THE CRIMINAL BAR ASSOCIATION OF ENGLAND & WALES

WELLBEING SURVEY ANALYSIS

In January of 2021, the CBA launched its well-being protocol. It is our intention to listen to the views and input, whether positive or negative, of a wide range of stakeholders before deciding on how best to protect the well-being of criminal practitioners. Whilst we will consult widely, the most important views are those of our own members, and so the committee decided to launch the consultation phase with a survey of our own membership.

We were acutely conscious that practitioners are being asked to complete varied surveys on what sometimes seems like an almost weekly basis, and that "survey fatigue" is setting in. We therefore kept the questions short, and there were only nine of them. We designed the questions in such a way that the answers could be interpreted clearly. We hope to set out in some detail the responses we received, but the headlines were very clear indeed; support for the protocol was virtually unanimous. Support for each of the propositions range from a minimum 92% up to 100% .

To each question there were simple alternative answers which invited simple agreement or disagreement with a proposition. By way of example, Q1 asked

"Do you agree with the CBA protocol that the court day should ordinarily end no later than 4:30 PM?"

As was clear from the answers to that question, many had different views as to the ideal ordinary end to a working day; some argued for 4:15pm, some for 4pm, and one perhaps rather optimistic individual thought the court should finish at 3:50pm. To have provided a range of alternative times would have diluted and confused the overall picture: 98.7% agreed that there should be some defined ordinary cut-off time. Similar levels of support were found all the propositions, as can be seen below.

Q1 Do you agree with the CBA protocol that the court day should ordinarily end no later than 4:30 PM?

Responses:

98.7% agreed

1.3% disagreed

Explanation of the question: paragraph 1 of the CBA protocol proposes that the court day should ordinarily end no later than 4:30 PM. The protocol expressly recognises that the cut-off time may be extended to accommodate particular circumstances. This is explicit in the term "ordinarily", and is further expressed in paragraph 2, which makes clear that the court may sit later - or indeed earlier than 10 AM - in exceptional circumstances, but that where such exceptional circumstances exist, enquiry must be made of the practitioners commitment before a decision is made. The protocol requires that an enquiry be made - a simple and proper requirement consistent with natural justice - but does not state that practitioners commitments will be determinative. We must recognise, and we do, that working in courts requires some degree of flexibility. The intention of the protocol is to change the culture whereby later and later sitting is becoming the norm, often without any consultation with those most affected. Our flexibility should not be taken for granted.

The alternative to that proposition – for those who disagreed with it - was accompanied by a simple explanation of what that disagreement supported i.e. "we should sit as late as the court wishes". One responder felt that lent an element of leading to the questions. We disagree. Those who do not wish there to be any defined ordinary cut-off time are necessarily in support of that decision being left exclusively to the court. They are perfectly entitled to take that stance, but they should not arrive at disagreement accidentally, by failing to understand what their disagreement amounts to.

Despite our best efforts, both in the questions and more importantly in the protocol itself, it seemed that some had still failed to read accurately the terms of this question, and the protocol itself. The protocol proposes courts should ordinarily end no later than 4:30 PM. One comment was that:

"This is a heavily weighted question. We should not sit "as late as the court wishes" but will sit beyond 4:30 if there is a pressing need to do so in exceptional circumstances"

Sitting beyond 4:30 where there is a "pressing need to do so in exceptional circumstances" is clearly encompassed in the term ordinarily, and the protocol makes clear that sitting beyond 4:30 will sometimes be appropriate, but it should not be the norm, . Neither the CBA nor the protocol itself have ever said otherwise, and nor will they.

However, the overwhelming majority entirely supported the proposition. Many had different views as to the ideal ordinary end to a working day; some argued for 4:15pm, some for 4pm, and one perhaps rather optimistic individual thought the court should finish at 3:50pm. To have provided a range of alternative times would have diluted and confused the overall picture: 98.7% agreed that there should be some defined ordinary cut-off time. Representative comments included:

"I have to travel at least an hour to get home from the court centres are practising. Childcare is available until 5:45 PM at the latest. If courts regularly sat later than 4:30 PM, I would not be able to continue in my career at the bar."

"Sitting beyond 430 causes problems with seeing clients. It causes problems with childcare, importantly causes problems with pregnancy and physical health. I went with a pregnant opponent to asked the judge if he would not sit late repeatedly. His response was that as she was past the first trimester she couldn't be sick as his wife was fine."

"There is so much work that goes on behind the scenes takes time and needs to be done at court."

"The court day must end at 430, because by no means has the working day ended then."

"Those with childcare and other caring responsibilities need to be able to plan their lives and even those without those burdens should not be required to be available whenever required."

"This really needs to be formalised in the Magistrates Court more than the Crown Court. DJs are STARTING trials after this time in the Mags"

Q2 Do you agree with the CBA protocol that, in addition to lunch breaks, courts should not ordinarily sit for longer than 1.5 hours without a break?

Explanation of the question: the protocol addresses not only the length of the ordinary working day, both in and out of court, but also the need for breaks during the course of the day. Paragraph 4 specifically states that courts should not ordinarily sit for longer than 1.5 hours without a break. The question is designed to gauge what level of support there would be for this proposal. As with paragraph 1 of the protocol, the term ordinarily is included, to make clear that there may well be appropriate circumstances for sitting longer without a break.

The issue of whether there should be breaks ordinarily, over and above lunch breaks, was the one issue which received the widest range of views, with many on both sides having particularly strong views. Whilst 92.15% agreed with the proposal, significantly 7.85% did not. We have looked at the explanatory comments from those responses with particular care.

Of those who disagreed, representative comments included:

"I agree that a midsession break is often desirable and useful but I think it should be a matter for the trial judge to decide upon. I do not think a protocol is necessary."

"It should not rigidly stick to 1.5 hours"

"Southampton successfully sits without a morning break but with an extended lunch hour. This is up to the court."

Of those who agreed, representative comments included:

"It is exceptionally hard to concentrate for long periods of time and continue to engage effectively. Regular breaks should be an integral part of the day."

"It is in the interests of justice to insist on breaks so that everyone can maintain concentration"

“this is long overdue. 90 minutes is over double the accepted duration of adult standard attention span in any event.”

“Occasionally, the bar need to eat, pause, take a strained eyes away from the screen and even use a loo...”

Overall, there was clearly very considerable support for breaks - again stressing the inclusion of the term “ordinarily”, and while flexibility and case sensitivities must be retained, the general view was that it is not fair on jurors or practitioners to sit without breaks for long periods of time, and that whilst good judges do this naturally, bad practice is still sufficiently common to cause serious concern.

Q3 Do you agree with CBA protocol that, where possible, listing should make every effort to accommodate its availability?

Responses:

100% agreed

0% disagreed

Explanation of the question: the advantages of listing a case so that trial counsel can attend, either for the trial itself or for any other hearings, is self-explanatory. Equally, it has to be acknowledged that there will be situations where it is not possible to accommodate Counsel. Paragraph 8 of the protocol proposes that in making such decisions, every effort should be made to accommodate prior commitments where possible. A paragraph stating that every effort should be made where possible may sound unnecessary, but the reality is that some courts (though not all) and some judges (though not all) do not make such an effort.

The support for this proposition was not only unanimous, but vociferous. Whilst the proposal is self-evidently reasonable, many felt that list offices and courts all too often disregard it. Representative comments included:

“Meeting orders of the court in the preparation stages of the case is demanding and time-consuming. This input can often be ignored when listing decisions are made”

“it is an obvious, constant, unnecessary and largely avoidable cause of distress when there is a last minute change of counsel”

“Merely pay lip service to it.”

“There needs to be a change of culture in this regard”

Q4 Do you agree with the CBA protocol that there should be a cut-off point in the evening and at weekends, after which advocates should not be required to respond to emails until the following day?

Responses:

95.4% agreed

4.16% disagreed

Explanation of the question: the invention of computers, mobile phones, and most particularly smartphones has enabled communications to continue long after the ordinary working day has finished. Since the introduction of these technologies, there has been no real time for the profession to develop a sensible working practice. Instead, it has become normal to be corresponding by email late into the night and throughout the weekend. Paragraphs 12 to 14 of the CBA protocol directly address this concern, and the lack of a common working practice. The absence of any form of guidance is in stark contrast to those in many other walks of life, and indeed many of those who are employed within the justice system.

One particular aspect of the protocol deserves detailed explanation. There are many whose ordinary working day is curtailed by other commitments, such as childcare, and for whom it is therefore convenient to work out of hours as an alternative. Those who work out of hours by choice wish to be able to send emails out of hours. It is of course possible for them to write those emails out of hours, but not send them until the ordinary working day starts, and this is ideally how they should operate. By sending emails out of hours, they create the risk that others will feel obliged to respond out of hours, or at least to read the emails to see whether or not an urgent response is required. The protocol seeks to create a balance between these competing issues, whilst setting a general baseline. It is worthy of note that the terms of each of those three paragraphs are virtually identical to the terms of protocols actually in force and issued by courts, not practitioners, in the family courts.

As with question one, we did not invite discussion as to when a specific cut-off point in the evening should be, as inevitably there would be different views. What we wanted to ascertain was the level of support for there being a cut-off point at all. The protocol specifically mentions the cut-off time of 6 PM, and again it should be noted that that is the time used in the family court protocols.

Although 4% appeared to disagree with the proposition, it was quite clear that virtually all of were answering a slightly different question. The question does not address the sending of emails, but responding to them. As is made expressly clear in paragraph 12 of the protocol, where it is not possible to send emails during working hours, "advocates may send their emails when is convenient to them." Comments from those who appeared to misunderstand this distinction included:

"for some who are juggling caring responsibilities, it may be difficult to work within these hours, and they may not get the opportunity to respond to emails until after a child's bedtime for example."

However, the overwhelming view was that out of hours emailing, both in the evenings and over the weekends, is the single biggest factor affecting the well-being of the bar. Representative comments include:

"strongly agree. Increasingly email traffic is directly responsible for increased stress."

"I have skeleton arguments and material sent by email between 9 PM and 9 AM including at 1 AM. It is ridiculous to expect me to respond overnight."

“Yes, as a mother of twins it’s impossible to look after your children, feed them bath them and put them to bed and still be expected to answer emails at the same time. I’ve recently had work emails at 11:30 PM.”

“I received a 10 PM email from a judge requesting written questions for the complainant in a trial beginning the next day as it was thought the PT pH judge had been wrong not order this and order simple normal cross examination. I was up until 2:30 AM drafting questions which had to be in by 9 AM. I had to leave the house by 7 AM to get caught in time so could not leave the work until the morning. Hopelessly tired and stressed for day one of a serious sexual case the next day.”

Q5. Do you support the CBA protocol objective of making ordinary working hours more amenable to family life?

Responses:

96.34% agreed

3.66% disagreed

Explanation of the question: whilst undoubtedly some have managed heroically to maintain a practice and a family life, it is quite clear that many are unable to do so. Whilst the problem has been recognised for many years, very little has been done to address it. One of the aims of the protocol - one of many - is to facilitate and support a working life that is consistent with having a family. There is clear statistical evidence of real problems with retention, particularly but not exclusively of women. The purpose of the question was to gauge whether the criminal bar fills that the current expectations are inappropriate or appropriate.

It is assumed that no one who disagreed with the proposal disagreed because they were in favour of discrimination against those with family life, but were expressing concerns as to the consequences of making our working life more amenable to family life. Representative comments included:

“But in a free market, surely the work will go to those who will give the service the client wants”

“This is not a 9-to-5 job be careful what you wish for.”

However, it was again clear that the overwhelming majority strongly supported this objective, and were very anxious that it was not currently being met. Of particular note, and particularly heartening, were those who were expressing concern about this on behalf of others rather than themselves. After all, we are a profession, not a random assembly of individuals. One example read:

“Please note that I do not have a family and therefore I have no vested interest in this issue. It will not change my life one bit. I still nevertheless agree.”

Other representative comments included:

“yes. If something doesn’t change I will need to leave”

“Just because we are self-employed and do our best to provide good service, this does not mean that we do not deserve a good social life.”

“yes wholeheartedly. For too long we have sacrificed our families, personal mental well-being, physical well-being and our own social lives”

“I know so many at the criminal bar who are leaving or can see themselves leaving because it is destroying their private life. I think the old view that you need to give yourself completely to the job and sacrifice everything else must stop”

“I often feel that I have to choose between the job and having a personal life outside of work; currently it feels the two not compatible.”

“At the moment listing practice is more chaotic than ever and it is being decided at 4:30 PM the trial is starting the next morning. This means preparing a trial once my children gone to bed… It means you are working 9 PM until midnight plus instead. Then up with children at 6 AM. It really is impossible”

“it is the only way to retain women at the Bar”.

“I have seen several talented younger members of chambers leave for work settings where they have equal pay and importantly reasonable accommodation for pregnancy. They have found the travelling to court plus the physical demands of the job at court not compatible with having children.”

Q6. Do you support the CBA protocol objective of making working practices less discriminatory?

97.13 % agreed

2.87% disagreed

Explanation of question: it is taken as read that no one would support working practices which were positively discriminatory. It was made clear in the explanation for disagreement, that disagreement was not a vote for discrimination but rather a view that the current expectations are appropriate i.e. non-discriminatory. The question obviously overlapped considerably with question five, but included all forms of discrimination.

A representative comment of disagreement stated:

“I’m not sure how working practices are currently discriminatory.”

Representative comments of agreement included:

“change will only come with a change in attitude from all professionals involved in criminal law including judges and some criminal practitioners.”

“The pressing challenge is to analyse how working practices can be indirectly discriminatory. The failed EOH proposal is a case in point.”

“Insofar is expecting someone to work on the Sabbath or unreasonable hours, I agree.”

Q7. Do you agree with the CBA protocol objective of the criminal bar should be treated equally with the family?

98.94% agreed

1.06% disagreed

Explanation of question: most of the 15 paragraphs of the CBA well-being protocol have been quite deliberately adopted in identical, or near identical, turns to the protocols issued by the family courts. It should be particularly noted that the family courts protocols were not introduced by practitioners, but by the president of the family court, and at his direction resident judges large family court centres. The criminal courts do not have a designated president, or indeed any designated senior judge, which may explain why we have not yet had the judicial support that we would hope for. The purpose of the question was largely rhetorical, so that respondents reflect on the fact that the CBA proposals are simply seeking parity with the only comparable, largely publicly funded, area of practice.

It was not entirely clear from any of the comments why anyone disagreed. One comment stated:

"The family bar are expected to work very long hours and often at the last minute with no time to make family arrangements for advocates. This is a dangerous comparison to make."

However, the overwhelming majority clearly felt that the comparison was well made. Supportive comments included:

"yes, although the family bar have the advantage of an extremely supportive president of the family division. We should seek similar support from an appropriate judicial office holder."

"We both have very difficult topics, very long hours, very difficult clients and witnesses. The family bar have been very good with accommodating advocates. There is no reason that crime should be any different"

"Strongly agree. There is no justification for the different treatment… for family work."

Q8. Overall, do you support the adoption of the CBA well-being protocol?

98.18% agreed

1.82% disagreed

Explanation of question: the final specific question asked a simple and unambiguous question. The CBA has spent many many hours considering precisely the terms of this protocol. Of course, there will be disagreements over the detail of its terms. What the question sought was to establish, without descending into the detail of minor preferences, whether there was overall support for the protocol. It is important for us to know, and it is important for other stakeholders to know. The result was clear. Such negative criticisim as there was principally focussed on the likelihood of the protocol being adopted, not on whether it was worthwhile.

One negative comment deserves mention:

"I think the bit about verbal aggression is a bit pathetic, given who we are and what we do".

This is a reference to paragraph 15 of the protocol, which in addition to stating that all court users, including of course practitioners, are entitled to be treated by all concerned with courtesy and respect, also states that verbal aggression is a form of abuse and should never be justified. It is presumably this sentence to which the commentator takes objection. We as a committee wish to reaffirm the importance of this paragraph in its entirety, and entirely distance ourselves from

that comment and the sentiments behind it. Verbal aggression can very easily become intimidation and bullying. It is by no means restricted to verbal aggression from the bench; indeed such verbal aggression is remarkably rare in court. It is far more prevalent in interactions between members of the bar, particularly in emails, particularly emails sent late at night. It is undoubtedly regrettable that there is the need for paragraph 15, but we feel that there undoubtedly is. It is perhaps surprising that it has not been expressly enshrined in the code of conduct.

The other comments were highly supportive of the protocol, and it is clear that there is a groundswell of support amongst the vast majority of practitioners. No doubt there will be some who prefer and benefit from the status quo, but there are many more who feel that the time is long overdue for there to be significant regularisation and modernisation of our working lives. The focus of the well-being committee will now turn to implementing the protocol, hopefully with the full support of relevant stakeholders.