BIHR BRIEFING: 6-MONTH REVIEW OF THE CORONAVIRUS ACT

28 September 2020

"Community Mental Health Teams stopped visiting care homes, so people with mental health issues and/or dementia have remained in placement for significantly longer than needed."

"Decision-making is no longer person centred; myths around Coronavirus Act powers abound."

"There has been so little regard for rights. The strategy from the government ignored the value in the lives of the people we support from the start (disabled people, older people, carers). How can you speak about a right to life when you discharge people with the virus into contained care environments and stop them accessing treatment?"

Summary

The 30 Sept will be the House of Commons first 6-month review of the Coronavirus Act (2020) (the Act). Act. The continuation of the Act without the necessary support to implement it or to monitor it's use compatibly with the Human Rights Act (1998) (which brings the fundamental protections from the European Convention of Human Rights (1950) into UK domestic law) will lead to a continued precarious situation for human rights for people in already vulnerable situations in the UK.

Since lockdown, the British Institute of Human Rights has supported over 700 people accessing (or trying to access) public services including their families and friends, and over 1000 people working in health and care services, advocates and campaigners. Our work enables us to call for national change and recommendations based on a human rights legal analysis and which truly understands people's every day experiences of their human rights.

This briefing **shares evidence from our work and shows that since the Act came in, decisions across the UK, by Governments and in local areas, have compromised people's rights.** This ranges from withdrawing vital care and support that many people rely on to keep safe and well, through to refusals of treatment due to age or disability.

Since the passing of the Coronavirus Act, BIHR has worked directly with 1700 people and conducted research with 230 people with care and support needs, frontline staff and community groups, which shows:

- Over 15% of people have experienced the right to life not being protected because of reduced services or prioritisation of other services. **with almost 10% experiencing the use of do not resuscitate orders being used without involving the person or using pressure.**
- Almost 30% of people have experienced care being taken away impacting their right to be free from inhumane or degrading treatment.
- Over 50% of staff working in health and care experienced restrictions being put in place which negatively impact people's physical and mental wellbeing.
- 50% of staff told us they had experienced decisions being made which impacted people's right to non-discrimination.

We urge MPs to seek explicit, concrete assurances from the Government, that any continued use of the Coronavirus Act, and related emergency law and policy will:

1. **Uphold people's human rights (Human Rights Act) ensuring people, including disabled adults and children and older people, are not placed at greater risk; and**
2. **Be subject to democratic oversight, and not simply Government-made law devoid of scrutiny and consultation.**

If this cannot be achieved with the Coronavirus Act in place, it must be scrapped.

BIHR contacts: Sanchita Hosali, Director: shosali@bihr.org.uk and Carlyn Miller, Policy & Programmes Manager: cmiller@bihr.org.uk

Background

On 26 March, The Coronavirus Act was passed at breakneck speed, giving the UK and devolved governments extensive powers to change the law, and providing permission to local authorities, police and other officials to suspend vital safeguards for us all.

The Human Rights Act requires all actions of public authorities, including suspensions of care and support to not breach our rights. This is this is made explicit in Section 4 Schedule 12 of the Coronavirus Act in reference to the Care Act. However, the reality is that most frontline staff do not have the human rights knowledge and confidence to make these difficult decisions. And people are rarely able to speak up and challenge these risks to their rights.

Our recent research draws on the experiences of people in a range of care and support sectors since the passing of the Coronavirus Act. The research demonstrates the reality for 1) people accessing (or trying to access) services, their families and those that care about them; 2) advocates, campaigners and community groups supporting people; and 3) frontline staff from health, care, social work, education and housing. Our findings shine a worrying spotlight on the negative impact of the Coronavirus Act and subsequent changes to law and policy for many:

- Almost **70% of people said their care and support had got worse during Covid-19**.
- Almost **70% of people** were **not provided with information that the duty on staff and services to respect their human rights had not changed as a result of Covid-19**. (Note: Section 4 of Schedule 12, of the Coronavirus Act explicitly states that any easements of care under the Care Act 2014 cannot be taken if they breach people's human rights)
- **Almost one quarter of people** said whilst they **used to be involved in making decisions about their care and support, this has stopped since Covid-19.**
- **Over half of people** were **not told how to review and challenge decisions** made **about their care and support** during Covid-19.
- **60% of people** were **not told the legal basis for changing (i.e. reducing) their care and support** during Covid-19.

This evidence is referred to by the Parliament's Join Committee on Human Rights in their recent report on the Government's response to COVID-19: human rights implications. That report further demonstrates the significant negative impact of the Coronavirus Act, and subsequent changes to law and policy, for people in vulnerable situations across the UK. The report calls on the Government to urgently address a number of issues to make sure that its handling of the Coronavirus pandemic is compatible with human rights. We have highlighted some of the recommendations which are the most relevant to our research and work in our Explainer which you can read here.

We note in particular the concerns about additional emergency laws passed by statutory instruments and the continued lack of parliamentary scrutiny on a range of legal measures which further restrict people's rights. We note that the JCHR has proposed an amendment to secure better human rights scrutiny of any further "lockdown" Regulations.

The Coronavirus Act: BIHR's key concerns

The human rights litmus test

In April 2020 the United Nations Secretary General stated:

> "The Covid-19 pandemic is a public health emergency but it is far more … a human crisis that is fast becoming a human rights crisis … human rights can and must guide COVID-

BIHR contacts: Sanchita Hosali, Director: shosali@bihr.org.uk and Carlyn Miller, Policy & Programmes Manager: cmiller@bihr.org.uk

> 19 response and recovery … People, and their rights, must be front and centre. We have seen how the virus does not discriminate, but its impacts do, exposing deep weaknesses in the delivery of public services and structural inequalities that impede access to them. We must make sure they are properly addressed in the response."

In the UK, to ensure the response to and the recovery from the pandemic does not become a human rights crisis, the Government's measures need to be lawful, legitimate, proportionate and non-discriminatory.

From our work directly with people, community groups and frontline staff, it is clear there have been significant problems with the implementation of the Coronavirus Act, and subsequent law and policy changes. The human rights litmus test of lawful, legitimate, proportionate and non-discriminatory is being failed; action must be taken to redress this.

Below we offer more detail into our key human rights concerns around the Coronavirus Act:

- Human rights compliance - the ability to uphold human rights during the pandemic
- Scrutiny and monitoring
- The reality for people with care and support needs

Human rights compliance

The right to life (Article 2 of the European Convention on Human Rights and our UK Human Rights Act) has been, and must remain, central to the Government's response to Covid-19. The Government, and those delivering a function of public nature, have a duty to recognise where there is a real and immediate risk to life, they put measures in place to safeguard those lives. Our research shows that there has been failure to protect life and that certain groups within our society have been at greater risk which has not always been met by greater protection; this has been a key issue for disabled and/or older people.

Many of the measures taken by Government to halt the spread of Coronavirus have been taken on the grounds of protecting life, **at all costs**. This focus has meant that actions taken by the Government have interfered with other rights. Where this is the case, the interference with other "qualified" or "non-absolute" rights may be justified but only where this interference is lawful, legitimate and proportionate and crucially where the checks and balances are in place to monitor the interference with people's rights.

It is these checks and balances that are too often missing in the implementation of the Coronavirus Act in its current form. This is despite the fact that the Act, on paper, requires suspensions of care and support to not breach our protections under the Human Rights Act. Explicit inclusion of this legal duty on the face of the Act is a positive approach which we welcome, and which in fact reflects how the HRA operates in relation to other laws.

However, the reality is that most frontline staff do not have the human rights knowledge and confidence to make these difficult decisions. From our research, **staff** told us:

- **Over 80%** of staff are **finding it harder to uphold human rights** during Covid-19.
- **More than three quarters** of staff had **not received training or clear information about upholding human rights law** during Covid-19.
- **Almost 80%** of staff were **not provided with training or clear information about the use of Emergency Powers under the Coronavirus Act**

Additionally, our research shows that **people who access (or are trying to access) services** are rarely able to speak up and challenge these risks to their rights:

BIHR contacts: Sanchita Hosali, Director: shosali@bihr.org.uk and Carlyn Miller, Policy & Programmes Manager: cmiller@bihr.org.uk

- Almost **60%** of people felt **less confident to raise concerns about their human rights with care and support staff and decision-makers** as a result of the Covid-19.
- **Over half** of people were **not told how to challenge decisions made about their care and support** during Covid-19.

Scrutiny and monitoring

Clearly the pandemic is an emergency situation and required a swift response. However, scrutiny of the implementation of the Act is vital. The Act was passed swiftly with limited review. Yet it gives the UK and devolved governments extensive powers to change the law, and provides permission to local authorities, police, and other officials to suspend vital safeguards for us all. We have significant concerns about the implementation and monitoring of the Coronavirus Act, and in particular those measures and "easements" related to care and support:

- In **England,** a system of Local Authorities declaring their use of easements to the care and support duties was set up, with a publication of this information (following questions in parliament). However, there does not appear to be any further process of monitoring and review of decisions to apply the easements to ensure the necessary checks and balances, given the significant impact this could have on the lives of people with care and support needs.

- In **Scotland,** Health and Social Care partnerships and Local Authorities do not have to declare their use of social care easements, monitoring takes place through non-mandatory surveys sent two-monthly from the Scottish Government to local bodies to complete. We, alongside a long list of other organisations raised serious concerns about the lack of transparency and accountability in this approach to the use of Emergency Powers. You can read more about this work here.

- In **Wales,** we understand Local Authorities notify the Welsh Government of use of easements, but this is not published. On the 23 September 2020, the Welsh Minister for Health and Social Services confirmed to that local authorities had made a notification of using the easements. However, our work with frontline staff and community groups suggests that in practice this is fact happening.

There must be absolute transparency and clear communication both centrally and locally where Emergency Powers are being used across the UK, it is clear that this is not the case at present. Whilst official counts of the usage of easements appears low, in practice the easements are **creating a permissive environment for the reduction of care and support for people across the country, irrespective of whether the easements are being used (or confusion about their usage)**. This is happening at a time when many people are reliant on the support to keep safe and well, not only in terms of physical health and pandemic, but also for their mental health and wellbeing.

As noted in our Briefings to both Houses on Coronavirus Bill in March 2020, the two-year time limit for the Coronavirus Act raises significant proportionality issues. Whilst a 6-month review clause was added to the Act, it is very clear from our research that the impact these changes are having on people with care and support needs are significant. The long-term impact of these changes continuing for up to two years has huge implications for human rights in the UK.

We urge MPs to call on the Government to guarantee that the Coronavirus Act is implemented in a way that respects and protects people's human rights. Our evidence demonstrates that the Government is not doing this; if they cannot ensure human rights are upheld as set out in our Call to Action below, then the Coronavirus Act should not continue.

BIHR contacts: Sanchita Hosali, Director: shosali@bihr.org.uk and Carlyn Miller, Policy & Programmes Manager: cmiller@bihr.org.uk

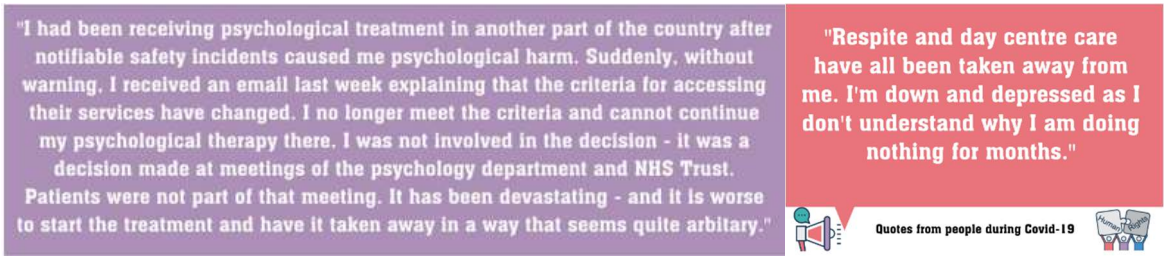
The reality of implementation

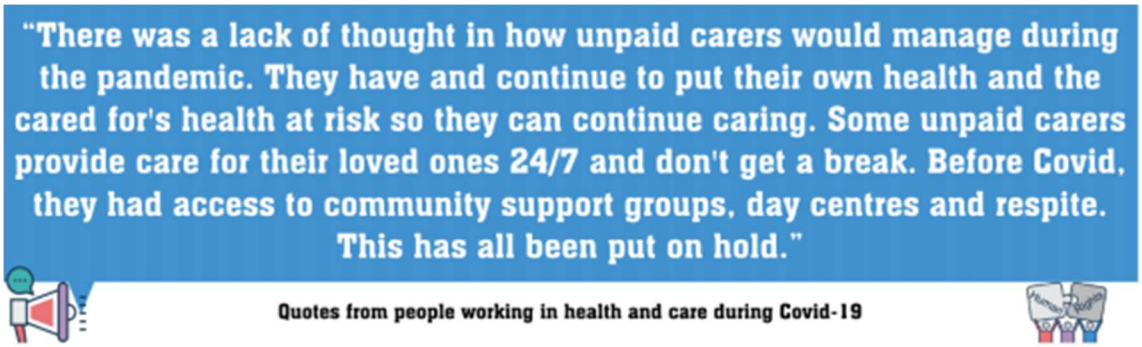
Since the Coronavirus Act became law six months ago, we have seen how decisions across the UK, both by Governments and in local areas, have compromised people's rights, from withdrawing vital care and support many rely on to keep safe and well, through to refusals of treatment based on people's age or disability.

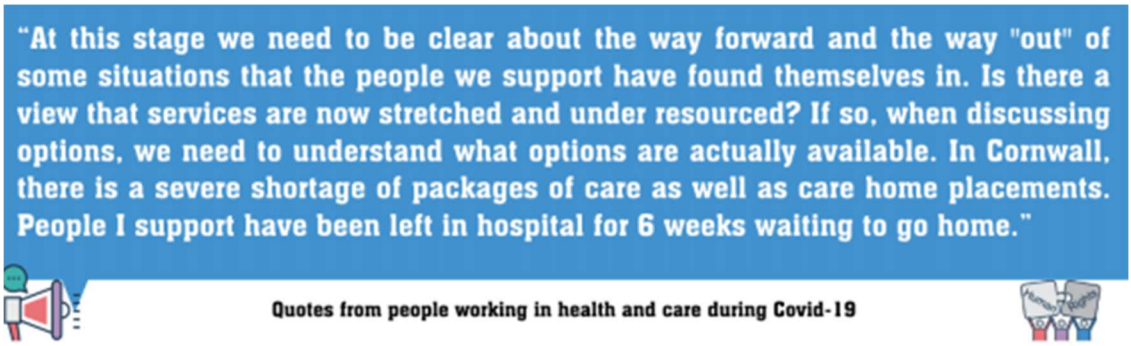
- **Almost 70% of the people who responded to our survey said that their care and support had got worse during Covid-19.**
- **Worryingly, 16% of people told us that they had experienced life not being protected because of reduced services or the prioritisation of other services**
- **28% of people told us that they had experienced care or support being taken away so much that dignity cannot be upheld.**

You can find our right by right analysis of issues raised by the people who participated in our survey here. These findings were mirrored in the responses from staff and advocates, campaigners and community groups.

The voices of people







BIHR contacts: Sanchita Hosali, Director: shosali@bihr.org.uk and Carlyn Miller, Policy & Programmes Manager: cmiller@bihr.org.uk

BIHR's Calls to Action

Our work and research over the past six months, since the passing of the Coronavirus Act, has shown us that the Emergency Powers contained within the Act, rather than safeguard those most in need of protection, have resulted in human rights issues for many people across the UK.

At this point, 6 months in, the Government needs to take immediate action to ensure that the legal duty to respect, protect and fulfil people's human rights is front and centre of Covid-19 law and policy. In order to do this under the Coronavirus Act, the following needs to happen.

- The Government, both centrally and locally must make it entirely clear that all legal duties under the Human Rights Act (HRA) remain in place regardless of Emergency Coronavirus legislation.

- The Government must ensure that all public officials are fully trained, resourced and supported to practically implement their legal duties under both the Human Rights Act (1998) and the Equality Act (2010).

- The Government communications about Covid-19 (and beyond) should be centred in human rights. Thus far there has been very little evidence of this, even though the main responses to the pandemic focused on rights-restricting measures.

- People accessing (or trying to access services) and those working in health and care must be provided with accurate and up to date information about which Emergency Powers are in use and which are not.

- Information about the Emergency Powers being used at local level should be monitored locally and centrally via a robust procedure.

If the above cannot be ensured by the Government whilst the Coronavirus Act is in place, then the Act will continue to be incompatible with human rights. **Without the above in place, the Act is not fit for purpose and rather than safeguard those most in need of protection the Act is making people in already vulnerable situations more vulnerable.**

BIHR contacts: Sanchita Hosali, Director: shosali@bihr.org.uk and Carlyn Miller, Policy & Programmes Manager: cmiller@bihr.org.uk