**Dr Stephen Thomson – written evidence (CIC0443)**

**House of Lords Constitution Committee**
**Inquiry into the Constitutional Implications of COVID-19**

1. I am an Associate Professor at the School of Law, City University of Hong Kong, with wide-ranging interests in administrative law and constitutional law. I have conducted research throughout the COVID-19 pandemic on the legality and constitutionality of the regulatory response to COVID-19 in a number of jurisdictions, including in the UK. My work has thus far included 'COVID-19 Emergency Measures and the Impending Authoritarian Pandemic' (2020) *Journal of Law and the Biosciences* doi: https://doi.org/10.1093/jlb/lsaa064 and 'COVID-19 Emergency Measures are Hurting Democracy Globally' (2020) 110(9) *American Journal of Public Health* 1356-1357, both peer-reviewed and co-authored with Dr. Eric C. Ip, Associate Professor, University of Hong Kong. I am also the rapporteur for the Hong Kong Special Administrative Region of the People's Republic of China in the *Lex Atlas: Covid-19* project, a major multinational study of legal responses to COVID-19 in collaboration with University College London, King's College London, the Max Planck Institute for Comparative Public Law and International Law and Oxford University Press, and am imminently due to present my work on the governance implications of the COVID-19 pandemic to Harvard Law School.

2. I take this opportunity to present written evidence to the House of Lords Constitution Committee in response to its call for evidence on the constitutional implications of the COVID-19 pandemic in relation to emergency powers. I have chosen to limit my contribution to selected questions posed in the call for written evidence.

**What existing powers (other than those in the Coronavirus Act 2020) might have been used to deliver the Government's response to the Covid-19 pandemic? Was the Coronavirus Act 2020 necessary to implement the Government's response to the pandemic?**

3. The primary legislative vehicle for the imposition of COVID-19 regulatory measures relating to lockdowns, quarantine requirements, restrictions on business and commercial operations etc has been the Public Health (Control of Disease) Act 1984, under which the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, the Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place) (England) Regulations 2020, the Health Protection (Coronavirus, International Travel) (England) Regulations 2020 and other delegated legislation has been made.

**Has the use of emergency powers by the Government to address the pandemic been proportionate?**

4. There have been multitudinous and widespread instances of disproportionate emergency measures adopted in the UK. The regulatory response to the COVID-19 pandemic has engaged a number of rights under the European Convention on Human Rights, including liberty (Article 5), respect for private and family life (Article 8), freedom of assembly and association (Article 11), protection of property (Protocol 1, Article 1) and education (Protocol 1, Article 2). The right to

freedom of movement (Protocol 4, Article 2) would be engaged if Protocol 4 was ratified, and arguably some aspects of the regulatory response to the COVID-19 pandemic could engage the prohibition on inhuman or degrading treatment (Article 3), as in relation to the treatment of hospital patients, care home residents and their family members. Article 15 of the Convention prohibits derogation from Article 3 rights in a time of war or other public emergency threatening the life of the nation.

5. Limitation on or qualification of a Convention right is required to be proportionate, which in law means that (i) the objective of the measure must be sufficiently important to justify the limitation of the right, (ii) the measure must be rationally connected to the objective, (iii) a less intrusive measure could not have been used, and (iv) a fair balance has been struck between the rights of the individual and the interests of the community. Moreover, in the context of a public emergency, it is also instructive to consider the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights. Of particular relevance in the context of the regulatory response to the COVID-19 pandemic are the following principles:

    - Public health may be invoked as a ground for limiting certain rights in order to allow a state to take measures dealing with a serious threat to the health of the population or individuals members of the population, but these measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured (Principle 25).

    - The severity, duration and geographic scope of any derogation measure shall be such only as is strictly necessary to deal with the threat to the life of the nation and is proportionate to its nature and extent (Principle 51).

    - The principle of strict necessity shall be applied in an objective manner, and each measure shall be directed to an actual, clear, present or imminent danger, and may not be imposed merely because of an apprehension of potential danger (Principle 54).

    - The national constitution and laws governing states of emergency shall provide for prompt and periodic independent review by the legislature of the necessity for derogation measures (Principle 55).

    - In determining whether derogation measures are strictly required by the exigencies of the situation the judgment of the national authorities cannot be accepted as conclusive (Principle 57).

    - A proclamation of a public emergency shall be made in good faith based upon an objective assessment of the situation in order to determine to what extent, if any, it poses a threat to the life of the nation, and a proclamation of a public emergency, and consequent derogations from Covenant obligations, that are not made in good faith are violations of international law (Principle 62).

6. However, a proportionality analysis might not even be conducted at all by the courts when an absolute right is engaged. There are, in short, serious doubts as to whether a whole range of legal measures imposed as part of the regulatory response to the COVID-19 pandemic would meet these stringent tests and standards. Notwithstanding the Secretary of State's consideration that the "restrictions and requirements imposed by [the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 and other regulations] are proportionate to what they seek to achieve, which is a public health response to" the "serious and imminent threat to public health which is posed by the incidence and spread

of… SARS-CoV-2… in England", I am of the view that many of the measures adopted would fail to meet these legal tests and standards.

7. Disproportionality in the regulatory response to the COVID-19 pandemic is not unique to the UK, but is also found in other states as part of a broader trend towards authoritarian models of governance, as I have argued with Dr. Eric C. Ip in 'COVID-19 Emergency Measures and the Impending Authoritarian Pandemic' (2020) *Journal of Law and the Biosciences* doi: https://doi.org/10.1093/jlb/lsaa064.

**To what extent have the legal requirements imposed on people during lockdown been clear and accessible to members of the public? How should the new measures introduced in response to the pandemic be communicated and explained to authorities (e.g. local government, police, border force, regulators), businesses and members of the public?**

8. Ministers and government spokespersons have often presented legal requirements alongside non-binding advice. While persons must of course comply with legal requirements, they are free to disregard or decline to follow non-binding advice. The parallel presentation of legal requirements and non-binding advice, without making clear what is legally required and what is not, is therefore inappropriate particularly from the perspective of the rule of law. I refer the Committee to what I have written about this at page 9 (PDF version) of 'COVID-19 Emergency Measures and the Impending Authoritarian Pandemic' (2020) *Journal of Law and the Biosciences* doi: https://doi.org/10.1093/jlb/lsaa064. In future, ministers and government spokespersons should make clear whether instructions are legally binding or merely unenforceable guidance, and use with care labels such as *advice*, *guidance*, *guidelines*, *rules* and *restrictions*, which have been used fluidly throughout the pandemic to include both binding and non-binding requirements.

**To what extent has Parliament been able effectively to scrutinise the statutory instruments related to the pandemic measures? What additional steps ought to be taken to ensure effective scrutiny of emergency statutory instruments in future?**

9. Concerns about effective parliamentary scrutiny of statutory instruments relating to pandemic measures have been ventilated elsewhere, but I would add that it is worth considering whether and to what extent the deficit in effective parliamentary scrutiny is consistent with Principle 55 of the Siracusa Principles, which states that "[t]he national constitution and laws governing states of emergency shall provide for prompt and periodic independent review by the legislature of the necessity for derogation measures", noting that this may also apply to de facto derogation.

**What processes are there for securing renewed Parliamentary oversight and control of the legislative agenda once the urgency of a given emergency has diminished? Are the sunset provisions and other safeguards provided for in the Coronavirus Act 2020 and associated regulations sufficient for this purpose?**

10. It is important to recognise that the urgency of the public health emergency presented by the COVID-19 pandemic has already diminished. This is not to assert that the risk to public health or challenges to public services, including the National Health Service, are necessarily diminished, but that the urgency of the regulatory response has diminished.

11. Around the time of the onset of the pandemic in the UK, comparatively little was known from a scientific or epidemiological perspective about SARS-CoV-2 and COVID-19, including the extent to which they might be harmful or likely to cause serious illness or death. As it has become apparent that COVID-19 is only likely to be particularly harmful or fatal to persons in specific categories, such as elderly persons or persons with underlying health conditions, regulatory measures should have become much more targeted to the protection of those groups. Whereas measures aimed at the general population may have been justifiable in the earliest stages of the pandemic, they have become decreasingly justifiable as the pandemic has progressed, during which time the epidemiological understanding of COVID-19 has developed, as has an indication of the severity of the deleterious effects of regulatory measures on other aspects of health and economic and social life.

12. This poses a specific legal problem as it gradually renders broad-brush regulatory measures aimed at the general population less justifiable under the proportionality principle, which is an established aspect of human rights law in the UK. It has also made the UK's regulatory response to the COVID-19 pandemic increasingly difficult to reconcile with the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights.

13. Sunset provisions offer some safeguard but not necessarily a sufficient safeguard. Consideration should be given to greater use of the affirmative procedure, and even the draft affirmative procedure, after the earliest and most urgent stages of the public health emergency have passed, including the introduction of a legal requirement that the affirmative procedure be used after a specific phase or period of time has passed since the onset of the emergency. In this regard it may be noted that, according to the Hansard Society, of the 295 coronavirus-related statutory instruments laid before Parliament to date, 206 were subject to the made negative procedure, 75 were subject to the made affirmative procedure, 13 were subject to the draft affirmative procedure, and one was "laid only" whereby no further procedure was necessary or possible (see https://www.hansardsociety.org.uk/publications/data/coronavirus-statutory-instruments-dashboard).

**Is there a case for reworking or consolidating emergency powers legislation? Should safeguards and scrutiny processes be standardised and, if so, how should they be designed to operate during a crisis?**

14. Great care must be taken in the event that emergency powers legislation is reworked or consolidated. Any reworking or consolidation must ensure that the legal basis for exercising emergency powers is curtailed or more properly controlled, and not expanded. While the enactment of emergency regulations in the earliest stages of a public emergency, including a public health emergency, using the negative procedure might be justifiable and indeed appropriate, the use of this procedure in general becomes less justifiable and appropriate as the emergency develops and its urgency subsides. Consideration should be given to greater use (including mandatory use) of the affirmative procedure after the

earliest stages of the public health emergency, or other public emergency, as stated above. Accordingly, any reworking or consolidation of emergency powers legislation should enhance – not undermine – effective democratic controls on government.

15. It should also be considered whether the emergency procedure contained in section 45R of the Public Health (Control of Disease) Act 1984 contains sufficient protection against abuse or misuse.

16. Finally, it is highly undesirable from the perspective of the rule of law, legal certainty and rights protection that the regulatory framework is amended with a comparatively high degree of incidence or frequency.

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