



The Law
Society



Law under lockdown

The impact of COVID-19 measures on access
to justice and vulnerable people

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About the Law Society

The Law Society is the independent professional body for solicitors in England and Wales, representing the interests of over 200,000 registered legal practitioners. We are run by and for our members. Our role is to be the voice of solicitors, to drive excellence in the profession and to safeguard the rule of law.

On behalf of the profession, we influence the legislative and regulatory environment in the public interest. At home we promote the profession and the vital role legal services play in our economy. Around the world we promote England and Wales as a global legal centre, open new markets for our members and defend human rights.

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Executive summary

The COVID-19 pandemic has presented a unique and unprecedented challenge which has had profound effects on our way of life in the UK. Policy decisions have had to be made quickly to respond to a rapidly changing emergency situation and to protect public health and lives. These decisions have necessarily been subject to less scrutiny than would otherwise be expected.

Law and policies brought in as a response to COVID-19 have affected all of us, but the implications for those living in vulnerable situations have been particularly severe and have often not received as much forethought as they should. This includes those living in institutionalised settings (such as prisons, immigration detention or care settings), and those who have particular needs that the Government has a duty to meet (including disabled people, children and victims of domestic abuse).

Solicitors have a role in supporting people in difficult circumstances and so have been on the frontline, witnessing and responding to the impacts that have emerged. It is essential that access to justice and legal advice are maintained during times of exceptional legal measures to ensure protection for those most at risk.

In examining these impacts, this report discusses three themes:

1. Access to justice through courts and tribunals

It is essential that those at risk are able to access the court in order to seek protection and assert their rights, especially during difficult times. Theme 1 looks at the extent to which access to justice through courts and tribunals has been maintained during this time. Courts have had to adapt rapidly to social distancing measures and, with many court buildings closed to the public, a large number of hearings have been put on hold or held through technological means. The justice system has responded swiftly through the use of remote hearings, proving the agility of the court system and wider legal profession, as well as their commitment to seeing justice done in challenging circumstances. However, there are profound misgivings about whether the use of telephone and video in court hearings allows justice to be done for certain vulnerable people. Meanwhile, the postponement of cases has resulted in escalating delays and backlogs of cases, meaning people aren't getting the timely help they need from courts and increasing pressure on a justice system already under severe strain.

2. Access to legal advice and representation

Theme 2 looks at the impact on access to legal advice and representation for those living in institutionalised settings such as mental health units, immigration detention centres, youth offender institutions and prisons. With physical visits to these settings prevented by social distancing rules, it has been necessary

for meetings with legal professionals to take place remotely. While great efforts have been made to supply the required technology, this has not been able to keep up with demand, hindering the ability to access timely legal advice for the adults and children living within these settings. This has happened at the same time as other means of external scrutiny of conditions within these settings, such as inspections, have declined. Contact with a solicitor provides a source of support and an important check on the treatment of people who are otherwise closed off from the outside world. Meanwhile, the measures introduced to tackle the pandemic have also created conditions in which legal advice is both increasingly needed and more difficult to obtain for those living in other vulnerable situations. The full lockdown measures made it even more difficult for victims of domestic abuse to get time away from their abuser, leaving many trapped in increasingly dangerous situations. It is essential to increase the accessibility of legal advice for victims of domestic abuse to ensure their safety, and the safety of their children.

3. Access to services and safeguards

Theme 3 analyses changes to the ways in which state authorities discharge their duties to provide public services to both adults and children, particularly within health and social care. State obligations to provide some services were changed during this time to allow resources to be diverted to tackling the pandemic and ultimately protect public health. However, this has caused considerable concern that people who are reliant on the state to meet their needs and protect them are not receiving the support and services they need with implications for their fundamental rights. While the intent behind these measures when the Coronavirus Act 2020 was passed may have justified them, the manner of their implementation has caused concern. These powers were only ever intended to be temporary and used when strictly necessary. As lockdown measures are gradually eased the necessity of these powers should be reviewed as part of the six-month review of the Coronavirus Act.

Summary of recommendations

Throughout this report we make practical recommendations for addressing the immediate and long-term impacts of the COVID-19 measures on vulnerable groups and the rule of law. We highlight what steps need to be taken so that future responses to emergency situations are better designed to ensure that those who need it most are protected and able to access justice. Across these recommendations, there are three priority areas for action:

1. Adapting or removing measures to reflect the current situation:

The current situation is different to what it was when the Coronavirus Act 2020 was passed and we now know more about the effectiveness of the measures implemented at the beginning of the lockdown period. Some of the powers granted in the Act either haven't been utilised or were only used to a limited extent. It should therefore be considered whether these are still needed. Some of the measures have had unintended but nevertheless disproportionate impacts on often vulnerable groups, causing hardship for the people affected by them. It is important that these measures are now considered for amendment in the Government's six-month review to reflect the current situation, alleviate adverse impacts and protect the rule of law.

2. Protecting access to justice and legal advice for those most at risk:

When exceptional measures, affecting the most intimate areas of people's lives, are introduced, it is essential to maintain access to justice to allow their implementation to be scrutinised and ensure protection for individual rights. For those who are especially vulnerable – whether because they are living in an institutionalised setting, reliant on forms of state support or otherwise living in precarious circumstances – this is even more vital. People affected by a change

in the way in which public functions are delivered must be able to challenge this to ensure it is done proportionately, according to due process and with respect for their fundamental rights. For those most at risk, such as victims of domestic abuse or those deprived of their liberty in health and care settings, ensuring their safety will require non-means tested legal aid so that they can access legal advice. It is essential that the courts continue functioning so that the wheels of justice can keep turning and the protection of the court remains available to those that need it most. Particular attention must be paid to the rights of vulnerable people who struggle to participate in new remote forms of justice.

3. Improving information, data collection and evaluation:

Responding to a rapidly changing emergency situation is uniquely challenging, not only for the national government making policy decisions, but also for those bodies implementing them. Government departments should identify where further information or guidance is needed to support those responsible for providing services to people living in vulnerable situations and commit to producing and disseminating any such information. There are significant gaps in the collection of data and monitoring of the impacts of COVID-19 measures on the people solicitors work with. Government should commit to significantly improving data collection and monitoring to ensure effective scrutiny of the immediate situation. Resources should be allocated to the analysis of the data collected. Service providers should also be agile in responding to findings in real time. Further in-depth evaluation of this information must be conducted as soon as possible, as this is essential to ensuring that lessons are learned from this period and implemented when shaping future responses to emergencies.

Introduction

The COVID-19 pandemic has affected the lives of everyone in the UK. It has also significantly altered the way in which decisions are made at all levels of government. Policy makers have been faced with the task of responding quickly to a rapidly changing situation, making difficult decisions in order to protect our health and lives and prevent the virus from spreading further.

Making policy decisions in this context necessitates a more flexible approach than is usually taken. The Coronavirus Act 2020 was subject to a fast-tracked procedure through Parliament and was passed in just five sitting days. The consultation procedure and detailed scrutiny that legislation normally undergoes did not take place, yet the Act brought in emergency measures of the sort that have not been seen in the UK since World War II. Many of those civil society organisations which would have provided insight from the perspective of their beneficiaries were not given the time to do so and were, at the time, understandably preoccupied by the immediate implications of the virus for their organisations and the people they support. Much was left to the discretion of ministers, with sweeping powers granted in the Act for them to make subsequent changes through secondary legislation. While the nature of an emergency situation requires expedited decision-making, all of this meant that the likely impact of the measures on the most vulnerable in society received less scrutiny than is ideal, at a time when it is arguably needed most.

As with any rushed decision-making, things can go wrong. Unintended consequences are to some extent inevitable and these have been steadily emerging throughout the pandemic since the introduction of lockdown measures on 23 March 2020. Many of these consequences are serious and have gravely impacted the wellbeing, safety and fundamental rights of large numbers of people. For these reasons, it is essential that access to legal advice and justice is maintained during emergency situations to enable those most at risk to challenge these effects and enforce their rights.

Frequent review of any emergency measures is essential to rectify problems which emerge after implementation and to ensure the measures themselves continue to be needed. Emergency measures must be temporary and are justified only if the threat remains sufficiently serious and if they interfere with rights only to the extent that is strictly necessary. It is therefore extremely welcome that the UK Government will shortly be conducting their six-month review of the Coronavirus Act, which presents a vital opportunity to do just that.

We also need to ask what can be taken away from this experience. While the situation may have been unprecedented during the first wave of the pandemic, with the threat of further waves and the possibility of similar pandemics in future, it is essential that lessons are now learned and reflected in the response to any future emergencies.

This report examines how the measures introduced in response to COVID-19 have impacted vulnerable people that solicitors support. It analyses how their rights and the duties owed to them have been affected by changes in the way government and state

authorities have discharged their responsibilities and provided services during the pandemic period from 23 March 2020. In doing so it focuses on the extent to which access to justice and legal advice has been maintained for these people to ensure their ability to challenge their situation in the face of extraordinary emergency measures.

It considers three themes:

- 1. Access to justice through courts and tribunals**
- 2. Access to legal advice and representation**
- 3. Access to services and safeguards**

We make detailed recommendations throughout this report for both improving the immediate situation and ensuring lessons from this period are learned and taken forward to shape future responses to emergency situations. Across these recommendations three further themes emerged as priority areas for action:

- 1. Adapting or removing measures that are no longer proportionate**
- 2. Protecting access to justice and legal advice for those most at risk**
- 3. Improving information, data collection and evaluation**

About this report

Our analysis has been informed by desk research, parliamentary questions, Freedom of Information requests, correspondence and discussions with Government and civil service officials, input from the Law Society's expert committees and a focused survey of solicitors.

The survey was conducted between 23 July and 12 August and received 143 responses. Respondents were asked only to answer questions relating to their practice areas and so not all respondents answered every question. Where the number of responses were low this is highlighted. The results are not intended to be taken as representative of the experiences or opinions of all solicitors.

Throughout the report the term 'vulnerable' is used. This may mean that an individual or group possesses a characteristic that may increase their vulnerability (such as age or lack of mental capacity), or could be considered vulnerable due to their circumstances (for example, living in an institutionalised setting, at risk of domestic abuse or having insecure legal status). Inevitably, the precise meaning of this term will depend upon the context.

Research and drafting were conducted from June up to and including August 2020. All information is correct at the time of writing although, given the rapidly changing situation, some information may be outdated by the time of publication.

Theme 1: Access to justice through courts and tribunals

It is always important that people should be able to access the courts to assert their rights. In the context of a national crisis, in which emergency measures affecting the fundamental rights of many people have been introduced at speed, it is even more important. Yet lockdown and social distancing requirements affected the extent to which people have been able to seek justice through the courts.

Following the outbreak of COVID-19, courts had to quickly adapt to respond to social distancing requirements. The vast majority of physical, face-to-face hearings were stopped¹ and replaced with remote hearings via telephone or video. Many hearings were put on hold, although exact numbers are unknown.

Her Majesty's Court and Tribunal Service's (HMCTS) court reform programme has been increasing the use of remote hearings since 2016; however, adapting to their use at speed on a much wider and unforeseen scale has been a challenge. The number of cases being heard remotely more than tripled from fewer than 1,000 in the first week of March 2020, to over 3,000 per week in mid-April.²

The speed of response has proven the agility of judges, court staff and the wider legal profession, as well as their commitment to maintaining access to justice. However, there have been some negative implications for access to justice during the pandemic. Delays and backlogs of cases have risen steeply, increasing

concerns for a system already under immense pressure and with consequential impacts for those awaiting legal resolutions to fundamental matters affecting their liberty, health and housing.

Significant questions remain regarding the suitability of remote hearings for certain cases and people, especially those who are vulnerable. While the measures implemented have been necessary, they must not become the new norm without steps being taken properly to evaluate the place of remote hearings in the justice system.

1. Delays

Prior to the pandemic, the justice system was already facing an overwhelming number of cases waiting to proceed. Years of financial cuts and court closures have created an escalating backlog of cases which has only worsened during the months since lockdown. HMCTS data shows that during the pandemic outstanding cases in criminal courts rose from 446,460 to 568,678 at the end of July (an increase of 27%), while those in family courts rose from 54,600 to 65,429 (a 20% increase).³

A recent Law Society survey, conducted to inform this report, revealed that 81% of solicitors responding had experienced significant further delays in cases proceeding to court as a direct result of the COVID-19 pandemic. 76% reported this delay had a significant impact on the rights and wellbeing of their clients.

A common theme amongst responses was the emotional impact of delays on clients, with increased levels of stress and anxiety noted:

“ The stress caused to defendants awaiting trial and sentence is immense – the lack of knowing what the future holds for them has caused increased levels of anxiety and in some cases mental health issues.

(Survey respondent, criminal law solicitor)

This was echoed by solicitors from a variety of practice areas. Solicitors working in family and children cases reported that delays prolonged and increased strain on familial relationships and exposed those involved, especially children, to continued risks to their safety.

“ People going through divorce and children matters do not want to wait for over a year to conclude matters [...] it has been very difficult getting responses from most family courts. This has caused great distress to the clients.

(Survey respondent, family and children law solicitor)

“ Children exposed to continued risks due to delay in issuing proceedings. Impact of delay meant removal test weakened thus leaving children at further risk.

(Survey respondent, children law solicitor)

In immigration, the blanket postponing of all appeals without any indication of when they would be relisted left many, including vulnerable asylum seekers, in a state of limbo, waiting to learn whether they would be able to remain in the UK in safety or would be deported to the place they had fled once the crisis is over. Across the board it is clear that uncertainty caused by delays causes the people involved in cases, which are often making decisions about the most important aspects of their life, considerable emotional distress.

This can affect the rights to liberty of those in custody and who are imprisoned. This is explored below.



Spotlight on: Access to justice for those on remand

As at 30 June 2020, 11,388 prisoners were on remand – some 11% of the population.⁴ In the initial lockdown period from 23 March criminal courts were not hearing any trials until the first jury trials recommenced in the week of 18 May 2020. Jury trials have only very gradually restarted, so that as of 25 August only 66 Crown courts (out of 77) were conducting these.⁵

Magistrates' courts have also gradually resumed trials, commencing in late April. However, these are still significantly fewer than prior to the pandemic. Justice Minister Chris Philp told the Justice Committee that in the week of 4 May, 197 magistrates' court trials had been listed, in comparison to approximately 800 per week pre-COVID-19.⁶

At the outset of the pandemic the Senior Presiding Judge, HMCTS and the Crown Prosecution Service (CPS) published a Crisis Protocol⁷ allowing the extensions of custody time limits (CTL) with guidance to the courts to the effect that the pandemic is a valid reason to extend these. Usually the limits are 56 days in the magistrates' court and 182 days in Crown Court. Most recently, temporary legislation was announced to extend CTLs by two months.⁸

While it is welcome that CTL cases are being prioritised by the courts now that trials are resuming, the backlog of cases in both the magistrates' and Crown Court jurisdictions will inevitably mean that periods of remand for

those that haven't been to trial will be longer, and that many prisoners eligible for parole will serve longer sentences than they should.

“ Crown Court clients in custody awaiting trials are waiting for extended times for their cases to be heard. Custody time limits are being extended willy nilly meaning potentially innocent people are being locked up, in some cases, for longer than any anticipated sentence even if they are found guilty.

(Survey respondent, criminal law solicitor)

The right to a fair trial, contained in Article 6 of the European Convention of Human Rights (ECHR) and Human Rights Act, entitles everyone to have their case heard “within a reasonable time”. This is mirrored in Article 5, the right to liberty, which ensures the right to a swift trial for those who are detained under criminal law powers or released pending trial. What is considered reasonable depends on the facts of the case, but excessive delays raise concerns regarding these obligations. Where a person is held in custody for a significant time, without trial, these concerns are even more pertinent and

the threat to their fundamental rights must be considered as a matter of urgency. There is currently no information available as to the numbers subject to extended CTLs, with a parliamentary question submitted on the issue being rejected due to disproportionate cost.⁹

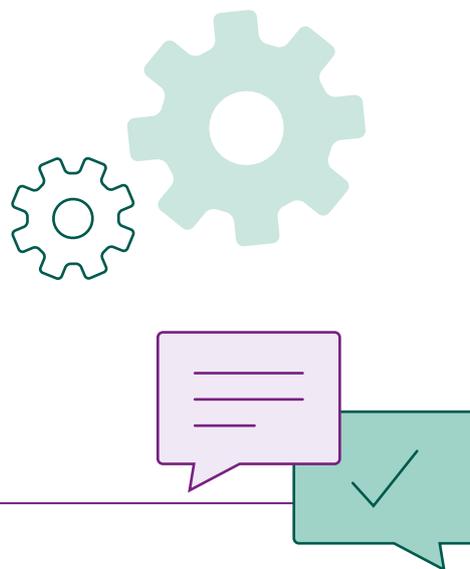
This issue is especially acute where children and young people are in custody. As of March 2020, there were 738 children in the youth secure estate, with more than one third (274) held on remand.¹⁰

“ The delay in listing cases has caused my 14-year-old defendant’s trial to be moved from June 20 to February 2021. He is currently detained in a secure detention centre and he will have been held on remand for over 14 months of his life by the time his trial has concluded [...] This is likely to cause him all manner of issues for his social and personal development. If he is found not guilty then he will have served what would be a 2.5 year prison sentence without actually having committed a crime and that is totally unacceptable.

(Survey respondent, criminal law solicitor)

In its report on the impact of COVID-19 on prisons, the Justice Committee noted the particular vulnerability of children in custody given their often complex requirements, including mental health and special educational needs, the impact of being separated from their families and support networks, and increased susceptibility to the adverse conditions caused by COVID-19 restrictions.¹¹ A higher duty of care is owed to children and young people in custody under human rights laws given the risks to their development and impact of detention on their future life chances. This is, therefore, an issue that urgently needs to be addressed.

Steps are being taken to address the backlogs in the justice system through the opening of 10 additional Nightingale courts. All of these are now operative¹² and a further eight were announced on 6 September.¹³ Yet, while social distancing measures are still in place, decisions on whether to proceed with a remote hearing or postpone until a physical one can take place will still have to be made throughout the justice system. It is a decision that requires careful balancing. On the one hand, delay risks frustrating an individual's right to a timely conclusion of their case and causing distress, anxiety and concern for fundamental rights. On the other, the use of remote means will not always be suitable for every case and every client.



Recommendations

- The UK Government must continue to make sufficient resources available as a matter of urgency to the courts, judiciary and legal professions to tackle the backlog of cases across all jurisdictions.
- The Ministry of Justice (MoJ) should move forward with its early advice pilot and improve access to legal aid to ensure hearings are more efficient and that parties are aware of alternative means of dispute resolution.

2. Remote hearings and vulnerable people

It is important that those involved in court hearings should understand the proceedings, be in a position to instruct their solicitor and feel that they have a proper opportunity to put their case forward.

The Coronavirus Act 2020 permitted the expanded use of video and audio hearings for all types of hearings and in all jurisdictions in the UK.¹⁴ It is broadly accepted that remote hearings can work well and improve efficiency for straightforward cases and for hearings involving only judges and advocates, such as case management hearings. However, there are deep concerns regarding their suitability for more complex cases and for those involving vulnerable people.

In our survey, a mere 16% of solicitors indicated that vulnerable clients were able to effectively participate in remote hearings. Where clients had no particular marker of vulnerability, 45% of solicitors indicated they were able to participate effectively. Both numbers are far below what should be expected and therefore cause for concern, but the difference highlights that there are additional challenges for vulnerable people when engaging in remote hearings.

Remote hearings are held using either telephones or interactive video-calling technology (via the Cloud Video Platform or other services such as Microsoft Teams or Zoom) rather than people attending a court in person. The judge, advocates, people involved in the case and witnesses are therefore all on a screen, or on the phone. Solicitors report that people who do not communicate regularly in this way find it disconcerting and struggle to follow what is happening in an already unfamiliar legal process and find it difficult to adequately present their case. Body language and signs of distress can't be picked up on as easily.

Communication between a solicitor and their client is also negatively affected in a way that means the solicitor is unable to fully support their client through the process. Solicitors we surveyed reported difficulty in ensuring that the person they are representing understands the proceedings and in offering reassurance throughout a remote hearing, particularly where clients were vulnerable:

“Clients describe difficulties adjusting to what is invariably described as an artificial, impersonal hearing. The main drawback appears to be the absence of the physical presence of their legal representative resulting in lack of reassurance, inability to pick up on distress, seek brief adjournments to explain matters arising, etc.

(Survey respondent, mental health law solicitor)

“ It is very difficult to ascertain whether a defendant speaking a foreign language is able to follow proceedings, especially where the interpreter is also working remotely (and remote from the defendant). Defendants with learning difficulties or mental health issues will occasionally decide to address the court directly, often to their disadvantage, and it is impossible to stop them without shouting them down. I have encountered District Judges engaging my clients directly, notwithstanding that I am present (remotely).

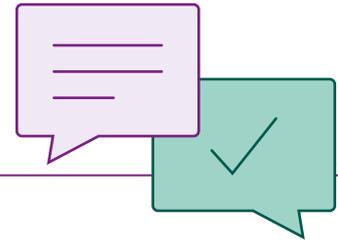
(Survey respondent, criminal law solicitor)

These responses demonstrate the benefit vulnerable people, in particular, receive from the physical presence of a legal representative, to ensure both their effective participation and comfort throughout the hearing. The role of a solicitor in a hearing goes beyond addressing the court and involves maintaining engagement with the person they are representing, explaining the proceedings and points of law, and protecting their interests by managing their conduct and supporting their wellbeing. Where a person has mental health issues, learning disabilities, language barriers, is a child, or has other factors affecting their ability to understand proceedings, this role becomes vital to ensure they are able to participate in the same way that a person without these characteristics would.

The use of interpreters has been reported by solicitors as a specific concern. Suitable interpreter services are scarce and there are practical difficulties in deploying them in remote hearings, as well as taking instructions before and during the hearings. This is even more of an issue for those who are hearing impaired and need British Sign Language interpreters, as their effective use is dependent on having a reliable, high quality video connection. Without the ability to effectively incorporate interpreters into proceedings, it is impossible for those who face language barriers to participate.

The Government's equality impact assessment of the Coronavirus Act acknowledged the difficulties vulnerable people may experience with remote hearings. It flagged that those with a disability, children and the elderly may struggle to adapt to this use of technology. It suggested that this risk would be mitigated through reasonable adjustments and the discretion of the courts to decide whether it is appropriate and in the interests of justice to continue remotely.¹⁵

However, the ability of the courts to undertake this assessment might itself be undermined by remote hearings. Research from the Equality and Human Rights Commission found that video hearings reduce opportunities to identify cognitive impairment, mental health or neuro-diverse conditions, and recommended that greater consideration should be given to identifying people for whom video hearings would be unsuitable.¹⁶ However, there has been no comprehensive evaluation of the impact of remote hearings on those with particular protected characteristics and the resulting impact on access to justice. In light of the pandemic and the expanded use of remote forms of justice, this is now urgently needed if the most vulnerable are not to be denied the same standard of justice as others.



Recommendations

- HMCTS should publish a framework of factors to be taken into consideration when deciding which hearings can proceed remotely and publish an equality impact assessment of this.
- Hearings involving vulnerable parties should be considered for postponement, with decisions to be made on a case-by-case basis, weighing the importance and urgency of the issue against the suitability of proceeding remotely and taking into account the nature of the hearing and the vulnerability of the parties.
- Where an interpreter is required, including sign language interpreters, there should be a higher presumption that the hearing should be postponed until a physical one can be held, unless it can be shown that it is in the interests of justice for these hearings to proceed remotely.
- Where cases are postponed for these reasons, they should be considered for priority listing when physical hearings are fully resumed.
- HMCTS should collect and publish comprehensive data which enables the impact of remote hearings to be monitored, which includes disaggregation by protected characteristics and other vulnerability factors.
- HMCTS should conduct a subsequent comprehensive evaluation of this data on the impact of remote hearings on access to justice, with specific emphasis on protected characteristics and other vulnerability factors.





Spotlight on: Access to justice in mental health settings

People with mental health needs are among those that can struggle to participate in remote hearings.¹⁷ Tribunals and courts dealing with mental health cases have also faced challenges in adapting to this. Here, we take a look at two settings.

Mental Health Tribunal (England) and Mental Health Review Tribunal (Wales)

During the pandemic, hearings for those detained under the Mental Health Act 1983 have taken place remotely. These cases decide, for example, whether someone who has been sectioned should be discharged, and are decided by a panel made up of three people: a judge, a mental health expert and a professional with relevant experience. In England, these cases have continued to be heard via video and telephone with smaller panels. In Wales, hearings have been undertaken by telephone only due to uneven and inadequate internet coverage in the region, but with mainly full panels.

Hearings of this kind require assessment of a patient's physical and mental state, which is very difficult when not face-to-face. Connection disruptions, distractions, the inability to assess body language, and the stress of an unfamiliar and impersonal process all present challenges to ensuring a fair and accurate assessment. In our survey, one solicitor reported that "clients with severe dementia [...] are not able to understand there is a real person talking to them, albeit on a screen, and will simply walk off". Clients may also be unable to understand

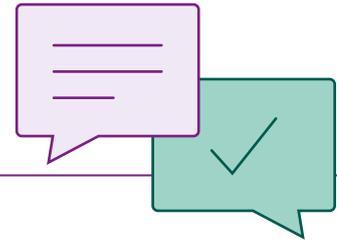
the procedures involved due to their specific health conditions and become agitated as a result, impacting their right to a fair and objective assessment.

Conversely, some respondents noted some benefit in clients being able to participate from a safe place. This highlights the importance of assessing the circumstances of an individual case when deciding whether the interests of justice can be served via a remote hearing. In all cases, video hearings were said to be preferable to telephone to prevent the client feeling "isolated, disconnected and excluded".

Court of Protection

Court of Protection hearings make decisions about financial and welfare matters for those who lack mental capacity. Conducting hearings remotely in this setting has taken concerted effort and dedication, given that the central court was entirely paper based prior to the pandemic and did not have the necessary technology in place. Many hearings have therefore taken place by telephone.

The Court of Protection was removed from the HMCTS court reform programme due to costs, prior to the pandemic. However, the experience of the pandemic has made clear that it is in need of modernisation, as it was significantly less prepared for the shift to remote hearings. This has called into question the decision to remove the Court of Protection from the reform programme.



Recommendations

- The decision to remove the Court of Protection from the HMCTS Reform programme should be reviewed in consultation with expert practitioners.
- The UK and Welsh Governments should take steps to support the Mental Health Tribunal and Mental Health Review Tribunal in Wales to conduct hearings with three member panels, by video, wherever possible.



Spotlight on: Access to justice in immigration detention

During the lockdown period, asylum applications and appeals, as well as visa processing, were suspended, leaving many in limbo and creating a lot of confusion. The process of reopening immigration tribunals has now begun; however, solicitors have reported being unclear as to how this is proceeding and as to the status of cases awaiting hearings.

Some substantive hearings have proceeded via remote means throughout the pandemic, such as judicial reviews, but delays have been reported. Solicitors have also reported a lack of availability of interpreters for these cases, resulting in adjournments.

Those involved in immigration cases are often extremely vulnerable. They also frequently need interpreters and are required to give evidence where an assessment of their credibility is vital to their case. Due to the difficulties presented by these circumstances, very careful consideration needs to be given to the interests of the person concerned, their ability to participate effectively and the impact on the fairness of the hearing when deciding whether to hold it remotely. In a number of immigration cases, especially those concerning serious matters such as deportation or asylum appeals, a remote hearing will not be appropriate.

3. Remote hearings – impact on due process

Maintaining confidential contact with a client before, after and throughout a hearing is crucial to ensuring that the person's wishes are understood, and their interests are represented fully. In our survey, solicitors commonly cited the inability to take instructions from clients as a challenge.

“ There is often no provision to have a conference with the client before and after the hearing which causes them to not understand what is happening. It is also very difficult to obtain updated instructions from them because contact with them is limited and often not confidential. In some circumstances I have been told that the conference can go ahead on the same video link however this is often recorded.

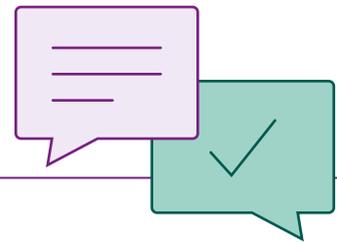
(Survey respondent, criminal law solicitor)

Some solicitors have responded to this problem by having another form of technological communication with the client at the same time – but this is reliant on clients having the technology and capability necessary for this. Others have suggested establishing a hearing etiquette, allowing frequent breaks for solicitors to take instructions and clarify points for clients. While this can extend the length and interrupt the flow of proceedings, it offers a possible practical solution to replicating interactions in physical courts.¹⁸

Solicitors have also raised concerns about cases where lay witnesses are required to give evidence or be cross-examined, or where one party is representing themselves – particularly where these people are considered vulnerable or the issue is sensitive. Giving evidence can be distressing for parties and witnesses, and solicitors are finding that where this is conducted remotely and technical difficulties arise, emotions and stress are magnified. We have had overwhelming feedback from solicitors that those representing themselves are finding it even harder than usual to understand court processes and participate in remote hearings. They have even less help than they would have in physical courts where they may have access to support services or where judges may be able to pick up on whether they are struggling. This is not possible in remote hearings.

The use of remote hearings in criminal matters has its own specific set of concerns, which are compounded where the defendant is considered vulnerable. The shift to remote hearings may affect several aspects of the right to a fair trial. A survey of the criminal justice system in England and Wales during the pandemic, conducted between March and May 2020, found that remote hearings are having an adverse effect on defendants' rights to access effective legal assistance, to participate effectively at their own hearings, and to review and challenge information and evidence being presented.¹⁹ Research from the University of Surrey, conducted prior to the pandemic, found that defendants are more likely to be jailed in video hearings and that suspects whose cases were dealt with remotely were less likely to have legal representation.²⁰ This could mean that there are defendants being unfairly convicted or given harsher sentences as a result of having to undertake their trial remotely. Criminal trials involve questions of fundamental rights, where the outcome can result in the accused being deprived of their liberty. It is therefore of paramount concern that the effects on due process in criminal matters are given serious thought when considering or using remote means.

Much is still unknown about the impact of using audio and video technology to conduct legal hearings, and opinions on the matter differ. While some respondents to our survey acknowledged the benefits of remote hearings, the majority were firm in stating that they do not feel they are appropriate for all types of case and all clients. What is clear is that further evaluation is needed, and caution should be exercised when considering the use of remote hearings during the pandemic period and before any decision is taken to extend their use beyond this.



Recommendations

- Case management hearings or other advocates' meetings should explicitly consider the suitability of the case for remote hearing.
- Hearings involving litigants in person, and where lay witnesses are to give evidence, should be considered for postponement.
- The use of remote hearings in cases involving litigants in person and lay witnesses should be evaluated with an emphasis on their ability to participate in the hearing, and on the quality of the evidence.



4. Access to justice in housing

At the beginning of the COVID-19 pandemic, measures were put in place to keep tenants in their homes during the crisis. The Coronavirus Act extended eviction notice periods to three months²¹ and eviction hearings were suspended.²² While these have been effective in achieving their immediate aim there is now a high number of tenants in considerable rent arrears and an already large backlog of cases waiting to be heard in the County Courts. At the time of writing, the stay on evictions is due to end on 20 September 2020. This will likely see a sharp rise in the number of possession proceedings resulting in large numbers of people facing homelessness. It is therefore vital that the court system is able to accommodate these cases and offer a sufficient degree of protection to those involved in them, when the stay on proceedings is lifted.

Systemic issues within the housing court system are at the root of many of the issues now facing landlords and tenants trying to access justice. These have been brought to the surface by the pandemic and now urgently need addressing.

Proceedings process

Possession proceedings decide whether a tenant or mortgage borrower is required to give up possession of a property. In response to the pandemic and the possibility of an increase in possession proceedings, the Master of the Rolls examined the way in which these hearings work. A new two-stage structure for possession proceedings was proposed, consisting of a review day and a substantive hearing three weeks later. The two-stage model would provide the parties with more opportunity to seek legal advice and representation, greatly increasing the chances of a fair outcome. Judges would also be able to adjourn a hearing without an application from the parties where no legal advice has been sought and/or where the consequences of eviction for the tenant, in light of the pandemic, would be serious. There is significant

value in these proposals but, to ensure they are effective, longer term issues relating to housing such as continuing legal aid deserts and mandatory evictions (discussed below) also need to be addressed.

Legal aid deserts and sustainability of housing legal aid

Housing Possession Court Duty Schemes (HPCDS) offer free legal advice on the day of a possession hearing to everyone, regardless of their financial means. Receiving no legal advice before these legal proceedings puts tenants at a significant, unfair disadvantage making this scheme an invaluable service.

However, the unfavourable terms of the HPCDS contracts, combined with the reduced listing of cases, make the scheme financially unviable for providers. The majority of providers, many of whom are not-for-profit organisations, operate the scheme at a loss, which has made it impossible for some providers to continue offering this service. Courts in Shropshire and Cornwall currently have no HPCDS provision.

Given the likely increase in possessions proceedings as a result of the pandemic, access to legal advice in relation to housing is more important than ever. Urgent changes to the HPCDS contracts, such as allowing claims for travel costs and an increase in fees, are necessary to ensure that legal advice is available in all areas.

Pre-action protocol for the private rented sector

Since the beginning of the crisis, the Ministry of Housing, Communities and Local Government has committed to considering a pre-action protocol for the private rented sector. This would commit landlords to following certain steps before starting possession proceedings and ensure that court litigation is a last resort. Any such protocol could mirror the one currently in place for social housing, with additional steps specific to private

renting. This would reduce the already significant burden on courts and help to keep tenants in their homes where appropriate, ultimately mitigating the risk of a spike in homelessness as a specific result of the pandemic.

However, mandatory evictions will continue to be an exception to the requirements of the protocol and therefore significantly hinder its impact.



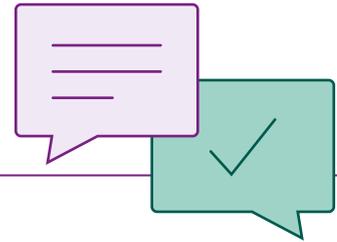
Spotlight on: Mandatory evictions

Mandatory evictions under section 21 of the Housing Act 1988 require no fault on the behalf of the tenant. They provide an accelerated means of obtaining a possession order – with judges only reviewing the procedural requirements of the application – and are therefore used by landlords as a speedy way of evicting a tenant. The same reduction in judicial oversight also applies to ground 8 evictions, which simply require arrears of two months' rent or more and a following of processes to be granted.

Given the limited ability of judges to intervene in these applications, the new housing court mechanisms put together in response to the pandemic will have little, even no, impact

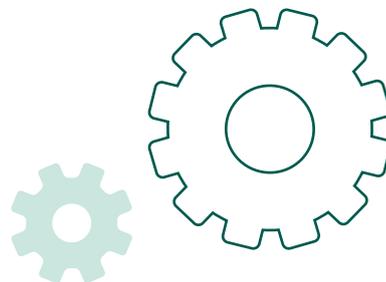
on these cases and will not protect tenants with Assured Shorthold Tenancies, which is a significant portion of the private rented sector. Legal advice will make little difference to the outcome, and neither will the review hearing and substantive hearing model as, by the nature of these eviction processes, landlords are going to be very unlikely to negotiate with tenants.

In order to ensure that the measures brought in to address the impact of the pandemic on housing have the desired impact, the UK Government should consider bringing forward temporary measures providing for some judicial discretion in some evictions that would otherwise be mandatory.



Recommendations

- The two-stage hearings process for possessions proceedings proposed by the Master of the Rolls should be implemented.
- The contracts and terms for HPCDSs should be reviewed to ensure financial viability for providers.
- The UK Government should consider bringing forward temporary measures allowing for judicial discretion in section 21 and ground 8 evictions, limited to the consideration of criteria related to the pandemic and resulting economic position of the tenant.
- Immediate or temporary measures should be followed by longer term solutions, including:
 - Consultation on establishing a pre-action protocol for the private rented sector, to ensure that landlords are applying for possession orders only as a last resort
 - Legislation providing for elements of judicial discretion in mandatory evictions, so that a pre-action protocol would also apply to these going forward
 - Revisiting the Renters' Reform Bill and publish the UK Government's response to the 'no fault evictions' consultation, conducted in October 2019.



Theme 2: Access to legal advice and representation

Beyond the court system, social distancing measures have changed the way in which people are able to access legal advice. During the lockdown period, meetings with legal representatives were predominantly by telephone or video conferencing and the majority continue to be so. For those who are living in institutionalised settings, such as prisons, immigration detention centres, mental health units or care settings, this is particularly important. People in these settings are reliant on those detaining or caring for them to facilitate access to legal representatives and during lockdown this depended on the supply of and access to technology.

Many of these settings were ill-prepared for the sudden increased demand for telephone and video conferencing services. Most did not have adequate provision to meet the demand, creating a barrier to accessing legal advice for those living within them. The time taken to expand provision has left many without advice and often impacted on the progression of their legal matters. Furthermore, with physical visits prevented and inspections either paused or replaced with shorter, often remote, inspections there is concern that the inability to access

lawyers has removed an essential element of external scrutiny of conditions in institutions at a time where these have become markedly more adverse.

Outside of these settings, those who have been disproportionately impacted by some of the Government's measures have also struggled to access much-needed legal advice. With the lockdown measures having intensified a domestic abuse crisis, additional support is urgently needed to ensure the safety of the (mainly) women and children living in dangerous situations.

1. Prisons and the secure estate for children

The impact of the COVID-19 pandemic on the ability of adults and children detained in custody to access justice has been severe.

Her Majesty's Prison and Probation Service (HMPPS) and the MoJ have an overriding duty to protect life and do their utmost to ensure that a catastrophic outbreak of COVID-19 in its institutions is prevented. The fact that such a disastrous outcome has been averted and there have been relatively few deaths among inmates and staff is to be commended.²³ This has been achieved by a strategy of 'compartmentalisation', developed by HMPPS in conjunction with Public Health England, to isolate the sick, shield the vulnerable and cohort symptomatic new arrivals,²⁴ as well as measures to reduce the prison population during this time.²⁵ One aspect of this approach has been to stop all prison visits from both family and legal representatives.

For most of the relevant period, legal professionals have not been able visit their clients in prison, whether to take instructions from those on remand about their ongoing criminal cases, from prisoners nearing the end of their sentences and appearing before the Parole Board, or to assist prisoners with legal matters unrelated to their criminal proceedings. A small number of prisons have begun legal visits as the lockdown restrictions eased.

Prison inspections were similarly suspended early in the pandemic and replaced with Short Scrutiny Visits in April. While these take place physically, it is with a reduced number of inspectors attending, over a single day and focusing only on a small number of issues. While this could be considered a measured response to the challenges at the time, the reduction in this form of scrutiny heightens the need to maintain other forms as far as possible, such as contact with and advice from solicitors, to ensure the safety and wellbeing of prisoners.

HMPPS has sought to enable prisoners' communication with their family and professionals, via in-cell telephones and additional video facilities. The Justice Committee was told that in-cell telephones are available in 60% of prison cells, with shared phones available for those that do not have access, and 900 locked mobile phones were introduced.²⁶ However, the telephone is a poor substitute for face-to-face legal communication and will only allow for a confidential conversation if the prisoner is in a single occupancy cell.

The Prison Service and HMCTS have rapidly had to set up facilities to allow legal consultations by the Cloud Video Platform Video Meeting Room (CVP VMR) service, which enables solicitors to join video calls with prisoners in prisons. However, the slots available are very limited. Cases are triaged according to court priority, with slots only made available for the consultations that are necessary to progress these priority cases.

Our survey revealed that solicitors with clients in prison or mental health settings were more likely to report having remote meeting requests denied or delayed than those with clients in other institutions. Those with clients in prison were also more likely to report a delay of over eight weeks and that this delay had a significant impact on the progression of the case. Responses received highlight the problems they are experiencing:

“Owing to the woeful lack of staffing and lack of investment in technology, there is currently an 8-week plus wait for the first available legal video link [...] the summary trials are being listed earlier than the first time we can even meet our clients. Telephone appointments are not offered in any London prison except Thameside. [...] Those clients who have credit can call us but the lines are not private and not suitable to take instructions in most cases. [...] This is damaging client/solicitor relationships. We are being expected to be ready to enter pleas and run trials without having sufficient time to go through papers with clients or take their instructions.

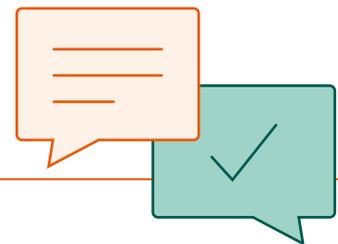
(Survey respondent, criminal law solicitor)

“ In one case we managed to get the judge to intervene with the prison. The client was due to be sentenced within 4 weeks and so meeting prior [was] crucial for medical reports but [the] prison were not able to accommodate a visit until 8 weeks time.

(Survey respondent, criminal law solicitor)

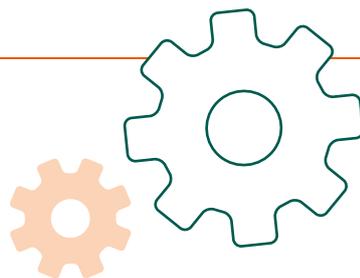
“ Getting access to prisoners is definitely worse since lockdown. We have to wait 5 weeks to get a video meeting and they are limited to 1 hour whereas before you would get a visit in about a week, sometimes less, and it could be for up to 2 hours 45 minutes, and if extra time was needed you could book another session to follow on.

(Survey respondent, criminal law solicitor)



Recommendation

- The Prison Service should expand its CVP VMR service facilities and provide adequate staff to enable all prisoners to access legal advice in a timely and confidential manner.



2. Mental health settings

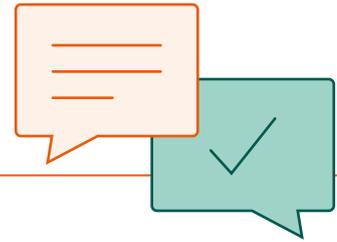
In June, the Joint Committee on Human Rights (JCHR) reported that a blanket ban on visitors to some hospitals, including mental health units, had been imposed as a result of COVID-19.²⁷ At the same time, such institutions saw an increased use of restraint and solitary confinement. The JCHR found that such a ban was not permitted or justified by NHS guidance published during the pandemic, unlawfully departs from the Mental Health Act Code of Practice and breaches rights laid out in the ECHR.

Solicitors have reported that they have encountered such bans in some institutions. In our survey, solicitors also reported that requests for meetings via telephone or video with those living in mental health units or prison were more likely to be denied or delayed than requests made to other institutionalised settings.

Meanwhile, inspections have similarly been reduced. In England, inspections by the Care Quality Commission were suspended during the lockdown period and subsequently resumed remotely, with 20 inspections completed as of July.²⁸ The Healthcare Inspectorate Wales paused its routine inspection programme “for the foreseeable future”, replacing physical inspections with remote ones and issuing guidance for Mental Health Act administrators.²⁹ It is important that remote inspections are followed up with full physical ones as soon as practicable to ensure standards are maintained and people with mental health conditions living or staying in hospitals and care settings are protected. There is a lack of accessible data on inspections in Wales during the pandemic, due to national data collection being paused. It is important that data collection is resumed to allow proper monitoring in Wales.

Those being cared for in mental health settings are extremely vulnerable and often lack mental capacity. They may not be able to advocate for their own interests, making external scrutiny crucial to ensuring their wellbeing is protected. Given the vital importance of visitations in this context, it is important that they are allowed to recommence as soon as is practicable.

In addition, those subject to restrictive measures in mental health units – as well as other health and social care settings – are struggling to access legal aid support to obtain advice and representation due to delays in carrying out deprivation of liberty assessments. Deprivation of liberty safeguards (DOLS) assessments are a series of checks that are legally required to be undertaken when depriving a person who lacks mental capacity of their liberty, to ensure that this is both appropriate and in their best interests. Many local authorities are not carrying out updated assessments due to the reallocation of front-line staff to other urgent work, or due to the inability of staff to attend to clients in person as a result of COVID-19 restrictions on contact at care homes and hospitals. The failure to renew an assessment results in the individual being ineligible for non-means tested legal aid, so that many subjected to deprivation of liberty orders are now unable to obtain legal advice and representation in order to challenge the restrictions placed on them. All deprivation of liberty cases concern fundamental human rights. It is therefore of paramount importance that legal advice is guaranteed in relation to all stages of such cases, no matter which power is used to deprive a person of their liberty.



Recommendations

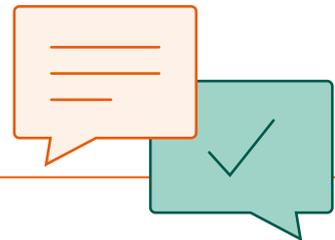
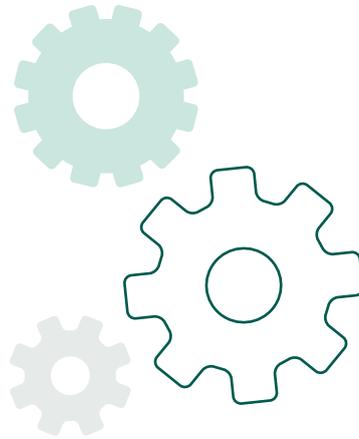
- The UK Government should adopt the relevant recommendation from the JCHR's report and encourage NHS England to ensure hospitals understand their obligation to allow visits to patients, unless an individual risk assessment has been carried out.
- Health Inspectorate Wales should collect and publish data on the number of inspections undertaken during the pandemic and any future inspection plans.
- Where DOLS assessments cannot be undertaken, the Legal Aid Agency should extend non-means tested funding to those cases where the Court of Protection authorises the deprivation of liberty, and includes a recital that it would, in any other circumstances, be authorised under a DOLS.



3. Immigration detention

Shortly after the lockdown measures were introduced a ban was placed on visits to UK immigration removal centres (IRCs). While IRCs remain closed to the majority of visitors, some visits by legal representatives can now take place, but only in exceptional circumstances and if no other means of contact can be used.³⁰

Solicitors report that the availability of technology within IRCs to facilitate remote meetings is limited. There has been no suspension to new immigration detention orders, nor to removals during the pandemic, with around 50 deportations being reported³¹ despite international travel restrictions. This means extremely important decisions concerning the life and liberty of the people concerned are still being taken. It is therefore vital that adequate communication with lawyers is maintained from IRCs to ensure that individuals are represented effectively in these.



Recommendations

- The access of detainees to legal representatives during the lockdown should be reviewed, including collecting and publishing data where possible so that evaluation can be conducted.
- The UK Government should review policies on detaining and removing people during pandemics, considering the ability of those concerned to access legal advice at the time.



Spotlight on: No recourse to public funds

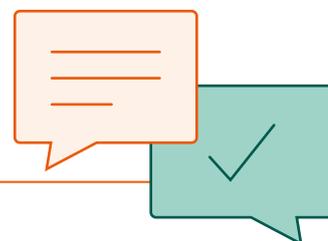
While reliable public data is not available, it is estimated that over 1 million people in the UK are subject to the ‘no recourse to public funds’ (NRPF) policy, including at least 100,000 children.³² This policy prevents migrants with leave to remain from accessing state financial assistance, such as welfare benefits.

Many of those who are subject to NRPF with leave to remain will have held employment, paid taxes in the UK and may have suffered the same loss of income as UK citizens as a result of COVID-19. While they will be eligible for payments through the furlough scheme, they are not able to receive income support should they be made redundant (or lose income if self-employed) as a result of the economic downturn linked to the pandemic.

One route to accessing public funds for those with NRPF is to submit a change of conditions request, which can permit access in some circumstances. Government data from the end of July showed a 572% increase

in change of condition applications made between April and June 2020, and more than the total of the previous 18 months.³³

However, the application process is extremely complex, to the extent that solicitors suggest legal support is required. Citizens Advice has recorded a 110% increase in the number of people needing advice on issues relating to NRPF during the pandemic.³⁴ While it is positive that the application has been moved online, the onerous evidential requirements and overall process is still so complicated that a lay person would arguably struggle to navigate it. Those applying will be at risk of financial destitution and therefore unable to afford a solicitor to help with this and ensure they can access support.



Recommendation

- The Government should make the NRPF change of conditions application process practically accessible to individuals or consider the possibility of permitting legal aid for such applications.

4. Those at risk of domestic abuse

The COVID-19 pandemic has been an especially dangerous time for domestic abuse victims, with lockdown measures making it even more difficult to get time away from the perpetrator, leaving many trapped in an increasingly volatile situation.

The numbers alone throw into sharp relief the urgency of the situation. During the lockdown period:

- **Calls to the national domestic helpline increased by around 66%**³⁵
- **Calls to the NSPCC helpline about the impact of abuse on children increased by 32%**³⁶
- **The Metropolitan Police have reported making 100 domestic violence arrests a day**³⁷
- **14 women and two children were killed in the first three weeks of the lockdown.**³⁸

In response to our survey, nearly half of solicitors (20 out of 42) had seen an increase in the number of cases involving domestic abuse. Overall, respondents reported having handled double the average number of cases per month during the pandemic, from eight to 16. A survey by Women's Aid found that 90% of respondents reported that the lockdown had impacted on their experiences of abuse,³⁹ while SafeLives found that nearly two thirds (61%) had not asked for any help at all since the introduction of lockdown restrictions.⁴⁰ Solicitors we surveyed raised similar concerns:

“ The pandemic has not only meant that domestic violence has increased as people have been forced to stay home together, it has also meant that many victims have not reported the instances due to the fact they perceived the relevant services to whom they could so report would be closed or unavailable.

(Survey respondent, family and criminal law solicitor)

Instances of domestic abuse have increased while it has become harder to access support services. The increased risk to the safety of women and children during this time makes it essential that routes to support and legal recourse are kept as open as possible. In response to the concerns expressed by the Law Society and others, HMCTS published guidance on 6 April on applying for a domestic violence injunction without a lawyer during the coronavirus outbreak.⁴¹ However, it is urgent that individuals at risk of domestic violence are able to access legal representation and are not left to navigate the legal system on their own.

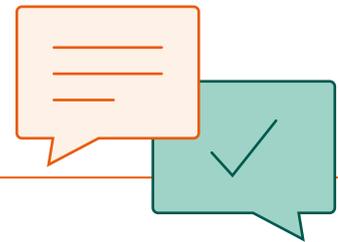
Having access to legal aid can be a lifeline for those at risk of domestic abuse. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 removed legal aid for all private family law cases except where an individual can prove that they are a victim of abuse. Even where they are able to prove this, they must fulfil the financial eligibility criteria. The means test to determine financial eligibility for legal aid is particularly stringent. A report, commissioned by the Law Society but produced independently by Professor Donald Hirsch of the University of Loughborough, shows that some of society's most vulnerable people – including some living below the poverty line – are unable to meet the legal aid means test.⁴²

The Law Society has long argued that non-means tested legal aid should be made available for individuals affected by domestic abuse. Solicitors working with domestic abuse victims not only provide them with essential legal advice, navigating the justice system on their behalf, but they also ensure victims are aware of other support available to them. Changes to legal aid are now urgently required to ensure that victims can access protections at times of heightened need and risk.

To access legal aid, victims are also required to seek evidence from doctors; however, doctors are simply too busy to provide evidence of abuse at this time – whilst victims still urgently need access to advice and representation. A practical solution to this is to allow solicitors to certify that an individual is a victim of domestic abuse for the purposes of obtaining legal aid.

To support those at risk of domestic violence fully, and make access to justice a practical reality, women and children must also have

access to refuges and specialist domestic abuse services. With the possibility of second waves of the COVID-19 virus, as well as future pandemics, it is essential that the infrastructure and services needed to support victims of domestic abuse are put in place now. One way to achieve this is through the provisions of the Domestic Abuse Bill. This Bill, progressing through Parliament at the time of writing, makes significant changes to the way domestic abuse victims and survivors are supported in England and Wales. One of the Bill's key elements is introducing the new role of the Domestic Abuse Commissioner. Had the role been in place and effective prior to COVID-19, we would expect the Commissioner to have brought the likely escalation of domestic abuse to the government's attention before the Coronavirus Act was passed, which might have ensured that more adequate support was in place earlier.



Recommendations

- The UK Government should reinstate non-means tested legal aid for victims of domestic abuse.
- The UK Government should consider allowing solicitors to certify that an individual is a victim of domestic abuse for the purposes of obtaining legal aid.
- The UK Government should seek to ensure adequate funding for services to support victims and survivors of abuse as the COVID-19 crisis continues and into the future.
- The Domestic Abuse Commissioner should be consulted as part of future lockdown planning and discussions to ensure that protecting victims remains a key priority.

Theme 3: Access to services and safeguards

Many people rely on the state for vital services and assistance to support them. Where people have additional needs – such as health conditions, disabilities or special educational needs – these services can be essential to ensuring they are able to live independently and with dignity. Powers were created in the Coronavirus Act 2020 to anticipate the strain on the system and create a legal basis for changes to the duties governing the way in which public services are delivered. Flexibility was built into this, allowing provisions to be ‘switched on’ and ‘off’ by ministers as required.

Given the nature of the duties in question, which affect intimate areas of people’s lives, it is important that powers reducing obligations to fulfil them are only used where strictly necessary and that appropriate mechanisms are in place allowing people affected to seek redress or challenge their treatment.

1. Necessity of the measures

Emergency measures are only justified to the extent that they are necessary and a proportionate response. Many of the measures provided for were forward-looking, anticipating strains on resources that it was thought would

emerge as a result of the pandemic. However, some of these have been under-utilised or provided for greater flexibility than the situation called for, raising questions about their ongoing necessity.

- **Social care:** The Coronavirus Act gave local authorities the power to suspend their obligations under the Care Act 2014 in England, and the Social Services and Well-being (Wales) Act 2014 in Wales.⁴³ This included duties to assess individuals’ care and support needs and to meet these needs through financial or practical support. Local authorities would continue to be obliged to make provision where not doing so would be a breach of ECHR obligations, though this is a very high threshold. During the pandemic, only eight out of 151 English councils triggered the provisions.⁴⁴ At the time of writing no local authorities in England are officially using them, although the power to do so remains. Limited data is available for Wales, which is of serious concern and prevents analysis on the extent to which the easements were used in Wales.
- **Mental health detention:** Any decision to deprive someone of their liberty is extremely serious and should be subject to robust safeguards. The Coronavirus Act allows for applications for compulsory admission to hospital under the Mental Health Act 1983 (MHA) to be made by a single practitioner, rather than the two usually required.⁴⁵ Provisions also allow the requirement that doctors be present at tribunal hearings to be relaxed. The Government has been clear that they consider these to be exceptional powers and NHS England guidance stated they would only 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”.⁴⁶ It has not been necessary to bring these provisions into force during the pandemic.

- **Children’s services:** Legislative requirements in relation to adoption and fostering were relaxed in April in response to COVID-19.⁴⁷ The provisions included:
 - Adoption agencies are not required to establish adoption panels, and fostering panels were made optional;
 - Relaxation of duties to notify agencies where a potential adoptive or foster parent has committed a criminal offence;
 - The suitability of foster carers can be assessed before health information and criminal records checks are carried out;
 - Relaxation of the requirement for social worker visits to children in care on a six-weekly basis.

The Law Society and others have argued that these measures were not proportionate, given that these duties could be met differently, through use of technology, rather than removed entirely. For example, adoption and fostering panels and social worker visits could all be held remotely within the statutory timelines, while notification of a criminal offence can take place by email. Moreover, data showed that the powers were not widely used in practice.⁴⁸

The Department for Education (DfE) has confirmed that the regulations will not be in place beyond 25 September 2020, and that there was no intention to use this period as a pilot for future legislative changes. However, following a DfE consultation in July, it has been confirmed that measures relating to medical reports, virtual visits and the suspension of regular Ofsted inspections are to remain in place.⁴⁹

- **Children and young people with special educational needs and disability (SEND):** Legal duties on local authorities and clinical commissioning groups in respect of Education, Health and Care Plans (EHCP) were also relaxed. EHCPs are legal agreements that outline the support a child or young person with SEND will receive to meet their needs across education, health and social care. Many of the easements have now been lifted, but the replacing of statutory timescales for EHCPs with a requirement to perform duties “as soon as reasonably practicable” remains.⁵⁰

These powers were only ever intended to be temporary and used when strictly necessary. As lockdown measures are gradually eased the appropriateness of these powers should be reviewed as part of the six-month review of the Coronavirus Act. It important that this period should not be used as a pilot for more permanent changes or that measures brought in in the context of an emergency should be used to cope with future strains on the system.

2. Scrutiny

At the same time that legal rights were weakened through easements, key sources of external scrutiny and mechanisms for challenging decisions were also suspended or made more difficult to access.

In March, the Local Government and Social Care Ombudsman (LGO) confirmed that it would not be investigating any further complaints against local authorities where that would require information or action from local authorities.⁵¹ Though this is understandable from a resourcing perspective, removing this avenue of complaint meant that those affected could not access the LGO for redress if a failure to provide vital services occurred. On 5 June 2020, some of the Ombudsman's existing investigations were resumed, with full and new investigations resumed as of 29 June. In response to a Freedom of Information request by the Law Society the LGO had identified 20 complaints and enquiries, received before 22 July 2020, as potentially COVID-19 related.

In this context, the role of solicitors was particularly important for ensuring those people affected by the changes could challenge their situation. In response to our survey, five solicitors were currently acting or had previously acted on behalf of someone in respect of the Care Act easements. Three of these cases were reported to involve alleged breaches of the ECHR, and three solicitors had acted in cases where the local authority had made decisions to disapply aspects of the Care Act without having formally 'switched on' the easements. One example of this is explored on the next page.



Case study: Derbyshire Council

When the mother of a disabled son approached a specialist public law firm with concerns about Derbyshire Council's use of the Care Act easements, pre-action steps were taken to engage the council. Faced with potential judicial review proceedings in relation to their use of the easements, it was revealed that the decision to use the easements was taken without following the steps required to trigger them formally⁵² as detailed in guidance from the Department of Health and Social Care (DHSC).⁵³

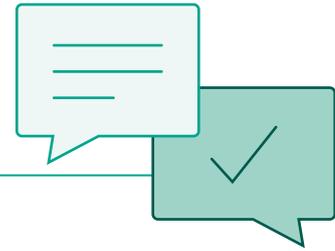
The decision was taken without consultation, contrary to what the guidance requires, and the obligation to report the decision to the DHSC was not discharged until three weeks after the decision was taken. It similarly failed to communicate its decision directly to those affected, instead publishing it within a 210-page cabinet report. When asked, the council was unable to provide any evidence to justify its decision that the legal threshold for triggering the easements was met in March.

The council accepted responsibility and stated that it will “certainly respond differently in the future”, particularly “in relation to

communicating decisions to all service users and providers”.⁵⁴ Following concessions made by the council, the judicial review proceedings were dropped.

Solicitors have reported that local authorities found it difficult to complete the required processes, often due to a lack of expertise or understanding of them. For example, a lack of experience in completing human rights assessments, especially among local authorities outside major cities, was cited.

However, a failure to comply with the required processes undermines the already reduced protections for vulnerable individuals who may be reliant on care services. In the case of Derbyshire Council, the legal approach prompted it to reconsider and rectify its actions. This demonstrates the value of legal advice for challenging improper implementation of emergency measures and providing redress when necessary, especially in the face of reduced scrutiny from alternative mechanisms.



Recommendations

- The six-month review of the Coronavirus Act 2020 should consider removing:
 - Schedule 12 providing for easements under the Care Act 2014;
 - Schedule 8 providing for easements under the Mental Health Act 1983;
 - The Adoption and Children (Coronavirus) (Amendment) Regulations 2020 in their entirety;
 - The Special Educational Needs and Disability (Coronavirus) (Amendment) Regulations 2020.
- The Welsh and UK Government (respectively) should collect and publish data regarding:
 - Use of easements to the Social Services and Well-being (Wales) Act 2014 in Wales;
 - The extent to which local authorities are using measures contained in The Special Educational Needs and Disability (Coronavirus) (Amendment) Regulations 2020 and the impact this is having on children and young people with SEND and their families.
- If provisions relating to the Care Act 2014 and Social Services and Well-being (Wales) Act 2014 continue in force, the UK and Welsh Governments should publish detailed guidance clarifying how to conduct the required processes and what minimum standards apply, making clear these are limited to the pandemic period.
- The UK Government should conduct an evaluation on the preparedness of children’s social care services for future emergency situations, with a focus on the least restrictive means through which to respond.
- When reducing individual rights and safeguards in relation to the provision of public services it must be ensured that appropriate routes to redress remain open and accessible, including access to solicitors and independent complaints or inspection processes.

Conclusion

At the time of writing, five months have passed since full lockdown measures were introduced and the Coronavirus Act was passed. These have significantly changed life in the UK and the ways in which state authorities have provided vital public services and protections in the months that followed. When emergency measures have been introduced, affecting fundamental rights and the most intimate areas of people's lives, maintaining access to justice is essential.

The justice system has experienced a wholesale change in the way it operates and, while it has in many ways adapted admirably, the sudden shift to reliance on remote hearings was not one it was fully prepared for. The resulting delays and reduced opportunity for contact between lawyers and clients has undermined the ability of individuals to access justice during a difficult time, particularly for more vulnerable people.

The ways in which people have been able to access legal advice and representation has also changed. Those living in institutionalised settings are facing barriers to contacting their lawyers as a result of social distancing measures preventing physical visits and inadequate supply of technology. For those who are compulsorily detained this has impacted on their rights to liberty and due process and reduced the external

scrutiny of the conditions in which they are living. Those who have been disproportionately impacted by some of the Government's measures have also struggled to access much-needed legal advice. With the lockdown measures having intensified a domestic abuse crisis, action is urgently needed to ensure the safety of women and children living in dangerous situations.

The Government has often been willing to adapt emergency measures when problems have become clear. However, the effect of rushing to introduce legislation without sufficient scrutiny has been profoundly felt in the lives of many people. Changes to the rules governing how public services are provided, particularly around health and social care, have caused widespread concern. It is vital that these temporary changes are properly monitored and that the people affected can effectively challenge them to ensure their fundamental rights are protected.

As we approach the six-month review of the Coronavirus Act, it is now important that the full range of measures put in place are reviewed with careful consideration given to their necessity, proportionality and effectiveness, and to identification of any adverse impacts. It is equally important that efforts are channelled into wider and ongoing data collection, monitoring and evaluation of the measures that have been implemented. The threat of further waves of this pandemic makes it essential that lessons are learned and put into practice so that responses to future emergencies may be improved.

Annex I: List of recommendations

Theme 1: Access to justice through courts and tribunals

Delays

- The UK Government must continue to make sufficient resources available as a matter of urgency to the courts, judiciary and legal professions to tackle the backlog of cases across all jurisdictions.
- The MoJ should move forward with its early advice pilot and improve access to legal aid to ensure hearings are more efficient and that parties are aware of alternative means of dispute resolution.

Remote hearings and vulnerable people

- HMCTS should publish a framework of factors to be taken into consideration when deciding which hearings can proceed remotely and publish an equality impact assessment of this.
- Hearings involving vulnerable parties should be considered for postponement, with decisions to be made on a case-by-case basis, weighing the importance and urgency of the issue against the suitability of proceeding remotely, taking into account the nature of the hearing and the vulnerability of the parties.
- Where an interpreter is required, including sign language interpreters, there should be a higher presumption that the hearing should be postponed until a physical one can be held, unless it can be shown that it is in the interests of justice for these hearings to proceed remotely.

- Where cases are postponed for these reasons, they should be considered for priority listing when physical hearings are fully resumed.
- HMCTS should collect and publish comprehensive data which enables the impact of remote hearings to be monitored, which includes disaggregation by protected characteristics and other vulnerability factors.
- HMCTS should conduct a subsequent comprehensive evaluation of this data on the impact of remote hearings on access to justice, with specific emphasis on protected characteristics and other vulnerability factors.
- The decision to remove the Court of Protection from the HMCTS Reform programme should be reviewed in consultation with expert practitioners.
- The UK and Welsh Governments should take steps to support the Mental Health Tribunal and Mental Health Review Tribunal in Wales to conduct hearings with three member panels, by video, wherever possible.

Remote hearings – impact on due process

- Case management hearings or other advocates' meetings should explicitly consider the suitability of the case for remote hearing.
- Hearings involving litigants in person, and where lay witnesses are to give evidence, should be considered for postponement.
- The use of remote hearings in cases involving litigants in person and lay witnesses should be evaluated with an emphasis on their ability to participate in the hearing, and on the quality of the evidence.

Access to justice in housing

- The two-stage hearings process for possessions proceedings proposed by the Master of the Rolls should be implemented.
- The contracts and terms for HPCDSs should be reviewed to ensure financial viability for providers.
- The UK Government should consider bringing forward temporary measures allowing for judicial discretion in section 21 and ground 8 evictions, limited to the consideration of criteria related to the pandemic and resulting economic position of the tenant.
- Immediate or temporary measures should be followed by longer term solutions, including:
 - Consultation on establishing a pre-action protocol for the private rented sector, to ensure that landlords are applying for possession orders only as a last resort;
 - Legislation providing for judicial discretion in mandatory evictions, so that a pre-action protocol would also apply to these going forward;
 - Revisiting the Renters' Reform Bill and publish the UK Government's response to the 'no fault evictions' consultation, conducted in October 2019.

Theme 2: Access to legal advice and representation

Prisons and the secure estate for children

- The Prison Service should expand its CVP VMR service facilities and provide adequate staff to enable all prisoners to access legal advice in a timely and confidential manner.

Mental health settings

- The UK Government should adopt the relevant recommendation from the JCHR's report and encourage NHS England to ensure hospitals understand their obligation to allow visits to patients, unless an individual risk assessment has been carried out.
- Health Inspectorate Wales should collect and publish data on the number of inspections undertaken during the pandemic and any future inspection plans.
- Where DOLS assessments cannot be undertaken, the Legal Aid Agency should extend non-means tested funding to those cases where the Court of Protection authorises the deprivation of liberty, and includes a recital that it would, in any other circumstances, be authorised under a DOLS.

Immigration detention

- The access of detainees to legal representatives during the lockdown should be reviewed, including collecting and publishing data where possible so that evaluation can be conducted.
- The UK Government should review policies on detaining and removing people during pandemics, considering the ability of those concerned to access legal advice at the time.
- The Government should make the NRPF change of conditions application process practically accessible to individuals or consider the possibility of permitting legal aid for such applications.

Those at risk of domestic abuse

- The UK Government should reinstate non-means tested legal aid for victims of domestic abuse.
 - The UK Government should consider allowing solicitors to certify that an individual is a victim of domestic abuse for the purposes of obtaining legal aid.
 - The UK Government should seek to ensure adequate funding for services to support victims and survivors of abuse as the COVID-19 crisis continues and into the future.
 - The Domestic Abuse Commissioner should be consulted as part of future lockdown planning and discussions to ensure that protecting victims remains a key priority.
- The Welsh and UK Government (respectively) should collect and publish data regarding:
 - Use of easements to the Social Services and Well-being (Wales) Act 2014 in Wales;
 - The extent to which local authorities are using measures contained in The Special Educational Needs and Disability (Coronavirus) (Amendment) Regulations 2020 and the impact this is having on children and young people with SEND and their families.
 - If provisions relating to the Care Act 2014 and Social Services and Well-being (Wales) Act 2014 continue in force, the UK and Welsh Governments should publish detailed guidance clarifying how to conduct the required processes and what minimum standards apply, making clear these are limited to the pandemic period.

Theme 3: Access to services and safeguards

- The six-month review of the Coronavirus Act 2020 should consider removing:
 - Schedule 12 providing for easements under the Care Act 2014;
 - Schedule 8 providing for easements under the Mental Health Act 1983;
 - The Adoption and Children (Coronavirus) (Amendment) Regulations 2020 in their entirety;
 - The Special Educational Needs and Disability (Coronavirus) (Amendment) Regulations 2020.
- The UK Government should conduct an evaluation on the preparedness of children's social care services for future emergency situations, with a focus on the least restrictive means through which to respond.
- When reducing individual rights and safeguards in relation to the provision of public services it must be ensured that appropriate routes to redress remain open and accessible, including access to solicitors and independent complaints or inspection processes.

Annex II: List of abbreviations

CPS	Crown Prosecution Service
CTL	Custody time limit
CVP VMR	Cloud Video Platform Video Meeting Room
DfE	Department for Education
DHSC	Department of Health and Social Care
DOLS	Deprivation of liberty safeguards
ECHR	European Convention of Human Rights
EHCP	Education Health and Care Plan
HMCTS	Her Majesty's Courts and Tribunals Service
HMPPS	Her Majesty's Prison and Probation Service
HPCDS	Housing Possession Court Duty Scheme
IRC	Immigration removal centre
JCHR	Joint Committee on Human Rights
LGO	Local Government and Social Care Ombudsman
MHA	Mental Health Act
MoJ	Ministry of Justice
NRPF	No recourse to public funds
SEND	Special educational needs and disability

Endnotes

- 1 157 court and tribunal buildings were selected at the end of March to be kept open for essential face-to-face hearings. The remaining 124 were closed to the public with access only allowed for judges and staff needed for operating remote hearings. See: HMCTS. *COVID-19: Overview of HMCTS response*. July 2020. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/896779/HMCTS368_recovery_-_COVID-19_Overview_of_HMCTS_response_A4L_v3.pdf
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- 12 See: <https://www.lawsociety.org.uk/campaigns/court-reform/tools/nightingale-courts-status-interactive-map>, accessed 6 September 2020.
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- 14 Coronavirus Act 2020, s.53 - 57.
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