

# Public Sector Equality Duty (PSED) statement – COVID Operating Hours for recovery in Crown Courts

## Introduction

1. The Public Sector Equality Duty (PSED) is set out in Section 149 of the Equality Act 2010. This document records how, in considering the COVID Operating Hours proposals, HMCTS has reflected the requirements of the PSED by having due regard for the need to:
  - Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act;
  - Advance equality of opportunity between people who share a protected characteristic and those who do not; and
  - Foster good relations between people who share a protected characteristic and those who do not.
2. The protected characteristics are: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion and belief; sex; and sexual orientation.
3. This Public Sector Equality Duty statement covers both public and professional court users.
4. HMCTS continues to undertake proportionate equality assessments for our Covid-19 related justice work in line with our existing approach and informed by EHRC guidance.<sup>1</sup> We have used the best available evidence within the limited timescales available to consider the likely broad equalities impacts of these urgent proposals within the overriding need to respond quickly to Covid-19 challenges.

## Proposals summary

5. As part of HMCTS's Crime Recovery Plan, one of the four pillars to recovery is to further maximise the use of our existing estate through opening our buildings for longer during COVID-19. The pandemic and its necessary countermeasures are an unprecedented challenge to the courts and tribunals which merits an unprecedented response. Covid Operating Hours (COH) was piloted in seven Crown Court centres to test if we could do more in the limited space, we have to support recovery. The pilots are unrelated to previous pilots which have tested extended and flexible operating hours in the civil and family courts. They were purposefully designed to respond to the impacts of Covid-19, and to be a temporary response to increase capacity.
6. This COH model tested the running of dual court lists in one courtroom, one in the morning and one in the afternoon. Alongside the 'COH court' at least one 'standard hours' trial court operated. This is referred to as the 'blended approach'.
7. No one individual was expected to participate in both the morning and afternoon session in one day. For example, morning trials that lasted more than one session would return for the morning session the next day. The COH dual list was used in one courtroom per site and there was always at least one other courtroom running standard hours jury trials.

---

<sup>1</sup> Equality and Human Rights Commission, *Public Sector Equality Duty guidance*, <https://www.equalityhumanrights.com/en/advice-and-guidance/public-sector-equality-duty-guidance>.

8. Representations can be made by parties (supported by reasons) at the Future Trial Review which takes place in advance of confirming whether the trial will be listed into a COH court or a standard hours court. Alongside this are provisions for practitioners to make an application to move a case should attendance at a COH court be impractical, supported by reasons.

## Assessment of impacts

### Direct discrimination

9. No potential for direct discrimination, on the grounds of any protected characteristic, was identified from the assessment pilot sites, or is anticipated from any further rollout of COH.

### Indirect discrimination

10. The most frequently cited discriminatory impact is the potential for indirect sex discrimination (with the possibility that this might also link to the pregnancy and maternity protected characteristic). As discussed below, there is some evidence suggesting that COH might have a greater impact on people with caring responsibilities, compared with those without such responsibilities. This has an equality dimension, if it is accepted that women are more likely, than men, to care for children and dependant adults. As discussed further, this was raised as a concern within recent surveys of legal professionals.
11. There may also be potential for indirect discrimination linked to the religion and belief protected characteristic. For example, Islamic prayers take place from Friday afternoon onwards and the Jewish Sabbath starts from sunset on Friday. In comparison with courts operating standard operating hours, COVID Operating Hours may have a slightly bigger potential impact, on those practising certain faiths. The possibility of indirect disability discrimination is also mentioned in the discussion of impacts on jurors.
12. No indirect discrimination, linked to any other protected characteristics, has been identified.

### *Jurors and other public users*

13. 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. In the research findings it is reported that:

“Courts reported that they tended to list less legally complex, shorter cases and those that are likely to crack in the COH court. Longer, more serious cases were directed to the standard hours court room because they needed the greater flexibility that a full day session provides.”

14. The research suggests that listing officers defined short cases as those with one defendant and which were estimated to last three days or fewer. The research found that:

“The listing of shorter cases in the COH courts generated mixed views among judges and listing officers. Some appreciated the capacity to hear cases that would otherwise not be heard, while others felt that resource should be deployed on longer cases.”

15. COH were used for a wide range of case types (with drugs, fraud and ABH charges being mentioned in the research assessment). In addition, the 'blended approach,' in which trials with traditional hours also ran, was found, in the research, to maintain a mix of cases (longer/shorter and complex/simpler). Based on the research assessment, there is no

evidence of significant displacement effects (and therefore no evidence of disproportionate impacts linked to any protected characteristics).

16. The COH research also found that, when there were no breaks in COH sessions, “it was felt that concentration levels for all parties, and in particular jurors, were impacted.” This impact might be especially felt by people with conditions that affect concentration or physical stamina (so potentially indirect discrimination linked to the disability protected characteristic).

### *Legal professionals*

17. Legal professionals who worked the PM court reported, in our assessment, that they often arrived home later in the evening, which caused many to feel that their work life balance had been negatively impacted. The COH assessment does not cover whether female legal professionals were disproportionately impacted compared with male legal professionals. As part of the assessment, data was collected on the views of legal professionals. The survey asked respondents how they rated their experience of being involved in a COH trial. Overall, male respondents were more likely to rate their experiences both positively and negatively than female respondents, who were more likely to express a neutral view.
18. Similar proportions of respondents both with and without childcare responsibilities expressed positive, neutral and negative views - around a fifth of respondents rated their experience as either good or very good, two-fifths rated it as neither good nor poor, and two-fifths rated it as poor or very poor. Respondents with childcare responsibilities were however more likely to express stronger views (both ‘very good’ and ‘very poor’).
19. These figures are based on small numbers (27 men and 13 women) and should be regarded as representative of respondents’ views only.
20. However, there is a reasonable assumption that caring responsibilities are a significant part of maintaining a work life balance – and that women are proportionately more likely to have caring responsibilities than men.
21. Other evidence sources claim that there is a more overt link to the potential for indirect sex discrimination.
22. Potential adverse impacts on female barristers were identified in the North-Eastern Circuit Women’s Forum report<sup>2</sup> of a survey on proposals to extend the operating hours of courts without safeguards. For example, 80% (474 of 594) respondents said earlier starts would have a negative impact on them, rising to 88% (519 of 587) for later finishes and 86% (510 of 595) more longer afternoon sessions. Over half of respondents (55%) said it would lead them to consider leaving the Bar, with 62% saying they would consider reducing the days/hours they work. (These percentages are based on 447 responses, but numbers, for different response options, are not stated).
23. A survey<sup>3</sup> of the Midland Circuit Women’s Forum on extended operating hours (EOH) covers similar themes. It concludes that “if EOH are introduced it will impact on women to

---

<sup>2</sup> North-Eastern Circuit Women’s Forum (2020), *Extended Operating Hours: A Risk Assessment*, downloaded from: <https://www.dropbox.com/s/qi0ssp2anesh6fb/NEC%20WF%20REPORT%2023%20JULY%202020%20FINAL.pdf?dl=0>.

<sup>3</sup> Midland Circuit Women’s Forum (2020), *Report on Court Extended Operating Hours Proposals*, provided by e-mail.

a greater extent than men.” This partly reflects qualitative feedback, but also this comparison of male and female respondents:

“More women than men expected to have to turn down instructions if extended operating hours are introduced: for example, if 9am starts are introduced, 58% of female respondents as against 46% of male respondents expected to have to turn down instructions; if 6pm finishes are introduced 63% of female respondents as against 50% of male respondents expected to have to turn down instructions, demonstrating the discriminatory impact of these proposals.”

(Base numbers are not stated, but there were 224 responses to the survey, with 46% of respondents identifying as male and 50% as female).

24. Alongside some more attitudinal content (with 88% of respondents being opposed to extended operating hours), a Women in Criminal Law<sup>4</sup> survey reports on reasons why respondents are opposed to EOH proposals:

- Impact on childcare or other caring arrangements (107, 41%)
- Impact on mental and/or physical health (33,13%)
- Impact on work/life balance 113 (43%)

(The percentages are based on the 262 of 480 respondents who answered this question.)

### Harassment and victimisation

25. We do not consider there to be a risk of harassment or victimisation as a result of these proposals.

### Advancing equality of opportunity

26. Consideration has been given to how COH will impact on the duty to advance equality of opportunity by meeting the needs of users who share a particular characteristic compared with those who do not share that particular characteristic.

27. There may be potential benefits from being able to attend court at different times. This might include alternative public transport options for disabled people, with increased opportunities for off-peak travel, which can also benefit older and young people in particular. Being able to attend an AM or PM trial, rather than standard hours, might be of value to those seeking to balance work and family/care responsibilities (proportionately more women than men).

28. A proportion of court users should potentially benefit from the increased capacity provided by COH, which will support efforts to reduce caseloads, reduce waiting times, and by extension improve access to justice. Such benefits might be especially felt by those with certain mental health issues, such as anxiety (long-term mental health conditions, with a substantial impact on daily life, are a disability, as defined in the Equality Act).

### Fostering good relations

29. Consideration has been given to how these proposals impact on the duty to foster good relations between people with different protected characteristics. We do not consider that these proposals will have any negative impacts relating to this aim of the Equality Act.

---

<sup>4</sup> Women in Criminal Law (2020), *Women in Criminal Law Survey on Extended Operating Hours*, at <https://www.criminalbar.com/wp-content/uploads/2020/09/WICL-EOH-Report-Results1.pdf>.

## Overall assessment

30. The evidence suggests there is potential for positive impacts, linked to advancing equality of opportunity and adverse impacts, linked to indirect discrimination, rather than direct discrimination.
31. Positive impacts include the benefits of increased court capacity and the argument that further delays will be especially stressful for people with mental health issues (long-term mental health issues fall within the definition of the disability protected characteristic). AM and PM court timings may also be preferred by some users.
32. A frequently cited concern is around the potential for indirect sex discrimination, linked to impacts on people with caring responsibilities. Much of the external evidence focuses on the impacts on female legal professionals.
33. The key mitigations to these impacts include:
  - The proposed approach to COH will blend each COH Court with one or more standard operating hours court in each Crown court centre.
  - In this blended approach, there will be significantly more courts operating standard operating hours than COH, which means that many cases will continue to be heard in standard operating hours.
  - Legal professionals will be able to request, through the usual channels, that cases are listed into a court that is operating standard hours rather than in one of the COH AM or PM sessions, where that is more suitable or practical.
  - Parties attend Future Trial Reviews in advance of trial where a judge reviews whether a case should be listed into a COH court or a standard hours court and are able to make representations about which of these listing approaches is suitable.
  - There will be additional provisions in place for practitioners to make an application to move a case listed in a COH court should attendance at a COH court subsequently become impractical, supported by reasons.
34. As well as mitigating concerns about indirect sex discrimination, the blended approach and listing practices referred to above should also mitigate potential adverse impacts linked to days of religious observance (the religion and belief characteristic).
35. Listing remains a judicial function and any decision on whether a case should be listed in a COH or standard hours court, or whether to move a case between or out of COH sessions, will be decided by the trial judge within the context of the listing practices outlined above.
36. The assessment of the pilots found that, when there were no breaks in COH sessions (which would be due to a judicial decision), “it was felt that concentration levels for all parties, and in particular jurors, were impacted.” This impact might be especially felt by people with conditions that affect concentration or physical stamina (so potentially indirect discrimination linked to the disability protected characteristic). However, the COH model encourages that time should be taken for breaks.
37. Similarly, the finding that COH trials can be tiring if breaks are not given, may have an impact which might fall disproportionately on disabled people, compared with non-disabled people. The mitigation is to ensure that breaks are given (in line with them being part of the COH model); additionally, reasonable adjustments should be considered for

disabled people where requested, and HMCTS has existing processes in place to enable this.

38. We have listened to concerns and acknowledge the potential impacts and have identified mitigations which can be put in place. Our assessment is that COH is a proportionate response given the overriding need for courts to respond to the pandemic; taking into account that it is designed as a temporary response to COVID-19, is time limited and will be reviewed in April; that each COH court will be blended with one or more courts operating standard hours; that provisions are in place through the future trial reviews to enable parties to request a case is listed into a COH court session or a standard hours session; and that there are provisions in place once a case is listed for parties to make an application to the court to move the case from a COH court. These justifications reflects the research finding that:

“COH appears to be an effective way of increasing the capacity of a single courtroom and thus, disposing of cases. Overall COH courtrooms dealt with more trials per day than standard hours courtrooms, with more cracked and effective trials being disposed of in COH courtrooms. As a ‘blended approach’ the model was found to increase overall capacity of the pilot sites to dispose of cases while maintaining a mix of longer/shorter, complex/simpler, cases.”

39. In respect of potential adverse impacts, our initial assessment is that COH does not lead to direct discrimination on the grounds of any protected characteristic. Moreover, there are mitigations available to address the potential impacts of indirect discrimination.

## Future actions

40. The research findings and this Equality Statement have highlighted the importance of ongoing data collection. The monitoring and review of the actual impact of COH will form an important part of the process should we decide to roll the model out further.
41. The general equality duty is still applicable to the ongoing operation COH courts and we will need to be satisfied, on an ongoing basis, that we are continuing to meet each of the aims of the general equality duty and be able to demonstrate due regard to them. We will continue to collect data to build on the evidence from the pilots, should we roll out COH wider. This will help us further understand user impacts relating to protected characteristics.
42. This Equality Statement will therefore evolve as we collect further data and responses in relation to the consultation exercise and as we continue to understand impacts on users with protected characteristics or otherwise. We will continue to actively engage with court users to secure constructive feedback, challenges and opportunities should we roll out COH wider. We will continually seek to optimise our understanding of equality impacts upon court users through ongoing data analysis. This will allow us to review issues and consider mitigating factors that will reduce/remove any such issues.

## Review of this statement

43. This Equality Statement will be revisited in the light of feedback from the targeted consultation exercise.
44. We will also review this Equality Statement as new evidence emerges. This is in line with the continuing ongoing nature of the PSED.