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JOINT COMMITTEE ON HUMAN RIGHTS BRIEFING NOTE



SUMMARY: The Government is taking various measures to try to contain and control the COVID-19 outbreak. The right to life (Article 2 ECHR) necessarily underpins the response to this pandemic. The Joint Committee on Human Rights will be scrutinising the measures taken to tackle the COVID-19 outbreak to consider the human rights implications of the response, including proportionality and how measures could be affecting different groups of people.

This background paper highlights the sorts of human rights issues that may arise in scrutinising the Government's response to COVID-19. It also aims to provide an overview of the legislative framework already in place for dealing with public health outbreaks.

There are a number of different measures that could be taken to help to contain and control the current COVID-19 outbreak. Some will necessarily engage human rights. Issues may include:

- Quarantine (Article 5 right to liberty; and Article 8 ECHR right to family life).
- Rationing health care (Article 2 ECHR right to life; Article 3 ECHR). Efforts to prioritise health care will need to be justifiable and non-discriminatory. The minimum requirements under Articles 2 and 3 ECHR must be met even if such measures are introduced.
- Reducing the numbers of health care professionals or care workers needed for certain functions so they are freed up to work on the emergency response. The minimum requirements under Articles 2 and 3 ECHR must be met even if such measures are introduced.
- Restrictions on visits from family and friends for those in quarantine or self-isolating (Article 8 ECHR right to family life).
- Prohibitions on public meetings and gatherings of more than a certain number of people (Article 11 ECHR freedom of assembly and association).
- Potential impact on children e.g. if schools close (Article 2, Protocol 1 Right to education; Rights of the Child).
- Restricting people's ability to work, which can have a disproportionate impact on certain groups (e.g. the self-employed who do not benefit from sick pay and who then may not be able to afford basic necessities).
- Restrictions on travel (potentially engaging Article 11 freedom of assembly and association).
- Prohibiting visits to those detained e.g. prohibiting children visiting parents in prison; prohibiting visits to young people in detention (Article 8 ECHR right to family life; rights of the child).

- Potential impacts on the right to property e.g. Government taking over private health care facilities; restrictions impacting on an individual's peaceful enjoyment of possessions (Article 1 Protocol 1 ECHR).
- Potential impact on prisoners and those detained, including in immigration detention centres and mental health hospitals (Articles 3, 5 and 8 ECHR).
- Potential impact on disabled people.
- Potential impact on those who come within the remit of the Mental Capacity Act 2005.
- Potential impacts on businesses, especially small businesses that may be less able to weather the economic impacts of restrictions (Article 1 of Protocol 1 – right to peaceful enjoyment of one's possessions).
- Restrictions preventing timely funerals (Article 9 ECHR freedom of religion or belief).
- Potential impacts for access to justice or services if there are not sufficient measures put in place to ensure adequate continuity of these public services (Article 6, 8, 3 etc).
- Potential implications for those whose circumstances make it difficult for them to comply with restrictions e.g. homeless people or those in temporary accommodation who will find it difficult to self-isolate.

There are a number of different legislative tools available to provide the Government with powers as part of the COVID-19 response:

- The Public Health (Control of Disease) Act 1984 (PHA), together with various regulations, provide extensive powers in respect of notifiable diseases. The Government, by Statutory Instrument, made COVID-19 a notifiable disease on 5 March 2020.
- There are wide powers to make emergency regulations under the Civil Contingencies Act 2004 (CCA). As is required under the CCA, such emergency measures must (1) be compatible with Convention rights within the meaning of the Human Rights Act; and (2) be appropriate and proportionate to the emergency.
- A new Bill (as anticipated) could introduce wide and varied powers.

Introduction

1. The current coronavirus (COVID19) outbreak is occupying the news and public concern. A number of measures to contain the disease are being taken and are being discussed. Some of these measures will directly engage human rights. For example, some measures could significantly curtail individual rights (e.g. to visit friends and family, to leave the house) raising Article 5 ECHR (right to liberty and security) considerations. There are other practical and economic impacts on individuals who cannot work due to self-isolating, or due to sickness - some of these measures will affect certain groups more significantly than others. There may be difficulties in ensuring access to essential services and supplies (e.g. food; medicine; standards in care homes; access to medical treatment). However, the positive obligations in Article 2 ECHR (right to life) also arguably require the Government to take reasonable steps to minimise the risk to life posed by this outbreak.

2. Any measures taken will need to comply with the UK's human rights obligations – both the UN international human rights obligations, as well as those flowing from the European Convention on Human Rights (ECHR) which is incorporated into UK law through the Human Rights Act (HRA). The human rights framework is designed to accommodate different scenarios and situations. Therefore, an emergency disease outbreak will often be an adequate justification for taking exceptional measures provided that such measures are justified and proportionate in the circumstances. This also involves considering what alternative measures are available, as well as considering the impact of certain measures on certain groups (and how any undue impact might best be mitigated).
3. Exceptionally, under Article 15 ECHR, it is possible for the UK to derogate from some of the provisions of the ECHR¹ if there is a “public emergency threatening the life of the nation”. However, it is only possible to derogate “to the extent strictly required by the exigencies of the situation” and provided that the measures are not inconsistent with the UK's other obligations under international law. Provided the measures in response to the COVID-19 outbreak are necessary, justified and proportionate, a derogation should not be needed.
4. This briefing paper aims to identify:
 - a. key human rights issues that might be raised by measures taken to tackle to COVID-19 outbreak; and
 - b. key elements of the existing domestic legislative framework for measures taken to contain a disease outbreak.

Key human rights issues

5. A number of different human rights considerations have arisen as a result of the COVID-19 outbreak. In particular:
 - a. **The outbreak poses a risk to life:** Article 2 ECHR places a positive obligation on States to take reasonable steps to protect a person's right to life. COVID-19 is clearly a threat to the right to life of certain individuals. However, many individuals are not identifiable as the threat is quite widespread. The State therefore has a certain duty to take reasonable steps to protect life.
 - b. **COVID-19 has a disproportionate impact on certain groups:** It is becoming increasingly well-known that COVID-19 is more life-threatening for certain groups, including older people and those with underlying health conditions. Therefore, the steps taken must ensure that those groups most at risk are protected appropriately. Measures must also be proportionate to this aim.
 - c. **Attitudes in relation to certain groups:** There have been concerns since the beginning of the outbreak of certain groups being victimised due to their perceived ethnic or national origin and fears about the disease (e.g. those of Chinese or East Asian appearance towards the beginning of the outbreak). It is important that the authorities use existing ‘hate crime’ laws to protect and police against such crimes.

¹ It is not possible to derogate from Article 2 (right to life), Article 3 (freedom from torture or inhuman or degrading treatment or punishment, Article 4(1) (prohibition on slavery) and Article 7 (no punishment without law).

- d. **Some of the measures taken will engage human rights and some will affect certain groups more than others:** Many of the measures could engage human rights. Any interference with human rights will need to be proportionate and necessary. Moreover, it is likely that some of the measures could affect certain groups more than others. This will need to be thought through to ensure any steps are proportionate. Moreover, blanket measures will need to be applied in a way which is proportionate and balanced, recognising the specific challenges these will pose to certain groups (e.g. homeless people may have specific difficulty in self-isolating). Some of the issues that could arise are set out in the following paragraph.

6. There are a number of different measures that could be taken to help to contain and control the current COVID-19 outbreak. Some will necessarily engage human rights. Issues may include:

- a. Measures to restrict the liberty of those who are infected e.g.:
 - i. Quarantine (Article 5 right to liberty and Article 8 right to family life ECHR).
 - ii. Preventing family visits (Article 5 right to liberty and Article 8 right to family life ECHR).

Such measures will normally be capable of justification in an outbreak crisis. Article 5(1)(e) ECHR specifically allows for the “lawful detention of persons for the prevention of the spreading of infectious disease”. However, such measures will only be necessary and proportionate if reasonable alternatives have not been overlooked (for example considering reasonable ways for those in quarantine to remain in contact with relatives).

- b. Measures to restrict the liberty of those who might be infected (e.g. have potentially come into contact with someone; or are showing symptoms of a flu/cold and might have COVID-19, although are undiagnosed due to a lack of testing at present).

Such measures will also engage Article 5 (right to liberty) and Article 8 (right to a private and family life). Such measures should be capable of justification, but if unduly onerous measures are being imposed on people who are simultaneously being denied tests to establish if they are infected, there could be grounds to question proportionality.

- c. Measures affecting healthcare provision, such as:
 - i. Prioritising certain healthcare for some over others.
 - ii. Reducing the numbers of health care professionals or care workers needed for certain functions so they are freed up for work on the emergency response.
 - iii. The Government taking over private healthcare facilities (Article 1 Protocol 1 ECHR right to property).

Such measures could potentially engage Article 2 ECHR right to life and Article 3 ECHR. Efforts to prioritise health care will need to be justifiable and non-discriminatory and must ensure that the minimum requirements under Articles 2 and 3 ECHR are met.

- d. Restrictions preventing timely funerals which can raise freedom of religion/belief issues (Article 9 ECHR freedom of religion or belief).

There may be good reasons for such restrictions in case of an epidemic, but they will need to be justified and proportionate.

- e. Measures to restrict the liberty of those who are not infected, such as:
 - i. shutting schools (Article 2 of Protocol 1 ECHR – right to education; child rights under the UN Convention on the Rights of the Child).
 - ii. preventing people from going to work, which may have a disproportionate impact on certain groups of workers (e.g. self-employed who do not benefit from sick pay or those who cannot afford basic necessities).
 - iii. preventing public gatherings (Article 11 freedom of assembly and association).
 - iv. restrictions on travel (with potential implications for Article 11 freedom of assembly and association).
 - v. placing entire cities/areas on shut-down.
 - vi. prohibiting visits to those in detention e.g. children wishing to visit parents in prison; families wishing to visit relatives in prison, including young people in detention (Article 8 right to family life).

Such measures would have a more significant effect on many people's lives and would therefore need a strong evidence base to be justified and proportionate. However, where there is a disease outbreak with the risk of significant loss of life at risk, such measures could be proportionate. Any disproportionate impact on certain groups (e.g. self-employed who do not have access to sick leave) should be considered.

- f. Measures taken (or how they are implemented) could disproportionately affect certain groups and this will need to be considered to ensure that any response is proportionate. For example:
 - i. Certain groups are more susceptible to dying from the virus (Article 2 ECHR) or might be affected differently by the measures (Article 14 – non-discrimination).
 - ii. Parents and children will be affected by schools closing.
 - iii. If measures only restrict the movement of certain groups, those groups will need specific consideration.
 - iv. Potential impact on prisoners and those detained, including in immigration detention centres and mental health hospitals (Articles 3, 5 and 8 ECHR).
 - v. Potential impact on disabled people.
 - vi. Potential impact on those who come within the remit of the Mental Capacity Act 2005.

- vii. Potential impacts on businesses, especially small businesses that may be less able to weather the economic impacts of restrictions (Article 1 of Protocol 1 – right to peaceful enjoyment of one’s possessions).
- viii. Potential implications for those whose circumstances make it difficult for them to comply with restrictions e.g. homeless people or those in temporary accommodation who will find it difficult to self-isolate.
- g. It is also possible that human rights issues could arise even where measures or restrictions are advisory. For example, impacts could be felt by certain groups who are self-isolating even where this is following a “recommendation” from the Government rather than a formal quarantine. Even if isolation follows softer “recommendations”, the consequences could require special measures to be taken to ensure that those groups receive the support they require.

The domestic legislative framework to respond to disease outbreaks

7. The Government will introduce a Bill with new powers to tackle COVID19 on Thursday 19 March. At present the main legislative framework to tackle public disease outbreaks is contained in:
 - a. Public Health (Control of Disease) Act 1984 and related secondary legislation;
 - b. Civil Contingencies Act 2004.

Public Health (Control of Disease) Act 1984

8. The Public Health (Control of Disease) Act 1984 (PHA)² provides that the appropriate Minister may by regulations make provision for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in England and Wales (whether from risks originating there or elsewhere).³ The following Regulations place certain obligations on healthcare providers to notify the authorities of certain diseases and provide local authorities with wide powers to deal with incidents or emergencies where infection or contamination presents, or could present, a significant risk to human health:
 - a. the Health Protection (Notification) Regulations 2010;
 - b. the Health Protection (Local Authority Powers) Regulations 2010; and
 - c. the Health Protection (Part 2A Orders) Regulations 2010.
9. On 10 February, the Health Protection (Coronavirus) Regulations 2020 were laid before Parliament. These regulations supplement the health protection regime in Part 2A of the Public Health (Control of Disease) Act 1984 in the event that there exists a serious and imminent threat to public health from COVID 19.

Health Protection (Notification) Regulations 2010

10. The Health Protection (Notification) Regulations 2010 place obligations on various persons to notify specified third parties for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or

² Together with the Health Protection (Local Authority Powers) Regulations 2010 and the Health Protection (Part 2A Orders) Regulations 2010

³ PHA, section 45C

contamination. The Government, by Statutory Instrument, made COVID-19 a notifiable disease under the Health Protection (Notification) Regulations 2010 on 5 March 2020. Once a disease has become 'notifiable', this places a statutory duty on registered medical practitioners to notify the 'proper officer' at their local council or local health protection team of suspected cases of certain infectious diseases.

Health Protection (Local Authority Powers) Regulations 2010

11. The Health Protection (Local Authority Powers) Regulations 2010 provide for local authorities to exercise certain powers without judicial oversight. These powers allow local authorities to:
- a. require that a child is kept away from school;
 - b. require a headteacher to provide a list of contact details of pupils attending their school;
 - c. disinfect/decontaminate premises or articles on request;
 - d. request (but not require) individuals or groups to co-operate for health protection purposes; and
 - e. restrict contact with, or relocate, a dead body for health protection purposes.

Health Protection (Part 2A Orders) Regulations 2010

12. The Health Protection (Part 2A Orders) Regulations 2010 make provision in relation to 'Part 2A orders'. In some circumstances, a local authority must apply to a justice of the peace (JP) for a 'Part 2A order', which imposes restrictions or requirements on a person(s) or in relation to a thing(s), a body or human remains, or premises. If the JP is satisfied that the relevant criteria are met,⁴ an order can be made for the purposes of protecting against infection or contamination that presents, or could present, significant harm to human health. The criteria are:
- a. the individual is or may be infected or contaminated;
 - b. the infection or contamination is one which presents or could present significant harm to human health;
 - c. there is a risk that the individual might infect or contaminate others; and
 - d. it is necessary to make the order in order to remove or reduce that risk.⁵
13. A JP can make a Part 2A order requiring a person(s) to:
- a. submit to a medical examination (excluding treatment or vaccination⁶);
 - b. be taken to hospital or other suitable establishment;
 - c. be detained in hospital or other suitable establishment;
 - d. be kept in isolation or quarantine;
 - e. be disinfected or decontaminated;

⁴ Based on requisite evidence set out in Regulation 4 of the Health Protection (Part 2A Orders) Regulations 2010

⁵ PHA, section 45

⁶ PHA, section 45E

- f. wear protective clothing;
 - g. provide information or answer questions about their health or other circumstances;
 - h. have their health monitored and the results reported;
 - i. attend training or advice sessions on how to reduce the risk of infecting or contaminating others;
 - j. be subject to restrictions on where they go or with whom they have contact;
 - k. abstain from working or trading.
14. It is an offence to fail, without reasonable excuse, to comply with a restriction or requirement imposed by or under a Part 2A order, or wilfully obstruct anyone acting in the execution of a Part 2A order.⁷
15. These Regulations provide for various safeguards. In particular, they:
- a. set out to whom the local authority must give notice of an application for a Part 2A order;⁸
 - b. set out the evidence that must be available to a justice of the peace before the justice may be satisfied that the criteria for making an order under section 45G of the Act are met;⁹
 - c. set a maximum period for which specified Part 2A orders (and any extensions to those orders) may remain in force, which is 28 days;¹⁰
 - d. oblige the local authority to provide certain information to the person subject to the order to ensure that they understand the reasons for the order, the effect of the order, and their right to apply for variation or revocation;¹¹
 - e. oblige the local authority to have regard to the impact of the order on the welfare of the person who is the subject of the order and of any dependants that person may have where an order is for detention, isolation or quarantine;¹² and
 - f. require the local authority to report details of applications, orders and variations or revocations of orders to the Health Protection Agency for monitoring purposes.¹³
16. A person's right to liberty (under Article 5 ECHR) can only be restricted by a Part 2A order, subject to the criteria laid down in the PHA being satisfied, in order to prevent the spread of infection or contamination presenting significant harm to human health. The exercise of other powers may engage a person's qualified rights (e.g. Article 8, the right to respect

⁷ PHA, section 45O

⁸ Regulation 3

⁹ Regulation 4

¹⁰ Regulation 5

¹¹ Regulation 8

¹² Regulation 9

¹³ Regulation 10 and 11

for private and family life). These rights can be restricted in the interests of public safety, or for the protection of health, but restrictions must be proportionate.

Health Protection (Coronavirus) Regulations 2020

17. The Health Protection (Coronavirus) Regulations 2020 were laid before Parliament on 10 February. The Secretary of State considered, for reasons of urgency, it was necessary to make this instrument without a draft having been laid before, and approved by a resolution of, each House of Parliament. The Regulations entered into force immediately and would only cease to have effect if either House failed to approve them within 28 days. They were approved on 9 March. They have a sunset clause of two years, meaning they will automatically expire after that time, unless Parliament decides to extend them.
18. These Regulations impose restrictions (including detention, isolation and restricting contact, for example) on individuals where the Secretary of State or a registered public health consultant have reasonable grounds to suspect that the individual is, or may be, contaminated with the coronavirus. The regulations provide for a police constable to detain an individual and enforce those restrictions as required. They also include provision for police constables to detain individuals where they have reasonable grounds to believe an individual is, or may be, infected or contaminated with coronavirus and are posing a risk to others. The police constable is obliged to have due regard to Public Health England guidance and consult a registered public health consultant in the exercise of their powers. The Regulations also provide for the Secretary of State or a registered public health consultant to apply for a Part 2A order (as discussed above).
19. In particular, the Regulations:
 - a. enable a person to be detained for screening purposes where certain conditions are met;¹⁴
 - b. enable screening and other requirements to be imposed on a person where certain conditions are met;¹⁵
 - c. set out the screening requirements;¹⁶
 - d. enable further restrictions and requirements to be imposed on certain persons for the purpose of reducing or removing the risk of persons infecting or contaminating others;¹⁷
 - e. provide for the isolation of persons;¹⁸
 - f. enable restrictions and requirements to be imposed in relation to groups of persons;¹⁹
 - g. provides that, as well as being able to make a Part 2A order on the application of a local authority as provided for in section 45M(1) of the 1984 Act, a justice of the peace may make a Part 2A order on the application of a registered public health consultant or the Secretary of State in particular circumstances;²⁰

¹⁴ Regulation 4

¹⁵ Regulation 5

¹⁶ Regulation 6

¹⁷ Regulation 7

¹⁸ Regulation 8

¹⁹ Regulation 10

²⁰ Regulation 11

- h. provides a right of appeal;²¹
 - i. provides for a police constable to detain an individual and enforce those restrictions as required Regulation 15 provides for offences;²²
- 20. The Regulations expire at the end of two years.

The Civil Contingencies Act 2004 & Part 2 Regulations

- 21. The Civil Contingencies Act 2004 (CCA) applies in circumstances of “emergency”, defined as an event or situation which threatens serious damage to human welfare or the environment, as well as war or terrorism.²³ An event or situation does not cause serious damage to human welfare unless it causes (amongst other things) loss of human life, human illness or injury, or disruption to healthcare services. The coronavirus outbreak clearly qualifies as an emergency based on that definition.
- 22. Part 2 of the CCA confers power on the Crown to make regulations (by Order in Council, or made by a senior Minister of the Crown if there is insufficient time for an Order in Council). Regulations may be made only if:
 - a. An emergency has occurred, is occurring or is about to occur;
 - b. It is necessary and urgent to make provision for the purposes of preventing, controlling or mitigating an aspect or effect of the emergency.
- 23. If the conditions are satisfied, regulations may make any provision for the purpose of, among other things, protecting human life, health or safety, treating human illness or injury, or protecting or restoring health services. They may make provision of any kind that could be made by Act of Parliament or by Royal Prerogative (though they may not amend Part 2 of the CCA or the Human Rights Act 1998²⁴).
- 24. However, emergency regulations made under the CCA must (1) be compatible with Convention rights within the meaning of the HRA; and (2) be appropriate and proportionate to the emergency. Section 20(5) CCA requires that emergency regulations must be prefaced by a statement by the person making the regulations –
 - a. Specifying the nature of the emergency in respect of which the regulations are made.
 - b. Declaring that the person making the regulations -
 - i. Is satisfied that certain conditions are met;
 - ii. Is satisfied that the regulations contain only provision which is appropriate for the purpose of preventing, controlling or mitigating an aspect or effect of the emergency in respect of which the regulations are made;
 - iii. Is satisfied that the effect of the regulations is in due proportion to that aspect or effect of the emergency; and

²¹ Regulation 12

²² Regulation 14

²³ Section 1 and 19 CCA.

²⁴ Section 23(5) CCA.

- iv. Is satisfied that the regulations are compatible with ECHR rights (within the meaning of s. 1 HRA).

25. Provisions may include:

- a. Providing for or enabling the destruction of property, animal life or plant life.
- b. Prohibiting movement to or from a specific place.
- c. Requiring movement to or from a specific place.
- d. Prohibiting assemblies of specified kinds, at specified places or at specified times.
- e. Prohibiting travel at specified times.
- f. Conferring any function on a Minister of the Crown or any other person.
- g. Creating a summary criminal offence (of failing to comply with a provision of the regulations or with a direction or order given under them, or obstructing a person in the performance of a function under the regulations), with a penalty of no more than 3 months' imprisonment or a fine.

26. Such emergency regulations must be laid before Parliament "as soon as is reasonably practicable" and if they are not approved within seven days of laying, the regulations lapse.²⁵ Moreover, the regulations are amendable if a resolution of each House is passed to amend them. The emergency regulations lapse automatically at the end of the period of 30 days, beginning with the date on which they are made (but new regulations can be made).²⁶ Any person making emergency regulations must have regard to the importance of ensuring that Parliament, the High Court and the court of Session are able to conduct proceedings in connection with the regulations, or action taken under the regulations.²⁷ The intention is therefore to ensure that there is adequate parliamentary and judicial oversight of both the content of the regulations and of action taken under them.

27. Therefore as/when any emergency regulations are made under the CCA, the Committee may wish to consider (1) whether the emergency regulations are compatible with Convention rights within the meaning of the HRA; and (2) whether the measures are appropriate and proportionate to the emergency.

²⁵ Section 27 CCA. There are also special provisions requiring parliament to meet if it is prorogued or adjourned when the regulations are laid.

²⁶ Section 26 CCA.

²⁷ Section 22(5) CCA.