THE DANISH INSTITUTE FOR HUMAN RIGHTS

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# COVID-19 MEASURES IN DENMARK – AND THEIR CONSEQUENCES FOR DUE PROCESS AND HUMAN RIGHTS

In a new report, the Danish Bar and Law Society and the Danish Institute for Human Rights draws attention to selected challenges regarding due process and human rights resulting from measures by the authorities to prevent the spread of new coronavirus/COVID-19 in Denmark. This memo in English gives an overview of our recommendations. The full report is available in Danish at https://menneskeret.dk/udgivelser/covid-19-tiltag-danmark-retssikkerhedsmaessige-menneskeretlige-konsekvenser.

Striking a balance between fundamental freedoms and combating COVID-19 is extremely difficult. We are aware that the Danish Parliament unanimously agreed to back measures that temporarily circumscribe many fundamental rights.

However, it is important to reflect on whether the measures struck the right balance between, on the one hand, protecting public health, including especially the elderly and particularly vulnerable groups and maintaining the capacity of the health services, and on the other hand, protecting the fundamental rights and due process for all citizens.

We have reviewed a number of COVID-19 measures and provide recommendations for the government and the parliament under each measure. Furthermore, we include seven cross-cutting recommendations on the basis of the review.

## CROSS-CUTTING RECOMMENDATIONS FOR FUTURE CRISES

Emergency legislation challenges a number of fundamental principles. When adopting emergency legislative amendments for COVID-19 measures, relevant organisations and authorities were not involved in a consultation process, and the Danish government and the parliament thus could not incorporate statements from stakeholders in the legislative process.

We have the following general and cross-cutting recommendations for managing future serious crises:

1. All legislation and regulation with a negative impact on due process or on the enjoyment of human rights should be submitted for consultation.
2. Emergency legislation should only be implemented for imperative measures that must be adopted immediately.
3. The legal authority for emergency measures should be as precise as possible, and broad enabling provisions should be avoided.

4. Emergency measures should be necessary, and they should be proportionate to what they aim to achieve.
5. Emergency measures should have a time limit and should be repealed as soon as the reasons for taking them no longer prevail.
6. The authorities should take special consideration and maintain particular focus on marginalised and vulnerable groups.
7. Emergency measures should be evaluated.

## THEMATIC RECOMMENDATIONS

### BAN ON ASSEMBLY AND GATHERING IN SPECIFIC PLACES

A ban on gathering in groups of more than ten people was a highly intrusive infringement on the freedom of assembly. The ban was in force from 18 March to 8 June 2020 and has been replaced by a ban on groups of more than 50 people. However, combating COVID-19 is so important for the protection of public health that the ban on assembly in groups of more than ten could probably be considered necessary and proportionate at the time it was introduced. The bans did and do not apply to demonstrations or other political or opinion-shaping gatherings.

The restriction on the freedom of assembly must continue to be necessary and proportionate as conditions change. Therefore, it is crucial that the government repeal the ban on assembling in groups as soon as the restriction is no longer absolutely necessary to protect public health (including to avoid overloading the healthcare system) and can be handled by general recommendations on distancing and hand hygiene etc.

The actual amendments to the Epidemic Act that made it possible to lay down a ban on assembly, should have been clarified further in the amending legislation. Without this clarification, it is unclear when a person is part of an assembly and what it means to be in the same place as other people. The police are very much left to their own assessment as to whether a person is in breach of the ban on assembly. Moreover, it can be difficult for individual citizens to predict when they will be covered by the ban.

During the planned revision of the Epidemic Act in autumn 2020, the government should thus carefully clarify and specify the provisions to be continued in a new Epidemic Act, taking into account protection of human rights and the highly intrusive nature of measures introduced under the COVID-19-crisis, including a ban on assembly and a possibility for curfews/restricting access to areas.

### CONTACT TRACING AND DATA COLLECTION

A new provision in the Epidemic Act gives very broad authority to obligate private individuals, businesses and public authorities etc. to provide data for use in contact tracing and to limit the spread of infection. The only limitation of the provision is that the data must be relevant, and that submission of data is necessary to prevent the spread and infection of COVID-19.

Furthermore, the Act now allows the use of data-driven solutions to assess the patterns of movement in the population. However, such measures are potentially highly intrusive, as they can enable monitoring and surveillance of specific persons.

In the revision of the Epidemic Act, the government should carefully account for how the provisions of the Act on obligations to supply data comply with the personal data processing principles on data minimisation, purpose limitation and time limit, and what data natural and legal persons are obligated to submit.

The government should also ensure anonymity (rather than pseudonymity) when data is processed about people's whereabouts to prevent infection with COVID-19, including use of apps or processing and collection of mobile phone data, so that data may not be used to monitor specific persons or groups.

## STRONGER PENALTIES FOR COVID-19-RELATED CRIME

In amendments regarding COVID-19-related crime, the parliament has set penalties for a large number of specific violations of the law, and the explanatory notes to the legislative bill describe in detail what situations should trigger specific penalties.

This is an example of detailed regulations that can prove difficult to apply in practice, where reality rarely matches the fictitious examples from the government and the parliament.

The government and parliament should restrain itself from regulating in too much detail and should demonstrate confidence in the courts by implementing regulations that allow the courts room to manoeuvre.

## COMPULSORY ISOLATION, COMPULSORY HOSPITALISATION AND COMPULSORY VACCINATION

Compulsory hospitalisation, isolation and vaccination are very intrusive interventions that can have serious consequences for the individual. According to the Epidemic Act, it is permitted to detain a person, even though there is no certainty that the person is infected with COVID-19.

A new aspect is that, in order to minimise the spread of other diseases (e.g. ordinary influenza), the Minister for Health can impose compulsory vaccination for influenza to prevent influenza patients from taking up beds in the health services, needed by COVID-19 patients. Such regulations have not yet been laid down.

In connection with the upcoming revision of the Epidemic Act, the government should consider carefully whether there is still a need for compulsory vaccination for other diseases in order to limit the number of other patients in the healthcare sector.