

Written evidence from the Law Society of England and Wales (COV0120)

Introduction

1. The Law Society is the professional body for solicitors in England and Wales. The solicitor profession feels a strong sense of responsibility to help keep the wheels of justice turning and to uphold the rule of law through these unprecedented times. Solicitors play an important role in supporting people who are being impacted particularly severely by the current situation.

What steps need to be taken to ensure that measures taken by the Government to address the COVID-19 pandemic are human rights compliant?

2. The Covid-19 pandemic has presented a unique and unprecedented challenge. Emergency measures are warranted but it is vital that these are enacted through law, proportionate, and strictly necessary. We agree with the view expressed in the Committee Chair's briefing on the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (the Regulations), and the four points outlined for ensuring the measures are lawful, justified, necessary and proportionate.¹
3. Ensuring continuing compliance with human rights also requires keeping the measures under constant scrutiny. We welcome the ongoing review of the regulations, conducted every three weeks, and of the Coronavirus Act 2020 (the Act), to be conducted six months after its introduction. These should be used to continually and critically assess the necessity and proportionality of the measures, and to make changes accordingly, as well as to address any unintended consequences.
4. There are also a vast range of possible human rights implications, yet to fully materialise, which are either an indirect result of or separate to the legislative measures. In particular, these include the privacy concerns regarding the NHS tracing app (including the potential impact on legal professional privilege) and the implications of reduced external scrutiny as a result of bans on physical visits for those in institutions such as prisons, detention centres or hospitals.
5. As overarching measures, we recommend that:
 - Specific human rights impact assessments should be conducted and published as part of the three week and six month reviews of the Covid-19 regulations and legislation to assist parliamentary and public scrutiny of the measures.
 - Government should consider ways to ensure monitoring and periodic review of the wider impact of legislative and non-legislative measures.

What will the impact of specific measures taken by Government to address the COVID-19 pandemic be on human rights in the UK?

¹ See: <https://publications.parliament.uk/pa/jt5801/jtselect/jtrights/correspondence/Chairs-briefing-paper-regarding-Health-Protection-Coronavirus-Restrictions-England-Regulation-2020.pdf>

Article 3 – freedom from inhuman and degrading treatment, article 8 – right to private and family life, and article 13 – right to an effective remedy

6. Measures to suspend local authority duties to meet care needs under the Care Act 2014 are currently in force in England, but not in Wales or Scotland. This applies unless if not to do so would be a breach of obligations under the European Convention of Human Rights (ECHR).
7. This assumes detailed knowledge on the part of local authorities as to what amounts to a breach of the ECHR, which may not exist. As a result there may be an uncoordinated response based on varying interpretations of what is required. While there is significant concern from the outset that this sets too high a threshold for qualifying for assistance, a lack of clarity on what is required means there is a real risk that even ECHR standards will not be met.
8. We recommend:
 - The Government should publish guidance clarifying what minimum standards apply notwithstanding the suspension of local authority duties under the Care Act, including examples of how to conduct ECHR compliant assessments and what could amount to a breach of obligations. It should be made clear that this only applies as guidance for exceptional measures taken under the Coronavirus Act 2020 and does not have ongoing applicability.
 - Given the easing of lockdown restrictions announced on 10 May, the necessity and proportionality of these measures should be reviewed as a matter of urgency.
9. This issue is exacerbated by the Local Government and Social Care Ombudsman having suspended any investigation of new complaints against local authorities where that will require 'information' from them. It is highly concerning that the Ombudsman will not investigate any new cases at a time when individuals' legal rights to care and support have been removed. This could lead to failures to provide vital services going unchecked while leaving vulnerable people with no means of redress. It is not clear whether the suspension also applies to cases where there is a possible breach of human rights.
10. We recommend:
 - The Ministry of Housing, Communities and Local Government should clarify how they will ensure a right of redress for those whose complaints are not investigated by the Local Government and Social Care Ombudsman.
 - The Local Government and Social Care Ombudsman should continue to investigate new complaints where there is a possible breach of human rights.

Article 3 – freedom from inhuman and degrading treatment, article 8 – right to private and family life

11. We are concerned about the impact of the Adoption and Children (Coronavirus) (Amendment) Regulations 2020 on vital safeguards necessary for the protection of children. In particular, these regulations allow:

- The removal of the requirement that adoption agencies establish adoption panels, and for fostering panels to be optional;
- Relaxation of notification duties in respect of criminal offences in relation to fostering;
- Relaxation of the requirement for social workers visits to children in care on a six-weekly basis.

12. While we appreciate the difficulties faced by social workers created by the current situation, we do not consider these measures to be proportional. There are a range of alternative steps that could be taken, namely utilising technology, that would infringe less on the rights of children and better ensure their protection, while still responding to resource pressures and the need for social distancing.

13. We recommend:

- The Government should review these measures and consider how technology can be used, for example, to conduct adoption and fostering panels and allow social worker visits to take place remotely.

Article 5 – right to liberty and security

14. The Act allows for applications for compulsory admission to hospital under the Mental Health Act 1983 (MHA) to be made by a single practitioner, rather than the two usually required. These provisions are not yet in force.

15. The requirement to seek the referral of two medical practitioners in order to section a person is an important safeguard, so invoking these measures should be approached with extreme caution. We welcome the guidance published by NHS England² which clarifies that these measures should only be used when strictly necessary, as a last resort and only in the context of the pandemic. We note that NHS England and NHS Improvement regional teams will have responsibility for oversight and urge the requirement of monitoring by local services to be carried out diligently.

16. To assist with monitoring if or when the measures come into force, we recommend:

- data is collected and published on how many compulsory admissions are made.

17. Covid-19 measures are also impacting on the operation of Deprivation of Liberty Safeguards (DOLS). All deprivation of liberty cases concern fundamental human rights and, as such, legal advice should be guaranteed. In the current framework there are arbitrary distinctions which determine whether non-means-tested legal aid is available or not.

² See: <https://www.england.nhs.uk/coronavirus/wp-content/uploads/sites/52/2020/03/C0454-mhlda-spec-comm-legal-guidance-v2-19-may.pdf>

18. Many local authorities are not carrying out updated deprivation of liberty assessments due to the reallocation of front-line staff or the inability to visit individuals. This is leaving many highly vulnerable people without the fundamental protections of the DOLS. For those who have already issued a challenge to the DOLS in the Court of Protection (COP) while a standard authorisation was in place, if the current DOLS has already been in place for one year (so that the COP cannot extend it further) non-means tested legal aid will end due to a lack of standard authorisation. This leads to an inability to progress the case on their behalf.

19. To ensure that safeguards are maintained as far as practicable, we recommend:

- Where new DOLS assessments cannot be undertaken, the Legal Aid Agency should extend non-means tested funding to those cases where the COP authorises the deprivation of liberty, and include a recital that it would, in any other circumstances, be authorised under a DOLS.

Article 6 - right to a fair trial

20. The justice system has had to adapt to incorporate social distancing measures which have changed how people access legal advice and representation, and the processes through which justice is done. Social distancing has made it difficult to ensure proper access to legal advice, in particular for those who are in prisons, detention centres or hospitals, or for those who lack appropriate technology. Court hearings are also being held remotely via video and audio technology.

21. Remote hearings may affect several aspects of the right to a fair trial, such as the right to hear the evidence against you, the ability of the court to properly assess the evidence of a witness, or the requirement for open justice that hearings be public.

22. It may also have specific adverse impact on the ability of a defendant to participate in their trial and fully understand the proceedings. The Equality and Human Rights Commission recently commented that remote hearings are not suitable for “many people” with a cognitive impairment or mental health condition, recommending that greater consideration should be given “to identifying people for whom video hearings would be unsuitable”.³

23. It is important to understand if and how conducting hearings remotely affects the justice process. The use of remote hearings during this period should not be used as a way of testing new technologies without detailed analysis of the impact on justice outcomes. Research from the University of Surrey,⁴ conducted prior to the pandemic, found that suspects whose cases were dealt with remotely were less likely to have legal representation. Participants also expressed concerns regarding open justice (e.g. fewer families attending) and the broader implication for public trust and

³ Equality and Human Rights Commission, *Inclusive justice: a system designed for all*. Available at: <https://www.equalityhumanrights.com/en/publication-download/inclusive-justice-system-designed-all>

⁴ Available at: <https://www.surrey.ac.uk/news/research-examines-impact-new-technology-used-video-court-hearings>

confidence in the criminal justice system. We are not aware of any evaluation of the specific impact video hearings are having on those with additional needs.

24. We recommend:

- HMCTS should collect and publish quantitative and qualitative data which enables monitoring of the impact of remote hearings, including for those with additional needs and litigants in person.

25. This issue also affects those who are continuing to be held in detention centres. Since visits are not allowed, it is difficult to access advice directly from a lawyer to help them secure release. At the time of writing, only two detention centres possess adequate technology for migrants to participate effectively in remote hearings.

26. To address this, we recommend:

- Further effort should be made to ensure that immigration detention centres have the technology required to enable detainees to access lawyers and participate in remote hearings.

Article 7- no punishment without law

27. We echo concerns expressed by the Committee Chair in their briefing⁵ regarding the enforcement of newly created offences under the Act. When creating new criminal offences, it is a fundamental requirement of the rule of law that this be done with transparency and clarity to ensure public awareness and understanding, as well as accurate enforcement.

28. There have been media reports of instances where this has not been achieved, with charges being brought under the wrong offences, or for offences that don't exist. Many will be concerned by CPS data which shows all of the 44 finalised cases brought for offences under the Act were incorrectly charged. Twelve cases (out of 187) for offences under the Regulations were also incorrectly charged, usually involving Welsh regulations being applied in England or vice versa.⁶

29. Much of this is the result of confusion, both for the public and the police, resulting from divergences between Government messaging and legislative instruments. While we appreciate the difficulties created by the need to respond to a rapidly changing situation, Government should be recognisant of the need for clarity in subsequent announcements regarding changes to Covid-19 measures.

30. We recommend:

- Government announcements should be accompanied by clear, succinct and prompt guidance for the public and police explaining the new measures and distinguishing between what is required by law and what is advised.

⁵ See: <https://publications.parliament.uk/pa/jt5801/jtselect/jtrights/correspondence/Chairs-briefing-paper-regarding-Health-Protection-Coronavirus-Restrictions-England-Regulation-2020.pdf>

⁶ See: <https://www.cps.gov.uk/cps/news/cps-announces-review-findings-first-200-cases-under-coronavirus-laws>

- The clarity of existing legal provisions should be considered as part of the three week and 6 month Government reviews.

Which groups will be disproportionately affected by measures taken by the Government to address the COVID-19 pandemic?

31. This question was the subject of a detailed response submitted by the Law Society to the latest Women and Equalities Committee inquiry.⁷
32. We have addressed above several of our key concerns regarding the disproportionate effect of the measures taken on disabled people, including those with mental health conditions, and those subject to immigration detention. In addition to this, there is specific impact on victims of domestic abuse, and migrants and asylum seekers.

Domestic abuse – articles 2, 3 and 6

33. The Covid-19 lockdown measures have made it even more difficult for domestic abuse victims to get time away from their abuser – leaving many trapped in an increasingly volatile situation.
34. The Law Society has long argued that non-means tested legal aid should be made available for individuals affected by domestic abuse. These changes are now urgently required in response to coronavirus, to ensure that victims can access protections at this time of heightened need and risk.
35. In addition to satisfying a particularly stringent financial means test,⁸ to obtain legal aid in private family law matters (which are otherwise excluded by the LASPO Act), victims are required to provide evidence that they have experienced domestic abuse to qualify under the domestic violence ‘gateway’. This will often be provided by doctors, but doctors are simply too busy to provide evidence of abuse at this time.
36. It is also important to ensure the safety of victims and their children once an emergency injunction is made. It is vital that every effort is made to support domestic abuse refuges and to provide emergency accommodation for those who cannot return or stay at home, either temporarily or permanently. This will require specifically allocated funding for local authorities and front-line organisations, and we welcome the funding provided by Government so far.
37. To ensure that victims of domestic abuse receive the urgent support they need, we recommend:

⁷ This will be made publicly available when published by the Women and Equalities Committee here: <https://committees.parliament.uk/work/227/unequal-impact-coronavirus-covid19-and-the-impact-on-people-with-protected-characteristics/publications/written-evidence/>

⁸ A report, commissioned by the Law Society but produced independently by Professor Donald Hirsch of the University of Loughborough, shows that some of society’s most vulnerable – including those living below the poverty line – are unable to meet the legal aid means test. ‘*Disqualified from justice: Legal aid means test report*’, Donald Hirsch, April 2018 [https://www.lawsociety.org.uk/support-services/research-trends/legal-aid-means-test-report/]

- The Government should make non-means tested legal aid available to all individuals affected by domestic abuse so that they can obtain advice and representation.
- There should be an urgent relaxation of the regulations so that solicitors can certify that an individual has experienced domestic abuse and allow them access to legal aid.
- The Government should continue to work with the domestic abuse support sector and local authorities to make sure new funding is properly targeted.

Migrants and asylum seekers – article 3

38. Many migrants have leave to remain, but no recourse to public funds such as universal credit, which leaves them at risk of destitution. A recent High Court ruling found that this policy breaches article 3 of the ECHR, prohibiting inhuman and degrading treatment.⁹

39. The current situation has made this issue increasingly urgent. Many will have experienced the same loss of income as UK citizens as a result of the lockdown measures. Applications to remove restrictions on accessing public funds for these groups have now been moved online but evidential requirements, such as providing six months of bank statements, are onerous and often difficult to satisfy in the current circumstances.

40. We recommend:

- The Government should announce immediate provisions for people with leave to remain who cannot access public funds and take steps to address the High Court's ruling.

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⁹ See: <https://dpplaw.co.uk/high-court-ruling-over-no-recourse-to-public-funds-delivers-further-blow-to-home-offices-discredited-hostile-environment-policy/>