

York: Human Rights City Network

FACT SHEET 2 (May 2020)

CORONAVIRUS AND HUMAN RIGHTS



This series of fact sheets attempts to capture the human rights implications of coronavirus, and responses to it, with a particular focus on the city of York (UK). Human rights concerns identified in Fact Sheet 1 will appear as boxed text in summarised form in subsequent fact sheets, followed by evidence of the actual human rights implications of coronavirus. We hope these fact sheets will be of use to government and statutory agencies – notably the City of York Council, the NHS, the police – and community and voluntary groups. For the former, the fact sheets provides guidance on addressing human rights when implementing the difficult measures required by the pandemic; for the latter organisations the they provide frameworks to support advocacy and the monitoring of policy as it impacts on individuals, families and communities and/or on issues of concern e.g. mental health, disability, the situation of refugees.

The local newspaper – *The Press* – is providing a day by day account of the effects of coronavirus on the city, and it is drawn on heavily as a source in this fact sheet. By 30 April 2020, 73 patients with coronavirus had died in York Hospital,¹ and 50% of York’s 36 care homes had reported coronavirus outbreaks.² In terms of the full profile of coronavirus-effects, York appears to be doing well in some areas – in addition to the above data, for example, the Google Community Mobility Report has commended York as one of the best cities in the country for adhering to the lockdown.³ But it is faring less well on other matters. Spending in York has fallen by over 50%, the fifth biggest fall out of 80 larger cities in England and Wales. The main reasons cited are the closure of universities, and the end to tourism. Non-grocery shopping has collapsed, falling by 75%.⁴ In this fact sheet we set out three human rights contributions to ongoing efforts to combat coronavirus: ensuring responses enhance dignity, the right to life and non-discrimination alongside protecting the vulnerable; using human rights when balancing priorities and making difficult decisions; and optimising the link between disease and democracy.

¹ '73 Covid-19, Patients Die at Hospital', *The Press*, 30 April 2020, at:

<https://www.yorkpress.co.uk/news/18417544.four-patients-covid-19-die-york-trust-hospitals/>

² 'Coronavirus in Half Care Homes', *The Press*, 2 May 2020, at:

<https://www.yorkpress.co.uk/news/18421718.coronavirus-outbreaks-reported-half-yorks-care-homes/>

³ 'Coronavirus: York a Top City for Staying at Home - says Google', *The Press*, at:

<https://www.yorkpress.co.uk/news/18387312.coronavirus-york-top-city-staying-home---says-google/>

⁴ 'Spending in York Plummets 50% - City Faces Challenging Times Post-Lockdown', *The Press*, 23 April 2020, at:

<https://www.yorkpress.co.uk/news/18398038.coronavirus-spending-york-plummets---city-faces-challenging-times-post-lockdown/>

Dignity, the right to life and non-discrimination

Fact sheets will monitor 3 routes to discrimination, with implications for dignity and the right to life:

- 1) *Discrimination in access to health care*. For example, the idea that ventilators could be rationed and certain groups, e.g. elderly or disabled people, essentially sacrificed, is abhorrent.
- 2) *Inadvertent discrimination* may arise from neutral sounding measures to combat coronavirus. For example, 'social distancing' means little in crowded housing conditions and prisons, and may lead to stigmatisation of already marginalised groups and increased levels of domestic violence and child abuse; mass school closings may mean some children go without food.
- 3) *Contextual and structural discrimination*, meaning enhanced vulnerability relating to qualities of coronavirus itself or the nature of society with which it interacts. Children, often considered a vulnerable group, are not especially at risk of contracting the virus or from the virus. Other groups, however, may be particularly vulnerable including homeless people, those with mental illnesses, people deprived of their liberty, migrants and refugees, those at risk of domestic violence and other abuse, and key workers, including health and social care workers.

Many of these anticipated vulnerabilities and forms of discrimination can now, sadly, be supported by empirical data. Early on in the UK concerns were expressed about elderly and disabled people being denied medical treatment – the National Institute for Health and Care Excellence (NICE) was forced to redraft its guidance to the NHS that it should assess patients with conditions such as learning disabilities and autism as scoring high for 'frailty', meaning they could be refused treatment because they needed support with personal care in their everyday lives.⁵ Human rights prescribes that access to medical care, in particular in situations of scarce resources, should be equal and guided by medical criteria – in short, decisions about the efficacy of treatment are not the same as judgements about the quality of a person's life, and as such no blanket measures excluding categories of people are permitted.⁶ Recent evidence has made it clear that coronavirus is disproportionately affecting ethnic minorities, and people living in poverty.⁷

A final example relates not to the effects of the virus, but to the effects of governmental responses to the virus. Very significant concerns have been raised about the 'Adoption and Children (Coronavirus) (Amendment) Regulations 2020', which came into force on 24 April 2020 (are not due to expire until 25 September 2020, and may be extended).⁸ These concerns relate to the dilution of social care and protection for some of the most vulnerable children in the country (those in care), the lack of consultation about the new regulations, and to fears that for a government sceptical about these protections the coronavirus crisis is being used as a cover to dilute hard-won protections, and that temporary measure may

⁵ Frances Ryan, 'It Is Not Only Coronavirus That Risks Infecting Society – Our Prejudices Do To', *The Guardian*, 9 April 2020, at https://www.theguardian.com/commentisfree/2020/apr/09/nice-guidelines-coronavirus-pandemic-disabled?CMP=Share_iOSApp_Other

⁶ Council of Europe Committee on Bioethics, 'Statement of the Committee on Bioethics: Human Rights Principles Must Guide Health Decisions', Strasbourg 14 April 2020. A broader set of concerns are addressed in Oliver Lewis, 'Disability, Coronavirus, and International Human Rights', Doughty Street Chambers, 21 March 2020, at <https://insights.doughtystreet.co.uk/post/102g27s/disability-coronavirus-and-international-human-rights>

⁷ Lucinda Platt and Ross Warwick, 'Are Some Ethnic Groups More Vulnerable to COVID-19 Than Others?' Institute for Fiscal Studies, May 2020, at <https://www.ifs.org.uk/uploads/Are-some-ethnic-groups-more-vulnerable-to%20COVID-19-than-others-V2-IFS-Briefing-Note.pdf>

⁸ For more general discussion of the short and long term impact of the virus on children, see Silvia Camporesi, 'It Didn't Have to Be This Way: A Bioethicist at the Italian Coronavirus Crisis Asks: Why Don't We Talk About the Trade-offs of the Lockdown?' 27 April 2020. At: <https://aeon.co/essays/a-bioethicist-on-the-hidden-costs-of-lockdown-in-italy>; and Aoife Nolan, 'A Child Rights Crisis', *London Review of Books* blog 6 May 2020, at https://www.lrb.co.uk/blog/2020/may/a-child-rights-crisis?utm_campaign=20200509%20icymi&utm_content=ukrw_subs_icymi&utm_medium=email&utm_source=LRB%20icymi

become permanent.⁹ In short, while it is frequently claimed that we are all in this together and that coronavirus does not discriminate, it is now clear that neither of these statements is completely true. Rather than being a great leveller coronavirus is holding up a mirror, highlighting and possibly accentuating the divides and inequalities that characterise our country, through intersecting forms of inequality and discrimination – in access to health care, and through inadvertent, contextual and structural discrimination.

While the issues set out in the paragraph above are national level concerns, they will all affect York – for example, local authorities deliver social care and protection for children in care. Annual indicator reports produced by the York: Human Rights network have found that inequality in the city is a cross-cutting concern, on issues ranging from educational attainment to life expectancy, child poverty and ‘in work’ poverty.¹⁰ There are already clear signals that coronavirus is affecting the vulnerable, fuelling discrimination and exacerbating inequalities in York. Examples include claims asserting the neglect of elderly people in care homes;¹¹ reports of patient discrimination towards health staff;¹² Citizens Advice York figures indicating an increase in foodbank voucher referrals by 150% and of universal credit claims by 200% during lockdown;¹³ and reports from the Samaritans of a ‘huge rise’ in calls seeking help, notably from in relation to domestic violence and mental health issues.¹⁴ Local authorities, including the City of York Council, are helping vulnerable groups in various ways, such as supporting Community Hubs, but it is clear that ongoing vigilance will be needed to ensure that dignity, the right to life and non-discrimination are enhanced and not diminished during the pandemic and its aftermath. Such work will need to address discrimination in all its forms - in access to health care, and through inadvertent, contextual and structural discrimination.¹⁵

Balancing priorities, making difficult decisions

⁹ A *Guardian* editorial noted: ‘The removal of protections in 10 sets of regulations relating to the care of looked-after children in England, with no public consultation or parliamentary debate, must be seen for what it is: an attack on their rights’. ‘The Removal of Important Protections from Children in Care is a Grim Indicator of Ministerial Priorities’, 28 April 2020. For further criticisms of the regulations, see the Children’s Commissioner, ‘Statement on Changes to Regulations Affecting Children’s Social Care’, 30 April 2020, at

<https://www.childrenscommissioner.gov.uk/2020/04/30/statement-on-changes-to-regulations-affecting-childrens-social-care/>; and Joanna Lucas, Albion Chambers, at <https://www.albionchambers.co.uk/chambers-news/adoption-and-children-coronavirus-amendments-regulations-2020>.

¹⁰ The indicator reports can be found at: <https://www.yorkhumanrights.org/current-work/>

¹¹ ‘Coronavirus: “They’re Playing Russian Roulette with Residents” Says Care Home Boss’, *The Press*, 13 April 2020, at: <https://www.yorkpress.co.uk/news/18373194.coronavirus-theyre-playing-russian-roulette-residents-says-care-homes-boss/>

¹² ‘“It is Upsetting”: York Healthcare Staff Face Discrimination During Pandemic’, *The Press*, 22 April 2020, at: <https://www.yorkpress.co.uk/news/18395124.it-upsetting---york-healthcare-staff-face-discrimination-pandemic/>

¹³ ‘Coronavirus: Universal Credit Calls to Charity Rocket by 200% During Lockdown’, *The Press*, 25 April 2020, at: <https://www.yorkpress.co.uk/news/18404501.coronavirus-universal-credit-calls-charity-rocket-200-lockdown/>

¹⁴ ‘York Samaritans See Surge in Calls During Lockdown’, *The Press*, 4 May 2020, at: <https://www.yorkpress.co.uk/news/18420508.york-samaritans-see-surge-calls-lockdown/>

¹⁵ For the City of York Council work to support the vulnerable, see <https://www.york.gov.uk/C19CYCStaff/VulnerablePeople> - the NGO JustFair is documented what local authorities in the North East of England are doing to protect vulnerable people, at: <http://justfair.org.uk/north-east/>

'[Qualified or non-absolute] (h)uman rights do not really resolve the tension between competing interests and various visions of how the world should be; rather, human rights ideas provide the vocabulary for arguing about which interests should prevail and how best to achieve the ends we have chosen'. Clapham

While some human rights are absolute, many are not. Human rights law recognises that there are circumstances when the enjoyment of (qualified or non-absolute) human rights may be restricted, subject to certain conditions being met. Public health is specifically named as a legitimate reason for instituting what are termed 'public interest restrictions' on such human rights. For example, all of us are currently experiencing restrictions on our freedom of movement and assembly because of coronavirus. Policy makers are faced with numerous trade-offs and difficult decisions at present.

The first way in which human rights is useful is that it acknowledges these dilemmas – these decisions are difficult - and, as the quote from Clapham suggests, provides a vocabulary for balancing, debating and prioritising interests e.g. When and how should restrictions on freedom of movement be eased?

Human rights make a second contribution by outlining criteria on the basis of which difficult decisions to restrict human rights should be made. Any restrictions must pass a 3 part test: they must be provided by law, address a legitimate purpose, and be 'necessary in a democratic society'.

- 1) The 'provided by law' requirement means that restrictions to rights must be clearly formulated and be accessible to the general public (ideally in written form).
- 2) In order to lawfully restrict rights, governmental authorities must pursue legitimate purposes, which include the protection of health (as noted above) and public safety.
- 3) The phrase 'necessary in a democratic society' means that restrictions on rights should be required by and be proportionate to the threat they are designed to meet – they should not go beyond responding to the threat in scope (materially, geographically), nor be open-ended. Restrictions should not undermine the essence of democracy and human rights.

These criteria can be used by City of York Council and other statutory bodies in policy formation, and by civil society to assess whether the criteria have been fully and fairly applied (especially criteria 3).

The clearest example of the need to balance interests and rights in York to-date has been the issue of whether and how funerals should be held during the pandemic. On 9 April 2020, the City of York Council banned mourners and stopped funeral services at York crematorium. The dead were to be subject to 'direct cremations' until further notice.¹⁶ There was recognition that this would be heart-breaking for the families of the deceased. The fact that families could not visit loved ones in hospital, nor attend their funerals, for fear of further infections had to be balanced against public health concerns and the safety of crematorium staff. There was a strong public response against this measure, and a petition quickly started to gather signatures. By 11 April the City of York Council agreed that a celebrant or minister could perform a short service, which would be filmed free of charge, and up to 10 mourners could attend but would have to remain outside the crematorium.¹⁷ The backlash continued, asserting that these compromises were not enough. Petition organiser, Kelsey Dobson, stated that 'Whilst yesterday's renewed guidelines allow immediate family outside the crematorium, this still refuses immediate family their right to be with their loved one during the

¹⁶ 'Funeral Services and Mourners to be Barred from York Crematorium from Tomorrow', *The Press*, 8 April 2020, at: <https://www.yorkpress.co.uk/news/18366421.funeral-services-mourners-barred-york-crematorium-tomorrow/>

¹⁷ 'Coronavirus: Council Says Funeral Services CAN Happen – But Mourners Must Remain Outside', *The Press*, 11 April, 2020, at: <https://www.yorkpress.co.uk/news/18374799.coronavirus-council-says-funeral-services-can-happen---mourners-must-remain-outside/>; City of York Council Press Release, 'Confirmation of Guidance for York Crematorium', 11 April 2020, at: <https://www.york.gov.uk/news/article/143/confirmation-of-guidance-for-york-crematorium>

service'.¹⁸ On 14 April the Council confirmed that up to 10 immediate family members could attend the crematorium, and a short ceremony held outdoors.¹⁹ This is a good example of balancing, with a sensible compromise reached through public debate. Public health concerns had to be weighed against other priorities and rights, notably the right to respect for private and family life, freedom of religion and belief, and to freedom of assembly and association. All of these rights are protected within the 1998 Human Rights Act.²⁰ Such balancing acts often involve everyday issues, and as such are an important means to engaging the majority of the public, and not just vulnerable groups, in discussions about the relevance of human rights to their lives.

Disease and democracy

'We don't do charity in Germany. We pay taxes. Charity is a failure of governments' responsibilities.'
Henning When, a German comedian, at the start of the pandemic

There are two issues at stake in this final section.

- 1) The question of what degree of transparency and openness is required in public decision-making at times of crisis. Democracy and associated human rights provide the oxygen that will breathe life into an effective response to the virus – democracy at a local scale, as well as nationally. Those who wrongly believe that authoritarian responses are a quick fix in such crises forget the evidence from past pandemics - HIV, Zika, Ebola, H5N1, Severe Acute Respiratory Syndrome (SARS) and Middle Eastern Respiratory Syndrome (MERS). We know that human rights need to inform responses: transparency and accurate information about risk, transmission and treatment (the right to information and expression); the active engagement of populations (a cross-cutting principle of participation); and maintaining a climate that will encourage people at risk or ill to seek help, rather than avoid health services because they are afraid of stigma and punishment (non-discrimination, right to adequate health care, right to life).
- 2) The issue of state capacity and the kind of state – local government and national government – that we want.

At times of crisis, it is inevitable that the weight in decision-making shifts from consultation to direction, and from elected representatives to experts and civil servants. But here again it is important that a balance is maintained, with oversight of and limits to new arrangements. At a national level there have been calls, for example, for greater transparency about the composition of, and advice given by, SAGE – the Scientific Advisory Group for Emergencies.²¹ In York, a basic question is how many residents would be able to say how decisions are currently being made in the city? While the City of York Council has a webpage dedicated to 'Councillors and local democracy', which includes urgent decision-making guidance and details a focus on executive and regulatory functions,²² these new arrangements have been subject to virtually no press coverage or public debate. Concerns have been raised by opposition political representatives and some members of the public that key decisions are not in the hands of elected members, and that there is limited input into and oversight over decision-making e.g. decision logs have not been published in a timely

¹⁸ 'Council leader says Mourner Ban Petition Will be Considered "Fully and Fairly"', *The Press*, 13 April 2020, <https://www.yorkpress.co.uk/news/18376181.council-leader-says-mourner-ban-petition-will-considered-fully-fairly/>

¹⁹ City of York Council Press Release, 'Additional Arrangements for Families at York Crematorium', 14 April 2020, at: <https://www.york.gov.uk/news/article/145/additional-arrangements-for-families-at-york-crematorium>

²⁰ For more on the Act, see: <https://www.equalityhumanrights.com/en/human-rights/human-rights-act>

²¹ 'No 10 Faces Calls to Lift the Secrecy Around Covid-19 Advisory Group', *The Guardian*, 14 April 2020, at: <https://www.theguardian.com/uk-news/2020/apr/14/no-10-secrecy-around-sage-coronavirus-advisory-group>

²² See: <https://www.york.gov.uk/COVIDDemocracy> - The Centre for Public Scrutiny is providing support for local authorities on governance and scrutiny, on behalf of the Local Government Association, at <https://www.cfps.org.uk/covid-19-notice/>

fashion, and often lack detail.²³ While a full assessment of the Council's response to the crisis will take time, it is important to frame the parameters for this discussion now.

At the heart of the current relationship between disease and democracy is the question of the kind of state we want. Coronavirus is a reminder that we need an effective and responsive state, including at local government level. No other organisation or mechanism could have responded effectively to the virus on the scale required. Money is being spent on health systems and infrastructure in an unprecedented manner. In essence, human rights are rights claimed by individuals and groups from the state as duty bearer. Decades of privatisation and austerity have weakened this bond, but the state is now centre-stage. Human rights are needed not just as a negative shield against government interference, but also as a means to make positive claims on government. Basic social provision, including health, social security, and housing, is a fundamental human right. The realities of crisis – the state matters; free health care for all is precious – should be remembered when life returns to normality, not just in the priority given to nurses, doctors, carers, and other key workers, but also for the ongoing responses to crises such as climate change.

A key lesson from the coronavirus response is that we can find the resources to address issues if we want to. A second lesson is that the positive energy from the profusion of volunteering, civic action and Community Hubs (run by council staff and volunteers, to deliver food and medication, check in on vulnerable people, etc.) needs to be tapped to enhance social cohesion, while not by intent or default replacing the state as the main means of service provision. Charity and volunteering are important, but Henning When (above) has a point – these activities cannot and should not replace government. Finally, the legacy of coronavirus for the state will be complex. It will have expanded its role significantly in some areas, such as the economy, at least in the short term; but it will have contracted in other areas, such as social care and protection for children. If we want a human rights city, or a human rights state, we will need to be clear about what kind of government we desire, and vigilant in campaigning to bring it about.

Further information

- British Institute of Human Rights: <https://www.bihar.org.uk/Listing/Category/corona-virus>
- Koldo Casla: <https://www.opendemocracy.net/en/transformation/coronavirus-beyond-human-rights/> and <https://www.acorrectionpodcast.com/phonyeconomy/allmg4lx4xdsf4jx47px6wh69yt7gc>
- Richard Carver: <http://cendep.blogspot.com/2020/04/human-rights-in-age-of-pandemic.html>

²³ Published decisions are available at:

<https://democracy.york.gov.uk/mgDelegatedDecisions.aspx?&RP=0&K=0&V=0&DM=0&HD=0&DS=2&Next=true&META=mgdelegateddecisions&DR=08%2f04%2f2020-22%2f04%2f2020>