



COVID Emergency Legislation

Scottish Parliamentary Briefing

- **Emergency public health situations do not override the Scottish Government's or Parliament's human rights obligations. Instead, the Scottish Parliament's role as human rights guarantor must be undertaken with even greater solemnity.**
- **Any restriction on the individual's human rights must meet the criteria of necessity, proportionality, legitimacy, be time-limited and subject to regular review.**

INTRODUCTION

These are extraordinary times, and Amnesty International recognises the need for extraordinary measures. Indeed, appropriate, necessary and proportionate measures to prevent, treat and control epidemic disease are core to the right to health, and the positive obligation to protect life. Such measures must, however - where they amount to restrictions or limitations on other rights enjoyed by those in the UK and Scotland - **be compatible with international human rights standards. That means, among other requirements, that measures must be of a duration strictly limited to the exigencies of the situation, subject to review, and amount to the least restrictive options available** given the legitimate aim pursued. Risks to rights must be mitigated. We urge members to bear these fundamental principles in mind when considering the wide-ranging powers in this Bill, and the time for which it is proposed they are in place.

Further, we urge MSPs to consider as a priority in assessing these measures the particular impact of this pandemic, and the measures designed to combat it, on those who face additional barriers in adequately being able to protect themselves, or who may be disproportionately impacted by restrictions. These groups include those living in poverty, the homeless, those in insecure employment and who may have no choice but to continue working, women at risk of violence (particularly in the home), and other groups at particular risk or those who need regular access to healthcare at a time of increased pressure.

Given that this Bill is going through the Scottish Parliamentary process at great speed and on an emergency basis, the below should not be taken to be the sum of Amnesty's concerns about this Bill, and members are urged to contact us for further information and/or with specific questions about any aspects not covered.

CRIMINAL JUSTICE, PRISONERS AND THE USE OF REMAND

Recommendations:

- **Explore and provide alternatives to detention for those with underlying medical conditions and older people if they do not pose a threat to themselves or society.**
- **Ensure that there is thorough risk assessment and that consideration is given to where prisoners will be released to and that this does not put the public, women or families at risk.**
- **Ensure any changes to jury trials is in line with Article 6 of the ECHR: Right to a fair trial.**

- **There should be a presumption against pre-trial detention except in the most extreme cases and only with oversight and access to appeals process.**

Decreasing the prison population and the number of people in immigration detention centres is a crucial means of slowing the spread of COVID-19 and keeping people safe. We welcome the consideration across the UK for exploring and providing alternatives to detention for those with underlying medical conditions and older people if they do not pose a threat to themselves or society.

For those who remain in detention including the staff in detention facilities, the authorities must provide a standard of health that meets each person's individual needs, ensuring the maximum possible protection against the spread of COVID-19. Please see medical equipment and the right to health for more information on protection for health workers but also those working in frontline jobs and unable to working from home.

There must be a risk assessment on all potential early releases particularly where the individual may be a public safety threat or a threat to victims. Scottish Women's Aid and Rape Crisis Scotland have already raised concerns about the impact of COVID-19 on women and children experiencing domestic abuse or sexual violence and we welcome funding for alternative ways for these organisations to support survivors.

Concerns have been raised regarding indictment trials being conducted by judges sitting without a jury. Any changes should not undermine Scottish citizen's right to justice and a fair trial. Amnesty is concerned by proposals to proceed with criminal trials without juries, in the presence of a judge, and believes these proposals could violate Article 6 of the ECHR.

In international law, the detention of individuals who are awaiting trial is a matter of special concern. Their situation is quite distinct from that of people who have been convicted of an offence. They have yet to be found guilty of any offence and are therefore innocent in the eyes of the law¹. This is a fundamental human rights principle, enshrined in the Universal Declaration of Human Rights (Article 11, paragraph 1) and elaborated on in the International Covenant on Civil and Political Rights, specifically the rights of a detained person to know why he or she has been arrested and to be brought before a court of law at *the earliest possible opportunity* (emphasis added). The key rights are described in article 9 of the International Covenant on Civil and Political Rights:

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

¹ There is a specific set of rights applicable to people taken into pre-trial detention, see: Human Rights and Pre-trial Detention: A Handbook of International Standards relating to Pre-trial Detention, United Nations (1994)

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) contain several provisions on the need to give special protection to juveniles remanded in custody, as do the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.

Bearing in mind the principles relating to pre-trial detention and the need to provide safe trials, tribunals or potentially adequate legal representation during this COVID-19 outbreak, serious consideration needs to be given to any use of pre-trial detention other than in the most extreme cases where there is a clear and imminent risk to society or the victim(s). There still needs to be oversight of these decisions and access to an appeal process which should be provided remotely. Amnesty has serious concerns regarding any extension to pre-trial detention and believe that this must only be used in extreme cases with clear judicial oversight.

EVICTIONS AND THE RIGHT TO HOUSING

Recommendations:

- **Governments must ensure that no one is left in a position of increased vulnerability to COVID-19, including by being evicted for their inability to pay rent or mortgage.**
- **Governments must urgently put in place measures to ensure that at a minimum those people living with homelessness who are infected with COVID-19 and those who belong to 'high risk' groups are provided with emergency accommodation where they are able to protect and isolate themselves and also have access to adequate health care and treatment.**

Access to adequate housing is critical for people to be able to protect themselves from COVID-19, stopping its spread and also recovering from it. Under international law there is a prohibition on forced evictions at all times. Forced evictions are defined as the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection. Appropriate forms of legal and other protection include adequate notice, opportunities for genuine consultation, and provision of legal remedy. Additionally, no one should be rendered homeless or vulnerable to other human rights violations as a result of an eviction.

In the context of the current crisis, the risk of an eviction being defined as "forced" under international law increases as we are presented with greater barriers to legal protection or access to legal remedy, "adequate notice" needs to be refined at a time when it would be almost impossible to find alternative housing and removals companies are not operating, and when due to COVID-19 infection or other mental or physical health impacts, individuals and families are not able to move. In these circumstances there is a high likelihood that an eviction would render someone homeless and vulnerable to other human rights violations.

Therefore, in the current crisis context, governments must ensure that no one is left in a position of increased vulnerability to COVID-19, including by being evicted for their inability to pay rent or mortgage. Where landlords are dependent on the rent for their livelihood, governments must ensure that they are adequately supported for the period of the crisis in a manner that does not negatively impact their right to an adequate standard of living among other human rights.

Steps to protect oneself against COVID-19 as well as to stop its spread include regular washing of hands, self-isolation and quarantines. For over 34,000 people who live with homelessness and in inadequate housing in Scotland, often lacking access to essential services including water and sanitation, protective measures are not just difficult but, in some cases, impossible. Governments must urgently put in place measures to ensure that at a minimum those people living with homelessness who are infected with COVID-19 and those who belong to 'high risk' groups are provided with emergency accommodation where they are able to protect and isolate themselves and also have access to adequate health care and treatment.

MEDICAL EQUIPMENT AND THE RIGHT TO HEALTH

Recommendations:

- **Key workers including healthcare workers must urgently be provided with adequate personal protective equipment, information, training and psychosocial support.**
- **The right to health requires states to “formulate, implement and periodically review a coherent national policy to minimize the risk of occupational accidents and diseases, as well as to provide a coherent national policy on occupational safety and health services”, which includes the working conditions of health workers.**

Health workers are at the frontline of this epidemic, continuing to deliver services despite the personal risks to them and their families. The risks they face include contracting COVID-19 while doing their jobs, long working hours, psychological distress and fatigue. While comprehensive information on the impact of the epidemic on health workers is being assessed, reports indicate that over 3,000 health workers have contracted the virus in China alone. This week has seen the first deaths of British doctors from Covid-19, as doctors and nurses' groups in the UK continue to highlight continuing shortages of protective equipment and lack of clear guidelines about their proper use.

As well as health workers, there are a number of key workers in Scotland who have to work with the public and must therefore be provided with added protections, these include police, prison staff, shop workers, care home and other social care workers, and transport staff. As well as employed staff there are a huge number of volunteers and those who provide unpaid care who similarly must be provided with adequate and quality personal protective equipment and information.

The right to health requires states to “formulate, implement and periodically review a coherent national policy to minimize the risk of occupational accidents and diseases, as well as to provide a coherent national policy on occupational safety and health services²”, which includes the working conditions of health workers. Adequate and quality personal protective equipment, information, training and psychosocial support are all necessary to support nurses, doctors and other response staff.³ States must also ensure there are mechanisms in place to guarantee support for the families of health workers and others who have died or become ill as a consequence of exposure to COVID-19.

² CESCR General Comment 14, para 36

³ WHO, Coronavirus disease (COVID-19) outbreak: Rights, roles and responsibilities of health workers, including key considerations for occupational safety and health (PDF): https://www.who.int/docs/default-source/coronaviruse/who-rights-roles-respon-hw-covid-19.pdf?sfvrsn=bcabd401_0

VULNERABLE GROUPS

Recommendations:

- **Gender perspectives and women's needs must be integrated into response measures, or the COVID-19 crisis will exacerbate already existing inequality. Amnesty recommends the Government follows the recommendations of Engender and Scottish Women's Aid with regard to this.**
- **Continued and safe access to sexual and reproductive health services including abortion should be guaranteed, as should menstrual hygiene products and supplies needed by pregnant and breastfeeding women.**

All people can get COVID-19; however, certain groups appear to be at greater risk of severe illness and death. According to Scotland's Chief Medical Officer, older people and people with pre-existing medical conditions (such as asthma, diabetes or heart disease) seem to be more vulnerable to becoming severely ill with the virus. Engender has warned that gender perspectives and women's needs must be integrated into response measures, or the COVID-19 crisis will exacerbate already existing inequality. In previous public health emergencies, women and girls have experienced particular and disproportionate impacts⁴. This is often linked to women performing care-giving roles, both in the informal sector and the health and social sector, and thus being at higher risk of exposure to illnesses; as well as gender inequality around health seeking and decision making. All response efforts should include a gender analysis to ensure that the rights of women, girls and gender non-conforming people are protected and that they receive appropriate support. This analysis should identify potential threats to their health, safety and other human rights, and mitigate these. Their particular needs must be taken into consideration, for example, by ensuring their access to sexual and reproductive health information, goods and services such as access to abortion services including remote video appointments and the option to take medication terminating a pregnancy entirely at home. Everyone who needs it should also have access to menstrual hygiene products and supplies needed by pregnant and breastfeeding women.

Furthermore, some people may face additional barriers in being able to adequately protect themselves against the virus – for example, people living in poverty, the homeless and particularly rough sleepers, will find it much harder to access preventive measures, including masks and sanitizer; and people who are homeless are facing significant challenges self-isolating.

Similarly, people without access to adequate water and safe sanitation will be more vulnerable to the spread of COVID-19 and will find it harder to take the steps to protect themselves that are being currently advised (such as washing hands frequently). In Scotland these groups might include some in remote and rural areas, Scottish Gypsy Traveller communities on sites without access to water, the homeless and those in inadequate accommodation. Other people that may be particularly impacted include those who do not have any choice but to live or work in close proximity with others without access to adequate preventive measures, such as in prisons or in work environments that pose health risks.

An increase in COVID-19 cases can also put increased pressure on public health systems, which may adversely impact people who otherwise need regular access to health care – for non-COVID-19 related

⁴ Engender Briefing: Women and COVID-19 (March 2020):

<https://www.engender.org.uk/content/publications/Engender-Briefing---Women-and-COVID-19.pdf>

reasons – including people with chronic health conditions, older persons and people who are pregnant. Older people and those with disabilities, even if not directly affected by the virus, often find themselves more isolated, and public health measures introduced in the context of COVID-19 may make access to basic needs even more difficult than before.

FREEDOM OF INFORMATION

Amnesty International is concerned with restrictions to access to information during this emergency period. While we understand that an extension of the period within which a public body needs to respond to a Freedom of Information request may be a proportionate response based on capacity issues, there is a concern that this will lead to it being functionally suspended for the duration of this emergency. We would urge the Scottish Government to consider the potential benefits of FOI in early identification of problems relating to coronavirus impacts on individuals, groups or communities. Monitoring and evaluation helps rather than hinders the effectiveness of systems and it is particularly important in the context of potentially great interference with individual rights and freedoms, that public bodies act transparently and are held accountable.

When the responses of public bodies to COVID19 are based on restrictions of information, a lack of transparency and censorship, they risk undermining the full range of fundamental human rights. They also risk making it harder for people to take adequate actions to protect themselves from infection, and for all stakeholders to obtain a realistic picture of developments from which to coordinate and take effective action to combat the spread of the virus. We would urge the Scottish Government to make it clear to public bodies that if there is to be an extension to the FOI waiting periods, they still have a clear, legal obligation to provide this information at the earliest possible opportunity.

PROPER LIMITS TO EXTRAORDINARY POWERS: HUMAN RIGHTS SAFEGUARDS

Recommendations:

- **Introduce a section on the face of the Bill which clearly states all powers contained within should be exercised in accordance with the principles of necessity, proportionality and non-discrimination, compatibly with international human rights law.**
- **Introduce a duty on the relevant Ministers to provide a statement of detailed, robust reasons for the exercise of the powers within where they impact on human rights.**

Amnesty welcomed the introduction of a sunset clause by the UK Government to require review of Westminster's Coronavirus Act 2020 at six-month intervals providing for far greater parliamentary scrutiny of the continuing need for such a wholesale reorganisation of the powers of the state. A clause requiring six monthly review and renewal, to be informed by expert evidence of the continuing public health situation, is an important safeguard. Amnesty therefore also welcomes the provisions in this legislation to require parliamentary consent every six months to extend its expiry date.

In line with this, we would suggest that the Coronavirus (Scotland) Bill, be amended to clearly state that all powers contained within should be exercised in accordance with the principles of necessity, proportionality and non-discrimination, in accordance with the European Convention on Human Rights (ECHR) and other international human rights obligations. This would go beyond the necessity for Scottish Parliament Bills to show compliance with ECHR Convention Rights, but given the sweeping nature of this Bill, additional human rights statements would seem in order. Another potential safeguard could be the introduction of a transparency obligation, requiring government to publish its

reasons for and an explanation for any measures introduced under this Bill, and requiring that to be robust and detailed.

RESTRICTIONS ON EVENTS AND GATHERINGS

Recommendations:

- **Introduce a clause which clearly states all powers under this schedule should be exercised in accordance with the principles of necessity, proportionality and non-discrimination, compatibly with international human rights law.**
- **there should be continuing monitoring and reporting on the use and impact of these powers to ensure consistency in their application and that there are no unintended consequences flowing from their use, such as disproportionate impacts on particular groups.**

The Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 make considerable restrictions on movement and gatherings which permit the government, if of the view that there is a serious and imminent threat to public health from coronavirus and the measures therein will be effective to control that or facilitate deployment of medical or emergency personnel, to make a declaration to that effect. Police are therefore given considerable powers to enforce restrictions on movement

These powers will inevitably interfere with fundamental rights - including those of freedom of assembly, and potentially the right to private and family life. It is difficult at this point in time to envisage all the uses to which this extremely broadly defined power could be used, but easier to imagine that such use could potentially be disproportionate or discriminatory, given its reach. At present, of course, such overbroad usage would be unlawful given section 6 of the Human Rights Act 1998, and it is to be hoped it would never be wielded in such a way. However, Amnesty urges MSPs to be alive to the question of whether such measures should be subject to an overriding requirement (as proposed above), on the face of the Bill, that their use be in accordance with the requirements of necessity, proportionality and non-discrimination. That could include a specific requirement that authorities seek viable alternatives that are less restrictive of the rights in issue. Moreover, we propose that there be a mechanism for specific periodic review of the necessity for the powers, to ensure the public health response period is kept to the absolute necessary minimum.

There should be continuing monitoring and reporting on the use and impact of these powers to ensure consistency in their application and that there are no unintended consequences flowing from their use, such as disproportionate impacts on particular groups. According to the UN International Covenant on Civil and Political Rights (ICCPR), and ECHR, for example, restrictions imposed on the freedom of movement and assembly (which these would likely amount to) are permissible if they are provided by law, and necessary to protect certain specified legitimate aims, one of which is public health – but must also be *“consistent with the other rights recognized in the [ICCPR].”* The Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR (“Siracusa Principles”), an expert interpretation of the ICCPR, provide further guidance on when and how restrictions to human rights may be implemented. In the context of limitations on rights to protect public health, the Siracusa Principles reiterate that any individual *“measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured”*, as well as fulfilling the usual requirements of legitimate aim, non-discrimination, strict necessity and proportionality (the least restrictive approach), being limited in duration, and being subject to challenge and remedy against any abusive use.

Further, new criminal sanctions should always be a measure of last resort, with fair trial rights upheld.

We hope that the information in this briefing is useful and if you would require any further briefing, please do get in touch. As I'm sure all Members would expect, our office in Scotland is now closed and staff are working remotely but will try to respond as quickly as possible.

AMNESTY INTERNATIONAL UK ADVOCACY OFFICE

For more information on any of the issues contained in this briefing, please contact Elizabeth.Thomson@amnesty.org.uk

Amnesty International
66 Hanover Street
Edinburgh EH2 1ED

scotland@amnesty.org.uk
www.amnesty.org.uk