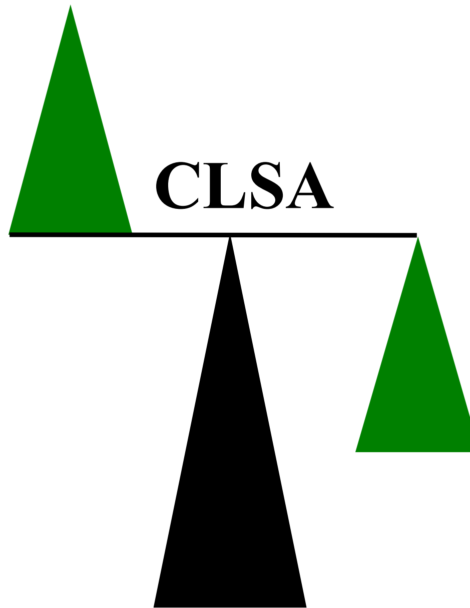

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Response of the Criminal Law Solicitors Association to the Covid Operating Hours in the Crown Court Consultation

The Criminal Law Solicitors' Association is the only national association entirely committed to professionals working in the field of criminal law. The CLSA represents criminal practitioners throughout England and Wales and membership of the Association is open to any solicitor - prosecution or defence - and to legal advisers, qualified or trainee - involved with, or interested in, the practice of criminal law. The CLSA is responding on behalf of its members.

The backlog in Crown Court cases predates the Covid Pandemic. While the pandemic has exacerbated the problem, it is not the original cause. At the end of February 2020, the backlog stood at 39,331. While Covid-19 has increased the backlog there was already a significant backlog already. Nor is this level of backlog unprecedented. We note that in 2015 the Crown Court backlog was well over 50,000 cases.[1] The primary causes are longstanding problems of cuts in Judicial sitting days, court closures, and the underfunding of Criminal Defence work, the Crown Prosecution Service, the Police and the independent Bar.

It is impossible not to notice that this consultation has been released at the same time Blackfriars Crown Court, which closed its eight courtrooms in 2019, is being redeveloped into a 385,000 square foot office and community space entitled “roots in the sky”.

The Covid Operating Hours (“COH”) proposals are of real concern to our members, who act as Advocates, but also litigate as Solicitors before the Crown Court. The impact of COH on our members is just as severe as that on the independent bar.

Although the stated intention is that COH will cease in June 2021, we note that there is a further review intended in April 2021. The possibility remains that COH may be extended past June 2021 or become permanent. There have been previous attempts to impose extended hours on the Magistrates’

[1] Criminal court statistics quarterly: April to June 2020 - GOV.UK (www.gov.uk)

Court and it is difficult not to infer an intention to further attempt a roll out of extended hours to the Magistrates' Court.

For the reasons which we set out below, we believe COH courts are discriminatory, will damage the work life balance and mental health of our members, and will have a hugely damaging impact on the retention of Solicitors, particularly women and those with protected characteristics. This discrimination applies not just to legal professionals but to Witnesses, Jurors and Defendants, and others. There are strong grounds to argue that the discrimination against those with protected characteristics render COH unlawful. In our view COH poses a risk to the proper administration of justice.

The potential benefits of COH have been overstated. The current backlog of cases in the Crown Court did not begin with the Covid pandemic. There are other means by which the backlog can be addressed which are not discriminatory and which will be more effective. We are further of the view that the consultation process is itself flawed.

We therefore strongly oppose the proposed roll out of COH.

Discrimination against People with Protected Characteristics

These proposals are discriminatory to people with caring responsibilities that are affected by having to arrive at court early or leave late, and as much is admitted by the Public Sector Equality Duty statement ("PSED"). The difficulties extended hours cause are obvious. It is also not just children. Many people have elderly or ill relatives whom also need care.

Primarily this is discrimination against women and single parent families. Many women within the legal profession (both Barristers and Solicitors) are mothers of young children. This is a backward step in the progress that has been made for equality in the Criminal Justice System.

It is not just the Solicitors and Barristers concerned that are impacted but their families. Their partners (if they have them) are left performing childcare alone. Their children have less time with their absent parent.

There are other protected groups whom are subject to discrimination. The PSED also acknowledges the impact on people with Jewish or Muslim faith, whom may be prevented from attending prayer.

What is not acknowledged in the PSED is the potential impact on those with disabilities who may not be able to attend at court at the required hours. For example a diabetic would be seriously discriminated against if refreshments are not available in a Crown Court building during a break in proceedings in an afternoon session when on site cafeterias have closed. It is not hard to think of many other potential examples of people with disabilities having difficulty with an early or a late sitting.

Solicitors firms are employers. If their clients are in a COH court they will have to allocate staff to attend court during those hours. They have a duty to their employees not to discriminate against them. It is not hard to see that enforcing working hours on staff that prevents them caring for their children, practicing their religion or which they cannot comply with because of a disability, is directly discriminatory. HMCTS appear to be of the view that it is acceptable to enforce such discrimination on Advocates and Solicitors firms that appear before the Court. It simply would be simply and straightforwardly unlawful for an employer to attempt to do so to their employees.

The alternative for Solicitors firms is to allocate that work to another employee. This imposes upon employees who have work taken from them and their colleagues who will be expected to take up the slack. It is unfair on all concerned. The other alternative is to give up the work, for example by briefing it to another outside advocate so that they can suffer the discrimination instead, and with the result that the firm loses income through no fault its own.

The proposed mitigation against this discrimination that is suggested in the consultation document is not only of little assistance; it is, to be blunt, offensive.

It amounts to this: the parties can make an application to the court have the case moved from the COH. The lawyers involved are not a party to criminal proceedings – the parties are the Crown Prosecution Service and the Defendant. The Advocates representing them can only make such an application if it is in their client's best interests. If it is not, then they could not make the application and would have to withdraw from the case if they could not meet the hours required of the COH Court. Secondly, there is no guarantee that such applications would be successful. Solicitors and Advocates are well used to being at the very bottom of the pecking order when Court listing is concerned. There are good reasons why a listed trial should go ahead when expected, and they may well outweigh the personal commitments of an advocate in the case.

Thirdly, and perhaps most importantly, it would be wholly wrong to ask an advocate to air their personal caring responsibilities, disability, or religious practice in court. In order to make such an application, by necessity they would have to inform their own client, their opponents and their opponent's client and the Court of their issue. They may well have to argue their application at a hearing open to the public.

For example, why on earth should a Jewish or Muslim practitioner be required to attend court and argue to their opponent and a Judge that the listing of a case should be altered so that they can attend prayer? Why should a practitioner who is mother or a lone parent be required to explain their child's caring arrangements in Court? These matters are deeply personal. No Solicitor, Barrister or any other professional working in the courts should be put in the position where they must choose between either returning their instructions in a case or airing such personal matters in Court so that a Judge can assess their merit. We find it very hard to understand how those proposing COH courts could think it could be acceptable.

In the Q and A session the suggestion is made that these personal issues are resolved in preparation for COH hours through consultation with local chambers and local implementation teams. It is not clear exactly what is being suggested and how it would work, and it is difficult to see how such consultation would affect the listing of an individual case. At the outset of a case the listing of a trial is conducted in open court at the plea and trial preparation hearing. If listing is then altered administratively, the only way of changing it is through an application in open court. It is hard to avoid the resolution of whether a case should be included in a COH court being reached at a hearing in open Court. In any event consultation with local chambers excludes local firms of Solicitors who employ solicitor advocates and who provide litigation support. They also exclude Solicitors firms and chambers that are not local to the court centre.

Work life Balance and Mental Health

Regardless of childcare or other commitments COH will inevitably have an impact on legal professionals. Work does not begin and end at the Court door. Defence solicitors and advocates need to be at court before the start of the sitting to confer with the prosecution and with their client. They need to be there after the end of the court day to do the same. They are often expected to work during lunch to prepare work that is needed later in the day. It does not end when they leave court. They have a commute to and from Court and many professionals face a long commute. When they do get home, there is the next day in court and other professional commitments to attend to.

There is also the prospect that Solicitors and Advocates will be required to appear in Court throughout the day. While the Consultation document claims that no-one would be required to work in the AM and PM sittings, we note in the pilot assessment report that in more complex cases Judges would use the morning to resolve legal issues before the beginning of the sitting in the afternoon.

Faced with this, it is not hard to see that, even without childcare or other commitments, the prospect of having court hours extended is one that causes legal professionals to react with horror. The impact on work life balance and as a consequence, the impact on the mental health of Solicitors and Barristers working in the Courts is not hard to see.

Our fears are borne out by the COH Pilot Court Assessment.

a. Court Staff, Judges and Professionals who worked in the PM COH courts reported arriving home later in the evening which impacted negatively on their work live balance.

b. Some Courts reported it was difficult to find Judges and Recorders to work in the PM Court because of issues with commuting and caring commitments.

c. HMCTS staff reported that clerks and ushers who didn't have childcare commitments were disproportionately less likely to work the PM court.

d. There were concerns from some courts that extra care needed to be given to the selection of jurors as it was reported that potential jurors with childcare responsibilities preferred to choose the AM session.

e. Probation staff reported no problems in resourcing the pilot although said they would have to look at resourcing plans if this was made more permanent.

f. The limited survey of legal professionals conducted in the pilot COH courts, 40% rated their experience as poor or very poor.

The fact that HMCTS staff found it difficult to find *Judges prepared to sit* in the PM courts is a red flag as to the impact on work life balance of those working in the courts.

This has a knock on effect on the quality of work that can be expected from professionals that are exhausted and who have little contact with their family and friends. Solicitors firms are under an ethical obligation to ensure that they

provide a proper standard of work for their clients. It is also not hard to see how there will be an effect on the quality of justice administered generally when both prosecution and defence advocates have are working long hours at court with less time to prepare, and when witnesses are giving evidence and jurors are deliberating at unsocial times.

Retention Crisis

This consultation takes place against the background of what is nothing short of a crisis in the retention of solicitors conducting criminal defence work. In 2010,1861 firms held crime contracts. In 2018 it was 1271, a drop of 36%. We anticipate that since 2018 more firms will have closed their doors to criminal defence work. In 2014 the Otterburn Report showed that crime firms were operating on the margins of profitability with an average profit margin of 5% and some making no profit at all. Shortly after that report the Legal Aid Agency enforced an 8.75% cut on Solicitors fees. The impact of that cut, along with the additional real terms cut caused by a further 6 years of inflation means that firms now operate in an environment where the fee schemes make it very difficult to return any profit.

This has had a consequent impact on the salaries firms are able to offer their employees which in turn impacts upon how many people can afford to choose a career as a defence solicitor. Fewer than 3% of training contracts now include an element of criminal defence work. Many of those who are already qualified as defence solicitors are leaving the profession. The result is that there was a 29% drop in the number of accredited duty solicitors between 2016 and 2019. In 2018 the Law Society published a heat map showing the ageing nature of the profession with very few young solicitors choosing a career in criminal defence work.[2] This is before the impact of Covid-19 is factored in.

[2] https://the-law-society.carto.com/builder/85de6858-77ba-4568-b225-41ffeed3b6df/embed

Extended Court operating hours make what is already an underpaid and shrinking profession, still more unattractive. As we have set out above, they particularly impact upon women and lone parents who may well feel that if they cannot manage the conflict between their family and work life, they will resolve the conflict by leaving the profession. Talented young people who otherwise might want a career in Criminal law will chose an alternative when they see the impact on their future family life.

Costs to Solicitors Firms

It is inevitable that complying with the requirements of COH flexible courts will have a financial impact on Solicitors firms conducting trials in those courts. Whether or not it is advocacy or litigation support, the alternatives for firms are to a) ask employees to take on longer working hours, b) take on extra staff to cover that work or c) give up that work and the consequent income. This applies both to firms who are providing advocacy services in house, and those who are providing litigation support.

As an illustration, the COH pilot assessment report states that Court staff had to take on extra responsibilities as a result of COH courts and that there was a strong feeling that extra resources were needed. It is anticipated that a COH roll out will require the recruitment of additional staff to support its operation.

It is inevitable that there will be a similar impact on Solicitors firms. We note that the Q and A session webinar published on 8 December makes clear that there will be no extra funding for advocates and litigators. In particular there will be no recompense for Advocates who are forced to give up work as a result of not being able to participate in a trial in a COH court due to their personal circumstances. There is no additional remuneration for additional childcare costs. There is no additional remuneration for solicitors firms who have additional employment costs. These are additional costs firms will simply have to absorb. As set out above, Solicitors firms are operating at the very margin of profitability, even before the impact of the Covid-19 pandemic.

The suggestion that COH courts will result in greater payments because of more daily refresher fees being paid is derisory. Any additional refreshers are of no use to a firm or advocate forced to give up work as a result of COH. The suggestion that additional days in a trial results in greater payments to Solicitors' firms providing litigation support is not necessarily true. The LGFS scheme under which firms are paid has a complex structure with a number of factors that influence the fee paid. The length of trial uplift often has no impact whatsoever on the fee paid under the scheme.

Impact on other court users

All Court users will be impacted by extended hours. Jurors and witnesses will be impacted in their caring commitments and travel to court, just as much as professionals working in the court. Their work life balance matters as much as anyone else.

More than that, a key concern with witnesses will be whether or not their ability to give evidence was impacted by having to do so late in the day when they naturally will be tired. It is not just giving evidence that is stressful and emotionally draining, but also waiting to do so. Witnesses who are waiting most of the day to give evidence, will be anxious during that wait and this will have an impact upon them if they are giving evidence after a long wait. The fact that the court only started at 2pm is not really much help. It is inevitable their mind will have turned to their appearance in court during the morning before they even attended court. This could then be compounded if their evidence is then interrupted by a hard stop at 6pm, so that they then must return the following day.

We note that of the 116 interviews conducted during the pilot scheme, only 5 were with witnesses and of those 4 were written responses. Has there been any real attempt to evaluate the impact of COH on the ability of witnesses to give evidence?

Some witnesses are reluctant. For a whole host of reasons, some witnesses do not want to attend court to give evidence unless they have to. Assisting (and in some cases, forcing) them to attend court takes time and effort. Has there been an evaluation of whether having a case in COH affected witness attendance? Was extra work needed to get witnesses to come to, and stay at, Court?

As regards Jurors, the perfectly natural and understandable impact on their concentration levels late in the day are obvious. Conducting an entire trial in the afternoon and early evening will inevitably impact on the ability of a Jury to follow the evidence. One of the few feedback comments reported in the consultation document is damming. “The PM Court is not equal to the AM. Nobody wants to be there. The energy in the room is negative, people are very flat and tired”.

It is fundamental that the Court has confidence in the ability of the Jury to follow the evidence presented in court. To risk otherwise is wholly unfair to both sides in Criminal trial. The Pilot Assessment report refers to “limited feedback” being collected from Jurors. Were questions asked about their being tired and maintaining concentration in PM Sessions? Has this risk been considered and evaluated? The report is silent. The inference is that the COH is being rolled out without any evidence on the point and nothing more than crossed fingers that it will not be a problem.

However, there is another group within the Criminal Justice System that appears to have been completely forgotten in the pilot report and consultation document – Defendants. It is equally fundamental that a Defendant can follow the evidence as much as a Juror. A Defendant may choose to give evidence and, if they do, they will be impacted just as much as any other witness if they are asked to do so at the end of the day when they will be tired. This will be at a time when they are facing a trial which could be one of the most important events in their lives, and which could affect them for many years.

Defendants on bail are as likely to face the same difficulties with commutes, caring responsibilities as anyone else. Defendants in custody may well have

lengthy journeys to and from prison at the beginning and end of a court day. For those even with a short journey, an AM session may well mean they miss breakfast in the morning and if they are in a late sitting, they are likely to miss a hot meal upon their return to prison.

The Pilot study assessment has not asked a single question of a single defendant to find out if their ability to follow and give evidence is impacted by extended hours. The PSED and consultation documents do not even acknowledge Defendants, let alone address the potential impacts on them.

During the COH pilot showed witnesses and defendants were sometimes denied the ability to properly speak with the advocate presenting their case. No matter how much work is done in advance, it is inevitable that there is a need for witnesses to speak with an advocate before a trial, and for Defendants to speak with their advocate during it. Table 9 of the pilot assessment report shows a marked increase in cases in COH courts in which advocates did not have enough time to meet witnesses or take instructions from the Defendant before Court, in comparison with the standard operating hours court. It is surely unacceptable to risk allowing trials to proceed where advocates, witnesses and defendants are placed in that position.

In response to these risks, the consultation offers only one suggestion – taking a 30-minute break during the session. Whether a 30-minute break will prevent witnesses, jurors and defendants from becoming tired at the end of the day is very doubtful. There is no evidence in the PSED or pilot assessment report to suggest that it would. At best, this is hopeful guesswork. Of course, a break does not assist in any way with travel to and from court and with seeing defendants and witnesses before the court starts.

Benefits of COH

Given the problems inherent in COH, one would have thought that those proposing it would have strong and compelling evidence as to its benefits so

as to demonstrate that they are risks worth taking. On the contrary, the evidence presented in the pilot assessment report is, at best, speculative.

The headline comparison of 0.9 trial disposals per week in a standard court and 3.5 in a COH court is meaningless. It should not need saying that the disposals per week figures are not a like for like comparison. Trials were selected for the COH court on the basis that they were shorter, less complex, and more likely to crack. In addition to that, within the Q and A session published on 8 December there is the admission that in some pilot sites Custody cases could not be included in the COH court, and those cases (which are more prone to delay) would by necessity go to the standard court.

In a tacit acknowledgement of this, the consultation document then attempts to calculate a comparison based on an assumption that a standard court will sit for 5 hours per day and a COH court will sit for 7. Upon this assumption it is calculated that a COH court will dispose of 3.5 cases per week as opposed 2.5 of similar cases in a standard court.

As we have stated above, this is at best, speculation. There is no evidence base for it. None of the pilot courts attempted a like for like comparison of cases (and it says much that during the Pilots, listing officers and Judges were reluctant to list the more complex and lengthy cases in the COH court).

There is an inherent advantage to a standard court to operate more efficiently and so conclude trials more quickly.

When starting at 10.30am, or even 10am, advocates have more time to confer and prepare which will make the trial run more smoothly, for example agreeing admissions or editing interviews. A court operating standard hours can be more flexible to sit early at 10am or sit slightly later in order to accommodate a witness or other trial business.

By contrast COH courts are less flexible. There is less time at the beginning and the end of the day to resolve issues out of Court. There is no scope to sit late to make the case run more smoothly. The limited assessment results of the COH pilots showed that COH courts were more likely to experience a start

delay. At end of a session in the COH hard stop meant the court was reluctant to start hearing from a witness who would not finish their evidence due to the hard stop, with the result that Court time went unused.

Even with shorter and simpler cases, in the pilot Courts the COH courts were more prone to delays and lengthier delays, as shown by table 7 in the pilot assessment report. We are concerned to read in the report of the CBA that in a report into COH at Liverpool Crown Court (which at the time of writing we have not been granted access to), that the average sitting time in EOH Courts was 52% - i.e 4 hours per day rather than the 7 hours the consultation document assumes. The assessment report gives no figure for the overall average sitting time in the COH courts across the entire pilot.

Given the above, the estimate of 40 extra trials over a 4 week period is, to put it generously, highly speculative. There are convincing reasons to doubt the assertion that COH is an effective way of increasing trial capacity in the Court estate.

Alternatives

We have refereed in our introduction to the true reasons for the current backlog in the Crown Court. The obvious conclusion is that what is needed to deal with this backlog is a long-term strategy based upon proper investment in all aspects of the Criminal Justice System. In the short term there are measures that could be taken that will more reliably increase court capacity without being discriminatory.

At present hearings conducted remotely via CVP are still conducted with a Judge sitting in a primarily empty Courtroom with the participants and the press attending remotely.

CVP hearings need not be conducted in a full courtroom, all that is needed is a room with sufficient space for the recording equipment and for the Judge

and Clerk to be socially distanced and for other participants, including the Advocates, CPS, Solicitors firms, press and public can attend via CVP.

It should be possible to locate suitable rooms within the existing court estate either in Crown Court buildings, Magistrates Court buildings or Civil Court centres. There would be minimal adaptation needed, the rooms in question simply need to have the appropriate equipment for conducting the hearings via CVP and recording them. While this does mean members of the public cannot physically attend the courtroom, most members of the public are excluded from court buildings at present in any event, due to the need to keep the number of people in a court centre down. They can still attend remotely along with all other participants.

Listing practices can also be amended so that the number of CVP hearings are expanded. Defendants in custody can attend via link from prison. Defendants who are on bail can attend remotely or have their attendance excused from all hearings save sentencing hearings. For example, the practice at Newcastle Crown Court is for Defendants to be excused attendance from a Pre-Trial Preparation Hearing, and for the Solicitors firms representing the Defendant to write to the Defendant following the hearing with the standard warnings that would have been given had the Defendant been in attendance. The Solicitors then being ordered to upload a copy of the correspondence within 7 days to confirm that the warnings have been given.

The result is that the only non-trial hearings that would require a full Court room would be sentencing hearings where the Defendant is on bail (where for obvious reasons, a secure dock and custody facilities will be required).

By changing listing practices in this way, it should be possible to remove most of the non-trial work from courtrooms which can then be adapted and used for the conduct of jury trials. We see no reason why the capacity of the court estate to conduct jury trials cannot be significantly increased with these combined measures.

In addition to this suggestion, we also refer to the Nightingale Court report prepared by HHJ Kearl QC and others, published on 27 May 2020. This report

contains several recommendations which have not yet been implemented and which we commend as far superior alternatives to COH.

Flawed Consultation Process

Aside from our substantive objections, we believe the process by which the consultation has taken place is also flawed.

This consultation was announced on 30 November. The deadline for responses is 14 December. It is proposed that the COH roll out begins in January 2021. This is an extraordinarily short timeframe.

There have been documents prepared for the purposes of the evaluation of the pilot schemes that have not been disclosed as part of the consultation process. We have had sight if a report by the Criminal Bar Association which refers to two documents that have not been published:

a) “Covid Operating Hours – Liverpool Crown Court’ compiled by the ‘HMCTS user experience and insight team’, dated 12th October 2020.

b) ‘COVID Operating Hours –Crown court pilot assessments- Interim MI’ Report dated 5th November 2020.

The CBA state that they do not have permission to share these documents. They do not form part of the documents disclosed for the purposes of the consultation. The response of the CBA suggest that there is data in these documents, for example the percentage of time COH courts sat in a particular session, that are not contained in the documents that have been disclosed. They should be disclosed so that consultees can make informed consultation responses. Consultees are entitled to expect that a government ministry undertaking a consultation exercise will do so in a way that is fair and transparent. A failure to disclose relevant documents can render a consultation process so flawed that it is unlawful – see *R (the Law Society) v Lord Chancellor* [2018] EWHC 2094.

We have requested these documents in writing ahead of the Q and A session published on 8 December. We have not received a response, nor was our request addressed in the Q and A.

The documents that have been disclosed are not adequate to form the evidence base for a proper consultation. There have been 116 interviews with court users. Just 5 of those interviews were with witnesses, and four of those were in the form of written responses. "Limited" feedback has been collected from Jurors. There has been a survey of legal professionals (of which only 13 respondents were women), which the pilot assessment report concedes is not representative of the entire profession. There has been no attempt whatsoever to interview Defendants or find evidence of the potential impact upon them.

We have referred to the discriminatory aspects of COH, and what limited evidence there is from the Pilot schemes supports our view that rather than detracts from it. As a result, the PSED statement is reduced to largely making assertions without evidence. It does not acknowledge the risk to those with disabilities. There is not attempt whatsoever to assess the impact on Defendants. The mitigations suggested in it are, at best, guesswork, and at worst, are themselves discriminatory.

To be proper, a consultation must be undertaken at a time when proposals are still at a formative stage, it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of the consultation must be conscientiously taken into account – see *R v North and East Devon Health Authority ex parte Coughlan* [2001] QB 213.

The timeframe for this consultation, the failure to disclose highly relevant documents relating to the results of the pilot schemes, the limited evidence base, and the inadequate PSED mean that, in our view, the consultation process is flawed.

Consultation Questions

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

By cancelling it. We do not say that to be sarcastic, but given the discrimination and risks to the administration of justice inherent in COH, we cannot support it in any form.

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

Please see our response above.

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

There would need to be a meaningful evidence base from which the costs and benefits to COH could be considered. There would have to be a properly drafted PSED and impact assessment. For the reasons we have set out above, there is so such evidence base from the previously conducted pilots.

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

Practitioners including not just Advocates but Solicitors and Solicitors firms. In particular female practitioners, others with caring responsibilities, religious backgrounds, and disabilities. Witnesses, Jurors, the Judiciary, HMCTS staff, Probation staff, particularly those who share the above protected characteristics. Defendants. That no thought whatsoever has been given to Defendants is astounding.

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?

It should not be rolled out and as such a review in April 2021 should not be necessary.