



Western Circuit Women's Forum

Observations on proposed COVID operating hours

in the Crown Courts 2020

1. SUMMARY

- 1.1 The Western Circuit Women's Forum ('WCWF') has, on a number of previous occasions, set out its concerns about proposals to extend court sitting hours, and the negative impact such schemes will have on those with caring responsibilities.
- 1.2 As we have repeatedly pointed out, the self-employed Bar already struggles to retain barristers (predominantly women) with child-care responsibilities. They already face the significant disadvantages of self-employed workers, which specifically include that there is no paid parental leave and, frequently, a diminution in practice and income coinciding with child-care costs on return to work. These difficulties are compounded by particular features of the self-employed bar; notably that one key to regular instruction is the ability to be flexible as court listing changes.
- 1.3 The WCWF's report, 'Back to the Bar 2018', included evidence that two-thirds of those who left the Bar over a six-year period were women. Almost all the men

who left became judges or retired after long careers. The vast majority of women who left dropped out mid-career, citing the difficulty of balancing work and family life.

- 1.4 In 2020, those difficulties have been exacerbated by Covid-19. Many practitioners, particularly those with a heavy court-based practice such as crime, have seen a reduction in their income. Those with child-care responsibilities have also struggled to sustain their practice whilst juggling caring and home-schooling commitments as schools and childcare provision shut down for a significant period.
- 1.5 It is acknowledged that the stated focus of the current proposal to extend court sitting hours is the backlog of criminal cases. We note that some thought has been given to the difficulty extended operating hours will present to those with caring responsibilities. However, the conclusion of the WCWF is that the proposed 'blended approach' of normal operating hours courts running alongside extended operating hours courts will not solve problems caused by the scheme for those with caring responsibilities.
- 1.6 HMCTS' assessment is that those who cannot attend the extended operating hours court can request that their hearing takes place within ordinary operating hours, and that this will mitigate the impact on those with caring responsibilities. This does not, however, reflect the reality on the ground: the availability of counsel competes with numerous other considerations when listing a case. If a barrister cannot attend a hearing listed within extended operating hours, there is no assurance or guarantee that it can immediately move into an ordinary operating hours listing.
- 1.7 To compound this, a scheme which systematically requires practitioners with caring responsibilities to fight to retain the work they are instructed to undertake is discriminatory.

- 1.8 It is acknowledged that significant steps must be taken to address the backlog of criminal cases, but this can and must be achieved by measures which do not disproportionately affect parents and carers at the Bar, the majority of whom are women.

2. THE CURRENT CHALLENGES AND IMPACT ON DIVERSITY

- 2.1 The WCWF has reported on the lack of diversity at the Bar many times. Since 2000, women have made up around 50% of those called to the Bar.¹ However, only 29% of self-employed barristers over 15 years' call and just 13% of QCs are women. There is no trickle-up effect; women are still leaving en masse.

- 2.2 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.'

- 2.2.1 It is incontrovertible that one of the major causes is the difficulty of combining primary caring responsibilities with a career at the Bar. That was the clear message from the focus groups in the Bar Council's 2015 'Snapshot' study.²

- 2.3 Self-employment already presents challenges for those with child-care responsibilities, including the absence of paid parental leave, diminution of income and child-care costs on return to work. The WCWF previously reported on responses from practitioners about the added difficulties faced at the Bar. These include the lack of fixed hours or predictable rotas, court sitting patterns precluding part-time work, fluctuating income and many last-minute demands on time. Often those challenges are amplified on Circuit where courts are spread out and can be significant distances away from home.

¹ Bar Council momentum Measures Report 2015.

² Snapshot: The experience of Self-employed Women at the Bar

3. EFFECTS OF LONGER SITTING HOURS

- 3.1 HMCTS proposes that the extended operating hours will be 9am-1pm, and 2pm - 6pm. A working day in the Crown Court routinely involves practitioners being present at court before and after sitting hours to work on the case. This work includes conferences with clients, taking instructions, meeting witnesses and holding discussions with opponents. Consequently, those who attend the morning shift of the extended hours court will often need to be in the court building for 8am, and those who attend the afternoon shift may expect to leave the court building at 7pm.
- 3.2 Childcare would need to commence from when practitioners need to leave for work and/or when they arrive home. We are not aware of any private nurseries across the Western Circuit that open earlier than 7.30am or close any later than 6.00pm. Breakfast club and after-school provision has generally not been available during the pandemic but in any event would not operate for longer hours than private nurseries. Childminders and nannies may be able to offer more flexibility but this is not guaranteed and even if extra hours were available they have to be paid for. Family members who may historically have offered help are likely to be in the form of grandparents, many of whom are in a vulnerable age category and should be limiting their social interactions.
- 3.3 There are obvious and very real practical hurdles surrounding childcare during early mornings and evenings. The WCWF can only fairly conclude that practitioners working in publicly funded areas, such as crime, are simply not going to be able to afford extra childcare even if it may be available.

- 3.2. HMCTS suggests that the pilot schemes ran with no expectation that any one individual would participate in both the morning and afternoon session in one day. However (as identified by the Criminal Bar Association), one court during the pilot did exactly that with the judge sitting between 9am and 6pm³.
- 3.3. The listing of criminal cases is often unpredictable and last-minute. A practitioner's availability is only one of many factors relevant to when a case might be listed. Frequently, cases will be listed without any enquiry into the availability of the instructed advocate.
- 3.4. The reality is that, in order to retain work and comply with their professional obligations, practitioners who are required to attend either a morning or afternoon court session will very often have additional professional commitments outside of that session. This is fortified by a recent response from a practitioner on the Western Circuit who participated in a pilot scheme:
- 'I wasn't asked about whether I could do the EOH [Extended Operating Hours]. I don't know if my clerks were asked, but I wasn't. It just went in my diary. It extended the hours of my working day, e.g. on one day, I had a mention listed in the morning (I think about 10). I didn't think I could refuse to attend without risking breaching my professional obligations. It also would have felt wrong to refuse, given I was due to arrive at Court a couple of hours later in any event. And as it happened, nobody else was easily available to cover it, anyway... So I got to court for 9, and then had to do the afternoon EOH. I didn't get home til late. finishing late plus travel means you lose all of your evening.'*
- 3.5. Adding extended operating hours to the unpredictability of court listing practices means that parents would have to arrange for care to be regularly available for the whole extended court-sitting period or for periods when childcare is simply not available. Covid-19 has significantly reduced the availability of childcare in

³ <https://www.criminalbar.com/wp-content/uploads/2020/12/Report-of-the-CBA-Working-Group-on-Court-Capacity-2.12.20.pdf> (at pp.21-22)

any event. It would be prohibitive practically, financially and emotionally. As one member of the Western Circuit put it:

'As things are - there is a very unhealthy working culture at the bar already. Many barristers already skrimp on sleep and time with families because of the heavy workload and demands of the job.'

4. THE 'BLENDED APPROACH'

- 4.1 We have serious concerns about the suggestion that practitioners could avoid listing difficulties by requesting that hearings take place during standard operating hours if they are unable to attend an extended sitting hours court. In our assessment, this places an unacceptable burden on those with caring responsibilities to disclose aspects of their personal lives to the court, their opponents and both their lay and professional clients. Many lay and professional clients may feel they have no other option but to instruct an alternative barrister who can commit to an extended hours listing so that the case is heard.
- 4.2 We are concerned that practitioners will be placed in the impossible position of appearing to factor their own personal commitments against the interests of their client. For example, a client's interests might be better served by them being represented by someone without child-care responsibilities who could represent them sooner in an extended operating hours court. What is the barrister supposed to do in those circumstances?
- 4.3 The inevitable result of extended operating hours is that many practitioners with caring responsibilities will simply not be able to conduct the same amount of work as those who are able to accommodate longer sitting hours. This will lead to a loss of income and the inevitable consequence of many barristers choosing to leave the profession. We fear that most of these barristers will be women.

5. **CONCLUSION**

- 5.1 We acknowledge the need to ensure the backlog of criminal cases is reduced quickly and effectively. We suggest that this is done using more part-time judges and Nightingale courts during normal operating hours.
- 5.2 Due to the limited scope and duration of the pilots (with some pilots running for as little as two weeks), and the very limited number of surveys carried out to assess response, we are sceptical as to HMCTS' conclusion that the scheme will effectively reduce the backlog of cases.
- 5.3 We are also concerned that this scheme will not be time-limited, particularly bearing in mind HMCTS' successive attempts in recent years to implement extended sitting hours in the face of clear and repeated concerns.
- 5.4 It is our assessment that, even if HMCTS were able to demonstrate some increase in the number of cases capable of being resolved by way of extended operating hours, even for a short period of time, it comes at too great a price: a significant risk of discrimination against those with caring responsibilities (most of whom are women) and the undoing of much of the hard work undertaken to encourage equality and diversity at the Bar.

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<http://westerncircuit.co.uk/womensforum/>