

CBA Young Bar Committee Response to HMCTS ‘Consultation with legal professionals on COVID operating hours in the Crown Court’

14 December 2020

Introduction

1. The CBA represents the views and interests of practising members of the criminal Bar in England and Wales. The CBA Young Bar Committee is a sub-committee of the CBA.
2. The Young Bar Committee (YBC) discusses issues raised by young barristers about the criminal justice system and inform the CBA. A young barristers’ practice differs from that of established practitioners and they face different challenges as a result.
3. The CBA YBC adopt the contents of the consultation response submitted on behalf of the CBA. The CBA YBC have serious concerns about the introduction and operation of the “Covid Operating Hours” scheme (“the Scheme”) as it does not account for reality of practice as a young barrister and will have a detrimental impact on the health and wellbeing of young barristers.

Realities of practice

4. Young barristers often travel great distances to work. This could involve travel times of up to 2 hours each way, sometimes more. Counsel should arrive at court at least 1 hour before a hearing to have a conference with the client and discuss the case with their opponent. This means arrival at the court building will have to be

open from 8am and a young barrister will need to leave home in the early hours in order to get to court.

5. Following hearings, counsel should spend some time discussing the case with their client before leaving court. If attending for a late listing, this means finishing in court at 6pm, having a conference until 6:30pm and then arriving home in the late evening. The YBC are concerned that this has been raised as an issue during the COH pilot with a barrister reporting that they did not get home until 8pm by which time their child was already in bed [page 16].
6. Young barristers often receive their work for the next day at 5pm and spend their weekday evenings preparing the case. Early starts and late finishes as part of the Scheme will have a detrimental impact on counsel's ability to prepare cases properly as there will be less time in the evenings and morning. To ensure that work is ready for 9am, it is inevitable that wellbeing will have to be sacrificed.
7. Once at court, the hour before a trial day starts is vital for ensuring that final preparations are complete, and the trial can proceed smoothly. Starting at 9am will not allow sufficient time to prepare for the trial day properly, resulting in delay which is reflected in the figures provided by HMCTS. COH courts are more likely to be delayed and more likely to be delayed by a more significant amount (in excess of 30 minutes) than standard hours courts [page 11]: only 15% of COH cases started on time compared to 24% in the standard hours court; 23% of Scheme cases experienced delay of more than 30 minutes compared to 19% in standard hours courts.
8. Though the figures indicate that COH courts are less likely to overrun than Standard hours courts, 19% of am sessions overran which may explain why the pm sessions were more likely to experience delay in starting.
9. Pupils are in a vulnerable position in chambers because they are at risk of not being invited to stay as a tenant at the end of pupillage. For this reason, pupils are under pressure to accept work without complaint. They are vulnerable to being given

work that is unattractive to more senior members of the profession for reasons such as the court location, remuneration or the type of case.

10. Cases with listings at the extremes of before 10am or after 4pm are more likely to be given to pupils who are unable to complain about the time of the listing and the impact this has on them, as outlined above and below.
11. Once taken on, young barristers remain vulnerable. The most junior tenants in a chambers often have very little control over their work diaries. Chambers' structure means that the most junior tenants are often provided with returned work the night before a trial. This can mean an extensive amount of preparation is required overnight. The CBA YBC is concerned that this scheme does not acknowledge this issue. It is reasonably foreseeable that young barristers will finish a trial in a "late trial slot" at 6pm and then be expected to commence a new trial early in the morning the next day. The further erosion of personal time will contribute to the retention issues faced by the young criminal Bar.
12. Young barristers are more likely to appear in the Magistrates' Court and it appears that Extended Operating Hours are being adopted, in effect, without any form of consultation. The rollout of Extended Operating Hours to the Magistrates' Court must be stopped in order to prevent burnout as elaborated upon below.

Detrimental impact on health and wellbeing

13. Young barristers already work long hours during the week and at the weekend. Papers are received at 5pm that must be prepared overnight for the next morning. Inevitably, this results in young barristers receiving less than the recommended 8 hours sleep every night during the working week. Additionally, there is no time to unwind from a stressful day. Young barristers are already grappling with the challenges that this presents for maintaining their mental health and personal relationships and some suffer from burnout. This directly leads to many leaving the Bar.

14. In order to prepare for Monday's work, hours are already put in at the weekend which further takes away time from relaxation and quality time with family. Many young barristers are familiar with spending the majority of Sunday preparing their cases. This is on top of any Saturday court lists which are the responsibility of many pupil barristers in London, again often with little or no control over their attendance.
15. The Scheme will require barristers to start earlier (at 9am) and finish later (at 6pm). This provides less time for preparation in the evenings or morning and the only option for 'making more time' is to reduce the number of hours that the barrister sleeps. This is supported by feedback from "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" [page 16]. Further, a Judge commented that "the PM court is not equal to the AM. Nobody wants to be there. The energy is negative, people are very flat and tired" [page 16]. Accordingly, the Scheme is not sustainable and does not foster a healthy, inviting or modern work environment.
16. Wellbeing at the Bar is an issue that the profession is trying to address due to the amount of time and energy that has to be put into work. The Scheme will undermine these efforts. It is unacceptable that young barristers should have to sacrifice their own health, personal relationships and interests for the sake of a job. Anecdotally, many at the young bar have heard of talented colleagues being dissuaded from entering the Criminal Bar or leaving the profession due to the lack of suitable remuneration in return for the demands of a stressful job. In the long-term, this will harm diversity at the Bar and access to justice for the public.

Response to Consultation Questions

17. The CBA YBC are concerned that the main objectives of the research and the consultation questions are based upon an assumption that the Scheme will continue. It does not appear that HMCTS are considering all options, including ending the Scheme, which undermines the credibility of this consultation. This is further supported by the 'summary assessment of COH' which only focuses on the positive outcomes of the research and ignores the alarming issues elaborated on below.
18. The CBA YBC are further concerned that the headline of the Consultation is the Scheme will dispose of 3.5 trials per week compared to 0.9 in standard hours courts. These figures must be tempered by the acknowledgement of the courts 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" [page 14]. Therefore, it was inevitable that a COH court would dispose of more trials. Had those cases been listed in standard hours courts, the figures would not have looked so attractive.
19. Further, it is alarming that 40% of legal professionals rated their involvement in the COH pilot as poor or very poor compared with only 20% rating the experience as good or very good. The positive reviews on the COH pilot significantly reduce to only 10% if looking at the pm sessions alone. These figures should make HMCTS consider whether the Scheme should continue at all rather than widening use of the Scheme to other court centres.
20. The answers to the following questions do not detract from the CBA YBC's primary position that the Scheme should not be rolled out to other court centres.

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

21. The CBA YBC adopts the CBA's response to this question.
22. The CBA YBC does not consider any "improvement" to the COH model would make it suitable. The YBC is unable to make any suggestions without having reviewed the costs attached to this scheme being brought in, and how those costs compare to increasing the number of ordinary court rooms, use of further nightingale courts, use of recorders, and use of CVP for non-jury matters without courtrooms being required. The CBA YBC does not consider that those options have been properly explored by HMCTS.
23. The CBA YBC is opposed to this scheme for the reasons set out above.

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

24. The CBA YBC adopts the CBA's response to this question.
25. The CBA YBC does not accept that any of the features scheme works well; no amount of strengthening will balance the harm it will do to the retention of the most junior in the profession. The CBA YBC is alarmed that no meaningful consideration has been given to the impact this scheme will have on retention and diversity of young women, young people of colour and young religious minorities. That failure has angered many young criminal barristers, and they are prepared to take action against this scheme.

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

26. The CBA YBC adopts the CBA's response to this question.
27. Prior to the transition and rollout of COH, proper consideration must be given to the alternative methods of maximising utilisation of the court estate set out on the CBA response.

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

28. The CBA YBC adopts the CBA's response to this question.

29. The user groups identified in the CBA response must be consulted prior to any implementation of the Scheme.

Do you agree 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?

30. The CBA YBC adopts the CBA's response to this question.

31. Any implementation will have a significant detrimental impact on the young criminal Bar. As "key-workers" who have attended courts throughout national and regional lockdowns to key the system functioning, many young criminal barristers have been under extreme stress throughout 2020. The implementation of this scheme for any period of time would cause a significant number of those young practitioners to leave the criminal Bar. The scheme is not acceptable.

CRIMINAL BAR ASSOCIATION YOUNG BARRISTERS' COMMITTEE

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