

# LegalAction

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## MAKING CONNECTIONS IN ADVICE SERVICES

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# Breathing spaces and rent arrears - making the connections

**James Bowker, Simon Mullings and Miguel Sanchez reflect on joint working and how the social welfare advice sector must connect to get the most out of new legislation.**



James Bowker



Simon Mullings



Miguel Sanchez

**O**n 4 May 2021, the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 SI No 1311 came into force (unless otherwise indicated, all further references to regulations in this article refer to these regulations). Up-to-date guidance was published by the Insolvency Service on the same date (*Debt Respite Scheme (Breathing Space) guidance for creditors* (the creditors' guidance) and *Debt Respite Scheme (Breathing Space) guidance for money advisers*). These regulations are an insolvency measure designed to help people who have debt problems but are able to meet ongoing commitments to pay instalments or who have evidence of a mental health crisis (MHC). Rent is one of the debts that is covered and while it is right to say that social welfare lawyers and advisers would wish for much more assertive assistance for renters, the regulations do provide some protection for those who meet the relevant criteria.

We at Citizens Advice Waltham Forest (Miguel) and Edwards Duthie Shamash (James and Simon) greatly value our long-standing connection and working relationship, and here we use a recent case to give a practical overview of how the regulations can be used. Readers can

find detailed technical training on the regulations and guidance elsewhere,\* but in this article we want to stress the practical benefits of good working relationships. Our key message is that these kinds of local relationships are what make for successful interventions for clients using this kind of legislation.

## The authorised debt adviser

The client in this case contacted Citizens Advice Waltham Forest because she was facing eviction proceedings. She made an application to suspend a warrant for her eviction having failed to keep to the terms of the last suspended warrant. A previous hearing in March 2020 had been vacated in line with Civil Procedure Rules 1998 Practice Direction 51Z (later r55.29), but now a new hearing was listed in the court.

Our client had been deeply affected by the pandemic. She had lost extended family members to the disease and had been through periods in which she had had to self-isolate. She worked for the NHS and had seen first-hand the virus's impact on patients and colleagues, as well as experiencing the trauma of inadequate PPE in the early days of the pandemic, and this had impacted on her mental health. She also had some health problems, as a result of which she had reduced her hours of work, and this had made it very difficult for her to pay her rent and clear her rent arrears. She had been on a period of sick leave and was receiving statutory sick pay, leading to a substantial reduction in her income.

We advised her to make a claim for universal credit (UC) to help her with her housing costs (UC HE) and told her we would assist her with an application for discretionary housing payments (DHP). The local authority would not award DHP unless there was an entitlement to UC HE but once she was entitled to that, she could claim this extra help.

The fact that our client was awaiting the first payment of UC including UC HE, which takes five weeks, and bearing in mind that an application for DHP can also take four to five weeks, as well as

her difficulties in being able to attend the next hearing, meant that the Debt Respite Scheme was an option that would benefit our client. This would give her 60 days' protection from enforcement action. During the breathing space, her UC (including UC HE) would be in payment and she might also be awarded DHP to reduce her rent arrears, which would place her in a more beneficial position when facing the eviction hearing after the moratorium.

As this was the third time in three years where the client was applying to suspend a warrant for her eviction, we believed that she would benefit from the assistance of experienced housing solicitors who could represent her in court face to face and reduce the risk of losing her home. In addition, in those early days of the regulations being in force, we did not know how the local authority landlord or the court would deal with the case.

## How do the regulations work?

There are two types of breathing space under the regulations and both provide a moratorium for debtors, including individuals undergoing MHCs. A standard breathing space and a MHC breathing space are both applied for through an authorised debt adviser, but the MHC breathing space also requires the evidence of an approved mental health professional (AMHP) and can be applied for by a nominated contact.

Rent arrears is a 'qualifying debt' for the purposes of a breathing space, along with a number of other types of debt listed at reg 5(1) (see also the creditors' guidance, para 2.6). The effect of the regulations is that a creditor who is told that a debt owed to them is subject to a breathing space must stop all action related to that debt and apply the protections specified in the regulations (reg 7(6)-(7) and creditors' guidance, para 1.1). The breathing space period can last up to 60 days. It will start the day after the debtor's details are put onto the breathing space register by the adviser (creditors' guidance, para 2.9).

When the creditor receives a breathing space notification, they must stop (creditors' guidance, para 3.1):

1. accrual of certain interest, fees or charges (reg 7(6));
2. any enforcement or recovery action, including commencing proceedings (reg 7(7)); and
3. contacting the debtor to request payment without leave from the court (reg 11).

Enforcement action includes obtaining a warrant or writ, trying to enforce a judgment or order issued by a court during the breathing space without the court's permission, or serving a notice of possession (creditors' guidance, para 3.4).

Rental agreements (though not including the rental arrears accrued up to the breathing space), taxes, local taxes, water, sewerage, electricity and gas bills are 'ongoing liabilities' that continue during the standard breathing space period. The debtor should continue to pay, or they risk the breathing space being cancelled (creditors' guidance, paras 3.13-3.14). This is not the case for MHC breathing spaces, where there is not the same obligation to meet ongoing liabilities.

A summary of the differences between the standard breathing space and

the MHC breathing space is helpfully set out in the *Debt Respite Scheme (Breathing Space) guidance for money advisers* and reproduced below.

**Representation at court**

Miguel is aware from our long time working together that Edwards Duthie Shamash has a legal aid contract in housing and represents people facing possession proceedings and eviction, and also that we run the local housing possession court duty scheme for the relevant court.

The client informed us that she had been in arrears for several years but had previously made real progress towards repaying them. However, as set out above, she had been badly hit by the COVID-19 pandemic. During this period, she had been unable to maintain the payments and had slipped further into arrears. Her health problems required an operation, scheduled to take place the week following the hearing, and she would not be able to attend court. Her situation was dire - this was not the first time she had faced a bailiff's warrant and she had managed to achieve two warrant suspensions previously.

Our first question to Miguel when he contacted us was whether he was

contemplating applying for a breathing space. He confirmed that he had applied, which was welcome news. With us on hand to attend court to ensure that the regulations were applied, that put the outcome of the hearing beyond doubt.

If there are existing legal proceedings, the creditor (in this case, the local authority landlord) must tell the court in writing of the breathing space (reg 10(1) and creditors' guidance, para 3.6). The court should not hold a hearing during the breathing space period (creditors' guidance, para 3.8). In this case, the local authority told the court promptly once it was informed of our client's entry onto the breathing space register. It requested that the matter be adjourned for a period of 60 days without any issues arising.

Our contact at the local authority confirmed that she had received no formal training on the regulations, though she had clearly educated herself, and having been informed of the breathing space she applied the regulations correctly. Notably, the deputy district judge seemed not to be familiar with the new regulations but, in the event, the adjournment was secured without difficulty.

The breathing space will give our client valuable time to show a pattern of payments and to develop a plan that can be put forward as to how the rent account is going to be conducted in future, such

	<b>Standard breathing space</b>	<b>MHC breathing space</b>
<i>Eligibility</i>	A client with a qualifying debt who meets eligibility criteria and conditions	A client with qualifying debt who meets eligibility criteria and conditions, who is receiving mental health crisis treatment
<i>How they access it</i>	Through a debt adviser	Through a debt advice provider, using evidence from an AMHP
<i>How long it lasts</i>	Up to 60 days, with a midway review between days 25 and 35	However long crisis treatment lasts, plus 30 days. Their ongoing treatment must be confirmed every 20 to 30 days
<i>Protections</i>	Pauses most enforcement action and contact from creditors, and freezes most interest and charges on their debts	Same as a standard breathing space
<i>Conditions</i>	They must engage with you and provide information. They must tell you if they missed anything in their application, or if there is any change in their circumstances. They must pay their ongoing liabilities, as a breathing space is not a payment holiday. They must not get any additional credit that exceeds £500	Nominated point of contact must engage with you
<i>What your client needs to do</i>	They must engage with you and tell you if their circumstances change. They must keep meeting some ongoing liabilities, like paying priority bills. They must not take out additional credit over £500	Nominated point of contact must engage with you
<i>How often can they have a breathing space</i>	Only one a year	No limit

that the council or the court is persuaded that she should not lose her home.

### Local connections

Citizens Advice made a vital intervention in the warrant problem faced by the client and was also able to make a crucial referral to make good the advice and assistance provided. In cases such as this, it will be equally important for duty advisers and housing lawyers to be in a position to inform the court of the existence of the regulations and how they work, ie:

- in cases where there is a breathing space in place, the court's responsibilities to effectively stay the matter will need to be set out assertively; and
- in cases where possession proceedings are before the court and a breathing space is contemplated, the duty adviser will need to: (i) set out the workings of the regulations; and (ii) make persuasive representations as to why the court should allow time for an application for a breathing space to be made.

In either case, it follows that duty advisers will need to have good referral arrangements in place with their local authorised debt advisers and vice versa. A representation to the judge confirming who can and will administer the breathing space application is likely to be much more successful than a vague assertion that an application may be considered. Our case shows that the regulations and guidance may need to be explained to a landlord and to the court to ensure that the correct outcome is achieved in proceedings.

It will also be helpful for there to be good arrangements between housing lawyers and debt advisers on the one hand, and mental health lawyers, advisers and professionals on the other, to ensure that the MHC breathing space is utilised where appropriate to provide vital protection to a very vulnerable client group. ■

\* See, for example, Simon Mullings and Sue James, *Housing Possession Duty Desk - a practical guide*, LAG, 2021.

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## No access to justice for rape survivors

Jayne Butler

**O**n 18 June 2021, the government published *The end-to-end rape review report on findings and actions* (CP 437). The introduction to the report, which was two years in the making, includes apologies from Robert Buckland QC MP and other senior ministers, along with the promise to 'drive urgency and focus' (page ii). However, its pledges lack particularity and for those of us working with victims and survivors of sexual violence, it is very much a case of too little too late.

The report fails on almost every level to take seriously both the scale of the epidemic of male violence being visited upon women every day in the UK and the systemic flaws within the criminal justice system. Funding cuts across the criminal justice system have led to cuts in specialist units dealing with victims of rapes, inadequate investigations, fewer cases leading to charge and long delays for cases reaching trial. Currently, fewer than one in 60 of the more than 52,000 rape cases reported to the police in England and Wales each year are charged, a rate of 1.6 per cent. Locate that number within the context that only one in six are reported in the first place and we have a clear, profound lack of access to justice.

Frustrated with progress on the review and a lack of engagement both with us as expert stakeholders and, most shamefully, with survivors themselves, Rape Crisis England & Wales worked with partners Imkaan, the Centre for Women's Justice and the End Violence Against Women Coalition to publish our own 'shadow rape review' in November 2020. *The decriminalisation of rape: why the justice system is failing rape survivors and what needs to change* recommends a series of actions, including ensuring access to specialist staff at all levels within the police, the Crown Prosecution Service (CPS) and trauma-informed advocacy and support services. It also details an important concept that the government's own rape review ignored completely: that a failure of prosecutions, the lack of investigations that lead to charges and the reluctance of survivors to report are not the root of the problem, but indicative symptoms of a system that is failing.

Failing in part because the criminal justice system has been defunded and stripped apart at all levels - police, courts, the CPS and legal aid. Failing in part because other government departments and commissioners - for example, health and education - don't prioritise specialist, holistic services for rape survivors as part of their responsibility or remit. But failing mostly because our society and systems are underpinned by a pervasive culture of misogyny and victim-blaming rape myths.

There is an urgent and radical need for change in the justice system and in our entire societal acceptance of violence against women and girls. The rape review, published just days after the damning Ofsted *Review of sexual abuse in schools and colleges* (10 June 2021), was the perfect opportunity for the government to show that it intends to address it. Rape justice is not merely an issue of criminal justice; there is parallel social justice that must be achieved for victims and survivors. This is the perfect example of what we should mean when we talk about holistic practice in access to justice, with legal advice and recourse cutting across areas of law and being delivered along with wider, trauma-informed services, and with strategic and systemic change - genuine social change - being an objective that the different parts of the system work to achieve. We need to end rape, and increasing prosecutions is just one part of achieving that.

The actions and the absolute lack of funding articulated in the government's rape review do not even begin to touch on that. While there are some welcome developments - for example, the pledge to move to suspect-focused investigations - there is no tangible evidence of the promised drive and urgency. It is as inadequate as it is insulting to women.

Rape has been decriminalised and substantial work is needed both inside and outside of the criminal justice system to resolve that. Until that starts, we continue to be failed. ■

Jayne Butler is CEO of Rape Crisis England & Wales.

*All sources referred to here are linked to in the online version at: [www.lag.org.uk/?id=211082](http://www.lag.org.uk/?id=211082).*