

## **Flexible Operating Hours (FOH): Dispelling some myths and misunderstandings**

His Honour Judge Hillen

*The Leader of the South Eastern Circuit has agreed that I should set out for you all the aims and design of this pilot. As many of you will know I am the Resident Judge at Blackfriars Crown Court which is a designated pilot court. I am also a bit of a Pooh-Bah. I am also Chair of the Local Leadership Group (London Central Crime LLG), I sit on the London FOH Local Implementation Team (LIT), as well as the Blackfriars LIT, on the FOH National Steering Group and I am invited from time to time to the Regional Estates meetings. So I have some insight into what is going on and I hope I can help shed some light on the FOH pilot. I stress that this does not mean I am a cheerleader for FOH. My personal opinions, and those of the Blackfriars Judges, are neither here nor there. What is important is that you are informed as to what the FOH pilot actually entails. I realise that there has been a failure in communication with those at the coalface, and I hope that my relatively recent involvement will improve that. I hope this series of frequently asked questions will address at least some of the issues raised in your Leader's recent Circuit Update.*

### **Why is this being done?**

In 2016, as part of the Reform Programme, the Senior Judiciary and Ministers asked for a review of the operating hours of courts and tribunals and to test possible changes in a number of pilots. The Flexible Operating Hours project was set up to run and evaluate these pilots in order to inform the future operating model for courts and tribunals. If the pilot does show efficiency savings, that could (and should) release funds for investment elsewhere in the Reform Programme, including investment in improving the estate for all court users.

### **Hasn't this been done before?**

Well yes - we all know that it has, but the previous pilots were considered to have been limited in their scope and unreliable in their findings. The Croydon pilot (2010) did not include an economic appraisal and was highly anecdotal; the Bow Street pilot (2002) and the Nottingham Civil Court pilot (2015) tested only a limited range of work; the Flexible Criminal Justice System (CJS) pilot (2012) did not look at the system-wide effect. The then SPJ wanted a cross jurisdictional approach, testing a wider variety of tribunals, summary criminal jurisdiction, civil and Crown Court hearings.

### **What is being tested?**

It will not surprise many that this is primarily estate driven. There is a perception that court rooms, and indeed court buildings, are not efficiently used. Therefore, the possibility of using each court room running courts

and tribunals at different times needs to be evaluated. The pilots attempt to replicate daily business within flexible sessions i.e. sitting the same work with alternative timings. There is a secondary, and not disingenuous, reason for the pilot and that is to test what improvement there can be in access to justice by operating courts and tribunals at different times of day so as to be more convenient for at least some court users. (Of course, the corollary of that is that whilst it might improve access to justice for some court users, it might be an obstruction to justice for others - that is to be tested.)

### **What are the criticisms of the scheme that need to be tested?**

There is a standard criticism of flexible operating hours which needs to be proved in whole or in part or disproved by the evaluation. The criticism is the FOH pilot is misconceived, predicated as it is upon the fact that there is space in courthouses which is only utilised for part of the day and that this is thought to be an underused resource. However, the argument goes on, that a court cannot be compared to ordinary business premises such as a factory or an office, but rather as a theatre, council chamber or Parliament - where the central platform, stage or chamber is only used for short periods. The rest of the court building, offices, CPS room, conference rooms, judges' chambers, probation and police rooms are all utilised throughout the day to result in the "production" which then takes place in the courtroom. The "production" in the "courtroom" - the stage to continue the analogy - involves getting a large number of people - judge, jurors, counsel, witnesses, defendant all in one place at one time from various places in and out of the immediate locality. Moreover the justice system involves its professional participants in much more than the case in progress in the courtroom. If they are in the courtroom they are not doing other things. Counsel and solicitors have to see other clients in conference, write advices and pleadings for cases in the stage of preparation, police officers in criminal cases have other ongoing enquiries and the court has business to deal with in chambers. Counsel have to ensure that the case is ready for the jury at the designated sitting time, which may involve preparing bundles, schedules and visual aids for the jury, conferences at court with investigating officers or defendants etc.

The counter argument to this is that by sitting for only 4 hours in sessions, counsel would be freed up to see other clients (sometimes in custody) during the remaining portion of the working day, police officers would be free to conduct investigations, take witness statements, etc. Counsel would also have preparation time in more complex cases during the session not involving their case (e.g. as happens in Maxwell hours cases now).

So the real evaluation will be - which of the sitting hours, traditional or flexible (or a mixture of the two) best enables the *whole* of the justice system to work to the benefit of the public? For that reason, the questions the evaluation will ask include - What is the impact of the FOH pilots on time spent not in court for legal professionals (including judiciary, defence and prosecution) for wider work including preparing cases and travelling? What is the impact on existing staff of running FOH? This is not just different hours but the impact on the work they do in their normal hours.

## **Has there been any consideration of the wellbeing and diversity issues?**

This is certainly the main point raised when I have met the Leader of the SE Circuit and the Chair of the CBA. They raise the fact that the evaluation will need to understand and gather evidence on "equality impact" and whether alternative approaches, including retention of the existing arrangements, might in fact be more effective in promoting diversity, and having positive impacts upon recruitment and retention. That has been taken on board and will form part of the evaluation. Specific questions for the evaluation will be - Do the FOH pilots have an impact on court users' wider work and life balance? Does it impact their childcare and other responsibilities?

## **How is this to be funded?**

There are no additional funds for this pilot, apart from for the evaluation itself. The agencies – stakeholders - whatever label you give them - are expected to participate voluntarily and cover any additional in-house costs within their own agency. That means probation, SERCO, HMCTS, MITIE, Witness Services, CPS etc etc. It follows of course that if there are additional costs to either or both branches of the profession those will need to be absorbed by chambers and firms operating in the various jurisdictions and courts affected.

## **Where and how is this being done?**

The pilots are (currently) to commence from October 2017 running for a period of 6 months. and will test increased sittings in Crime (Magistrates' and Crown Courts), and Family and Civil jurisdictions at six sites – Highbury Corner and Sheffield Magistrates' Courts; the Crown Courts at Blackfriars and Newcastle; Brentford County Court (civil) and Manchester Justice Centre (family and civil). The range of pilot models is intended to test running hearings at different times of the day, ranging from 0800 through to 2030.

**Blackfriars:** Blackfriars will have one courtroom which will have two Crown Court hearing sessions to run after each other in one room. There will be two 4 hour sessions, the first 09:30-13:30, the second 14:00-18:00. The idea is that the Court rooms will be used for 8 hours, a 60% increase on current use.

**Blackfriars and South London Local Justice Area.** This idea is that one courtroom will be used for a Magistrates' Courts to sit in the Crown Court after the end of the Crown Court hearings. So, from 9:30-13:30 a Crown Court session and then 14:00-18:00 a Magistrates' Court

(predominately trials). Again, Court rooms sitting with this pattern will also be used for 8 hours. Senior Judiciary have recently asked that those operating the pilot look at a 2+5 option, i.e. a Magistrates' court sitting from 09.00 to 11.00, and Crown Court sitting from 11.30 to 17.30. This latter idea is still under development.

~~**Highbury Corner:** there will be three Magistrates' Court sessions to run after each other in one room. The sessions would each be 3 hours with flexibility to allow variances to sitting patterns. Courts running from 8am and from 10am for 3 x 3 hour sessions. The model is for two court rooms, one starting at 8.00 to 18.30, the other starting at 10:00, finishing at 20.30. The idea is that Court rooms sitting with this pattern will be used for 9 hours, a 50% increase~~

**CORRECTION:** The FAQ by HH Judge Hillen contains an error in that it refers to the Highbury Corner Magistrates sitting at 8 a.m. That is a model being used elsewhere in the country but not now at Highbury Corner. Highbury Corner Magistrates will sit from 10 a.m. to 1 p.m., 2 p.m. and to 5 p.m. and 5.30 p.m. to 8 p.m. as stated in Susan Acland-Hood's message. HH Judge Hillen apologises if anyone has been misled by this error.

**Brentford County Court:** HH Judge Walden Smith is the other judicial representative on the National Steering Group and she will be in a better position than me to explain this, but as I understand it the proposal involves two courts in a larger centre running opposite patterns of listing work before or after an existing court day. The work listed in the new session would include a mixture of work likely to suit litigants in person and offering an opt-in for other case types. The idea is that Court rooms would have 7.5 hour utilisation, a 50% increase.

### **When is this being done?**

The implementation of the pilot was originally to start in May 2017. Newcastle Crown Court, the Recorder of Newcastle tells me, was almost ready to go. The pilot was put on "hold" during the election period, and because of the decision that there be an independent expert evaluation to ensure that there was confidence in the findings. There were also longer lead-in times for some agencies and stakeholders than had originally been expected. The realistic timetable as of the time of writing is that the pilot will last for six months from October 2017 to April 2018. My understanding is that as the pilot develops over that period the details can be tweaked depending upon what effect it is having. The practicalities of the pilot are being worked out through a series of Local Implementation Team (LIT) meetings which your representatives attend (Dominic Hockley the SE Circuit Blackfriars Representative and at the last LIT Rosina Cottage QC, the Central London Bar Mess Chair).

### **Will this increase trial length and how will that impact on my work?**

The evaluation contractor will be conducting a comparative assessment with a courtroom in the equivalent jurisdiction which is not sitting FOH. In my own court Judge sitting hours are currently 5.79 hours per day. If

those hours are trial hours then the FOH reduction to 4 hours a day will mean a lengthening of trials by 28% (judicial anecdote for Croydon actually puts the extension of the length of trial at 40-50%). This will obviously affect practitioners in the number of trials they can take on (it will also affect listing, availability of jurors and so forth). It is important that this information is captured by the evaluation contractor.

### **Who is evaluating the pilot and how is it to be evaluated?**

This is very important. There are a lot of myths about that there is some kind of agenda and that an evaluation will be done by MoJ or HMCTS, and the results "spun". I assume that is why the Leader of the Circuit has said in his update on 11<sup>th</sup> July that there should be a "judicial evaluation". In fact, the National Steering Group appreciates that this pilot needs to be evaluated professionally and independently. Given the criticism of other FOH pilots, it needs to have credibility and to be accepted by all interested parties. For this reason, the project team have sought an independent contractor to do the evaluation. The successful bidder will almost certainly be some group, probably academics, who have a track record in research into the justice system. I cannot say at the time of writing who the group will be but there has been or will be input from the representative bodies for legal professionals including the Bar Council and Law Society.

The prime issues for the evaluator will be to ask whether you can run a court room effectively at a different time of the day and whether there is an appetite to scale FOH more widely at a national level. Given the long-term intention is to see if money can be saved which can be used elsewhere in the system, the evaluator will be required to see what the additional running costs are of FOH in the pilot courts and to make a full economic evaluation including any additional costs and benefits.

The Croydon pilot recommended the occasional use of FOH when there was a backlog of cases to be cleared. At the present time, certainly in crime, there is no noticeable backlog but that may change. The effect of the pilot on case volumes will need to be assessed and it may be that FOH in this respect doesn't work in one jurisdiction but does in another.

Most importantly the evaluation will have regard not only to the limited number of cases heard in FOH courtrooms but will address the fact that some cases are not included, and cannot be, in the pilots. For example, across all jurisdictions some cases are not listed in the courtrooms testing the pilot for good reason e.g. vulnerable witnesses who should not go part heard, unavailability of witnesses during part of the day (for child care reasons for example), travelling difficulties for defendant and/or witness, mental health defendants (or witnesses) being brought from secure hospitals, long time estimate cases, child witnesses who cannot give evidence in the afternoon in line with the protocols.

### **Should we agree to do it?**

Those who devised the system wish to test it. No one is being asked to make it work, but no one should be engaged in making it not work. It is to be tested, tested to the limit, but not in such a way that it is made to fall over. The Bar, not only at a representative level but the practitioners in the courtrooms, will be involved in the evaluation process.

The criticisms of FOH that Kerim Fuad QC set out so forcefully in the South Eastern Circuit Leader's Update on 11<sup>th</sup> July 2017 are well known to those responsible for the scheme. If those criticisms are right, and I suspect they are held by many if not all of you, then I commend the wise words of your Leader who says:

"However, having reflected carefully on this I believe that participating in the system will be the best way of exposing the fatal flaws with evidence based examples."

If the thinking behind the pilot is not right, or not wholly right, then that too will be exposed by the independent evaluation.