The Response of the

Criminal Bar Association of England & Wales

to the HMCTS "Flexible" Operating Hours Prospectus

About the Criminal Bar Association

The Criminal Bar Association of England and Wales ("**the CBA**") represents the views and interests of practising members of the criminal Bar in England and Wales. The CBA's role is to promote and maintain the highest professional standards in the practice of law; to provide professional education, training and assistance 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.

The CBA is the largest specialist Bar association, with over 4,000 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.

This response to HMCTS's consultation on its proposed pilot has been prepared and provided on behalf of the membership of the CBA.

Overview

The CBA, the Bar Council and others have previously expressed their concerns about courts sitting in shifts and we will not repeat those at length here. We believe any such system is an attempt to deal with the fact that the Ministry of Justice is underfunded, and so are the courts. The implementation of such a scheme will put back attempts to make the Bar and therefore, ultimately, the Judiciary more diverse.

The pilots themselves will affect those who take part in them; those with caring responsibilities are unlikely to be able to take cases in such courts.

We have responded to the specific questions set out in the prospectus and we have provided some further observations.

. **Responses to the prospectus questions**

> *Q1: How do you think we could improve the pilots described above? Are there types of work we're suggesting which should not be included in the pilot, or types of work we haven't considered which should be?*

a. By cancelling them. This is not intended as a negative or sarcastic comment. The pilots are an attempt to solve a problem that does not exist. In our response to this question will address several of the assertions contained within this document.

The Leveson Report

b. In paragraph 1.3 of the prospectus, Sir Brian Leveson is quoted out of context. His remark was addressed to work in the Magistrates' court alone. Indeed, regarding Crown Court work we would draw your attention to paragraphs 214-222 of his report; "…The number of cases in which the 'Maxwell' approach could be adopted is likely to be very limited, for example, to lengthy, complex trials where defendants are on bail or, perhaps, for certain terrorism trials at Woolwich Crown Court…"

Pilot Objectives

c. "Different, not extended, court hours".

This is a fundamental misunderstanding of the way the courts operate. If counsel has a matter listed in the morning, and the afternoon, they will be working extended hours. The administrative overhead that would be involved in avoiding such a situation would be substantial. Our current experience of listing practices suggests that the needs of the advocate are rarely, if ever, taken into consideration. To do so in a limited pilot would be at odds with the objective set out in paragraph 2.9; it would not reflect the reality once such a scheme is rolled out nationwide when co-ordination would be required across the court estate.

d. "Finding ways of using valuable estate for longer".

This, we would suggest, is the real purpose of the scheme; to allow for the closure of courts and the "sweating" of the remaining assets. Cost-savings are being put before the proper administration of justice.

e. “To understand whether operating courts and tribunals at different times of the day offers more open and accessible justice for citizens”.

The Criminal courts are not an exercise in consumer choice; they are where the State prosecutes its citizens. The overriding purpose of the Criminal Justice system is to deal with cases justly.

f. “User-centric”.

Any system which presents those with caring responsibilities with a choice between their professional life and their caring responsibilities is not “user-centric”

g. “The pilots must be evaluated to establish whether operating courts and tribunals on the suggested flexible operating hours models is sustainable and scalable and to understand the impacts for all court participants.”

It is incorrect to say that the pilots are required to assess the efficacy of the scheme and any potential negative impacts. We have outlined before, in detail, the negative effects on those with caring responsibilities but it goes well beyond that. The scheme will affect the efficient and just disposal of cases: all the points we and others have mentioned, including delay, lengthening of trials, increased footfall, cost, the impact on other agencies such as police, prisons and security firms – and so on. We maintain that a live test is unnecessary because the foreseeable risks are too great. Those effects will be also present in the pilot. The CBA cannot countenance its members being prejudiced throughout the course of a pilot merely to prove those negative consequences.

h. “We have carried out an equalities assessment in line with our statutory responsibilities under Section 149 of the Equality Act 2010”.

Has an equalities assessment of the likely impact of the pilot itself been carried out? The pilots themselves would have a detrimental impact on diversity for those subjected to the pilots. We are also concerned about the use of the word “significant”. If there is a level of impact on diversity that HMCTS would be happy to accept, we would like to know what that is.

i. “Keeping expensive court rooms and hearing rooms empty before 10am and after 4pm, rather than having fewer, better-maintained rooms open for longer hours, has a real cost”. Courts are not empty before 10am and after 4pm. Court buildings are in use from 8.00/8.30am until 6pm already. Another way of phrasing this objective would be to say “we want to squeeze more work into fewer buildings”. It is difficult to see how that improves the administration of

justice. It should, of course, be noted that the elapsed time for trials will increase, not decrease, if trials are sitting "Maxwell hours".

j. "We recognise that the current court and tribunal estate is not currently used to its full capacity…"

Given this statement, it seems clear to us that the only purpose for the pilot is to allow court closures. We would suggest that a more useful pilot would be to provide a sufficiency of judges, recorders and jurors to enable HMCTS to use all courtrooms every day within current sitting hours. HMCTS would then be in a position to assess the impact on the just and effective disposal of cases, experience of witnesses and the ownership of cases.

k. "we do not anticipate that Flexible Operating Hours will be suitable for all types of work in court such as long, complex trials…."

We find this a confusing assertion given it is the one type of trial where such hours are common. Indeed, Sir Brian suggested that such sitting hours in the Crown court would ONLY be suitable for such cases.

l. "We know that the way that courts list at the moment is not perfect…"

We repeat; if the pilots operate under a special listing system it will not reflect wider practice and will not be scalable. We would suggest that, for the more efficient administration of justice the Scheduling & Listing project should take priority; its learnings should feed into an assessment of FOH, and not the other way around.

Q2: How could we improve the way cases are listed in order to make the pilot work more effectively, and limit any negative impacts for legal professionals?

i. We appreciate that HMCTS has a genuine desire to improve the way the courts are running, regardless of any FOH pilot. The listing system is currently deeply flawed and in need of fundamental change.

ii. The CPR and the Better Case Management initiative all presume case ownership by an advocate. This is routinely ignored by listing offices a practice which significantly undermines this desirable principle and thereby creates avoidable inefficiencies.

iii. Any scheme will need liaison between listing officers in different courts and proper account to be taken of an advocate's availability. For example, if an advocate has

a case listed in a morning slot, listing should not put a case for which the advocate is instructed in the pm slot, if so requested.

iv. However, creating exceptions to allow listing to support the pilot will not replicate what would happen should the scheme be rolled out nationwide. Without confidence in a properly reformed listing system there will be no avoiding substantial negative impacts on legal professionals. No reliable assessment could be based on a pilot so divorced from the practical realities of how a court operates.

v. We also note the intention to have "backers". This means that those with caring responsibilities will be expected to make arrangements for trials which then do not take place.

vi. We disagree with the observation that mixed jurisdiction sittings will avoid advocates appearing "back to back". Many advocates – in particular the most junior – appear in both the magistrates' courts and the Crown courts.

Q3: All the pilots offer the potential of at least 50% extra capacity in a court room. While still achieving this, are there any variations to the sitting patterns proposed which you think would work more effectively?

i. These figures are misleading; although the pilots may allow for 8 hours of sitting time (as opposed to the current 5 to 5 ½ hours) each trial would only sit for 4 hours – a reduction of 20-25%). A 3 day trial will now take 4 days.

ii. We also note proposals to hear DV cases in the late afternoon. Given a significant number of complainants in such cases will have childcare responsibilities late finishes – or early starts – will have a significant detrimental impact on such witnesses

Q4: What other changes to the pilot proposals could make participation in the pilots easier for legal professionals?

We do not see how any scheme would work for legal professionals in the criminal justice system.

Q5: Are there any other considerations for flexible working opportunities for professionals which could be included in the design of the pilots (e.g. legal professionals limiting availability to only morning or afternoon working, condensed hours etc.)? How could you see this working.

We do not see this working, and we do see these as "opportunities". Limiting their availability presents the advocate with choice of losing their work or working extended hours.

Mixed model

Q1: What do you think are the benefits of a Crown Court + Tribunals mixed jurisdiction model?

There are none. It merely squeezes different types of work into one building. It can have no other purpose than allowing HMCTS to reduce the Court estate.

Q2: What do you think are the drawbacks of a Crown Court + Tribunals mixed jurisdiction model?

It assumes the FOH model. In fact, it takes away flexibility. Crown Court hours would become inflexible whilst the volume of work would not decrease.

Q3: What do you think the main issues would be for implementing this model.

See our answers to questions 1&2.

Q4: What hours do you think would form the most appropriate sitting pattern?.

We don't.

Q10: Do you think a Civil/Family Court & Tribunals mixed jurisdiction model would be a better fit? Are there be any different benefits or concerns for running this as a pilot?

We are not in a position to comment on this.

Crown Court + Magistrates' Court "2+5" mixed jurisdiction sitting

Q1: What do you think are the benefits of the "2+5" Crown Court + Magistrates' Court mixed jurisdictional model?

There are none.

Q2: What do you think are the drawbacks of the "2+5" Crown Court + Magistrates' Court mixed jurisdictional model?

- This model is the worst of all worlds. It is the equivalent of a trial court hearing a list before the trial begins, but pushing the working hours further into the evening to accommodate. Also; it will limit conference space. There would be Crown Court barristers trying to speak to clients whilst Magistrates' court list defendants were packing out the public areas.

Q3: How do the benefits and drawbacks of this model compare to the "4+4" version where both the Crown Court and Magistrates' Court sit four-hour sessions?

We don't see any benefits. All the drawbacks of the "4+4" model are present, plus some additional ones.

Q4: What do you think would be the main issues for implementing this model?

We have commented on the drawbacks above

Q5: What types of work should be heard in the Magistrates' Court two-hour session?

This presupposes that we think this model should be implemented; we don't.

Crown Court with "virtual" hearings

Q1: What do you think are the benefits of piloting a further model of a Crown Court with additional virtual/video/telephone hearings

We can't see any benefits.

Q2: What do you think are the drawbacks of this as an additional pilot?

We have noted all drawbacks above.

Q3: What do you think would be the main issues for implementing this model?

No further observations

Q3: If based on having a full Crown Court sitting day (6 hours inclusive of 1 hour break), what hours should we consider running the virtual hearings aspect?

No further observations