SHRC
Scottish Human Rights Commission

Briefing: COVID-19 Emergency Legislation Scotland

Introduction

1. The Coronavirus Act 2020 (the "Act") received Royal Assent on 25 March 2020. The Act responds to the current coronavirus (COVID-19) pandemic, and introduces wide and varied powers in a range of areas. The Act confers powers on UK Ministers and Ministers of devolved administrations. The Scottish Government will introduce its own emergency legislation with the Bill being considered at Stages 1, 2 and 3 on Wednesday 1 April.

2. The response to the coronavirus outbreak will see the introduction of a range of different measures, many with significant human rights implications. At the time of drafting, the Commission has not had sight of proposed Scottish legislation but provides the below analysis based on the UK Coronavirus Act 2020.

General principles

3. It is important to note that the coronavirus outbreak presents a threat to public health and a danger to life, particularly for older people or those with underlying health conditions. The State has positive obligations under Article 2 of the European Convention on Human Rights ("ECHR") to take reasonable steps to minimise the risk to life posed by the current outbreak. That said, those measures must comply with the UK's, and in turn Scotland's, human rights obligations. Measures relating to the pandemic also have a significant impact on other internationally protected rights such as the right to health (Article 12 International Covenant on Economic, Social and Cultural Rights), in terms of which states must ensure that goods and services related to health are available, accessible, acceptable and of good quality.

4. In general, measures must be **lawful, necessary, proportionate** and **time limited.** This means they must go no further than is strictly necessary, and should be linked to scientific and public health evidence. It must be recognised that measures could disproportionately impact certain groups and every effort should be made to address this. Finally, measures must be subject to **meaningful review and scrutiny**.

Review and scrutiny

5. Given the broad powers that are being conferred on Ministers, and the very limited scrutiny that emergency legislation receives in the first instance, it is vital that there be a requirement for Parliament to review legislation at defined periods. **Section 98 of the Coronavirus Act provides for a six month parliamentary review, and the Commission believes Scottish legislation should include similar review provisions**. It may be that certain areas where there are particular concerns, for example mental health law, should be reviewed more frequently. Given the evolving nature of the public health crisis, express provision should be made to ensure parliamentary review in the event that parliament is no longer sitting.

6. The Commission believes it is particularly important that Scottish legislation provides for appropriate external oversight and scrutiny by existing bodies. Not only should the continuing need for specific powers be kept under review, so too should the use and impact of those powers. **Scottish legislation should therefore introduce reporting mechanisms on the use of powers, to be scrutinised by appropriate external and independent bodies.** There are a range of existing monitoring bodies into whose remit areas of the Act may fall and who would have the expertise to carry out such an exercise, subject to proper resourcing. For example, we have suggested that the mental health provisions could be appropriately monitored by the Mental Welfare Commission.

Specific measures / areas of concern

Mental Health

7. Section 9 and Schedule 10 of the Act make changes to the Mental Health (Care & Treatment) (Scotland) Act 2003 (the "2003 Act") and the Criminal Procedure (Scotland) Act 1995. Firstly, we stress that these amendments have significant implications for the safeguarding of the human rights of people with mental disorder, amounting to greater power in the hands of professionals, lower levels of scrutiny and the potential for significantly increased periods of detention and restriction of autonomy. They impact on Articles 2 (right to life), 3 (freedom from torture, inhuman or degrading treatment), 5 (right to liberty), 6 (right to fair trial) and 8 (right to respect for private and family life) of the ECHR.

8. While measures to restrict these important safeguards may be necessary during the emergency period, they must be understood and applied in this way, rather than solely as "administrative burdens" on health and social care staff. Accordingly, the following areas require particular care and attention to adhere to human rights principles:
    - These measures should only be used as a last resort, where absolutely necessary as a consequence of the emergency.
    - Monitoring of the use of these powers is essential to assessing whether they have remained proportionate in practice. **Local authorities and health boards should be required to record and report on the use of the powers in respect of each type of order.** We would suggest that the Mental Welfare Commission, properly resourced, would be an appropriate body to whom reports should be made.
    - Given the impact of these measures on human rights protections, **we would suggest an earlier reporting period for these measures, of three months.**

- **We would urge serious caution on the use of paper hearings for Mental Health Tribunal proceedings (Schedule 9, para 15).** Oral hearings are essential to ensure the right to a fair trial, particularly in the context of mental health tribunals where the participation of the patient in discussion of deeply personal matters must be maintained. Matters suitable for paper hearings should be specified and should be restricted to procedural matters or those on which all parties agree. Video and audio technology would be a more appropriate means of facilitating hearings, provided it is able to ensure the participation of all key parties, including named persons, advocates and legal representatives.

9. It should be noted that the UN Convention on the Rights of Persons with Disabilities (CRPD) also sets out a range of duties to ensure disabled people experience their rights equally with others. In particular, Article 11 of CRPD sets out a duty on states to take "all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters". Rights for disabled people must continue to be upheld, alongside everyone else. In practice this includes a need for reasonable adjustments and accessible information relating to Coronavirus and associated measures (Article 9 CRPD) and support for decision-making (Article 12 CRPD).

Social care

10. Sections 16 and 17 of the Act provide for changes to local authority obligations to assess need for the provision of community care where "it would not be practical to comply" with the duty or to do so would delay the provision of care. While local authorities will be increasingly stretched, it is vital that essential care is provided, particularly where the absence of care would result in risks to life (Article 2) or inhuman and degrading treatment (Article 3). Where people with mental disorder are required to be moved from

hospital to community care settings, it will remain necessary to ensure that the care provided is adequate and that their care needs are given equal priority with those with physical health issues. We are aware that, in England, the Department of Health and Social Care has produced an ethical framework for adult social care decisions in the pandemic[1]. **We would like to see an ethical framework for both health and social care in Scotland which sets out ethical and human rights-based principles to guide decision-making.** This could also guide decisions about access to critical care to ensure there is no discrimination against people with disabilities or older people.

11. Again, **robust monitoring, reporting and review** of the use of these measures and the level of unmet need which arises will be essential. In particular, it will be important to ensure pre-emergency duties are reinstated and met as soon as possible.

12. Adults with incapacity and care homes: It is already apparent that people in care homes are becoming subject to a very restricted regime which impacts significantly on their right to private and family life (Article 8 ECHR), restricting their autonomy and access to family members. Schedule 19 (Health protection regulations: Scotland) may provide some basis to authorise restrictions, however, the Regulations made to date do not appear to cover this. We hope to see Regulations address this situation and it is welcome that the Act requires explicit consideration of proportionality (para.2). In addition, people may need to be moved from hospitals to alternative care settings, such as care homes, in circumstances that are likely to amount to a deprivation of liberty (Article 5 ECHR). While, again, this may be justified, the Act does not currently provide a legal basis for this to happen, and such

[1] https://www.gov.uk/government/publications/covid-19-ethical-framework-for-adult-social-care/responding-to-covid-19-the-ethical-framework-for-adult-social-care

moves would therefore be absent any procedural safeguards. The European Committee on the Prevention of Torture's "statement of principles" relating to the treatment of persons deprived of their liberty in the pandemic requires *"Any restrictive measure taken vis-à-vis persons deprived of their liberty to prevent the spread of COVID-19 should have a legal basis and be necessary, proportionate, respectful of human dignity and restricted in time. Persons deprived of their liberty should receive comprehensive information, in a language they understand, about any such measures."*[2] Amendments to the Adults with Incapacity (Scotland) Act 2000 (AWI Act) are likely to be required as the legislation contains significant safeguards requiring the input of local authority and health professionals. **The AWI Act should be amended to uphold safeguards so far as possible,** rather than leaving a gap lacking a legal basis and liable to be filled with an absence of procedural safeguards.

Restrictions on movement and gatherings

13. The Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 make considerable restrictions on movement and gatherings, giving police powers to disperse gatherings and to remove people to the place where they are living. Anyone who contravenes a direction or fails to comply with a reasonable instruction commits an offence.

[2] Principle 4, Council of Europe, Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic, 20 March 2020 Council of Europe, https://rm.coe.int/16809cfa4b

14. Restrictions on movement and gatherings interfere with a number of human rights, most notably the right to private and family life (Article 8 ECHR), freedom of expression (Article 10 ECHR) and freedom of assembly and association (Article 11 ECHR). Interferences with these rights can be justified provided they are in accordance with the law, pursue a legitimate aim and are necessary in a democratic society (proportionate).

15. The Commission believes that restrictions on movement are currently proportionate given the widespread risk to public health that coronavirus presents. The Commission notes that the above regulations expire at the end of a period of six months, which it believes is an important safeguard against arbitrary application. So, too, is regulation 2(3) which provides that as soon as the Scottish Ministers consider the restrictions are no longer necessary to control or prevent the spread of coronavirus, they must be terminated. It is vital that all measures and powers taken are explicitly linked to public health considerations and remain proportionate to those considerations.

16. Police are given considerable powers to enforce restrictions on movement. Those powers necessarily involve discretion of individual officers. **The Commission believes there should be continuing oversight including reporting on the use and impact of these powers to ensure consistency in their application and that there are no unintended consequences flowing from their use, such as disproportionate impacts on particular groups.** Police officers should be clearly briefed on the limits of their legal powers, and the distinction between law and public health guidance. Similarly the public must have clear information as to what the powers are and what is expected of them under the legislation and/or as a matter of public health guidance.

Measures to protect public health: quarantine

17. Section 49 and Schedule 19 of the Coronavirus Act allow Scottish Ministers to make regulations relating to the protection of public health. The types of measures envisaged are wide-ranging, including the power to require a person to submit to a medical examination, be removed to a hospital or other suitable establishment or be kept in isolation or quarantine. These measures engage a number of rights, particularly in relation to the right to liberty and security (Article 5 ECHR), the right to a fair trial (Article 6) insofar as they provide an ability to challenge any decisions, and the right to private and family life (Article 8).

18. Given the interference with liberty and security and a person's bodily autonomy, again it is particularly important that any powers are **time limited, subject to review, subject to external scrutiny and monitoring and are explicitly linked to the need to control the spread of coronavirus.**

Emergency and temporary registration of workers

19. The Coronavirus Act provides for the emergency registration of health professionals and social workers (sections 4 and 7). The Commission notes that the so-called 'relaxation' of the regulatory regime is intended to deal with shortfalls in required numbers of health and care professionals during the pandemic.

20. **It is vital that any relaxation of regulatory requirements does not endanger those receiving care, and that appropriate safeguarding measures and professional standards are maintained.** This is particularly important as many professionals will be dealing with people in circumstances where normal visiting, inspection or oversight mechanisms may have had to be suspended or substantially curtailed.

21. Under Article 2 ECHR, the State has a positive obligation to protect life. It also has a duty to prevent inhuman and degrading treatment under Article 3 ECHR. Article 2, the right to life, is applicable in cases where health care has been denied, or medical negligence has resulted in avoidable death. While the State has discretion in how to allocate limited resources, there must be regulations in place for the protection of patients' lives and also an effective system for establishing the cause of a death and any liability of medical practitioners involved. This is not only to ensure accountability, but also to prevent future deaths.

Places of detention

22. In addition to the provisions contained in the Coronavirus Act, the Commission highlights that particular attention should be paid to places of detention and other residential settings. The UK National Preventive Mechanism has written to the Secretary of State for Justice to outline the vital importance of efforts to uphold the rights of people in detention and deprived of their liberty during the pandemic. The NPM highlights the duty of the state to adhere to the UN Standard Minimum Rules for the Treatment of Prisoners ("Mandela Rules") and the European Committee on the Prevention of Torture's "statement of principles" relating to the treatment of persons deprived of their liberty in the pandemic. The NPM has raised the following specific issues:

- The need to reduce the detained populations to mitigate the inherent risk of maintaining people in close confinement. This is particularly important for detainees with underlying health conditions, including children, and those in other vulnerable categories as well as in areas of the detention estate that are already overcrowded. We are aware of the large numbers of immigration detainees that have been released, and urge facilitation of prison releases where risk assessment, and the impact on other services in the community deems this

feasible, by expanding the use of existing instruments or executive release under emergency legislation.

- The need to consider ways to reduce the numbers of people remanded to custody. This could have the additional benefit of reducing the pressure on staff working in places of detention.
- The need to consider individual people deprived of their liberty in non-hospital settings (e.g. care homes) where the provision of care and imposed isolation to manage infection spread for an individual may give rise to a new or changed deprivation of liberty.
- The need to address the possibility that the shutdown of community services could leave some vulnerable individuals – such as children in residential special schools – at greater risk of being detained.
- Maintaining principles of equivalence of care in relation to both physical and mental healthcare to those in detention. At a time when all health services are under significant strain, the government must ensure that those deprived of their liberty are not disadvantaged in accessing the health services that they need. This is particularly important given the extent to which detainees are likely to be held in conditions that amount to solitary confinement.
- The measures envisaged to facilitate contact between detainees and their families, and contact with other professionals such as advocates. Where physical visits have had to be restricted, and given the many ways in which family contact plays a crucial role for those in detention, how will the government ensure skype, adapted mobiles and any other forms of contact are available.
- The potential impact of COVID-19 on staffing levels in mental health places of detention, which could limit both general support to patients and specialist roles such as psychological input. This could lead to an increase in mental distress of

patients and then an increase in the use of restraint, segregation and seclusion which may compromise people's human rights. Reduced staffing levels could also impact people who are already in segregation/seclusion.

The NPM in Scotland will work constructively with government and services to inform responses to these concerns.

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30 March 2020