

**Written evidence from Professor Fiona de Londras, Dr Alan Greene,
and Dr Natasa Mavronicola, Birmingham Law School (COV0012)**

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

0.0 Executive Summary

0.1 Ensuring the Government’s response to COVID-19 is human rights compliant requires:

- (a) Full compliance with international and domestic human rights obligations including entering derogations where strictly required by the exigencies of the situation, and putting in place robust and appropriate safeguards;
- (b) Recognition and fulfilment of the state’s positive obligations in a manner appropriate to the prevailing circumstances;
- (c) Independent oversight and review of the necessity, proportionality, and effectiveness of COVID-19 related measures.

1.0 Human Rights Compliance

1.1 Pandemic response engages the state’s obligations to respect, protect and fulfil rights, including the right to life and the right to health. State actions may limit the enjoyment of qualified rights. The relevant question is whether, in doing so, measures introduced comply with the requirements of human rights, including proportionality and entering derogations where appropriate and necessary. Furthermore, some rights (such as Article 3 ECHR) do not permit either derogation or limitation. The government’s response to COVID-19 has clear implications for well-established rights such as the right to liberty, the right to freedom of assembly, and the right to privacy. The powers and restrictions introduced are likely to have cumulative and knock-on effects for the enjoyment of other rights, including potentially the absolute right to be free from inhuman and degrading treatment (Article 3 ECHR).

1.2 All powers, measures and restrictions introduced should be assessed to consider whether they can be justified under the ordinary application of relevant human rights law, or whether (if permissible) a derogation is required. Derogations play two critical functions in this respect. First, they ensure that the state maintains rule of law and human rights compliance when taking exceptional and invasive measures to address an exigent situation. Second, they ‘quarantine’ those measures to the particular situation for which they were developed (in this case the pandemic) in an attempt to ensure they are not applied more broadly (e.g. for security or other non-pandemic-related purposes). Derogations to both the ECHR and ICCPR may be required.

1.3 The deprivation and restriction of liberty powers in the Coronavirus Act 2020 (the Act) demonstrate the importance of such an assessment. While lawful detention of persons to prevent the spread of infectious diseases is permitted (Article 5(1)(e) ECHR), it must be the last resort (*Enhorn v Sweden* (2005-I) 41 EHRR 633, [44]). The Bill arguably does not meet that threshold (requiring instead that a public health official considers detention/compulsion to remain at a specified place in isolation from others to be necessary and proportionate (Schedule

21)) thus raising a clear question of compatibility with Article 5. As the COVID-19 pandemic amounts to a “public emergency threatening the life of the nation”, and given the extent of these powers, if such powers are considered to be strictly required by the exigencies of the situation a derogation to Article 5 ECHR ought to be entered to underpin them (Article 15 ECHR). Similar concerns apply with respect to Article 11 ECHR and the Act’s powers to issue directions relating to events, gatherings and premises (Schedule 22). This is particularly important in a democratic society as such powers could be applied to political organisations and trade unions.

1.4 Serious consideration should be given to whether restrictions announced on 23 March are restrictions of movement or better understood as deprivations on liberty. Introducing these measures through the Public Health (Control of Disease) Act 1984, rather than the Civil Contingencies Act 2003, does not alleviate their human rights implications. Instead, it raises further concerns regarding transparency, oversight and limitation in comparison with bespoke emergency legislation.

1.5 Whether or not derogations are entered, human rights compliance will require the state’s significant powers to be subject to appropriate and robust procedural and substantive safeguards in order to minimise the risk of individual rights violations occurring. The appropriateness and necessity of continuing derogations should be kept under constant review (see No. 3 below) as derogations are permitted only when they are strictly required by the exigencies of the situation (Article 15 ECHR).

2.0 Positive Obligations

2.1 The state has positive obligations to take measures to protect persons’ life and bodily and mental integrity. These obligations are amplified in respect of persons in detention, including those detained under the Act, and in respect of vulnerable persons. We note the decisive steps now taken by the UK Government to protect public health and recognise their contribution to fulfilling relevant rights, including the right to health, and recall the obligation to ensure rights without discrimination.

2.2 Positive obligations are fundamentally about providing ‘practical and effective’ protection of rights. This means that the overarching goal is protection, rather than coercion. While some powers of compulsion may, at times, be necessary, the state’s positive obligations require it to take all reasonable steps to ensure that people can comply with its policy of social distancing and associated objective to minimise loss of life, including by financially securing people’s livelihoods. Rather than enforcing social distancing primarily or exclusively through coercive legal powers such as detention, human rights law requires proper attention to enabling measures such as effective financial security for individuals and families, protection for vulnerable children, provision of appropriate at-home medical care to at-risk population etc.

2.3 The state is obliged under human rights law to ensure that persons are not “denied shelter, food or the most basic necessities of life” (*R. (on the application of Limbuela) v Secretary of State for the Home Department* [2006] 1 A.C. 396 (HL), [7] (Lord Bingham)) as a result of, for example, forced closure of businesses or places of welfare provision in the absence of

appropriate basic goods provision. We welcome the extensive package of welfare and living supports announced by the Chancellor of the Exchequer on 20 March 2020 and relevant provisions of the Coronavirus Act 2020 as a substantial step towards fulfilling the state's obligations under human rights law, although we anticipate more extensive measures will be necessary.

2.4 Where coercive powers are necessary, they must be formulated in a manner that complies with human rights, as noted in 1 above, and subject to rolling oversight and review as outlined in 3 below.

3.0 Oversight and Review

3.1 The urgency of the moment has required the swift passage of the Coronavirus Act 2020. Its provisions have significant implications for human rights. We welcome the provision for regular reporting (s. 97) and six-monthly parliamentary review (s. 98), but stress the importance of ensuring reporting and review are evaluative and independent in order properly to underpin democratic legitimacy and rights protection.

3.2 Pandemics and their impacts shift over time. What is proportionate today may not be proportionate in six months, or once the public health crisis has been resolved or made manageable. Even with a derogation, Article 15 ECHR requires that powers to tackle the COVID-19 pandemic must be limited to those strictly required by the exigencies of the situation. Moreover, the reasonable measures demanded by positive obligations to secure rights must remain responsive to the changing circumstances. Thus, best efforts should be made to assess measures taken, and their proportionality, across time.

3.3 Achieving this will be aided by ensuring that the impacts, effectiveness, continuing necessity and proportionality of the powers and approaches adopted to combat COVID-19 are subject to independent oversight and review on a rolling basis, which in turn would feed into the six-monthly parliamentary review. Such review would provide Parliament with the evidence required to assess the operation of the Act. As such it will help to ensure rights compliance, democratic legitimacy, and operational effectiveness, and ensure the effective deployment of the review provisions in the Bill.

3.4 Oversight and review should take at least three forms:

1. Rolling parliamentary oversight of the application of the powers and their impact (including unanticipated impacts) by select committees including a newly-established COVID-19 Select Committee with appropriate public health and human rights expertise in the membership;
2. Regular independent, evaluative review of the operation, deployment, impact (including unanticipated impacts), effectiveness and continuing rationality of the measures by a specially-established post to be known as the Independent Reviewer of COVID-19 Legislation;
3. Ordinary parliamentary oversight including through the statutory six-monthly review, informed by the insights on the operation, impact, and effectiveness of the Act and other

relevant regulations provided by the COVID-19 Select Committee and the Independent Reviewer of COVID-19 Legislation.

4.0 About the Authors

Fiona de Londras is Professor of Global Legal Studies at Birmingham Law School. Alan Greene is Senior Lecturer at Birmingham Law School. Natasa Mavronicola is Reader in Human Rights Law at Birmingham Law School. Combined they have extensive expertise in human rights law, emergency, positive obligation, public law, and review and oversight of state powers.

5.0 Further Reading

Jessie Blackbourn, Fiona de Londras, Lydia Morgan, *Accountability and Review in the Counter-Terrorist State* (2019; Bristol University Press)

Alan Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis* (2019; Hart Publishing)

Natasa Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs* (forthcoming; Hart Publishing)

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