Cabinet Office

Government response to the Lords Constitution Committee's report on COVID-19 and the use and scrutiny of emergency powers

6. We recommend that Parliament be consulted on any future draft legislation prepared on a contingency basis to address a potential emergency, ensuring that it provides for sufficient parliamentary scrutiny. The pre-legislative scrutiny of what became the Civil Contingencies Act 2004 provides a clear model for such an approach. (Paragraph 48)

The Government will always endeavour to provide opportunities for pre-legislative scrutiny of legislation, including legislation prepared on a contingency basis, drafted to address specific emergencies.

Any changes to the Civil Contingencies Act, and any changes to primary legislation, set out to address any potential emergencies will be subject to Parliamentary scrutiny.

10. We recommend that the Government sets out the rationale for using the urgent procedure under the Public Health (Control of Disease) Act 1984 in the explanatory memorandum accompanying an instrument made using that procedure. This should explain why the particular measures in the instrument need to be made urgently. Poor government planning does not justify use of the urgent procedure under the 1984 Act. (Paragraph 64)

The Public Health (Control of Disease) Act 1984 was the main legislative means by which the Government delivered its public health response to COVID-19. The Act was designed for the very purpose of protecting populations from communicable diseases of pandemic proportions. Experience from the Swine Flu pandemic was used to inform amendments to the Public Health Act in 2008 that ensured the Government was able to launch a rapid response to the current pandemic. It is always preferable to use existing powers where they exist and so this is the reason the Government drew upon the powers set out in the 1984 Act. The fast-moving, urgent and often unpredictable nature of the pandemic necessitated the use of the emergency procedure under s45R of the Public Health Act.

The Explanatory Memorandum accompanying each Statutory Instrument clearly sets out that the emergency procedure is being used and provides the rationale as to why that procedure is being used in that particular instance. Regulations were only made when necessary and proportionate for the purposes of preventing, protecting, controlling or providing a public health response to the incidence or spread of infection in England with coronavirus.

The incidence and spread of coronavirus presented the Government with a unique, and initially unknown, epidemiological situation. Given the stark spread of the disease, the Government recognised that urgent measures were needed to control transmission and save lives, with a minimum delay. The draft affirmative procedure is unsuited to dealing with

an emergency situation of this nature, given that it usually takes six to eight weeks for an instrument made under the draft affirmative procedure to be debated and approved.

No two public health emergencies will be the same, so it is difficult to predict what would be reasonable and proportionate in the event of future disease outbreaks.

11. We recommend that there should be a presumption in favour of using sunset provisions in all regulations made under the Public Health (Control of Disease) Act 1984. They should expire after three months unless renewed by a resolution of both Houses. (Paragraph 68)

14. We recommend that there should be a presumption in favour of using sunset provisions in all regulations introduced during a national emergency. They should expire after three months unless renewed by a resolution of both Houses. (Paragraph 82)

For regulations made under the Public Health (Control of Disease) Act 1984, there is an ongoing duty for the Secretary of State to ensure that the regulations are proportionate to prevent, protect, control or provide a public health response to the incidence or spread of infection in England.

Review periods were built into regulations made in response to the coronavirus pandemic – every 7, 14, 28 or 35 days depending on the instrument – to ensure that the measures could be continually assessed and scrutinised. For example, the Secretary of State for Health's power to restrict access to public places in the Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020 contained a requirement for review at intervals of at least every seven days. However, in the context of coronavirus, other approaches were also used to keep SIs under review. These alternatives to sunsetting are set out in the Coronavirus Act 2020, and include: regular reviews by a Secretary of State, the ability for Government to make specific and specified changes to and within clearly defined timescales, or the ability for Government to limit changes to particular periods (e.g. academic years). There are also changes which, for good reason, the Government may wish to be in force permanently and so are not the subject of any form of sunsetting. Of course, where this is the case, Government policy may change and those changes that are currently permanent, may become time-limited or may be removed altogether.

A sunset provision is only one method by which departments can seek to ensure that SIs, or provisions under them, are time-limited. Different approaches can be adopted in different cases. For example, in the education sphere where there may already be defined concepts such as "academic year", it is likely to be clearer to ensure that a time-limited change is expressed as applying to a particular academic year than it would be to try to apply a "one-size-fits-all" sunset clause. To assist with clarity, each EM should outline whether a sunset provision is included and explain the rationale.

We continue to review the legal framework, including the Public Health (Control of Disease) Act 1984, drawing on lessons learned from the pandemic, balancing the need to ensure appropriate Parliamentary scrutiny of new regulations against the ability to move quickly and certainly to protect public health.

15. We recommend the Government adopt, at a minimum, the following safeguards in respect of all affirmative instruments introduced during a national emergency:

(a) The Government should commit to holding a debate and vote on regulations before coming into force wherever possible.

(b) Where this is not possible:

(i) The Government should set out in the explanatory memorandum accompanying an instrument why it considers it necessary for the regulations to come into force before a parliamentary debate; and

(ii) The Government should commit to holding a debate and vote on regulations within 21 days of regulations coming into force. (Paragraph 83)

The Government endeavours to schedule debates as soon as parliamentary time allows to enable parliamentary scrutiny and oversight. All Statutory Instruments (SIs) brought forward in response to COVID-19 have been scrutinised in line with the requirements set out by Parliament. Explanatory Memoranda for the regulations explain the rationale for instruments having been made under the emergency procedure.

Conscious of the need to maintain and assist Parliament with scrutiny of legislation throughout the pandemic, the Government has endeavoured to foster a constant dialogue with parliamentarians. The Government has made regular statements in both Houses, provided written and oral evidence to select committees, responded to debates and oral questions, and answered MPs' and Peers' written questions and letters.

With regards to the Civil Contingencies Act 2004, emergency regulations that come into force through Part 2 of the Act are made as 'made affirmative' SIs. These SIs enable the Government to respond to emergencies quickly, when the urgency of a situation does not allow time for prior debate. Indeed, emergency regulations under Part 2 can only be made if the need for them is pressing and urgent. The Act provides for parliamentary scrutiny after emergency regulations have been made, providing for adequate safeguards, balanced against the importance of an effective and timely emergency response.

26. We strongly recommend that all Government guidance during a public health emergency conform to the following essential conditions to enable people accurately to understand the law:

(a) Guidance should clearly distinguish information about the law from public health advice. It should not suggest that instructions are based on law when they are not.

(b) Where guidance provides information about the law, this should be accurate and

complete. Where the law is too complex to be set out in full, guidance should make clear that the account is partial.

(c) All relevant legal instruments should be identified wherever legal requirements are referred to in guidance, accompanied by up-to-date hyperlinks to the underlying regulations on legislation.gov.uk.

(d) Guidance should make clear when opinions are being offered about the interpretation of the law, including a clear statement of the source and status of such opinions.

(e) A consistent approach to use of the terms "advice", "guidance", "recommendation", "rules" and "restrictions" should be adopted in all Government publications and public statements, in each case making clear whether the term is referring to obligations required by law, or to public health advice. (Paragraph 166)

These exceptional times have given rise to the need for exceptional legislation. Indeed, the Government's response to the pandemic has required an ever-increasing volume of supplementary guidance. That is not different in kind from standard practice, but it has had an unusually wider reach than legislative guidance usually does. Throughout the pandemic, the Government has continued to evolve its approach to make sure that it clearly and openly communicates the effects of changes made to the law, alongside publication of the legislation and its associated guidance. The Government is keen to make sure that it draws lessons from how guidance is received publicly in this pandemic to shape delivery of guidance to the public in future pandemics.

Guidance has continued to be an important and necessary way of supporting the public in understanding legislative change. The Government is of the view that it would have been impracticable for the Government to legislate for every change that needed to be implemented in response to the pandemic. Indeed, guidance can be a more proportionate and effective way of encouraging changes in behaviour and has been an invaluable tool. Guidance now serves as one of the main tools for driving behaviour, in particular, following the lifting of most legal restrictions as we moved to Step 4 of the Government's roadmap. It is for departments to make judgements about the right balance to strike between law and guidance in any particular case.

27. We recommend that the Government ensures that every statement of Government guidance (including every amendment and replacement text) is separately published (and later archived) in a publicly accessible format. This will make it possible to identify the guidance that applied at any given time and enable each statement of guidance to be compared to the legislation in force at the relevant time. (Paragraph

167)

Government guidance relating to the COVID-19 pandemic is publicly available on GOV.UK. The Government Digital Service has developed a style guide for COVID-19 content to ensure that information is written in an accessible and consistent way for users. Many high-profile pieces of guidance are translated into multiple languages and accessible versions, such as Easy Read English, to improve their reach.

Guidance which is no longer in effect remains accessible on GOV.UK as withdrawn web pages, which highlight that the guidance is no longer current, but allows users to identify the guidance which applied at various stages of the Government's COVID-19 response.

Details of amendments and corrections to current guidance on GOV.UK are also published to guidance pages via 'change notes', which describe any changes which have been made and when they took place.

34. We recommend that the Government adopts alternative drafting practices to make the mass of COVID-19 regulations more accessible for members of the public and lawyers alike. For every set of amending regulations made, the Government should set out in the explanatory memorandum: (i) the regulations that are being amended; (ii) the substance of the amendments being made; and (iii) the reason for those amendments. (Paragraph 187)

The Explanatory Memorandum (EM) template and guidance was updated in July 2021. This was disseminated to all departments via the Parliamentary Business and Legislation Secretariat. The template was updated with input from Parliamentary Committees, including both the Secondary Legislation Scrutiny Committee (SLSC) and the European Statutory Instruments Committee (ESIC).

In addition to the guidance, the Parliamentary Capability Team based in the Cabinet Office provides a range of training and resources for civil servants of all grades, from all departments, on Secondary Legislation. The training offer includes practical advice on how to produce effective EMs. This workshop in particular has been designed in partnership with SLSC staff and focuses on the information and considerations that go into an effective EM. The training provided on EMs sets out four main criteria for writing a good EM, namely that it is: written in plain English; short and concise; self-contained, with context explained; and summarises the costs and benefits of the legislation.

35. We recommend that, whenever amending regulations are made, the Government publishes an accompanying Keeling Schedule setting out the new legislation in full and indicating all the amendments that have been made. This would not have the status of legislation but should be published on legislation.gov. uk alongside the original instrument to facilitate public access and understanding of the changes that have been made to the underlying legislation. This approach would enable members

of the public and lawyers to identify present and past law with greater ease. (Paragraph 188)

Legislation.gov.uk already facilitates public access and understanding of the changes that are made to legislation as it makes its way through Parliament. This facility also allows the legal community to monitor and analyse legal changes.

In order for legislation to be made publicly available, it must first be registered at the National Archives (TNA) and then published on the legislation.gov.uk website. TNA have prioritised the rapid publication of COVID-19 regulations throughout the pandemic and, to assist this, have extended the SI Registration and Publishing Support Service beyond the usual working hours. Many significant changes to the numerous health protection regulations made during the pandemic were made by amending existing regulations. In order for the public to be able to read and understand these changes in context, it is crucial that a version of the original regulations incorporating all of the latest amendments is made available quickly. On average, TNA have produced the "as amended" versions of Coronavirus legislation within two days of the commencement of the amending legislation. In the case of the most significant changes, they have reduced this time even further.

To support ease of access and aid legal certainty, TNA have also created a new Coronavirus service (www.legislation.gov.uk/coronavirus) to provide important information about Coronavirus legislation, including links to key regulations, and guidance for researching it.

38. We recommend that all future ministerial statements and Government guidance on changes to COVID-19 restrictions clearly state the geographic extent of the new requirements. (Paragraph 203)

COVID-19 guidance on gov.uk states clearly that the guidance applies to England only. Where relevant, alternative links to current guidance for those living in Wales, Northern Ireland and Scotland are made available.

41. We recommend that a review of the use of emergency powers by the Government, and the scrutiny of those powers by Parliament, should take place in advance of the public inquiry. We believe this review could be completed in time to inform the public inquiry and planning for any future emergencies. (Paragraph 209)

The Government is fully committed to learning lessons at every stage of this crisis and its response has been subject to regular independent scrutiny, including 21 reports by the independent National Audit Office and 51 parliamentary inquiries. This will continue to be the case. There is a legal requirement on the Cabinet Office under Regulation 59 of the Civil Contingencies Act 2004 (Contingency Planning) Regulations 2005 to conduct an assessment of CCA regulations at least every five years. This was last undertaken in March 2017 and a review is currently underway. This review will cover the entire CCA, including Part 2 of the Act which provides for the making of temporary special legislation (emergency regulations) to help deal with the most serious of emergencies. The review concludes in March 2022.

43. Section 21(5) of the Civil Contingencies Act 2004 appears to present a legal and practical barrier to use of that Act during an emergency. We recommend that section 21(5) of the Civil Contingencies Act 2004 be reconsidered as part of the review of emergency powers. (Paragraph 215)

All provisions in the Act are within scope of the Civil Contingencies Act (CCA) review. The Resilience Strategy call for evidence includes a dedicated CCA annex which will allow stakeholders to comment on all areas of the legislation. We will then consider this evidence carefully and present any recommendations for change in the final review, which is due for publication in March 2022.

44. We recommend that the review of emergency legislation consider the use of the Coronavirus Act 2020 and Part 2A of the Public Health (Control of Disease) Act 1984, including whether the correct balance was struck between the restrictions on civil liberties and parliamentary scrutiny, and the Government's ability to respond adequately to the COVID-19 pandemic. (Paragraph 216)

The Government's response to the pandemic was delivered through long-established legislative vehicles, such as the Public Health (Control of Disease) Act 1984; and other rapidly developing means, such as the Coronavirus Act 2020. This enabled the Government to tackle the public health threat, and to underpin its response with a broader package of support.

When considering its response to the pandemic, the Government first considered how to use existing powers and was well aware of the requirements for parliamentary scrutiny for use of these powers. It considers the use made to date of these emergency powers to have been appropriate given the imminent and serious threat to public health caused by coronavirus. We appreciate and value the scrutiny role Parliament plays and have tried hard to balance this with the continually changing nature of the pandemic. As we continue to move through this phase of the pandemic, we will continue to work closely with Parliament to ensure regulations are scrutinised and debated in a timely fashion, wherever possible.

We continue to review the legal framework, including the Public Health (Control of Disease) Act 1984, as well as our standing civil contingency powers. We will draw on lessons learned from this pandemic and balance the need to ensure appropriate parliamentary scrutiny of new regulations with the ability to move quickly and certainly to protect public health.

The Government welcomes the reflections of parliamentarians, select committees and other stakeholders on its use of emergency powers when responding to the pandemic and will reflect on any points raised. But we will also need to be mindful that emergency situations, by their nature, demand that the Government is able to act with speed and flexibility when responding in the national interest. Standardisation or a one-size-fits all approach is unlikely to be appropriate in such a context.

45. The review should inform the development of any future bespoke emergency powers, including any amendments to the Public Health (Control of Disease) Act 1984 and Civil Contingencies Act 2004 that may be considered necessary. This could include amendments to the urgent procedure in the 1984 Act and requiring the use of sunset clauses in the regulations made under that Act. (Paragraph 217)

The Government keeps under consideration the existing powers available to it and any additions or amendments required. The review of the Civil Contingencies Act and call for evidence launched on 13 July 2021 will identify if any changes are needed to the Civil Contingencies Act.