What are the implications of COVID-19 law and regulation for health professionals in England?

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Aims of this report

This report provides health professionals with an overview of key legal and regulatory responses to COVID-19, and how they affect important areas of health and social care, in England. It explains the laws and other sources related to professionals' rights and duties to help guide their decision-making. The overview of legal measures aims to be of ongoing relevance, but laws may change, and this document is representative of the situation on 7th July 2020. The report also provides guidance to assist reflective practice underpinned by a human rights-based approach.

COVID-19: The UK's legal response

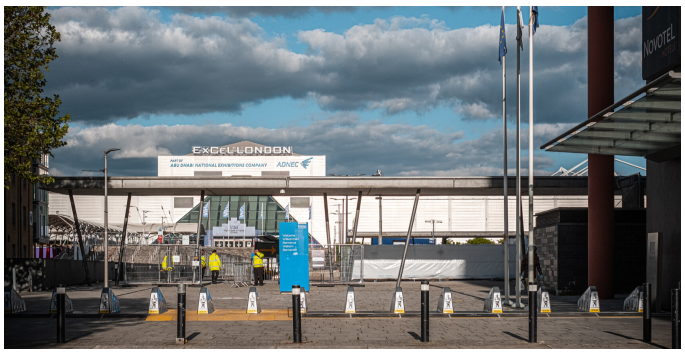
In March 2020, the UK Parliament enacted the Coronavirus Act 2020. This Act will be in force for up to two years; albeit that some of its provisions have not been given immediate effect—and may never take effect. The Act operates alongside existing legislation enacted for all of the UK, as well as measures that apply only to England, Northern Ireland, Scotland, and Wales, or just some of these. The legal and policy situation for health and social care is complex, with regulation and guidance coming from the UK government and the devolved administrations. Local government also has a crucial role to play, as do health professionals and their representative organisations and regulators.

Rights and duties are at the core of being a health professional. Health professionals owe general duties to the public, underwritten by law and professional ethics. It is important to take a holistic, culturally congruent stance on the provision of health and social care in light of people's needs and rights.

The legal and regulatory context in England

The COVID-19 pandemic poses extraordinary challenges within the health and social care environments. To respond effectively to these and to mitigate the harms—direct and indirect—of the pandemic, organisations and professionals with responsibilities for health including in social care settings, need to understand the legal context within which they work. Public health law provides the authority to act for the public's health, and it places constraints on what might be done to protect and promote the public's health.

The English legal context incorporates new and existing legislation. The Coronavirus Act 2020 creates public health powers and amends (or creates the scope to amend) powers, procedures, and obligations in existing statutes. The Government has stated that the laws are to be implemented in ways consistent with human rights obligations, as enforceable through the Human Rights Act 1998.



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The following diagram illustrates how legislative, regulatory and advisory sources interact in England:

Overarching law

Human Rights Act 1998 and Equality Act 2010

These Acts respectively codify fundamental rights and prohibit discrimination. Both remain in force throughout the pandemic, requiring all measures enacted to be proportionate and necessary to its aims, and for consideration to be afforded to unequal effects.

The Coronavirus Act 2020

This Act introduces novel powers, and amends (or provides the power to amend) existing legislation, aiming to slow the spread of the virus, reduce the resourcing and administrative burden on public bodies, and limit the impact of potential staffing shortages.

English public health laws

Public Health (Control of Disease) Act 1984

This legislation allows the Secretary of State to create Regulations to prevent the spread of infectious disease in England.

Health Protection Regulations

Health Protection Regulations are made under the Public Health (Control of Disease) Act 1984. These make provisions to prevent person-to-person transmission, through enforceable restrictions regarding personal, commercial, and other freedoms and activities. They are subject to frequent review, and include the Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020 as well as 'lockdown' measures locally, such as in Leicester in early July 2020, or in earlier Regulations covering all of England.

Professional regulation and governance for public health

Statutory Regulators for Health Professionals

Bodies which license and discipline health professionals, including the General Medical Council and the Nursing and Midwifery Council, have general codes of conduct and have also issued specific COVID-19 related guidance.

Public Health England

As an executive agency of the Department of Health and Social Care, Public Health England works alongside the Secretary of State and national and local government, the NHS, and public health professionals and has issued public and professional guidance on COVID-19.

Advisory guidance

Professional Associations

Bodies including the Academy of Medical Royal Colleges, the Royal College of Nursing, the Faculty of Public Health, and the British Medical Association are providing guidance and support to their members in responding to COVID-19.

Advisory and Expert Ethics Bodies

Bodies such as the World Health Organization, the Moral and Ethical Advisory Group, the Equality and Human Rights Commission, and the Nuffield Council on Bioethics are addressing ethical questions raised by the pandemic.

COVID-19 laws and regulation in key areas of health and social care

The measures adopted in response to COVID-19 make significant changes to health and social care. When exercising duties, it is important to maintain a high standard of practice and continue to respect human rights and equality obligations.

1. Health professionals: workforce and employment

The impacts of the pandemic include implications for workforce capacity. In response to this, the General Medical Council (GMC) and Nursing and Midwifery Council (NMC) have granted temporary registration to suitable persons to reduce the burden on and accelerate the workforce capacity of the NHS.

Accordingly, the Coronavirus Act allows for the temporary registration or a licence to practise to fit, proper, and suitably experienced persons as health professionals under the Health Professions Order 2001 as well as the Nursing and Midwifery Order 2001. During the pandemic, indemnity coverage is provided for clinical negligence liabilities associated with COVID-19 that are not covered by alternative indemnity arrangements (such as the Clinical Negligence Scheme for Trusts, insurance companies or medical defence organisations).

Public health agencies in the four nations of the UK have issued common guidance on the use of Personal Protective Equipment (PPE), including disposable gloves, disposable plastic apron, disposable fluid-repellent gown, surgical gown, fluid-resistant surgical mask, filtering face piece respirator and eye protection. Specific instructions apply to:

1. acute hospital inpatient and emergency departments, mental health, learning disability, autism, dental and maternity settings
2. primary, outpatient, community and social care, care homes
3. ambulance, paramedics, transport, pharmacists
4. additional considerations in any setting.

2. Resource allocation

Healthcare professionals face challenging decision-making situations due to the significant strain the pandemic has placed on the healthcare system. NHS England implemented a standard operating procedure document to allow for the optimal allocation of scarce resources, with a specific reference to the allocation of ventilators. To inform the decisions of healthcare providers, additional guidance has been issued by bodies such as the National Institute for Health and Care Excellence and the British Medical Association. The GMC also updated its guidance on prioritisation of access to treatment given the impacts of the pandemic. Notably, the Government's pandemic flu planning guidance does not make provision for any specific clinical or ethical guidance regarding the allocation of limited medical resources.

3. Social care

Amendments to the Care Act 2014 permit the lessening of some obligations placed on local authorities relating to assessments and meeting the care and support needs of individuals and carers. These 'easements' include suspension of: i) the obligation to conduct an assessment of needs relating to adults, children and carers; ii) duties to determine eligibility for care and support; iii) requirements relating to preparation or review of care and support plans; and iv) the obligation to conduct financial assessments. In addition, the Coronavirus Act provides for amendments to the Chronically Sick and Disabled Persons Act 1970, easing local authorities' duties relating to welfare services for children with disabilities moving to adult services as well as assessment duties relating to such children. The Coronavirus Act also softens the duty to meet adults' and carers' need for care and support. However, these amendments do not make it permissible to breach people's human rights under the Human Rights Act 1998. Overall duties to promote well-being and safeguarding remain intact and decision-making in accordance with the 'easements' is subject to legal challenge. The continued operation of the Equality Act 2010 should also be kept in mind.

The Coronavirus Act does **not** amend the Mental Capacity Act 2005 or Deprivation of Liberty Safeguards. However, the different context, in light of the pandemic, means that there are important contextual questions to consider regarding people's rights and professionals' obligations in relation to the operation and application of the Mental Capacity Act. These concern, for example, measures to support people's decision-making or questions such as isolation in a care home setting.

In a broader health and safety sense, the government provides practical guidance on protecting employees and employers from COVID-19 in the workplace. This guidance includes information on risk assessment as well as measures relating to social distancing, cleaning and hygiene.

4. Mental health care

Amendments have been made to the Mental Health Act 1983 (MHA) to account for potential staffing shortages, albeit that at the time of writing these have **not** been implemented. They include provisions to allow for compulsory detention under sections 2 and 3 MHA on the basis of one registered medical practitioner's recommendation.

They also provide a basis, if implemented, for treatment without consent under section 58 having consulted only one other professional involved in the patient's care. In each case this would apply to situations where the requirement for two practitioners' recommendations "is impractical or would involve undesirable delay".

5. Managing death and bereavement

The Coronavirus Act introduces new statutory powers for national and local authorities to support the resilience of local death management systems. Broadly speaking, these emergency powers relate to the transportation, storage, and disposal of the deceased. The question of death management is particularly sensitive and challenging. It is necessary to protect those involved in funeral arrangements and control the spread of COVID-19, whilst also recognising the need to respect the personal wishes, religion and beliefs of people who have died and who are bereaved. Health Protection Regulations have also provided legal rules on who may attend a funeral.

Reflective practice: a human rights-based approach

The law on COVID-19 is complex, controversial, and subject to change. It will not always make clear what is required, or fit easily with other types of rules and guidance operating in the workplace. But decision-makers in a clinic or hospital, in public health, or in social care still need to make informed judgements. Human rights standards, which are part of UK and international law, can help.

Human rights standards resonate with ethics, equity and other ways of thinking with which health professionals should be familiar. They offer key prompts in the face of challenging or apparently everyday decisions. They enable health professionals to identify the fundamental values at stake, how they conflict, and the way in which such conflicts can be resolved, while never losing sight of the interests of the person receiving care.

What are the key features of a human rights-based approach?

• **Mobilise social rights**. The right to health obliges states to combat pandemics, through disease control measures, but also preparedness planning, adequate resourcing of the health system (including public health) and removing obstacles to treatments and vaccines.

• **Adopt fair processes**. Valuable resources, like tests, ventilators, and PPE, should be allocated on the basis of public criteria, with transparent decision-making and wide participation where feasible. Accountability should be promoted by regular monitoring and review, with remedies available where standards are breached.

• **Respect civil and political rights**. The right to life and the right not to be subject to inhuman or degrading treatment must be respected. Government has a positive obligation to take appropriate steps to safeguard people's lives; this includes making regulations that require public and private facilities to adopt measures for the protection of the lives of people in their care. Liberty and privacy, the ability to sustain important relationships and to accept or reject professional advice, are integral to ethical health care and to individual dignity. They continue to be fundamental in a time of pandemic emergency, though they may be limited.

• **Justify restrictions**. Limitations can only be imposed if they are necessary, the least restrictive means needed to protect the public's health, justified by scientific evidence, and laid down in law. Independent review after a fixed time-period is essential.

• **Embed equality and non-discrimination**. Decisions should not exacerbate existing inequalities or create new ones. Planning at all levels should take account of the needs of people from BAME communities, older people and other marginalised groups, as well as women, who are disproportionately burdened with caring responsibilities in the health and social care sector and domestically.

Further information and resources

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For further briefings and resources on the law and regulation in all four UK nations, please see the project website: https://bit.ly/3eaM1Sg

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