

Mishcon de Reya

Our Ref: SK/DP/RL

Your Ref:

FOR THE ATTENTION OF JOANNA GREGSON, DANIEL POOLE AND LAURAN MINGINS

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**BY EMAIL ONLY (JOANNA.GREGSON@EQUALITYHUMANRIGHTS.COM;
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Dear Sir or Madam

**Our client: Criminal Bar Association
Request for a Section 31 Review in relation to HM Courts and Tribunals
Service**

We are instructed by the Criminal Bar Association (the **CBA**).

We write on behalf of the CBA respectfully to request that the Equality and Human Rights Commission (**the Commission**) invokes its powers pursuant to section 31 of the Equality Act 2006 (the **EA2006**) to assess the extent to which or the manner in which HM Courts & Tribunals Service (**HMCTS**) has complied with its public sector equality duties (a **Section 31 Assessment**) in relation to a proposed extension of court operating hours.

The CBA is deeply concerned that HMCTS is using the Covid-19 pandemic as an excuse to drive through, without meaningful consultation, reforms to court operating hours that have previously been shown to be unworkable and discriminatory.

We set out below the background to HMCTS's proposal, the CBA's response and the relevant equality law.

Background

The criminal justice system of England and Wales is responsible for the administration of criminal cases throughout the jurisdiction. HMCTS is a fundamental cornerstone of that system. It is critical for the proper operation of British justice that those involved in the administration of justice (including but not limited to jurors and advocates)¹ are representative of British society. For the reasons set out in this letter and its enclosures, our

¹ [Diversity and Fairness in the Jury System \(ucl.ac.uk\)](https://www.ucl.ac.uk/legislation/2019/09/diversity-and-fairness-in-the-jury-system)

client has real and immediate concerns that HMCTS's current proposals strike at the heart of the fair and efficient operation of the British criminal justice system.

Operational capacity in the criminal justice system has been an issue for a number of years. As a result of the significant underfunding of HMCTS, including substantial reductions to the number of court sitting days and funding for Recorders between 2018 and 2020, a sizeable case backlog had built up, which was then exacerbated by the Covid-19 pandemic. HMCTS has repeatedly attempted to introduce extended operating hours (**EOH**) during the past 18 years, the most recent attempt in 2017 being abandoned because it was unworkable and discriminatory.

Standard court operating hours are 10am to 4.30pm, Mondays to Fridays with a 60 minute break (**SOH**). It is, however, important to emphasise that the work of criminal barristers outside SOH is already unpredictable. Barristers travel to numerous courts, many of which are a long distance away from their home and trials tend not to start or end on time. Barristers work long hours before and after courts, undertaking preparation, taking instructions and working on other cases.

The Consultation

On 27 November 2020, HMCTS opened a consultation on "Covid Operating Hours" (the **Scheme**), which was originally open for written responses until 11.45pm on Thursday 10 December 2020 (**Consultation**)² (a period of just 9 working days), but now appears to have been extended to 11.45pm on Monday 14 December 2020 (a period of just 11 working days).

The Scheme follows a pilot EOH scheme operated in seven Crown Court centres in September and October 2020 and is almost identical to a pilot model tested by HMCTS in 2017³.

The Scheme can be summarised as follows:

- One trial courtroom runs two separate morning and afternoon sessions of 9am to 1pm and 2pm to 6pm. (**EOH**)
- At least one other trial court room runs SOH.
- The Scheme would be implemented at 65 Crown Court sites which have at least two trial courtrooms available.

Should a decision be taken to roll out the Scheme nationally, HMCTS anticipates that this will commence from mid-January 2021. It is stated that the Scheme is a temporary measure with a review anticipated to take place in April 2021 but no end date was originally set. The CBA repeatedly asked HMCTS to provide an end date for the operation of the Scheme and on 7 December 2020 HMCTS stated that the Scheme would end by the end of June 2021. However, it is clear to the CBA that HMCTS will extend the Scheme well beyond the

²https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/939710/COH_consultation_document.pdf

³ <https://insidehmcts.blog.gov.uk/wp-content/uploads/sites/171/2017/10/Flexible-Operating-Hours-Pilots-Prospectus.pdf>, pp. 10 - 11

proposed end date. Gemma Hewison, a senior HMCTS official, recently asserted in a written statement to the Administrative Court that the number of outstanding cases was not anticipated to return, even to the high levels immediately pre-Covid, until, at least, March 2023.

The Consultation anticipates that shorter, more straightforward trials will generally be more suited to EOH Courts⁴. It should be emphasised that because these courts are more likely to be used to deal with shorter, less complex cases, the burden will fall excessively on junior practitioners. Such junior practitioners are significantly more likely to be female⁵, black, Asian or minority ethnic⁶ or disabled⁷ than more senior members of the Criminal Bar.

HMCTS states that the purpose of the Scheme is to "*further maximise the use of [HMCTS's] existing estate through opening our buildings for longer during COVID-19*"⁸.

The Consultation document contains a "Summary of the Public Sector Equality Duty Statement", rather than an Equality Impact Assessment⁹. The statement acknowledges the Scheme has the "*potential for indirect sex discrimination, linked to impacts on legal professionals with caring responsibilities, and in particular the impacts on female legal professionals*". No objective justification or analysis of proportionality is provided.

HMCTS subsequently uploaded a further, more detailed Public Sector Equality Duty Statement¹⁰. Whilst again acknowledging a potential indirectly discriminatory impact on women and in relation to religious belief (for example, due to the Jewish Sabbath starting at sunset on Fridays and Islamic prayers taking place from Friday afternoons), it remains totally inadequate to meet the needs of the public sector equality duty. The Statement identifies no quantitative or qualitative research save for a survey of only 40 people¹¹, there is no weighting of the impact of the Scheme on jurors or victims by reference to protected characteristics and it contains sections that are patently irrational. For example, it assumes that out of hours sitting will benefit age specific groups because they will have off peak travel costs despite this obviously not being the case.¹²

⁴https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/939710/COH_consultation_document.pdf, p.26

⁵ [Diversity-at-the-Bar-2019.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/939710/Diversity-at-the-Bar-2019.pdf) (barstandardsboard.org.uk), p.11

⁶ [Diversity-at-the-Bar-2019.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/939710/Diversity-at-the-Bar-2019.pdf) (barstandardsboard.org.uk), p.13

⁷ [Diversity-at-the-Bar-2019.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/939710/Diversity-at-the-Bar-2019.pdf) (barstandardsboard.org.uk), p.17

⁸ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/939710/COH_consultation_document.pdf, p.2

⁹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/939710/COH_consultation_document.pdf, p.26

¹⁰ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/939441/Public_Sector_Equality_Duty_statement.pdf

¹¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/939441/Public_Sector_Equality_Duty_statement.pdf, para 22

¹² https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/939441/Public_Sector_Equality_Duty_statement.pdf, para 27

CBA's Response to Consultation

The CBA submitted its response to the Consultation on 2 December 2020, entitled *Report of the Criminal Bar Association Working Group on Court Capacity* (the **Report**).¹³ We have enclosed a copy of that Report in Annex 1 for the Commission's ease of reference. While the CBA has stated that court capacity needs to be increased to reduce the backlog of jury trials in the Crown Court and prevent "burnout" due to excessive sitting hours in the Magistrates Court, it does not endorse the Scheme and sets out five alternative (and non-discriminatory) proposals. Of particular note to the Commission, the Report highlights the discriminatory impact of the Scheme on individuals sharing the following protected characteristics:¹⁴

- Women – On the basis that the Scheme's extended court sitting hours puts women at a particular disadvantage because women continue to carry out the primary caring responsibility for young and old within society.
- Race – On the basis that extended sitting hours will be applied to the less complex cases, which are typically dealt with by more junior practitioners who are more likely to be from black or minority ethnic backgrounds.
- Religion – On the basis that observers of certain religions may be at a particular disadvantage from extended sitting hours because of the need to undertake religious observance.
- Disability – On the basis that extended sitting hours would put certain disabilities at a particular disadvantage.

The CBA's Report was followed by a letter dated 3 December 2020 from the Chair and Vice Chair of the CBA to Kevin Sadler, Acting Chief Executive and Operations Director of HMCTS, in order to draw HMCTS's attention to serious concerns about the legality of the Scheme.¹⁵ The letter is enclosed as Annex 2 for ease of reference. As well as highlighting the discriminatory impact identified above, the Letter identified significant failings by HMCTS to comply with its public sector equality duties (set out in more detail below).

Presentation by HMCTS

HMCTS delivered an online session on 7 December 2020 to address questions raised as part of the consultation (**Presentation**). The session has been uploaded onto YouTube¹⁶ and a readout has been published on the HMCTS website¹⁷. HMCTS acknowledged there is "a possibility that barristers with caring responsibility, who are disproportionately women, are not given briefs by their chambers. Another knock-on effect is that clients may decline or wish to change their

¹³ <https://www.criminalbar.com/wp-content/uploads/2020/12/2020-Report-of-the-CBA-Working-Group-on-Court-Capacity-2.12.20.pdf>

¹⁴ [Report-of-the-CBA-Working-Group-on-Court-Capacity-2.12.20.pdf \(criminalbar.com\)](#), pp.26 – 31

¹⁵ [CBA-Letter-to-HMCTS-03.12.20.pdf \(criminalbar.com\)](#)

¹⁶ [COVID Operating Hours - YouTube](#)

¹⁷ [HMCTS COVID operating hours consultation: readout from presentation and Q&A session - GOV.UK \(www.gov.uk\)](#)

representation if their lawyer cannot attend a [EOH] hearing, rather than wait for a standard hours one"¹⁸.

In responding to questions about discriminatory impact, HMCTS rejected any proposal to increase the barristers' fee in light of likely increased childcare costs as a result of the Scheme. The Presentation also acknowledged that 40% of legal professional respondents rated their experience of the trial of the Scheme as "poor or very poor" and a further 40% rated it neither good nor poor. Only 20% of respondents rated the Scheme "good or very good".¹⁹

Relevant law

As a public body, HMCTS is subject to the public sector equality duties (**PSEDs**) set out in section 149 of the Equality Act 2010 (the **EA2010**). In summary, this means that HMCTS must have due regard to the need to:

- Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act.
- Advance equality of opportunity between people who share a protected characteristic and those who do not.
- Foster good relations between people who share a protected characteristic and those who do not.

It is submitted that HMCTS has acted, and continues to act, in clear breach of the PSEDs in the manner in which it has proposed a Scheme which, by its own admission, will have a discriminatory effect on women and certain religious groups and, we submit, on other protected characteristics as set out above. The Scheme will also have a discriminatory effect on female and disabled jurors and jurors from certain religious groups. It has done so while failing adequately to assess the discriminatory impact via a thorough Equality Impact Assessment and without providing any justification or proportionality assessment. Further, it has allowed for an inappropriately short consultation period and failed to identify bodies with whom to consult given the potential discriminatory effect of the Scheme, such as women advocates, black, Asian and minority ethnic professional associations, disabled groups and trade unions amongst others. Consequently, it is submitted that the consultation conducted to date by HMCTS (such as it is) is itself discriminatory, and should be extended to include, inter alia, meaningful consultation with such groups.

In light of this, the CBA respectfully requests that the Commission conducts a Section 31 Assessment in respect of HMTCS's proposals under the Scheme, and the manner in which HMCTS has sought to consult on those proposals.

¹⁸ [HMCTS COVID operating hours consultation: readout from presentation and Q&A session - GOV.UK \(www.gov.uk\)](http://www.gov.uk), para 22

¹⁹ [HMCTS COVID operating hours consultation: readout from presentation and Q&A session - GOV.UK \(www.gov.uk\)](http://www.gov.uk), para 14

In the circumstances, such an assessment would be consistent with the Commission's general duties under section 8 EA2006, including in particular the duties to promote understanding of the importance of equality and diversity, to enforce the EA2010, and to work towards the elimination of unlawful discrimination.

We also note that in the Commission's 2019-2022 Strategic Plan (submitted to Parliament in June 2019), the Commission commits to tackling discrimination in the workplace, promoting fair treatment at work, and strengthening the PSEDs. It is the CBA's view that commencing an assessment of HMCTS in these circumstances falls squarely within the scope of each of those objectives.

As above, to date, HMCTS has not provided the CBA with an Equality Impact Assessment in respect of the Scheme as proposed. Should the Commission agree to commence a Section 31 Assessment, we respectfully suggest that the Commission, inter alia, seeks a copy of any Equality Impact Assessment produced by HMCTS in respect of the Scheme, pursuant to its powers in Schedule 2, paragraphs 9 and 10 EA2006. It is the understanding of our client that no Equality Impact Assessment Statement has been undertaken by HMCTS.

Urgency of request

As set out above, HMCTS proposes to implement the Scheme in January 2021, without engaging in any meaningful consultation. We understand from our client that this is likely to have an immediate impact on the diversity of the junior bar and composition of jury panels. There is a well-founded fear, based on reports from a cross-section of the CBA membership, that the introduction of the Scheme would accelerate the departure of many including junior female practitioners, in particular, from the profession.²⁰ On behalf of our client, we have today also written to HMCTS to request that, in light of the content of this letter and our referral to the Commission, the consultation be suspended pending consideration of its scope and terms of reference and plans for any proposed implementation should cease.

We look forward to hearing from the Commission as soon as possible with regards its intended course of action, whether pursuant to section 31 of the EA2006 or otherwise.

Please do not hesitate to contact us if we, or our client, can be of any further assistance to the Commission.

Yours faithfully

Mishcon de Reya

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²⁰ [Women in Criminal Law, Survey on Extended Operating Hours Executive Summary 28 September 2020](#)

Annex I – CBA's Response to the Consultation

The logo for Mishcon de Reya, featuring the text "Mishcon de Reya" in a white serif font centered within a solid orange rectangular background.

Annex 2 – CBA's Letter to HMCTS