handling in order to ensure they give evidence. Many witnesses will themselves have caregiving responsibilities or other protected characteristics. Only five witnesses were interviewed, which cannot possibly be representative. Interviews with witness support services cannot be considered as 'proxy' responses for witnesses themselves.

We consider that a nationwide rollout of COH would give rise to a legal challenge under s.149 Equalities Act 2010 or judicial review, and we are aware that other responding representative bodies (including WICL and the CBA) share that assessment.

Impact upon solicitor workload

Whilst the COH proposals will inevitably and unacceptably extend the working day for advocates, we consider that insufficient regard has been paid to the knock-on effect for solicitors. Any extension to the working day of instructed Counsel appearing in the Crown Court will in turn extend the working day of File Managers, Firm Owners and Administrative support, whose days do not begin and end with court

[4] Table 10, p16 COH Report.

appearances. For most solicitors, the active court day is simply something around which the bulk of all other work takes place.

It is proposed that safeguards will be put in place to ensure that advocates do not work "double-shifts" (i.e. both the morning and afternoon slots in COH courts.) There are no such safeguards for file managers, who frequently run multiple cases spanning both morning and afternoon sessions in different courts every day. Those cases each require preparation in advance, as well as ongoing availability to liaise with clients and advocates when not physically in court. In reality, this means solicitors could be working effectively from 6 or 7am to 9pm/10pm every day if this is rolled out more widely.

The further consequence, from the perspective of business owners, is that staff (solicitors and admin support) would quite rightly expect to be paid for working longer than their contracted hours, and at unsocial times. This will have a significant cost implication for firms who are already struggling to keep afloat as a result of the coronavirus lockdowns. There may be contractual difficulties in running practices beyond the contracted 9am – 5pm, given that no employer is able to force staff to work more than their contracted hours, and many firms employ part-time staff who work particular days or hours to fit around shared childcare commitments. If those members of staff cannot adapt to working or being available around the extended hours, then it falls back on partners either to arrange cover (at additional expense) or to carry out the work themselves on top of their own caseload.

Temporary nature of COH

The consultation document states, in bold, "**We propose that COH would be a temporary measure, in response to the COVID-19 pandemic, and as such its operation would be time-limited."** We applaud this sentiment, but HMCTS has provided no indication as to the likely discontinuance beyond a "formal review" in April 2021. If the COH model is implemented, we have serious concerns that it will become the normal operating model beyond the end of the pandemic.

In forming this view, we are reminded of previous attempts by HMCTS to amend court operating hours. The previous attempt (in 2017), which contained proposals remarkably similar to the present model, was terminated in the face of overwhelming opposition due to its unworkability and discriminatory impact. By retaining the same proposals but changing the name from "Flexible Criminal Justice System" (2012) or "Flexible Operating Hours" (2017) to "COVID Operating Hours" (2020), we consider that HMCTS is attempting to use the COVID emergency to implement a long-planned systemic change. Our opinion on this is strengthened by the notable lack of any COVID specific public health risk analysis contained within the consultation. If we are correct in our evaluation, then we have no confidence that this will be a temporary situation.

Lack of benefit

The limited data provided as part of the consultation does little to persuade us that there is any net benefit to the wider implementation of COH courts, particularly taking into account the potential negative impacts.

- Where trials are concerned, the requirement for cases to have a 30-minute break per COH session means that the effective trial sitting time in COH courts is 3.5 hours in total, compared to around 5-6 hours in regular court.

- The fixed start and end times of COH courts operate to the detriment of court users, and particularly witnesses. Judicial reluctance to allow a witness to begin their evidence if they are unlikely to finish in the same session will result in inconvenience to witnesses who may then be called to court the following day. This further erodes any suggestion of increased efficiency, where COH days may be terminated early and reconvened the following day to allow for a complete evidence giving session with the additional impact upon witness recall where momentum in a case has been lost overnight. In standard courts, flexible times (in discussion

with all parties) can allow for inevitable slippage. The pilot scheme clearly reflected this issue - "*Courts reported that they tended to list shorter cases and those that are likely to crack in the COH courtrooms. Longer, more serious cases were directed to the standard hours courtrooms because they needed the greater flexibility that a full day session provides.*" (p14).

- The comparison exercise conducted between COH and regular courts was, in light of the above, entirely redundant, as the different courts tried different types of cases. It is therefore a fallacy to represent the increased number of cases disposed of in COH courts as a success of the scheme and makes it impossible to evaluate whether there would in fact be any long-term improvement as a result of this scheme.

- The consultation demonstrates an apparent difference between the motivation of parties in the morning and afternoon COH sessions. This comment by a Judge is stark: "*The PM court is not equal to the AM. Nobody wants to be there. The energy is negative, people are very flat and tired.*" Notwithstanding the issue of court users' wellbeing, this comment has a clear warning sign in respect of the administration of justice. The idea that there may be a difference for defendants being tried in the morning versus the afternoon is one which should give HMCTS significant cause for concern.

COVID transmission

As mentioned above, given the purported basis for the COH proposal is to address problems caused by the COVID pandemic, the consultation is alarmingly silent on any public health risk analysis. If Public Health England has in fact produced a report in connection with the COH rollout, then we encourage HMCTS to disclose it forthwith.

The risks posed by the court and prison estate were well recognized at the outset of the pandemic. Despite the importance of a functioning justice system, it was considered necessary to close down. Only when extensive transmission protection measures (including a much reduced capacity) were in place have we seen a gradual re-opening and the exemption of the courts from a second lockdown imposed on 5 November 2020.

It is unclear, in the absence of any widely accessible effective vaccine, how HMCTS suggest that those risks have reduced to the point of being able to increase court capacity to the levels outlined in the consultation. This is particularly in respect of the same courtroom being used by two sets of different people each day, and for cases to be spread across 3 or 4 days rather than 1 or 2 days (thereby increasing the overall number of potential contact points and transmission risk.)

We would suggest that the only safe and proper response to increase the number of cases being heard whilst also safely maintaining distancing measures is to increase the space available within the court estate. This does not mean cramming more cases into already restricted court buildings. It requires an expansion of the physical court estate as well as properly utilizing the virtual capacity to keep practitioners and court staff protected.

HMCTS is under an obligation to maintain safe working practices. Regrettably the consultation does not provide any assurance that this duty is being complied with beyond a vague promise of "building risk assessments" (p23). The fact that those risk assessments are not already in place displays a woeful failure to have due regard to the safety of court users.

Proposals

We have had the benefit of reviewing the comprehensive proposals set out by the CBA, and we endorse their suggestions. We consider that every effort should be made to explore other options before COH, and that this should be a measure of last resort given the concerns outlined above. We would suggest that the following four proposals are preferable to COH, and with the proper investment and resource would be more effective in the medium - long term.

1. Fully utilise all existing Magistrates, Crown and Appellate court buildings, including those which have recently been closed down but not yet converted (e.g Blackfriars Crown Court, at which nine courtrooms remain intact).
2. Invest fully in temporary 'Nightingale Courts,' using re-purposed government owned and civic buildings;
3. Increase use of virtual technology across the court estate for any matters which can be heard remotely;
4. Improve allocation of cases to appropriate courts, for example by having a greater concentration of custody cases in those courts with a higher custody capacity.

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