Kevin Sadler, Acting Chief Executive and Operations Director

Her Majesty's Courts and Tribunals Service

102 Petty France

London

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Thursday 3rd December 2020

Dear Kevin,

Re: 'Consultation with legal professionals on COVID operating hours in the Crown Courts'

We are writing on behalf of the Criminal Bar Association (CBA) about the proposed introduction of the "Covid Operating Hours" scheme ("the Scheme") on which you are currently consulting. We attach the response of the CBA to the consultation; a report by the CBA Working Group on Court Capacity.

The purpose of this letter is to draw your attention to our serious concerns about the legality of the proposed Scheme, both in its introduction and in its operation. In particular, we raise the following matters:

(i) If its introduction follows the process that it appears HMCTS intend to follow, then its introduction will be in breach of the Public Sector Equality Duty ("PSED") and in breach of HMCTS's public law consultation obligations.

(ii) The Scheme, as presently anticipated, will operate in a way that is discriminatory as against: (a) women, (b) some religious minorities, (c) some groups of disabled people, and (d) junior Black barristers and barristers from other minority ethnic groups. It will also violate Articles 8 and 9 and Article 14, read with Articles 8, 9 and 6, Schedule 1 Human Rights Act 1998.

We note that the concerns we express in this letter reflect those raised by the CBA in relation to the earlier pilot in 2012 and that abandoned by HMCTS in 2018.

We consider that the Scheme is not only likely to be unlawful in its introduction and implementation but that it is also wholly inappropriate and inadequate for dealing with the challenges that the pandemic presents to the court service, court users, including the most vulnerable, and those, including the Criminal Bar, who work within it.

We trust that in light of our report provided in response to the consultation exercise, and the contents of this letter, that you will conclude that introduction of the Scheme will be neither lawful nor adequate to deal with the challenges we all now face. We address our particular concerns below.

The Public Sector Equality Duty

As you know, the PSED requires that HMCTS has "due regard" to the need to achieve certain equality outcomes; namely, the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010 (EA 2010); advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it, and foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it, involves having due regard, in particular, to the need to remove or minimise disadvantages suffered by

persons who share a relevant protected characteristic, that are connected to that characteristic; take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it; and encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low. In the case of disabled people, the steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities. Further, having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to tackle prejudice, and promote understanding.

As has been adverted to by the courts many times: (i) the PSED is an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation; (ii) an important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements; (iii) the relevant duty is upon the decision maker personally - the decision maker cannot be taken to know what his or her officials know or what may have been in the minds of officials; (iv) a decision maker must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy; (v) the duty must be fulfilled before and at the time when a particular policy is being considered; (vi) the duty must be "exercised in substance, with rigour, and with an open mind" and general regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria (see, for example, *Bracking v Secretary of State for Work and Pensions [2013] EWCA Civ 1345, [2014] EqLR 60*, paras 25-6 and *Hotak v Southwark London Borough Council (Equality and Human Rights Commission and others intervening) and A'or [2016] AC 811*, paras 73-75). Where a decision may affect large numbers of vulnerable people, many of whom fall within one or more of the protected groups, the due regard necessary is very high. It will require gathering the necessary information to conduct a rigorous analysis, including evidence based information about specific impact on those with protected characteristics (see, for example, *R (Hajrula) v London Councils [2011] EWHC*

448 (Admin) at para 69; *R (JM) v Isle of Wight Council [2011] EWHC 2911 (Admin)* at para 122 and *R (W) v Birmingham City Council [2011] EWHC 1147 (Admin)* at para 176).

As you appreciate, ordinarily, public authorities, including HMCTS, will demonstrate discharge of the PSED by the production of an Equality Impact Assessment ("EIA"). We note that none has been prepared in respect of the Scheme as proposed. Instead, a "Public Sector Equality Duty (PSED) Statement" has been provided to us. This Statement is plainly inadequate to meet the requirements of the PSED. By way of example only, there is no quantitative or qualitative research identified within the Statement save for the outcome of a survey responded to by 40 people, that the Statement appears to acknowledge is of limited, if any, value; §19. There is no weighing of the impact of the Scheme on jurors or victims, by reference to the protected characteristics or any analysis. Some of the contents are simply bemusing – thus, again by way of example only, it appears to be assumed that out of hours sitting will benefit older and young people (age groups unspecified) because they will have off-peak travel costs but arriving at court before 9am or leaving after 6pm is not off peak and some trial participants have their costs met by HMCTS in any event – a financial benefit that has never been available to criminal barristers who are expected to meet the costs of travel out of a fixed fee. The Statement assumes no impact on the fostering of good relations. It gives no reasons at all for this conclusion, notwithstanding that the prosecuting of particular groups/ classes of defendants is, quintessentially, an area in which good relations between communities may be affected and this may be impacted by, for example, choice of counsel, treatment of victims etc. As will be apparent from the requirements of the PSED, as summarised above, the Statement does not have due regard to the matters required of HMCTS by the PSED.

We assume that an EIA in respect of the proposed Scheme has not been undertaken. The Statement plainly does not meet the requirements of the PSED.

In addition to the PSED, the Ministry of Justice, HMCTS's sponsoring department, is subject to the specific equality duties (*Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017, SI 2017/353*). These require HMCTS to publish information demonstrating its compliance with the PSED. This information must include, in particular,

information relating to persons who share a relevant protected characteristic who are affected by its policies and practices, as is the case in relation to those matters and groups affected by the proposed changes in the Scheme. We have not seen any such data. Please provide it or explain why it has not been gathered.

To be clear, the duties above fall upon HMCTS. While the CBA will draw attention to those matters about which we have knowledge, that does not obviate the need for HMCTS to properly discharge its duties under these provisions.

We do note that there does not appear to have been discrete consideration of the impact on, or consultation with, the following groups:

- Women advocates
- Witnesses
- Victims Commissioner
- Specialist (criminal) solicitor practitioner associations
- Black, Asian and Minority Ethnic professional associations
- Disabled groups
- JUSTICE and other NGOs (fair trials)
- Equality and Human Rights Commission
- Court Staff
- Trade Unions
- Judges
- Probation Workers
- Jurors
- CPS

Indirect discrimination

As you will know, indirect discrimination is proscribed both under the EA 2010 and under Article 14. Article 14 is dealt with below.

HMCTS appears to accept in its PSED Statement that the Scheme might have disproportionate impact on women, some religious minorities and disabled people. HMCTS's response to the 2018 consultation also appears to have accepted some indirectly discriminatory effect. It must do so since the disproportionate impact on women, religious minorities and disabled people in requiring them to partake in trials outside normal hours is obvious. Thus, for the Scheme to be lawful, it must be justified; that is, it must meet the strict test of being a proportionate means of achieving a legitimate aim.

We note too, although this seems to have been overlooked entirely, that given the cohort of cases likely to be affected by the Scheme (1-3 days single defendant cases), 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.

We note that the Statement identifies certain "mitigations". We address these, along with justification, below.

Articles 6, 8, 9 and 14

The Scheme, if introduced, will impair the enjoyment of the family lives of many court users. This appears to be acknowledged in the Statement, at least, in the case of women. It will also adversely impact on the right to manifest religious belief in the case of some court users and on the right to a fair trial, where defendants and victims are disadvantaged. This will impact both upon those whom the Scheme's requirements directly affect because of their own protected characteristics and also on those consequentially affected. A trial that must be moved to accommodate the caring responsibilities of a witness will affect a defendant and so on. No regard appears to have been paid to these important issues. For any adverse impact

to be lawful, it must be justified. In the case of a discriminatory impact, whether direct or indirect, (Article 14), any purported justification will be subject to strict scrutiny given the impact on highly protected groups, including, by reference to sex, race, religion and disability; that is, the interference must be strictly "necessary". No such justification has been identified as addressed further below.

Justification

As to justification, for indirect discrimination and a breach of Articles 8, 9 and 14 read with Articles 6, 8 and 9, we draw your attention to the following matters:

- We do not accept that the Scheme will bring the increase in court capacity contended by HMCTS. We observe that the figures you cite, in support, within the consultation documents (2.5 trials per week per standard operating hours court 'SOH'; 3.5 trials per week per extended operating hours court 'EOH'), are speculative. The assessment of the pilot data reveals that much shorter cases were tried in the pilot EOH courts relative to the SOH courts. This, inevitably, meant that more cases could be heard. Further, no consideration has been given, in the speculative projection, to the way in which EOH courts, which only sit for 3 and a half hours per trial per day (an SOH court can sit for 5 and a half to 6 hours per trial per day) are more vulnerable to the impact of delays. 85% of the pilot courts within the Scheme experienced delay i.e., did not even sit for 3 and a half hours per trial per day. The impact of the wholly predictable higher rates of delay (e.g. prison vans failing to arrive and legal conferences not completing by 9am) combined with the shorter sitting hours and "hard stops" resulting in earlier finishes to avoid witnesses' evidence continuing to the following day, which have been built into the inflexibility of EOH listings, will reduce their efficiency.
- The Scheme significantly increases the cost per trial (two judicial sitting day fees per courtroom per day, two teams of advocates' fees, two teams of court staff fees) in return for much reduced sitting time per trial per day. We do not regard that as a rational or efficient use of public funds at this juncture. An SOH

courtroom, in a Nightingale court, delivers 5 and a half to 6 hours of sitting time per trial per day.

We suggest that the purported contribution of EOH courtrooms, as to which you contend 65 will operate the Scheme within 65 court centres from January 2021, will make very limited, if any, contribution to the backlog we face, incur more cost, and impede the administration of justice relative to the viable alternative options.

We have seen no evidence of a comparative exercise, between the costs and gains of Nightingale courts for bail cases and use of magistrates' courts with custody facilities as jury trial venues, to clear the backlog of criminal cases in the criminal courts.

You will note that we have in our report weighed EOH Courts in the context of other available proposals for clearing the backlog (our proposals 1-5 in the appended report). It is our view that the Scheme is the least attractive proposal, not least, because it is the only proposal of those we reviewed, which carried an identifiable social harm; it is discriminatory.

There has been no cost /benefit analysis provided with the consultation document or the Statement. Please provide such an analysis now if one has been undertaken.

Mitigation

The Statement sets out what are said to be "mitigations". These include requesting at a Pre-Trial Review Hearing, or directly to the court, that a hearing take place during standard operating hours, where attendance out of hours will be impossible or disadvantageous because of a protected characteristic. It is assumed therefore that *prima facie* discrimination might be addressed by requiring counsel to disclose to a judge the most intimate aspects of their private life (caring responsibilities, disabilities, religious belief), all of which themselves will be disclosable to the parties. These parties will include the barrister's own lay client.

Regulatory consequences also flow from this proposed system of work (Core Duty 2, Rule C21.2, Rule C25, Bar Standards Handbook – Equalities Rules 'fair allocation of work' rC110(3)(i) and S.47 (6) Equality Act 2010), addressed in our report, but not in your consultation documents.

There has been no assessment, so far as we are aware, of proportionality. There has been no scrutiny of the extent of the impact on those groups who will be adversely affected to a disproportionate degree if the Scheme is introduced. There has been no proper balancing exercise undertaken between the aims of the Scheme and those affected. In the absence of such an exercise, it must be concluded that the Scheme, as proposed, is unlikely to be justified and, thus, will be unlawful. As you will also be aware, a failure to comply with the PSED is likely to make the process of establishing justification for indirect discrimination more difficult. We anticipate that will be the case here.

Consultation

The period for consultation is 13 days. This is for a proposal which has a scheduled start date of January 2021. This is plainly inadequate. The issues raised by the introduction of the Scheme are of considerable public importance and, even with the urgency arising from Covid, require careful consideration and consultation.

As you know, any consultation exercise, especially on a matter as important as this, must be undertaken when the proposals are at a formative stage; adequate information must be provided with the proposals, including the impact on minority groups; adequate time must be made available for individuals to respond and conscientious consideration must be given to those responses (*Gunning*). None of this is possible in the short number of weeks between now and the date upon which it is proposed the Scheme will be introduced. We have already identified above those groups with whom consultation does not appear to have taken place and there may be many others who have an interest in this issue.

Public Health Impact

Finally, we note the very important impact the EOH Scheme may have on Covid risk. There will be two groups of trial participants operating out of the same room in close proximity, with courtrooms having no external ventilation. Afternoon participants will invariably attend before the afternoon "shift" start time, to prepare, thereby increasing footfall in robing rooms, witness care, cells and other parts of the court building in the lead up to and across the lunchtime "handover" period.

HMCTS suggest in the consultation documents that this can be mitigated by updated building risk assessments, not yet undertaken, for which HMCTS are responsible.

We do not accept that this is a safe way in which to proceed. We do not accept that HMCTS is the appropriate department to assess the public health risk at this stage in the pandemic. Transmissions rates remain dangerously high, social distancing is still in place and vaccines and testing are, not yet, widely available.

We have seen no assessment of the scheme by an independent scientific body, Public Health England or the Health and Safety Executive. We are therefore deeply concerned about the avoidable exposure of our members, and other court users, to unsafe working conditions.

We observe that there is no sunset clause in the proposal, only a review date, provisionally, set for April 2021. We are unpersuaded that the Scheme is intended as either temporary or for use solely in the currency of the pandemic. Earlier pilots have been directed at the permanent introduction of this scheme, and similar schemes - in 2002 (The Bow Street Project), 2010 (The Croydon Project), 2012 (The Flexible Criminal Justice System Pilot) and 2017 (The Extended/ Further Operating Hours Pilot).

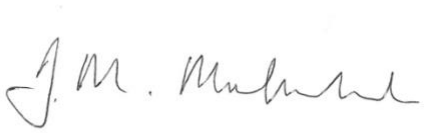
Gemma Hewison, Director of Strategy and Change for HMCTS, has said in a witness statement provided to the Administrative Court dated 27th October 2020 that the outstanding jury trial caseload may be reduced to pre-Covid levels by March 2023 although, clearly, there

is no guarantee that this will be the case. The only reference to a 'pre-Covid baseline' to date has been that set out in the MOJ's updates and refers to the end of February 2020. The backlog at that point was 39,331 cases; itself, an unacceptable rise of 23% in the previous 11 months (31,916 at 31 March 2019). We are, therefore, deeply concerned that the scheme will be in place for years and that it will become so embedded in the criminal justice system that it will lead to a permanent change in the sitting hours of the criminal courts with a consequently deleterious effect on the diversity of the profession.

We trust these matters will receive your very urgent attention. We would be grateful for a full reply within 7 days given the truncated consultation period and the imminence of the proposed introduction of the Scheme.

Yours Sincerely,

James Mulholland QC, Chair of the Criminal Bar Association



Jo Sidhu QC, Vice Chair of the Criminal Bar Association