

Western Circuit Women's Forum Observations on Extension of Court Sitting Hours Pilot For Family and Civil Courts 2018/2019

1. **SUMMARY**

- **1.1.** In April 2017, the Western Circuit Women's Forum published observations on the proposals for extension of Court Sitting Hours expressing particular concerns about the risks to the diversity of the Bar and Judiciary¹.
- **1.2.** Following consultation, HMCTS has recognised a number of concerns raised by the profession and, on the basis that there are "currently particular pressures in the criminal jurisdiction" have taken the decision not to proceed with piloting the scheme in Criminal Courts and to limit the pilots to the Civil and Family Courts.
- **1.3.** HMCTS' revised proposal does not meet the risks to diversity of the Bar and Judiciary.

¹ WCWF Observations of Extension of Court Sitting Hours - April 2017 -available at https://westerncircuit.co.uk/womens-forum/

² HMCTS - Flexible Operating Hours Pilot: Prospectus for Civil and Family Court Pilots - Nov 2018 (p2)

- 1.4. The new pilot prospectus notes the concerns raised by the profession as to the impact of extended hours on diversity for the legal profession and judiciary. It is the stated intention of the pilot scheme to address those concerns by gathering the right data because "understanding the advantages and disadvantages to particular groups of people is a priority for the independent evaluation". It is important to note, however, that the pilot intends to survey only two courts and Manchester is the only one which deals with family cases. It will be vital that any evaluation takes on board relevant evidence and data from beyond a single large city. This paper seeks to assist with that by providing reliable data which has been gathered widely and over an extended period of time.
- 1.5. There is growing evidence that the self-employed Bar already struggles to retain parents (predominantly women) with child care responsibilities. They already face the significant disadvantages of the self-employed in that there is no paid parental leave and frequently a diminution in practice and income coinciding with child care costs on return to work.
- in November published the report "Back to the Bar A survey of obstacles, aids and recommendations for parents returning to the Bar". In addition, we have sought further views from civil and family practitioners as to HMCTS' current proposals. This paper repeats the evidence and concerns set out in the 2017 response and draws on further evidence which was unavailable at the time of that response.
- **1.7.** Moreover, the decision not to pilot in the criminal courts was largely due to concerns raised about the high likelihood of advocates being required in both early and late sessions, especially more junior barristers. These factors apply to criminal,

³ HMCTS - Flexible Operating Hours Pilot: Prospectus for Civil and Family Court Pilots - Nov 2018 (p9)

⁴ WCWF - Back to the Bar - A Survey of obstacles, aids and recommendations for parents returning to the Bar - available at https://westerncircuit.co.uk/womens-forum/

civil and family cases and we can see no evidence that the three jurisdictions have significantly different considerations for the more junior Bar given that:

- The Family Bar is the one jurisdiction in which the majority of the practitioners are female (61% in 2013); and ⁵
- It is highly likely that a significantly higher percentage of people attending family proceedings have caring responsibilities than those attending criminal proceedings.
- **1.8.** Our previous assessment was, and remains, that it is plain from the comments of respondents that longer sitting hours would undo at one fell swoop so much of the good work which is currently being undertaken to retain parents.
- 1.9. Longer sitting hours would lead directly to the immediate loss of many talented women from the profession. It would deter those with caring responsibilities from court-based sectors of practice. The corresponding deleterious effect on diversity in the ranks of junior, QC's and judges would be profound and long-lasting.

2. <u>DIVERSITY</u>

2.1. We repeat that women have made up around 50% of those called to the Bar since 2000.⁶ Only 29% of self-employed barristers over 15 years call are women, and only 13% QCs. There is no trickle-up effect; women are still leaving en masse. This is not simply because women are 'choosing' not to work: the employed Bar boasts far better representation of women. There are clearly factors embedded in self-employed practice which make it difficult for some women to remain.

⁵ The 2013 statistics from the BSB working lives survey are at table 2.4 on page 27 of this document:https://www.barstandardsboard.org.uk/media/1597662/biennial survey report 2013.pdf

⁶ Bar Council Momentum Measures Report 2015.

2.2. Lest it be forgotten how serious this problem is, it is worth recalling that The Bar Council Momentum Measures Report in 2015 concluded that, on current patterns, gender equality could never be achieved: 'The attrition is such that it would require a very long period of substantial imbalance in favour of women at Call to achieve a balance of women in practice.'

3. MANAGING CARING RESPONSIBILITIES AND CURRENT COURT HOURS IS ALREADY A MAJOR CAUSE OF ATTRITION - NEW EVIDENCE

- **3.1.** The Western Circuit Women's Forum's 2018 "Back to the Bar Survey" findings as to the difficulty of combining work at the Bar with caring responsibilities on current court hours were summarised as follows:
- **3.2.** Almost two thirds of those who left the Bar on the Western Circuit over a 6-year period were women, whereas almost all of the men who left became judges or retired. The vast majority of women who left did not become judges or retire, but left mid-career.
- **3.3.** Most of the women who left cited the difficulty of balancing work and family commitments as a factor in their decision. 55% of respondents said they could not balance their home and work lives in a satisfactory manner. This imbalance is likely to involve childcare and there is sound anecdotal evidence and material from focus groups to show that being a primary carer for children is a difficult role to combine with a career at the Bar.
- **3.4.** The majority of respondents in this situation struggled to find childcare support flexible enough to meet their needs, and many cited this as their greatest

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⁷ WCWF Back to the Bar Survey 2018

difficulty. Many respondents concluded that their only option was to pay for full-time childcare support, even when officially working only part-time as barristers. The expense and inflexibility of childcare prevented some women from undertaking part-time work.

3.5. Comments in this survey included:

- ◆ Court hearings regularly run late and the venue can be changed at the last minute leading to significantly increased travel time.
- ★ The biggest issues are finding flexible childcare and attempting to have some semblance of a family life.
- ★ The amount of childcare you need in a given week might vary significantly both in terms of quantity and exactly when it is required. Sometimes you might need someone as early as 6am to 7/8pm to look after your children so that you can leave for court for a case running for all 5 days, other times you might only need childcare from 9am to 5pm for 3 days to enable you to do paperwork. Your child carer needs to be ultra flexible for this to work.
- ♦ I also had to commit money to a nanny even though I didn't always need her as
 it was the only way to make sure I had childcare available to work random
 hearing days.
- ♦ It would not have been cost effective to have a full time nanny and only work part time.
- ★ The necessary childcare was extremely expensive and frequently didn't cover my earnings in a week.
- **3.6.** It is worth repeating that the same clear message was evident from the focus

groups in the Bar Council's 2015 'Snapshot' study.8

3.7. Any difficulty related to primary caring responsibilities currently affects women more than men: 63% of the members of the practising Bar who stated to the BSB that they had primary caring responsibilities for children were women.⁹

4. CURRENT CHALLENGES

- 4.1. In 2017, the Western Circuit Women's Forum urged HMCTS to listen to feedback about current concerns before any consideration was given to the extension of court hours. To assist with a full understanding of the existing challenges for those who work in court and have caring responsibilities, not to mention the immensity of the emotional and financial cost of combining a career at the Bar with being a primary carer, we published comments from respondents and these remain pertinent.
- 4.2. It is important to note that there are particular difficulties at the Bar which are not faced by many other professionals. This includes lack of fixed hours or predictable rotas, court sitting patterns precluding part-time work, fluctuating income, and many last-minute demands on time. The challenges are amplified on Circuit where courts are spread out and can be significant distances away from home.
- 4.3. The following quotes are taken from the WCWF original response in April 2017:

⁸ Snapshot: The experience of Self-employed Women at the Bar

⁹ Bar Standards Board 2016 [report?] provided to WCWF: a low response rate for this question means that the answers should be approached with caution

As it is I drop them at the childminder at 7.30 am and collect them at 5.30. The childminder does the school run for me. I work most evenings, after they have gone to bed, prepping cases and catching up with paperwork. It is a struggle. **EP: single mother of 5 and 7 year old**

I returned to work on a part time basis. I have childcare for three days a week and so I am available for court work on those days. Of course, if I am in court for those three days, my preparation and paperwork must be done during weekends and evenings. LA: mother of children age 3 and 1

As with everyone else I do not clock off at 4:30. I am also up working until 2 or 3am ahead of a busy court day. I just spend an hour every evening eating my dinner with my children rather than relaxing at the gym or in the pub before opening the brief again. What is often called "a lifestyle choice" in having children and continuing with a career at the bar is challenging enough at the moment. KS: mother of 3 yr old and 1 year old

My wife and I share the responsibility for dropping both children off at 07:30 in the morning and collecting them anytime between 17:00 and 18:00 in the evening. My wife is a barrister of similar call. The current court sitting times of 10:00am to 16:30 hours will allow my wife and I to commute from court in order to collect our daughters. Although we both have work to do after court, in the evenings and often into the early hours of the morning, the certainty of knowing that the court will not sit much beyond 16:30 allows us both to continue to do this job and arrange childcare with the certainly of knowing that we will not need to be in court. **LB: father of 2 young children**

I am already having to organise child care from 7:30am to 6pm for my 3 year old and 10 month old baby. It is not only prohibitively expensive but as a barrister practising in criminal law I cannot work part time. I see my children for 1 hour before bed and at the weekends. KS: mother of 3 yr old and 1 year old

Already we face having to pay for full time child care cover 5 days a week as the courts cannot say when cases are going to be listed. On days we have paid for the cover and do not work because the court has moved a case we are out of pocket to the extent that many women returning to work after maternity barely break even for the first year.

MMC: mother of 2 school-age children

At present we just about manage to coordinate our diaries to ensure the children are picked up at the end of the day. More often than not I collect them both once I have finished court, and work again once they are in bed. Once my daughter starts school we will become heavily dependent on after school club, which finishes at 6pm. <u>JL:</u> mother of two young children

I live an hour from my local court centres so if I am to get home to collect them from the childminders I need to leave the court centre by 5 at the latest. This is tough enough as it is. I am already limited in the courts on Circuit I can work in. KS: mother of 3 yr old and 1 year old

Since becoming a mother, my practice and career has undoubtedly suffered. I am no longer able to travel to courts other than those that are within an hour from home because I have to be home for, if not pick up every day, then the evening responsibilities involved in caring for a now 9-year old child. All of that has made a difference to my career but it is something that I have organised my practice around and something that I have come to accept. SR: mother of 9 year old

5. EFFECTS OF THE PROPOSED LONGER SITTING HOURS

- **5.1.** We note the view that: "There are of course many other professionals whose work extends well beyond their hours of required attendance in a particular place, but who are nevertheless asked to attend outside the hours of 10am to 4pm; and that these are the only possible working hours does not fit with the experience in other countries where more flexible hours are used." ¹⁰
- 5.2. This suggests a persisting misunderstanding as to work which is undertaken in the court building but outside of a court hearing. This applies particularly to Civil and Family Hearings for the following reasons. If a hearing is listed at 10am, the court will either require parties to attend at 9am, or at the very least the parties and advocates will need to meet at 9am to take instructions and negotiate. Even if the hearing finishes at 4pm, the order needs to be drawn by the advocate, together with preparing an attendance note and having a post-hearing debrief/conference with the client.
- **5.3.** Current proposals would mandate court opening hours allowing security clearance of parties and lawyers by 07.00 hours until 20.00 hours.
- 5.4. This applies at least equally to Family and Civil jurisdictions, and probably to a greater extent than Crime, because of the negotiations which take place between parties at the door of the court. These negotiations often lead to a much more efficient use of court time relating to agreements as to directions, costs budgets and/or the final disposal of the case. These are fundamental to the efficient use of court time and can rarely be conducted prior to the day of the listing.

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¹⁰ HMCTS - Flexible Operating Hours Pilot: Prospectus for Civil and Family Court Pilots - Nov 2018 (p8)

- 5.5. Caution is urged before reliance is placed on practices of other countries which have different court systems. By way of example, in many types of proceedings in France it is not adversarial but judge-led, so there is not as much need to attend earlier for negotiation purposes. Moreover, according to a study by the Organisation for Economic Co-operation and Development, the cost of childcare in the UK is amongst the most expensive in the world. ¹¹
- **5.6.** The following is a summary of concerns raised by practitioners on the Western Circuit in November 2018 in response to the proposed pilot and the way in which it is to be evaluated:

Junior Practitioners

- ◆ The types of cases proposed to be covered in the extended hours are those most likely to be undertaken by junior members of the Bar, often with fixed fees, who are likely to be in court every day and will not be able to sustain early and/or late sitting hours.
- ◆ Public transport is likely to be unavailable on Circuit early enough in the morning to enable a practitioner to get to court for an early sitting.
- ◆ It is likely that practitioners on Circuit will have to stay overnight in a location close to court to be able to get there on time, for which there would be no additional remuneration. This will make it cost-prohibitive, particularly for junior practitioners and those conducting legal aid work.

Caring Responsibilities

◆ The types of cases proposed are most likely to be undertaken by parents with caring responsibilities, or newly returning to the Bar after a period of parental leave.

¹¹ OECD (2011) Doing Better for Families

- ◆ Childcare is not available at the times proposed, particularly taking into account travelling times on Circuit where a large geographical area is covered.
- ◆ It will be impossible for practitioners who use nurseries for childcare to appear in cases listed either early or late (unless they are able to rely on someone else to transport their children to and from the nursery) given that the 'usual' nursery hours are not any earlier than 7.30am or any later than 6.00pm.
- ◆ Live-in childcare is probably the only way of being able to attend court early or leave late, but then there is the difficulty with the maximum number of hours per day or per week that someone who lives in can work.
- ◆ Practitioners with childcare responsibilities will see their children less, childcare will cost more and they may not have anyone who can care for them in any event.

Particular Hearings

- ★ With Financial Dispute Resolution (FDR) hearings, there are particular difficulties with the proposals. There is always a requirement to attend court one hour before an FDR hearing. If the hearing is listed at 8am, barristers (and their clients) will need to attend at 7am. Unless the Court building is open at 7am, the case will not be ready to go into court at 8am. This will have a knock-on effect on all of the other cases in the court list. If it is a later listing, a hearing is very likely to be ineffective as practitioners and parties often need the whole day to negotiate. If there is a change of judge after an early sitting, this is likely to render the entire hearing as ineffective, as parties often need to go back before the same judge after negotiating for a further indication or approval of a consent order/directions.
- ◆ First hearing private children cases are likely to involve a large number of vulnerable parties who are unrepresented and where there may be allegations of domestic violence. This means them being asked to attend court hearings in the evening and then waiting for public transport to take them home late at

night, which will put a lot of parties at risk. Most, if not all, of the parties in private children cases will also have caring responsibilities in any event given that the hearing will concern their children and may not be able to find (or afford) childcare to attend court outside 'normal' court hours.

- The proposal includes cases such as possession hearings to be listed between 8am and 10.30am. The very nature of these hearings means that one party is likely to be on a low income, probably with children, unable to arrange childcare and be able to arrive at court early enough and/or with mental health or physical issues that will make getting to court very difficult and/or expensive (owing to the lack of public transport in more rural areas, particularly on Circuit, at this time). Furthermore, childcare is not a recoverable disbursement under the Civil Procedure Rules.
- ◆ Infant approval hearings are not 'family' proceedings. The child needs to attend court and they cannot be expected to do so in the evening, as they need to get to bed at reasonable time.

Wellbeing

- ◆ From a wellbeing perspective, the impact on practitioners will be stark. They are likely to be tired with much longer working days, which may well lead to poor performance and inefficiency at court. This is before even considering the negative impact this will have on childcare arrangements and time together as a family during the evenings.
- ◆ Detailed orders are often required to be prepared on the day of the hearing. There will be a negative effect on advocates if the order needs to be drawn after a late finish and in circumstances where, often, they will then have to prepare for a case the next day (which could be an early sitting). It will be near impossible to properly prepare for hearings, including preparing case

summaries/position statements in order to comply with the relevant Practice Directions.

◆ There will be a detrimental effect on the wellbeing and family life of barristers, with an increasing risk of more barristers leaving the profession, particularly those with caring responsibilities.

The Effect on Other Court Users/Staff

- ◆ There will be a detrimental effect on CAFCASS practitioners with early or late sitting in first hearing private children cases. They already have an unsustainable workload and many CAFCASS practitioners will also have caring responsibilities.
- ◆ There is a concern about the effect of early and late sitting on barristers' clerks, solicitors and other staff working in solicitors' firms, judges, ushers, security and other court staff who are likely to experience similar issues with childcare and travelling.
- ◆ Given the cuts that have already been made, and the strain on the budget that is already evident, there are concerns about how the government and/or the Legal Aid Agency will afford extra payments to run the court buildings (splitshift judges, court staff, security and extra payments for advocates).

Other

- ◆ There is likely to be a significant rise in wasted court time, delays and injustice if parties and/or advocates cannot or do not attend early or late hearings.
- ★ These proposals will lead to a profession in which only the privileged work.

- ◆ There are concerns as to the choice of pilot areas: Manchester and Brentford are not sufficient given different considerations on Circuit and in more rural areas, particularly as the only family cases will be in Manchester.
- ◆ There are concerns as to whether the 'cab rank' rule will apply to early/late sittings if the proposal is rolled out. Even if it does not, there are concerns that barristers who do not conduct cases listed early or late will conduct less work and practising at the Bar will simply become unsustainable.
- ♦ The proposals may deter people from joining the profession.

6. THE TERMS OF THE PILOT

- 6.1 For the reasons expressed above, we do not support the Pilot going ahead. We are concerned that there are not sufficient differences between the criminal and civil/family jurisdictions and, furthermore, there will not be a large enough evidence base to enable a fair and representative survey to take place.
- 6.2 If, however, the government disagrees with this and the pilot goes ahead, we propose that the following data needs to be collected as a minimum:
 - (a) The type of hearing listed and its time estimate;
 - (b) The time the hearing is listed;
 - (c) The time the court ordered the parties/advocates to attend;
 - (d) Who attends to represent each party and whether all parties have attended;
 - (e) Whether the hearing was effective;
 - (f) What time the case started and finished;
 - (g) Who has opted-in and opted-out, and any reasons given for opting out.
- We would then wish to see this data and comment further before any further Pilots are proposed.

7. CONCLUSION

- 7.1 We consider the evidence base is already sufficient to demonstrate, unequivocally, that extended sitting hours would pose significant difficulties in terms of the wellbeing of the profession and in respect of arranging childcare. The lack of predictability and lack of notice about court listings under the new proposals would mean that parents would have to arrange for care to be regularly available for the whole extended court-sitting period. The financial cost would be prohibitive.
- 7.2 We repeat the concerns expressed in 2017, which we do not consider have been answered by narrowing the scope of the proposals to Family and Civil Courts.

If these changes come into effect women (or fathers if the principal care givers) will be faced with having to pay someone to be available until 7 - 9 every night in case our cases are listed then. MMC: mother of 2 school-age children

I do not know of any nursery schools which will look after children until 8.30 pm. It is far more difficult to 'car pool' with younger children because the requirement for car seats complicates any such plans. Parents who cannot rely on family members will be forced to consider live-in nannies and other, more expensive, childcare options. **LA: mother of children age 3 and 1**

When do they expect me to prepare my cases, or draft attendance notes from the days hearing, or draft the orders after the hearing – my only prep time during the week is at night. Am I to start work much later into the night and then finish in the early hours of the morning? The knock on effect then, is that I need to book more days out for preparation work which means less income but potentially with increased childcare costs. **CM: mother of 3 year old**

7.3 More prohibitive yet would be the emotional cost. Longer sitting hours would mean that a primary carer of young children may not see their children at all on the days when they were on late shifts. The unpredictability of court patterns would play havoc with carefully-worked arrangements. A work/life balance which is currently fragile for many primary-carers would be shattered.

Quite apart from the debilitating financial cost, very few mothers would feel they were fulfilling their caring roles if their children had to experience this sort of unpredictable upheaval to their daily routines. Even once home after the proposed late sitting many barristers would need to do further work on their case. MMC: mother of 2 school-age children

How do they expect us to have any time with our children when they go to bed well before 8.30pm? CM: mother of 3 year old

Court currently finishes around 4pm, by the time results sheets have been filled in and the necessary people spoken to I am lucky to get home by 6.30pm (and I live reasonably close to court!). If that timetable is pushed back by 2 hours and I don't arrive home until 8.30pm then my children would rightly feel abandoned. By that time they will have been home from school alone for 4 hours, by necessity they will have to have fed and looked after themselves. My children are of an age where they could probably handle that as a very occasional event, but I would be reneging on my responsibilities if this was to happen regularly. SD: single father of two school-age children

We will not know from one week to another whether our trials will be early or late and arranging let along keeping consistent child care will be incredibly difficult. Our routines will be shot to pieces and life even more stressful than it is already. Routine is particularly important in my house as my son has autism - when it changes it is extremely disruptive. HD: mother

There are huge feelings of guilt about how little time I get to spend with my children as it is. I miss assemblies, sports days, concerts etc because I cannot just take an afternoon off here or there because that's not the way this job goes. I do not know of a childminder or nursery that will keep children beyond 6pm...and in any event my children go to bed at 7, if I didn't pick them up until just before 7 (if courts finished at 6) I would not be able to read with them, help them with their homework or spend any time with them. **EP: single mother of 5 and 7 year old**

If I am in court until 8.30 at night, I simply do not see when I will be able to prepare my cases. . LA: mother of children age 3 and 1

7.4 The effects of longer court hours would be profound: Every primary carer surveyed on the Western Circuit with young children said that they would have to leave the Bar. The attrition rate, which is already high, would soar.

I am proud of what I do. I worked jolly hard to get here and work hard to maintain my practice. I know that has an impact on my children, at the moment I can just about live with the balance I have - but I could not sacrifice my children and their upbringing any more. **EP: single mother of 5 and 7 year old**

If the court hours were extended to 8.30 pm or even 6 pm, this will make life so difficult for working parents that I suspect a considerable proportion will be forced to consider alternative careers. Of course, with the responsibility of childcare still falling largely in the lap of women, it is they who will be put at the greatest disadvantage. LA: mother of children age 3 and 1

I work all over the Western Circuit and it is not unusual for me to have a six hour round trip to court. If the court sits until 7pm or even 8.30 pm, I would not even get home until 11.30 pm. I will never see my children and in these circumstances, there is no way that I intend to continue my career at the Bar. LA: mother of children age 3 and 1

If we have to work in court until 6pm I will have to give up my practice. I am not willing to and I cannot afford to employ a live in nanny. In short if the current court day is extended my career at the bar is over. KS: mother of 3 yr old and 1 year old

The Criminal Bar is not well paid which means that it would be impossible, certainly for me, to fund a nanny, which is what the reality of late and uncertain finish times would mean. That would leave many women with no alternative other than to give up a career which we value and enjoy despite the difficulties inherent with it. **SR: mother of 9 year** old

My experience of my own practice and of many mothers I have tried to help over the years is that it hangs by a thread for a few years. I have no doubt that requiring court hearings until 8.30 would sever that thread for a considerable number of women. **SP**, mother of 2 teenagers

I would have to seriously consider how practical it was for me to continue at the bar whilst our children are at school. <u>JL: mother of two young children</u>

If court hours were to change to any later then I would not be able to work as a barrister. **EP: single mother of 5 and 7 year old**

Any extension to the sitting hours of the Crown Court to 18:00 (for the Crown Court) would make it impossible for both my wife and I to continue to practice at the Bar. At least one of us would have to consider an alternative career. **LB: father of 2 young children**

These changes would make it impossible for most women to return to the Bar after having had children. MMC: mother of 2 school-age children

I would seriously have to consider whether I could remain at the Bar if the courts sat past 4.30pm, as I have no childcare past 6.00pm. RG: mother of 5 and 2 year old

7.5 The Lord Chancellor and Ministry of Justice have repeatedly set out their support for the principle of improving diversity in the profession and the judiciary. HMCTS introduces the pilot stating that the aim is to "design our processes around the people who use and need them, to improve access to justice and to create a

system that is more considerate of others' time and convenience, as well as be more efficient". Longer court sitting hours are entirely inconsistent with this principle and this stated aim and should be resisted by all who desire a representative Bar and Judiciary.

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WESTERN CIRCUIT WOMEN'S FORUM

JANUARY 2019

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