

Written evidence submitted by the Law Society of England and Wales (CVB0047)

1. Summary

- 1.1. The Law Society of England and Wales is the independent professional body that works globally to support and represent 200,000 solicitors, promoting the highest professional standards, the rule of law and access to justice.
- 1.2. Solicitors play an important role in supporting vulnerable people who may be impacted by the coronavirus pandemic particularly severely for reasons linked to their protected characteristics, such as BAME clients. As an organisation, the Law Society has a public interest role in ensuring the law does not have disproportionately adverse effects on vulnerable and protected groups.
- 1.3. This submission follows the Law Society's response to the Women and Equalities Committee's inquiry into coronavirus and the impact on people with protected characteristics.
- 1.4. It focuses on the disproportionate use of fixed penalty notices, visits for those in prisons and immigration detention centres, and changes made to legal aid for immigration and asylum appeals. We also give recommendations on the communication of immigration policy changes, and the impact of no recourse to public funds and policy regarding immigration fee waivers.
- 1.5. The Law Society recommends:
 - The National Police Chiefs Council should collect and publish comprehensive data for each police force, disaggregated by race and ethnicity, regarding fixed penalty notices issued under the Covid-19 regulations.
 - Equality Impact Assessments should be formalised as a requirement before deploying any consequential algorithmic system in the public sector and these should be made proactively, publicly available.
 - The Government should commence the socioeconomic equality duty in the Equality Act 2010 s1 in England and Wales, at least with regard to algorithmic decision-support systems
 - The Government should commission a review into policy options for mandating human rights considerations in technological design within different consequential sectors, including in the criminal justice system. This review should consider how and where human rights impact assessments should be required in public procurement processes.
 - Government announcements on restrictions in response to coronavirus 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.

- The clarity and level of public awareness of existing legal provisions relating to coronavirus restrictions should be considered as part of the three week and six-month Government reviews.
- Where possible, new and updated regulations relating to coronavirus should be made and laid before Parliament sufficiently ahead of time to allow scrutiny and legal clarity.
- The Ministry of Justice (MoJ) should confirm what plans they have for reinstating social visits and visits by legal representatives to prisons and detention centres, as well as the safety measures that will be in place for these.
- The MoJ should introduce a fee for completing advance skeleton arguments for immigration and asylum appeals based on hourly rates, on an interim basis at minimum, to enable effective data to be gathered on the actual costs of this work.
- Changes to immigration policy during the pandemic should be widely communicated and accompanied by clear, succinct and prompt guidance for visa holders and applicants.
- The process involved in making applications for financial support with regards to no recourse to public funds and immigration fee waivers should be made practically accessible to individuals, including through the availability of legal aid for such applications.
- The Home Office should consider suspending immigration fees payable during the Covid-19 pandemic.
- The Home Office should urgently remove the destitution test for the Immigration Fee Waiver policy, as directed by the Upper Tribunal.
- Public communications should be made with an aim to ensure that those potentially eligible for immigration fee waivers are aware of this and any additional changes to the policy.

2. Impact of the Government measures to contain the virus

a) Fixed penalty notices

- 2.1. The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 created new offences to restrict social contact and granted the power to issue fixed penalty notices (FPNs) to enforce these. The amount payable was initially £60 for a first offence (£30 if paid within 14 days), £120 for a second offence, and double the amount of the last penalty received for third and subsequent offences, up to a maximum of £960. This was subsequently raised to £100 for a first offence (£50 if paid within 14 days), up to a maximum of £3,200, in the Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 2) Regulations 2020.

- 2.2. Figures released by the Metropolitan Police show that a disproportionate number of FPNs have been issued to BAME people in London.¹ Between 27 March and 14 May, 26% of FPNs were issued to black people, who make up 12% of those living in London, and 23% were issued to Asian people, who represent 18% of the London population.
- 2.3. Data obtained through Freedom of Information requests by Liberty Investigates has shown similar trends among other police forces. Out of 25 forces that responded, 18 showed disproportionalities between FPNs issued to BAME people and white people.²
- 2.4. The Metropolitan Police stated their statistics are the result of a range of factors, including “interactions between the areas subject to significant proactive policing, activity targeting crime hot-spots”.³ They cite a continued focus on preventing crime during lockdown involving “proactively undertaking patrols and targeting crime hotspots”.⁴
- 2.5. The Law Society’s report, *Algorithm use in the Criminal Justice System*,⁵ demonstrates pre-existing problems with algorithms used in predictive (or ‘proactive’) policing and its disproportionate effects on BAME people. The continued use of these during the lockdown period in the same way as pre-lockdown can be seen to have disproportionate effects in relation to the number of FPNs issued.
- 2.6. Predictive hotspot tools make statistical forecasts about where future crime may take place or where future police interventions may have a positive impact. There remain serious and unresolved problems with accuracy, validity, and bias in both the datasets and statistical models that drive these tools.
- 2.7. For example, many of these tools are based on statistics such as recorded crimes and calls from the public. There are concerns that reliance on these forms of data can result in a ‘feedback loop’, whereby areas that are overpoliced become more so, to the detriment of other areas, due to the inflated recording of activity by police. Where there are geographic divisions with strong demographic or socioeconomic characteristics, there are concerns that this could fuel discriminatory policing.⁶
- 2.8. While continuing to focus on preventing crime during lockdown is a justifiable aim, it is likely that this also has the result of disproportionate policing of the Covid-19 regulations. A heavier police presence in crime hot-spots (where these overlap with areas with concentrated BAME populations) could mean that more BAME individuals would be caught breaching the lockdown regulations, whereas similar breaches in other areas would go unnoticed.
- 2.9. To further understand the extent to which fixed penalty notices have been issued disproportionately during the pandemic, including where and why, we recommend:

- The National Police Chiefs Council should collect and publish comprehensive data for each police force, disaggregated by race, regarding fixed penalty notices issued under the Covid-19 regulations.
- Equality Impact Assessments should be formalised as a requirement before deploying any consequential algorithmic system in the public sector and these should be made proactively, publicly available.
- The Government should commence the socioeconomic equality duty in the Equality Act 2010 s1 in England and Wales, at least with regard to algorithmic decision-support systems.
- The Government should commission a review into policy options for mandating human rights considerations in technological design within different consequential sectors, including in the criminal justice system. This review should consider how and where human rights impact assessments should be required in public procurement processes.

2.10. Separately, there are concerns regarding apparent confusion, for both the public and the police, over what is required by law under the Covid-19 measures. Much of this has resulted from divergence in Government messaging and a lack of clarity over what is advice and what is law. People who do not speak English as their first language, potentially of a BAME background, may have experienced additional uncertainty. 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 for all.

2.11. Lockdown measures in England were eased from 4 July and restrictions on social contact now take the form of advice, rather than legislation.⁷ We welcome this clarification and the accompanying guidance issued by the Government.⁸

2.12. However, the regulations to bring this into effect were not updated and laid before Parliament until 3rd July. It is yet to be seen whether this gave sufficient notice to the police to ensure that FPNs are only issued where now permitted. Where possible, and as urgency decreases, changes such as this should be put before Parliament with sufficient time to allow Parliamentary scrutiny and the greatest possible legal clarity.

2.13. Given the possibility of subsequent waves of the pandemic requiring the return of restrictive measures, particularly at a local level and therefore not generalised, our members agree it is important that learning from this initial period are applied.

2.14. 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.
- The clarity and public awareness of existing legal provisions should be considered as part of the three week and six-month Government reviews.
- Where possible, new and updated regulations should be made and laid before Parliament sufficiently ahead of time to allow scrutiny and legal clarity.

b) Prisons and immigration detention centres

- 2.15. BAME people make up a disproportionate number of those in prison. The latest MoJ statistics, from 31 March 2020, show that 27% of the prison population are from BAME backgrounds.⁹ In the immigration system, a high proportion of the ten most common nationalities entering detention were from countries with majority BAME populations.¹⁰ Therefore, lockdown measures in place in these institutions will have a disproportionate impact on BAME people.
- 2.16. Social distancing measures have prevented physical visits to those in prisons or immigration detention centres¹¹, thereby removing an important element of external scrutiny of their living conditions, which have been significantly impacted as a result of the pandemic. Other means of external scrutiny have also been affected, with the Chief Inspector of Prisons announcing on 17 March that all scheduled inspection work had been suspended, and the replacement of full inspections with short scrutiny visits in April.¹²
- 2.17. Solicitors are reporting that family members have been unable to visit loved ones. Legal representatives have likewise not been able to visit clients and requests for remote meetings have been subject to delays, which is hampering preparation for some court hearings. Maintaining contact with legal representatives even during the height of lockdown and social distancing is vital to ensure that prisoners are being treated appropriately and that any outstanding legal issues are able to progress.
- 2.18. However, while physical access has not been possible, we are pleased to note that HM Prisons and Probation Service have made strong efforts to ensure that contact, both social and legal, with prisoners and detainees has been maintained through remote means during this time. With the recent easing of restrictive measures, we would expect that visits to prisons and immigration detention centres for relatives, legal representatives and inspectors should resume, with appropriate safety measures in place.
- 2.19. We recommend:

- The MoJ should confirm what plans they have for reinstating social visits and visits by legal representatives to prisons and detention centres, as well as the safety measures that will be in place for these.

c) Immigration and asylum legal aid fixed fee

2.20. The Civil Legal Aid (Remuneration) (Amendment) (Coronavirus) Regulations 2020 came into force on 8 June. This created new fixed fees for preparation of immigration and asylum appeals that are directed to follow the new HMCTS online appeals procedure which requires the drafting of an appeal skeleton argument (ASA) at an early stage in the appeals process. The rollout of the online appeals programme was brought forward as a result of the pandemic.

2.21. We believe that the fee was set at an arbitrary level, without having the benefit of robust data on how long preparation of the ASA is likely to take. Although the MoJ has pledged to review the fee within the next 12 months, this may result in solicitors not being able to take on this work on the basis that it is not financially viable. Ultimately it risks the collapse of the immigration legal aid system.¹³

2.22. This change may also result in an increased number of migrants and asylum seekers acting as litigants in person without legal advice. They would be required to gather evidence (much of that which would normally be available if represented, such as mental health assessments or country reports, would be very difficult to obtain), navigate the complex appeals process, present legal arguments and represent themselves at Tribunal. Arguably, it would be impossible and certainly impractical, for the significant number of migrants who are not fluent in English to effectively participate in their appeal.

2.23. We recommend:

- The MoJ should introduce a fee for the advance skeleton argument based on hourly rates, on an interim basis at minimum, to enable effective data to be gathered on the actual costs of this work.

d) Communication of immigration policy changes

2.24. The Law Society welcomes the efforts made by the Home Office to maintain regular engagement with stakeholders during the pandemic. However, we believe that the response to the pandemic through changes to immigration policy have often not been clearly communicated to the wider public.

2.25. We acknowledge that the response to a rapidly changing emergency situation poses significant challenges for policymakers. The announcement of changes to immigration policy have often been piecemeal and lacking in clarity and supporting information, which is vitally needed to uphold the rule of law. For example:

- In March, the Government announced an automatic, one-year visa extension for NHS frontline workers¹⁴ whose visas expire before 1 October 2020. This was extended to cover additional frontline workers on 29 April¹⁵, and on 8 June, guidance¹⁶ was updated to provide additional details about the scheme.
- On 21 May, it was announced that health and care workers would no longer be liable to pay the immigration health surcharge. No further information was provided to the public until 17 June¹⁷ when a refund for affected workers who had paid the charge since 21 May was announced during the Prime Minister's Questions.
- Leave to remain until 31 March was initially granted, upon request, to Chinese citizens whose visas expired between 24 January 2020 and 30 March 2020 who could not leave the UK due to Covid-19. The guidance was updated to cover all nationalities on 24 March, and again on 22 May to allow extensions until 31 July 2020.

2.26. While the substance of these announcements has been welcome, the manner in which they have been made has caused considerable confusion and stress for foreign nationals living in the UK during this time. Many of these people are of a BAME background and some may have limited knowledge of the English language. If an applicant inadvertently becomes an overstayer, they may be affected for up to ten years when making future visa applications, in addition to breaking the law and facing possible deportation.

2.27. As with the changes made to criminal law in response to the pandemic, we consider that this raises significant rule of law issues, particularly affecting BAME people. It is extremely important that the public can understand, follow and rely on the law, especially in emergency situations that require largescale cooperation in response to rapidly changing circumstances.

2.28. We recommend:

- Changes to immigration policy during the pandemic should be widely communicated and accompanied by clear, succinct and prompt guidance for visa holders and applicants.

3. Other factors that have amplified the impacts of the pandemic on BAME people

a) No recourse to public funds policy

- 3.31. As highlighted in the Law Society's previous response, the 'no recourse to public funds' (NRPF) policy is a serious issue for migrants which places them at risk of destitution. The NRPF policy significantly affects BAME communities as they are more likely to be migrants holding conditional visas. A report by the charity Unity¹⁸ found that 95% of the 276 cases of people subject to NRPF studied were of BAME backgrounds. Many BAME migrants with leave to remain will have held employment and paid taxes in the UK and may have suffered the same loss of income as UK citizens as a result of the pandemic. Despite this, they are not able to access equivalent state financial support due to the NRPF policy.
- 3.32. In our previous submission we noted the improved online application process involved in making applications for a change of conditions of leave to allow access to public funds in certain circumstances, notwithstanding onerous evidential requirements. Our members have reported that this process appears to have been streamlined operationally, as applications with limited evidence and detailed annotation are succeeding. Though the pragmatic approach practitioners have encountered is welcomed, it has not been communicated clearly to the public.
- 3.33. Legal advice is crucial for those engaging with the immigration system, as it is highly complex and the decisions made have a fundamental impact on the most important parts of a person's life, such as their home, contact with their family and their liberty. The policy of NRPF, makes it very difficult for migrants to be able to afford legal advice when they need it most, for example, in the event that they have lost their job as a result of covid-19.
- 3.34. The application process is extremely complex, and many applicants are unable to do this unsupported. The onus remains on the individual to apply when they experience a change of financial circumstances. However, many may be unaware they are eligible to apply. Even if affected individuals are aware of their eligibility, it is reasonable to assume that they may lack the necessary finances to engage a solicitor, as legal aid is unavailable for this work. Members who have assisted with such applications have reported that all clients in these scenarios have been of a BAME background.
- 3.35. To ensure migrants' rights are accessible in practice, we recommend:
- The Home Office should consider lifting NRPF restrictions during the Covid-19 pandemic.¹⁹

Failing this:

- A package of financial support should be made available for those with leave to remain, who may have experienced the same loss of income as UK citizens as a result of the lockdown measures.

- Public communications should be made with an aim to ensure that those potentially eligible for such applications are aware of this.
- The process involved in making applications should be made practically accessible to individuals, considering the possibility of permitting legal aid for such applications.

b) Immigration fee waiver policy

- 3.36 Fee waivers for certain types of leave to remain visas are available in very limited circumstances. Currently, applicants must prove they are either destitute or have exceptional circumstances to qualify. The policy was declared to be unlawful by the Upper Tribunal on 20 May 2020²⁰, but is yet to be actioned by the Home Office. Instead of the destitution test, the court ruled that the Home Office should be applying a test of whether applicants could afford to pay the fees, and if migrants could prove they did not have the income to pay then they should not have to do so.
- 3.37 This decision is welcomed, as this change would result in thousands of migrants and their families would be able to extend their lawful grants of leave to remain in the UK without potentially falling into unmanageable debt.
- 3.36. Similar issues as discussed above with regard to the NRPF policy apply. Migrants with precarious immigration status, many of whom are likely from BAME backgrounds, may have lost their income as a result of the pandemic at a critical time. Without being eligible for a fee waiver they will be unable to advance their immigration status, facing possible overstaying and deportation.
- 3.37. The online application process is complex and onerous, requiring a significant amount of supporting evidence, demonstrated by high refusal rates. In response to a Freedom of Information Request by the Guardian²¹, the Home Office confirmed a refusal rate of over 70% for fee waiver applications in 2019, and between 72% to 90% over the five years prior to this. As with applications to access public funds, many people struggle to complete the application unsupported and so seek the assistance of a solicitor at their own expense, as legal aid is unavailable.
- 3.38. We recommend:
- The Home Office should consider suspending immigration fees payable during the Covid-19 pandemic.
 - The Home Office should urgently remove the destitution test for the Immigration Fee Waiver policy, as directed by the Upper Tribunal.
 - Public communications should be made with an aim to ensure that those potentially eligible are aware of this and any additional changes to the policy.

- The process involved in making applications should be made practically accessible to individuals, considering the possibility of permitting legal aid for such applications.

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References

¹ See: <http://news.met.police.uk/documents/final-fpn-arrest-analysis-report-96756>

² See: <https://libertyinvestigates.org.uk/articles/police-forces-in-england-and-wales-up-to-seven-times-more-likely-to-fine-bame-people-in-lockdown/>

³ See: <http://news.met.police.uk/news/metropolitan-police-release-detailed-analysis-of-covid-19-related-enforcement-403705>

⁴ See above

⁵ The Law Society, 2019, *Algorithm use in the Criminal Justice System*. Available at: <https://www.lawsociety.org.uk/support-services/research-trends/algorithm-use-in-the-criminal-justice-system-report/>

⁶ See above, p.35

⁷ See: <https://www.gov.uk/government/speeches/prime-ministers-statement-to-the-house-on-covid-19-23-june-2020>

⁸ See: <https://www.gov.uk/government/publications/staying-alert-and-safe-social-distancing/staying-alert-and-safe-social-distancing-after-4-july>

⁹ This figure is calculated from those who's ethnicity is recorded as Black or Black British, Asian or Asian British, Mixed, or other ethnic group. See 'Prison population: 31 March 2020', available at: <https://www.gov.uk/government/statistics/offender-management-statistics-quarterly-october-to-december-2019>

¹⁰ The 10 most common nationalities entering immigration detention for 2019 were: Albanian, Iranian, Indian, Romanian, Brazilian, Chinese, Iraqi, Pakistani, Nigerian and Polish. See: <https://www.gov.uk/government/publications/immigration-statistics-year-ending-december-2019/how-many-people-are-detained-or-returned>

¹¹ This is also a concern with regards to mental health units. Certain ethnic groups are more likely to be sectioned and are therefore overrepresented in mental health units- in the year to March 2019, black people were more than 4 times as likely as white people to be detained under the Mental Health Act. See: <https://www.ethnicity-facts-figures.service.gov.uk/health/mental-health/detentions-under-the-mental-health-act/latest>

¹² See: <https://www.justiceinspectorates.gov.uk/hmiprison/about-hmi-prisons/covid-19/short-scrutiny-visits/>

¹³ For more information, see: <https://www.lawsociety.org.uk/news/stories/new-legal-aid-fee-first-tier-immigration-tribunal-appeals/>

¹⁴ See: <https://www.gov.uk/government/news/nhs-frontline-workers-visas-extended-so-they-can-focus-on-fighting-coronavirus>

¹⁵ See: <https://www.gov.uk/government/news/home-secretary-announces-visa-extensions-for-frontline-health-and-care-workers>

¹⁶ See: <https://www.gov.uk/coronavirus-frontline-health-worker-visa-extension>

¹⁷ <https://www.politicshome.com/news/article/boris-johnson-vows-all-nhs-migrant-workers-who-have-had-to-pay-health-surcharge-since-it-was-scrapped-will-have-it-refunded>

¹⁸ Unity, 2019, *Access Denied: The cost of the 'no recourse to public funds' policy*. Available at: <https://static1.squarespace.com/static/590060b0893fc01f949b1c8a/t/5d0bb6100099f70001faad9c/1561048725178/Access+Denied+>

²⁰ R (otao Dzineku-Liggison) v SSHD [JR/2249/2019]

²¹ See: <https://www.theguardian.com/uk-news/2019/apr/04/over-70-of-uk-immigration-fee-waiver-requests-by-destitute-are-rejected>