

## Written evidence from National Survivor User Network (COV0233)

### ABOUT NSUN

The National Survivor User Network (NSUN) is a network of people who have and do experience mental distress who want to change things for the better. NSUN connects people and influences policy, practice and perceptions by amplifying the experiences and aspirations of our members.

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### EXECUTIVE SUMMARY

1. The Coronavirus Act 2020 effectively suspends the Care Act 2014 and is likely to have a serious negative impact on adults with care and support needs and their carers, at a time when their needs may increase. Changes to the Mental Health Act are similarly likely to have serious negative impacts for people experiencing mental distress.
2. NSUN is concerned that significant legislative changes have been rushed through with minimal informed scrutiny, and inadequate consideration as to their impact on the lives and rights of people who live with mental ill health, distress, or trauma.
3. The Coronavirus Act 2020 contains key changes which will not just affect people in the short term but could impact on our rights in the longer term. NSUN is concerned that some people will have no choice but to sacrifice treatment, support, or their liberty at a time when they are in most need.
4. Given the lack of priority given to revision of mental health legislation in the past, NSUN is urging a clear and well-communicated six-month sunset clause for these changes which should not be retained unless there is overwhelming need.

### WHICH GROUPS WILL BE DISPROPORTIONATELY AFFECTED BY MEASURES TAKEN BY THE GOVERNMENT TO ADDRESS THE COVID-19 PANDEMIC?

5. The Coronavirus Act 2020 is likely to have a **serious negative impact on adults with care and support needs and their carers**. It essentially suspends the Care Act 2014 duties in England to assess and arrange services to meet the needs of disabled adults, including the duty to meet the eligible needs of disabled people and their carers.
6. The only exception is where a failure to provide services would result in a breach of the European Court of Human Rights (ECHR). However, the threshold for ECHR breaches in this area is high, which **means the Act risks leaving many disabled adults with no entitlement to care, at a time when their need for care may be considerable**.
7. Duties for young people transitioning to adult social care have also been suspended.
8. Changes to the Mental Health Act, particularly extensions to detention time limits and the removal of safeguards, mean **people experiencing**

**mental distress are also likely to be disproportionately affected.**

**WHAT WILL THE IMPACT OF SPECIFIC MEASURES TAKEN BY GOVERNMENT TO ADDRESS THE COVID-19 PANDEMIC BE ON HUMAN RIGHTS IN THE UK?**

9. The Coronavirus Act 2020 relaxes safeguards in mental health legislation for up to two years in order to ensure that health services can continue to operate in the event of increased demand. The Act allows the 4 governments across the UK (of Northern Ireland, Scotland, Wales and the UK) to switch on these new powers when they are needed (and to switch them off again once they are no longer necessary), based on the advice of Chief Medical Officers of the 4 nations.
10. Under the temporary coronavirus legislation, if staffing levels reach a critical point, the Government is able to switch on additional powers in England and Wales which would mean that:
  - i. An application for the detention of an individual under the Mental Health Act could be made to an Approved Mental Health Professional (AMHP) by one doctor rather than two if it is impractical to get advice from two doctors or would cause undue delay.
  - ii. The clinician in charge of the patient's treatment could be allowed to continue medication without their consent (forced treatment) beyond three months without getting an independent/second opinion (SOAD), if they think that would cause undesirable delay or be impractical.
11. Some time limits set in the Mental Health Act have been extended, including:
  - i. Under section 5: emergency detention for people already in hospital extended from 72 hours to 120 hours, and nurses' holding powers extended from 6 to 12 hours
  - ii. Under sections 135 and 136: police powers to detain a person found in need of immediate care at a "place of safety" extended from 24 hours to 36 hours.
  - iii. Under section 35/36: The cap on how long someone can be held in hospital while awaiting a report (currently 12 weeks) has been lifted.
12. **Detaining someone raises important human rights concerns around their right to liberty (Article 5 of the Human Rights Act (HRA)) and their right to a private and family life (Article 8 HRA). Any restrictions of these rights must be lawful, legitimate and proportionate. Lack of resources as a sole justification is usually not enough to restrict a person's human rights.**

**WHAT STEPS NEED TO BE TAKEN TO ENSURE THAT MEASURES TAKEN BY THE GOVERNMENT TO ADDRESS THE COVID-19 PANDEMIC ARE HUMAN RIGHTS COMPLIANT?**

13. It is critical that Government ensures that exemptions only extend as far as is absolutely required, both in time and scope, and are regularly monitored and adjusted.
14. **The Government should reconsider removing the safeguard of a second opinion after three months of treatment.** This safeguard is a minimum protection for people made to have medication under the Mental Health Act, including for those who are being forced to take medication. It should be retained, particularly for higher risk prescribing. [The Independent Mental Health Act Review](#) recommended making it harder for clinicians to administer treatment without consent, and proposed an appeal process against treatment decisions. To give some context, the CQC receives about 16,000 requests for SOAD opinions every year, and changed treatment plans in 29% of their visits ("[Monitoring The Mental Health Act 2018/19](#)"). Removing safeguards in relation to consent to treatment may be in breach of Article 8 of the Human Rights Act.
15. **The Government should return the time limit for doctors' holding powers to 72 hours under Section 5 of the Mental Health Act.** Prior to the Coronavirus Act 2020, a voluntary patient could be prevented from leaving hospital so that they can be assessed for detention under the Mental Health Act, with no entitlement to an advocate or tribunal, for up to 72 hours. NSUN does not believe the extension to 120 hours is proportionate or reasonable, and believes it may be in breach of the Human Rights Act.
16. **The Government should clarify the role of Approved Mental Health Professionals (AMHPs) within the emergency legislation,** which seems to extend the role of AMHPs in the light of the anticipated shortage of doctors who can make recommendations for detention under the MHA, but without increasing the number and capacity of AMHPs. NSUN's understanding is that there are currently under 4000 AMHPs and no central register of AMHPs. If there are no AMHPs available, this calls into question the legality of detention under the MHA.
17. **Given the lack of priority given to revision of mental health legislation in the past, the Government should introduce a clear and well-communicated six month sunset clause for these changes** which should not be retained unless there is overwhelming need, in addition to the recommendations set out below.
18. **The Government should reinstate the Care Act 2014 in full,** ensuring that duties in England to assess and arrange services to meet the needs of Disabled adults, including the duty to meet the eligible needs of Disabled people (Section 18) and their carers (Section 20) are acted upon.
19. **Duties for young people transitioning to adult social care should also be reinstated urgently.** The Secretary of State for Education now has power to disapply the duty on schools and other institutions to admit a child to a school where they are named on an Education Care and Health Plan (EHCP). The Secretary of State is able to vary provisions of the act, such as the core duty to procure provision set out in an EHCP, so instead of being an absolute duty it becomes a

'reasonable endeavours' duty, creating a lesser entitlement for up to two years. **Any changes to the Care Act which may deprive people of care and support should be removed from the Coronavirus Act and need to be debated separately.**

**22/07/2020**

## **INFORMATION SOURCES**

### **39 Essex Chambers:**

<https://www.39essex.com/the-coronavirus-bill-schedule-11/>

### **Alex Ruck Keane:**

<https://www.mentalcapacitylawandpolicy.org.uk/covid-19-and-mca-first-guidance-out/>

### **British Institute of Human Rights:**

<https://www.bihhr.org.uk/Blog/the-corona-virus-bill-and-human-rights>

### **The Coronavirus Act 2020**

<https://www.legislation.gov.uk/ukpga/2020/7/contents/enacted/data.htm>

### **Doughty Street Chambers:**

<https://insights.doughtystreet.co.uk/u/102d7k0/sophy-miles>

### **Equality and Human Rights Commissions:**

<https://www.equalityhumanrights.com/en/our-work/news/human-rights-and-equality-considerations-responding-coronavirus-pandemic>

### **Human Rights Act (1998)**

<http://www.legislation.gov.uk/ukpga/1998/42/contents>

### **Inclusion London:**

<https://www.inclusionlondon.org.uk/campaigns-and-policy/act-now/coronavirus-bill-could-leave-thousands-of-disabled-people-without-support/>

### **The Independent Review of the Mental Health Act (1983)**

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

**Liberty:**

<https://www.libertyhumanrights.org.uk/news/press-releases-and-statements/liberty-calls-continuous-scrutiny-coronavirus-bill>

**The Masked AMHP**

<https://themaskeamhp.blogspot.com/2020/03/the-coronavirus-bill-proposed.html?m=1>

**Mental Health Act (1983)**

<http://www.legislation.gov.uk/ukpga/1983/20/contents>

**Mind:**

<https://www.mind.org.uk/news-campaigns/news/mind-responds-to-changes-to-the-mental-health-act-in-emergency-covid-19-legislation/>

**Recovery in the Bin:**

<https://recoveryinthebin.org/2020/03/17/3-point-plan-to-make-dwp-support-people-during-covid-19-outbreak/>

**Lucy Series**

<https://thesmallplaces.wordpress.com/2020/03/20/the-mental-health-acts-forgotten-sibling/>