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THE RESPONSE OF 25 BEDFORD ROW TO HMCTS’ “CONSULTATION WITH LEGAL PROFESSIONALS ON COVID OPERATING HOURS IN THE CROWN COURTS”

PREFACE

1. 25 Bedford Row is arguably the leading specialist set of criminal defence practitioners. We only defend. We have been representing defendants in the criminal courts at every level for over 40 years. Our 75 members range from the most junior to leading juniors and QCs and we are culturally and ethnically diverse. The majority of our work is taken on a legally aided basis. Although based in central London, our members defend in trials throughout England and Wales. Chambers itself, and many of its members, have won countless awards for excellence since its inception. 25 Bedford Row has a strong commitment to equal opportunities practices and procedures, with members having won awards for outstanding achievements in this area.
2. 25 Bedford Row is opposed to COVID Operating Hours (COH) in the Crown Courts. Indeed, we are opposed to Extended Operating Hours (EOH) as a policy in both the Magistrates and Crown Courts. From here on in, we use the term “Scheme” to cover both COH and EOH.
3. The Scheme is inherently discriminatory. The Scheme should be abandoned forthwith on account of the discriminatory impact on diversity at the Criminal Bar that would otherwise flow from it, in terms of gender, race, religion and protected characteristics.
4. 25 Bedford Row questions the validity of the Consultation. The short time frame is a particular concern and leads us to conclude that this may be a consultation in name only.

5. 25 Bedford Row has had regard to the **Report of the Criminal Bar Association Working Group on Court Capacity** dated 2 December 2020 and endorse it in its entirety.
6. 25 Bedford Row has also had regard to the **Women in Criminal Law (WICL) Survey on Extended Operating Hours**, which we commend to HMCTS as the only survey open to all court professionals with significant uptake.

ANSWERS TO CONSULTATION QUESTIONS

7. In answer to the consultation questions we submit as follows:

1. How do you think we could improve the proposed COH model?

8. 25 Bedford Row does not consider the COH model can be rectified; it is inherently discriminatory and should be abandoned forthwith. The Scheme discriminates unlawfully because the hours mean that the pool of available work is smaller for those with childcare and other caring responsibilities, which prevents them from being available for every case. This Scheme cannot be reconciled with childcare arrangements and so freezes out a section of the Bar, predominantly women.
9. As the WICL survey results demonstrate, 90.5% of the females and 82.8% of the males who responded to its survey were against the Scheme, with the majority citing the negative impact on childcare or other caring arrangements. Of the number of primary caregivers who responded to the question regarding their position on the Scheme, 90.9% were against it. HMCTS spoke to 40 legal professionals. This small number is wholly unrepresentative of the Criminal Bar and is a stark contrast to the size of the WICL survey, more than 10 times larger.
10. 25 Bedford Row notes that the Public Sector Equality Duty (PSED) statement identifies the discriminatory impact on those with caring responsibilities (Paragraph 10). The purported “mitigations” to these impacts place the onus upon the legal practitioner to mitigate the risk against themselves (Paragraph 33 (bullet point 3)). This is unfair and unreasonable, and it’s against the spirit of the Equality Act 2010, if not its terms,
11. Paragraph 33 (bullet point 3) of the PSED statement further suggests that, “legal professionals will be able to request, through the usual channels, that cases are listed into

a court that is operating standard hours. We note, however, there is no evidence of what steps HMCTS have taken to assess the efficacy of the “usual channels”, nor indeed a definition of what is meant by this.

12. The Scheme allows for individual judges to decide any application to move/ keep a trial out of the COH scheme. This level of discretion is unreasonable and would lead to variations from court to court that would make allocating cases to counsel much more problematic. We note the absence of an adequate remedy for a legal professional whose application is refused by a Judge.

13. A National Protocol would be necessary to ensure that caring responsibilities are determinative. However, even a system that guarantees that practitioners will get a slot that suits them personally, does not remedy its discriminatory nature. There is no way to avoid the discriminatory effect and so the Scheme must not be rolled out.

2. What features of the COH model work well and should be strengthened?

15. 25 Bedford Row does not consider that any part of the COH model works well. Moreover, any scheme that is inherently discriminatory is so fundamentally flawed that any apparent benefit is irrelevant.

16. Proper analysis of the HMCTS assessment demonstrates that any purported benefit of this Scheme is inaccurate. The assessment purports that a comparison between a Standard Operating Hours court versus a Covid Operating Hours court reveals that 0.9 trials would be completed in a week as opposed to 3.5 trials. However, this is not in fact a true ‘like by like’ comparison. We note Paragraph 3.3 of the HMCTS Assessment Report, *“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”*. We consider that, in light of this, the Key Assessment Findings comparing the outcome of the COH with Standard Hours courts are potentially misleading. The pilots did not produce enough data to allow any conclusion that the model works well.

17. 25 Bedford Row notes that the Lord Chief Justice, Lord Burnett of Maldon, himself advised the **Justice Select Committee in the House of Commons** that the benefits might be more illusory than real.

3. What would we need to consider in the transition and roll out of COH?

18. The COH scheme results in such a harmful impact on the personal and professional lives of criminal barristers that 25 Bedford Row cannot and does not support the transition to or roll out of COH.

19. The contribution the Scheme may make to increasing court capacity will be outweighed by a number of negative factors including, its discriminatory impact, inevitable inflexibility in trial listings and disruptive impact on trials. We are particularly concerned about the impact on diversity at the Criminal Bar that the transition and roll out of this inherently discriminatory Scheme will cause.

20. We do not accept a consultation that presupposed the transition and roll out of the Scheme is meaningful. We note the lack of consultation with key participants, including court staff, jurors, probation, witnesses, judges, police and civil society. The views of these groups must be considered.

4. Are there other user groups in the Criminal Justice System that we should consider and why?

Age, Race, Disability, Sex, Pregnancy and Maternity, Religion and Belief

Statutory Duty

21. HMCTS is aware of its duty, as a public authority to eliminate discrimination, pursuant to **section 149 Equality Act 2010**.

24. It is our view that these proposals will have a discriminatory impact on individuals with the following characteristics:

- a. Age
- b. Race
- c. Disability
- d. Sex
- e. Pregnancy and Maternity
- f. Religion and Belief

25. There has been a lack of adequate assessment of the discriminatory impact on individuals who fall within the relevant characteristics.

26. There has been no weighing up of the impact of the Scheme or any analysis with reference to the protected characteristics.

Assessment of Impact

Age

27. HMCTS has not fully or properly considered the impact of their proposals on Junior members of the Bar (under 10 years call), who will be disproportionately affected by these proposals.

28. The HMCTS Proposal says that "Mitigations of these impact 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 providing most suitable".

29. Evidently, junior members of the legal professions are predominantly instructed in shorter, more straightforward cases and will thus be disproportionately affected by these provisions. In assessing the impact of these provisions, there has been no consideration given by HMCTS on the impact these proposals will have on junior members of the profession.

Race

30. Similar to the matters outlined above (with regards to the Age characteristic), the Scheme will have a disproportionate impact on black barristers and minority ethnic groups, both men and women. As noted by the CBA within their response:

"The Scheme is likely, disproportionately and adversely, to impact on black barristers and barristers from other minority ethnic groups, both men and women. The Criminal Bar is significantly more diverse by gender and race at the junior end of the profession. It is our juniors who are much more likely to be instructed in the cohort of cases targeted by the Scheme which will, barely, touch the lengthy, complex trials that are most likely to be conducted by senior White male barristers."

31. There has been no assessment of the likely impact on black barristers and barristers from other minority ethnic groups.

Disability

32. There has also been no assessment of the impact of these proposals on professionals who have a disability.

33. Paragraph 16 of the PSED Statement, which relates to jurors states that:

“The COH research also found that, when there were no breaks in COH sessions, it was felt that concentration levels for all parties, and in particular jurors were impacted.” This impact might be especially felt by people with conditions that affect concentration or physical stamina (so potentially indirect discrimination linked to the disability protected characteristic).”

34. Although there is recognition that the proposals will potentially affect juror members who may have a disability, there has been no assessment of how the proposals will impact legal professionals who fall within the disability protected characteristic. Professionals with a disability may not be able to undertake the work, resulting in a loss of income.

35. This renders the Scheme inherently discriminatory.

Sex

36. The HMCTS Proposal says it has identified:

“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.”

37. However, at paragraph 17 of the PSED Statement notes that the COH assessment does not cover whether female legal professionals were disproportionately impacted compared with male legal professionals.

38. As set out by HMCTS, “as part of the assessment, data was collected on the views of legal professionals. The survey asked respondent how they rated their experience of being involved in a COH trial”.

39. The figures put forward by HMCTS, that “similar proportions of respondents both with and without childcare responsibilities expressed positive, neutral and negative views” are based on small numbers (27 men and 13 women). Consequently, the figures cannot be regarded as being representative of the views of members of the legal profession and is far too slender a base from which to draw conclusions.

40. As outlined within the WICL response to the consultation (p.3):

“WICL completed a survey in September 2020 which was open to all practitioners and had a significant number of participants. 480 individuals responded...

The WICL survey showed that of 311 responders, around 4% were in favour of COH, 88% were against and 8% were neutral. Of greater concern, of 297 responses who responded to a question on whether they were concerned about their mental health due to COH, 77% replied yes, with 16.5% replying no. The same number responded to whether they had concerns about a negative impact on their private/family life due to COH and almost 91% indicated that they did, with only 6% stating that it would not.

The survey also invited views on concerns about the likelihood of having to return cases listed in the COH courts, and whether there were concerns about a loss of future instructions as a result. 72% replied yes to the latter.

The survey results showed a vast number of practitioners are deeply worried about the impact of COH on childcare, their physical and mental health as well as the unacceptable encroachment into their private/family lives beyond that which is already accepted as part of life at the Criminal Bar. Practitioners have been placed under extraordinary strain in the pandemic and are a precious resource. To fail to protect them is to fail to protect the justice system.”

Pregnancy and Maternity

41. The HMCTS Proposal fails to have regard to legal professionals who are expectant mothers and there has been no consideration or assessment of the impact on this group.

42. Expectant mothers are more vulnerable in the current pandemic and have to ensure that, in terms of travel arrangements steps are taken to reduce their risks. The current court sitting times, (10.00am - 4.30pm) mean that expectant mothers are able to avoid the peak travel times to avoid undue exposure to the risk of contracting COVID-19.

43. The COH Proposal however places expectant mothers at greater risk as they will need to travel at peak times and will also be exposed for longer periods of time to others.

44. In addition, it is likely that the majority of expectant mothers will be at the junior end of the Bar, who as noted above are those who are likely to have to attend COH due to the type of cases they are usually instructed on.

Religion and Beliefs

45. The PSED Statement recognises that there will be a potential impact on those who hold certain religious beliefs. It says:

“There may also be potential for indirect discrimination linked to the religion and belief protected characteristic. For example, Islamic prayers take place from Friday afternoon onwards and the Jewish Sabbath starts from sunset on Friday. In comparison with courts operating standard operating hours, COVID Operating Hours may have a slightly bigger potential impact, on those practising certain faiths. The possibility of indirect disability discrimination is also mentioned in the discussion of impacts on jurors.”

46. HMCTS further states that, as well as mitigating concerns about indirect sex discrimination, the blended approach and listing practices referred to should also mitigate potential adverse impacts linked to days of religious observance. However, as noted by HMCTS "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.”

47. Consequently, if a trial judge chooses to list case in COH court against the wishes of a practitioner who cannot, because of childcare responsibilities, conduct a trial during those hours (and these are more likely to be women than men), that practitioner will have to return the case, suffering the loss of income and professional standing as a consequence. This also applies in the case of women and those with child care responsibilities.

Justification/Mitigation

48. 25 Bedford Row adopts the submissions made by the CBA and WICL. We do not accept that there is justification for the Scheme.

49. We also do not accept that the proposals made to mitigate the discriminatory impact of the Scheme is adequate or addresses the issues of indirect discrimination.

50. As outlined above, there has been no adequate assessment of the discriminatory impact on those groups that will be affected by the Scheme.

51. Notably, one of the proposals for mitigating the Scheme, namely listing shorter, less complex cases, has an unfair and disproportionate impact on junior members of the Bar and those from black and minority ethnic groups.

52. Further, there has been no assessment of proportionality or balancing exercise undertaken with regards to the aims of the Scheme and those affected.

53. Moreover, despite the assertion by HMCTS (paragraph 27 of PSED Statement) that being able to attend an AM or PM trial, rather than standard hours, might be of value to those seeking to balance work and family/care responsibilities, HMCTS found that court staff, Judges and legal professionals who worked the COH PM session reported arriving home later in the evening, which caused many to feel that their work/life balance had been negatively impacted.

Pupil Barristers and Junior Tenants

54. In addition to the above and to the court users identified by the Criminal Bar Association and Women In Criminal Law, the position of **pupil barristers** and **junior tenants** should also be considered as entities in their own rights.

55. When considering appropriate candidates for pupillage training it is of course with a view to identifying future junior members of chambers.

56. As such the candidate's ability to undertake cases within the extended hours programme would be of relevance.

57. Recruitment processes have strived to be as inclusive as possible. It would therefore be highly undesirable to have to inquire as to a candidates personal responsibilities which may make it impossible for them to attend court outside of current court hours.

58. The nature of pupillage in a criminal set of chambers includes instructions at short notice and a considerable amount of travel. This pattern of work inevitably continues many years into a junior tenants practise.

59. Pupils and junior tenants are not as able to select the cases they undertake and may well feel obliged to agree to deal with matters which compromise their other commitments.

60. It is considered that these matters have the potential to limit the candidates who feel able to work within the criminal justice system.

61. It is also of note that in recent years it has been recognised that the physical and mental wellbeing of legal practitioners should be prioritised. This is of importance to the individuals concerned and to the Criminal Justice System as a whole.

62. The participants should be operating at the peak of their abilities. These proposals appear to fly in the face of ongoing efforts in this area.

5. Do you agree that that should we 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?

63. The decision to consider proceeding with the COH scheme at all, let alone to review it in 2021 is so fundamentally opposed by 25 Bedford Row that we believe that there should be a cessation of the policy forthwith. Beyond abandoning the policy, there is no recommendation that we believe can be made to improve it. The Scheme is discriminatory, unfair and contrary to the interests of justice and the interests of the public. That is because it fails to remedy the very problems it seeks to solve and in fact exacerbates them. 25 Bedford Row will support any action by the Criminal Bar Association, as it has always done.

64. We of course recognise the clear need for something to be done to remove the back log however, and commend the following suggestions:

- i. True investment in the system ensuring it is completely COVID-Secure.
- ii. Utilisation of all current court space so as to ensure the maximum number of trials are taking place as is possible. We believe we are nowhere near reaching that point.

- iii. Removal of unnecessary hearings that can be conducted remotely of which there are many. A National Protocol on Remote Hearings will assist in achieving this consistently throughout England and Wales.
- iv. Additional opening nightingale courts/civic buildings.
- v. Maximisation of all judges and recorders, and that consideration should be considered to bringing retired judges back to assist with the backlog.

25 Bedford Row
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