The Bar Council

Response of the Bar Council on the Coronavirus Bill 2020

Coronavirus Bill – 23 March 2020

Introduction

The Bar Council recognises that the provisions set out in the Coronavirus Bill 2020 ("the Bill") are extraordinary legislative measures which seek to address a genuine national emergency, and which therefore require a different approach to conventional legislation. We seek to assist Parliament in passing this legislation in a manner which reflects that emergency but safeguards the rule of law and personal liberty to the fullest extent possible in the circumstances. We recognise and wish to convey our appreciation for those who have clearly worked very hard to produce the Bill in a very short timescale.

Summary

This response will deal with the following matters:

a. the need for safeguards as to the use of the powers conferred by the Bill, in particular those which have serious consequences for personal liberty, and as to the duration of application of the Bill;
b. other legislative powers that the Government may wish to consider including within the Bill;
c. analysis of the detailed provisions of the Bill, where our approach has been to consider the following questions:
    i. Is the provision unnecessary (e.g. because there is an existing provision which deals adequately with the problem)?
    ii. Does the provision deal adequately with the problem being addressed?
    iii. Are there likely to be unintended consequences that need to be considered?

Duration and safeguards

1. The Bill expires two years after commencement (cl 75(1)), except for the provisions set out in cl. 75(2). It may be extended in tranches of no more than six months (cl 76(1) and (3)). There is a provision for reporting periods every two months (cl 83(1) and (4)) and for Parliamentary consideration after one year.

2. We would urge the Government to provide for greater scrutiny of the operation of the Bill. It seems to us that a process where the first opportunity for scrutiny arises only after a year of operation, regardless of the extent of usage of the powers set out in the Bill, is insufficient. It seems to us to be inevitable that issues will arise which require urgent consideration in Parliament. We would suggest that six-monthly scrutiny throughout the entire duration of the operation of the Bill is a minimum requirement.

3. The majority of the powers in the Bill which impact directly on personal liberty relate to those who are "potentially infectious persons" (cl. 49). The definition includes those who may be infected with coronavirus where there is a risk that the person might infect others (paragraph 2(1)(a) of Schedule 20). On its face this definition is likely to apply to the vast majority of the population – if it does not already do so, it seems inevitable that it will at some point during the outbreak.

4. Clause 1(3) contains an important qualification – that the definition does not apply, unless a contrary intention appears, to "*persons who have been infected but are clear of coronavirus (unless reinfected)*". It seems to us that it is absolutely crucial that the powers in the Bill are not to be applied to those who have been infected but have recovered, both for reasons of basic civil liberty but also to ensure that those who have recovered are available to carry out to the full their work and caring obligations.

5. We are concerned that the phrase identified above does not provide sufficient clarity. It may be that it is the best definition that can be applied now, but we would urge the Government to put in place an obligation on the Secretary of State to publish guidance as to the application of the test, to be updated as clinical understanding of the virus and the recovery process improves. This will help to ensure that those who are required to make judgements about the medical condition of the individual in question (which will include public health officers (paragraph 3(2) of Schedule 20), immigration officers and constables (paragraph 7(1)) and magistrates (paragraph 17)) are all operating to the same standard[1].

Additional powers

6. The Government has announced that borrowers affected by the coronavirus outbreak will be entitled to ask their mortgage lender for a repayment holiday of three months. The Bill does not contain any provisions in relation to that proposal, and it therefore appears that the intention is for this to be addressed by voluntary action from mortgage lenders. We consider that there are a number of difficulties with this approach. We list some of these issues below.

7. Lenders do not have the capacity to undertake individual assessments of borrowers' needs for a payment holiday on a large scale basis. There are already press reports indicating that lenders are unable to deal with the volume of requests being made[2]. It cannot be assumed that all borrowers will be able to engage with the process either - many may be too ill, or lack the confidence or ability to proactively seek help. There will be a disproportionate impact on those who are already vulnerable.

[1] We note that such persons are required to have regard to any relevant guidance (paragraph 21 of Schedule 20) but there does not appear to be a positive obligation to produce the same and/or to do so in a particular timeframe, or to keep it updated.

[2] https://www.dailymail.co.uk/news/article-8136305/Mortgage-meltdown-Bank-chaos-families-rush-freeze-payments.html

8. If legislation is passed to give the government powers to suspend mortgage repayments (and possibly other loan repayments and/or interest charges – we address this further below), lenders would not have to devote resources to considering how or when to offer a repayment holiday (freeing those resources up to actually administer the scheme) and borrowers would be freed of the concern of repossession, adverse credit reports and the worry about whether they will or might qualify.

9. We invite the Government to consider whether such powers should extend beyond mortgages. Those who are already struggling to make ends meet are likely to have other credit obligations, such as credit cards, bank overdrafts and motor finance. Some may have obligations under high cost short term credit agreements. Missing payments on such agreements would have significant consequences, including repossession of motor vehicles, adverse credit entries (which would have an impact well beyond the likely scope of the outbreak) and the incurring of high interest and default charges.

10. In addressing the Government's proposals for mortgage repayment holidays, lenders have made it clear that interest will continue to accrue throughout the relevant period. This will result in borrowers paying more overall. We invite the Government to consider whether that is appropriate – if it is not then it seems likely that legislation will be required, both to set out the circumstances in which interest will not accrue and to make provision for regulatory consequences. For example, it might be necessary to temporarily suspend certain regulatory requirements, such as the provisions of the Consumer Credit Act 1974 in relation to post-contractual notices, so that lenders are not exposed to future enforcement difficulties as a consequence.

The Bill in detail

11. For ease of reference, the provisions of the Bill are dealt with in the order in which they are drafted. The provisions of Schedule 20 are dealt with last, but they are amongst the most important.

Clause 2: Emergency registration of health professionals[3]

12. This provision enables the Registrar to add a person, or provide that a group of persons may be added, to the register as long as the Registrar considers them to be fit, proper and suitably experienced. The "fit and proper" qualification will presumably protect against those struck off because fitness to practice was impaired, but it will be essential for the Registrar to develop policies on this urgently.

13. We note that there is no express restriction to the need being caused by coronavirus; the test is an "emergency involving loss of human life or human illness etc". Potential unintended consequences are therefore (a) that persons who have previously been found not to be fit and proper (rather than having eg retired/ceased to practice) are

[3] There are errors in the references to the two statutory instruments in clause 2, where the SI number does not correspond to the identified instrument.

returned to the register, unless there are specific safeguards in place; (b) this could on its face be used for a standard "winter flu crisis" even if the coronavirus is over by next winter. We consider that this power should be expressly limited to the current crisis.

Clause 5: Temporary registration of social workers

14. This clause (relating to social workers) is very similar to the provision made for nurses, midwifes and health professionals (see clause 2 above). The 2018 Regulations set out the process for registration if a person meets the requirements in reg 11; the proposed additional regulation would give the regulator the same power as the Registrars in relation to nurses etc. Essentially the same comments apply.

15. Further, there is a very broad power to impose/vary/revoke/add new conditions to the registration – this is almost certainly needed given the nature of the power, but should be refined as soon as possible and/or made subject to a requirement that such conditions are necessary to protect the public rather than at the sole discretion of the Registrar/regulator.

Clauses 7 and 8 and Schedule 6: Emergency volunteers

16. We consider that it would be sensible to expressly address the following points within Schedule 6 of the Bill:
    a. To reduce ambiguity, it would be sensible to deal with holiday pay within Schedule 6, Section 5(2) and (3). Holiday pay is arguably remuneration. However, it has its root in health and safety, not least provided for by the Working Time Directive. The Schedule should address whether holiday pay accrues whilst the individual is volunteering.

    b. To reduce ambiguity, it would be sensible to explicitly address whether service is accruing with the original employer for the purposes of s.212 Employment Rights Act 1996 during the period in which the individual is on volunteering leave.

    c. Will an emergency volunteer be treated as having paid their national insurance contributions in the period in which they are volunteering but not being remunerated by their employer? Even if they are subsequently compensated by the Secretary of State, it is necessary to be clear on whether such contributions have been made, particularly in the event the volunteer needs to claim contributory based benefits in the future.

    d. It is evident that the term 'emergency volunteer' has been used in order to create a category of individual that does not create employment rights for the period whilst the individual is volunteering. We would suggest that there are legitimate policy reasons that the Equality Act 2010 should apply to such volunteers. The Equality Act contains the basic standards of decency which protects individuals within the workplace. There is no need for these basic standards to be put to one side even in the case of a national emergency.

e. Even if there is some reluctance to apply to the entirety of the Act to such volunteers, we would suggest that as a minimum, the harassment provisions contained within s.26 of the Act should be expressly stated to apply to such volunteers. It should be a basic entitlement that such volunteers are treated with dignity and that they have a lawful means of preventing any harassment that they are subjected to. At present, if the Equality Act's harassment provisions were not to apply then the volunteer would not have a clear route to challenge overt racist or sexist behaviour (for example).

f. Finally, given the volunteer status, it would be sensible for the Schedule to explicitly set out that such volunteers remain protected by workplace health and safety laws whilst volunteering.

Clause 14 and Schedule 11: Local authority care and support

17. The core duties under sections 9 and 10 of the Care Act 2014 to assess the needs of adults for care and support, and the needs of their carers for support, are removed by para 2(1) of Schedule 11, as are associated duties relating to carrying out and recording those assessments under section 12. Para 2(2) removes the duty to determine whether assessed needs meet eligibility criteria, and subsequent parts of para 2 make similar provision in relation to the assessment of children's needs under section 58 and 59 and provisions relating to transition from child to adult services.

18. Para 2(4) leaves a discretionary power for local authorities to carry out such assessments if they consider it appropriate for the purpose of carrying out various of their powers, which are modified under the remaining provisions of the Schedule. Para 3 removes the obligation to carry out a financial assessment, but provides that charges can't be made if there hasn't been an assessment. Para 4 amends the section 18 duty to meet needs for care and support unless it's necessary to avoid a breach of ECHR rights.

19. The problem being addressed is presumably the lack of capacity of the NHS and social services to provide during this period. This certainly addresses that issue by removing various duties on them. The removal of (new) CHC duties on CCGs will mean that patients discharged from hospital and requiring care at home will have to look to local authorities, but there will be no obligation to assess them or provide any care unless there would otherwise be a breach of ECHR rights, which in this context is extremely hard to establish. There are therefore likely to be many thousands – millions? – of people left without care and support.

20. The consequence is that vulnerable people, many of them elderly, are likely to be left entirely without social services support. There may be concerns that, if it is determined that a removal of support will not breach ECHR rights because there are family

members who can provide support, this will lead to an increased risk of spreading the virus.

21. The saving of the duty where necessary to avoid a breach of the ECHR is arguably unnecessary given the existence of the HRA – although of course welcome. This is very much a "floor" duty, previously only seen in relation to the provision of subsistence support for destitute asylum seekers. Its effects are potentially extremely wide-ranging.

22. A middle route may be to amend the duty so as to be subject to guidance (all local authorities are under a duty to act under DHSC guidance when carrying out social services functions), which could be amended flexibly to respond to genuine capacity issues if local authorities have them. It is well documented that adult social care is the biggest call on LA resources, and the removal of these duties, if not limited by appropriate guidance, is likely to have far-reaching negative implications for the care of the elderly and vulnerable.

Clauses 23-27 and Schedule 14: Food supply

23. The provisions relating to the integrity of food supply chains appear to us to be sensible. However, we note that the powers to require information and consequent enforcement measures do not apply to individuals. The explanation given in the Explanatory notes (para 219) is that this will protect farmers and sole traders from being required to give information, but does not indicate why this is considered necessary.

24. This approach is not consistent with the approach taken to information requirements in Schedule 27 (transportation, storage and disposal of dead bodies), where individuals are included – we recognise that this may be due to the different nature of each industry, but it seems to us that there are potential risks posed by individuals in the supply chain in circumstances of food shortage and authorities should be empowered to investigate individuals as well as corporations. If such a change is made, it is likely that penalties for non-compliance in Schedule 14 will need to be revisited.

Clauses 37-42: Statutory sick pay

25. Many of the provisions in clauses 37-42 of the Bill relating to Statutory Sick Pay ("SSP") are uncontroversial. They seek to fund the SSP regime and to provide that SSP is payable from day one.

26. However, the provisions do not address limb (b) workers, i.e. those that fall within s.230(3)(b) Employment Rights Act 1996. These individuals appear to be left out of the protection of SSP. If the underlying policy is to ensure that people remain at home, then these individuals should be included in order to assist in meeting that policy objective. Consideration also needs to be given to whether or not this provision

disproportionately leaves out marginalised groups within society or disproportionately impacts certain protected characteristics.

Clause 49 and Schedule 20: Powers relating to potentially infectious persons

27. These powers involve, as noted above, an extraordinary curtailment of civil liberty. We agree that they may be necessary, but certain additional matters should be considered. Firstly, there is currently no requirement on the officer taking the relevant action to take account of representations from the person detained. We think this should be reconsidered. Secondly, only the paragraph 14 powers carry a 'requirement' to be given in writing. We consider that the fact and reasons for detention under paragraphs 9 and 13 should be recorded (even if after the event).

28. This is not a power of arrest; the citizen has not committed any crime nor is he/she suspected of such. It is detention outside of the protections of the Police and Criminal Evidence Act 1984 ("PACE") and the Codes of Practice. Accordingly Code C (which details the rights of a person in police detention) will not apply and there do not appear to be any equivalent protections for the rights of a person being held – for example the right to inform someone of your detention and whereabouts, the right to legal advice, the need for interpreters, the rights of the vulnerable etc. We would urge the Government to give urgent consideration to putting in place an equivalent Code of Practice, or to consider to what extent the Code C provisions should be read across to this situation.

29. There is a further complication which arises from the offence created by paragraph 23 of Schedule 20, namely where a person fails to comply with any "direction, reasonable instruction, requirement or restriction" to go to or remain at a place of assessment. An officer can arrest someone who is committing an offence without a warrant if s24 PACE applies (the arrest criteria include to prevent a person causing physical injury to himself or another (which might include the risk of infection) and the officer not being able to ascertain the identity and address of the person). So, the police officer could use the power to "remove" under Schedule 20, but equally could arrest the person who is not co-operating instead. In the latter case, the person *has* to be taken to a police station as soon as practicable (s. 30(1A) PACE). A police station is not likely to be equipped to deal with a potentially infected detainee, so an arrest in these circumstances would defeat the purpose of Schedule 20, namely to take someone effectively to quarantine. We suggest that consideration is given either to the drafting of an exception to s30(1A) PACE or to provide that the power of arrest for a paragraph 23 offence should not be exercised where there is a co-existing power elsewhere in Schedule 20 to effect the removal and keeping of the person at a specified place.

30. In para 3 of Schedule 20, "public health officer" is defined as an officer of the Secretary of State designated as such for the purposes of this Schedule, or a registered public health consultant so designated (comparable provisions exist re: Scotland, Wales and NI). Given the wide powers exercisable by such persons we consider that there should be much greater clarity as to who may be designated, including details of any

professional qualifications required. Whilst we understand that a degree of flexibility may be required, such persons will have very significant powers and responsibilities and we are concerned at the present absence of clarity.

31. The powers in Schedule 20 come into effect when the Secretary of State makes a declaration in accordance with paragraph 4, i.e. when she is of the view that the incidence or transmission of coronavirus constitutes a serious and imminent threat to public health. Such a declaration has already been made, so these provisions will come into force immediately on Royal Assent. Whilst the Secretary of State is mandated to revoke the declaration when she ceases to be of that view, it is not clear that there is a specific duty to undertake periodic reviews of the position. We think it would be helpful if this were to be specifically articulated.

32. Our analysis of the provisions of paras 9 and 13 (screening and assessment) is as follows. The combination of paras 9(1) and 13(3) and (4) is that a public health official may require a person to stay at a place of assessment for 48 hours but has no power to detain the person. A constable has the power to detain for 24 hours with an extension of further 24 hours, but an immigration official can only do for a maximum of 12 hours. Therefore after 12 hours the person can leave the place, in circumstances where the public health official requires him to stay for 48 hours, if there is no constable to detain him beyond the 12 hours. We doubt that is the intended consequence.

33. Paragraph 15(3) and (4) empowers a public health official and/or the Secretary of State to revoke and substitute/re-impose a period of a requirement/restriction under paragraph 14 for up to and including 14 days. It is not clear whether that further period commences as of the date of the original order, the date of the revocation or the date of the substitution/re-imposition (if different from the date of revocation).

34. On our understanding, there is the potential for the total period of quarantine to exceed 28 days (paragraphs 14(3)(d) and (e); 15(5) and (6)). We consider that there should be a requirement for external review at this stage, which could be most easily undertaken by requiring the person to be brought before the magistrates' court (by videolink) in order that the requirement can be reviewed. Given that these powers could (and may well be) used against some of the most lonely, vulnerable members of society e.g. the homeless, it is our view that requiring the state to justify to a court restrictions on liberty that exceed four weeks is a basic requirement of justice. We also consider that, in the event of detention beyond 28 days, there should be provision for further external review. Given that these powers are plainly not intended to be used for lengthy periods of time, this is a necessary safety net in the case of either wrongful use of the provisions or inadvertent error. The detained person should be entitled to publicly funded representation for each such review.

35. Paragraph 17 gives a right of appeal to the magistrates' court. We understand that this is an appeal on the merits (in which case all matters can be considered, including medical evidence) rather than simply a review of the exercise of the Schedule 20 powers, but this should be made clear. The Government may also wish to consider

putting in place an expedited procedure for such appeals. We consider that the person should be entitled to publicly funded representation either under the Duty Solicitors' scheme or at a fixed rate to be set by regulation.

36. Finally, we consider that further consideration should be given to the information gathering powers in paragraphs 10(2) and 14(3). Failure to provide this information is an offence (paragraph 23(1)(d)). We consider that there should be a provision, equivalent to that which appears in s.2(8) of the Criminal Justice Act 1987, that this information would only be admissible against the individual for a prosecution which relates to the provision of the information itself (for example, if it is false). If such information is generally admissible in other criminal proceedings, an individual who may have another reason for failing to provide this information (i.e. that it might incriminate him in relation to another offence) may decide to withhold it, prejudicing the effective tracing of other potentially infected persons.

Law Reform Committee, on behalf of the Bar Council
23 March 2020