

## Law Society response

HM Courts and Tribunals Service consultation with  
legal professionals on COVID operating hours in the  
Crown Courts

December 2020



## Preface

1. The Law Society ('the Society') is the independent professional body for solicitors in England and Wales. We are run by and for our members. Our role is to be the voice of solicitors, to drive excellence in the profession and to safeguard the rule of law.
2. On behalf of the profession, we influence the legislative and regulatory environment in the public interest. At home we promote the profession and the vital role legal services play in our economy. Around the world we promote England and Wales as a global legal centre, open new markets for our members and defend human rights.

## Introductory remarks

3. The Society's primary concerns throughout the pandemic has been to ensure that justice continues to be delivered and that all users are safe.
4. After years of underfunding and cuts, there was already a significant backlog in the criminal courts<sup>1</sup>, which has been exacerbated by the pandemic<sup>2</sup>. The Society understands therefore, the need to reduce the pressures on courts and tribunals, particularly given the unprecedented challenges presented by the COVID-19 pandemic.
5. While we share the objective of seeking to reduce the backlog in the court system, we remain to be convinced that COVID-19 operating hours ('COH') have delivered any significant additional capacity. Although more cases have been disposed of during COH, it appears to have been largely due to the fact that shorter, less complex cases are allocated for these times, which means that a greater number of cases can be allocated (including backup and floating cases), and therefore a greater number of those cases crack. It is our view that the vast majority of the benefits observed in the pilots would equally have been delivered had the same mix of cases been allocated to courts operating normal court hours. Given the additional costs of running COH courts, we do not believe these proposals deliver value for money for the taxpayer or achieve the objective of clearing the backlog.
6. Our members have noted specific concerns about these proposals, particularly increased work pressures, incompatibility with caring responsibilities, and other potentially discriminatory impacts that may result in them being unable to attend additional hours hearings. This could result in them losing out on cases and income at an already extremely difficult time. The impact of such considerations on other court users, such as witnesses and victims, will also be an important factor.
7. To preserve access to justice and the rule of law, legal representation must be available. It is clear from public statements by the Criminal Bar Association that many barristers may be unable or unwilling to attend COH hearings. Without advocates on

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<sup>1</sup> At the end of November 2020, HMCTS figures showed the criminal case backlog in the Crown Courts stood at 53,318 the pre-COVID baseline being 39,331. HMCTS, Weekly Operational Management Information, 2020: [HMCTS weekly operational management information March to November 2020 \(accessible version\) - GOV.UK \(publishing.service.gov.uk\)](https://www.gov.uk/government/publications/hmcts-weekly-operational-management-information-march-to-november-2020-accessible-version)

<sup>2</sup> There has been an incremental increase in the trial backlogs since quarter one of 2019. HMCTS, Criminal court statistics quarterly: April to June 2020: <https://www.gov.uk/government/publications/criminal-court-statistics-quarterly-april-to-june-2020/criminal-court-statistics-quarterly-april-to-june-2020>

board, proposals to extend hours will not work, as the client's right to a fair trial may be compromised, if they are unable to secure the services of an advocate in whom they have confidence.

8. We would suggest that other approaches might better meet the objective of clearing the backlog. The starting point must be to make proper and full use of our existing judges and courts, added to by part time judges and court space. Before looking at COH, the Ministry of Justice ('the Ministry') must ensure that it is making maximum use of normal court hours, with no restrictions on judges sitting while there are court rooms (real, virtual or Nightingale) available where they could be working. Not only do we believe this will deliver a greater increase of court capacity than extended hours but would have limited (or equal) cost implications.
9. We believe the government can avoid extended hours and build court capacity to clear the backlog by efficiently using unused public buildings – including court buildings which have been closed but have remained unsold – as Nightingale courts, and the additional resource it would take to run COH courts should be used instead to open these.
10. Before we respond to the consultation questions, the Society will set out its concerns about the consultation timeframe; the potential for discrimination; the data that is informing the COH proposals; and transparency around the duration of the COH proposals.

## **General observations**

### Adequacy of the consultation timeframe

11. The Society is grateful for the short extension granted by HM Courts and Tribunals Service ('HMCTS') to submit our response but we still believe the consultation timeframe is much too short to provide a more meaningful response.
12. We acknowledge the urgency of the situation, however it must be noted that given the extent of information contained within the three consultation documents, the need to study the data provided, the requirement (and ability) to effectively consult with our members, and the time required to go through internal sign off processes has meant we have been unable to respond in as much detail as we would have normally wanted to.
13. We must also note the burden that was placed on the Society regarding the direction from HMCTS in the consultation document for responses to be co-ordinated by the professional bodies. We were not asked in advance about this, and this is not something we have the resources to do in the very short time frame of this consultation. We did, however, take steps to communicate the consultation to our members and encouraged them to submit their own responses.
14. We also believe HMCTS has given itself too short a timeframe to consider, in depth, the feedback they will be receiving from individual legal professionals and legal professional bodies.

15. HMCTS has acknowledged in their assessment report<sup>3</sup> that more work needs to be done before they can understand the full scope for rolling out COH. In order to provide an informed response, and before a decision is made, it is vital that HMCTS takes sufficient time to address the following:
- How much extra capacity could actually be delivered
  - The location of the proposed sites where COH will be rolled out to (intention is to roll out to a maximum of 65 locations)
  - What the costs would be to run the COH model in these sites
  - What the extent of the discriminatory impact would be.
16. In addition to responses to the above we would expect a published summary of the consultation responses HMCTS receives; recommendations as to whether the proposals for COH will be rolled out; an action plan set out as to how this will be done; and an evaluation framework for evaluating these proposals.
17. With the proposed start date scheduled for January 2021, Local Implementation Teams (LITs) would need to be established and we believe they would have a very limited amount of time to consider and make the necessary arrangements to incorporate the COH model. The court staff who volunteered to participate in the pilots had to take on additional responsibilities as a result of the COH courts, and a number of them reported tiredness as an issue. HMCTS would need to ensure that they have the necessary staffing arrangements and resource in place for these courts to function – this will involve sufficient time to recruit and train staff.

#### Potential for discrimination

18. The feedback received from our members – and indeed from the interviews conducted by HMCTS with participants - highlighted the potential this model has for discrimination. In particular, we are concerned that COH could have a negative impact on solicitors and other court users, including:
- Those with children or caring responsibilities
  - Those with disabilities
  - Vulnerable people
  - Those from certain religious groups particularly where there is a requirement to stop working at a specific time
  - Female legal professionals
  - Junior lawyers
19. These concerns are substantiated by HMCTS' Public Sector Equality Duty (PSED) Statement<sup>4</sup> which accepts that COH courts might have a disproportionate impact on women, some religious minorities and disabled people. However, as HMCTS' evaluation of these pilots lacks evidence from these marginalised and under-represented groups more detail is needed on why this is and how they intend to evaluate this assumption going forward.

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<sup>3</sup> HMCTS, COVID Operating Hours (COH) Crown Court Pilot Assessment, Final Report, User experience and Insight, 2020: [COVID\\_operating\\_hours\\_assessment\\_report.pdf \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/531117/COVID_operating_hours_assessment_report.pdf)

<sup>4</sup> HMCTS, 2020: [Public\\_Sector\\_Equality\\_Duty\\_statement.pdf \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/531117/Public_Sector_Equality_Duty_statement.pdf)

20. The Society does acknowledge that indirect discrimination is not unlawful provided there is a legitimate policy reason for these proposals and that the discriminatory impact is proportionate. The legitimate policy aim is to clear the increasing backlogs in the Crown courts, but we reiterate our concern that we do not think the proposals for extended hours will achieve this.
21. With regards to the mitigations, the Society recognises the steps HMCTS has taken to identify those set out in the consultation document, and should these proposals be rolled out HMCTS must ensure the enforcement of such mitigation measures.
22. It will be crucial to understand any unintentional consequences and any further evidence of indirect discrimination that may result from the COH courts, should they be rolled out. In order to effectively monitor the concerns we have expressed, and the concerns expressed by other professional bodies, we would encourage HMCTS to continue the ongoing engagement with national representative bodies as well as identifying local partners in the confirmed COH court locations in order to better understand concerns as they emerge and enhance the requirements of the COH evaluation.
23. It appears that no Equality Impact Assessment (EIA) has been undertaken. This is essential and should ideally have been provided as part of this consultation. A more in-depth EIA should be carried out as part of the review/evaluation in April.

#### Insufficient data

24. HMCTS has acknowledged there were limitations to the data, and this has been outlined in the assessment report (116 responses, 52 being from the legal profession). HMCTS also states that they have conducted qualitative in-depth interviews with 116 respondents but have not specified how this was done – whether this was done manually or whether it depended on machine learning to conduct the analysis. We would ask HMCTS to confirm the methodology that was used as this could affect the information obtained and thus the outcomes being relied upon to roll these proposals out.
25. The Society is of the view that the data that is available suggests the Ministry is not achieving the additional hours in practice that are claimed. We believe part of the reason COH courts are disposing of more cases is due to the nature of the cases allocated to COH courts which, as mentioned in paragraph 5, tend to be shorter and less complex. We do not believe this is related to the extra hours that are theoretically available and therefore we do not believe rolling out COH will deliver the policy outcomes the Ministry is seeking, to any greater extent than would be achieved by opening these further courts in standard operating hours (SOH).
26. Further clarification would be helpful as to the calculations regarding the additional capacity from COH<sup>5</sup>. We do not believe HMCTS has made a fair comparison and we

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<sup>5</sup> 'The additional capacity from COH can be illustrated by estimating the average disposals of a standard hours court hearing similar cases. Disposals in a standard hours court would be around 5/7 of that in a COH court (due to the longer day in a COH court\*) and could dispose of approximately 2.5 trials per room per week, compared to the average of 3.5 trials per room per week in COH. As a result, for every 10 courtrooms running COH, an additional 40 trials could be disposed of over a 4-week period'. HMCTS, Consultation with legal professionals on COVID operating hours in the Crown Courts, 2020: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/939710/COH\\_consultation\\_document.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/939710/COH_consultation_document.pdf)

would suggest that the trials that would be heard in the SOH rooms are at risk of being further delayed because there are fewer SOH courts available to hear those types of cases.

27. There is no evidence of whether there are significantly different delays, depending on whether a case is heard in a COH court or SOH court. This is important because if there were a significant difference it could create a potential conflict of interest between the advocate who would struggle to make the COH hearing, and the client who wants to have their case disposed of as quickly as possible – we believe this is a key factor that must be considered. If the Government proceeds with COH, this is something we would want to see expressly addressed in the April 2021 review.
28. Please could we request for HMCTS to either publish or share with the Society:
- The 'Covid Operating Hours – Liverpool Crown court' document compiled by the HMCTS user experience and insight team dated 12 October.
  - The 'COVID operating Hours – Crown court pilot assessments – interim MI' report dated 5 November 2020.
  - The Flexible Operating Hours 2019 pilot final report – even though this is focused on the civil and family jurisdiction, the general experience of extended hours is of relevance and we would ask that this be published for the benefit of these proposals.

#### Transparency around the duration of the COH proposals

29. HMCTS has stated that the use of COH will be time limited but they do not specify an end date. We note the suggestion from HMCTS in a recent Gazette article<sup>6</sup> that COH 'will not continue beyond June 2021' and would ask for formal confirmation of this.
30. We also ask for assurance that HMCTS are not intending to use this process as justification for rolling out extended operating hours more widely and on a permanent basis. The reason we raise this is that since 2002 the Government has made numerous attempts to implement extended hours into the court system. On each occasion the Society has made it clear that we do not think such proposals are a workable or cost-effective approach; that they create financial and practical difficulties; and that they pose risks for the parties and professionals involved – this position remains unchanged. Pilots that have been carried out in the criminal courts, and which were abandoned, include:
- The Bow Street pilot (2002)
  - The Croydon pilot (2010)
  - The Flexible Criminal Justice System (CJS) pilot (2012)
  - The Flexible Operating Hours pilot at Blackfriars and Newcastle Crown court and Islington and Sheffield Magistrates Courts (2017)
31. It does not appear that HMCTS has defined what the criteria might be to return to 'normality' (however you define this). We would need to know at what point HMCTS would consider the backlog problem in the Crown courts to have been resolved and

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<sup>6</sup> Fouzder, M. (2020) 'Covid-19 operating hours 'will not continue beyond June 2021'', The Law Society Gazette, 9 December: <https://www.lawgazette.co.uk/news/covid-19-operating-hours-will-not-continue-beyond-june-2021/5106727.article>

therefore they need to set out a clearly defined end point.

32. We also need clarification from HMCTS as to what the 'review' in April means.

- Will this be a full evaluation?
- Will it evaluate the assumptions made in the PSED statement?
- What methods will HMCTS use to capture the relevant data?
- Will a full EIA be conducted?

## Questions

**Question 1: How do you think HMCTS could improve the proposed COH model?**

**Question 2: What features of the COH model work well and should be strengthened?**

33. In response to questions 1 and 2 we refer to our recommendations in paragraphs 8 and 9 and ask that these be fully considered before HMCTS makes any decision to roll the COH proposals out.

**Question 3: What would HMCTS need to consider in the transition and roll out of COH?**

34. Should HMCTS make the decision to roll out these proposals they would need to set out a clear and realistic timeframe as to how they will carry out this transition and they would need to consider:

- Staffing arrangements – as referred to in paragraph 17, HMCTS will need to ensure they have sufficient and fully trained staff resource in place to support the COH model. They will also need to ensure staff are present for when the court is required to open earlier and close later, to accommodate court users who are attending early and late sittings (more reference to this in paragraph 42).
- The safety measures in place both in terms of COVID-19 and the possibility of infection, and regarding court users leaving courts later at night, particularly during these winter months.  
Given the additional footfall that these proposals are likely to cause, consideration must be given as to whether the site is suitable for the 'blended approach' to be implemented, and this will depend on local HMCTS court risk assessments. HMCTS must incorporate and maintain safe working practices, and ensure they have clear processes (including effective comms systems) in place should individuals test positive for COVID and if there are any outbreaks.
- The wellbeing of all involved - it is noted in the consultation document that 'when there were no breaks in the COH sessions it was felt that concentration levels for all parties, and in particular jurors, were impacted'. From the outset it was agreed that there would be a break of half an hour in every session. We would need assurance from HMCTS that should these proposals be rolled out, the agreed breaks would take place for the benefit of all parties' wellbeing and justice outcomes. If a decision is made to run through these breaks, this information must be recorded so it can be taken into account in the evaluation as this runs the risk of artificially inflated hours at a cost of the wellbeing of participants. This could ultimately have an adverse impact on the quality of decisions, and perhaps even the fairness of the proceedings.

- Setting up an advisory group similar to the Evaluation Advisory Group in place for the Flexible Operating Hours (2019) pilot. This would bring together representatives from the national representative bodies, as well as some of those mentioned in our response to question 4, to assist HMCTS in understanding the different impacts these proposals will have.
35. HMCTS also needs to take into account that the proposed model could also have an adverse impact on police officers by creating listing difficulties. When courts need to list a hearing which involves police witnesses, it is often difficult to accommodate them because they have set shift patterns which cannot be easily moved, if at all. For example, a multi-handed case involving several police officers would be very complex to list even in a normal court where hearings are more flexible. The court would require the officers there over two or more days and so their diaries would have to line up. It is quite hard to imagine that this would help to clear the backlog. If anything, it might increase it.
36. It is not clear whether feedback was sought from any police officers as part of the pilot assessment, nor in fact whether any police officers were involved in cases in the pilot. Feedback from police officers will be necessary for the review/evaluation in April, however.

**Question 4: Are there other user groups in the criminal justice system that HMCTS should consider, and why?**

37. HMCTS will need to capture data from a larger number of service delivery partners and users, particularly:
- Support services such as ‘Support Through Court’ for unrepresented litigants or inexperienced court users
  - Victims and witnesses - HMCTS needs to demonstrate a more in depth look into the impact on these groups. Suggested ways in which it could do this includes:
    - (a) engaging with the Victims Commissioner
    - (b) looking at the impact on witnesses access to support
    - (c) the impact of delays and overruns
    - (d) the types of cases in COH court and the involvement of any vulnerable witnesses.
  - Female advocates
  - Black, Asian and Minority Ethnic professional associations
  - The junior side of the profession such as the Junior Lawyers Division (JLD); Young Legal Aid Lawyers (YLAL); Young Barristers Committee (YBC). There is a real risk that COH work will be undertaken by more junior staff. This could raise an issue of indirect discrimination, where staff who are at an earlier stage in their career (and are likely to be younger) are treated less favourably than more senior staff. More junior staff are also likely to require greater supervision, deferring to a superior for advice might not be immediately available during antisocial hours. This could have an impact on the speed and quality of advice available to those clients who are seeking advice and representation during this time.
  - CPS
  - Specialist solicitor practitioner groups such as Criminal Law Solicitors Associations (CLSA); London Criminal Courts Solicitors Association (LCCSA); the Solicitors’

Association of High Court Advocates (SAHCA)<sup>7</sup>; Legal Aid Practitioners' Group (LAPG)

- Judges
- Equality and Human Rights Commission
- Disabled groups such as Disability Rights UK; Disability Law Service
- Jurors – limited feedback was received from this group during the pilots and given that they are representative of wider society their input is essential.
- JUSTICE and other NGOs dealing with the impact on the actual trial process; fair trials for defendants
- Court staff; custody staff; probation staff
- Trade Unions such as the Public and Commercial Services Union
- Defendants
- The Police

**Question 5: Do you agree that, should HMCTS proceed with further roll out, the operation of COH should be reviewed in April 2021, and what do you consider are the key points the review should focus on?**

38. As referred to in paragraph 32, HMCTS needs to set out what a 'review in April' means. However, even before this stage is reached HMCTS needs to ensure that they have addressed all the concerns raised regarding potential discrimination in order to meet their legal obligation to minimise any discriminatory impact.
39. As part of any review HMCTS will need to focus on getting suitable feedback from all those who are involved in COH courts and, of equal importance, those who are not and must ascertain the reasons for this. A way to address this would be to focus on the opt out process – capturing the reasons why court users opt out of the COH will be essential to any evaluation and this needs to be recorded consistently:
- Do HMCTS have a plan as to how they will garner more responses?
  - Is there a target number of people HMCTS is aiming to get responses from before they review in April? This will need to be a statistically valid number of participants which will depend on the overall total who participate.
  - How will HMCTS ensure that they are collecting the right types of data to understand the impact the COH courts are having on court users?
40. Clear questions need to be asked to ensure the relevant data is collected. Areas we believe that need to be covered include, but are not limited to:
- How much of a contribution these COH court rooms are making in clearing the backlog?
  - The cost of running the COH court rooms
  - Did any court users have to attend court for a second day if their hearing over ran, and did that cause any problems?
  - The impact of the additional funding that will result from a doubling of travel expense claims where lawyers or other court users have to travel to attend court on two or more days instead of one because of COH

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<sup>7</sup> According to SRA data, as of November 2020 there are 7,165 solicitors who hold Higher Rights of Audience (HRA) of which 4,619 have HRA in both civil and crime and so a significant proportion of our members could be impacted by these proposals: [https://www.sra.org.uk/sra/how-we-work/reports/statistics/regulated-community-statistics/data/higher\\_rights\\_of\\_audience/](https://www.sra.org.uk/sra/how-we-work/reports/statistics/regulated-community-statistics/data/higher_rights_of_audience/)

- Whether court users had any transport issues to and from the court
- Did any court users require additional support in order to travel to and from court?
- Did any court users have to wait longer for their case to be heard in a SOH court?
- The impact these proposals have on disabled court users, including disabled defendants
- Requirement for more information on the types of cases being heard in COH courts
- Further information on how cases are chosen to be heard in the COH courts
- Characteristics of parties/court users involved (i.e. gender, age, race etc)
- Access to support before, during and after a COH hearing
- The practical efficiency of the process
- Thorough analysis of all parties involved including court staff; support services; witnesses; jurors
- Did court users incur additional childcare costs and was out-of-hours childcare readily available?

41. With regards to transport issues there has been no real assessment of the impact on legal professionals and other court users who may have to travel a long distance to court. This is particularly important for those involved in COH hearings which overrun and have to continue the following day when in a normal court the hearing would be extended and be finished in one day.

42. There are various practical concerns relating to both parties and legal representatives attending court for a hearing at 9.00am. Legal representatives are likely to need to attend court up to an hour before the hearing commences; the court building must therefore be open and available from 8.00am.

43. Those using public transport may struggle to get to court for 8.00am especially when we take into consideration the restrictions caused by social distancing measures. It is also likely that travel costs will increase for those using public transport as they may be required to travel during peak hours.

44. Not only might it be necessary for lawyers and other court users to pay for additional days of travel if the hearing continues the following day, overnight stays would almost certainly be necessary more frequently, given the need for lawyers and some other court users to be at court at 8.00am for a 9.00am start. Even a 9.00am start may pose challenges in areas where transport is not very efficient. This calls into question the cost effectiveness of the scheme; not only in increased numbers of claims from legal professionals, but the additional cost of accommodating jurors.

45. This is an additional factor which may have significant equality implications for those with caring responsibilities, which is likely to put women in particular at a disadvantage. It may also discriminate against disabled people for whom travel, and overnight stays very often pose greater challenges.

## **Conclusion**

46. As we have already mentioned, we acknowledge the urgency of this situation but would ask HMCTS to fully consider the concerns we have set out in this response and our recommendations regarding the steps that should be taken to avoid the use of extended hours.

47. We are as always happy to provide further feedback on any of the points raised above.

