



## **EXTENDED OPERATING HOURS PILOT**

**In this document we offer guidance and support to advocates who find themselves in difficulties due to the operation of the pilot scheme.**

### **THE CBA VIEW OF THE PILOT**

The CBA believes that the pilot scheme is unnecessary and creates risks for the public and for all those who use, or work in, or are compelled to appear in criminal courts. Those risks are out of proportion to the stated aim of the pilot scheme, which is apparently an information-gathering exercise. The pilot scheme has virtually no support among those with daily experience of working in Court. Existing inefficiencies can and should be remedied before a new scheme is imposed, whose aim remains unclear and ill-defined. No extra resources are being put into the pilot scheme.

The evaluation of such a scheme does not require a pilot. The problems are clear to see. The pilot is constructed to succeed, but only by setting artificial parameters. By making the pilot “voluntary” it becomes self-selecting. Only those able to appear in such a court will appear in such a court. The discriminatory effect of a scaled-up scheme will be concealed.

### **The pilot scheme is not in the public interest, for reasons that include:**

- The extra costs to the public purse that will be caused by the lengthening of trials are likely to outweigh any apparent convenience by extending the court hours
- The scheme is not suitable for the increasing number of cases with vulnerable witnesses or sex offences
- Jurors and witnesses will be expected to leave home and return home at unsocial hours, compromising their family responsibilities.
- The Court’s support-systems are not equipped to deal with two or three shifts per day. They struggle with one.
- In the short-term, clients will have less choice of advocate.

- In the longer term, advocates will leave the profession if this scheme is adopted more widely.
- Hence, the talent pool for future leaders and judges will shrink.

**For advocates, the pilot scheme is**

- Destructive of diversity.
- Discriminatory, by effectively excluding advocates with care responsibilities.
- An unreasonable cost burden for barristers & their chambers who will need to pay staff for extra hours out of existing resources.

**THE CBA WILL FULLY SUPPORT ANY BARRISTER WHO FINDS THAT**

- THEY ARE NOT ABLE TO VOLUNTARILY PARTICIPATE IN THIS PILOT.
- THEY ARE UNABLE TO ACCEPT A RETURN FOR A CASE IN A PILOT COURT.
- THEY ARE UNAVOIDABLY DELAYED IN ATTENDING A HEARING IN A PILOT COURT.

IF ANY BARRISTER RECEIVES PRESSURE, OR CRITICISM, FROM A JUDGE OR ANY OTHER PERSON THEY SHOULD LET THE CBA KNOW; WE WILL TAKE APPROPRIATE STEPS ON YOUR BEHALF.

**PRINCIPLES**

The scheme is voluntary and no one can be made to participate in the scheme. However, the CBA foresees that advocates will have to refuse work because it is being placed in a pilot court.

The CBA takes “voluntary” to mean that no case will be placed in the pilot court if the instructed counsel has requested that it is not placed in such a court.

If a case is already listed for a pilot court it should be removed from the court at counsel’s request, provided there is sufficient notice.

## **SUPPORT**

### **1. Dates already set**

We are aware that some listings for the pilot courts were set at PTPH hearings several weeks ago. The scheme is voluntary. If you do not want it in a pilot court, please ensure that you let the court know as soon as possible and request a different listing. Explain the reasons for your request and ensure that it is logged and also passed onto the CBA.

If your request is refused, please request written reasons for the refusal and let us know immediately. We will take appropriate steps to help.

At that point, you may find that you have to return the case. Please ensure that you notify the CBA of any such situations. Ensure that your solicitors and clerks are notified of the reason for the return.

### **2. Dates not already set**

If you attend a hearing (PTPH etc) where a further hearing date is being set, be sure to request that the subsequent hearing not be listed in a pilot court if you know that this will cause difficulties either for yourself or instructed counsel. If the matter is listed in a pilot court notwithstanding your request, please ask that the reasons for this be stated and let us know. In appropriate cases we will speak to the Court on your behalf.

You may wish to give reasons for requesting the matter not be placed in a pilot court For example:-

- a. "I am the instructed advocate, and I am not able [*note not "I am refusing"*] to participate in the pilot scheme in the afternoon/morning/either session due to outstanding commitments." Do not feel pressured to particularise your difficulties. If you come under any pressure, please let us know. No one should be compelled to explain themselves in these circumstances.
- b. "I would have to travel a great distance, and therefore will either have to leave home extremely early if it is in the morning session or will be home very late if it is the afternoon session, so it is not suitable."

If the request is refused, please ask that the Judge states the reason for the refusal. Ensure that this is communicated to the CBA.

### **3. Mentions etc**

We assume that no matter will be placed in a pilot court without sufficient advance notice being given. If a mention has been placed in a FOH the day before the hearing, it is possible

that this will not give you time to re-arrange pre-existing commitments made on the basis of normal court operating hours (GP appointments, childcare issues etc).

If you cannot do a FOH listing and have been given sufficient notice, contact the court as soon as practical and request that the matter be re-listed.

If the court refuses to re-list, request that reasons are provided.

If you have to return the case, ensure that a note is sent to the court explaining that the matter has had to be returned. Please also copy any such note to the CBA.

If a matter is listed at late notice in the next day's FOH list, and this presents difficulties/ commitments that cannot be re-scheduled

- If the matter cannot be returned, then attempt to get to court as soon as reasonably possible. Ensure that you or your clerks contact the court as soon as possible to notify them of any delay. We would imagine your arrangements normally allow for a 10am attendance.
- If it is in an afternoon list and you will not be able to attend due to commitments that cannot be rearranged (caring responsibilities, GP appointments etc), attempt to return it
- If you cannot attend, and the matter cannot be returned, ensure that your clerks contact the court as soon as possible requesting that the matter be taken out of the list.

#### **4. Trials**

If you are instructed in a trial that is due to be in a FOH court, this may cause you difficulties with existing commitments (caring responsibilities etc.) It may be that such matters would either be insurmountable, or result in such additional costs as to make acceptance of the brief uneconomic.

If there is time, request that the matter is re-listed, stating reasons for the request.

If your request is refused, ask for a written explanation.

If you cannot then do the case because of the listing, ensure that the court is notified in writing of the reasons; also communicate this to the CBA.

It may be that the case cannot be returned. In such cases, you should try and attend as soon as reasonably possible. Ensure that you or your clerks contact the court as soon as possible to notify them of any delay. We would imagine your arrangements normally allow for a 10am attendance in court.

As with any trial, take the time you need. If you need more time due to late arrival of prison van/ shortage of staff in cells/ lack of CPS staff etc etc.. Make sure that the reasons for any delay in the court sitting are clearly stated

If you are subjected to any criticism, or pressure of the judge, please let the CBA know as soon as possible.

## **5. Returns**

The pilot is voluntary. No barrister should be forced to accept a case placed in the pilot court. In practical terms, this will mean that if a case has been placed in a pilot court efforts should be made to have matters re-listed so that there is no need to return it.

A last minute return for a court sitting early or later is also likely to present additional difficulties for Counsel. If you are unable or unwilling to do work at late notice in a pilot court (for example, because of ongoing commitments) ensure that you notify your clerks of this so that late returns from a pilot court are not placed in your diary. Please ensure that you also let the CBA know that you are unable to cover matters in pilot courts, and why.

If you are asked to cover a return, please check whether it is for a pilot court. Please also check as to why the matter has been returned. Previous counsel may now be unable to cover the case because their existing personal commitments are not compatible with extended hours.

Anyone accepting such a return will be benefiting from a discriminatory system and contributing to the success of such a system. We would imagine that many criminal barristers would not wish to accept returns in such circumstances.

By refusing to accept returns, criminal barristers will not be refusing to work. They will simply undertake their own work. They will fulfil their professional obligations and act in the best interests of their clients in every case in which they are instructed, but will do so when they are able to do so..

## **CLERKS**

Ensure that for your chambers, you have a list of barristers who will be unable to attend cases in an FOH list without sufficient notice. Please ensure that this list is also passed to the CBA; it is important for us to know who is being excluded from cases due to the FOH scheme.

CLERKS - before accepting an instruction from CPS for a FOH list, check with the barrister whether they are prepared to accept. Do not simply accept the instruction and sort it out later; this makes it the problem of your set.

CLERKS - before assigning any case in a FOH list, check with the barrister

## **CAB RANK**

- If a listing means you would have no option but to incur additional expenses (paying for care costs etc) so that it amounts to a reduced fee/ not an adequate fee, you may find that you cannot accept the brief.
- Again, please ensure that you let the CBA know if this happens
- As for those determining not to accept work which is in the name of another counsel, the matter is equally straightforward. Since November 2003, graduated fee cases have been 'undeemed' – in other words they are expressly stated not to provide adequate remuneration. This is important as it means the cab-rank does not apply to such cases. The BSB handbook expressly stated this to be the position at rule rC30: the cab-rank rule does not apply if "you have not been offered proper fee for you services".
- It will be a matter for each individual barrister to determine, but if you decide that the 'return' does not provide a proper fee, there is no professional reason why any new instructions cannot be refused. In short, you cannot be compelled to work.

**[This document gives the CBA guidance on difficulties that the 'Flexible Operating Hours' pilot scheme may cause. It is advisory and does not replace any of the professional conduct rules to be found in the BSB Handbook.]**