

Written evidence submitted by the Law Society of England and Wales (CVD0028)

1. Introduction

- 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. Law Society members 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 clients with disabilities and mental health needs. 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. The Law Society represents disabled solicitors, and solicitors who represent clients with disabilities, and is advised by the expert practitioners on its Mental Health and Disability Committee. The Committee's role is to keep under review and promote improvements in law, practice and procedure affecting disabled people, including those who have mental health needs, and people who are in vulnerable circumstances, which ensure their rights and equality of treatment under the law.
- 1.4. 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.
- 1.5. The Law Society has two main areas of concern regarding the impact of the Government's response to Covid-19. These are the impact on access to justice and other vital state functions for both our disabled members, and the impact on our members' clients with disabilities.

2. Impact of the pandemic on disabled people

- 2.1. The Law Society conducted a survey of its members in order to understand how the Covid-19 pandemic has affected them and, in particular, what specific effects it has had on the protected characteristics of members of the profession. Just under one fifth of respondents said that they had been impacted as a result of a disability, which makes this the protected characteristic most commonly identified as being linked to specific impacts. Of these, impacts on mental health and increased isolation were the most commonly cited, in addition to others such as a lack of workstation adjustments at home and concern about future employment opportunities.

Impact of the Government measures to contain the virus

a) Government communications and consultation with disabled people during the pandemic

- 2.2. The Law Society has engaged with Government throughout the pandemic to highlight the impacts of any emergency legislation on vulnerable groups, including those with disabilities.
- 2.3. The Act contains measures that directly affect both disabled people and people with potentially impaired mental capacity. It is critical that such people are supported to fully understand the changes and are protected via the legislation.
- 2.4. We have raised the need for appeal rights for people with impaired mental capacity, and engaged with the Crown Prosecution Service¹, to confirm that prosecution of a person with impaired mental capacity under the Health Protection Regulations² would generally not be in the public interest.
- 2.5. Whilst the legislation was introduced in response to an emergency, it is vital that measures are continually monitored to ensure that they remain necessary and proportionate as circumstances change, and that they do not interfere unduly with civic rights. This includes adapting provisions where necessary and mitigating any detriment to equality and the rights of vulnerable people within society.
- 2.6. Consultation and communication by the Government is critically important to ensure that the Government is aware of the impacts of the legislation. This is especially important with regards to disabled people, who may have barriers to communication, and as a result rely on an infrastructure of supporting organisations to collect and provide feedback on their behalf.
- 2.7. We recommend:
- The Government should ensure that future communications are effectively conveyed to disabled people, any representative bodies and local authorities, particularly regarding any changes to legislation which could arise in ‘local lockdowns.’

b) Disabled people’s access to state services during the pandemic

i) Legal representation and wider access to justice issues

- 2.8. As raised in our previous response, in March, the Local Government and Social Care Ombudsman (‘LGO’) confirmed³ that it would not be proceeding to investigate any further complaints against local authorities where that would require ‘information’ or ‘action’ from local authorities. Though this is understandable from a resourcing

¹ See: <https://www.lawsociety.org.uk/topics/coronavirus/mental-capacity-and-coronavirus-legislation>

² See: [Coronavirus: Health Protection \(Coronavirus, Restrictions\) \(England\) Regulations 2020](#).

³ See: <https://www.lgo.org.uk/information-centre/news/2020/mar/lgsco-suspends-complaints-enquiries-of-councils-and-care-providers>

perspective, it is an example of how individuals' access to justice has been affected at the same time as their legal rights to care and support were reduced.

- 2.9. On 5 June 2020, some of the LGO's existing investigations were resumed⁴, with full and new investigations resumed as of June 29.⁵ There is likely to be a significant backlog, the handling of which has not been directly addressed by the LGO, despite a statement explaining their intended approach for cases involving Covid-19.⁶
- 2.10. Remote court hearings have impacted disabled people differently depending on area, a full breakdown of which is seen in our response to the Civil Justice Council's consultation.⁷ Broadly speaking, remote hearings have proceeded for those detained under the Mental Health Act 1983, though our members report difficulties involved in assessing a person's physical state remotely. Furthermore, discharge of patients has been made less likely as a result of social distancing measures and the lack of available community services. Members have also reported discrepancies between hospitals' access to remote facilities, such as video conferencing facilities for patients to speak with their representatives. Further difficulties are encountered by members representing a person whom they are unable to meet, due to blanket bans on visitation.
- 2.11. In contrast to this, we note that remote hearings of the First-tier Tribunal (Special Educational Needs and Disability) have been reported by many to have been very successful. Some members have reported that the hearings have been even more successful than prior to the pandemic, as issues previously raised with HM Courts and Tribunals System (HMCTS) including adjournments and delays seem to have been resolved. We note this success with caution, in that the perspective of the litigant themselves may not always be being accounted for, and that it is essential that no decision is made to extend the arrangements to a more permanent basis are made without proper consultation or evaluation outside of the pandemic context and involves the litigant.
- 2.12. We recommend:
- The LGO provides a framework for how it will approach a potential backlog of applications encountered during the pandemic
 - A review is undertaken of access to remote hearings for people detained under the Mental Health Act 1983.
 - There is an evaluation of the use of remote hearings in SEND Tribunals.

ii) Health and social care services

⁴ See: <https://www.lgo.org.uk/announcement>

⁵ See: <https://www.lgo.org.uk/information-centre/news/2020/jun/ombudsman-to-resume-taking-new-complaints-online>

⁶ See: <https://www.lgo.org.uk/make-a-complaint/fact-sheets/other-topics/complaints-involving-covid-19>

⁷ See: <https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/cjc-impact-of-coronavirus-covid-19-measures-civil-justice-system/>

- 2.13. Local authorities who wish to use the Care Act 2014 easements laid out in Schedule 12 of the Coronavirus Act are bound to comply with a process laid out in guidance⁸ by the Department of Health and Social Care (DHSC). Despite this requirement, the Law Society notes concerns⁹ that this process has not always been followed.
- 2.14. We are aware that local authorities have simultaneously faced increased strain as a result of some measures, and a lack of support in meeting them. The Law Society considers that the answer to this is not to take away fundamental rights of disabled people, but instead to ensure local authorities are properly supported to meet their legal obligations.
- 2.15. In May, the Law Society asked the DHSC to consider providing national guidance with practical examples as to what constitutes a breach of the European Convention on Human Rights (ECHR). Members reported the difficulties for local authorities in carrying out comprehensive Human Rights Act assessments, especially for those based outside of London and other major cities. This is due to a lack of experience in conducting such assessments outside of the 'No Recourse to Public Funds' arena.¹⁰ National guidance and toolkits would ensure consistency, reassurance and a method for recording decision making, however no guidance has yet been produced.
- 2.16. We note that only one local authority is exercising the easements¹¹ at the time of writing, and strongly recommend that the provision of such powers is reviewed, given the lifting of general restrictions related to the pandemic.
- 2.17. From a rule of law perspective, it is extremely problematic if disabled people are unable to understand what their rights are at any given time, which is likely where individual local authorities retain such a high level of discretion, and in the absence of any national guidance. This risk is particularly heightened in light of potential 'local lockdowns'. Inconsistencies in application and uncertainty across regions should be reduced as far as it is possible and practical to do so.
- 2.18. We recommend:
- The Government review the Care Act easements with a view to ensuring co-ordinated approaches across all local authorities should they find the powers to still be justifiable.
 - If it is deemed necessary for these to continue being in force, the Government should publish detailed guidance clarifying what minimum standards apply notwithstanding the suspension of local authority duties under the Care Act and what is expected of local authorities to meet these, including practice examples of what could amount to a breach of ECHR obligations.

⁸ See: <https://www.gov.uk/government/publications/coronavirus-covid-19-changes-to-the-care-act-2014/care-act-easements-guidance-for-local-authorities>

⁹ See: <https://www.libertyhumanrights.org.uk/issue/liberty-and-disability-charities-warn-councils-not-to-weaken-social-care-during-coronavirus-pandemic/>

¹⁰ Section 115 of the Immigration and Asylum Act 1999 states that a person will have 'no recourse to public funds' if they are 'subject to immigration control'

¹¹ See: <https://www.cqc.org.uk/guidance-providers/adult-social-care/care-act-easements-it>

- The Government publish comprehensive guidance for local authorities regarding potential ‘local lockdowns’, including their duties, powers and responsibilities in such scenarios relating to health and social care services, and the Care Act easements.

iii) **Children and young people with Special Educational Needs and Disability**

- 2.19. Measures introduced by the Government¹² to modify the legal duties on local authorities and clinical commissioning groups to secure provision in Education, Health and Care Plans (‘EHP’), has had a serious impact on children and young people with special educational needs and their families.¹³
- 2.20. As a result of easing the duty on local authorities to deliver the education and healthcare provision set out in a child’s EHP to use their unspecified ‘reasonable endeavours’, children are deprived of their absolute right to these provisions as set out in section 42 of the Children and Families Act 2014. The replacement of statutory timescales set out in the Special Educational Needs and Disability Regulations 2014 with a requirement to perform duties ‘as soon as reasonably practicable’ if delays are a result of Coronavirus could result in a child beginning the academic year without their EHP in place. As the Children’s Commissioner notes¹⁴, local authorities were already often not meeting the statutory timescales before the pandemic, and are likely to have a backlog of EHPs to deliver when the regulations are lifted.
- 2.21. The Law Society shares the concerns of the Children’s Commissioner that these measures were not proportionate.¹⁵We are also concerned that it is unclear what steps the Government has taken to monitor the impact of these measures on disabled children and their families.
- 2.22. Whilst the Law Society welcomes the recent announcement that unless the evidence changes, no further national notices will be issued, we would want the Government to ensure that ‘local flexibilities’ do not give rise to the same issues that have been seen in relation to the Care Act easements.

We recommend:

- The Government formally monitor the extent to which local authorities are using these measures and the impact this is having on children and young people with SEND and their families

¹² See: <https://www.gov.uk/government/publications/changes-to-the-law-on-education-health-and-care-needs-assessments-and-plans-due-to-coronavirus/education-health-and-care-needs-assessments-and-plans-guidance-on-temporary-legislative-changes-relating-to-coronavirus-covid-19>

¹³ See: evidence provided to the Education Select Committee on 1 July 2020 - <https://committees.parliament.uk/oralevidence/627/pdf/>

¹⁴ See: <https://www.childrenscommissioner.gov.uk/2020/05/12/changes-to-send-duties/>

¹⁵ See: <https://www.childrenscommissioner.gov.uk/2020/05/12/response-to-steps-taken-to-relieve-councils-of-certain-duties-to-children-with-special-educational-needs-and-disabilities-send/>

c) Additional Points

i) Easements to the Mental Health Act 1983

- 2.23. Having asked the Government to publicly announce the criteria for invoking the provisions of the Coronavirus Act relating to the Mental Health Act 1983, we welcome the fact that criteria have been provided in guidance¹⁶ published on 19 May 2020.
- 2.24. This guidance states that the provisions will be brought into force if it is 'deemed nationally that the mental health sector is experiencing extraordinary resource constraints that puts patients' safety at significant risk.' Examples of considerations in respect of this strain are provided in terms of 'local operational challenges arising from resource constraints.'
- 2.25. We expect that the mental health sector will experience significant strain in the coming months as a result of the lockdown and backlog in Mental Health Tribunal applications. Confirmation from the Government that these provisions will not be brought into force as a result of this strain, which is not directly caused by Covid-19, would provide much needed reassurance.
- 2.26. We recommend:
- The Government commit to not bringing into force the easements to the Mental Health Act 1983 as set out in the Coronavirus Act 2020 unless necessitated by the Covid-19 pandemic itself, as opposed to administrative burdens.

ii) Independent Review of the Mental Health Act 1983

- 2.27. Further to the above, we also would like to note the delay in the Government's approach to the recommendations arising from the Independent Review of the Mental Health Act 1983, the report of which was published in 2018.¹⁷ On 22 January 2020, Health Minister Nadine Dorries confirmed that the Government 'will publish [the] White Paper in the next few months, which will set out the Government's response'¹⁸, though no white paper has been published to date. We understand that the pandemic has contributed to this delay and would encourage the Government to take action as soon as is reasonably possible.
- 2.28. We recommend:
- The Government publish a timeframe for publication of their response to the recommendations made in the Independent Review of the Mental Health Act 1983 as soon as possible.

¹⁶ See: <https://www.england.nhs.uk/coronavirus/wp-content/uploads/sites/52/2020/03/C0454-mhlda-spec-comm-legal-guidance-v2-19-may.pdf>

¹⁷ See: <https://www.gov.uk/government/publications/modernising-the-mental-health-act-final-report-from-the-independent-review>

¹⁸ See: <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-01-15/3763/>

iii) Deprivation of Liberty Safeguards

2.29. It is reassuring that the Deprivation of Liberty Safeguards ('DoLS') were not included within the Coronavirus Act. On 24 March 2020, Health Minister Lord Bethell said¹⁹:

"We recognise that we have to strike a careful balance between the need to protect some of the most vulnerable in our society with preventing the spread of the virus. Therefore, we have decided not to alter deprivation of liberty safeguards in primary legislation. However, we think that we can achieve significant improvement to the process through emergency guidance. That will include making clearer when a deprivation of liberty safeguards authorisation is necessary, and the basis on which an assessment can be made, including, for example, phone or video calling for assessment."

2.30. Publication of the emergency guidance²⁰ referred to was welcomed, which acknowledged the additional pressure that the pandemic will put on the DoLS system. Our members working for local authorities report that other than some delays, no new issues seem to have arisen with DoLS as a result of the pandemic itself. This in contrast to the existing problems with the scheme.

2.31. We understand that local authorities are struggling to meet demand as applications increase, particularly following the 'acid test' as set out by the Supreme Court in 2014.²¹ Prior to this, there were 13,715 DoLS applications made in 2013-24, compared to 217,235 in 2016-17, amidst a growing backlog of 131,350 applications.²²

2.32. We anticipate serious problems in the future as a result of the increased financial pressures on local authorities due to the pandemic, combined with the new Liberty Protection Safeguards ('LPS'). The LPS will cover care homes, community settings, and those aged 16 and 17 years old, which we are concerned have not been adequately accounted for in the DHSC's impact assessment.²³ It has been estimated that the LPS is potentially underfunded by over £55 million.²⁴

2.33. This is exacerbated by the delay in issuing further statutory instruments under the Mental Capacity (Amendment) Act 2019, and publication of the draft Code of Practice for consultation. In June 2019, Minister Caroline Dinenage set out a timeframe of

¹⁹ See: <https://hansard.parliament.uk/lords/2020-03-24/debates/8570A6D4-3516-4114-B70C-A57638B56C08/CoronavirusBill>

²⁰ See: <https://www.gov.uk/government/publications/coronavirus-covid-19-looking-after-people-who-lack-mental-capacity/the-mental-capacity-act-2005-mca-and-deprivation-of-liberty-safeguards-dols-during-the-coronavirus-covid-19-pandemic>

²¹ P v Cheshire West & Chester Council P & Q v Surrey CC [2014] UKSC 19

²² See: <https://publications.parliament.uk/pa/bills/lbill/2017-2019/0117/mental-capacity-IA.pdf>

²³ Ibid, 22

²⁴ See: http://www.edgetraining.org.uk/wp-content/uploads/2019/04/LPS_funding_sheet_April-2019.pdf

'spring 2020' for these to be laid before Parliament²⁵, which was not on track even prior to the pandemic. This was in advance of the implementation of the scheme, scheduled for 1st October 2020.²⁶

2.34. In February 2020, the Law Society wrote to the DHSC to raise concerns related to the proposed timeframe in light of these delays, as there would be insufficient time for those working in the area to properly prepare or ensure adequate training on the new system, amongst significant upheaval and confusion.

2.35. On 28 May 2020, Lord Bethell confirmed²⁷:

“The Government is acutely aware of the pressures that COVID-19 is exerting on the health and social care sector and will provide an update on the Liberty Protection Safeguards implementation timetable shortly. In the meantime, we are not asking the health and care sector to prioritise implementation work in light of the pandemic.”

2.36. This indicates that implementation of the LPS in October 2020 is unlikely, despite a lack of vital communication on this from the Government. This is particularly significant during a period of intense strain on local authorities and the health sector and may have caused unnecessary stress and confusion.

2.37. We recommend:

- The Government conduct updated research and consult as to the funding required for the LPS scheme, to ensure it is adequately funded for prior to any implementation.
- The Government publish an updated timeframe for implementation of the Mental Capacity (Amendment) Act 2019, and any associated statutory instruments, as a matter of urgency.
- The Government publish an updated timeframe for publication of the Code of Practice, ensuring that there is adequate time to allow for sufficient public consultation and thereafter, training for those involved in the new LPS scheme.

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²⁵ See: http://data.parliament.uk/DepositedPapers/Files/DEP2019-0635/letter_from_Caroline_Dinenage_Liberty_Protection_Safeguards.pdf

²⁶ Ibid, 25

²⁷ See: <https://members.parliament.uk/member/3609/writtenquestions#expand-1195953>