

Francis Hoar – written evidence (CIC0451)

House of Lords Constitution Committee

Inquiry into the Constitutional Implications of COVID-19

Introduction

1. I am a practising barrister, specialising in public and constitutional law, and a member of Field Court Chambers in Gray's Inn.¹
2. I have, since April 2020, been counsel to Simon Dolan and other claimants in two judicial reviews ('**JRs**') of the various 'lockdown' regulations made under the Public Health (Control of Disease) Act 1984 ('**the 1984 Act**'). In particular:
 - (1) A JR ('**Dolan (No. 1)**') issued in May 2020 of The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 ('**the No. 1 Regulations**'), which imposed the first 'lockdown'; this JR was heard by the Court of Appeal (Lord Burnett CJ, Singh and King LJ) in October 2020 and is awaiting judgment;² and
 - (2) A JR ('**Dolan (No. 2)**') issued in September 2020, originally of the Health Protection (Coronavirus, Restrictions) (England) (No. 2) Regulations 2020 ('**the No. 2 Regulations**'), as later amended in September 2020 by the 'Rule of Six' and other Regulations;³ this application was amended to challenge the various 'Alert Level Regulations' in October 2020 and has since been amended (on 12.11.2020) to challenge the Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations 2020 ('**the No. 4 Regulations**'), which imposed the current 'lockdown'.
3. I am also acting for anonymous claimants in a JR challenging the Health Protection (Coronavirus, International Travel) (England) Regulations 2020 (imposing quarantine on passengers entering the country from certain countries).
4. In each of the above JRs, the claimants' submit that the respective regulations are *ultra vires* Part IIA of the 1984 Act, on the grounds that the Act as amended did not give Ministers powers to impose restrictions on the healthy population or on premises other than those contaminated; and that the powers
5. These are my opinions and not those of my clients in the above matters, nor those of Field Court Chambers.
6. The Constitutional Committee of the House of Lords ('**the Committee**') has not asked expressly about the government's use of the 1984 Act to impose the most 'far reaching restrictions' on everyday life – in peace or in war – 'perhaps ever' (Hickinbottom LJ on 4.8.2020, in ordering the hearing of *Dolan (No. 1)* in the Court of Appeal⁴). The Committee's terms of reference for this call for evidence is the balance between powers of the Executive and Parliamentary oversight and 'the Government's response to the Covid-19 pandemic'. The bulk of the government's response – the first and second 'lockdowns', the 'Rule of Six', facemask mandates, 'track and trace' and the international quarantine regulations

¹ <https://fieldcourt.co.uk/barrister/francis-hoar/>

² The original Statement of Grounds (since amended) is published here: https://static.crowdjustice.com/group_claim_document/Statement_of_Facts_and_Grounds_-_Written_Submissions_of_the_Claimant_69dBeCS.PDF

³ The original Grounds in *Dolan (No. 2)* are published here: https://static.crowdjustice.com/group_claim_document/Statement_of_Facts_Grounds_as_filed_CJ.PDF

⁴ https://static.crowdjustice.com/group_claim_document/Court_of_Appeals_Order_-_4_August_2020.pdf

– has been through secondary legislation made under the 1984 Act. Given the terms of reference and my experience, this submission will concentrate on the use of the 1984 Act; and in England only.

7. I first wrote in detail about the No. 1 Regulations, before I was instructed in any of the above JRs, in a detailed article published on 21.4.2020⁵ and summarised in a blog in the UK Human Rights Blog.⁶ I argued that the Regulations imposed exceptional and unprecedented restrictions on cardinal democratic rights (in particular the right to freedom of political association and assembly protected by the common law and by Article 11 of the European Convention on Human Rights and Fundamental Freedoms ('**the Convention**')), the right to liberty (Article 5), which may not be interfered with without a derogation from the Convention (which has not been lodged) and other fundamental rights including the right to private and family life (Article 8), to freedom of worship (Article 9) to the absence of interference with private property (Article 1 of Protocol 1); and that that the acts of the government in closing schools (which were not done under the 1984 Act but through a 'direction' that was not made on a statutory basis) deprived children of their right to education. I concluded that the measures were disproportionate to the risk from the virus – including as it was known to be at the time (one with a very low infection fatality rate that hugely disproportionately threatened identifiable groups) – and were, in consequence, unlawful; and I also supported the arguments of other lawyers and legal academics that the No. 1 Regulations were *ultra vires* the 1984 Act. I maintain these views.

Historical perspective and pandemic planning

8. This country's experience of dealing with pandemics and recent pandemic planning is, I suggest, an important consideration for the Committee. First, it demonstrates how extraordinary and unprecedented are the 'lockdown' restrictions that have been introduced. Secondly, it allows the Committee to measure how proportionate and rational (or not) those restrictions are. Thirdly, the historical context and previous preparation has been almost entirely ignored by the government, its advisers, Parliament and the media, to the extent that 2020 has felt like 'Year Zero' in the means by which democratic, social and economic norms have been cast aside to deal with one, far from unprecedented, public health crisis.
9. These considerations have constitutional implications. There have, since the Great War, been means by which emergency powers could be used in wartime and times of national crisis. Their existence, and particularly their scope, has always been controversial. Yet they have been tolerated by Parliament and the public because of trust in the 'constitutional' means by which liberty and democratic norms are protected. I say 'constitutional' because of the absence of a codified constitutional settlement enforceable by the courts upon both other arms of the state: executive and legislature. This itself has serious implications. The British constitutional settlement depends not only on trust but on an understanding that each of the three powers (executive, legislature and judiciary) share a culture of respect for democratic norms. This year, the executive has used an Act of Parliament never before contemplated to give it 'emergency' powers and has extended them with minimal reasoning and no evidence of review; and Parliament has been unwilling to stand in its way. It has become painfully obvious that the trust is unmerited and that the culture of the respect

⁵ <https://fieldcourt.co.uk/wp-content/uploads/Francis-Hoar-Coronavirus-article-on-ECHR-compatibility-20.4.2020-1.pdf>

⁶ <https://ukhumanrightsblog.com/2020/04/21/a-disproportionate-interference-the-coronavirus-regulations-and-the-echr-francis-hoar/>

for democratic norms has been diminished, to the extent that those norms appear to be treated as an optional extra which can be dispensed with wherever 'safety' demands it. The extraordinary – and absolute – proscription of the right to protest is a particularly stark example.

10. The lack of historical perspective has been striking. An indication of this has been the depressing regularity with which this pandemic has been described as 'unprecedented'. It is far from it. Pandemics in 1957/58 and 1968/69 were responsible for a similar number and far more fatalities respectively (in relative and in, the latter, absolute terms) than the deaths ascribed to Covid-19.⁷ 'Spanish Flu' in 1918/19 was worse by an order of magnitude.⁸
11. What has been unprecedented has been this country's reaction to it. In the two comparable 20th century pandemics (and even in 1918) there were no wholesale shut-downs of shops, pubs and restaurants; it would have been inconceivable for any government – in the middle of a Cold War against Communist tyranny – not merely to limit but to *proscribe all* political protest and collective worship; and the suggestion that there could be aggressive restrictions on the individual social lives of citizens, still less requiring them to remain at home *on pain of arrest*, would have been considered – rightly – to be to the adoption of practices reserved for the other side of the Iron Curtain. Life went on. Freedom was not conditional and (while focussed and directed measures could be taken that might temporarily affect freedom in particular circumstances) could not be suspended. Gross domestic product rose in each of the four years affected (1957/58 and 1968/69)⁹ and the absence of economic consequences demonstrates both that the depression this year has been caused by lockdowns, not the pandemic; and that the consequences of that depression (to public health as much as to people's jobs and quality of life) could have been avoided. It is no accident that 'lockdowns' originated in Communist China: indeed, there is substantial evidence that the adoption of these extraordinary measures in March was assisted by a social media campaign organised by the People's Republic.¹⁰
12. Moreover, the reaction to this pandemic is contrary to all pandemic planning done by the UK and the World Health Organisation before 2020.¹¹ In the UK Influenza Pandemic Preparedness Strategy 2011 ('**the 2011 Strategy**')¹² there was a section revealingly entitled 'business as usual', in which it was said that:

During a pandemic, the Government will encourage those who are well to carry on with their normal daily lives for as long and as far as that is possible, whilst taking basic precautions to protect themselves from infection and lessen the risk of spreading influenza to others (see Chapter 4). The UK Government does not plan to close borders, stop mass gatherings or impose controls on public transport during **any** pandemic. (Emphasis added)

⁷ 33,000 UK deaths from 'Asian Flu' in 1957/58; UK population then 51.5 million (now 67.8 million), equivalent to 43,450; 80,000 deaths from 'Hong Kong Flu' in 1968/69 out of a population of around 55.3 million, equivalent to 98,000; Sources: <https://www.belfasttelegraph.co.uk/news/uk/history-of-major-virus-outbreaks-in-the-uk-in-recent-times-39009641.html>; <https://www.macrotrends.net/countries/GBR/united-kingdom/population>;

https://web.archive.org/web/20110629184711/http://www.statistics.gov.uk/downloads/theme_compendia/AA2010/aa2010final.pdf

⁸ It killed around 200,000 out of a population of under 44 million, equivalent to 308,000 deaths today. *Ibid*

⁹ 1957, 2%, 1958, 1.3%, 1968, 5.5%, 1969, 1.9%:

<https://www.ons.gov.uk/economy/grossdomesticproductgdp/timeseries/ihyp/pn2>

¹⁰ <https://www.tabletmag.com/sections/news/articles/china-covid-lockdown-propaganda>

¹¹ And, while the pandemic planning has been focussed on pandemic influenza, there is minimal if any evidence to suggest the transmission of different respiratory viruses is any different, even if their virulence and infectiousness will vary (as it does in different forms of flu); albeit that one difference is that children and young people are at lower risk from C19 than they are from flu.

¹²

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/213717/dh_131040.pdf

13. Table 1 at p 25 of the 2011 Strategy sets out measures recommended as 'proportionate' responses to a 'high' impact pandemic. This refers to 'Transport, schools, shops affected by sickness and family care absences', justice system affected by absences and has an extensive section on *advice*. This is preceded by this key objective (at para 3.1 at p 19):

ii. Minimise the potential impact of a pandemic on society and the economy by:

- Supporting the continuity of essential services, including the supply of medicines, and protecting critical national infrastructure as far as possible.
- Supporting the continuation of everyday activities as far as practicable.
- Upholding the rule of law and the democratic process.
- Preparing to cope with the possibility of significant numbers of additional deaths.
- Promoting a return to normality and the restoration of disrupted services at the earliest opportunity.

(Emphasis added)

14. In respect of public gatherings and public transport, the 2011 Strategy stated as follows:

There is very limited evidence that restrictions on mass gatherings will have any significant effect on influenza virus transmission¹⁴. Large public gatherings or crowded events where people may be in close proximity are an important indicator of 'normality' and may help maintain public morale during a pandemic. The social and economic consequences of advising cancellation or postponement of large gatherings are likely to be considerable for event organisers, contributors and participants. There is also a lack of scientific evidence on the impact of internal travel restrictions on transmission and attempts to impose such restrictions would have wide-reaching implications for business and welfare.

For these reasons, the working presumption will be that Government will not impose any such restrictions. The emphasis will instead be on encouraging all those who have symptoms to follow the advice to stay at home and avoid spreading their illness. However, local organisers may decide to cancel or postpone events in a pandemic fearing economic loss through poor attendances, and the public themselves may decide not to mix in crowds, or use public transport if other options are available.

15. In October 2019, the World Health Organisation ('**the WHO**') published 'Non-pharmaceutical public health measures for mitigating the risk and impact of epidemic and pandemic influenza'¹³ ('**the WHO Report**'). This made the following findings:

- (1) 'Active contact tracing is not recommended in general because there is no obvious rationale for it in most Member States. This intervention could be considered in some locations and circumstances to collect information on the characteristics of the disease and to identify cases, or to delay widespread transmission in the very early stages of a pandemic in isolated communities.' (P 38);
- (2) The isolation of sick individuals 'could' reduce transmission but 'the overall effectiveness of isolation is moderate, and combination with other interventions may improve the effectiveness.' (P 41);

¹³ <https://apps.who.int/iris/bitstream/handle/10665/329438/9789241516839-eng.pdf>

- (3) 'Home quarantine of exposed individuals [who have had contact with infected cases] to reduce transmission is not recommended because there is no obvious rationale for this measure, and there would be considerable difficulties in implementing it.' (P 47)
- (4) There was 'very low' quality of evidence about the effectiveness of school closures, albeit that closures are recommended in a 'severe' pandemic where the adverse effects have been 'fully considered'. (P 52)
- (5) Workplace closures were 'unlikely to be feasible' (p 55) and were only recommended in 'extraordinary severe pandemics', albeit the quality of evidence was 'very low' (p 55); and the study only recommended such measures for 'selected workplaces' (p 55) and did not consider closing whole categories of workplaces;
- (6) There was a 'very low overall quality of evidence on whether avoiding crowding can reduce transmission of influenza' (p 58) and, although avoiding crowding was recommended 'during moderate and severe epidemics and pandemics', this was only in relation to 'large' meetings, religious 'pilgrimages' (not all collective worship), 'national events and transportation hub locations' (p 59);
- (7) Internal travel restrictions were only 'conditionally recommended during an early stage of a localised and extraordinarily severe pandemic for a limited period of time. Before implementation, it is important to consider cost-effectiveness, acceptability and feasibility, as well as ethical and legal considerations in relation to this measure' (p 65, emphasis added) and the overall quality of evidence in support was 'very low' (p 66); and
- (8) No recommendation was made to close or restrict cafés, bars or restaurants.

16. All of the above measures, many of which are only conditionally recommended on low evidence, fall far below the extraordinary restrictions imposed in 2020. All are targeted – at infected individuals, potentially infected (albeit their isolation is not recommended), individual workplaces, very large gatherings, localised areas of infection, etc. None envisage restrictions affecting all businesses of a particular category. It is reasonable to assume that the authors of the WHO Report and the 2011 Strategy – and, perhaps, any pandemic planners in any free country before 2020 – did not even contemplate the wholesale proscription of all collective worship and protest or the restriction of even intimate social interaction, including in the home, let alone requiring the entire population to remain at home on pain of arrest.

17. It is also worth observing that neither the 2011 Strategy or the WHO Report even suggest the unprecedented and strange application of a guidance to remain 2 metres away from any other person in all circumstances. While this is 'only' guidance, it has had an extremely costly impact on the functioning of businesses, schools, Parliament and the courts since it was imposed – without any debate in Parliament and almost no prior debate in the media – in March. Notably, the references to individuals distancing themselves from others in both the above reports are limited to symptomatic people and make no reference to arbitrary distances. This is yet another novelty that has been imposed with minimal if any empirical evidence to support it, in the absence of any advanced debate and with minimal if any scrutiny in Parliament.

18. The 2011 Strategy and the responses to similar pandemics within living memory also show a humility about the ability of the state to protect the population against the natural progression of viruses. This is also reflected in the caselaw of the European Court of Human Rights (**'the Strasbourg Court'**), which has required states to take active measures to protect individual populations from defined risks but has never suggested that the removal of fundamental rights –

wholesale – could be justified by the risk of infectious disease (see submissions in *Dolan (No. 2)*, *supra*, at paragraphs 211 to 218).

19. We are in danger of forgetting that a society's health is founded not only on the physical health of its citizens but on the guarantees of its openness, freedom and prosperity. Those guarantees – the restraint of a sovereign Parliament, our protections against government by decree and the freedoms protected by the common law and our protection of Convention rights – have (in modern times) perhaps never been put under more tension and never been found more wanting. Our terror of ill health and understandable concern for the vulnerable appears to have led us to abandon those ideals, perhaps thinking that they can be put to one side for a few months only to be recovered later. Yet the rapid descent back to ever greater control by the State in September and the adoption of yet another lockdown shows how false, how casual, was that conceit. Worse, there appears to be an acceptance that fundamental freedoms may be granted or taken away by government on the behest of medical and scientific advice about one virus, one malady, at the expense of all else.

1. Does the Coronavirus Act 2020 strike the right balance between powers for the Executive and parliamentary oversight and approval?

20. I do not address this subject in detail. Many concerns have been raised about the 2020 Act, not least the complete absence of any detailed scrutiny of a very lengthy Bill that had clearly been drafted over a lengthy period. I raise two:
- (1) The relaxation of the determination of the cause of death in Schedule 13 to the Act; and
 - (2) The powers to detain potentially infectious persons in Schedule 21 to the Act;
21. Schedule 13 allows a medical practitioner to sign a death certificate if he or she is not the practitioner who attended the deceased during his last illness (para 4(2)) and even if the deceased has not been attended during his last illness (para 4(3)). The statistics relying on the mention of Covid 19 on death certificates have been and continue to be used to justify the most extreme restrictions on fundamental rights and it is imperative that those statistics are soundly based. Even if there was justification for this measure at the height of the Spring epidemic, there is no longer.
22. Schedule 21 gives powers to arrest and detain an extraordinary wide selection of people, including anyone who 'may be' infected with the virus and even anyone who has 'been in' an 'infected area' within the past 14 days (para 2(2)). An 'infected area' is an area outside the UK that the Secretary of State declares to be 'where there is known or thought to be sustained human-to-human transmission of coronavirus' or from which there is a high risk that coronavirus will be transmitted to the United Kingdom. This gives the Secretary of State considerable power over which there is little scrutiny; and judicial review is unlikely to be sufficient as the courts will have a particularly high degree of deference to Ministers making individual decisions based upon scientific advice.
23. Powers for the detention of those who 'may be infected' are already contained in the 1984 Act (under s 45G), but only by justices of the peace and only upon the justice determining that there is sufficient evidence of possible infection. This Schedule, however, gives any constable, public health officer or immigration officer the power to detain any person who 'may be infected' without setting out any standard by which they can determine that. Thus: (a) it is unclear whether the test is 'reasonable suspicion', 'reasonable belief' or some other standard; (b) these officials have no experience in determining whether a person 'may be'

infected with a particular disease; (c) given the time it takes for any form of test for the virus, such an assessment can only be made in view of symptoms or other reasons; and (d) the symptoms for the virus are shared with many others, including the common cold. In consequence, any challenge to the use of these powers would potentially be difficult.

24. Notwithstanding the above, the CPS, in a review with findings published on 15.5.2020, found that 'all 44 cases [prosecuted] under the [2020] Act were found to have been incorrectly charged because there was no evidence they covered potentially infectious people, which is what this law is intended for.'¹⁴
25. Given that the powers of arrest were used only unlawfully at the height of the epidemic, there can be no rational basis for retaining them now. More to the point, it is concerning that untrained public officials have been given such wide powers that are not only at risk of being misused but quite clearly have been.

2. 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?

26. The 2020 Act has not been the principal means by which the government has 'responded' to the pandemic; and its provisions and secondary legislation under it have been very considerably less far reaching than the various regulations under the 1984 Act.
27. The question of whether the 1984 Act allows Ministers to interfere with fundamental rights is currently before the Court of Appeal (who are determining the Claimants' appeal in *Dolan (No. 1)*). The arguments in support of the Claimants' submission that the 1984 Act does not give Ministers the power to interfere with fundamental rights of the whole population and is restricted to regulations affecting persons who 'may be infected' (or premises which 'may be contaminated') are set out in Ground One in *Dolan (No. 1) (supra)*.
28. Irrespective of whether those arguments are accepted by the Court of Appeal, I submit that it is wrong and undemocratic for any Minister to make such extraordinary restrictions under the 1984 Act. Aside from the absence of any specific provisions that would appear to give Ministers such powers, I make the following observations:

(1) Other than through primary legislation (in respect of which we can only trust Parliament to exercise self-restraint and to respect fundamental rights) the Civil Contingencies Act 2004 ('**the CCA**') should be the only means by which restrictions on the fundamental rights of the entire population or whole categories of businesses are made. While the measures that may be made under the CCA are almost unlimited (including anything that can be done by primary legislation) they are subject to the following important qualifications:

- (a) Regulations may be made under the CCA in an 'emergency', which includes 'an event or situation threatening serious damage to human welfare in a place in the United Kingdom' (s 1(1)(a)) or loss of life (s 19). Measures must also be necessary to make provision for the purpose of preventing, controlling or mitigating an

¹⁴ <https://www.cps.gov.uk/cps/news/cps-announces-review-findings-first-200-cases-under-coronavirus-laws>

aspect or effect of the emergency and the need for the provision must be urgent (s 21(2)-(4)).

- (b) Regulations imposed under the CCA may last no more than 30 days (s 26) and lapse in the absence of positive resolutions by each House within seven days of being laid before Parliament (s 27), including in circumstances in which Parliament is not sitting or has been prorogued (s 28). Thus, while new regulations in the same form may be laid after the first regulations have lapsed, they would still require such a positive resolution.
- (c) Any provision made under the CCA may be amended by either House when put before them (s 27(3)).

(2) Under the 1984 Act, by contrast:

- (a) If a Minister declares that by reason of urgency it is necessary for secondary legislation not to be laid before Parliament, the measure can be made under the 'emergency procedure' (under s 45R) and need not be debated for 30 days which does not include any period in which Parliament is not sitting, is in recess or is prorogued;
- (b) This has been the means by which all regulations have been made this year, despite tenuous suggestions of urgency in many cases; and, although it is potentially possible to judicially review such declarations, the process is extremely slow (the challenge to the use of the emergency procedure in the Rule of Six Regulations in *Dolan (No. 2)* was issued at the beginning of October and the single High Court Judge has not considered whether to give permission to bring the claim over six weeks later); and
- (c) MPs and Peers are not able to amend any provisions in secondary legislation, if made under the emergency procedure.

29. It is clear from Hansard that Ministers proposing the Health and Social Care Bill (later the 2008 Act, which added Part IIA of the 1984 Act under which all regulations have been made) did not contemplate that it would authorise regulations to be made affecting all individuals, terminating the right of protest or to collective worship without reservation and removing the right of whole categories of businesses to trade;¹⁵

30. I go further. I do not consider that it can ever be justified for a free society to interfere with the social interactions of all individuals in the home or to allow the form of quasi-house arrest imposed this year, to proscribe all collective worship without qualification or to prohibit all political protest. The first two are fundamental rights of particular importance; and without the latter, it is impossible for a state to consider itself a liberal democracy. The essence of a liberal democracy is that a citizen accepts the civic duty to obey laws with which he disagrees or even regards as morally wrong because – and only because – of the right to elect a representative to Parliament and to speak and protest freely against any laws.

3. How have the measures taken by the Government to address the pandemic been implemented, i.e. which aspects of the lockdown were set out in

¹⁵ 'Lockdown: a response to Professor King' (<https://ukhumanrightsblog.com/2020/04/06/lockdown-a-response-to-professor-king-robert-craig/>), by Robert Craig, 6.4.2020.

legislation, regulations and guidance? What effect has this had on the clarity of the measures?

31. The restrictions have been imposed almost exclusively under the 1984 Act and exclusively through using the emergency procedure that prevented all prior scrutiny (before two exceptions were made in respect of the Alert Level and No. 4 Regulations) and about which there has been minimal subsequent scrutiny.
32. I have read in draft the reply to this question of Michael Gardner, partner of Wedlake Bell but who writes in a personal capacity, in answer to this question. I endorse them entirely (as I do the remainder of his submission).

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

33. The use of the 1984 Act has been grossly disproportionate. Indeed, it is difficult to think of any response to any domestic crisis in modern history that has been less proportionate.
34. I rely on my above submissions about the overview for the historical background and the lack of any precedent for the lockdown and other restrictions on fundamental rights made in 2020.
35. The cardinal error in the government's approach – one that means that its response cannot be proportionate – is that it has closed its eyes to any consideration other than the effect of its measures on the transmission of the virus. It has done so at least since 16.4.2020, when the First Secretary of State (in the Prime Minister's absence), formulated 'five tests' which all related to the transmission of the virus and the response of the NHS to it. Those tests were re-iterated by the Prime Minister on 10.5.2020, when he said that, while there would be a staged relaxation of the 'lockdown' restrictions, each relaxation would be 'subject to all these conditions and further scientific advice' and that 'we will be driven not by mere hope or economic necessity. We are going to be driven by the science, the data and public health.'¹⁶ But he wasn't just excluding 'hope' but any factor other than the effect on the virus.
36. This is contrary to any reasonable or rational means of testing proportionality; or of determining any political question. It is difficult to think of any circumstances – outside a war for national survival – in which it can be legitimate to put aside all considerations other than that of one (however pressing) issue. And reducing the transmission of a virus with an infection fatality rate of around 0.27 % (as estimated by WHO¹⁷) and an average age of death of around 82 is hardly such a situation.
37. The legal test of proportionality was formulated by Lord Sumption (sitting judicially) restrictive measures are proportionate:

[The effect of precedent] can be sufficiently summarised for present purposes by saying that the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine

- (i) *whether its objective is sufficiently important to justify the limitation of a fundamental right;*

¹⁶ <https://www.gov.uk/government/speeches/pm-address-to-the-nation-on-coronavirus-10-may-2020>

¹⁷ https://www.who.int/bulletin/online_first/BLT.20.265892.pdf, 14 October 2020, "Across 51 locations, the median COVID-19 infection fatality rate was 0.27% (corrected 0.23%)".

- (ii) whether it is rationally connected to the objective;
- (iii) whether a less intrusive measure could have been used; and
- (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.

These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them.

(Bank Mellat v Her Majesty's Treasury (No. 2) [2013] UKSC 39 paras 20)

38. And, more concisely:

There is in reality a sliding scale, in which the cogency of the justification required for interfering with a right will be proportionate to its perceived importance and the extent of the interference.

(Pham v Secretary of State for the Home Department [2015] 3 All ER 1015, para 106)

39. I suggest that it is impossible to determine whether a less restrictive measure might have achieved the desired outcome unless there is sufficient empirical evidence of the effectiveness of the measure proposed. And that does not include assertions based on modelling or the evidence of behavioural scientists that have all too often been the only "evidence" to justify restrictions imposed by this government.

40. I refer the Committee to the content of the Grounds in *Dolan (No. 1)* and *(Dolan (No. 2))*, in which the limited evidence of the efficacy of the measures imposed is set out in detail. Moreover, both the UK 2011 Strategy and the WHO Report – published only in October 2019 – demonstrate how little evidence there is for the efficacy of any of the measures.

41. It is woefully insufficient for the government to answer – as they are wont to (including in evidence in the above cases) that *any* reduction in social interaction must, by definition, reduce the possibility of infection. Worse, for Professor Chris Whitty to assert (as if it is his place to do so) that 'unfortunately these economically and socially destructive tools are what we have in the absence of anything else'.¹⁸

42. First, there is no sound evidential basis for the efficacy of lockdown policies. They have never been used before 2020, they would appear not to have had any impact on the peak of infections¹⁹ and, as an article in the Lancet concluded after a review of international evidence:

"... government actions such as border closures, full lockdowns, and a high rate of COVID-19 testing were not associated with statistically significant reductions in the number of critical cases or overall mortality."²⁰

43. Secondly, the measures are the most extreme and far reaching ever imposed in peace or (in most cases) war. As is demonstrated by national and international experience and planning, there is a great need to preserve a country's freedoms, its social life at a family, local, regional and national level, its communities, its

¹⁸ Q1564, evidence to the Science and Technology Committee of the House of Commons on 2.11.2020, <https://committees.parliament.uk/oralevidence/1122/default/>

¹⁹ For example, studies by Edinburgh University's Simon Wood (<https://arxiv.org/abs/2005.02090>) and Germany's Stefan Homburg (https://advance.sagepub.com/articles/Comment_on_Flaxman_et_al_2020_The_illusory_effects_of_n_on-pharmaceutical_interventions_on_COVID-19_in_Europe/12479987) have suggested that based on an analysis of the timing between the date of the full lockdown and the peak of hospital deaths, infections had already peaked in the UK and in Germany before the lockdown.

²⁰ [https://www.thelancet.com/journals/eclinm/article/PIIS2589-5370\(20\)30208-X/fulltext](https://www.thelancet.com/journals/eclinm/article/PIIS2589-5370(20)30208-X/fulltext), 21.7.2020

prosperity and its democratic stability. Without all these, society is at risk of breaking down.

44. Thirdly, the measures have caused considerable harms, to public health (including through causing a fear of medical appointments, causing drastic declines in treatment for cancer and heart disease in particular), mental health and wellbeing and prosperity – which is to say the future existence of small businesses that make up the heart of communities around the country and the jobs, prosperity and future happiness of millions of people.
45. Fourthly, they have harmed, perhaps irreparably, the democratic stability of this country. The suspension of ordinary social and commercial life has become a normality, with only the degree of the suspension varying. Fundamental rights and freedoms – including those necessary for the sustenance of free debate and protest – have become seen as optional extras, to be granted or removed at the advice of scientific committees sitting in private and focussing on one issue. And this 'normality' has been sustained by the introduction of 'tiers' (due to be reintroduced in December) whereby the extent to which society can function in areas of the country has become dependent upon advice given in secret.²¹

Criminalisation and enforcement

5. What new criminal offences have been introduced as part of the Government's response to the pandemic? Is criminalisation a proportionate, justified and appropriate response?

46. The many means by which normal social activities and – in particular – the exercise of fundamental rights have been criminalised are set out in detail in the Grounds to *Dolan (No. 1)* and *Dolan (No. 2)*. I suggest that in almost all cases, criminalisation is not a proportionate response to a public health crisis.
47. As referred to above, the duty of the state in public health crises caused by natural disasters (under Article 2 of the Convention) has been to ensure that citizens receive accurate advice. Then, behaviour can be moderated according to the risks to them and around them.
48. Since March, the strategy promoted by behavioural scientists on SAGE has been precisely the opposite. Rather than providing accurate information about the actual risks to individuals – which vary enormously depending upon their age and state of health – they have addressed the public in patronising terms, pronouncing that:

The perceived level of personal threat needs to be increased among those who are complacent, using hard-hitting Evaluation of options for increasing social distancing emotional messaging. To be effective this must also empower people by making clear the actions they can take to reduce the threat (11).²²

²¹ By the Joint Biosecurity Centre, which advises the Secretary of State in secret about whether to make statutory instruments under the 1984 Act – using the emergency procedure – to add or remove local areas from particular 'tiers' under the Alert Level Regulations.

²² Options for increasing adherence to social distancing measures, 22nd March 2020 (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/887467/25-options-for-increasing-adherence-to-social-distancing-measures-22032020.pdf)

49. This lack of trust is inimical to a responsible reaction to a public health crisis. Individuals who are treated as responsible adults will behave accordingly. Criminalising ordinary social behaviour and the exercise of fundamental rights with no rational explanation (or any attempt to make one) does not only cause resentment, it diminishes the responsibility people feel to obey the law. A person liable to arrest and a criminal record for staying with one's parents, going to church or attending a peaceful protest against this undemocratic form of governance is unlikely to treat socially valuable laws with the respect that has been commonplace and with which is necessary for society to function.

6. Have the new criminal offences introduced in response to the pandemic been sufficiently clear to: (a) members of the public and (b) the public authorities responsible for their interpretation and enforcement (including the police and the Crown Prosecution Service)?

50. I again refer to Mr Gardner's response to this question, which accords with my view.

51. A huge number of criminal offences that have been made, effectively by Ministerial edict. Not only have they criminalised basic social interaction, they have done so in an extremely complicated way that would be difficult even for lawyers to understand.

52. A worrying element has been the frankly unpleasant exertion of power by police forces around the country. The following are well known (and so will not be cited): the use of drones to spot and punish walkers in the Peak District; checking shopping baskets to see whether people had (lawfully) bought 'non-essential' goods; preventing journalists from reporting protests; sending several armed officers to arrest gym owners; imposing fixed penalty notices of £10,000 on students for holding house-parties; and finding people for not wearing masks when they are medically exempt. Worse has been the use of riot police – at least twice – to break up peaceful demonstrations.

53. A further grave difficulty – both with police forces and other state agencies – has been the abandonment of neutrality in the manner in which they not only enforce but promote their enforcement of lockdown and other restrictions. It should be apparent to them that these measures are highly controversial, even if that controversy is inadequately ventilated in the media. Yet police social media accounts constantly promote their enforcement through advocating the necessity and efficacy of the measures; and do so in an attempt to induce moral reprobation on those who object to them. It is not appropriate for officers to say that they are enforcing the law for people's 'safety' when that assertion is not an accepted fact but a matter of opinion; as is the need for them to have any part in enforcing those measures.

54. Related to this has been the absence of neutrality in the laws they have chosen to enforce and those they have not. An important example is the fact that no attempt was made to prevent several large (and not peaceful) Black Lives Matter protests, while a conscious attempt appears to have been made (even while protests were – briefly – not proscribed by the No. 2 Regulations) to break up any protests against these restrictions.

7. What factors led to wrongful arrests and convictions under the emergency powers and how might these have been avoided?

55. The exercise of power by the police force is on the condition that they do so as 'citizens in uniform'. And they only do so if they exercise that power proportionately. As has been said above, this has all too often not been the case.

Promulgation

8. 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?

56. I disagree with the criminalising of ordinary social behaviour and the removal of fundamental rights. What would be effective and proportionate would be for honest and balanced public information to be distilled to the public, allowing them to determine their behaviour responsibly.

Devolved and local government

57. *[I do not intend to address these issues only to reduce the length of this submission.]*

Parliamentary scrutiny

13. 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?

58. The use of the 1984 Act and, in particular, the emergency procedure has removed any advanced scrutiny from Parliament. The recent debates before the Alert Level and No. 4 Regulations have been only very limited progress. Debates were held over only one day, neither House had the ability to make amendments, speeches were restricted in time and there was no detailed scrutiny of any of the measures.

59. Yet these were statutory instruments of fundamental importance imposing 'economically and socially destructive measures' (in the words of Prof. Whitty) on the whole country. Parliament is sitting and each of the regulations were announced days in advance. Each House has a duty to ensure that it has sufficient time and space to scrutinise and be able to amend that legislation.

60. As Lord Sumption has suggested, the only means by which this can happen effectively is for each House to refuse to agree to any further statutory instruments under the 1984 Act and to insist that they are presented under the Civil Contingencies Act. Only then can they be amended and can Parliament have the right to vote and veto them within seven days of their passing.

14. To what extent are safeguards on emergency powers (such as provisions for 21-day reviews) undermined when Parliament is not sitting, or when sittings are restricted? How might the law and/or parliamentary procedure need to adapt to such circumstances?

61. Again, the answer lies in refusing to agree to any statutory instruments under the 1984 Act and to insist on the use of the CCA. That way, each measure will expire within seven days unless both Houses approve it, irrespective of whether it is sitting.
62. There is no need to amend Parliamentary procedure to do this. The Act is there already.

15. 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?

63. The House of Lords has the power of veto over secondary legislation, notwithstanding that it is unelected. That is no mere hangover or 'unfinished business' from the two Parliament Acts. It has been preserved to allow the House to check the misuse of executive power. And there could not be a more appropriate use of that power than by vetoing secondary legislation that overrides fundamental rights.

16. What lessons can be learned from the (1) Government's preparation, and (2) Parliament's constrained scrutiny of the fast-tracked Coronavirus Bill? What should be done differently the next time there's a need for substantial emergency legislation?

64. Each House of Parliament is master of its own procedures. Each House (including the unelected one) has a democratic duty to ensure that all legislation is scrutinised adequately; and that is particularly important for 'emergency' legislation (so called only because of its designation by the executive). If there were an emergency so great that it was said that legislation had to be passed in days, then each House must do its duty and sit late and, if necessary, overnight.

17. How does and should the Sewel/Legislative Consent convention operate in relation to emergency legislation?

65. The Civil Contingencies Act is an adequate and appropriate means by which emergency legislation can be passed.
66. The Act has provisions by which the devolved Parliament and Assemblies may pass emergency legislation. They are more limited than the powers given to the Westminster Parliament; and it is right that that is so in a United Kingdom.

18. 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?

67. No. The Civil Contingencies Act is adequate. The problem is that it has not been used.

18/11/2020