

Michael Gardner – written evidence (CIC0476)

House of Lords Constitution Committee

Inquiry into the Constitutional Implications of COVID-19

1. *I am a solicitor and partner in the law firm Wedlake Bell LLP and must declare my interest in that I and my firm represent Mr Simon Dolan and others in two sets of judicial review proceedings currently before the High Court in relation to the Government's handling of the Covid-19 pandemic.*
2. *Please note, however that the evidence submitted below is submitted by me purely in a personal capacity and represents my own personal views. It should not be taken as having been submitted on behalf of Wedlake Bell LLP or any client of Wedlake Bell LLP.*

The use of emergency powers during the Covid-19 pandemic

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

3. I make no comment on the Coronavirus Act 2020 which was not the route chosen by the Government to impose lockdown restrictions on individuals and businesses. Suffice to point out that the Government managed to pass that Act in less than a week. The fact it was able to do so sits uneasily, in my view, next to its subsequent reliance upon emergency provisions in other legislation so as to by-pass Parliamentary scrutiny.

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?

4. As I have observed above, the Government has not used the Coronavirus Act 2020 as its primary means of legislating for the pandemic.
5. Instead, the Government (including the devolved administrations) has primarily used Part 2A of the Public Health (Control of Infectious Disease) Act 1984 ("the 1984 Act") as the means by which it has sought to impose unprecedented and draconian restrictions on individuals and businesses since 26 March 2020.
6. Purportedly under powers it claims to have under the 1984 Act, the Government has created statutory instruments containing powers to "lock down" the population. These began with The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 ("the Original Regulations"). They have continued to amend, replace and introduce new variants to these laws for the last 9 months. Currently, in England The Health Protection (Coronavirus, Restriction) (England)

(No.4) Regulations 2020 impose a further lockdown across the whole country ("the New Regulations").

7. At the time of filing this response, the legality of the Government's use of the 1984 Act has been challenged by way of judicial review by Simon Dolan and Others in two legal actions in the High Court. Mr Dolan's challenge to the Original Regulations ("Dolan 1") and the variations to those regulations was refused permission by the High Court following a hearing on 2 July, but an appeal against the refusal of permission was heard by the Court of Appeal at the end of October. Judgment in that appeal is currently awaited. Meantime, a further judicial review was commenced by Mr Dolan and others ("Dolan 2") on 2 October to challenge the introduction of new restrictions, again implemented via the 1984 Act.
8. One of the issues raised in those actions is whether the Government's use of the 1984 Act to make the lockdown regulations was "ultra vires". There are various strands to this argument. But one of them is based upon the "Simms principle" that if it is proposed to interfere with fundamental rights of individuals, it is not sufficient that a statute uses general wording to do so. It must be more specific in legislating a power to interfere with those rights.
9. The relevant provisions of the 1984, it is argued in the Dolan proceedings, does not – and is not intended to – confer on the Government, the extremely wide powers that the Government has purported to and has exercised in making its various lockdown laws.
10. This is a very important issue. If the Courts agree with the claimants in the Dolan cases on this point, it would render swathes of the lock down laws illegal. The Government would still have the power to make similar laws, but would have to do so under different legislation and subject itself to much tighter Parliamentary scrutiny.

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

11. Right from the start, the Government's use of its purported powers under the 1984 Act and the use of separate "guidance" alongside it has caused serious confusion.
12. On 23 March, the Prime Minister made an announcement in which he issued an "instruction" to the British people to stay at home and observe tough new restrictions. The police announced they would enforce this new regime. Yet it was not until 26 March that the legislation to implement the new regime was actually brought into effect. Anyone arrested between the issue of the PM's "instruction" on 23 March and the date of the measures coming into legal force on 26 March would have been a victim of an unlawful arrest. Prime Ministers in the UK cannot change the law of the land by means of pronouncements made on television.
13. Once the legislation in the form of the Original Regulations came into force (without any prior scrutiny or approval of Parliament) there was immediate confusion about what was and was not lawful. For example, the right of people to

leave their homes to take exercise was not defined. There was confusion as to whether this was the right to leave one's home only once a day or more than once. Whether there was a geographical limit to how far a person could go. Whether a person could drive to the place where they wanted to exercise. Whether they could rest up whilst exercising. And so on. It was soon evident that even the police at times were not sure what was or was not legal. Subsequent divergence between the law in England and say Wales produced more confusion (in Wales, for example, there was for a time an express restriction to one outing for exercise per day).

14. Ministerial announcements as to what people could or could not do, further added to the confusion. In London, the Mayor wrongfully announced that public transport was reserved for so-called essential workers. In fact, there was no restriction on who could use the tube to travel if they had a reasonable excuse to do so.

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

15. The Government's imposition of lockdown laws has involved the greatest interference with civil liberties ever seen since the UK has been a democracy. The attempts by the state to micromanage and criminalise ordinary interactions between people – including close family members – are unprecedented in this country. Moreover, thousands of businesses employing millions of people have literally been deprived by the State from the ability to earn a living and to trade.
16. The virus SARS-CoV-2 which causes Covid-19 is extremely dangerous to the elderly who have pre-existing health conditions but has proven to be of very limited menace to the vast majority of the population. The official statistics produced by the NHS showing the distribution of deaths of those supposed to have died with or because of the virus speak for themselves. In the whole of England, according to those figures, only around 320 healthy people under the age of 60 have died since the start of the pandemic. The overwhelming percentage of victims of the virus (91% according to the ONS) have had other pre-existing conditions. And the unreliability of PCR tests and the method of reporting deaths has probably meant that the numbers of deaths has been overstated. For example, once someone has tested positive for the virus, their death will be attributed to Covid-19 if they die within 28 days of such a test – no matter what actually caused their death. Further, evidence suggests that many patients are admitted to hospital for reasons other than because they are suffering from Covid-19, but acquire the infection whilst in hospital.
17. The impact of lockdown measures on the health and well-being of the population (including the short and long term) and the economy have been enormous and will be hugely detrimental to the whole country for many years to come. Huge disruption has been caused to the education of children and young people, despite there being very little to no material health risks posed to them directly. Even now, with the schools back, there seems to be an exaggerated risk aversion in how outbreaks of the virus are treated. That crippling aversion to risk is exemplified by the behaviour of the Prime Minister this very week. It is well known that he became ill with Covid-19 in April and that he subsequently recovered. Scientific debate has raged as to whether someone who has had the virus and recovered can be reinfected (or infect others) or whether their

immunity if it exists will last. However, despite countless millions of cases of the virus worldwide, there are very few documented instances of where someone has caught the virus again. This suggests as a matter of common sense that the risk of reinfection is very low. Yet the Prime Minister – despite also having a negative test result several days after his potential exposure to an infected person – is self-isolating for 14 days. This scenario is no doubt being repeated for hundreds of thousands of workers – including in the NHS. The disproportionate impact this has on the functioning of the economy, education, healthcare etc is no doubt severe.

18. It has been questioned in the above referenced judicial review proceedings whether the Government has properly assessed the costs/ benefits of its measures in seeking to restrict the spread of the virus, when balanced against the considerable harms they have caused. (Or indeed, whether it has even carried out such a balancing exercise).
19. These are matters which have been raised in Dolan 1 and Dolan 2 and await final determination by the Court.
20. Whilst no one can doubt that the Government has been placed in a very difficult position and has had to make very profound decisions under immense pressure, my own view is that their legislative actions have been disproportionate in the face of a virus, whose effects on the population and threat level have been reasonably clear for some months. As the old adage goes, has the "cure been worse than the disease"?

Criminalisation and enforcement

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?

21. It is accepted that in order to encourage necessary behaviours and to discourage misbehaviours, it is sometimes necessary to impose criminal sanctions on people. However, in seeking to impose new offences based upon some of the most basic and important human activities and to do so on a blanket basis against the entire population, it must be questioned whether the Government has struck the appropriate balance. For example, to give police the power to summarily impose fines of £10,000 on individuals for exercising what would otherwise be their right to conduct peaceful protest is, in my view, an unacceptable and disproportionate response. Nor has it been helpful that some protests have attracted such fines, whilst others have not. At the time of writing this, the police have announced that they will not issue any more £10,000 penalty notices but will refer offenders for prosecution.
22. The idea that it should be an offence for say a couple who have been living together throughout the pandemic to be prevented from boarding the Eurotunnel to leave the country and fined for attempting to do so is profoundly wrong. (This has happened according to newspaper reports on 17 November). This is especially so when under the Health Protection regulations relating to travel, one of the specific exceptions to the self-isolation requirement is that you can travel (by any means) directly to an airport or port for the purpose of leaving the country. Thus, according to the Government's guidance and the actions of Kent

police, someone who lives in England cannot drive a car to the Channel Tunnel to leave the country, but someone (whether an English resident or not) who arrives in England from abroad, may at any time during their 14 day self-isolation period, travel on public transport to an airport (potentially coming into contact with significant numbers of people) and freely leave. (See reg 4(9)(a) of The Health Protection (Coronavirus, International Travel) (England) Regulations 2020). Another striking example of how arguably absurd the new offences have become is the gatherings restriction which prohibits you from meeting with anyone in your garden, but allows you meet a stranger in a public park (where arguably you are more likely to come into contact with other people etc). There are many anomalies.

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)?

23. As already mentioned, the conflation of guidance with actual legislation and the statements of politicians, the media and the police which have occasionally been at odds with the actual law, are all factors that have added to public confusion.
24. In my view, to be viable, it is essential that any criminal laws are:
- a) **sufficiently clear**, so that the public – and those tasked with enforcing the laws against the public - understand what is or is not legal;
 - b) are, as a matter of practicality **enforceable** against those who break them;
 - c) are seen to have the necessary **legitimacy** by the majority of those expected to comply with them.
25. I would submit that in many cases, the new criminal offences introduced by the Government with its lockdown measures have failed to meet all three of those criteria.
26. As regards clarity, there has been too much confusion between what is allowed and what is not allowed – exacerbated by frequent changes to the laws, the misunderstanding of politicians, the media and police and the confusion between guidance and the law. Having the law contained in complex statutory instruments which, in some cases, have required cross referencing between multiple instruments has made it even harder for people to work out what they can or cannot do.
27. As far as enforceability is concerned, some of the rules are absurd and plainly unenforceable, particularly as regards restrictions on the numbers allowed to gather in private settings. The resources and degree of intrusion into people's private lives that would be required to enforce such provisions have, in effect, rendered swathes of the legislation unenforceable. So why make it in the first place?
28. Finally, as regards legitimacy, there has been far too much (inevitable) inconsistency in how the laws operate (e.g. allowing two strangers to meet

together in a public park but not allowing someone to meet their own sibling in a private garden). The more perceived unfairness there is, the less likely the public are to feel obliged to respect the law or feel that it should apply to them. This has not been helped by public figures such as Dominic Cummings apparently flouting the rules.

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

29. The Government should not, in my view, make ordinary, otherwise innocent day to day private interactions of people a matter for the criminal law except in truly exceptional circumstances. If it does, the law should be clear as to what is or is not a criminal offence. Many of the offences created under the lockdown laws were far too complicated and too intrusive to be viable as criminal offences for the reasons stated above.
30. How can members of the public be expected to interpret complex, inter-connected statutory instruments?
31. I suspect that many members of the public – perhaps the majority – have no idea where the actual law can be found and rely upon what they are told by the media and social media about what they supposedly can or cannot do. The use of localised lock down laws in particular areas has only served to increase complexity and confusion. As has the frequent amendment/ change to the law in force.

Promulgation

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?

32. As noted above, the lockdown laws were contained in an increasingly complex web of repeatedly amended and cross referenced statutory instruments which challenged many lawyers, let alone ordinary members of the public, to be able to interpret them. The same applies to the law enforcement authorities. It is true that the legislation can be readily accessed via the internet, but expecting non-lawyers to read, interpret and understand statutory instruments is totally unrealistic. The publication of "guidance" by the Government has been helpful in some areas. But in others, guidance has gone beyond what is strictly in the law. People should not be led to believe that something is illegal when it is not.

Devolved and local government

What have been the consequences of legal divergence between the constituent parts of the United Kingdom in responding to the pandemic?

33. I do not think that devolution has been helpful in this pandemic for four main reasons.
34. First, it is undesirable (and arguably absurd) that different rules on responding to what is a national healthcare situation should be subject to different laws in the devolved areas of the UK. There are no hard borders within the UK and a virus does not recognise borders anyway. Thus, it is illogical and only serves to add to confusion if different rules apply depending on where people are relative to those internal borders. This has been especially so in relation to travel restrictions.
35. Secondly, at the risk of straying into politics, rightly or wrongly there is a suspicion that this crisis has provided a platform for political grandstanding and point-scoring by devolved governments at the expense of joined up action with Westminster to tackle the spread of the virus.
36. Thirdly, the duplication of effort, resources, agencies and communication that has resulted from having different decision-making bodies and rules cannot have helped in tackling the pandemic.
37. Fourthly, the overall impact on the public cannot have been positive with mixed messaging from political leadership in different parts of the UK.

Have local authorities been granted adequate powers to respond to the pandemic in their local area? Have the emergency measures taken by the Government struck the right balance of power between national and local governments?

38. No comment.

How well have intergovernmental relations worked during the crisis through established mechanisms and through the Civil Contingencies Committee (COBR)?

39. No comment.

Are there examples from other countries that are instructive as to the management of the virus between national and regional/state legislatures and executives?

40. No comment

Parliamentary scrutiny

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?

41. In my view (and I think uncontroversially), the UK was clearly not adequately prepared for this pandemic in terms of availability of PPE, arrangements for tracking and testing, use of mobile applications, policies to control borders and above all availability of critical care beds in the NHS. The Government has had to play catch up from the start. But from the perspective of Parliamentary governance, the biggest single failing, in my observation, has been the complete absence of effective Parliamentary scrutiny throughout the pandemic.
42. The Government's use of the 1984 Act and the "emergency procedure" under s45R of the Act has, in my view, been the principal factor in ensuring the failure of Parliamentary scrutiny. (To be fair to Parliament, it cannot have helped that social distancing rules have made it difficult to function – as has been the case with many other workplaces). Further, the Government has a large majority in the House of Commons and (post-Bercow) seems firmly back in control of the Parliamentary timetable.
43. The statutory device of s45R of the 1984 Act has enabled the Government to repeatedly write legislation – often at the eleventh hour – and to bring it into force without the need for any prior Parliamentary scrutiny or approval. The emergency procedure under s45R does require that such legislation be approved by Parliament within 28 sitting days after it is made. However, through its control of the Parliamentary timetable, the Government has been able to delay such scrutiny, sometimes until many weeks have passed since the legislation came into force. In many cases, Parliament has finally come to vote on measures long after they have ceased to apply and have been replaced.
44. Unbelievably, the Original Regulations – which involved the single biggest imposition on civil liberties and caused the single most destructive fall in GDP in English history – were only finally "debated" by Parliament at the beginning of May. Yet the Original Regulations had come into effect as from 26 March – more than 5 weeks earlier. The "debate" when it came, was a derisory affair comprising less than 20 MPs making speeches remotely. No vote was held. I find this astonishing.
45. The Government has since repeatedly used the "emergency procedure" under s45R to introduce much of its lockdown legislation under the 1984 Act. This use (or rather in my view misuse) of the legislation has continued for months and has been used for much legislation ranging from the Original Regulations through to the imposition of face coverings and latterly the second lockdown. The legality of the Government's use of s45R is being challenged in proceedings for judicial review before the High Court in *Dolan 2*.
46. It is worth noting that even when belatedly, from October, the Government under pressure from some of its own MPs, finally started to allow Parliament to vote on new lockdown measures before they came into effect, the Government has still been using the emergency procedure regardless. Little time has been allowed for proper debate – let alone proper scrutiny by Parliament of the detail of the legislation which, once made under the emergency procedure, cannot be

amended. It is submitted that had there been even a modicum of scrutiny, some obvious flaws in the legislation (e.g. the 10pm curfew) would have probably been identified and addressed before the legislation was enacted.

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?

47. The safeguards aimed at ensuring Parliamentary oversight of measures introduced under Part 2A of the 1984 Act have been rendered largely meaningless by the Government's routine adoption of the emergency procedure under s45R to make legislation and put it into force without Parliament's prior involvement. Only the replacement of powers purportedly exercised under the 1984 Act with use of the relevant provisions of the Civil Contingencies Act 2004 ("CCA") would ensure better scrutiny and control. Indeed one of the reasons why it is contended that the 1984 Act was never intended to be used in the way the Government is now using it, was precisely because the CCA contained the correct balance between protecting the nation in times of crisis, whilst still ensuring tight Parliamentary scrutiny of the process.
48. A poor second best if the 1984 Act continues to be used, would surely be for Parliament to establish some kind of new committee for scrutinising new lockdown laws and to allow that committee to sit on an urgent basis so as to apply at least a degree of prior scrutiny to that legislation before it is put before MPs in Parliament. Otherwise, such scrutiny as there is in the chamber, will continue to be rather superficial - and ineffectual.

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?

49. As has been noted. The Coronavirus Act 2020 is largely irrelevant to the much more significant issues of Parliamentary oversight created by the Government's use of the 1984 Act.
50. There has, in my view, been far too little - if any - effective scrutiny of lockdown measures and too great a willingness to wave them through - but also not to rigorously test the data and assumptions on which they have been introduced - and maintained in force. The imposition of the recent lockdown under the New Regulations is a case in point. This was voted on by MPs and Peers and overwhelmingly passed, despite serious questions having been raised about the presentations made by the Government's advisers to try and justify the measures. MPs and Peers have been put in a difficult position and placed under much pressure in being required to vote on such important measures at such short notice. But I think they could do more to test what is being put before them.

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?

51. There are any number of situations in which a Government may need to move with such swiftness that it simply cannot be expected to first go through numerous procedural hoops in Parliament over a protracted time period before taking action for the good of the nation. However, in relation to this pandemic, even if the Government's introduction of the Original Regulations was somehow justified (a moot point), there is no reason at all why it could not have been subjected to a much greater scrutiny by Parliament over the subsequent continuation of the measures. Where were MPs in May and June when the lockdown continued – despite the peak of the pandemic having passed over in early April and when hospital bed availability was increasing? The Government was effectively acting on its own and doing as it pleased for far too long. In the absence of any effective scrutiny, the only option open to those who believe the Government has erred in its approach, has been to try and bring the matter before the Courts by way of judicial review.
52. But that task has proved extremely difficult for a combination of reasons. These have included the apparent reluctance of the Courts to give such challenges the priority and expedition that some would argue they merit (in contrast, for example, to the way in which challenges to Brexit and the prorogation of Parliament were expedited in 2019). Secondly, another serious impediment has been the fact that the Government has repeatedly moved the goalposts by making frequent legislative changes – requiring a constant amendment to any claim and addition of further evidence. These factors have helped slow down the process and have diminished the scope for citizens to exercise timely judicial reviews of the Government's actions. It is also undeniably the case that the Courts in such cases are presented with very difficult choices, given how much is at stake and the enormity of the decisions that individual judges face making. A public health scenario is somewhat different to a purely political scenario. Lives are at stake, not just money or political reputations. But ultimately, the Courts cannot and generally do not shrink from ruling in difficult cases.

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

53. No comment.

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?

54. The status of the powers that the Government has claimed to have under the 1984 Act are currently the subject of legal challenges in the Courts in Dolan 1 and

Dolan 2. The final outcome of that litigation may resolve whether or not the Government's use of emergency powers purportedly under the 1984 Act was or was not lawful. It may yet be that this question will have to be decided by the Supreme Court.

55. If the Court decides that the Government at all times acted lawfully, then it is to be hoped that lessons will at least be learnt. In particular, how for example was it possible for Parliament to be effectively by-passed so easily, for so long, by the Government and how did we end up with "Government by decree."? For that, in effect, is what we have had since March. Democracy may be tedious at times. But leaving decisions in the hands of a small group of people for a protracted period when those people are not being held to account by the legislature nor the Courts, does not always lead to good law making.

18/11/2020