



Coronavirus Bill

House of Commons

Second Reading

March 2020

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Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK section of the International Commission of Jurists.
2. This briefing addresses the emergency Coronavirus Bill, ahead of Second Reading in the House of Commons on the 23rd March 2020. We fully appreciate the pressure Government is under in responding to the outbreak of the coronavirus and understand that the measures proposed in this Bill are for the carefully considered extension of State power in a time of public health emergency. Nevertheless, it is important that due scrutiny is given to any expansion of power. JUSTICE is solely concerned with the operation of the justice system and we set out the three, narrowly confined concerns below to ensure that the proposed powers are used appropriately:
 - **The sunset and review provisions in the Bill must be shorter, to reflect a proportionate exercise of exceptional powers and the estimates as to the length of the crisis;**
 - **Powers that may restrict events, gatherings and use of premises must only be exercised when it is necessary and proportionate to do so;**
 - **Every effort should be made to ensure that legal cases can proceed through the courts and tribunals. The preference should be for fully video trials in the alternative to in-person trials to ensure equality of arms and effective participation.**

Sunset and Parliamentary review provisions

3. Clause 75 of the Bill provides that the legislation (other than the provisions listed under subsection 2) expires at the end of a period of **two years**, beginning with the day on which it is passed.
4. Clause 76 allows for a “relevant national authority” to shorten or lengthen (up to six months, on a repeatable basis) the expiry date of any provision. Clause 79 provides that a shortening is subject to the affirmative procedure while an extension is subject to the negative procedure.

5. Clause 84 requires a debate to be held in both Houses about the status of a report on the use of the powers in the Bill (produced by the Secretary of State in accordance with clause 83) one year after Royal Assent.

Concerns

6. The proportionality of any emergency legislation must be viewed in relation to its intended duration. It is imperative that emergency powers do not remain in place for longer than the emergency itself.
7. Government recognises that limiting the duration of the Bill is of great importance: “this Bill has been introduced to support public bodies, and wider society, in responding to the covid-19 outbreak and so is time limited”.¹
8. However, the two-year period provided for in Clause 75 is out of step with both:
 - i. previous emergency legislation (see paragraphs 9-13 below)
 - ii. current estimates for the length of the coronavirus crisis.²

Comparative examples

9. *Civil Contingencies Act 2004* – under ss. 26-27, regulations lapse after **seven days** from the point they are laid, and no more than **30 days** after they are made.
10. *Anti-terrorism, Crime and Security Act 2001* – Part IV powers of detention were set to expire in **15-months**, with a **12-month extension power** available to the Secretary of State, subject to the affirmative resolution procedure.³

¹ Coronavirus Bill 2019-20 Explanatory Notes, para 522.

² See Imperial College COVID-19 Response Team, ‘Impact of non-pharmaceutical interventions (NPIs) to reduce COVID19 mortality and healthcare demand’, p. 6 available at <https://www.imperial.ac.uk/media/imperial-college/medicine/sph/ide/gida-fellowships/Imperial-College-COVID19-NPI-modelling-16-03-2020.pdf> “When examining mitigation strategies, we assume policies are in force for 3 months, other than social distancing of those over the age of 70 which is assumed to remain in place for one month longer ... suppression strategies are assumed to be in place for 5 months or longer”. Further, in a press conference on 19 March 2020, the Prime Minister stated that: “We can turn the tide within the next 12 weeks”.

³ N.B. Powers under this Act were deemed incompatible with the European Convention on Human Rights by the House of Lords in *A and others v Secretary of State for the Home Department* [2004] UKHL 56),

11. Prevention of Terrorism Act 2005 – the operative provisions were subject to a **12-month** sunset clause, with a **12-month extension power** available to the Secretary of State, subject to the affirmative resolution procedure.
12. Terrorism Act 2006 – detention powers were subject to a **12-month** sunset clause, with a **12-month extension power** available to the Secretary of State, subject to the affirmative resolution procedure.
13. Terrorist Asset Freezing (Temporary Provisions) Act 2010 – contained a sunset clause **with an expiry date of 31 December 2010**.

Suggested amendments

14. In light of the examples above, as well as the projected length of the coronavirus emergency, JUSTICE would suggest that the sunset clause should be shortened to **six months**.⁴
15. JUSTICE appreciates that Government needs to retain an “extension mechanism since the health and welfare implications of letting the provisions expire when covid-19 is still spreading could be serious and at this time the duration of the covid-19 pandemic is not known”.⁵ We therefore do not suggest amendment of Clause 76. However, given the significant infringements of civil liberty permitted under the Bill, we would argue that any extension should be subject to the **affirmative resolution procedure**.
16. Further, in light of the changing nature of the pandemic and in order that Parliament has proper opportunity to scrutinise the Bill, JUSTICE would suggest that:
 - i. the Secretary of State prepares their report on the use of the powers in this Bill on a **monthly basis**; and
 - ii. both Houses have the opportunity to debate the use and necessity of the powers after **three months**.
17. JUSTICE would therefore propose that the following amendments are tabled:

⁴ We note that Liberty previously recommended: “Emergency legislation passed in haste should always include a sunset clause of no more than 12 months to ensure that the legislation is properly considered and debated at a later stage”. See Liberty, Memorandum to the House of Lords Constitution Committee (March 2009), available at <https://publications.parliament.uk/pa/ld200809/ldselect/ldconst/116/9031105.htm>

⁵ Explanatory Notes, n. 1 above, para 114.

Page 45, line 25 – Leave out “2 years” and insert “6 months”	A
Page 50, line 34 – After “76(1)” insert “or (2)”	B
Page 50, leave out lines 37-39	C
Page 54, lines 11 and 13 Leave out “2 months” and insert “1 month”	D
Page 55, line 8 – Leave out “one-year” and insert “six-months”	E
Page 55, lines 10 and 14 – Leave out “sixth” and insert “third”	F

Clause 50 and Schedule 21 - Powers relating to events, gatherings and premises

18. Clause 50 together with Schedule 21 create powers to prohibit or restrict events and gatherings, and to close premises. The Secretary of State may issue a direction prohibiting, or imposing requirements or restrictions in relation to, the holding of an event or gathering (para 5(1)); or entry into, departure from, or location of persons in premises (para 6(1)), *for the purpose of* (a) preventing, protecting against, delaying or otherwise controlling the incidence or transmission of coronavirus, or (b) facilitating the most appropriate deployment of medical or emergency personnel and resources. Equivalent provisions are created for Scotland, Wales and Northern Ireland.

Concerns

19. These powers engage the right to freedom of assembly and association, pursuant to Article 11 of the European Convention on Human Rights, as well as the general social engagement of people and businesses across the country. Such measures could have a significant effect on many people’s lives, restricting their liberty and impacting upon livelihoods.

20. The powers must therefore be exercised only when it is necessary and proportionate to do so. Indeed, the Schedule 20 powers of a public health officer, constable and immigration officer to direct or remove persons to a place suitable for screening and assessment can only be exercised when it is *necessary and proportionate to do so* (a) in the interests of the person, (b) for the protection of other people, or (c) for the maintenance of public health.⁶

21. Moreover, the Explanatory Notes to the Bill indicate that the provision under Schedule 21 should only be exercised by the Secretary of State “*if the public health situation deems it necessary*” [para 90].⁷

Suggested amendments

22. JUSTICE suggests that the same safeguard is placed on the power of the Secretary of State to issue a direction under Schedule 21 as is required for the power to issue a direction under Schedule 20: where it is **necessary and proportionate to do so**.

23. JUSTICE would therefore propose that the following amendments are tabled:

G

NEW CLAUSE: “The Secretary of State may issue a direction under this paragraph only if they consider that the public health situation deems it necessary and proportionate to do so.”

To be inserted at:

- i. England (Part 2) – between 5(1) & (2); between 6(1) & (2);
- ii. Scotland (Part 3) – between 14(1) & (2); between 15(1) & (2);
- iii. Wales (Part 4) – between 27(1) & (2); between 28(1) & (2); and
- iv. Northern Ireland (Part 5) – between 37(1) & (2); 38(1) & (2)

And consequential amendments thereto.

Clauses 51-55 and Schedules 22 to 26 - Courts and tribunals: use of video and audio technology

24. These clauses would expand the use of live links in court cases. Such provisions were proposed in 2016, to reflect the HMCTS Court and Tribunal Modernisation Programme,⁸

⁶ See Schedule 20 paragraphs 6(3), 7(3), 8(2) and 13(6).

⁷ <https://publications.parliament.uk/pa/bills/cbill/58-01/0122/en/20122en22.htm>

⁸ <https://www.gov.uk/guidance/the-hmcts-reform-programme>

but the Prison and Courts Bill did not proceed. They are introduced here in anticipation of the need to ensure court and tribunal cases can take place. We applaud this intention. The uncertainty over the outcome of any case can cause anxiety and hardship across all kinds of dispute. This is particularly acute in criminal cases. In addition, should a defendant be remanded in custody, it is important that their guilt is determined as soon as possible. During a crisis such as this, remaining indefinitely within prison before a verdict is given could have severe mental health, employment, housing and family ramifications.

25. These clauses must also be seen in the context of the Lord Chief Justice's decision that no new Crown Court trials will begin that are estimated to run for three days or more.⁹ This is a valuable tool to reduce the burden on the courts at this difficult time. However, it risks leaving more people languishing in custody indefinitely, potentially beyond custody time limits. Review of decisions to remand in custody will be necessary in the trials that cannot go ahead and careful consideration given to appropriate alternatives.
26. JUSTICE considers that modernisation through video links, if done correctly, can offer potential practical benefits to the court and parties alike. However, careful consideration must be given to ensure that digitally excluded individuals and people who are vulnerable by circumstance or disability are not disadvantaged in its application. Likewise, technology must be of sufficient quality to ensure a fair trial. There has been much scrutiny over the possible operation of video link trials and the obstacles to a person appearing on a link being able to fully and effectively participate.¹⁰
27. As such, we consider that these measures are *only appropriate* for this emergency situation. Their effectiveness in achieving the aims of justice must be carefully evaluated, with their structure and procedure carefully thought through. Many of the current difficulties are due to the majority of the case participants being in a courtroom with one participant joining via a live video link. This can make that participant and their evidence seem less engaging, or difficult to follow if the technology is not working properly. For this reason, we think that the use of live link hearings during the pandemic should be considered in the following way, and we are speaking with HMCTS as to how this can be achieved:

⁹ <https://www.judiciary.uk/announcements/coronavirus-jury-trials-message-from-the-lord-chief-justice/>

¹⁰ We considered these issues in our working party reports [Preventing Digital Exclusion from Online Justice](#) (2018) and [Understanding Courts](#) (2019) .

- a. The presumption should be that hearings will be conducted in person. This is likely to be difficult during the coronavirus outbreak, but it should always be considered first.
 - b. Should that not be possible, due to reasons relating to the pandemic, there should be a presumption that *all* parties appear via video link in a virtual courtroom (wherever the judge is located). This would be the fairest way to ensure that everyone can equally participate in the hearing.
 - c. If the technology is not available for this to happen, the participants that are able should attend court, with the participants who are unable to attending via video link. This should only be contemplated if it is in the interests of justice that the hearing should go ahead and if there would be no significant injustice to the party who appears via video link.
 - d. If it is not in the interests of justice to proceed, the hearing should be adjourned until it is possible for all parties to attend in person or all parties to attend via video link. Remand in custody would need to be reviewed in this situation.¹¹
28. We understand that these are case management powers to be directed by the trial judge on a case by case basis and are not suitable for primary legislation. However, we do consider it necessary that Parliament consider and understand the implications of the legislation being proposed.
29. In a court environment, vulnerable individuals have many opportunities to seek advice and support from friends, their representatives or other professionals. These formal and informal mechanisms must continue to be accessible when parties appear via video link. Moreover, defendants also require a direct and confidential line of communication with their representatives if they are to appear via video link. Proceedings must continue to be fair and accessible irrespective of the medium used. JUSTICE considers that with creativity and exploration of appropriate technology, fully video hearings can facilitate all of these needs.

JUSTICE

19th March 2020

¹¹ There is provision in the Bill for live audio link to be used. This is the least suitable mechanism for the participation of lay people, but may be necessary where the person has no other means of participating can be useful for case progression between legal professionals. We consider that the Bill provides adequate safeguards for its use.