



CBA Response to the Justice Committee

Inquiry on Court and Tribunal Reforms

Monday 11th March 2019

Introduction

1. The CBA represents the views and interests of practising members of the criminal Bar in England and Wales.
2. The CBA's role is to promote and maintain the highest professional standards in the practice of law; to provide professional education and training and assist with continuing professional development; to assist with consultation undertaken in connection with the criminal law or the legal profession; and to promote and represent the professional interests of its members.
3. The CBA is the largest specialist Bar association, with over 3,500 subscribing members; and represents all practitioners in the field of criminal law at the Bar. Most practitioners are in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country. The international reputation enjoyed by our Criminal Justice System owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy all guarantee the delivery of justice in our courts, ensuring that all persons receive a fair trial and that the adversarial system, which is at the heart of criminal justice in this jurisdiction, is maintained.

Q1: What will be the likely effects of the reforms, both implemented and proposed, on access to justice in relation to:

- a) Civil justice?**
- b) Family justice?**
- c) Criminal justice?**
- d) Administrative justice, particularly as delivered by the tribunals system?**
- e) Those who are digitally excluded or require support to use digital services?**

4. As the CBA is an organisation of criminal barristers, our answer to this question is focused only on the likely effects of the reforms on criminal justice and those who seek access to it.
5. The CBA is in favour of modernising the criminal justice system in order to make it more straightforward, accessible and efficient for those who use it and those work within it. However, we are concerned that many of the reforms already implemented and those proposed are framed too much around efficiency at the expense of ensuring a fair process for all.
6. The CBA has repeatedly and publicly outlined its concerns about HMCTS staff reductions, court closures and the impact of increased digital working on vulnerable defendants (details repeated below at Q2). In reality many of the changes will significantly limit the ability of individuals to access the criminal justice system.
7. Take for example the introduction of the online plea and allocation scheme in criminal cases. The Ministry of Justice and HMCTS has already introduced the option for defendants to plead online in low level criminal offences. The plan is to broaden that policy out to allow defendants to indicate pleas online and for allocation decisions to be taken outside the courtroom in most cases.

8. As outlined within the Public Accounts Committee report¹, little thought appears to have been taken about the unintended consequences of adopting this scheme. Will defendants who refuse to indicate pleas online be penalised at a later stage if they subsequently plead guilty at their first appearance in Court? How will vulnerable defendants, such as youths or those with mental health difficulties, be protected from third party pressure to plead guilty online? No answers have been provided so far. Furthermore, the CBA fears that unrepresented defendants may choose to indicate guilty pleas online because they have either not taken sufficient time to think about the consequences or have not realised that they have a legitimate defence in law. Experience tells us that most defendants don't focus on the issues in the case before attending court; it is only at that stage, having discussed the evidence with a legal representative and facing the prospect of appearing before the court, that the reality of the situation often sinks in.

9. The CBA is concerned that the online plea scheme, much like other reforms referred to elsewhere in this response, removes an important safety valve in the system for the sole purpose of making costs savings. As observed by the Public Affairs Committee, the authors of the reforms don't appear to have adequately considered how the changes will impact the ability of individuals to fairly access justice.

Q2: What are the effects on access to justice of court and tribunal centre closures, including the likely impact of closures that have not yet been implemented; and of reductions in HMCTS staffing under the reform programme? For users, how far can online processes and video hearings be a sufficient substitute for access to court and tribunal buildings?

10. The CBA answer to this question is focussed only on court closures and staffing reductions in criminal courts, and the use of online processes and video-link hearings in criminal courts.

¹ Public Affairs Committee report 'Transforming courts and tribunals' (HC 976) 16 July 2018, paragraph 21 <https://publications.parliament.uk/pa/cm201719/cmselect/cmpubacc/976/976.pdf>

11. The CBA is in favour of genuine efforts to modernise outdated IT systems and court infrastructure, including the use of video-link technology where appropriate. However, such efforts must be aimed at improving access to justice and the smooth running of the justice system. In our view, the current proposals are primarily aimed at cutting costs and will in fact reduce access to justice and court efficiency.
12. The CBA is opposed to any further court closures. The current proposal is only the latest in an extensive programme of court closures undertaken by this government. Data recently published by the House of Commons Library confirmed that, since 2010, 162 out of a total of 323 magistrates' courts in England and Wales have been closed; just over 50%. It is difficult to identify any motivation for this programme other than cutting costs; there has certainly not been any corresponding drop in the crime rate in that period that would justify such extensive closures.
13. As a result of these closures, many court users – be they defendants, witnesses, legal practitioners or court staff – have to travel significantly farther, and at significantly greater expense, to attend court. This will inevitably have a greater impact on people in rural areas and parts of the country without a large court centre nearby. To cite just two examples, it has been noted in the media that the proposed closure of Northallerton Magistrates' Court will force local residents to travel to Harrogate Magistrates' Court instead, a bus journey of some three hours and 20 minutes. In a similar vein, research by Dr Olumida Adisa at the University of Suffolk found that court closures in the county have meant that residents of west Suffolk, on average, have to travel twice as far, and at twice the cost, to attend court.
14. It is trite to say that a fundamental requirement of the principle of access to justice is that citizens can access a court. Recent court closures, and the proposed further closures, make that harder. This is exacerbated by the fact that many court users, particularly in the magistrates' court, are people of very limited means. The additional costs involved in travelling to distant courts will inevitably result in more

defendants and witnesses failing to attend court. This will result in delays, cases being dropped unnecessarily, and people being denied justice.

15. The CBA is opposed to the reductions in HMCTS staffing which are proposed. The proposals are extreme; a loss of about 6,500 jobs between 2016 and 2022, bringing the total staff numbers down to around 10,000. Again, the motivation for these cuts appears to be primarily cost saving. Users of criminal courts have already seen the impacts of ongoing reductions in staff, such as court clerks and court ushers being required to cover several courtrooms at the same time. The author of this response recently witnessed a judge in a serious drugs trial having to ask a member of the public in the courtroom to fetch a witness from outside, as there were no staff in the courtroom to assist. Having less staff, both in courtrooms and in supporting roles, is having and will continue to have a negative impact on court efficiency and the overall smooth running of the criminal justice system.
16. The CBA is in favour of the use of online and video-link technologies to improve court efficiency and access to justice, where appropriate. For instance, the move to digitise the service and management of evidence in the Crown Court through the Crown Court Digital Case System has had many positive results, even though the system is far from perfect and needs further refinement. However, there are recurring problems with online technologies adopted in the criminal justice system. For instance, different stakeholders in the criminal justice system often have different, and indeed incompatible, systems or software carrying out similar tasks. The recent adoption of separate online platforms by the Metropolitan Police (Evidence.com) and the CPS (Egress) to serve video evidence is just one example. Such overlap reduces efficiency and presumably increases unnecessary costs.
17. The use of video-link in hearings can be extremely useful for defendants, practitioners and witnesses. Many defendants in custody would prefer to attend court for a brief hearing via video-link from prison rather than be transported, potentially for hours, in the confines of a prison van. Many practitioners would

similarly prefer to attend straightforward hearings at distant courts via video-link rather than suffer the cost and time involved in travelling. Video-link also enables witnesses to attend court that otherwise might have been unable to do so.

18. However, the focus must be on improving the running of the court system rather than costs. Video-links should be used only where there is no risk of prejudice to any party by the individual in question not attending in person. For many hearings, for instance where detailed instructions must be taken from a defendant, a face to face conference between the defendant and their representative is a necessity. The courts must also be aware of the risk of depersonalising defendants who attend via video-link; there has been some research to suggest that defendants who appear via video-link for sentence hearings may receive longer sentences than those who appear in person.
19. Further, there must be proper financial investment in video-link technology. The systems in operation in some court centres are already out of date. Again, the author of this response recently witnessed a case in which a witness was appearing via video-link from a different court which operated a different, and incompatible, video-link system. Accordingly, the connection had to be established via a third-party company to act as a “bridge”, at significant extra cost. Ultimately, the connection was still so poor that it had to be abandoned and alternative arrangements made.
20. We hope that the Government will review its decisions on court closures and staffing reductions, and ensure that a programme of technological improvements is adopted that has access to justice and efficiency rather than cost saving as its goal. The Criminal Justice System has suffered swingeing cuts in the last 10 years and cannot survive any further cost-cutting programmes.

Q3: Have the Ministry of Justice and HMCTS consulted effectively on the reforms, and maintained sufficient communication, with:

a) Judicial office holders at all levels of seniority?

21. The CBA acknowledges the key role that must be taken by the senior judiciary, along with other practitioners, in the design and implementation of the reforms.
22. On the specific issue of HMCTS consultation with the judiciary, to the extent that the CBA is able to comment, we were encouraged by the National Audit Office report on 'early progress in transforming courts and tribunals'; although concerns were raised about wider engagement, the report acknowledged that senior judges were actively involved in the reform projects and working groups.²

b) The legal professions and the advice sector?

23. The CBA is committed to engaging fully with both Ministry of Justice and HMCTS personnel, to ensure that court users are provided with a positive experience and, most importantly, fair and easy access to justice.
24. The CBA believes that both the Ministry of Justice and HMCTS do value the input of stakeholders within the criminal justice system. Over time good working relationships have been established between our representatives. However, on the issue of these reforms, there was an initial failure in communication and engagement with the legal profession. As a result, the CBA and other organisations were effectively locked out of the initial discussions and were therefore unable to comment on plans at an early stage. The lack of transparency surrounding the programme, as acknowledged by the Public Affairs Committee in its July 2018

² National Audit Office report 'Early progress in transforming courts and tribunals', 9 May 2018, paragraph 2.9 <https://www.nao.org.uk/wp-content/uploads/2018/05/Early-progress-in-transforming-courts-and-tribunals.pdf>

report³, resulted in stakeholders such as the CBA feeling that changes were being imposed rather than co-created.

25. The debate surrounding the Flexible Working Hours pilot exemplified that problem. Prior to the proposal being published, the CBA was not formally consulted by HMCTS. We raised concerns after publication and subsequently provided the Ministry of Justice and HMCTS with empirical evidence demonstrating the devastating effect that such a scheme would have on the legal profession. The CBA objections, however, were not immediately acknowledged. The initial lack of consultation coupled with the subsequent failure to publicly recognise the concerns raised led to significant anger amongst the CBA membership, which was widely reported in the media. The Ministry of Justice and HMCTS did subsequently engage in productive dialogue with the CBA and the policy was eventually abandoned in relation to the criminal courts. However, earlier consultation, before publication, would inevitably have saved a significant amount of time.
26. The CBA is confident that the Flexible Working Hours pilot experience highlighted, for both the Ministry of Justice and HMCTS, the importance of establishing and subsequently maintaining a productive dialogue with the legal profession on reform proposals. We hope that the meaningful dialogue eventually established in that instance will be replicated on the reform programme moving forward.

c) Other relevant stakeholders?

27. The reforms clearly impact on organisations external to HMCTS such as the Crown Prosecution Service, police, probation and prisons. Those organisations have already had to make internal decisions and take action in order to support HMCTS proposals e.g. investment in digital equipment. Unfortunately, the infrastructure being put in place is not sufficiently reliable; there have been multiple occasions,

³ Public Affairs Committee Report, paragraph 2

covered by the national media, when cases in the crown courts have ground to a halt due to failures in the technology.⁴ The CBA is concerned that these failures are not only the consequence of insufficient investment in the modernisation programme but also a failure by HMCTS to meaningfully engage with those external organisations responsible for large parts of the digital infrastructure.

28. The CBA also joins Transform Justice⁵ in expressing concern about the limited consultation by HMCTS with members of the public. Many of the reforms directly impact on the general public and how they access the criminal justice system. However, there has been limited public consultation on important aspects of the reform package, with no public consultation on the increased use of video hearings and online pleas. The CBA believes that HMCTS must engage in meaningful consultation with members of the public on issues that directly impact on how individuals access the criminal justice system.

Q4: Have the Ministry of Justice and HMCTS taken sufficient steps to evaluate the impact of reforms implemented so far, including those introduced as pilots; and have they made sufficient commitment to evaluation in future?

29. The CBA is concerned about the scale of the reform programme and the speed with which it is being implemented. Despite having extended the timetable, HMCTS has fallen behind in its delivery of the reforms. The announcement on 6 March 2019 of a further delay to 2023 should be used by HMCTS as an opportunity to properly evaluate the impact of reforms already implemented and ensure that the potential consequences of further changes are understood and addressed before introduction.

⁴ Article in The Times on 8 March 2019 ‘Trials halted as courts hit by second huge computer failure’ https://www.thetimes.co.uk/article/00620a9c-412a-11e9-889c-a7e27b96460c?utm_source=newsletter&utm_campaign=newsletter_121&utm_medium=email&utm_content=121_5369723&CMP=TNLEmail_118918_5369723_121

⁵ Public Affairs Committee Report, paragraph 14

30. As outlined in the report of the Public Affairs Committee, the evidence suggests that HMCTS has not adequately considered how the reforms will impact access to, and the fairness of, the criminal justice system for the people using it.⁶ For example, over 160 magistrates' courts have closed since 2010, resulting in many individuals having to travel further distances to their local courts. The consequences of that policy are outlined above. However, the CBA has seen no evidence that analysis has been undertaken, either by the Ministry of Justice or HMCTS, in order to evaluate the impact of the closure policy on those who use the courts. Equally, little assessment appears to have been undertaken in relation to the increased use of video hearings and introduction of online pleas, in particular to address the concerns raised by many stakeholders about the impact of those changes on young and vulnerable defendants.
31. The Public Affairs Committee also concluded that the Ministry of Justice does not appear to understand the financial implications of its planned changes on the wider justice system.⁷ The CBA is concerned that the financial savings envisaged by the reform programme have resulted in additional costs being borne in other parts of the criminal justice system. For example, the closure of local courts over many years has inevitably led to increased travel costs for individuals attending court. However, neither the Ministry of Justice nor HMCTS have published costs and savings models evidencing the financial fallout of reforms already implemented.
32. As outlined above the CBA is confident that lessons were learned by both the Ministry of Justice and HMCTS during discussions about Flexible Working Hours. We support the recent announcement of a further delay in the timetable and hope it represents an acknowledgement of the many concerns expressed by key stakeholders.

⁶ Public Affairs Committee Report, paragraph 4

⁷ Public Affairs Committee Report, paragraph 5

33. Both the Ministry of Justice and HMCTS will need to engage more meaningfully with key stakeholders. In relation to changes already implemented, the CBA believes time must be taken to properly assess the impact of the reforms on access to, and the fairness of, the criminal justice system. Moving forward with further reforms, the CBA will push for open consultations and robust research pilots, ensuring that any changes to the criminal justice system are based on a comprehensive body of opinion and evidence.