

Coronavirus: The Tight Rope of Protecting our Safety and our Liberties

How do we protect our most vulnerable in our society whilst protecting our innate human rights?

We are all learners at the moment, and we are doing so fast. Our children may be home schooling but we are having to update our textbooks too.

The Coronavirus has caused us all to rethink how we live our lives, and exercise our rights and freedoms that we all too often take for granted.

We live by laws and rules but have within a democracy basic protections that are there to guarantee our individuality and self autonomy. But is that something you can have with a pandemic sweeping across the globe which cares for none of it?

We have been given rules on self isolation and social distancing, brought in as the guidance was not dissuading enough to stay home and not take risks. It seemed entrusting us with making sensible choices to keep ourselves and others safe, needed something stronger as it became clear with scenes of packed parks and beaches that some could not be trusted or simply lacked the sense.

But was that fair? Maybe they were exercising their free will to accept or reject the then guidance. "I am not sick" said one aggrieved fitness fanatic seen at an outside gym on the news. The problem is that was not the point.

Maybe the problem was the guidance was not clear or that not enough led by example.

What about the right to work and pay our bills? As someone who is self employed I fully understand the notion of no work means no pay.

So the Coronavirus Bill was put quickly through said to be reasonable, proportionate and based on the latest scientific information. It is time limited for 2 years, some provisions will not come in immediately, and each of the 4 Governments have their own choice when to "switch them on and off."

It contains provisions on assisting front line staff, dealing with the deceased and supporting people with sick pay and assisting food supply routes.

The most debated has been the enforcement of the safety measures:

"..containing and slowing the virus – by reducing unnecessary social contacts, for example through powers over events and gatherings, and strengthening the quarantine powers of police and immigration officers."

What does that mean? We are still working it out it seems.

It has just been reported that the National Police Chiefs Council and the College of Policing are expediting guidance on whether police do, as many have been doing, have the power to stop people going from a run or for a drive.

In Australia fines are being issued if people are found on a beach.

In my world the new measures are having a profound effect and perhaps long overdue- heralding the rapid use of technology in all its forms. We had been utilising prison links, witness links and telephone hearings for a while but now virtual attendance of as many as we can is the name of the day.

What do we do about our prison population? Should we release them with stricter bail conditions, restricting their movement?, (which now befalls us all), with electronic tagging? As they will be coming out to social distancing some could say this is itself a form of house arrest. Or is it safer for them and the community to keep them remanded until there is greater testing.

Every case must be judged on its own merits balancing as it always has the risk on both sides. We have always had the legal principles, those need not change but that the factual questions may.

The Ministry of Justice here has announced that pregnant prisoners who do not pose a high risk to the public are set to be temporarily released from custody. The move is to protect themselves from COVID-19.

Why? As of the last 24 hours -65 inmates have tested positive for the virus across 23 prisons, 3 now have died -2 from the same prison HMP Littlehey.

Bail applications are now being made which do not just cite the Bail Act but are now citing the EHCR rights to family and the right to life itself.

Northern Ireland are now releasing prisoners in response to the pandemic, fewer than 200 it is said. Only those within the last 3 months of their sentence but not if serving for murder, terrorism or sex offences. The Justice Secretary Naomi Long told press they had no choice. It will be under constant review.

Scotland are currently considering doing the same.

This raises a real dichotomy of protecting them and ourselves by releasing prisoners when many of them were inside to protect us from them.

Prison staff are getting sick, and prisoners confirmed to have Covid 19, are having to share cells with those showing symptoms. Government guidance say this “cohorting” is necessary and an effective strategy. Two staff members at HMP Pentonville have now died.

Prison Governors in England and Wales have asked for thought to be given to the release of low risk offenders to prevent the system becoming overwhelmed.

For those inside how do they have legal and social visits?

The Government has now published guidance for worried families and friends of those in prison. It cites that 60% of the population have in-cell telephones and 900 locked mobiles will be provided for those who do not. This will be across 57 sites and will include immigration detention centres. The calls are not free but it cites additional credit being allowed on compassionate grounds. They will still receive post.

Thus efforts are being made to account for our ECHR enshrined right to family life. All non essential transfers from prisons will cease.

Will this all lead to legal challenges? Time will tell.

In the last few days it has been announced that “ Risk-assessed prisoners” who are within two months of their release date will be temporarily released from jail, as part of the national plan to protect the NHS and save lives. No high-risk offenders, including those convicted of violent or sexual offences, anyone of national security concern or a danger to children, will be considered for release, nor any prisoners who have not served at least half their custodial term. Additionally, no offender convicted of COVID-19 related offences, including coughing at emergency workers or stealing personal protective equipment, will be eligible.

Those showing symptoms will also not be released, without housing and health support being in place. The releases will be phased and will start within the next week.

Here the Courts and all of their users, including Judges are working round the clock to

simultaneously reschedule many of their cases and do all they properly can by telephone and remote video hearing. The tightrope is being walked in every case. The rights of an accused to be present at his hearing unless he waives it, against the right to limit face to face in court hearings. It has as we all have, had to evolve rapidly.

Initially trials were being limited to start if under 3 days duration, that did not last long, as it became clear self isolation was depleting participants particularly jurors. The already well underway trial involving the death of PC Harper was with great reluctance aborted after they lost another juror.

This has impact for all, the accused left to await their fate longer, the witnesses, the barristers and Judge all working hard in the midst, and the family and friends of the deceased no doubt preparing for what they had thought maybe a resolution soon.

Now national and local protocols are underway. Can an accused on bail telephone in? Can we use video conferencing to appear? It is all being done with as much care as possible. But by necessity it is not perfect as the availability of time, resources and equipment dictate. So yes some custody cases are being adjourned as they cannot take place now and so we better know where we are.

The Scottish Criminal Bar Association have raised concerns about the suggestion that jury trials may be adjourned for up to 18 months and changes to the rules of evidence.

Particular areas of law have their own matters of immediate concern. Immigration cases involving the liberty of a person.
Civil cases where financial claims will be amplified in this time of social distancing and new employment arrangements.

Family cases concerning the welfare of a child.

In criminal law, those in custody awaiting trial. Time limits by necessity will either if properly judged be extended or bail applications will ensue.

The issue is the same do as much as you can remotely, but that does not mean even so all types of hearings can be accommodated or concluded.

In one of my areas of specialism, the new guidance says Psychiatric Fitness to plead hearings requiring a number of experts, cannot be fully done without a face to face hearing.

The courts have toiled to bring in urgent new working protocols and practice directions, across all legal areas to deal with the priority cases which cannot wait out the undetermined virus spread.

From 30 March 2020, there will be 157 priority court and tribunal buildings open for essential face-to-face hearings.

The court and tribunal buildings are divided as follows:

157 open courts-open to the public for essential face-to-face hearings
124 staffed courts- staff and judges will work from these buildings, but not open to the public
89 suspended courts-temporarily closed.

The courts are no different to society at large it is all about fair risk management. That is something they have been doing for a long time, we all must do the same.
It has been said that the true measure of any society can be found in how it treats its most vulnerable members. We will need to carefully walk this tightrope to ensure we stay protected in every way but understanding that in this extreme time we may have to find new ways to exercise our individuality when we are all so vulnerable.

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