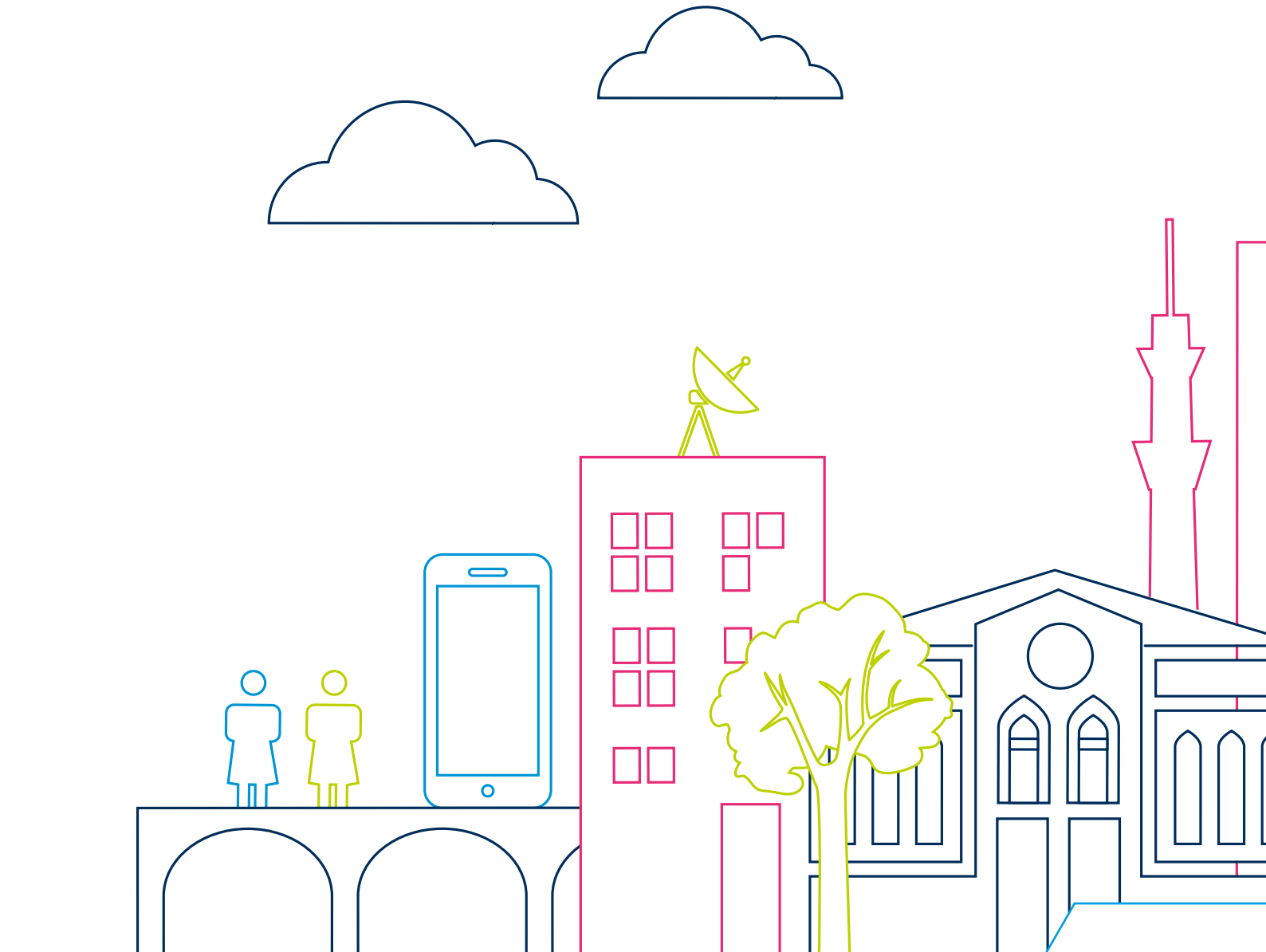




HM Courts &  
Tribunals Service

# Temporary Operating Arrangements

Public Sector Equality Duty Statement  
July 2021





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# Introduction

1. The Public Sector Equality Duty (PSED) is set out in Section 149 of the Equality Act 2010. This document records how, in considering the Temporary Operating Arrangements (TOA) proposals, HMCTS has had, as required by the PSED, 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
2. The protected characteristics are: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion and belief; sex; and sexual orientation. The 3 aims of the duty apply to all protected characteristics apart from marriage and civil partnership, which is only relevant to the first aim (eliminating discrimination).
3. This PSED statement covers both public and professional court users. Impacts on HMCTS staff are not within scope of this assessment.
4. HMCTS continues to undertake proportionate equality assessments for our COVID-19 related justice work in line with our existing approach and informed by Equalities and Human Rights Commission (EHRC) guidance (Equality and Human Rights Commission, 2014). We have used the best available evidence within the time available to consider the likely broad equalities impacts of these proposals, within the context of needing to respond to COVID-19 challenges and the changing situation this brings about.
5. This statement has been revised and updated to reflect responses to the consultation (HMCTS, 2020a) on potential wider roll-out of TOA (known as Covid Operating Hours, or COH, at the time of the pilots and consultation) in the Crown Courts. It should be read alongside the consultation response document, which provides an overview of all the responses received. In this statement we have drawn on the consultation responses to reflect:
  - new evidence submitted in response to the consultation
  - existing evidence, referred to in the consultation responses, which was not used in the earlier PSED document. This includes some reporting on the earlier use of extended operating hours – which comes with the caveat that the COH pilots were significantly different from the models, and context, of previous testing of extended and flexible court operating hours. This statement also now includes brief references to findings from the Flexible Operating Hours (FOH) project (IFF Research / Frontier Economics, 2021). Again, there are caveats around the extent to which these findings are relevant or applicable to TOA in the Crown Courts. The FOH projects comprised two pilots, in Manchester Civil Justice Centre and the County Court at Brentford. They differed from TOA in a number of ways, including jurisdiction (FOH was tested in civil and family courts) and used different models (the FOH model in Manchester included the shifting of a sitting day from 10-4pm to 2-7pm and in Brentford there were additional AM (8-10-30am) and PM (4:30-7pm) sessions, so both different hours to TOA
  - existing evidence, that was referred to in the earlier PSED statement, but which we have revisited in the light of the consultation responses
6. As discussed in the next section, this revised PSED statement covers both the original model piloted in late 2020, and a further model developed following the consultation.

## Proposals summary

7. As part of HMCTS' Crime Recovery Plan, one of the four pillars to recovery is to consider adopting different operating hours as part of maximising HMCTS' own estate. The pandemic and its necessary countermeasures continue to be an unprecedented challenge to courts and tribunals which merits an unprecedented response. COH was piloted in 7 Crown Court centres to test if we could do more in the limited space we had to support recovery. The COH pilots were unrelated to previous pilots which have tested extended and flexible operating hours in the civil and family courts. COH was purposefully designed to respond to the impacts of COVID-19, and to be a temporary response to increase capacity.
8. The TOA model used in the pilots involves the running of dual court lists in the same courtroom, one in the morning and one in the afternoon. Alongside what was then called a 'COH court' at least one 'standard hours' trial court operated at the same court site. This is referred to as the original piloted model.
9. No one individual (either a public or professional user) is expected to participate in both the morning and afternoon session in one day. For example, morning trials that last more than one session would return for the morning session the next day. The TOA dual list would be used in one courtroom per site and there is always at least one other courtroom running standard hours jury trials.
10. Representations to remove cases from TOA lists can be made by or on behalf of any party at a pre-trial hearing, which takes place in advance of confirming whether the trial will be listed into a TOA court or a standard hours court. Alongside this, there are provisions for practitioners to make an application, supported by reasons, to move a case should attendance at a TOA court be impractical.
11. As set out in the response to the consultation, a further model has been proposed, which could be taken up at local level. In this model, extended sessions operate for longer than the standard court hours, but those sessions are held entirely remotely. The remote sessions would consist of non-trial work, e.g. Pre-Trial Preparation Hearings (PTPHs), mentions, sentencing etc. Extended remote sessions would run for a minimum of 7 hours, to allow for any potential delays with technology, but also reflecting that the need to travel would be removed, so providing for a longer day. By operating remotely, it would free up the physical estate exclusively for trials where rooms permit. In both models, locally-led roll out is a guiding principle. Rather than a national roll out, Resident Judges will be supported in implementing whichever TOA model (or mix of the two) best suits the local circumstances of their court.
12. As well as these guiding principles, TOA are timebound measures which will come to an end six months after any court chooses to implement them.

# Assessment of impacts

## Direct discrimination

13. No potential for direct discrimination, on the grounds of any protected characteristic, was identified from the assessment pilot sites or through the consultation. No potential for direct discrimination is anticipated from any further rollout of TOA, using either of the 2 proposed models.

## Indirect discrimination

14. Feedback from the consultation and other evidence (both discussed below) all refers to the original piloted model. The remote working model has not been piloted or consulted on, but consultation feedback and other evidence have been used to infer the possible impacts of this approach.
15. The most frequently cited discriminatory impact, in both consultation responses and secondary evidence, is the potential for indirect sex discrimination (and, in some cases, indirect pregnancy and maternity protected discrimination). As discussed below, there is some evidence suggesting that TOA might have a greater impact on people with caring responsibilities, compared to those without such responsibilities. As mentioned in some consultation responses, this would affect both women and men. However, ONS time use analysis (Office for National Statistics, 2016) suggests that, on average, women spend more time than men caring for children (4.7 hours per week compared with 1.9) and adults (0.3 hours per week, compared with 0.2). If it is accepted that women are more likely than men to care for children and dependant adults, then there is an equality dimension. As discussed further, this was raised as a concern within recent surveys of legal professionals. This feedback applied to the piloted model.
16. It is anticipated that such impacts would be less likely with the remote working model, because savings in travel time would offset the longer working day. Within the consultation responses, there was a suggestion that technology to support remote hearings could be used in conjunction with, or as an alternative to, COH, especially for shorter cases, such as PTPHs. Findings from a recent Women in Criminal Law survey may be relevant to the remote working TOA model and its potential to address impacts on those with caring responsibilities (although it is

acknowledged that this is not about remote hearings in a TOA context). This found that "96% of respondents were in favour of retaining a presumption of remote hearings in Court, where no one has requested otherwise, in some circumstances" (Women in Criminal Law, 2021, page 1). Reasons, cited by these 511 respondents, included:

- impact on travel time (505, 97%)
- saved costs (483, 93%)
- ability to complete other work on the same day as a short hearing (489, 94%)
- impact on childcare or other caring arrangements (54%, 279) (see Women in Criminal Law, 2021, page 2)

17. There may also be potential for indirect discrimination linked to the religion and belief protected characteristic. For example, Muslim prayers take place from Friday afternoon onwards and the Jewish Sabbath starts from sunset on Friday. In comparison with courts operating standard operating hours, TOA may have a bigger potential impact on those practising certain faiths. This could still potentially apply to the remote working model.
18. A number of consultation responses refer to potential public health implications of having two groups, in different trials, using the same courtroom in one day. For example, the CBA response refers to risks associated with 'crunch points' during the day (Criminal Bar Association of England and Wales, 2020, page 36). These responses predated the COVID vaccination programme. However, we acknowledge the possible equality dimension as national data tells us that older people, disabled people (as defined in the Equality Act), men (compared with women for most age groups), and people from Black, Asian and Minority Ethnic backgrounds (compared with White people) are at greater risk of serious health impacts from COVID-19 infection (see Office for National Statistics, 2021). We also acknowledge the intersection of the age, disability, race and sex protected characteristics in terms of COVID impact. Any courts potentially using the piloted model would adhere to HMCTS guidance on cleaning and other areas of COVID-compliance; additional cleaning has been incorporated into the TOA model. This impact would only apply to the piloted model, not the remote one.

19. Further discussion of potential indirect discrimination has been covered in terms of impacts on two broad groups: public users (including jurors, victims, defendants and witnesses) and legal professionals and others. This reflects their different types of engagement with TOA.
20. For public users, attending a TOA court this would typically be for the duration of a trial lasting up to three days. For victims, witnesses and defendants, whose cases are scheduled for a standard-hours court (in a location where TOA is also running), there could also be potential longer-term impacts. Possible displacement effects are considered below.
21. Legal professionals and others regularly working in courts implementing TOA will be impacted for the period it operates. The consultation responses made the case that the impact could go beyond a limited TOA period and affect individuals' futures in the legal profession.
22. For both models, no potential indirect discrimination, linked to the following protected characteristics was identified: gender reassignment, marriage and civil partnership and sexual orientation.
23. The following sections explore further the impacts on different groups of participants in both TOA and standard hours courts. Further sub-headings have been added to reflect different themes drawn from consultation responses and other evidence.
24. Because the remote working model has been developed as a response to some of the issues raised in the consultation (with use of video or audio hearings also being proposed in some responses), a more general assessment of its impacts is provided below. There is a wider evidence base on remote working, and HMCTS has (separately) looked at the equality impacts of increased remote working as a response to COVID-19. However, in the case of TOA, it is relevant that the remote working model will only be used for certain types of cases. As discussed below, this means, for example that the remote working model should have relatively limited impacts on victims and witnesses (and those who support them) and on jurors.

## Jurors, victims, witnesses and defendants

### Breaks in sessions

25. While breaks in sessions are a judicial decision, COH courts were designed to have at least one 30 minute break. The pilots identified a small number of examples where breaks had not occurred. It 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). Breaks would also be an issue for those with conditions that require regular medication or interventions (for example, people with diabetes). For

these kinds of impact, the age protected characteristic might intersect with disability, because of the relationship between disability and ageing. Such impacts would apply to the piloted model, but probably not to the remote model because of the different work it involves.

### Witness attendance

26. The consultation response from the CBA refers to the possibility of indirect sex discrimination, stating that:  
"EOH may also have an indirectly discriminatory impact on female witnesses and complainants ... because the cohort of cases that it targets, single defendant/ 1-3 day cases, comprise the majority of domestic violence and sexual assault cases." (Criminal Bar Association of England and Wales, 2020, page 44).
27. Their view is supported by the Victims' Commissioner whose response suggests that potential adverse impacts "affect women most since they are, overwhelmingly, the most frequent complainants in high harm cases and could possibly amount to a level of indirect sex discrimination" (Victims' Commissioner for England and Wales, 2020).
28. While the pilot assessment found limited evidence of witnesses being required to attend court over multiple days, the Victims' Commissioner's response notes that the 'hard stops' at the end of an AM or PM session could result in this occurring. The response adds that the mitigation of sitting for longer, to prevent this exists, in standard hours courts but is not currently possible for COH. The Victims' Commissioner's response describes how:  
"a complainant, a child victim of sexual abuse or someone who has been trafficked, might give half of their evidence on one day and be required to wait, often in anticipation of stressful cross-examination overnight until the same time on the next day" (Victims' Commissioner for England and Wales, 2020).  
Standard hours courts do have flexibility, but it is nevertheless possible in those courts for witness testimony to be split over more than one day.
29. The Victims' Commissioner's consultation response also notes the pilot's observation that in COH courts legal professionals had less time to speak to other parties before the hearing. The Victims' Commissioner adds that the level of support for witnesses may be reduced as the Witness Service does not operate for the full extent of COH hours and, although it is proposed that HMCTS staff could fill gaps, there was concern that they have not have the same level of training (Victims' Commissioner for England and Wales, 2020). There is a suggestion, from feedback contained within the CBA survey of COH pilot participants, that HMCTS staff were not always available and that there were negative impacts on witnesses as a result:

"One of the witnesses was required to stay to assist the police with enquiries. After 4pm the witness care officers left (as they are not contracted to work the EOH court) and an usher took over. The usher left at 5pm when the jury were sent home, despite the witness still being in the Court building and required to assist the police with

ongoing enquiries. The witness (understandably) left without being released by the CPS rep which meant that the enquiries could not be immediately completed and resulted in further disruption to the witnesses' evening as the police had to arrange for the witness to attend the local police station. All could have been avoided if the usher had remained with the witness as had been expected" (Criminal Bar Association of England and Wales, 2020, page 51).

30. The Citizens Advice Witness Service's consultation response (unpublished, 2020) agrees that HMCTS staff would need to provide support where the Witness Service are not able to cover the extended hours. They further noted the challenge in securing available waiting room space.
31. The TOA model states that a "trial with a vulnerable witness (where s28 has not been utilised) is unlikely to be suitable for a shift court." However, there are concerns from the Victims' Commissioner that it will not be possible to assess whether COH is suitable for a victim or witness, due to lack of clarity around identification and communication of suitability criteria with the judiciary (Victims' Commissioner for England and Wales, 2020).
32. As in all listing decisions, the resident judge will work with relevant parties to agree how a case will be listed. The use of TOA at their court, the case mix, nature and frequency of cases being brought to that court will be a factor under consideration when making the decision. With reduced court capacity due to COVID we have generally seen a tendency to prioritise more complex cases in listing decisions over shorter cases. TOA courts may therefore provide a means for shorter cases to be heard more quickly, should the judge wish to have this option. In the pilot assessment, it was found that "COH courtrooms dealt with substantially more trials than standard hours courtrooms, with more cracked and effective trials being disposed of in COH courtrooms" (page 8). There were 3.5 trial disposals per room per week in COH, compared with 0.9 in standard hours (page 9). The pilot assessment report adds that "judges tended to list less legally complex, shorter cases into COH sessions" (HMCTS User Experience and Insight, 2020, page 9). This could create a mix of potential adverse and positive impacts. On the one hand, the disadvantages of TOA courts could fall disproportionately on female witnesses and complainants. On the other, having their case heard in a TOA court could mean that it would be heard more quickly, and they would therefore have faster access to justice.
33. Only the piloted model would directly affect witnesses, as witnesses would not be in attendance in the remote working model.

## Displacement effects

34. Turning to impacts on participants in standard hours courts, the pilot research considered the potential for adverse impacts resulting from displacement effects – that is, unintended effects caused by the displacement of cases which might otherwise been heard, if the AM and PM trials hadn't been running. Such impacts could potentially affect both victims and witnesses and defendants. In the research findings it is reported that:

"Courts reported that they tended to list less legally complex, shorter cases and those that are likely to crack in the COH court. Longer, more serious cases were directed to the standard hours court room because they needed the greater flexibility that a full day session provides" (HMCTS User Experience and Insight, 2020, page 10).

35. The research suggests that listing officers defined short cases as those with one defendant and which were estimated to last three days or less. The research found that:

"The listing of shorter cases in the COH courts generated mixed views among judges and listing officers. Some appreciated the capacity to hear cases that would otherwise not be heard, while others felt that resource should be deployed on longer cases" (HMCTS User Experience and Insight, 2020, page 10).

36. COH were used for a wide range of case types (with drugs, fraud and ABH charges being mentioned in the research assessment). In addition, the piloted approach, in which trials with traditional hours also ran, was found, in the research, to maintain a mix of cases (longer/shorter and complex/simpler). Based on the research assessment, there was no evidence of significant displacement effects (and therefore no evidence of disproportionate impacts linked to any protected characteristics).
37. Further monitoring would need to take place with any further use of the piloted model. The consultation response from the Victims' Commissioner notes that:

"The assessment report gives an example of one court involved in the pilot: *"Due to the case profile at one site (where the majority were sex cases) it was harder to find appropriate cases that fitted with the COH court. The resident judge therefore used the COH courts for short work or other court business when needed."*

In any follow-up evaluation, I would like to see what the impacts of the case requirements for COH courts, i.e. shorter/less complex, have on listing other cases within the court. ... I would be particularly concerned if displaced cases unintentionally led to longer waiting times for vulnerable or intimidated victims and witnesses, many of whom will have protected characteristics" (Victims' Commissioner for England and Wales, 2020)



38. Such effects should not be an issue with the remote model as courtrooms would not necessarily be used to facilitate remote hearings, with judges using chambers or other space. The remote model therefore creates additional capacity rather than removing standard hours capacity.

## Impacts of the remote working model

39. The remote working model's case mix doesn't require jurors to be present. Victims and witnesses are very unlikely to be required. It is more likely that defendants would need to attend. However, it is anticipated that most defendants would be in secure settings, meaning that disabled and vulnerable defendants should have appropriate support. It is acknowledged that remote hearings can present access issues for disabled defendants (for example, neurodiverse individuals or those with sensory impairments). This is covered further in our separate PSED consideration for remote hearings, in a Covid response context, but, broadly, reasonable adjustments should be available to mitigate adverse impacts and judges can decide to have a physical hearing if necessary.

## Legal professionals and other participants

### Impacts linked to caring responsibilities

40. As part of the COH pilots, the views of legal professionals were collected both in interviews and via a survey. Legal professionals who took part in interviews and worked in the PM court reported, in our assessment, that they often arrived home later in the evening, which caused many to feel that their work life balance had been negatively impacted. As part of the COH assessment, the survey asked respondents how they rated their experience of being involved in a COH trial. Overall, male respondents were more likely to rate their experiences both positively and negatively than female respondents, who were more likely to express a neutral view.
41. Similar proportions of respondents both with and without childcare responsibilities expressed positive, neutral and negative views - around a fifth of respondents rated their experience as either good or very good, two-fifths rated it as neither good nor poor, and two-fifths rated it as poor or very poor. Respondents with childcare responsibilities were however more likely to express stronger views (both 'very good' and 'very poor').
42. These figures are based on small numbers (27 men and 13 women) and should be regarded as representative of respondents' views only (HMCTS User Experience and Insight, pages 16-17). It is possible that lower response numbers from women reflect that they had to turn down work in COH sessions and that those with caring responsibilities were less likely to take part in the pilots (and therefore to complete the survey). The proportion of women who responded is slightly lower than would be expected from the national statistics. As of December 2019, women constituted 38 per cent of the Bar (see Bar Standards Board, 2020a), whereas 33% of pilot survey respondents were female. However, we do not know the male / female breakdown for the localities covered by the COH pilots.
43. There were also small response numbers in the small scale 'proof of concept' piloting previously done at Croydon Crown Court. Out of 82 advocates, 14 mentioned the impact of 'shift sittings' on childcare arrangements, with 11 negative (6 women, 2 men and 3 unspecified sex) and 3 positive responses (2 women, 1 unspecified (London Criminal Justice Partnership, 2011, see pages 29 and 31).
44. Returning to the question on work life balance, there is a reasonable assumption that caring responsibilities are a significant part of maintaining a work life balance – and that, as referred to above, on average women spend more time than men on caring for others.
45. Potential adverse impacts on female barristers were identified in the North-Eastern Circuit Women's Forum report of a survey on proposals to extend the operating hours of courts without safeguards (North-Eastern Circuit Women's Forum, 2020). The survey was a response to HMCTS's proposal, in its recovery plan published in July 2020 (HMCTS, 2020b), that options were explored on for extended operating hours to increase capacity. Survey findings included that 80% (474 of 594) of respondents said earlier starts would have a negative impact on them, rising to 88% (519 of 587) for later finishes and 86% (510 of 595) for longer afternoon sessions. Over half of respondents (55%) said it would lead them to consider leaving the Bar, with 62% saying they would consider reducing the days/ hours they work. (These percentages are based on 447 responses, but numbers, for different response options, are not stated, see North-Eastern Circuit Women's Forum, 2020).
46. A survey of the Midland Circuit Women's Forum on extended operating hours covers similar themes. This survey was carried out in Summer 2020, as a "response to growing concerns that HMCTS would implement extended operating hours (hereafter 'EOH') for some courts on a temporary basis with a view to reducing the backlog of cases occasioned by the coronavirus pandemic" (page 4). It concludes that "if EOH are introduced it will impact on women to a greater extent than men" (page 21). This partly reflects qualitative feedback, but also this comparison of male and female respondents:

"More women than men expected to have to turn down instructions if extended operating hours are introduced: for example, if 9am starts are introduced, 58% of female respondents as against 46% of male respondents expected to have to turn down instructions; if 6pm finishes are introduced 63% of female respondents as against 50% of male respondents expected to have to turn down instructions, demonstrating the discriminatory impact of these proposals." (Base numbers are not stated, but there were 224 responses to the survey, with 46% of respondents identifying as male and 50% as female. See Midland Circuit Women's Forum, 2020, page 15).

47. Alongside some more attitudinal content (with 88% of respondents being opposed to extended operating hours), a Women in Criminal Law survey on extended operating hours reports on reasons why respondents are opposed to EOH proposals:
- Impact on childcare or other caring arrangements (107, 41%)
  - Impact on mental and/or physical health (33,13%)
  - Impact on work/life balance (113, 43%)

(The percentages are based on the 262 of 480 respondents who answered this question. See Women in Criminal Law, 2020, page 4)

48. The conclusions of these surveys are similar to the CBA's own qualitative and quantitative research into the operation of the COH pilots, submitted as part of their response to the consultation. The CBA notes "overwhelming concern [about the] inherent discrimination of EOH" and states that "70% of responses to their survey [identified] the discriminatory impact on carers" (Criminal Bar Association of England and Wales, 2020, page 50, response numbers not stated). They cite narrative responses about individual impacts, some of which draw on individuals' experience of COH courts. For example:

"On a personal level I found this exhausting. My day does not start any later due to a late start of trial. I have 2 relatively young children (9 and 11) and I was getting home between 7.20-8pm depending on the trains and tube. Seeing my children so late was very disrupting to them as it was bedtime when I got back. The trial itself had no difficulties with witnesses. However, I would not wish to conduct a trial like this again. I was able to source family for childcare for this one off but it will financially cost me if this was the normal. School wrap around care is only until 6pm in the evening and starts at 7.30am in the morning. I have to pay extra for this wrap around care and even on these times I could not get to court in time for a 9am start or obviously get home for a 6 pm pick up if court is finishing at 6pm. Who do I get to cover a start time so early or a finish so late? I did this case as I am working mother and wanted to try it to give proper feedback. It was as I expected very tiring and not good on my family – we coped as a one off but I would not be volunteering myself for this again. The issues as to discrimination of working outside normal hours will

and did impact me as a working mother" (Criminal Bar Association of England and Wales, 2020, pages 51-52).

49. Although not fully comparable to TOA (for reasons including a later PM finish time and different jurisdiction), the evaluation of the FOH project had broadly similar findings, for example that:

"...a minority reported actually having worked longer hours when participating in FOH hearings. Those with young children reported increased contingency planning with colleagues, friends and family, adding to their workload, and making work/life balance more emotionally and practically challenging than it was under business as usual. Professionals who opted out of the FOH pilots often did so because of their childcare responsibilities, which prevented them from having the time and capacity to accommodate displaced workloads" (IFF Research / Frontier Economics, 2021, page 20).

A caveat is that FOH had different hours to COH (with the FOH pilots having evening sessions up to 7pm).

50. The CBA report also notes that the working day for legal professionals extends beyond the sitting hours of court. The Bar Council Protocol for sitting hours states that "advocates must undertake a great deal of work outside the courtroom and outside court sitting hours in order that hearings run as smoothly and efficiently as possible" (General Council of the Bar, undated, page 3). Lawyers may travel significant distances to reach the courts they operate in. For example, one respondent to the CBA survey notes that they live one hour from Manchester, Chester and Bolton Crown Courts and 2 hours from Sheffield (Criminal Bar Association of England and Wales, 2020, page 53).
51. Bar Council and Bar Standards Board research "has identified variable sitting times (at the unexpected behest of the court) to be a key factor contributing to the pressures upon barristers with caring responsibilities, particularly women, and therefore a significant barrier to retention after childbirth" (cited in General Council of the Bar, undated, page 1). The Bar Council Protocol also makes a wider connection between retention of caregivers and the diversity of the Bar (General Council of the Bar, undated). This concern is that the impact of COH may lead to women leaving the Bar - with concerns of this being a particular risk for women returning from maternity leave (see, for example, in North-Eastern Circuit Women's Forum, 2020).
52. The CBA's qualitative research notes that impacts linked to caring responsibilities apply to other groups, as well as barristers. For example, one responding criminal barrister states that:

"Numerous CPS caseworkers with childcare responsibilities complained to me that both the early and late sittings caused them great difficulty with childcare arrangements" (Criminal Bar Association of England and Wales, 2020, page 50).

53. This observation is supported by the response from the FDA union (representing Crown Prosecution Service members) which states that “the CPS Crown Advocates undertaking these cases, and the paralegals supporting them, are more likely to be female and BAME” (FDA, 2020).
54. These impacts were identified in relation to the piloted model, set out in the consultation. The remote model appears to largely mitigate negative impacts because the earlier starts or later finishes would be offset by savings in travel time.

## Intersectionality

55. The Criminal Bar Association has also suggested, in its report submitted to HMCTS as part of its consultation response, that gender discrimination (or sex discrimination, if linked to the protected characteristics in the Equality Act) can intersect with race discrimination, noting that:  
“...there is no proposal to extend EOH to lengthy or ‘complex’ cases. We question...this strategy from the perspective of racial disparity. The professions and judiciary are predominantly white and male at the more senior levels (dealing with more complex cases) and more diverse in the magistrates and at a junior level for counsel in the crown court. We question why a discriminatory working practice is being foisted onto a targeted section of the criminal justice system workforce” (Criminal Bar Association of England and Wales, 2020, page 30).
56. This conclusion draws on Bar Standards Board reporting on gender and ethnicity, which describes how:  
“...the makeup of the Bar by gender and ethnicity differs substantially by seniority, area of practice, and practising status. For example, women make up 37.6% of the practising Bar, but make up 32.7% of barristers of 15 or more years of call, and 45.7% of barristers under 15 years of call. Differences also exist for ethnicity, although these are not as notable as those for gender” (Bar Standards Board, 2020b, page 13).
57. We note the data on the diversity of the Bar and the possibility that there may be a particular impact on female BAME lawyers.
58. In line with our coverage on the impact of caring responsibilities, our assessment is that such ‘intersectional’ impacts would be mitigated by the remote working model.

## Impacts of remote working model

59. The remote working model may have impacts on some disabled people, for example some people with sensory impairments or neurodiverse people. This is discussed further in our separate PSED statement on remote working. Broadly, any such impacts should be mitigated by the provision of reasonable adjustments for disabled people. Judges have the discretion to move cases into a standard physical court list.

## Harassment and victimisation

60. We do not consider there to be a risk of harassment or victimisation as a result of these proposals.

## Advancing equality of opportunity

61. Consideration has been given to how TOA will impact on the duty to advance equality of opportunity by meeting the needs of court users and those working in courts who share a protected characteristic compared with those who do not.
62. With the piloted model, there may be potential benefits from being able to attend court at different times. As part of its ‘balanced scorecard’ across different impact domains, the FOH evaluation found an indicatively positive effect on access to justice, with some evidence of reductions in time taken off work and improvements to perceived convenience of hearing times and travel to and from court. The FOH pilots also found to have some positive impact relating to public user satisfaction with case outcome, their perceptions of quality of justice, and reduced average waiting times. Within the FOH evaluation, these are seen as general benefits, so would apply to public users with different protected characteristics (IFF Research / Frontier Economics, 2021). In much earlier trials of extending operating hours models “defendants who were employed during traditional work hours were felt to welcome the opportunity to attend court early” (Rahim and all, 2013, page 17). There was also small-scale evidence from the Croydon extended hours pilots, with 3 (of 7) disabled respondents preferring a Shift Session Court time (two jurors & advocate), for reasons including managing work and illness (London Criminal Justice Partnership, 2011, page 33).

63. 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 (proportionately more women than men). However, we do note consultation feedback which counters this view, as discussed in detail above. For example, the Criminal Bar Association points out that “unlike, for example, nurses, or doctors or other shift workers, there is no certainty of or advance scheduling for criminal lawyers and specifically not for the cohort of cases targeted by EOH” (Criminal Bar Association of England and Wales, 2020, page 29). This could potentially also apply with the remote working model, but as discussed earlier, savings in travel time could be positive for those with caring responsibilities (see for example, Women in Criminal Law, 2021).
64. A proportion of court users should potentially benefit from the increased capacity provided by TOA, which will support efforts to: reduce caseloads, reduce waiting times, and by extension improve access to justice. In much earlier trials of extending operating hours models, staff speculated that “an extended court was more likely to conclude a case quicker, and so would benefit victims and witnesses as they would not have to return to court on another day” (Rahim and all, 2013, page 18). Such benefits might be especially felt by those with certain mental health issues, such as anxiety (long-term mental health conditions, with a substantial impact on daily life, are a disability, as defined in the Equality Act).
65. By reducing the need to travel to court, the remote working model may advance equality of opportunity for those with disabilities or health conditions which make travel to court difficult or stressful (the disability protected characteristic) and pregnant women or those with small children (the pregnancy and maternity protected characteristic).

## Fostering good relations

66. Consideration has been given to how these proposals impact on the duty to foster good relations between people with different protected characteristics. Fostering good relations is particularly about the need to tackle prejudice and promote understanding between people who share a protected characteristic and those who do not.
67. Consultation responses have referred to this aim of the Equality Act, but have not suggested any particular (positive or adverse) equality impacts linked to it. Our assessment remains that, for the remote working model as well as the piloted model, TOA will not have significant impacts relating to this aim.

## Overall assessment

68. The evidence suggests some potential for positive impacts, linked to advancing equality of opportunity; and adverse impacts, linked to indirect discrimination.
69. Positive impacts include the benefits of increased court capacity and the argument that further delays will be especially stressful for people with mental health issues (long-term mental health issues fall within the definition of the disability protected characteristic). AM or PM court timings may also be preferred by some users.
70. A frequently cited concern is around the potential for indirect sex discrimination, linked to impacts on people with caring responsibilities. Much of the external evidence focuses on the impacts on female legal professionals. The potential for indirect sex discrimination was acknowledged in the previous version of this equality statement but has been amplified and expanded by the further feedback received as a part of the consultation. For example, the CBA survey contains evidence on how long travel times to court can exacerbate adverse impacts on barristers with caring responsibilities.
71. The consultation responses also refer to the potential for adverse impacts that were not identified in the earlier version of the PSED statement. This includes the CBA's suggestion that race and sex discrimination can intersect, with the risk of a 'double impact' on BAME female legal professionals.
72. The consultation responses have, moreover, drawn out additional themes relating to potential adverse impacts on other groups, for example victims and witnesses. These again link to the potential for indirect sex (and potentially also age) discrimination.
73. Responses also mentioned possible public health issues, which links to protected characteristics because seriousness of COVID-19 infection is linked to age, disability, race and sex.
74. Overall, the consultation has drawn out more evidence and feedback on potential adverse impacts. It also drew views on the effectiveness of the proposed ways of mitigating adverse impacts. For both these reasons (and because of the introduction of a remote working option), the mitigations, set out in the earlier version of this equality statement, have been revisited.
75. Key mitigations are listed below with paragraph numbers linking to the corresponding impacts. An annex summarises impacts and mitigations.
- a) The development of a remote working TOA model, which would create savings in travel time to offset earlier start or finish times. This aims to mitigate the adverse impacts on those with caring responsibilities which were raised in consultation responses. (See paragraphs 15-16, 40-57.) It is, however, acknowledged that, as reflected in a growing evidence base, this model could be associated with other equality impacts, especially for disabled people. These are discussed in our pre-existing equality statement on remote hearings.
  - b) The other proposed approach to TOA involves using each TOA court with one or more standard operating hours court in each crown court centre. This would address backlogs, but courts would still have more standard operating hours provision. (See paragraphs 15-57.)
  - c) In both approaches, parties attend a further hearing in advance of trial where a judge can review whether a case should be listed into a standard hours court or is suitable to be listed into a TOA court. Parties may also make representations to the judge about which of these listing approaches is suitable. (See paragraphs 15-17, 26-32, 39-59.)
  - d) There are provisions in place for practitioners to make an application to move a case listed in a TOA court to a standard hours court should attendance at a TOA AM or PM session become impractical, supported by reasons. (See paragraphs 15-17, 26-32, 39-59.) There was feedback on this proposed mitigation within the consultation, with CBA commenting that:
 

"We observe that this proposed 'mitigation' is both unworkable and itself discriminatory, effectively placing barristers with caring responsibilities (which HMCTS accept will be disproportionately female) in the invidious position of a conflict with their lay client in relation to proximity of trial date, and of ventilating their personal circumstances in public criminal proceedings" (Criminal Bar Association of England and Wales, 2020, page 7).



- e) HMCTS is committed to fully resourcing any court that wishes to adopt TOA, whether this be in the form of court clerks, jury support, ushering or any combination of these. This extra staffing will mitigate against some impacts on witnesses, jurors, defendants, and by extension, on legal professionals. HMCTS will attempt to ensure delay and negative impacts are minimised by: ensuring courts run more smoothly; that witnesses understand what is happening on the day; that jurors have sufficient information and support to ensure they are in the right place at the right time; and that there is proper liaison with legal representatives to assist defendants. (See paragraphs 26 to 32.)
  - f) HMCTS will ensure, through the operation of effective Local Implementation Teams (LITs), that there is an ongoing assessment of the efficacy of TOA at each court. This will ensure that the approach to adopting TOA in these locations is informed by those involved in operating them. The approach has been designed to allow for local flexibility in the application of TOA, to assist with this. The LITs will also consider whether the expected benefits are being achieved. They will also continuously review the equality impacts and ensure any adverse impacts are addressed and mitigated as far as possible. It has been suggested that local Chambers' Equality & Diversity Officers should be invited to join the LITs to provide going input, and HMCTS is happy to encourage this approach. (See paragraphs 15-59.)
  - g) The model of a TOA court, is a four-hour trial session with approximately half an hour break. The length of breaks is a judicial decision, but HMCTS will ensure that the importance of breaks is clear to courts wishing to adopt TOA. (See paragraph 25.)
  - h) Effective case management and pre-trial engagement will be key to understanding the needs of victims witnesses and defendants in each case and, through the LITs, HMCTS will encourage effective communication (with CPS, witness care and defence solicitors in particular) to ensure the best possible arrangements are in place for witnesses to give evidence in as safe and timely manner as possible. (See paragraphs 26 to 32, 39.)
  - i) HMCTS will work closely with Citizens Advice Witness Service to identify locations where the risk of having insufficient cover from the Witness Service is greatest. Where this is the case, HMCTS staff, such as ushers who are trained in the management of witnesses, will provide cover at times of day when Witness Service staff are not available. (The last two points point are not relevant to the remote hearings model, as it would not usually involve witnesses). (See paragraphs 29 to 30.)
  - j) HMCTS will undertake health and safety risk assessments at any site choosing to adopt TOA. These assessments will take account of potential increases in footfall and occupancy at certain times of day because of the increased number of trials in progress. Adjustments will be made accordingly, including where necessary, additional cleaning. (See paragraph 18.)
  - k) The TOA model provides for cleaning of the TOA courtroom over the course of an hour between the sessions. This cleaning, to the standard expected at the end of any court day in the context of the pandemic, will be carried out as standard at any TOA court. (See paragraph 18.)
  - l) On days of religious observance (the religion and belief characteristic), provision is already made, in standard hours courts, for Islamic prayers and (in winter) for the Jewish sabbath. There are therefore existing accommodations in place for Friday afternoon religious observance. The TOA PM session simply extends the time period for which such accommodations are needed. (See paragraph 17.)
  - m) Reasonable adjustments should be considered for disabled people where requested, and HMCTS has existing processes in place to enable this. (See paragraphs 25, 39 and 59.)
76. We have listened to concerns and acknowledge the potential impacts and have identified mitigations which can be put in place. Our assessment is that TOA is a proportionate response given the overriding need for local courts to decide how best to respond to the pandemic. It also takes into account the following safeguards:
- TOA is designed as a temporary response to COVID-19, and is time limited
  - Use of either TOA model will be a local judicial decision, informed by appropriate local engagement with external stakeholders such as victim and witness services and legal chambers
  - In either of the proposed models, TOA court will be used with one or more courts operating standard hours
  - Provisions are in place through the future trial reviews to enable parties to request a case is listed into a TOA court session or a standard hours session
  - There are provisions in place once a case is listed for parties to make an application to the court to move the case from a TOA court

77. It is still possible that, for the piloted model, even with these safeguards in place, there may still be some potential for indirect discrimination, with a disproportionate impact on those with caring responsibilities. (For the remote working model, we anticipate that there would be fewer disproportionate impacts). We have therefore considered justification for TOA. The research provides the following argument for TOA:

“COH appears to be an effective way of increasing the capacity of a single courtroom and thus, disposing of cases. Overall COH courtrooms dealt with more trials per day than standard hours courtrooms, with more cracked and effective trials being disposed of in COH courtrooms. As a ‘blended approach’ the model was found to increase overall capacity of the pilot sites to dispose of cases while maintaining a mix of longer/shorter, complex/simpler, cases” (HMCTS User Experience and Insight, 2020, page 18).

78. Reflecting this finding, possible indirect discrimination impacts should be set against the benefits (for victims, witnesses and defendants) of increased capacity, potentially getting cases to court quicker than might otherwise be possible. The scale of such impacts will be determined by local take-up, but TOA provides two models for local courts to address backlogs, and therefore bring benefits for victims, witnesses and defendants.

79. However, as acknowledged in the assessment report, case mix needs to be taken into account when assessing the benefits of TOA:

“COH courtrooms disposed of 3.5 trials per room per week ... [Analysis] suggests that a standard hours courtroom, operating with the same case mix as a COH courtroom, could dispose of approximately 2.5 trials per room per week” (HMCTS User Experience and Insight, 2020, page 10).

80. The small gain with the original piloted model of around one trial per courtroom per week must be balanced against the potential for indirect discrimination, even after mitigating actions. The remote model may be associated with fewer indirect discrimination impacts – but this is only a working assumption and further evidence and insight would be needed before coming to a more definite view.

## Future actions

81. The research findings and this Equality Statement have highlighted the importance of ongoing data collection. The monitoring and review of future use of TOA will form an important part of the process for any courts which use TOA.
82. The PSED would still apply to the ongoing operation of TOA courts and HMCTS will need to continue to demonstrate compliance with its obligations under the duty. We intend to collect data to build on the evidence from the pilots, including surveys of legal professionals, at any sites which run TOA sessions. We will seek to gather responses from both legal professionals who do and do not take on TOA cases (via local chambers and communications at participating courts) to ensure that we collect evidence on the full range of perceptions and barriers that legal professionals may face. This will help us further understand user impacts relating to protected characteristics. In addition, HMCTS has a process for local courts and tribunals to consider the PSED whenever changes are being considered or made. This will again provide insights on ongoing local impacts.
83. This Equality Statement will therefore evolve. We will continue to explore user impacts and to actively engage with court users to secure constructive feedback, challenges and opportunities that come with any local decisions to take up TOA. We will continually seek to optimise our understanding of equality impacts upon court users through data analysis. This will allow us to review issues, as and when they emerge, and consider mitigating factors that will reduce/remove any such issues.

### Review of this statement

84. This Equality Statement has been revisited in the light of feedback from the consultation exercise.
85. We will continue to review this Equality Statement as new evidence emerges from any local take-up of the piloted or remote working models. This is in line with the continuing ongoing nature of the PSED.



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## Annex: Mitigations

The table below shows possible indirect discrimination impacts alongside mitigations. The mitigations are listed at paragraph 75 above.

In addition to the mitigations shown in the table, the timebound nature of TOA would also act to mitigate any adverse impacts.

Paragraph(s) of Equality Statement	Impact	Protected characteristics	Mitigation (see paragraph 75)
15-16, 40 - 57	Impact on legal professionals with caring responsibilities, including on career and work-life balance and career.	Sex, race (intersecting with sex for female legal professionals from BAME backgrounds), pregnancy and maternity	a, b, c, d, f
17	Later finish times affecting the observation of holy days	Religion and belief	b, c, d, f, l
18	Public health implications of having two trials, within the same courtroom, on the same day.  This has an equality dimension as people with certain shared protected characteristics are at greater risk of serious health impacts from Covid-19 infection	Age, disability, race, sex	a, f, j, k
25	Tiredness and other impacts associated with not having breaks in sessions	Disability, age, pregnancy and maternity	a, g, m
26 - 32	Impacts on victims and witnesses, including: <ul style="list-style-type: none"> <li>'hard stops' at the end of the day, meaning giving evidence on multiple days</li> <li>less time with lawyers and witness services</li> </ul>	Sex and potentially other characteristics	c, d, e, f, h, i
39 and 59	Participants' having accessibility challenges, associated with remote working	Disability, age	c, d, f, h, m





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