

## DRAFT RESPONSE TO HMCTS COVID OPERATING HOURS CONSULTATION

On the North Eastern Circuit the court estate has very quickly and effectively returned as much as is reasonably practicable to servicing its caseload within the constraints imposed by the necessary Covid safety measures and the amount of physical court space made available by the Ministry of Justice. Our principal, simple and short representation is that we are, with the assistance of our Presiding Judges, Resident Judges, local judiciary and local HMCTS staff, managing a steady but manifest shift back toward normal service without the intervention of COH being necessary or even helpful.

However, we do not leave it there because we wish to deal with COH on its merits as a policy rather than simply pointing to how well we are doing locally, all factors considered. The view of the vast majority of criminal barristers on our circuit as to COH can be summarised as follows:

- 1) COH is not the answer to the current backlog of cases. The backlog existed long before the pandemic. It is largely due to lack of utilised court space and a sufficient number of judges sitting at any one time, and has simply been exacerbated rather than caused by the Covid crisis. The more effective answer is to make more court space available, including (for a start) the numbers of Nightingale Courts promised rather than those so far actually created. This step, taken in tandem with deploying an increased number of judges and recorders at any one time so as to enable such increased court space to be used to the full, is the most obvious and practical solution.
- 2) We regard, by contrast with the real and effective approach that increasing the available courtroom number along with a commensurate increase in judicial office holders deployed at any given time would constitute, the COH “solution” as a sticking-plaster

approach, with limited benefits as against heavy costs, not least in undermining rather than promoting diversity within the Bar. We see, for example, that in the consultation document HMCTS states the *“additional capacity from COH...is an estimated 40 additional trials over a 4 week period for every 10 courtrooms running COH”*. Superficially this assertion – which is no more than an estimate on its own terms, presumably designed to help make the case for COH – sounds modestly impressive, until we unpack it with elementary maths. 40 trials over a 4 week period per 10 courtrooms equates to 10 trials per week per 10 courtrooms, which equates when unpacked further to one extra trial per courtroom per week. But what would be wrong with simply providing one or more extra courtrooms and available judges per court in court centres which currently have spare courtrooms and providing Nightingale courts in centres which do not?

3) Therefore, where the Pilot Assessment Final Report states that, *“Resident Judges felt that the COH pilot may be a useful tool for increasing capacity for sites which have more Judges than available court rooms”*, we suggest the infinitely better answer is to increase the number of Nightingale courts, in line with the sort of number promised by government months ago, in addition to using existing courtrooms around the country which are currently lying empty. We acknowledge that this approach may cost more money, although the extent of the greater expense would have to be quantified in a way that takes account of the *“additional resource”* – as the Pilot Assessment Final Report describes it – that will have to be made available for COH itself to be viable in any event. As the Final Report itself puts it, *“Extra staff were needed to run the approach, this will need to be reflected in resourcing plans if future adoption is considered.”*

4) Relatedly, we would make the point that on the North Eastern Circuit some of our court centres do not suffer from the problem of having

more deployable judges than available courtrooms. Those court centres face the opposite problem of insufficient judicial deployment to meet the needs that currently empty courtrooms could go some way to addressing.

- 5) We make the additional observation that the cases that were run on COH during the pilot were carefully triaged to ensure that those likely to be ineffective or problematic were weeded out. The practical consequence is that the cases selected would all have either cracked on the first day or trial or have run simply and smoothly to conclusion within a short number of days irrespective of the sitting hours. Short, simple, handpicked cases and those that are foreseeably destined to crack neither prove nor test the efficacy of COH.
  
- 6) COH is likely to have a detrimental impact on the wellbeing of members of Circuit and their families, as well as an adverse knock-on consequence on the quality of their work. The Pilot Assessment Final Report merely scratches the surface where it states as follows: *“Court staff, Judges and legal professionals who worked the PM court reported arriving home later in the evening, which caused many to feel that their work/life balance had been negatively impacted”*. Many members of Circuit have arranged their personal and family lives in such a way that is incompatible with what would effectively be shift work. To have COH imposed on them will likely cause upheaval, anxiety and upset, all so that HMCTS can provide a fig leaf for central government to conceal the naked truth, which is that chronic underfunding is the main culprit responsible for the backlog, with the coronavirus situation merely acting as an accelerant. We do not regard this as an acceptable trade-off.
  
- 7) Related to this wellbeing / family life point to some degree – but arguably even more serious – COH is antithetical to the championing

of diversity and equality, which are values that most right-minded people hold dear. This is powerfully illustrated by a single example. A female member of Circuit has recently written directly to me in the following terms:

*"I am a young mother, about to return from maternity leave to resume my successful practice [at the Bar]...*

*If the court operating hours were extended, I would most likely not be able to continue my career at the Bar. The nursery provision I have secured for my child would not start early enough to accommodate pre-9.30 listings or finish late enough to accommodate sitting after 4.30pm. I would simply be pushed out of the profession, as would hundreds of other working parents at the Bar.*

*It is well documented that women, on average, bear a greater proportion of caring responsibilities than men. Therefore extending court operating hours would discriminate directly against women barristers, not to mention female judges and court staff.*

*I would urge HMCTS to abandon this proposal, due to the unlawful and disproportionate effect it would have on female advocates, judges, court staff, court users and others with caring responsibilities."*

We believe that this speaks for itself. It is no answer, as some have been heard to say behind the scenes, that nannies could be employed or alternative arrangements made. For many working mothers, there are no such alternatives: which member of the junior Criminal Bar, already struggling on the income from publicly funded cases to make ends meet, could afford a nanny? Moreover, even if they could, many will have entered the profession on the basis of court sitting hours that accommodate the kind of family life that they want, and will never for a moment have anticipated potentially being forced either to make radical (and perhaps unaffordable) changes to their family arrangements or stop being barristers altogether. And so we contend that COH will discriminate, pretty starkly and possibly unlawfully, against women and those with caring responsibilities.

8) The Public Sector Equality Duty (PSED) statement – COVID Operating Hours for recovery in Crown Courts – denies any potential direct discriminatory effect of COH, cursorily accepts some potential indirect discriminatory effect, but then surprisingly asserts “*potential for positive impacts, linked to advancing equality of opportunity...*” The latter apparently derives from possibilities such as “*alternative public transport options for disabled people, with increased opportunities for off-peak travel, which can also benefit older and young people in particular*”. Sophistry of this magnitude does the author(s) of the PSED statement no credit and can quickly be unpicked. The proposition that COH holds no foreseeable scope for direct discrimination does not deal with the nub of the problem: whether or not the foreseeably discriminatory effect of COH is properly to be characterised as direct or indirect, the single example given above (which we respectfully suggest is likely to be echoed by barristers who are mothers with childcare responsibilities throughout England and Wales) suggests that it will be profoundly sexist in the result, and lead to some women having to leave the legal profession. Is HMCTS *really* prepared to countenance such a spectre on its watch? And the proposition that COH will potentially promote diversity because cheaper bus fares might be available to some stakeholders only needs to be articulated for it to be exposed as threadbare.

9) We note the results, in the consultation document, of the “*Survey of legal professional pilot participants*”. The preponderance of the feedback could, we suggest, be fairly categorised as lukewarm-to-negative: “*Overall, 20% of legal professional respondents rated their experience as either good or very good, 40% rated it as neither good nor poor, and 40% rated it as poor or very poor.*” We note the disclaimer that “[*s*]urvey findings represent the views of respondents only and should therefore not be generalised to all legal professionals”. We are unsure what this disclaimer is intended to convey. If it is designed to suggest that the views of 52

respondents is not necessarily representative of the professions at large, then what are these numbers designed to illustrate? What would the author(s) be saying if these 52 had largely been supportive of the proposed scheme? However, perhaps the fairest analysis of this survey is that there is simply no evidence of a preponderance of support for COH amongst legal professionals apt to be affected by the policy, and such evidence as there is suggests the contrary.

10) We are unable to derive reassurance from the suggestion *“that COH would be a temporary measure, in response to the COVID-19 pandemic, and as such its operation would be time-limited”*. Insofar as it is purposed to be *“part of HMCTS’s Crime Recovery Plan”*, we must ask rhetorically: recovery from what? The backlog of cases in the criminal justice system existed long before the world had ever heard of this virus. The Covid crisis has merely worsened a very bad pre-existing problem. So if COH is proposed as a means of addressing the backlog, once established it is likely to remain in situ for many years, unless the proposal is to bring the backlog back to pre-Covid levels then revert to conventional sitting hours across the board. That in turn would require resorting to the fiction that all was well in the criminal justice system before the pandemic and that the backlog then was acceptable but that Covid has somehow pushed it to the point where it has become unacceptable.

Drawing the strands together, we criminal practitioners on the North Eastern Circuit are determined to play our part in getting the criminal justice system back in good working order as soon as practicable. By “good working order” we do not mean simply to pre-Covid backlog levels: we mean addressing and gradually easing the entire backlog to a point where criminal trials can be diarised and then disposed of in a timely fashion, in fairness to all involved. But that will only be achieved by making more courtrooms available and deploying more judges at any given time. COH, by contrast, is a sticking-

plaster proposal, to which we are fundamentally opposed, for all the reasons set out above.

We have considered the “*Consultation questions*” and decided that they are for each individual practitioner to answer rather than the North Eastern Circuit collectively. We do, however, register our concern that following the invitation to “*hear your views on whether we should proceed with COH*”, the questions which are then enumerated appear largely to be predicated upon the basis that COH will be rolled out, subject to some tinkering around the edges. We therefore can only express our hope that this consultation process is a meaningful one as opposed to being treated as a bureaucratic hurdle to be surmounted as part of the journey to a predetermined destination.

Finally, we take a little comfort from the Consultation document’s assurance that “[t]he Resident Judge at each court site would be responsible for determining whether implementation of COH is appropriate” and trust our Resident Judges to see the force in the above points when determining whether to impose what amounts to shift patterns on practitioners. We do not believe, however, that they should be put in the position of having to make such a determination in the first place, because the scheme itself is fundamentally flawed, not to mention possibly unlawful, given the inevitable sex discrimination that it will create.

7<sup>th</sup> December 2020

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