

HOUSE OF LORDS

Select Committee on the Constitution

4th Report of Session 2019–21

Coronavirus Bill

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Select Committee on the Constitution

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Committee staff

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Coronavirus Bill

Introduction

1. The Coronavirus Bill was introduced to the House of Commons on Thursday 19 March 2020. It had all its Commons stages on Monday 23 March and was introduced to the House of Lords on Tuesday 24 March. All Lords stages are expected to take place on Tuesday 24 and Wednesday 25 March.
2. The Bill is an emergency measure to respond to and manage the effects of a coronavirus (COVID-19) pandemic. It creates new, temporary, statutory powers and amends existing legislation.
3. The Bill is complex and lengthy, containing 102 clauses and 29 schedules. It has potentially significant constitutional and civil liberties implications in relation to powers of detention and quarantine, restrictions on free assembly and the conduct of criminal trials. It creates extensive delegated powers, including Henry VIII powers. Many of these powers are subject only to a limited form of parliamentary scrutiny and others are not subject to any parliamentary procedure whatsoever.

Fast-tracking

4. The Bill is being fast-tracked through both Houses. In line with our recommendations for fast-track bills,¹ the Government provides a justification for the fast-tracking in the Explanatory Notes to the Bill,² and the Bill includes a sunset clause and review provision.
5. We have previously examined the issues with fast-tracking legislation and found that it constrains parliamentary scrutiny, limits the opportunity for parliamentarians to table and debate amendments, restricts input from stakeholders and the public, and potentially leads to poor legislation.³ While the fast-tracking of bills has become concerningly commonplace in recent years,⁴ they have been short measures of only a handful of clauses. It is unusual for a bill of this size and significance to be fast-tracked.
6. We concluded in our recent report on *The Legislative Process: The Passage of Bills through Parliament* that fast-tracking was acceptable “only in exceptional circumstances and with the agreement of the usual channels.”⁵ **The coronavirus pandemic fulfils these criteria.**

Sunset clause

7. The Bill as introduced was subject to a two-year sunset clause, with a power to extend its operation for a further six months. Following negotiations with opposition parties, the Government agreed to amend the Bill such that the

1 Constitution Committee, *Fast-track Legislation: Constitutional Implications and Safeguards* (15th Report, Session 2008–09, HL Paper 116), paras 186, 199, 208–209

2 Coronavirus Bill, *Explanatory Notes* [HL Bill 110—EN (2019–21)], paras 161–169

3 Constitution Committee, *Fast-track Legislation: Constitutional Implications and Safeguards* (15th Report, Session 2008–09, HL Paper 116)

4 See, for example, Constitution Committee, *Northern Ireland (Executive Formation and Exercise of Functions) Bill* (15th Report, Session 2017–19, HL Paper 211); *Northern Ireland (Executive Formation) Bill* (26th Report, Session 2017–19, HL Paper 404); *European Union (Withdrawal) (No. 5) Bill* (19th Report, Session 2017–19, HL Paper 339)

5 Constitution Committee, *The Legislative Process: The Passage of Bills through Parliament* (24th Report, Session 2017–19, HL Paper 393), para 37

House of Commons must review it every six months.⁶ The Bill includes a power to repeal itself before the effects of the main sunset clause take effect and a number of measures in the Bill are subject to more restrictive sunset provisions. Not all of the Bill's powers come into effect immediately and there is a provision to allow measures in the Bill to be suspended and then reactivated as needed.⁷

8. **The inclusion of sunset provisions in the Bill is essential. Two years would have been too long for these powers to have operated without reapproval by Parliament and we welcome the cross-party agreement to reduce the period to six months.**
9. **Modification and improvement of this fast-track legislation, which was drafted at speed, may be required in the coming months. The Government should be prepared to consider amendments ahead of the six-month renewal vote, rather than seeking only to perpetuate the existing provisions.**

Delegated powers

10. The Bill contains a range of delegated powers.⁸ They are broadly framed, include Henry VIII powers, and are often subject to limited or no parliamentary scrutiny. The Delegated Powers and Regulatory Reform Committee has reported on the Bill and drawn a number of provisions to the attention of the House.⁹ It concluded:

“Given the speed with which the Government need to act and the significance of the powers needed to address the emergency, we have, on this occasion, chosen mainly to highlight points of concern rather than make definitive recommendations. Whilst in no way resiling from the appropriateness of this exceptional approach, we nonetheless believe that it is important for us to state clearly that, had the country not been in the midst of a developing national emergency, there are powers in this Bill, including far-reaching Henry VIII powers, about which our commentary would have been far more trenchant and our recommendations far more robust.”¹⁰

11. **We agree with the assessment of the Delegated Powers and Regulatory Reform Committee. The delegated powers in the Bill are very broad and would not be acceptable save for the exceptional circumstances. The sunset clause, mechanisms for robust parliamentary scrutiny of the powers, and adequate provision for administrative and judicial oversight are imperative for granting such significant powers to ministers.**

6 Coronavirus Bill, [clause 98](#). Every six months, “so far as is practicable”, the House of Commons must consider a motion “That the temporary provisions of the Coronavirus Act 2020 should not yet expire”. If the motion is rejected, a Minister must use the power in section 90 to repeal the Act within 21 days. If the motion is passed, the Act can continue for up to two years (section 89) with the possibility of a further six-month extension (section 90).

7 Coronavirus Bill, [clause 88](#)

8 Coronavirus Bill, [Delegated Powers Memorandum](#), para 8

9 Delegated Powers and Regulatory Reform Committee, [9th Report](#) (Session 2019–21, HL Paper 42)

10 *Ibid.*, para 28

Power to suspend port operations

12. Clause 50 and schedule 20 empower the Secretary of State to suspend relevant port operations.¹¹ Schedule 20 empowers the Secretary of State to issue directions, where the Secretary of State is satisfied that “there is a real and significant risk that, as a direct or indirect result of the incidence or transmission of coronavirus, there are or will be insufficient border force officers to maintain adequate border security”, and the Secretary of State “has taken such other measures as are reasonably practicable to mitigate that risk.”¹² Any such directions may last a maximum of six hours, and can be renewed once for up to an additional six hours. Any subsequent extension (after the first) would be for a period of up to 12 hours (renewable indefinitely). The Secretary of State can give consequential directions and notify the ministers of the three devolved governments. A failure to comply with a direction is an offence, liable on summary conviction to a fine and period of imprisonment. The maximum period of imprisonment varies in the different parts of the UK. In England and Wales it is 51 weeks;¹³ in Scotland 12 months;¹⁴ and in Northern Ireland six months. **The Government should explain why different maximum sentences are proposed for different parts of the United Kingdom.**
13. This is a broad power to issue directions, and consequential directions, that can affect port operations in whole or in part, and be used to direct individual persons caught up in port operations (e.g. those arriving in vessels, trains, aircraft). As they are directions, there is no automatic parliamentary scrutiny over their exercise. Neither is there any provision for appeal to the courts. **It is essential for the purpose of accountability that the exercise of this power to issue directions is subject to judicial review in the High Court or Court of Session. We would welcome confirmation by the Government of our understanding that this is the case.**

Parliamentary accountability and oversight

14. The Bill and the Delegated Powers Memorandum make clear that it is envisaged that even as late as two years into the operation of the Bill’s provisions, it may be possible that Parliament is unable to sit.¹⁵ The same may be expected of the Welsh Assembly, Scottish Parliament and Northern Ireland Assembly. Even when these bodies are able to sit, the participation of members may be restricted before, during and after the peak of the epidemic. **It is essential that Parliament and the devolved legislatures scrutinise the use of the powers in this Bill, given their breadth and significance. We will consider how best to ensure that scrutiny and accountability are maintained in these exceptional circumstances.**

*Legal accountability**Judicial review*

15. The strength of the legal limitations on the broad powers in the Bill relies on parliamentary scrutiny and the availability of adequate legal accountability.

11 Including airports, seaports or hoverports.

12 Coronavirus Bill, [schedule 20, paragraph 1\(2\)\(a\) and \(b\)](#)

13 Until [section 281\(5\)](#) of the Criminal Justice Act 2003 is commenced the maximum term of imprisonment in England and Wales will be six months.

14 Subject to [The Presumption Against Short Periods of Imprisonment \(Scotland\) Order 2019](#), which provides for a presumption against sentences of less than 12 months.

15 Coronavirus Bill, [Delegated Powers Memorandum](#), para 427

16. The acceptability of the more significant powers, such as those in clause 51 and schedule 21, rely on the possibility of appeals to the magistrates' courts, or the sheriffs courts in Scotland.¹⁶ Under ordinary circumstances, appeals to the magistrates' court have the advantage of accessibility and the possibility of appeal to higher courts. Given the scale of the coronavirus pandemic, and the powers the Government will use to respond to it, there may be a need to resolve difficult legal questions concerning the proportionality and necessity of restrictions and directions, and of their compliance with the Human Rights Act 1998. As such questions are important and often legally complex, it is right that they be heard to as great an extent possible in the High Court or Outer House of the Court of Session, without undue delays or procedural obstacles.
17. The High Court is well-adapted to make speedy determinations of whether a matter should be given permission for judicial review. The current practice of the High Court already allows it to conduct hearings by video-link. It would be possible for an affected person to instruct a solicitor, the solicitor a barrister, and for the barrister to arrange for hearings before the High Court without any person outside the court being required to leave their place of residence.
18. Given the importance of the High Court to the constitutional propriety of the Bill, there are two ways in which the Bill could be improved to strengthen this function. The first is to provide regulation-making powers to allow the Secretary of State to make provision for expedited recourse to the High Court or Outer House of the Court of Session for challenges to the application of the Bill's powers. This could either be direct access, or by way of case stated in a magistrates' court. Second, the Government could relax onerous cost rules in connection with judicial review challenges to powers under the Bill. One option would be to provide that, save in the case of vexatious or unreasonable claims, a party bringing a challenge to the exercise of powers under the Bill's provisions, or related subordinate legislation, should not be liable for the state's adverse costs in such proceedings.
19. The Government could take two additional administrative steps to ensure that affected persons have a realistic opportunity to challenge decisions applicable to them. It could provide that legal aid applications in relation to powers under the Bill should be determined as a matter of priority and that the evidentiary hurdles associated with demonstrating legal aid eligibility should be relaxed, so that persons unable to satisfy the applicable burdens, due to the coronavirus, do not thereby lose the possibility of vindicating their public law rights. **We recommend the Government considers how the role of the High Court and the process of judicial review can be strengthened and supported in the exceptional circumstances of the coronavirus pandemic.**

Functioning of courts

20. The Bill aims to maintain the functioning of the courts and tribunals system during the pandemic. To that end it amends existing law to permit wider use of video/audio technology, "either in video/audio-enabled hearings in which one or more participants appear before the court using a live video or audio link, or by a wholly video/audio hearing where there is no physical

¹⁶ See also the related powers in the [Public Health \(Control of Diseases\) Act 1984](#).

courtroom and all participants take part in the hearing using telephone or video conferencing facilities.”¹⁷

21. Schedule 26 creates criminal offences “to protect participants and prohibit recording or transmitting live-streamed proceedings photography and sound recordings in the context of virtual hearings and live-links”.¹⁸ These are equivalent to offences that currently exist in relation to photographing or recording court proceedings.
22. The Bill elsewhere provides for restrictions to be imposed on individuals who are potentially infectious. Such decisions are open to appeal to the magistrates’ courts. Clause 56 and schedule 26 provide that such appeals should be heard by video link.
23. The courts, including the High Court, are likely to be affected by closures during the coronavirus pandemic. **The Government and Her Majesty’s Courts and Tribunal Service, in consultation with the Lords Chief Justice of England and Wales, Lord President in Scotland and Lord Chief Justice of Northern Ireland, should set out how they plan to ensure that all legal proceedings, including judicial review, will continue to be facilitated, even by video-link, during such disruption.**

Civil liberties

24. The Bill has the potential to affect civil liberties in a number of important areas: the detention or quarantining of individuals, the registration of deaths and the disposal of human remains, the closing of ports, restrictions on free assembly and the conduct of criminal trials. We do not explore these issues in detail as they are largely provided for in the form of delegated powers and so their impact cannot readily be assessed until they are used. **It is essential that the Government exercises these significant powers in a proportionate and non-discriminatory way.**
25. **The constitutional propriety of these measures depends on the continued effective operation of standard processes of administrative and judicial oversight. Parliament must ensure that such review procedures continue to function properly and should make this a central consideration in its periodic reviews of the powers.**
26. We have a specific concern regarding the power in paragraph 5 of schedule 8. This power effectively licenses unlimited periods of detention for those within the hospital system. **The Government should explain how it intends to use this power, how it will do so proportionately and publish guidance as to how lengthy and potentially unjustified instances of detention can be challenged.**

¹⁷ Coronavirus Bill, [Explanatory Notes](#), para 98

¹⁸ *Ibid.*, para 100