The Bar Council

Bar Council response to the HMCTS Consultation with legal professionals on COVID operating hours in the Crown Courts

1. The Bar Council welcomes the opportunity to respond to the HMCTS Consultation on COVID operating hours ("the Consultation"). We are also grateful for the short extension provided to respondees, although we note, as have many others, that the timeframe is nonetheless very short for such an important proposal.

2. This response has been produced in partnership between The Bar Council, the Circuit Leaders and the Young Barristers' Committee ("YBC"). The Bar Council represents over 17,000 barristers of whom 4,829 (28.3%)[1] report that they have a criminal practice for insurance purposes. The YBC represents barristers in the first seven years of practice of whom 1400 have indicated that they have a criminal practice. Whilst all members of the criminal Bar wish to see as many cases listed as possible, it is clear that the proposed rollout has the capacity to unfairly discriminate and is not the most effective way to get through cases in the most timely or just manner. An additional response provided by the North Eastern Circuit is appended.

Executive summary

3. Throughout the pandemic members of the Bar, together with the judiciary, court staff, the CPS, defence solicitors and other key stakeholders in the criminal justice system have worked tirelessly to ensure that disruption to this key public service is kept to a minimum. We remain committed to exploring all reasonable avenues to ensure that the current unacceptable levels of backlog and delay in the Crown Courts are addressed as efficiently as possible. It is vital that when initiatives such as Covid Operating Hours (COH), which have that aim are considered, they are subjected to a proper cost/benefit analysis, including an equality impact assessment – failure to do so risks allocating scarce resources inefficiently and compounding the problem.

[1] Figure as at 01 December 2020 provided by the barrister demographics dashboard

4. The Bar Council has grave concerns about the proposed national rollout of COH, which can be summarised as follows:

a. There is a wholly inadequate evidence base to support a conclusion that COH will provide any, or any sufficient or sustainable, increase in Crown Court capacity;
b. The discriminatory consequences of a national rollout of COH have not been sufficiently considered and/or given sufficient weight. In particular, whilst the potential for discriminatory effects is recognised, the mitigations which are suggested are not adequate.

5. We do not propose to respond directly to the questions which are set out in the Consultation paper at page 29. Those questions are directed to matters which we consider to be premature given the serious concerns we outline above and address in more detail in the body of this response.

The fundamental question: will COH increase court capacity and if so, by how much?

6. We consider that the Consultation fails to present any proper evidential basis to enable this fundamental question to be answered. Some of the underlying data obtained from the pilot, and relied upon by HMCTS, has been published[2] . The extent to which respondees can properly examine the conclusions which are drawn from that data is limited by the time available, but it seems clear to us that the evidence put forward suffers from some serious deficiencies, including that:

a. A potentially misleading comparison is made between the throughput of work in the COH pilot courts and those operating standard operating hours ("SOH");
b. The estimates made as to increased capacity in COH courts are based on a crude and inadequate calculation, which takes no account of some of the data available from the COH pilots;

[2] COVID Operating Hours (COH) Crown Court Pilot Assessment Final Report ("the Assessment Report")
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/939440/COVID_operating_hours_assessment_report.pdf

c. Insufficient consideration appears to have been given to the inevitable differences between the operation of COH at a national level, as against the operation of a voluntary scheme at a few carefully selected pilot courts.

The comparison between trial volumes in COH and SOH courts

7. The Consultation rightly acknowledges that the COH pilot courts benefitted from a listing process which placed "*short cases and those that are likely to crack in the COH courtrooms*" (page 14). This reflects the experiences of the members of the criminal Bar who undertook work in the pilot Courts.

8. We are concerned, therefore, to see that the first of the "Key Assessment Findings" (page 12) nonetheless seeks to draw a direct comparison between the number of trials taking place in COH and SOH courtrooms, in the following terms:

COH appears to be an effective way of increasing the capacity of a single courtroom to dispose of cases disposing of an average of 3.5 trials per courtroom per week, compared to courts operating standard hours disposing of 0.9 cases per week.

9. We do not ignore the fact that there is also a caveat that "*This reflects the different case types in different courts*". Our concern is that the caveat fails to correct the misleading impression given by the headline data, which provides no meaningful comparison as to the throughput of work which can be achieved in COH and SOH courts.

10. It is also vital to consider the longer-term impact of listing shorter cases in COH courts. If such cases are prioritised, the outstanding caseload will consist of a greater proportion of longer and more complex cases. We understand that custody cases are not deemed suitable for the afternoon courts – this will reduce the pool of cases that can be accommodated in COH courts still further. The remaining cases will then be competing for space in the SOH courts, resulting in an increase, rather than a reduction, in the delay experienced in those cases. If reducing the backlog means reducing the wait for a trial to get on, this metric is ignored in the analysis provided and the basis on which the COH national scheme is premised in the consultation.

The estimates made in the Consultation

11. The third of the "Key Assessment Findings" states:

The additional capacity from COH (by comparing the average disposals of a standard hours court hearing similar cases, with a COH Court) is an estimated 40 additional trials over a 4 week period for every 10 courtrooms running COH.

12. This estimate is arrived at by a simple calculation of the number of additional hours which a COH courtroom will sit, by comparison to a SOH courtroom (page 8, where the assumption is made that a COH courtroom will sit for seven hours and a SOH courtroom for five hours). This has been extrapolated to a conclusion that each COH court will dispose of one additional trial per week, using the number of trials actually achieved in COH courts during the pilot (said to be an average of 3.5 per week) as a benchmark.

13. This conclusion, which appears to be the high point of the evidence relied upon to show the effectiveness of COH courts, is seriously flawed:

a. Firstly, as has been explained above, the workload of the COH pilot courts was not reflective of the generality of Crown Court trial work. At most, the estimate can therefore only have any application to work of the type which was carefully selected for hearing in the COH courts.

b. Secondly, there is clear evidence that, even during the pilots (when considerable effort was made in every pilot centre to make the scheme work for a finite period), disruption to the court day was greater in the COH courts than the SOH courts. Delays in the start of the court day and premature finishes caused by the "hard stops" at the end of each session will plainly have an impact on the number of *actual* hours a COH court is able to sit and will have a "real life" impact on the progress of trials. No effort has been made to factor in the experiences of the pilot courts to the estimate[3], nor (so far as we are able to ascertain) has any modelling been carried out in this regard.

c. Thirdly, no account is taken of the likely divergence between the experiences of a limited and carefully selected pilot scheme and those which will occur in the event of a national rollout. We consider this aspect in more detail below.

14. We stress that we do not reject the possibility that COH courts may enable *some* increased throughput of work, in particular contexts. However, the use of estimates such as the one above does not enable such a conclusion to be drawn. If,

[3] For example, the fact that during the pilot 10% of the sessions run in SOH courts exceeded 5 hours – see Table 6 of the Assessment Report.

on a proper and full examination of the underlying data, the case for COH can be positively made, we will, of course, give due regard to it. Such an examination will also have to consider other "real life" impacts of the operation of COH which are not addressed in the Consultation. These include the fact that a trial will take a greater number of days to conclude than it would in a SOH court, which brings costs[4] (such as the need for a witness to attend on two days or the officer in the case to be absent from other duties for a longer period) and additional risks in terms of availability of witnesses and the potential for disruption to the trial timetable.

15. In assessing whether there is a need for COH, regard must also be had to the progress which is already being made in relation to Crown Court capacity. The newly announced Nightingale Courts and the further anticipated adaptation and use of Court estate for jury trials should be taken into account. We are aware that HMCTS is currently surveying adjustments to the current estate (with an intended date for completion early in the New Year) to free up more court rooms which are able to accommodate trials with multiple defendants, which will enable more single court rooms to be used for trials concurrently. This extra court estate should be taken into account when considering whether COH are necessary at all.

National rollout

16. There are obvious issues of scale which will impact on any national rollout of COH. These include, but are not limited to, the availability of staff for COH courts, the capacity of PECS to deliver those in custody to a larger number of courts on time and local issues such as the proximity of courts to suitable public transport links. We are concerned that there seems to be very limited, if any, recognition of these issues in the Consultation.

17. As to staffing, we note that, during the pilot "*Some courts brought in additional resource from other jurisdictions or roles, but these staff needed extra support initially which impacted on existing experienced staff*" (page 15) and "*Extra staff were needed to support the COH courtrooms which should be considered in resourcing plans if future adoption is considered*." (page 18). This aspect is addressed on page 23 in the following terms: "*We are considering potential COH staffing requirements in our ongoing recruitment*

[4] We also note that the operation of a COH court involves two judicial "sitting days" – whilst at present there is no restriction on the number of sitting days, this would be a matter of concern if that position changes for the next financial year.

campaigns. If decision is made to roll out, we would have sufficient additional court clerks, jury officers and ushers in place."

18. We are aware that there is presently an extensive recruitment process underway which seeks to attract an additional 1600 HMCTS staff. This recruitment was identified as being necessary across all jurisdictions, well in advance of the suggestion that COH should be rolled out nationally in the Crown Courts. Plainly that investment in staffing is welcome, but it cannot be relied upon to meet this additional need. We have serious concerns as to the availability of sufficient staff in the event of a national rollout commencing in January 2021. When addressing the Bar and Young Bar Conference on 20 November 2020, the Lord Chief Justice described the recruitment process as "*painfully slow*"[5]. We understand that some 700 new staff have been recruited by HMCTS since the announcement. However, we have not been told how many are destined for the Crown Courts. Any that are going to help with other jurisdictions are clearly not available to support the COH scheme. This must be acknowledged. We are concerned that a national rollout in the imminent future will be seriously impacted by staffing issues.

19. We understand that PECS has been able, in general terms, to adequately service the needs of the morning COH pilot courts. However, that considerable achievement has to be viewed in the context of the limited additional demand created by six pilot courts – a rollout which is proposed to deliver more than ten times that number of COH courts will place significantly increased demand on a service which has struggled to ensure that all defendants arrive at Court on time for SOH courts. We have seen no analysis of this aspect.

20. The COH pilot courts were located in areas where transport links did not provide substantial obstacles to trial participants. We do not know the proposed locations of the 65 courts in which COH are proposed, but it seems unlikely that this will be the case for all of them. No analysis or consideration of this aspect appears to have been undertaken. This is particularly important in the context of court closures meaning people often have to travel further to access their local courts and the significant reduction in public transport as a result of Covid-19 which makes travelling times even longer and more complicated.

[5] https://www.judiciary.uk/publications/speech-by-the-lord-chief-justice-bar-councils-annual-bar-and-young-bar-conference-delivering-justice-in-2021/

21. If trial participants cannot make reasonable arrangements to arrive at Court sufficiently early, or to leave sufficiently late, for COH to be realistic, then the anticipated gains will be illusory. Further consideration to the impact an earlier start and later finish for those court users (including defendants, witnesses and victims) reliant on public transport and with caring responsibilities must be given. We stress that a Court day which starts at 9 am or concludes at 6 pm will mean that many trial participants, particularly advocates, will need to arrive at Court by 8 am in order to be properly prepared for a 9am start[6]. Nor is it realistic to imagine that they will be able to leave Court at 6pm – it is more likely to be closer to a 7 pm finish, given that there will inevitably be tasks to perform after the conclusion of the Court day.

22. For these reasons, we do not consider that the Consultation enables the fundamental question to be answered accurately. In the absence of clear evidence to show that a national rollout of COH will increase throughput and reduce the delay in getting trials heard in the Crown Courts, the Bar Council cannot support it. The only matter which we consider to be clear is that COH are very likely to operate in a manner which is discriminatory. We consider this further below.

COH are discriminatory and will adversely impact equality and diversity at the Bar

23. It appears to be accepted in the Consultation that COH will discriminate against certain groups, primarily those with caring responsibilities. In the summary of the Public Sector Equality Duty ("PSED") Statement (page 26), the following statement appears:

The potential adverse impacts from COH courts are the potential for indirect sex discrimination, linked to impacts on legal professionals with caring responsibilities, and in particular the impacts on female legal professionals.

24. The Statement goes on to set out the mitigations which are proposed to address these adverse impacts:

Mitigations of these impacts include guidance the judiciary have provided on the types of case which are suitable for listing into the COH courts, with shorter, more straightforward cases proving most suitable. The blended approach ensures there is at least one or more courtroom running standard operating hours, hearing more complex trial work, alongside a COH court at each site. This should provide flexibility for legal practitioners not able to attend either an AM or PM trial. This mitigation is underlined with parties able to make representations at

[6] We note that 1 in 4 respondents (7 from a total of 28) reported issues in arriving at Court for the start time of the COH am court – Table 9 of the Assessment Report.

Trial Reviews whether a case should be listed into a COH or standard hours court. The trial review takes place in advance of the listing of the trial. Alongside this are provisions for practitioners to make an application (supported by reasons) to move a case should attendance at a COH court be impractical. The pilots showed applications of this type were low in number at pilot courts.
These provisions should mitigate potential adverse impacts, including those linked to days of religious observance (the religion and belief characteristic), if they are reflected in listing decisions. Listing remains a judicial function and decisions whether a case should be listed in a COH or standard hours court, or whether to move a case between or out of COH sessions are decided by the trial judge.

25. We repeat the concerns expressed above as to the very limited period afforded for response to the Consultation. We are also concerned at the lack of data and analysis provided. No Equality Impact Assessment has been provided and the PSED Statement identifies only general issues, and not in the detail that is required. The approach is inconsistent with the recently reaffirmed stringency of the public sector equality duty, and the rigour consequently required to meet it (see *Regina (Bridges) v Chief Constable of South Wales Police (Information Commissioner and others intervening*[7])).

26. The MoJ is under specific equality duties, and is obliged to carry out an assessment of the effect of the introduction of COH on those with protected characteristics. Any such assessments ought to be published as part of any consultation. It appears that no detailed data has been gathered in relation to those with protected characteristics (see p. 18 of the Assessment Report) and the statement therefore does not meet the requirements of the PSED. Further work should have been done, or should now be done, in order to gather and assess such data before any wider roll-out of COH is considered.

27. It is clear that the proposed "blended" position of COH plus SOH will give rise to indirect discrimination for a number of reasons, most obviously that: first, those with caring responsibilities (predominantly women advocates) will find greater difficulty with both early and late operating hours; and secondly, trials that will be on COH will largely be short trials in which junior members of the profession will be

[7] [2020] EWCA Civ 1058. "*The duty must be exercised in substance, with rigour, and with an open mind. It is not a question of ticking boxes*." (paragraph 175)

instructed. These junior members of the profession are more likely to be women and/or ethnic minority advocates, because of the more diverse nature of the junior Bar. Therefore, women, and particularly ethnic minority women, will be particularly adversely affected by the proposed changes.

28. The feedback from those who have used the pilot courts comes from much too small a cohort to give a reliable indication, one way or the other, as to discriminatory impacts[8], but we consider it to be clear that the proposed changes will have a very significant impact. The feedback from members of the Bar through circuit women's forums has been overwhelmingly negative, with a large proportion identifying it is as a significant factor that could cause them to have to leave the profession.

29. The perceived countervailing advantages to advocates (leaving aside the potential for increased case efficiency, as to which we remain unconvinced for the reasons set out above) are slight and in some cases misconceived, such as the suggested reduced transport costs of off-peak hours (where that transport is available and accessible), when travel will in fact have to take place during such hours in at least one direction.

30. The suggested mitigations, which entail an application to have a trial listed in, or moved to, a SOH court if necessary, do not ameliorate these harms. The onus should not be on the advocates to make applications for exceptional orders, especially where in order to do so, private caring or other arrangements will have to be revealed to the Court and opposing parties. The result is expected to be a much higher risk that advocates will be unable to take cases or have to return cases because they are listed in a COH court, when they would otherwise be accepted or retained. The risk of serious adverse impacts will increase in line with the duration of the operation of COH.

31. Even if a case had been made out to support a national rollout of COH, we consider that these serious issues cannot properly be mitigated in the manner suggested. Accommodations which can be made in the context of a local pilot scheme of a few weeks, in which participation was voluntary, will inevitably be

[8] It is concerning that few of those from whom information was obtained come from ethnic minority communities (see the Table on page 20 of the Assessment Report), given the disproportionate impact that the roll-out of the COH scheme will be expected to have on such groups, for the reasons already set out.

stretched beyond breaking point when applied to a national scheme which is anticipated to operate over the course of at least several months.

Duration of operation of COH

32. The Consultation states on page 27 that "*COH would be a temporary measure in response to the COVID-19 pandemic. Should the proposal be progressed it is proposed that the continued operation of COH would be formally reviewed in April 2021.*"

33. When first proposed, the COH scheme was going to have a sunset clause. Notably, there is no mention of such a clause in the proposed scheme as set out in the consultation document. No indication is given as to how long this "temporary measure" is likely to be required, although we note that in the presentation given on 7 December[9] it is said that "*COH would be a temporary measure finishing at the end of June 2021 or before*". There is no indication as to the process for formal review – for example, whether COH would have to be shown to achieve an *actual* increase in throughput of an extra trial per week, in order to justify the continuation of the scheme or, whether it is proposed that there be any assessment of the discriminatory impact of COH in practice. If this scheme is intended to address the backlog, at what point would that be considered to be a success? We remain concerned that there is nothing in the Consultation itself which identifies the point at which the COH scheme will no longer be considered necessary, nor as to how the proposed June 2021 end date (if still envisioned) has been determined.

Conclusion

34. The Bar Council cannot support the introduction of a rushed and poorly evidenced scheme which has the potential to have serious discriminatory implications in circumstances where the methodology for assessment of its desirability remains wholly unclear and unconvincing.

[9] https://www.gov.uk/government/publications/court-and-tribunal-recovery-update-in-response-to-coronavirus/hmcts-covid-operating-hours-consultation-readout-from-presentation-and-qa-session