

PUBLIC LAW BRIEFING NOTE

Inquests, Prisons and Covid-19

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Statute: Coronavirus Act 2020, Coroners and Justice Act 2009

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On 25 March 2020, the [Coronavirus Act 2020](#) ('the 2020 Act') received Royal Assent and became law. The Chief Coroner has also released a number of Guidance Notes (Numbers [34](#), [35](#) and [36](#)) which expand upon the new powers granted in the 2020 Act and provide practical direction for coroners and those who use the coronial system.

This note addresses the issues raised in the 2020 Act and [s30](#) which suspended the requirement to hold jury inquests in England and Wales. In addition, this note will address the Guidance provided by the Chief Coroner in which he acknowledges the challenges posed to the coronial system by the Covid-19 pandemic.

Finally, this note will consider the potential impact of Covid-19 on those detained in prisons and other detention centres along with the longer-term impact that the inevitable deaths in these locations will have for coroners and those involved with inquests.

Are inquests and hearings still being heard?

The Covid-19 pandemic presents a number of challenges for coroners, not least the holding of hearings and inquests. Whilst there has been no ban on hearings taking place Guidance Note 34 states at §10 that "*no physical hearing should take place unless it is urgent and essential business and that it is safe for those involved for the hearing to take place. A particular concern is to ensure social distancing in court and in the court building*".

No indication has been given as to what constitutes urgent and essential business but Guidance Note 35 gives examples of what might constitute essential business in a Crown Court. It remains notably silent, however, on what this means for Coroner's Court. The same Guidance Note reminds coroners that they should not feel pressure to open inquests sooner than is

reasonably practicable. Ultimately, however, it will be a decision for each senior Coroner to make based on the circumstances in their jurisdiction. It is likely that each local authority will take a different approach to the holding of 'essential' hearings depending on the type of case but also on the individual dynamics of each court.

The vast majority of jury inquests that are listed between now and 28 August 2020 are currently being adjourned in light of the guidance from the Lord Chief Justice.¹ Cases which are scheduled for 1 September onwards, however, should generally remain in their current listings. This may be an optimistic window given the inevitable backlog and the need for adjourned inquests to be relisted. There are already examples of inquests currently listed for September and October being removed from Coroners lists whilst those that have already been adjourned are often not given a new listing. By way of example, the Bradford Coroner's Court has no listings until December 2020 and an open jury inquest for a death which occurred in 2017 was adjourned with no new listing.²

Can they be conducted remotely?

The obvious question then is whether hearings or inquests themselves can be conducted remotely. Schedules [23](#) and [24](#) of the 2020 Act made a number of changes to the Criminal Justice Act 2003 and Crime and Disorder Act 1998 respectively which expanded the criminal courts' powers to use technology across a wider range of hearings and participants. There was, however, no reference to Coroner's Courts where the need for a specific reference was arguably merited.

This is because under current legislation the coroner must be present in the court for a hearing to be held. Coroners are reminded in Guidance Note 34 that "*hearings must in law take place in public and therefore coroners should conduct telephone hearings from a court, not their homes or their office...hearings taking place in public may mean they take place where only a member of the immediate family is present and with a representative of the press being able to be present*".

¹ Explanation re para 1 COVID note #3

² <https://www.bradford.gov.uk/births-deaths-marriages-and-civil-partnerships/coroners/list-of-inquests/>

Guidance Note 35 provides specific guidance on hearings during the pandemic and states that whilst some parties can attend a hearing by phone a “*coroner should be present at the hearing*” and cannot attend by telephone or Skype. Whilst provision is made in the 2020 Act to expand the ability for all parties to appear at certain criminal hearings remotely (with the exception of jurors), no reference is made to the greater use of technology in Coroner’s Courts. Therefore, there is a more limited scope for the use of technology in hearings involving a coroner and there is a greater likelihood of adjournments of even small hearings in the coming months.

Whilst Coroners must conduct hearings from a court it does not need to be the Coroner’s Court specifically and use may be made of a local Crown Court’s facilities. Ultimately, whilst there is the ability for hearings to be conducted remotely, they are, at present, unlikely to be common. This may change as the use of technology improves, particularly in the Crown Courts.

Aside from technological constraints a further feature that makes even remote hearings less likely is the recognition of potential witnesses’ primary commitments. A large proportion of witnesses at Coroners Court are medical professionals or serving police officers who will have pressing clinical and professional commitments arising from the Covid-19 pandemic.

Covid-19 as a natural cause of death

Covid-19 was added to the list of notifiable diseases under Schedule 1 of the Health Protection (Notification) Regulations 2010 on 5 March of this year.³ This creates a duty on registered medical practitioners to notify their local council or local health protection team of suspected cases of infectious diseases. Ordinarily, this would create the requirement for a jury inquest to be held if a senior coroner has reason to suspect the death was caused by a notifiable disease pursuant to s7(2)(c) [Coroners and Justice Act 2009](#) (‘CJA 2009’).

However, [s30\(1\)](#) of the 2020 Act suspends the jury requirement where the cause of death is suspected to be Covid-19. Under the Act, therefore a death from Covid-19 does not ordinarily require the opening of an inquest. This is made clear in Guidance Note 34 at §18-19 as whilst Covid-19 is a notifiable disease it “*does not mean referral to a coroner is required by virtue of*

³ <https://www.gov.uk/government/news/coronavirus-covid-19-listed-as-a-notifiable-disease>

its notifiable status (the notification is to Public Health England), and there will often be no reason for deaths caused by this disease to be referred to a coroner”.

This is understandable given the potential impact of Covid-19 on the coronial system. Conservative projections currently estimate that the total death toll in England and Wales as a result of Covid-19 will be 25,000.⁴ If an inquest was to be held for each and every death related to Covid-19 the impact on the coronial system would be crippling.

In Guidance Note 36, it is noted that the provisions of the 2020 Act are not retrospective. Therefore, whilst s30(2) of the 2020 Act sets out that Covid-19 is not to be considered a notifiable disease under s7(2)(c) CJA 2009 this will only apply to inquests opened from 26 March 2020 onwards. Any inquest opened prior to 26 March 2020 into the 463 deaths attributed to Covid-19 up to that point would therefore still require a jury. However, in reality it is likely that under Rule 5(1) it would not have been considered “*reasonably practical*” to open inquests into these deaths and the number of such cases requiring a jury will be likely be low.

Covid-19 in prisons and detention centres

Whilst the positive obligation to undertake a jury inquest has been removed under [s7\(2\)\(c\)](#) of the CJA 2009 the picture is complicated where the death occurs in custody or state detention. Senior coroners will still be required to open investigations where a death occurs in these circumstances pursuant to [s1\(2\)\(c\)](#) CJA 2009. A senior coroner who conducts such an investigation will hold an inquest into that person’s death under [s6](#) CJA 2009 but this need not involve a jury where the death was by natural causes (per [R \(Tainton\) v HM Senior Coroner for Preston and West Lancashire](#) [2016] EWDC 1396 (Admin) at §59). This is reflected in Guidance Note 34 which states that “*a death, whilst being from COVID-19, may be in such a category as to require more detailed explanation, such as in a prison death (where an inquest is mandatory). In this situation the coroner will have little choice but to open an investigation (but possibly to delay opening the inquest itself until a later date)*”.

⁴ Explanatory Notes to the Coronavirus Act 2020, para 60.

Even where a jury is not mandatory, there may be instances of arguable breaches of the state's obligations to protect a detainee's life from Covid-19 under Article 2, ECHR. These may fall into two categories:

- i. Breach of a general duty requiring the state to “*establish a framework of laws, precautions, procedures and means of enforcement to protect the lives of citizens which will, to the greatest extent reasonably practicable, protect life*” ([R \(Middleton\) v. West Somerset Coroner](#) [2004] 2 AC 182 at §3). This would be characterised by a systemic failure to protect from Covid-19.
- ii. Breach of an operational duty requiring the state to protect an individual citizen or group of citizens against specific kinds of danger, such as Covid-19, where it would be argued that this was known to pose “*a real and immediate risk to the life of the individual*” ([Osman v UK \(2000\) 29 EHRR 245](#) at §116).

As of 7 April 2020 there are reported to have been ten deaths in two prisons caused by Covid-19 as well as 107 current confirmed cases across forty-seven prisons.⁵ In an attempt to reduce and contain the spread of the virus two approaches appear to be taking place. The first is an attempt to reduce the prison population. Prison Governors are now able to release pregnant prisoners and there are plans for prisoners on mother and baby units to also be temporarily released.⁶ To date, however, only six prisoners have been released.⁷ Further temporary releases include those of risk assessed prisoners who are within two months of their release date⁸. Less directly, the number of prisoners in the UK has dropped by over 1.5% since the start of the pandemic. On 6 March 2020 the prison population stood at 83,957 but this dropped to 82,456 by 10 April 2020.⁹

The second approach has been one of isolation and cohorting. The current Government [guidance](#) for prisons and other prescribed places of detention is that detainees who have a new, continuous cough or high temperature should be isolated in single occupancy accommodation. However, if resources are under pressure, cohorting is being advised whereby all those who are

⁵ <https://howardleague.org/news/howard-league-and-prison-reform-trust-urge-ministers-to-move-further-and-faster-to-protect-prisoners-staff-and-public-from-coronavirus/>

⁶ <https://www.gov.uk/government/news/pregnant-prisoners-to-be-temporarily-released-from-custody>

⁷ <https://publications.parliament.uk/pa/cm5801/cmselect/cmjust/correspondence/200407-Justice-Committee-meeting-Robert-Buckland-note1.pdf>

⁸ <https://www.gov.uk/government/news/measure-announced-to-protect-nhs-from-coronavirus-risk-in-prisons>

⁹ <https://www.gov.uk/government/statistics/prison-population-figures-2020>

suspected of having Covid-19 are confined to one area.¹⁰ There are already media reports of prisoners exhibiting flu like symptoms being cohorted with those who are confirmed to have the virus.¹¹ Without testing this runs the risk of infecting prisoners who display these symptoms but where these are not caused by Covid-19. A prisoner may have had a cough for any number of reasons but could now be placed in isolation with a fellow prisoner who has confirmed Covid-19. Alternatively, due to the current size of the prison population, there may not be enough facilities for prisoners to be placed in single occupancy cells,¹² which could lead to those displaying Covid-19 symptoms not being adequately isolated and potentially infecting other prisoners. Therefore, there is the real possibility of an increase in Covid-19 infections and deaths amongst prisoners.

This may give rise to instances where the state has arguably breached its Article 2 duties by failing to properly protect prisoners from Covid-19. This could still involve a jury under s7(3) CJA 2009, where the death is caused by Covid-19, but it can nevertheless be argued that there have been failings to protect life under Article 2 of the ECHR and that these amount to “*sufficient reason*” to sit with a jury. This would presumably be on the basis that the circumstances are analogous to other deaths in custody which require a jury under s7(2)(a) CJA 2009 where prison deaths are violent or unnatural.

The number of cases of Covid-19 is likely to rise in prisons at a time when staff levels are reduced due to their own illness or isolation. The stress on prisons and other prescribed places of detention is also likely to increase as will the number of deaths, directly or indirectly, related to Covid-19. Investigations are already being opened by the Prisons and Probation Ombudsman (PPO) and the subsequent inquests are being postponed. The ultimate impact on the coronial system is unclear but the Chief Coroner has made plain in Guidance Note 34 at §41 that the “*sufficiency of inquiry should be maintained as much as possible in prison deaths*”. In view of s7(3) CJA 2009 and despite the provisions of the 2020 Act there therefore remains the possibility of a number of jury inquests for deaths of prisoners caused by Covid-19.

¹⁰ <https://www.gov.uk/government/publications/covid-19-prisons-and-other-prescribed-places-of-detention-guidance/covid-19-prisons-and-other-prescribed-places-of-detention-guidance>

¹¹ <https://www.theguardian.com/society/2020/mar/31/uk-prisoners-covid-19-symptoms-forced-share-cells>

¹² *Supra* 8 above at pg. 2

This briefing note was produced by John Morrison, a pupil barrister at QEB Hollis Whiteman. This note should not be taken as constituting formal legal advice. To obtain expert legal advice on any particular situation arising from the issues discussed in this note, please contact our clerking team at barristers@qebhw.co.uk. For more information on the expertise of our specialist barristers in criminal and regulatory law please see our website at <https://www.qebholliswhiteman.co.uk/>.