



The Law Society

**Her Majesty's Courts and Tribunals Service
Flexible Operating Hours Prospectus**

The Law Society response

December 2017



PREFACE

The Law Society ('the Society') is the professional body for solicitors in England and Wales, representing over 170,000 registered legal practitioners. The Society represents the profession to parliament, government and regulatory bodies and has a public interest in the reform of the law.

The Society welcomes the opportunity to respond to the Her Majesty's Courts and Tribunals Service ('HMCTS') prospectus on the proposed reforms; we support the need to ensure courts are used as efficiently as possible and that they are accessible for all users. To address the questions contained therein we have sought the views from the Society's specialist committees:

- Access to Justice Committee
- Children Law Subcommittee
- Civil Justice Committee
- Criminal Law Committee
- Family Law Committee
- Housing Law Committee
- Immigration Law Committee

We understand that the questions relating to tribunals/courts mixed models may not be limited to immigration and asylum cases. In the event HMCTS propose to combine a different tribunal the Society reserves the right to make further representations after consulting the appropriate policy committee(s).

EXECUTIVE SUMMARY

1. The Society understands the need to manage the pressures on courts and tribunals, by taking advantage of the opportunities that technology can provide to delivering a just, proportionate system that upholds access to justice. Accessibility will be integral to the success of these reforms; a system which precludes users from engaging effectively with the courts cannot be considered as a process that delivers justice.
2. We welcome HMCTS' decision to publish a prospectus and gather stakeholder views. The document provides a much clearer explanation of the reasons for the pilot and HMCTS' intentions than what was available publicly before. However, key concerns that have been raised by the Society at a national and local level remain outstanding. In the circumstances, we believe that solicitors will be very reluctant to participate in the pilot.
3. Before addressing the questions posed, the Society will set out its summary position as to how the Flexible Operating Hours ('FOH') options proposed are likely to impact upon court and tribunal users:
 - **The potential for discrimination** has been highlighted by our members, particularly against those with childcare or other caring responsibilities, and certain religious groups.
 - **The increased pressure on legal aid practitioners.** Previous assurances that the London pilots will only deal with trials appear to have changed, as timetables include bail applications which will have an impact on duty rotas. Nor are there any details of costing, or on uplift in rates to reflect any antisocial working hours.

- **Safeguards to prevent longer working hours.** While the prospectus repeats the intention that no lawyer should have to work longer hours than at present, there are no practical measures identified in the document to show how this will be avoided, or to explain how lawyers are to notify the court if their cases are listed during the early morning and late evening sessions on the same day.
 - **Interactive scheduling of cases.** Without some means of determining court users' availability and preference of when their case is scheduled, not only does the pilot fail to be 'user-centric' by design, courts may find themselves at risk of breaching anti-discrimination legislation.
 - **Any economic analysis of efficiency savings must be undertaken on a full costs basis.** Our analysis indicates that the extension of hours will increase the costs incurred by the firms involved. In the cases of legally aided work, and particularly criminal defence work, firms will still deal with the same amount of work in the pilot courts - and hence receive the same income from those cases as at present - but will have to utilise greater resources over a longer period of time to earn that same income. This is likely to make existing slim profit margins much more difficult to maintain threatening the viability of law firms, and putting access to justice at risk. In the case of private work, it is unclear whether during the pilot firms will be able to charge higher rates for work out of normal office hours, as would be usual for any commercial business offering out of hours services, because of the terms of retainers with clients, and the implications of their professional obligations. If out of hours work became mainstream, the likelihood is that firms would amend their terms of business to pass on this additional cost to clients.
 - **Pilot time frame.** Until the FOH models have been determined and sufficient time has been given to incorporate the new models in the existing timetables, the FOH pilot should not commence.
 - **Utilisation rates.** Utilisation data does not reflect how the courts are used on a day-to-day basis or the use of any of the other facilities which will have an impact on how many cases can be heard in a single day.
 - **Publication of additional information.** We urge HMCTS to publish evidence relating to pain points which have been identified in the prospectus, the updated invitation to tender criteria and the findings and evaluation from the pilot on FOH in the Immigration and Asylum Tribunal based in Manchester.
4. For ease of reference questions have been addressed in the order that they appear in the prospectus. For those questions which introduce new FOH models, we have provided a comprehensive answer to each proposal, which addresses the questions posed in a single answer.
 5. None of the questions in the prospectus specifically invite views on the data required or the content of the evaluation. The Society has made extensive representations on what any evaluation must capture in order to be sufficiently robust. In July 2017 the Law Society submitted a formal written response to HMCTS, rather than rehearse the substantive points below, a copy of that response is annexed to this paper.

DETAILED RESPONSE

General observations

1. We would urge HMCTS to reconsider starting the pilot before the FOH models have been determined and local implementation teams (LITs) have sufficient time to consider and make the necessary arrangements to incorporate new models into their existing timetables. This period should be not less than twelve weeks from the date of publication of the summary of responses and recommendations. This period would be required to consider any necessary staffing arrangements for essential service partners, particularly if detainee transport is required. From representations made by contract managers at LIT meetings we understand that staff shifts are organised up to 12 weeks in advance.

Pilot timeframe

2. The prospectus invites the views on five new FOH operating models which are wide in scope. For the first time, at least publicly, tribunals and virtual hearings are now being considered within these new FOH models.
3. HMCTS has given itself a very short timeframe in which to consider the new models, make recommendations, and incorporate the conclusions into the existing FOH pilot framework (bearing in mind the Christmas holiday period). The deadline to respond is 1 December 2017 and HMCTS is due to publish a summary of result in early January 2018, with the pilot still due to commence in February 2018.
4. We would expect the summary of responses published in January 2018 to also include recommendations as to whether any of the proposed FOH models are being taken forward and if so, in what locations. Under the current timeframe, this will give LITs only a few weeks to incorporate new FOH models into pre-existing arrangements, FOH timetables that some LITs have been working on for months.
5. Sufficient time must be made available to those voluntary LITs to convene and discuss how any new model would work in practice, whether that be in addition to or instead of the current timetable of casework that has been agreed. Further membership of the LITs may also be required if a new jurisdiction is being tested as part of the FOH pilot. The Society has been involved across all the LIT meetings, which have taken place in the months leading up to the commencement of the pilot. LIT members volunteer their time outside of their office hours and monthly meetings are frequently in the early evening. Although the original pilot was due to take place in May 2017 many of the timetables are still a work in progress, a point which is frequently noted in the prospectus¹. This is partly due to the pragmatic way in which many of the LITs have taken in balancing the needs and priorities of court users in each pilot location. This discretion to deal with any additional models at a local level must be maintained and will be integral to the smooth running of any FOH pilot.
6. Finally, it is concerning that the second evaluation tender process is commencing before the feedback on these new FOH models has been considered and before any decision has been made on whether to include them. If the additional FOH models are

¹ HMCTS Flexible Operating Hours Prospectus – October 2017 at paras 3.11,4.11, 4.15 and 4.27 : <https://insidehmcts.blog.gov.uk/wp-content/uploads/sites/171/2017/10/Flexible-Operating-Hours-Pilots-Prospectus.pdf>

taken forward, this could substantively alter the remit of what would be expected of a prospective evaluation – the models to be evaluated may have increased by over 50%. Moreover, the evaluation will need to capture data from a larger number of service delivery partners and users, particularly if a mixed immigration tribunal model is tested. This would need to include fee paid tribunal judges, tribunal panel members, Home Office presenting officers, immigration practitioners, those responsible for detaining and transporting detainees to and from detention centres² and interpreters. Please see our response at paragraphs 6.1- 7.3 for further information on FOH mixed jurisdiction models.

Use of the court building vs utilisation rates

7. HMCTS frequently makes reference to utilisation data as an evidence base that informs their decisions to close or consolidate the court estate. However, utilisation data does not reflect the reality of how the court is used on a day-to-day basis, or the use of any of the other facilities which will have an impact on how many cases can be heard in a single day. The utilisation data is expressed as a percentage of time that the court room (not the court building) is used out of those traditional opening hours.
8. Since 2015 the Society has raised concerns about how these rates are calculated, particularly as there have been instances where the percentage is formulated on incorrect figures, such as the true number of courtrooms in a court³.
9. Basing policy decisions to close or consolidate courts and tribunals on utilisation data is problematic. It is not an accurate reflection of how the court is used throughout the day, both before and after the hearing. Important preparatory work takes place in the court building, confidential consultation is required for legal representatives to advise their clients, take instructions and for parties to meet advocates ahead of the hearing (for the first time, in many cases). All parties being available before the hearing presents the opportunity to narrow the issues in dispute, and, in many cases, there may be the opportunity to resolve the matter without having to proceed to a hearing.
10. It is also disappointing that the utilisation data used to inform the court closure consultation exercises that have taken place since 2015 is not publicly available. We would urge HMCTS to publish the full dataset on court and tribunal utilisation rates retrospectively and continue to recalculate and publish this information on a quarterly basis as part of the quarterly statistics that are produced for civil justice, criminal justice, family courts and tribunals.

² The immigration detention centres are managed by a number of different contractors – G4S runs Brook House and Tinsely House, Reliance runs Larne House and Pennine House, Mitie runs Colnbrook, Campsfield House and Harmondsworth, HMPS manages Morton Hall and The Verne and Serco is responsible for Yarl's Wood. Source: <https://www.gov.uk/immigration-removal-centre>

³ Proposal on the provision of court and tribunal estate in England and Wales – Law Society Response “*in relation to Burton Magistrates’ Court, the consultation states that this court has four court rooms. We have been informed that this is not correct and that the court has three court rooms plus a small annex that is only used when necessary. Figures from HMCTS, quoted in the local press, show that courtroom 4 was only used for 64 hours in 2014-2015.9 As a result, Burton Magistrates’ Court is stated as operating at 51 per cent capacity. If the usage figure is calculated based on the three actual court rooms, it would be higher.*” - page 9 <http://www.lawsociety.org.uk/policy-campaigns/consultation-responses/court-closures-consultation-response/>

Legal aid

11. It will be very hard to obtain the goodwill of the profession for this pilot unless enhanced payment rates are offered for attending court in unsocial hours. This would reflect the enhanced payments that firms will be obliged to pay their staff and other costs incurred. Without this many firms will effectively incur a financial loss for participating in the pilot.
12. Solicitors have contracted with the Legal Aid Agency (LAA) to provide legal aid services based on a standard model. These proposals are predicated on the basis that there will be an early and late team of participants ready and able to participate in the extended hours programme. Legal aid firms did not however bid for contracts on that basis and do not have the resources to increase their staffing to enable them to participate in such extended hours. They are therefore unlikely to be able to participate in the extended hours programme without:
 - a. Contravening the working time regulations;
 - b. Unduly interfering with their own and their staff members' family and personal lives;
 - c. Potentially unlawfully discriminating against members of their practice who have families and young children, special health needs or mobility needs.
13. Some of these concerns are being looked at in more detail at a local level, with the LAA attending the Manchester LIT meeting and being requested by the chair to look at costings in respect of the legal aid work that would be carried out by the contract holder in the event that the housing repossession list is included in the FOH pilot. This is not the same approach which has been adopted in respect of criminal duty solicitors despite the Society continually raising these points at a local and national level over the last 12 months.

Publication of additional information

14. We are still not satisfied that sufficient preparatory work has been undertaken to identify the costs and risks of this proposal either nationally; in each local pilot area; or in relation to the various different user groups. The pilot was postponed in September 2017 and is now due to commence in February 2018, providing a period of approximately four months to conduct survey work and analyse some user data which would provide essential information on user preferences that could inform prospective FOH models. There is a reference to "*Anecdotal evidence*"⁴ in the introduction of the prospectus which implies that taking time off work is the biggest pain point. We urge HMCTS to publish any evidence that supports these pain points which have been identified in the prospectus.
15. We understand that HMCTS are currently carrying out a second invitation to tender (ITT) process. We recommend that this updated ITT is published now to ensure complete transparency; so that stakeholders are fully informed of the criteria which HMCTS are providing to potential evaluators during the procurement process. Any

⁴ HMCTS Flexible Operating Hours Prospectus – October 2017 at Paragraph 1.4:
<https://insidehmcts.blog.gov.uk/wp-content/uploads/sites/171/2017/10/Flexible-Operating-Hours-Pilots-Prospectus.pdf>

evaluation of the pilot must assess the impact on the quality of justice of the court sitting late into the evening. There is existing research evidence which tends to suggest that defendants appearing late in the day may be more likely to be refused bail or receive harsher sentences⁵.

16. HMCTS have recently carried out a pilot on FOH in the Immigration and Asylum Tribunal based in Manchester. We recommend that the findings and evaluation from this pilot are published as soon as possible. This will assist stakeholders in understanding the HMCTS thinking behind the proposed mixed jurisdiction model briefly outlined at page 20 of the prospectus.

RESPONSE

Question 1: 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?

1.1 The Society has some serious concerns about the timeframe and data that informs the FOH pilot; transparency around the evaluation process; and the disproportionate impact this pilot might have on certain groups – specifically those with young children, caring responsibilities and those working under legal aid contracts. Paragraphs 4-13 above are repeated as are the Society's requests for HMCTS to publish:

- All anecdotal evidence which informs the statements made around user pain points in the prospectus.
- The most recent ITT document.
- The findings from the FOH pilot that took place in the Immigration and Asylum tribunal in Manchester.
- A full dataset of all utilisation rates for all courts and tribunals in England and Wales.

Consistent and straightforward opt out process

1.2 We note the availability to opt out of the pilot will differ from court to court, with Manchester Civil Justice Centre offering the greatest flexibility due to the wider range of work being heard as part of the pilot. The pilots are "*based on the premise that no individual should be required to work longer hours*"⁶ yet there are no details on measures that will ensure this does not happen. We recommend that the ability to opt-out that is proposed in Manchester is applied to all FOH pilot courts.

1.3 The differing availability to opt-out will clearly have an impact on the data captured. The FOH pilot cannot be deemed as "successful" in respect of uptake rates on the basis that opting out was made so difficult it essentially made it mandatory in some courts but not in others. This will skew the information that informs any robust evaluation as it will only capture the needs of those who wanted to take part.

1.4 Capturing the reasons for opting out of the process will be essential to the evaluation and will need to be recorded consistently. This information will be integral in informing all four of the HMCTS objectives – is the court more accessible to citizens, what is the impact on

⁵ Extraneous factors in judicial decisions, page 6890: <http://www.pnas.org/content/108/17/6889.full.pdf>

⁶ HMCTS Flexible Operating Hours Prospectus – October 2017 at Paragraph 4.33: <https://insidehmcts.blog.gov.uk/wp-content/uploads/sites/171/2017/10/Flexible-Operating-Hours-Pilots-Prospectus.pdf>

professional users, is it a sustainable, and is it a scalable model. The volume and reasons for opt-outs will need to be considered when interrogating the data of those cases that have been heard outside of traditional operating hours.

- 1.5 The Society recommends that the same straightforward process is adopted across all FOH pilot courts and that the reasons for opting out are recorded and included as part of the evaluation. We note that the matter of FOH listing will remain subject to the discretion of the judge. However, the process which has been proposed for opting out of the FOH list has been discussed at length at LIT meetings. In both Brentford and Manchester, it has been proposed that this will simply require an email explaining the reasons, sent to a dedicated email inbox which will be monitored closely by the listing officer. Timeframes will be in operation so that the court is not inundated with last minute opt-outs. We support this approach. Not only does this mitigate the risk of delay prejudice⁷ it would seem counterproductive to require an application to be taken out of the list, when the purpose of the pilot is to increase efficiency and give greater access and flexibility to the court user.

Availability of wifi and increased phone signal coverage in court

- 1.6 We welcome HMCTS' commitment to ensure that public services adapt to the different ways people live and work but this should not be limited to simply extending operating hours. Adapting the existing court estate for improved remote working should be considered – whether that be more consultation rooms, better wifi connectivity or simply more plug sockets for laptops and phones.
- 1.7 According to a recent survey by Deloitte⁸, 85% of adults in the UK own a smartphone and 91% of the 41 million 16-75 year olds who have a smartphone in the UK use their device every day. The most common usages of smartphones among workers in 2017 are emails (44%) and voice calls (34%⁹). We are frequently informed by our members that they are unable to use their mobile phones in the court buildings due to an absence of wifi or poor mobile phone signal. This very common problem is exacerbated by the fact that due to necessary security measures on entry to a court, one cannot leave to make a quick call and then immediately return with ease.
- 1.8 We understand that wifi is available in all of the courts that have been selected for the pilot except for Brentford County Court. We understand that HMCTS is currently installing wifi across Family and Civil Courts. We recommend that wifi is installed at Brentford ahead of the FOH pilot commencing.
- 1.9 Although this is a problem which goes further than the FOH pilot we recommend that HMCTS considers active or passive systems that boost phone signal so that mobile calls can be taken and made from inside the court building. It is essential that FOH court users and practitioners are able to use their phones inside the court building if they are expected to attend hearings that will run late into the evening (to make travel arrangements, check train times, book taxis, arrange lifts etc).

⁷ Having to wait a long period of time to be taken out of the FOH pilot list to then be put into the regular court list.

⁸ https://www.deloitte.co.uk/mobileuk/assets/img/download/global-mobile-consumer-survey-2017_uk-cut.pdf

⁹ See pages 3 and 10 https://www.deloitte.co.uk/mobileuk/assets/img/download/global-mobile-consumer-survey-2017_uk-cut.pdf The data cited in the report is based on a nationally representative sample of 4,150 UK consumers aged 16-75. For information on sample size please refer to page 52.

Measures to ensure that service partners do not work longer hours

- 1.10 The prospectus has stated that there is no intention to make professional users work longer hours and measures will be put in place to safeguard against that risk. We welcome that assurance. However, there are no details of what those measures will be and no indication that a listing tool which might help address this challenge will be available to test throughout the course of the pilot.
- 1.11 We recommend that HMCTS provide details of any measures which they intend to implement for the duration of the pilot as early as possible so that stakeholder feedback can be provided.
- 1.12 Unfortunately, careful listing will not resolve the capacity and resource issues that many of our members will be faced with in light of an extended court day. There is a real risk that many practitioners will end up working longer hours and, in some circumstances, will receive no additional remuneration for doing so.
- 1.13 Legal aid practitioners are expected to open their office from 9.00am-5.30pm. The FOH pilot calls into question whether this would still be possible as these firms tend to operate very small offices with limited support staff. A practitioner who is attending a hearing until 8.00pm may not have the flexibility or available cover to enable them to go into the office later the next day or reduce their hours at other times in the week. Moreover, we have received no confirmation from the LAA that there will be any sort of uplift or enhanced payment for working antisocial hours.
- 1.14 There are additional issues for those practitioners engaged in private work, as they may have no choice but to pay their staff for working outside of their contractual hours. Again, those who work in smaller firms might not have the capacity to enable their staff to work flexible hours which might change from day to day, week to week, depending on when their cases are listed. The staffing requirements are wider than just practitioner availability – it will need additional support staff to be available in accordance with the opening hours of the court so that clients can contact their solicitors on the day of the hearing. This additional cost is likely to be transferred to the client by way of higher fees which raises an important access to justice point. For the purposes of the FOH pilot, access to advice and representation from solicitors may become more expensive due to a postcode lottery.
- 1.15 Due to the staffing issues outlined above and firms anxious to retain the LAA contracts there is a real risk that this antisocial work will be undertaken by more junior staff. This could raise an issue of indirect discrimination, where staff who are at an earlier stage in their career (and are likely to be younger) are treated less favourably than more senior staff. More junior staff are also likely to require greater supervision, deferring to a superior for advice might not be immediately available during antisocial hours. This could have an impact on the speed and quality of advice available to those clients who are seeking advice and representation during this time.
- 1.16 Research has indicated that flexible working becomes a necessity for many women around the middle phase of their career, typically but not always coinciding with having children¹⁰. Flexible operating hours may already be set out in contractual terms and the

¹⁰ Obstacles and barriers to the career development of woman solicitors, Insight Oxford Limited, Page 19:
<http://www.lawsociety.org.uk/support-services/advice/articles/diversity-survey-results/>

basis upon which returning to work was possible. For some staff, these flexible hours may fit in well with the proposed flexible operating hours for the Courts, but for many others, they will not, and indeed they may be wholly incompatible. Renegotiating contractual terms further to accommodate the FOH pilot may not be possible and is likely to have a disproportionate impact on the work / life balance of women.

- 1.17 There is also the potential for discrimination against certain religions, particularly where there is a requirement to stop working at a specific time. For example, Jewish holy days always begin at sundown.

Family cases

- 1.18 In preparing this response we have not had the opportunity to widely survey the membership due to the short timeframe afforded to stakeholders to respond. The views expressed below have been gauged from the policy committees which consist of specialist practitioners working in family law.

- 1.19 In respect of suitable cases which might be considered in family cases, First Directions Appointments (FDA)s might be appropriate as they are predominantly case management hearings and are shorter than others. Financial Dispute Resolutions (FDRs) which are being considered as part of the Manchester FOH model, could be more problematic, particularly where the parties are diametrically opposed in their views on what they would be prepared to agree by way of settlement. The parties should expect that for such a pivotal hearing sufficient court time is made available and that the same judge would be present for the duration of the hearing. On the basis that Manchester Civil Justice Centre is looking at listing an extended afternoon model running from 14.00-19.00 with a short break in the middle there may need to be considerations on what cases would be suitable as judicial continuity will be integral to the smooth running of such hearings.

- 1.20 In respect of considering any First Hearing Dispute Resolution Appointment (FHDRAs) hearings during antisocial hours would be largely dependent on the availability of CAFCASS and other bodies such as interpreters and witness protection. We would recommend that as part of the outcome to be published, HMCTS needs to demonstrate that they have adequately consulted these stakeholders and should include details of this engagement.

Question 2: 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?
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- 2.1 The Society believes that there are a variety of alternative improvements in the running of the courts that could be explored, such as improving the accuracy of scheduling and listing. We understand that in many courts this is still done manually, rather than using a software program – as a result of this and for other reasons, hearing lengths are often not predicted with any accuracy. If this could be addressed it would assist everyone involved in the process, and would be one practical way to improve efficiency without the potential inconvenience for many court users that this pilot is likely to entail.

- 2.2 The FOH pilot presents an ideal opportunity to take advantage of technology by testing an interactive listing tool which takes user preferences into account. We understand that there is a separate workstream dedicated to listing and scheduling but if there is

no in-house listing prototype ready to test in February 2018 there are various free online tools which should be considered as part of the FOH pilot to improve the listing of cases.

2.3 A simple online search revealed that there are over 20 interactive scheduling tools and apps which are available. These tools are widely used by businesses in order to quickly ascertain availability for meetings with external parties. Most are free of charge, compatible with mobile devices, can take time differences into account, and do not require the user to register before entering their preferences. Moreover, many enable the user to enter their availability anonymously so only the party requesting that information is privy to the identity of all the other parties. This is important for family cases where the availability of one party should not be made available to the other, such as those matters where domestic violence is alleged.

2.4 In respect of family cases better judicial continuity of all cases would be a vast improvement, ideally the same judge should deal with a both the FDA and FDR. In children cases the FHDR and subsequent hearings should be listed similarly save for any final hearings. This would cut costs of court time in judges and parties (represented or otherwise) addressing the court and bringing the court and judges up to speed on cases.

Question 3: 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?

3.1 We would recommend that HMCTS consider using an online scheduling tool which takes account of user preferences alongside at least one of the FOH models. Paragraphs 2.1- 2.3 above are repeated.

3.2 The models currently being proposed seem to focus on much greater additional capacity rather than an increased accessibility to the court for citizens. There is not one model which is testing a 'middle ground' model which might more accurately reflect typical office working hours. If the FOH pilot is to proceed, we would recommend that a 9.00am – 5.00pm FOH operating model is tested. This may be more manageable for court users, specifically those who have children or caring commitments.

3.3 We would stress, however, that even this model will be opposed by many professional users. It does not mitigate those issues fully, particularly those users who reside in regions which have undergone substantial court estate consolidation and thus have to travel longer distances to and from court. For example, 15 courts and tribunals have closed in the North West and Manchester Civil Justice Centre has absorbed the work of seven courts. Travelling from places such as Buxton by car can take an hour and a half, over an hour by train and up to two and a half hours by bus each way¹¹.

Court 'capacity'

3.4 The increased court capacity must be measured against the real hearing hours that operate in local areas due to judges acting flexibly in response to the needs of a particular case or due to the emergency nature of some cases. Percentage increases should not be falsely inflated or attributed to 'new' operating models if courts and

¹¹ Travel time estimates taken from Googlemaps are based on a journey from Buxton town centre to Manchester Civil Justice Centre.

tribunals are already in fact sitting longer periods than the 'traditional hours' model. Anecdotal evidence from our membership suggests that it is often the case now that matters run later than 4.00pm. Tribunals such as the SSCS will often not finish until 5.00pm.

3.5 We have been informed that certain family cases in Manchester Civil Justice Centre are dealt with at the end of the court day. For example, Emergency Protection Orders sought by a local authority may require immediate hearings in order to remove and safeguard a vulnerable child who is at risk of serious harm.

3.6 HMCTS will need to carefully consider how to manage cases which might already be exceeding the traditional hours model to ensure:

- Those existing practices are not unnecessarily interfered with.
- The proposed models truly differ from current practice.
- The evaluators are fully informed of the 'as is' situation in each court so perceived benefits are not attributed to the FOH pilot models.

3.7 "Capacity" to hear cases cannot be equated with whether there is court room availability, to do so would overlook the role of all service partners which are required at different stages of the criminal, family and civil justice systems. We are pleased to see that HMCTS have endeavoured to engage with those service partners, but this does not seem to have been reflected in capacity calculations. The "up to 50% capacity" figure comes from extending the court day from 5 hours to 7.5 hours. The prospectus does not acknowledge the extra administrative support and security staff which would be required for an extended court day to deal with the increase in footfall of court users. Below we have included anecdotal evidence provided to us by members on the court staffing and facilities:

"I work in Hatton Cross tribunal where there has been a serious cut of administrative staff. Current constraints mean that there is insufficient staff to perform the basic functions from 10.00am-4.00pm. There are a few court ushers available for the afternoon and no real court counter service to speak of - staff morale is very low. Any extension to the operating hours would be very challenging. If the hours were extended more staff would be required, backed by a degree of recruitment and investment for ushers and security guards. If you are dealing with people coming from detention – you will need additional staff to secure the cells"

- Immigration solicitor and fee paid Judge, London.

"Better refreshment facilities for parties, particularly as hearings might be running until 8.00pm in the evening. When the CVS ran my local courts catering, the staff interaction with the parties plus the quality of the catering improved the parties' sense of wellbeing in a court environment. Tension and stress levels were reduced in an environment which was stressful for anxious parties going through a divorce and/or not seeing their children. The impact of the closure of these services has not been properly evaluated and cannot be underestimated."

- Family solicitor, Nottingham

3.8 HMCTS have clearly acknowledged that adjustments would be required in those courts absorbing cases redirected from the closure of local courts in the same region. This was explicitly referenced as a requirement for Manchester Civil Justice Centre which now hears redirected case work from seven local courts that have now closed¹².

3.9 The FOH pilot cannot be deemed successful if the efficiency gain for one service partner is only as a result of burdening another. For example, a practitioner who is required to attend a short hearing at 8.00am, cannot leave the court without a sealed order, but may have to wait until the counter service opens at 10.00am. Court counter services must accommodate the FOH models to mitigate this risk.

3.10 We recommend that HMCTS ensure that a counter service is adequately staffed and available at all FOH pilot courts. The opening hours of that counter service should mirror the extended court day. Any costs associated with the provision or procurement of additional staff should be recorded and considered as part of any cost benefit analysis within the evaluation.

Question 4: What other changes to the pilot proposals could make participation in the pilots easier for legal professionals?

4.1 The majority of our previous recommendations could make participation in the pilots easier for legal practitioners, specifically:

- Online scheduling tools to ascertain user availability (paragraphs 2.1-2.3).
- Piloting a 9.00-5.00pm FOH model (paragraphs 3.2-3.6).
- Extending the court counter services (paragraphs 3.7-3.10).
- Greater flexibility to opt out particularly for those who have children or caring responsibilities (paragraphs 2, 13, 1.2, 1.5 and 1.16).

4.2 The Society has raised from the outset that the FOH puts additional pressure on a very fragile Legal Aid system. We recommend that HMCTS works with the LAA to agree a reasonable uplift in fees for working antisocial hours, which should be available to all legal aid practitioners who are subject to the FOH pilot by virtue of their office location. For the avoidance of doubt this would include housing, civil, family and criminal practitioners who are undertaking legal aid work. Paragraphs 12-14, 1.13 and 1.15 are repeated.

4.3 We understand that an uplift will be available for those practitioners working for the Crown Prosecution Service during antisocial hours. In a previous evaluation of an extended hours pilot that took place in 2013, CPS budget constraints meant that they were unable to take part in some cases¹³ as it was not financially viable to do so. However, the same or similar uplift is not being offered to Legal Aid practitioners who are acting for the defence, working within the same if not narrower financial margins.

¹²The Northwest has seen 13 courts close since 2015. Manchester Civil Justice centre now takes the civil cases from Altrincham, Bolton, Bury, Oldham and Tameside Civil courts. Buxton family court and Macclesfield family court have also closed and reallocated work there. Source: <https://consult.justice.gov.uk/digital-communications/proposal-on-the-provision-of-court-and-tribunal-es/results/nw-consultation-response.pdf> and https://consult.justice.gov.uk/digital-communications/proposal-on-the-provision-of-court-and-tribunal-es/user_uploads/north-west-consultation-paper.pdf-1

¹³See Process evaluation of the flexible criminal justice system pilots, Ministry of Justice analytical series (2013) page 11: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260703/process-evaluation-cjs-pilots.pdf

We urge HMCTS to publish any uplifts or adjustments that are being offered to other service partners at the earliest juncture, before the FOH pilot commences. In any event, this data would need to be disclosed for the purposes of a robust cost/benefit analysis which would be required to explore whether FOH models are sustainable or scalable.

Question 5: 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?

5.1 Although there has been reference to the 'lessons learnt' from other pilots, we would recommend that HMCTS revisit the findings from the previous flexible operating hours pilot. FOH models have been piloted on a large scale as recently as 2013, across 52 Magistrates' Courts. According to an independent evaluator, half of the sittings during this pilot were abandoned and staff shortages at weekends resulted in adjournments, with knock-on delays as cases were relisted to be heard in the week. In terms of fiscal incentives available for the duration of the pilot:

"both operational and strategic staff were clear that the pilots could not have gone ahead without premium pay"¹⁴

5.2 One of the difficulties that members have identified is the unpredictability of working pattern that FOH introduces, which may change day to day, or week to week, depending on what case(s) are listed outside of traditional hours. This might be further complicated by those who already work flexible hours or job share in order to accommodate their work / life balance, family or caring commitments. For example, the Brentford LIT had previously discussed hearing housing possession cases on two different days, when currently they take place on one. This would require at least one duty solicitor to be available on each day, when previously only one was required.

5.3 Anecdotally, some of our members have said that if there was some degree of predictability it might be easier for them to adopt flexible working patterns. For example, enrolling children in after school clubs or arranging childcare might be more convenient if there was some certainty that a practitioner was working a similar eight-hour day – starting later and finishing later, or vice versa. Many of the models appear to be adopting different patterns and caseloads throughout the pilot, which is clearly to test different matters at different hours. This is likely to add to the unpredictability of when flexible working patterns might need to change. A full survey of our membership was not possible due to the short consultation period. However, any evaluation should consider capturing the reasons why users may wish to opt out. We would recommend that evaluators survey those practitioners who did take part in the FOH asking questions around their working patterns and whether the FOH impacted their work / life balance.

Crown court and tribunal mixed jurisdiction model

6.1 There is little detail provided in the prospectus about the Crown and Immigration mixed FOH model or HMCTS' thinking behind this combination. It fails to detail whether the

¹⁴ Process evaluation of the flexible criminal justice system pilots, Ministry of Justice analytical series (2013) page 11: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260703/process-evaluation-cjs-pilots.pdf

relevant agencies have been consulted if the intention is to proceed with foreign national offender appeals. Where cases involve a detained person, additional staff will be required to transport and escort detainees and secure the cells. We refer to our points made previously at question 3, specifically our concerns about available 'capacity'.

- 6.2 There are nine immigration removal centres in England and Wales, which are operated by five different contractors: G4S, Serco, Mitie, Reliance and HMPS. We are aware that HMCTS has engaged with Serco and that staffing shifts are set at least 12 weeks in advance. If HMCTS intend to proceed with a mixed model, the additional lead-in time must be factored in to consult the relevant parties (as identified at paragraph 7 above) and that sufficient staff would be available for the duration of the pilot.
- 6.3 Due to the nature of immigration, interpreters are engaged more frequently. Their presence will be necessary in many cases for a hearing to proceed so that applicants can understand what is going on and to give full instructions. We understand that interpreters are not paid for their travel time, which is likely to increase if they are required to travel at more antisocial hours or during peak travel times.
- 6.4 There are several drawbacks when using this type of mixed jurisdiction model in the same courtroom. A Crown court and an Immigration & Asylum appeal hearing are subject to two very different settings despite the potential for both to involve detained parties. Crown court hearings take place in formal courtrooms whereas Tribunals are meant to be less formal, often taking place in large rooms. If both courts are using the same courtroom, without changing the layout to the room in between sittings, there is a danger of losing one these settings and therefore changing the tone of the case.
- 6.5 The loss of an informal setting for a tribunal case can have a significant impact on those who are involved in a tribunal hearing as well as having some logistical drawbacks. For example, a Crown court will be set up with a formal structure using items such as benches and a box for witnesses. This type of layout would make it difficult to take instructions and pass documents around for a tribunal case.
- 6.6 For immigration matters, often family and young children attend and stay in the waiting room. It would not be appropriate to ask family members and children who are attending court for a tribunal case to use a waiting room with defendants for serious offences.
- 6.7 There will be cost implications for implementing this type of model. Courtrooms will need to be assessed and for many, undergo refits to change between the different style of courtrooms to make them suitable. The Law Society would recommend a full cost assessment for each court building before implementing this style of model.
- 6.8 We are also concerned with the shorter sitting hours for judges proposed in this model as it appears that judges will be asked to work shorter hours but continue to be paid for the full day (4 hours instead of 6 hours). This proposal does not consider the cost implications regarding judges working fewer hours in this model.
- 6.9 The Society reserves the right to make further submissions following the publication of the findings from the recent FOH that took place in Manchester Immigration and Asylum tribunal.

Civil / family courts & tribunals mixed jurisdiction model

7.1 The prospectus contains even less detail about this proposed model; therefore, we urge HMCTS to publish the findings and evaluation of the recent pilot that took place in Manchester. Paragraph 6.9 above is repeated.

7.2 If the question is posed with the view to consider the same case types that were proposed for the Crown Court model (i.e. foreign national appeals) the Family and Civil courts might not be a suitable venue as they do not have the right facilities to hold detained parties securely. If the intention is to hold other immigration hearings, we invite HMCTS to provide more information on this proposed model. There is no detail about how FOH model might operate in the civil or family courts in the HMCTS prospectus or whether any findings from the recent pilot have informed this question.

7.3 If the intention is to hear foreign national appeals the same points raised at paragraphs 6.1 to 6.3 apply to this proposed model.

“2+5” Crown and Magistrates’ court mixed model

8.1 According to the prospectus there are already plans in place to pilot a Crown / Magistrates’ FOH model in Blackfriars Crown court. The hearing time is evenly split, with four hours for each, placing emphasis on the perceived benefits of Maxwell Hours and increasing the court “capacity” from the traditional hours (currently a 5 hour court day) to 8 hours.

8.2 It therefore seems strange that views are now sought on a similar, amended model, before the pilot has even commenced, which explores the possibility of Magistrates’ sitting for only 2 hours at a time – effectively a quarter day. It does not appear that there has been any consideration of the costs associated with Magistrates travelling to and from court for two-hour shifts.

Magistrates’ sitting hours and availability

8.3 Employers are required to allow employees to take time off work in terms of full or half days (13 full days or 26 half days) to sit as magistrates. If employers refused to allow any additional days off to sit as magistrates, under the current system magistrates would sit for two hours for up to 26 half days, but only work for two hours rather than for a full half day on each occasion. This would lead to fewer court sitting hours or a need for additional Magistrates to fill the gaps – which might be challenging if magistrates need to negotiate additional time off with employers.

8.4 The House of Commons Justice Select Committee report of 19 October 2016 on the role of magistracy indicates that the number of Magistrates has fallen significantly over the last decade: *“the current total of 17,552 compares to around 30,000 in 2006”*¹⁵.

8.5 The number of magistrates can be expected to decrease further in the coming decade, with the report also indicating that *“86% are aged 50 and over, with only 4% under 40 and less than 1% under 30; well over half of magistrates (57%) are within ten years of the*

¹⁵ <https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/165/165.pdf> - page 17

*retiring age of 70.*¹⁶ The Select Committee report also identified “*sufficient evidence of low morale within the magistracy to cause concern.*”¹⁷ The availability of magistrates to fill any gaps is therefore questionable.

8.6 The Select Committee report identifies the pressures on magistrates in relation to taking time off from their employment and it therefore seems likely that many magistrates may struggle to get additional days off to sit additional days or half days. Furthermore, cuts to the Ministry of Justice’s advertising budget have been identified as posing significant challenges to the recruitment of additional magistrates.

8.7 There are various practical concerns relating to both parties and legal representatives attending Court for a hearing at 9.00am. Legal representatives are likely to need to attend court up to an hour before the hearing commences; the court building must be open and available from 8.00am. In some cases, legal representatives are ordered to attend Court at 9.00am for a hearing at 10.00am so it may be expected that this practice will continue. Even if not ordered, there is often much to discuss between parties before the hearing commences. There also does not seem to be time allocated to the Magistrates for writing up or reading the court file.

8.8 Those using public transport may struggle to get to Court for 8.00am. It is also likely that travel costs will increase for those using public transport as they will be required to travel during peak hours. Practitioners also identify challenges in defendants getting to Court for a hearing starting at 10.00am and expect that these will only be amplified with earlier start times.

30 minute handover period

8.9 Our members have expressed concerns relating to the practicalities of the change-over from Magistrates’ Court to Crown Court and the thirty minutes allocated to do so.

8.10 This would also allow virtually no time for the Magistrates’ Court hearings to run over, potentially leading to delay in the commencement of the Crown Court list and therefore the afternoon sitting stretching later into the evening, beyond 5.30pm. The various concerns relating to Courts sitting later into the evening would therefore once again become relevant.

Maxwell hours

8.11 Maxwell hours have had mixed reviews since inception, and there is very little information available either on their effectiveness or on the concept more generally.

8.12 The Criminal Procedure Rules relating to the ‘Control and management of heavy fraud and other complex criminal cases’ refers to the use of Maxwell hours, stating that “*they should only be permitted after careful consideration and consultation with the Presiding Judge.*”

¹⁶ <https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/165/165.pdf> - page 17

¹⁷ <https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/165/165.pdf> - page 3

8.13 It is unclear what the benefits of basing the 4+4 system on the concept of Maxwell hours will be. The model's suitability for various types of hearings, bearing in mind the concept was originally developed for very complex fraud and then other complex criminal cases, is also unclear.

8.14 Maxwell hours were initially intended to be from 9.30am to 1.30pm. This would therefore cover the first of the two Crown Court sittings in the 4+4 proposals. However, the proposal for a second four hour sitting running until 6.00pm moves away from the original model and raises the same questions relating to fairness as mentioned above, particularly if taxing evidence is compressed into a four-hour period later in the day when it has been established defendants are more likely to receive harsher sentences¹⁸.

Crown court & virtual/ video / telephone hearings

9.1 It may be helpful to clarify what is meant by virtual hearings and video-enabled hearings as they are quite different. At present, we understand that it is not possible to have a fully virtual hearing as this would require primary enabling legislation. As this legislation is not even available in a draft bill it is highly unlikely that any fully virtual hearings could be tested at the same time as the FOH which is due to start in early 2018. Therefore, we have limited our response to video-enabled hearings where one or more party dials-in, but the bench still sits.

9.2 The Society has serious reservations about the principle of testing out new technology on criminal cases which determine questions of liberty, particularly as cases have a higher proportion of vulnerable parties. Just as we wouldn't expect Mental Health Act issues to be dealt with via an online process due to the vulnerability of the user and the fact that these cases may deprive a person of their liberty, it would seem illogical to test virtual hearings in criminal proceedings where the same issues arise.

Virtual bail and remand pilots

9.3 We also have concerns around testing video-enabled technology in bail and remand hearings as a default. Pilots which have been adopting this as standard practice have been going on for some years in Kent. Having the defendant appearing at the first hearing via video link could seriously impair their ability to give instructions, and is likely to impair the ability of the legal representative to discuss possible bail conditions and make necessary arrangements (such as contacting relatives to secure accommodation, sureties etc).

9.4 As HMCTS have a separate workstream looking at virtual bail and remand, which is looking at sustainability and scalability we would recommend that the service managers from each of those workstreams meet to discuss where there is potential overlap on their work. We note that the bail and remand work is currently appearing on all of the FOH timetables for the criminal courts. It would not make sense for those workstreams to be working at cross purposes.

9.5 Most importantly, before any further consideration of virtual hearings is considered for criminal hearings, there should be a full, robust evaluation and analyses of the current pilots that have been operating in Kent for at least two years.

¹⁸ "We find that the likelihood of a favorable ruling is greater at the very beginning of the work day or after a food break than later in the sequence of cases".

9.6 We understand that over November and December 2017 the HMCTS workstream looking at virtual bail and remand is developing minimum eligibility criteria which would apply to the person as to their suitability to appear before the bench via video link. We recommend that the criteria are properly consulted on, with feedback obtained by service partners operating in both the mental health arena and criminal justice system. The criteria would serve as an essential safeguard to ensure that those subject to proceedings are able to give instructions and engage with the hearing in an effective and meaningful way.

9.7 Without an agreed minimum eligibility criteria, that applies to all court and tribunal users, the Society would not be in a position to support the extension of video-enabled or virtual hearings in any jurisdiction.

9.8 For the reasons outlined above, we would recommend that HMCTS explore the possibility of using virtual/video/ telephone hearings for cases which do not determine questions of liberty. Hearings which are to agree the management of the case or costs would raise fewer questions around vulnerability.

ANNEX A – LAW SOCIETY RESPONSE TO FOH PILOT JULY 2017

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