

INDEPENDENT INQUIRY INTO CHILD SEXUAL ABUSE

SUBMISSIONS ON BEHALF OF OFSTED REGARDING VIRTUAL HEARINGS

1. These submissions are made in response to the invitation for comments received in the note from Solicitor the Inquiry on 27 March 2020.
2. Ofsted's position is set out below in respect of the proposals for virtual hearings for IICSA investigations. These submissions should be considered as applicable to all IICSA investigations where a virtual hearing may be proposed in future. Further, investigation specific, submissions are made in respect of the CSEN and CPIROS investigations, the two investigations for which virtual hearings have been proposed at paragraphs 34 and 39.
3. Ofsted has no objection in principle to virtual hearings, although Ofsted's preference is for face-to-face hearings in all investigations wherever possible. Ofsted does however have a number of serious concerns about the current proposal. These concerns focus, in particular, on the ability of the Inquiry to fulfil its remit and inspire public confidence in the proceedings, and on the diversion of the resources of Ofsted (and other public authorities) away from current critical and urgent work on the Covid-19 pandemic.
4. The Prime Minister has been clear that managing the response to Covid-19 must be the top priority for all public bodies. A significant number of public bodies and NGOs are involved in IICSA and are also at the forefront of the national effort to manage Covid-19. Local authorities, voluntary agencies and the police are already hard pressed maintaining essential child protection services at this time. Police and local authority senior managers are also co-ordinating local emergency responses on the ground including those for vulnerable children, families and adults. It is vital that they are given no additional burdens at this time.
5. Proceeding with business as usual and especially a public hearing, even remotely, would put an unnecessary additional burden on these services at a crucial time. Furthermore, organisations will have increased staff absence and operational obstacles to manage because of staff working remotely wherever possible. They are

unlikely to be able to engage with current investigations at the same level as previous investigations, which may make the Inquiry's hearings less effective. Ofsted considers that this would be a disservice to those victims and survivors who are looking to IICSA for answers.

6. To continue business as usual and proceed with public hearings may also impact the ability of organisations to meet their other functions, by being required to put staff and resources into inquiry work which could be prioritised elsewhere. For example, Ofsted has stopped all routine inspection and is redeploying many of its staff to support front line services, local authorities or other government departments. If the inquiries go ahead as proposed, Ofsted will have to retain some of this resource rather than redeploying it to help manage Covid-19.

Submissions in response to the proposals at paragraph 9 of the note:

- a) **Whether Ofsted agrees in principle that, in the current circumstances, the investigation hearing can and should be heard remotely in the way set out**

7. Ofsted has no objection in principle to virtual hearings in response to the Covid-19 crisis and is in general supportive of all attempts to undertake necessary and urgent work as far it is possible to do so in the current circumstances. However, Ofsted doubts whether the current set of IICSA hearings amount to necessary and urgent work in the circumstances.

8. The Judiciary's Protocol for conducting remote hearings in civil cases¹ states, "it will normally be possible for all short, interlocutory, or non-witness applications to be heard remotely. Some witness cases will also be suitable for remote hearings." IICSA hearings are not short, interlocutory, or without witnesses. There has been no large-scale research into the extent to which virtual hearings can be effective for an Inquiry hearing which lasts several weeks, has multiple witnesses, and is driven by large amounts of evidence. Ofsted notes that hearings in the Grenfell Inquiry have been adjourned indefinitely and that hearings for the Contaminated Blood Inquiry, the

¹ Protocol regarding remote hearings, 20 March 2020, paragraph 12: https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil_.GenerallyApplicableVersion.f-amend-24_03_20-1.pdf

Undercover Policing Inquiry and the Manchester Arena Inquiry² have all been postponed until the autumn.

9. Although Ofsted supports and recognises the importance of IICSA, no convincing arguments have been made to persuade Ofsted that this work is any more urgent and necessary than other public inquiries and should therefore continue at pace, in the current crisis.
10. Ofsted's principled objection is based on two reasons. First, proceeding with virtual hearings unnecessarily diverts urgent time and resources from public bodies undertaking front line work to protect those who the pandemic renders most vulnerable. Second, continuing by way of virtual hearing may do a disservice to the goals that IICSA seeks to promote and the victims and survivors it seeks to give a voice to.
11. The points set out below are applicable to hearings starting in both April or May and June, particularly when we cannot at present, anticipate how the pandemic will develop and therefore how long the current "social distancing" measures will be in place. Ofsted therefore objects to virtual hearings being listed before the autumn.

Diversion of resources

12. An Inquiry to consider the extent to which State and non-State institutions have failed in their duty of care to protect children from sexual abuse and exploitation necessarily requires public bodies to participate fully. To do so, key personnel in public bodies such as Ofsted are, rightly, required to spend a significant amount of time preparing for hearings. The commitment required to effectively participate is significantly compromised by the current multiple and urgent demands of the pandemic.
13. Over the next six months Ofsted is participating in five investigations (CIPROS, CSEN, Residential Schools Phase 2, Lambeth, and Effective Leadership). The CIPROS and CSEN investigations alone require statements and attendance from, among others, HMCI, the National Director for Social Care, and the National Lead for Safeguarding. Presently, these key personnel are working on protecting those children who are rendered most vulnerable by the pandemic.

² <https://manchesterarenainquiry.org.uk/an-update-on-manchester-arena-inquiry-start-date-following-covid-19/>

14. To divert key members of the organisation not only undermines Ofsted's Covid-19 response but also removes Ofsted from multiple internal and cross government meetings and communications which are essential to a co-ordinated public response to the crisis.
15. This will also be the case for all front-line public services involved in the protection of children. All central Government departments, local authorities, police forces and CCGs are engaged in the response to Covid-19 in some way.
16. Dedication to such urgent work is necessary to protect and promote the interests of children during the pandemic, particularly children vulnerable to abuse or exploitation. This is a goal which IICSA must share.

Victims and survivors: effective evidence

17. Whilst Ofsted does not represent victims or survivors, it does seek to be a force for improvement. The best interests of children and students is the driving force behind everything that Ofsted does. Virtual hearings may not be in the best interests of victims and survivors in two respects.
18. First, there are problems of achieving equally effective witness evidence under virtual conditions (irrespective of the practical difficulties set out below). While much evidence is submitted in writing and considered ahead of each hearing, live witness evidence is a key component of each IICSA hearing.
19. In various other contexts research has suggested that when parties are no longer physically present litigants are more likely to become disengaged, the client/lawyer relationship can be negatively affected, parties may have reduced understanding and respect for the process, the perception of the judge may be altered, and witnesses may disclose less information.³ The extent of these issues may depend on the exact

³ Hynes J, 'Remote Hearings In The Immigration Tribunal: What Could Possibly Go Wrong? | Free Movement' (*Free Movement*, 2020) <<https://www.freemovement.org.uk/remote-hearings-in-the-immigration-tribunal-what-could-possibly-go-wrong/>> accessed 31 March 2020; Public Law Project, 'The Digitalisation Of Tribunals: What We Know And What We Need To Know' (2018) <<https://publiclawproject.org.uk/wp-content/uploads/2018/04/The-Digitalisation-of-Tribunals-for-website.pdf>> accessed 31 March 2020; Burton M, 'Justice On The Line? A Comparison Of Telephone And Face-To-Face Advice In Social Welfare Legal Aid' (2018) 40 *Journal of Social Welfare and Family Law*; Eagly I, 'Remote Adjudication In Immigration' (2015) 109 *Northwestern University Law Review*; Rowden E, and Wallace A, 'Remote Judging: The Impact Of Video Links On The Image And The Role Of The Judge' (2018) 14 *International Journal of Law in Context*; Transform Justice, 'Defendants On Video - Conveyor Belt Justice Or A Revolution In Access?' (2017)

form of remote hearing – for example the ability to assess the credibility of a witness where there may be a need to delay questions or an inability to see the witness in full may be undermined. It would not, for example, be possible to identify if there were others present when a witness gave evidence.

20. Ofsted does not suggest that research into experience of virtual hearings in immigration tribunals or criminal proceedings is directly transferable to IICSA. However, it does at least call for significant caution in relying on a method of hearing which is unsystematically tested or researched and may not effectively serve the interests of victims and survivors.

21. Second, it is important not only that justice is done, but also that it is perceived to be done. Ofsted is concerned that several of the investigations have concluded, and reports have been published following face-to-face hearings. While the recommendations of IICSA are important work, so is the perception that a full and independent public inquiry has taken place into events which were damaging many children and young people. Ofsted is concerned that by proceeding with some investigations by way of virtual hearings when others have had, and may in future have, face-to-face hearings, there may be a perception of a lesser justice having been served for some.

b) Whether there are any practical difficulties Ofsted foresees to the holding of a virtual hearing;

22. Ofsted has several concerns about the practicalities of undertaking virtual hearings with so many participants and with such a high volume of witness evidence.

23. First, Ofsted understands that with any new technology there are inevitably teething problems and is concerned that for such a large hearing, with so many participants, these may be greater. Time will need to be built into any listing to account for this, both at the start and end, and during each day.

24. Second, IICSA has indicated that legal representatives and core participants will need to download the remote hearing software themselves, but no mention is made of compatibility with either Mac or Windows machines or the capability required for the

system identified to run effectively. Without this information it is not possible to assess how appropriate the model would be for Ofsted or Ofsted's counsel.

25. Third, Ofsted can foresee several technical risks during the hearings themselves which IICSA would need to adopt satisfactory protocols for:

- a. What should happen if and when participants alert the Inquiry that they have dropped out of a hearing due to technical or broadband issues and how they will catch up with proceedings – including whether the hearing will be stopped, if there will be a mechanism for live replay or whether the transcript will have to be used;
- b. Whether that process may be different for different participants;
- c. What process would apply if the transcription service froze or cut out and there was a gap in transcription;
- d. Adequately supporting participants who do not have access to a reliable broadband connection, and what the Inquiry's position would be if a participant or witness was unable to partake due to a lack of broadband.

26. Fourth, there remain significant practical but non-technical difficulties. Ofsted notes that while those required to attend courts and tribunals are listed as key workers, and so eligible for childcare facilities, those attending public inquiries are not. Even with the facilities for a virtual hearing, this may cause difficulties for legal representatives, core participants and witnesses as it is noted that HMCTS guidance states that for telephone and video conferencing; "Users will need a quiet space where they will not be disturbed during the hearing."⁴ This may not be possible without the assurance that those participating can access childcare. This may be particularly problematic for victim and survivor witnesses who will need adequate support to give effective evidence.

27. Fifth, it is not clear what steps have been or will be taken to ensure accessibility and alternative arrangements for those with disabilities, whether those individuals are core participants, legal representatives, witnesses or members of the public. It is unclear how the proposal for virtual hearings and the identified system comply with the Inquiry's obligations under the Equality Act 2010 or what assessment of this has been undertaken.

⁴ <https://www.gov.uk/guidance/hmcts-telephone-and-video-hearings-during-coronavirus-outbreak>

c) Whether Ofsted agrees to the Inquiry’s proposal that the Inquiry proceed with a virtual hearing commencing 20 April 2020 as planned. If not, providing reasons, in detail about the availability of individual core participants and whether witnesses if non-availability of key personnel is a particular issue and whether potential alternative hearing slots in May or June 2020 could be used instead;

28. It is proposed in both the note provided for CSEN and CPIROS that a virtual hearing be undertaken for each investigation on 20 April 2020. It is somewhat unclear whether the proposal is that two hearings may be run concurrently or that either CSEN or CPIROS could take place on 20 April. This is problematic for Ofsted as a core participant in both. Whilst separate counsel represents Ofsted at the hearings, the same, very small support team will be required to assist on both hearings. This will cause difficulties, as it is unclear when legal team discussions would take place, if two hearings take place concurrently with the same breaks. If breaks are not taken at the same time, the instructing solicitor would potentially need to break from observing one set of evidence to consult with counsel on another hearing or indeed to observe the evidence given at the hearing.

29. Ofsted repeats its concerns above about the danger – both to safeguarding children during the pandemic and effectively participating in IICSA – of requiring key personnel to participate in IICSA at what is likely to be the high point of the crisis. In respect of CIPROS, the inquiry should also note that many voluntary organisations, such as Churches, Synagogues and Mosques are also involved in supporting communities outside of their usual collective worship.

30. In addition to the above concerns there is also the very real possibility of key witnesses, legal representatives or panel members being taken ill and unable to engage in the hearing. Whilst a virtual hearing would accommodate those self-isolating without symptoms or with those mild enough to allow the individual to continue working, it cannot accommodate the possibility of witnesses or panel members falling ill to the extent that they are unable to engage in part or all of the hearing. It is anticipated that “social distancing” will continue at least until after Easter and this may be much longer. While such mechanisms remain in place and the threat of contagion remains high it therefore remains a risk that the hearing may need to be adjourned once started, or again. In Ofsted’s view this would cause more disruption and potentially further, avoidable, delay.

d) Whether they agree with the Inquiry's provisional analysis that section 18(1) of the 2005 Act required a livestream of proceedings to the public where physical access cannot be provided and therefore the Inquiry should proceed even though a three-minute delay to the transmission is not possible.

31. Ofsted considers that the way public access to proceedings is provided is a matter for the Chair, pursuant to Section 18 of the Inquiries Act 2005.

32. While Ofsted's evidence is not expected to touch on issues to which the 3-minute delay is likely to be most relevant and nor are any of Ofsted's witnesses anonymised or subject to a restriction order Ofsted is cognisant of the concerns which other core participants, particularly witnesses and victim and survivor groups may have on this issue. Whilst steps can be taken without a delay to protect individuals' identities, these are limited. Ofsted would hope that those voices, of the individuals most likely to be affected by the removal of such a delay, are considered carefully in any decision on this point.

33. Ofsted is concerned that any approach which does not adequately protect victim and survivor anonymity may undermine confidence in the Inquiry. However, Ofsted is equally aware that the paramount importance of open justice, and maintaining confidence in the Inquiry, requires the Inquiry to be publicly accessible. Postponement, or technology which can accommodate a delay, may adequately accommodate both concerns.

Observations in respect of each investigation:

Child Sexual Exploitation and Organised Networks

34. Ofsted has concerns about the availability of legal representatives if this hearing were to be postponed until May or June. Much work has already been undertaken preparing for the hearing and having already made enquiries, Ofsted's counsel would have significant difficulty in finding availability, for such a duration, at such relatively short notice. This would therefore require new counsel to prepare and read into the matter at short notice, which would not only be a significant task but would place an avoidable and unnecessary financial burden upon Ofsted as a public body. Such problems are likely to be replicated across other core participants.

35. Ofsted is also concerned that due to the shutdown of Relativity prior to the Covid-19 crisis, disclosure is still ongoing. It was clear from the update note of 23 March 2020 that this has caused a significant delay to work. At paragraph 5, it was stated that “if the position is not resolved by end the of the week then the inquiry will consider alternative methods of disclosure”. No confirmation has been received since this note that the problem has been resolved and that all disclosure will be available before the start of the hearing. Conducting disclosure review concurrently with the hearing places significant resource constraints on Ofsted’s legal team, and Ofsted repeats its concerns as set out above.
36. At paragraph 14 of the same update note it is confirmed that some statements are still awaited, and further requests have also been made which have not yet been received. It is not clear which organisations or individuals are yet to provide evidence or respond to further requests, but Ofsted is conscious of the impact of Covid-19 on a significant number of the core participants and believes this casts doubt on whether it will be possible for these requests to be met within the timescale for the hearing.
37. Lastly paragraph 17 onwards of the note relates to the disclosure of individual children’s files. This appears to be a significant volume of material. This disclosure has not yet begun, and the sensitive nature and complexity of such disclosure mean that it may require expert as well as legal review, in part if not whole, to fully analyse it. This will take further time and will involve specialists who may be best utilised by their employer organisations elsewhere during the pandemic.
38. Ofsted would therefore submit that adjourning this investigation hearing until the autumn would be preferable.

Child Protection in Religious Organisations

39. This hearing was adjourned part heard, with evidence having already started. Ofsted is concerned at the proposal to reschedule the hearing in May or June for the reasons set out at paragraphs 28-30 above. However also because, continuity of counsel is considered crucial for a hearing part heard. Having already made enquiries, Ofsted’s counsel would have significant difficulty in finding availability, for such a duration, at such relatively short notice. It is anticipated that such problems are likely to be replicated across the core participants and the longer the position is left without clarity, the more likely it is that counsel will be unavailable.

40. Ofsted would therefore submit that adjourning this investigation hearing until September, when no hearings are currently listed, would be preferable.

Conclusion

41. Ofsted has been supportive and fully engaged in IICSA throughout the Inquiry and recognises the importance of the Inquiry's work to improve child protection. Ofsted is however concerned that to move to proceed with hearings using an untested model, at a time of national crisis when so much is unknown may lead to further delay and difficulties and ultimately fulfilling the Inquiry's remit more difficult.

42. Ofsted looks forward to receiving the submissions of other parties, the decisions arising from these submissions and continuing to participate in the Inquiry's investigations in due course.

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31 March 2020