

Dame Vera Baird QC
Victims' Commissioner for England and Wales

Office of the Victims' Commissioner for England and Wales
5th Floor, 70 Petty France
London SW1H 9EX

9 December 2020

Rt Hon Robert Buckland QC MP
Lord Chancellor and Secretary of State for Justice
Ministry of Justice

Sent by email

Dear Secretary of State

CONSULTATION: COVID OPERATING HOURS (COH)

After reviewing the consultation documents, I would like to set out my observations concerns with the COVID Operating Hours Proposal.

At the outset, it should be noted that the consultation documents¹ show only a small amount of data has been gathered on the impact on victims or witnesses.

My main concerns about the proposal are about:

- which victims and witnesses will be asked to give evidence within this shift system;
- who will asked to attend court early;
- the issue of returning to complete testimony due to the rigidity of the COH proposal;
- the assessment there is “***potential for indirect sex discrimination***” and the impacts on people with caring responsibilities²; and
- the lack of consideration about the potential for victim attrition.

Overview

I do not consider it realistic to assume that a judge would be able to assess at PTPH whether COH could disadvantage a particular victim or witness. Witness Care Units are already cracking under significant strain even without the need to ascertain what might be subtle and personal information. The information would need to be ascertained in some

¹ See *COVID Operating Hours Crown Court Pilot Assessment, Final Report: User experience and Insight*:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/939440/COVID_operating_hours_assessment_report.pdf

²https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/939441/Public_Sector_Equality_Duty_statement.pdf

detail then forwarded to the police in the case, then to the CPS, who would put this to a barrister who would mention it to a judge. You only have to consider the gaps this information could fall through to understand how many victims and witnesses could be disadvantaged.

I would not feel satisfied unless there was a clear and accepted unfailing process by which HMCTS and other agencies would conduct assessments of whether the hours could disadvantage a victim or witness. If one is in process of development, it should be shared with victims support services for their input and evaluation. It seems to me unlikely that such a system could be designed and be an effective protection at the distance from the victim from which it will operate with the level of information required for appropriate decision making.

The next issue is whether potential disadvantage to a victim/witness would, in any case, be treated as good reason why a case should not be subjected to the two-shift system. There is a considerable backlog of cases and courts which could otherwise be put to more flexible use appear, on some of the evidence, to be hamstrung by their designation for rigid COH. Presumably they need to be filled with cases and what guarantee could there be that pressures would not outweigh the impact on a victim when that impact is being related third hand from a distance.

Hard Stops

COH courts operate with 'hard stops' at the end of an AM or PM session (meaning they are not supposed to overrun). The consultation document states that this hard stop "*created some inefficiency as sessions would finish early if they thought a witness would go past the stop time compared to standard hours courtrooms where they could overrun*". This suggests some witnesses may be in court to give evidence, the court will finish early, and the witness is called back for a second day to give evidence due to the 'hard stop' rule (see page 15).

These points are not addressed in any more detail in the documents, nor are these impacts fully considered, e.g. whether it would be preferable to give the witness the choice of over-running (particularly for a short time) or returning the next day.

For a complainant giving evidence in a high harm case, it could be punitive to be required to testify across two, or more, separate half days. Often courts sit for longer to finish a witness's evidence so that they do not have to return a second time. Hard stops make this impossible. Courts must finish so the next shift can come in.

This may mean that a complainant, a child victim of sexual abuse or someone who has been trafficked, might give half of their evidence on one day and be required to wait, often in anticipation of stressful cross-examination overnight until the same time on the next day.

It will affect women most since they are, overwhelmingly, the most frequent complainants in high harm cases and could possibly amount to a level of indirect sex discrimination. Government proposals in the victim care sector are to improve the criminal justice experience in order to help victims to cope and recover and not to make it worse

Also, the consultation documents do not include an assessment about how many victims would not attend court if they are told to do so early or stay late and cannot manage it.

Witness support

In the learning lessons section of the consultation document, it states "*We would continue to collaborate with MoJ and Witness Service on the support that they can give to early morning*

and late afternoon sessions. Where they were unable to facilitate, we would mitigate by use of HMCTS resources” (p.23).

It's unclear whether these 'HMCTS resources' would adequately replace the support offered Witness Service, whether sufficient resourcing is in place to take on this responsibility and what any additional training is being given to HMCTS staff who take on these additional duties.

Vulnerable witnesses and trials with a large number of witnesses

With the COH model, the consultation document states that *“A trial with a vulnerable witness (where s28 has not been utilised) is unlikely to be suitable for a shift court”*. And, the same page states *“A trial with a large number of witnesses is unlikely to be suitable for a shift court”* (see page 22). Both of these need more clarity about under what (exceptional) circumstances these would be suitable and how these are deemed suitable.

More complex cases

The assessment report gives an example of one court involved in the pilot: *“Due to the case profile at one site (where the majority were sex cases) it was harder to find appropriate cases that fitted with the COH court. The resident judge therefore used the COH courts for short work or other court business when needed”* (p.11).

In any follow-up evaluation, I would like to see what the impacts of the case requirements for COH courts, i.e. shorter/less complex, have on listing other cases within the court. As the Public Sector Equality Duty statement sets out: *“A potential issue is whether there could be equality impacts resulting from displacement effects – that is, unintended affects caused by the displacement of cases which might otherwise been heard, if the AM and PM trials hadn't been running”* (p.2).

As I have stated above, I would be particularly concerned if displaced cases unintentionally led to longer waiting times for vulnerable or intimidated victims and witnesses, many of whom will have protected characteristics.

Legal professionals meeting with witnesses before trial

The assessment report sets out that *“Respondents [Legal professionals] who had attended COH sessions were more likely to [...] not having sufficient time to meet witnesses and other parties”* (p.15). In the consultation document, there are no mitigating actions proposed to address this.

Evidence on the impact on witnesses

The assessment report states that *“During the pilots it was not possible to collect detailed data on the impact of the approach on those with caring responsibilities and the impact on specific groups (including citizens and witnesses)”* (p.18). (the absence of this information adds weight to my concerns that future assessments of suitability for COH will be very difficult for the judiciary - see above)

The assessment included interviews with 5 witnesses (4 of these were written responses) over the seven pilot sites – one of these was in Liverpool, four were in Portsmouth. These interviewees had all attended court, but we also need to hear from those who didn't or

couldn't – perhaps because of difficulties with travel, childcare, particular fears or so forth. Equalities impacts can only really be assessed by understanding the effect on those who don't make it to court, as well as those who do.

Further Assessment

I would recommend that in any further assessment and monitoring, a more considered and thorough approach is taken to assess the impact on victims and witnesses. This should include, but not be limited to, witnesses' access to support, the impact of delays and overruns, number of witnesses in COH courts, types of cases in COH courts, vulnerable witnesses and provision of special measures, and victims and witnesses who did not attend court.

We also need to consider how to minimise the risk of further harm caused by allotting inappropriate and vulnerable victims to COH courts. This will require an assessment of the probability of a position of indirect discrimination occurring since women will be more likely to be in this position than men.

in Line with my usual practice, a copy of my response will be placed on my website.

Yours sincerely

A handwritten signature in black ink, appearing to read 'V Baird', written in a cursive style.

Dame Vera Baird QC

Victims' Commissioner for England and Wales

cc: HMCTScovidoperatinghours@justice.gov.uk