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Executive Summary

- As the Committee which 'examines the value for money of Government projects, programmes and service delivery' and 'holds government officials to account for the economy, efficiency and effectiveness of public spending', the Public Accounts Committee has a legitimate role in assessing the extent to which the Government is fulfilling its human rights obligations in the expenditure of public funds.
- The findings of the NAO Report suggest gaps in protection that call into question the adequacy of the Government's Programme of support for CEV people to respect, protect and fulfil the right to health and the right to life. Monitoring and data gathering arrangements were insufficient to allow robust analysis of whether the programme fulfilled these rights.
- The findings of the NAO Report suggest that, while non-discrimination was considered in the design of the Government's Programme of support for CEV people, there are insufficient data and monitoring mechanisms to assess whether the programme effectively fulfilled that right.

1. Human rights and the Public Accounts Committee's remit

1.1 We note that the remit of the Public Accounts Committee is the 'examination of the accounts showing the appropriation of the sums granted by Parliament to meet the public expenditure, and of such other accounts laid before Parliament as the committee may think fit' (see Rule 148 (1) Standing Order). We submit that integrating human rights considerations into the Committee's work is within its remit.

1.2 International human rights obligations and obligations under the Human Rights Act 1998 apply to all government activity, including the arrangement of public expenditure. In practice, this means that in making resource-allocation decisions the Government is expected to take into account its human rights obligations, including especially obligations to respect, protect, and fulfil rights like the right to equality and non-discrimination, the right to life, the right to health, the right to education, and the right to food. Furthermore, while international human rights law does not prohibit privatisation as a mode of delivering even basic goods (such as food, shelter, water, and healthcare), it does oblige the state to (a) design procurement and privatisation in a rights-based way, (b) supervise privatised arrangements to ensure that they are effective modes of respecting, protecting, and fulfilling rights, and (c) revise and revisit arrangements and modes of delivering basic goods in order to identify, address, and avoid repetition of shortfalls in rights protection.

1.3 As the Committee which 'examines the value for money of Government projects, programmes and service delivery' and 'holds government officials to account for the

economy, efficiency and effectiveness of public spending', the Public Accounts Committee has a legitimate role in assessing the extent to which the Government is fulfilling its human rights obligations in the expenditure of public funds.[1] Indeed, doing so is integral to assessing the effectiveness of public expenditure, as effectiveness must encompass successfully discharging legal obligations, including human rights obligations. As courts generally exercise deference in respect of government expenditure, Parliament and its committees play a critical role in ensuring accountability for public expenditure including for its human rights implications. The Public Accounts Committee is critical to that accountability and scrutiny work. Our submission surfaces a number of human rights considerations relevant to the Committee's inquiry on 'Covid-19: Supporting the vulnerable during lockdown' in order to assist the Committee in integrating human rights analysis in its inquiry.

2. Four key roles of human rights

2.1 In respect of the immediate reaction to COVID-19, human rights play four important roles.

1. Human rights impose some positive obligations on the state. That is, they require the state to take certain actions in order to secure the practical and effective protection of rights. In the context of the pandemic these include, *inter alia*, an obligation to protect life by taking steps to address clear health threats[2] including in places of detention or accommodation (e.g. prisons, detention centres for asylum seekers, places of refuge); the absolute obligation of non-discrimination; and the obligation of due diligence in respect of potential negative consequences on rights enjoyment (e.g. exacerbations of domestic violence during lockdown[3]).

2. Human rights constitute limitations on the actions that the state may take in response to the virus. Some rights cannot be limited at all; they are absolute rights. Other rights may be limited, but only where such limitations are necessary and proportionate. Human rights compliance requires rigorous engagement with questions of necessity and proportionality in respect of responses to the pandemic. It also requires regular revisiting of these questions in order to assess whether, against changing epidemiological and other evidence, measures remain necessary and proportionate, and whether the measures in place constitute the minimum intrusion with rights possible while pursuing a legitimate objective (i.e. the protection of public health).

3. Human rights constitute 'design principles' for longer-term responses to the pandemic. A human rights approach requires us to identify and understand the long-term rights-related impacts of the pandemic, and to design responses to those impacts that operate to enhance, and do not unlawfully limit, the enjoyment of rights.

4. Human rights play an accountability role in respect of pandemic responses, ensuring that where rights have been violated in the response to the pandemic one has

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[1] Description of the Public Accounts Committee provided on the Committee webpage: https://committees.parliament.uk/committee/127/public-accounts-committee/

[2] UN Human Rights Committee, General Comment No. 36: Right to Life UN Doc. CCPR/C/GC/36, esp. para 26; *Stoyanovi v Bulgaria* App. 42980/04, Judgment, 9 November 2010, [61].

[3] CEDAW Committee, General Comment No. 19: Violence against Women UN Doc. A/47/38, para 9; UN General Assembly Declaration on the Elimination of Violence against Women, GA Res. 48/104, Article 4; *Opuz v Turkey* [2009] ECHR 870, [131].

access to justice and to an effective remedy,[4] and requiring the state to take steps to ensure non-repetition of such violations in this or any future analogous situations.[5]

3. Three key human rights issues the Committee should consider in relation Government support for the clinically vulnerable during lockdown

3.1 There are three key human rights issues raised by the NAO report on government protection and support of clinically extremely vulnerable (CEV) people during lockdown. These relate to three sets of distinct rights, all of which the UK is obligated to protect under both domestic and international human rights law.

a) Right to health

3.2 In order to protect the right to health, states must ensure that services, goods and facilities are available, accessible, acceptable and of good quality.[6] While the right to health is progressively realisable, it imposes some immediate obligations on states,[7] namely to ensure non-discrimination in access to health,[8] and to ensure a minimum level of access to the essential components of the right including to essential drugs.[9] The right to the highest attainable standard of health entails an entitlement to a system of health protection that provides equal opportunity for everyone to enjoy the highest attainable level of health,[10] access to essential drugs,[11] equal and timely access to basic health services,[12] and health-related education and information.[13]

3.3 In the context of support for CEV people during the pandemic, a rights based approach would ensure that such people were provided with information and advice regarding the importance of shielding during the pandemic. Moreover, it would ensure that all CEV people were provided with access to the basic essentials necessary for living while shielding, in order to make shielding practically feasible for such individuals. We

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[4] Article 2, International Covenant on Civil and Political Rights; Article 13, European Convention on Human Rights.

[5] The right to a remedy is understood in international human rights law as involving a guarantee of non-repetition and, where necessary, changes in relevant laws and practices. UN Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligations Imposed on States Parties to the Covenant. UN Doc. CCPR/C/21/Rev.1/Add.13

[6] CESCR General Comment 14: The Right to the Highest Attainable Standard of Health (Article 12), UN Doc. E/C.12/2000/4, para. 12.

[7] CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), UN Doc. E/1991/23; CESCR General Comment 14, para. 10: The Right to the Highest Attainable Standard of Health (Article 12), UN Doc. E/C.12/2000/4, para. 43

[8] CESCR General Comment 14: The Right to the Highest Attainable Standard of Health (Article 12), UN Doc. E/C.12/2000/4, para. 12(b).

[9] CESCR General Comment 14: The Right to the Highest Attainable Standard of Health (Article 12), UN Doc. E/C.12/2000/4, para. 12(a).

[10] CESCR General Comment 14: The Right to the Highest Attainable Standard of Health (Article 12), UN Doc. E/C.12/2000/4, para. 8.

[11] CESCR General Comment 14: The Right to the Highest Attainable Standard of Health (Article 12), UN Doc. E/C.12/2000/4, para. 12(a).

[12] CESCR General Comment 14: The Right to the Highest Attainable Standard of Health (Article 12), UN Doc. E/C.12/2000/4, para. 17.

[13] CESCR General Comment 14: The Right to the Highest Attainable Standard of Health (Article 12), UN Doc. E/C.12/2000/4, para. 11.

acknowledge that ensuring this was the central goal of the Government's Programme of support for CEV people ('the programme') and very much welcome the alignment of this aim with the Government discharging its human rights obligations in the creation of this Programme.

3.4 While the *aim* of the Government's Programme was consistent with fulfilling its human rights obligations, it is also required to bring about outcomes which *in fact* protect human rights. Being able to assess whether the Programme in fact protects human rights requires the effective monitoring of its outcomes. In spite of this, we note that the NAO report raises concerns about the adequacy of monitoring measures relied on by the Government in providing support to CEV people.[14] The NAO notes several factors that rendered it infeasible to make an overall assessment of access to support by CEV people under the Government's Programme. These included a lack of adequate performance monitoring mechanisms integrated into the medicines delivery services,[15] and the inability to 'identify a workable solution acceptable to local authorities' for the purpose of tracking the delivery of 'basic care' to CEV people.[16] Without mechanisms to monitor the effectiveness of support mechanisms for CEV people, key data that enable robust review of the Programme by the relevant departments and by Committee may not be available. As a result, processes to assess robustly whether the Programme was sufficient to fulfil the rights of CEV people may have been inadequate.

3.5 We further note that the piecemeal evidence that is available as to whether the Programme effectively protected CEV people is indicative of gaps in protection. The Health Foundation's analysis of ONS data shows that during the first wave of the pandemic approximately one in three people (31%) who were shielding experienced a reduced level of care for their existing health conditions and one in ten people did not access any care at all.[17] Moreover, while such statistics are not determinative for assessing the Programme's effectiveness, the NAO notes that the COVID-19 related mortality rate (i.e. where COVID-19 was mentioned on the death certificate), remained significantly higher for CEV people (13.6 per 100,000 people on 9 April 2020[18]) than that of the age-matched general population sample (5.3 per 100,000 people[19]) throughout the Programme.[20] We urge the Public Accounts Committee to explore these figures further, as they indicate potential ineffectiveness of the outcomes of the Programme.

3.6 Gaps in protection of CEV people under the Government's Programme are consistent with a number of shortcomings of the Programme noted in the NAO report, which we hope the Public Accounts Committee will scrutinise with respect to the right to health. First, we note serious concerns as to the clarity of Government communications to CEV people, which are referred to in the NAO report.[21] For example, the report refers to the fact

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[14] National Audit Office, 'Protecting and supporting the clinically extremely vulnerable during lockdown' (10 February 2021) (https://www.nao.org.uk/wp-content/uploads/2021/02/Protecting-and-supporting-the-clinically-extremely-vulnerable-during-lockdown.pdf).
[15] Ibid, paras 3.15 - 3.18.
[16] Para 3.21.
[17] The Health Foundation, 'Understanding the needs of the most clinically vulnerable to COVID-19'(December 2020) (https://www.health.org.uk/news-and-comment/charts-and-infographics/understanding-the-needs-and-experiences-of-those-most-clinic)
[18] Ibid, Figures 11 and 12.
[19] Ibid.
[20] Ibid.
[21] National Audit Office, 'Protecting and supporting the clinically extremely vulnerable during lockdown' (10 February 2021) (https://www.nao.org.uk/wp-content/uploads/2021/02/Protecting-and-supporting-the-clinically-extremely-vulnerable-during-lockdown.pdf), paras 2.12 – 2.13.

that in May 2020, nearly 50 charities wrote an open letter to the minister for the Cabinet Office asking for clear communications with charities, health and care professionals, and local authorities to ensure consistency of advice given to those who were vulnerable.[22] Secondly, while some surveys of CEV people indicated satisfaction with the food boxes delivered to them, the NAO report states that the local authorities it interviewed were 'highly critical' of the emergency provision, which they stated was of 'poor nutritional value'.[23] Thirdly, gaps in protection are also consistent with the lack of monitoring of the care provided, already noted above. It is not clear how the Government would have been able to identify and rectify gaps in protection without ongoing and accurate review of access to the Programme and of its affects.

3.7 Finally, the NAO report indicates that more long term and systemic limitations associated with the NHS may have also been a factor in impeding the effectiveness of the Government Programme. A rights-based approach to the design and funding of key institutions including the health system would enhance their resilience and ensure the adequate distribution of health services. However the pandemic has generally exposed limitations in health systems,[24] defined by the WHO as the organisation, people and actions whose primary intent is to promote, restore or maintain health.[25] The NAO report highlights the inadequacy of datasets held by the NHS in terms of their accuracy and the level of detail regarding patients' conditions they contained,[26] as well as the access to compiled lists of CEV individuals by local authorities.[27] Such factors signal the need for the Public Accounts Committee to consider the necessity of more structural reform of the NHS and its relationships with local authorities, for the purpose of ensuring effectiveness of analogous programmes in future.

b) Right to non-discrimination

3.8 In protecting the rights of CEV people and providing support to them, the Government and public bodies are obliged to ensure that individuals do not experience discrimination based on protected characteristics.[28] We note from the NAO report that the four national chief medical officers who finalised the interim list of conditions for who was to be advised to shield considered 'protected characteristics at the start and throughout the Programme', which were 'dealt with as the chief medical officers considered to be clinically appropriate'.[29] This appears to provide a good example of the right to non-discrimination

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[22] Ibid.
[23] Ibid, para 3.9.
[24] See for example Kate Tulenko and Dominique Vervoort, "Cracks in the System: The Effects of the Coronavirus Pandemic on Public Health Systems" (2020) 50(6-7) *American Review of Public Administration* 455; Lindsay Maizland and Claire Felter, "Comparing Six Health-Care Systems in a Pandemic", *Council on Foreign Relations*, 15 April 2020.
[25] World Health Organisation, *The World Health Report 2000—Improving Performance* (2020; WHO).
[26] For example, hospital data did not always specify sufficient detail of people's medical condition, leading to 126,000 people being added to the List in error and unnecessarily advised to shield. National Audit Office, 'Protecting and supporting the clinically extremely vulnerable during lockdown' (10 February 2021) (https://www.nao.org.uk/wp-content/uploads/2021/02/Protecting-and-supporting-the-clinically-extremely-vulnerable-during-lockdown.pdf), paras 2.4, 2.8, 3.24 and figure 5.
[27] Ibid.
[28] Article 4, International Covenant on Civil and Political Rights; Article 14, European Convention on Human Rights.
[29] National Audit Office, 'Protecting and supporting the clinically extremely vulnerable during lockdown' (10 February 2021) (https://www.nao.org.uk/wp-content/uploads/2021/02/Protecting-and-supporting-the-clinically-extremely-vulnerable-during-lockdown.pdf), para 2.3.

being integrated in the design of the Programme, which we welcome. We suggest that the Committee ought to consider the extent to which the right to non-discrimination was factored into other decisions related to the Programme, including the allocation of relevant funds. Furthermore, in considering the support provided to CEV people, we submit that the Public Accounts Committee should question whether the support provided by the Government was tailored to ensure that its protections supported the most vulnerable within the vulnerable groups. We further submit that it should examine whether access to support was limited in a way that disproportionately impacted people based on protected characteristics, including race.

3.9 We recognise that, in the absence of effective monitoring, the task of identifying gaps in protection under the Programme and whether they are linked to particular social characteristics may not be possible. In doing so, we once more highlight the importance of the Government ensuring there are effective means of monitoring the outcomes of its human rights interventions, including disaggregating data by protected characteristic. If the Public Accounts Committee is unable to consider whether the Programme was designed and administered in a way that complied with the right to non-discrimination, we submit that it ought to make recommendations to ensure it has the ability to examine the right to non-discrimination in its future inquiries.

c) Right to life

3.10 As well as prohibiting the intentional and unlawful taking of life, the right to life obliges the state to take appropriate steps to safeguard the lives of those within its jurisdiction.[30] This includes implementing operational measures to protect those whose lives are at risk,[31] and taking steps to reduce transmission including by providing financial assistance in order to reduce risks of persons having to undertake higher-risk activities out of economic necessity.[32]

3.11 In examining the effectiveness of Government support for the clinically vulnerable during lockdown, we respectfully suggest that the Committee should consider the interaction of this support with the right to life. Specifically, we urge the Committee to consider whether the Government took appropriate steps in providing this support to protect those whose lives was at risk. We submit that such an assessment would in essence require a consideration of many of the issues already outlined above. In particular, the steps taken by the Government in ensuring the clarity of its communication, the monitoring of its provision of care, including the suitability of the products such as food it provided, its liaising with local authorities and monitoring of access to its Programme, should be the subject of close scrutiny in considering the protection of this right.

4. Concluding remarks

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[30] UN Human Rights Committee, General Comment No. 36: Right to Life UN Doc. CCPR/C/GC/36, esp. para 26; Article 2 of the European Convention on Human Rights.
[31] *Stoyanovi v Bulgaria* App. 42980/04, Judgment, 9 November 2010, para 61.
[32] Written evidence of Fiona de Londras, Alan Greene and Natasa Mavronicola to the Joint Committee on Human Rights (2020) COV0012, para. 2.1. (https://committees.parliament.uk/writtenevidence/920/pdf/). See also Elizabeth Stubbins Bates, "Article 2 ECHR's Positive Obligations—How Can Human Rights Law Inform the Protection of Health Care Personnel and Vulnerable Patients in the COVID-19 Pandemic? *Opinio Juris*, 1 April 2020 (https://opiniojuris.org/2020/04/01/covid-19-symposium-article-2-echrs-positive-obligations-how-can-human-rights-law-inform-the-protection-of-health-care-personnel-and-vulnerable-patients-in-the-covid-19-pandemic/).

4.1 We recognise the extensive work of the Public Accounts Committee in reviewing the Government's response to the pandemic. The Committee is the only committee so far to examine the Government support program for CEV persons during the pandemic. This inquiry may, indeed, be the only occasion a parliamentary committee assesses it. It critical that the human rights implications of Government support in this area are examined closely, so that human rights can be better protected in future, analogous, situations, and so that in assessing the effectiveness of government expenditure questions relating to the fulfilment of human rights obligations are effectively integrated. We stress that questions of rights-related impacts are not limited to the Joint Committee on Human Rights or other dedicated human rights fora. Rather, they are relevant to the work of the Public Account Committee, which is engaged in ensuring accountability for, effectiveness of, the Government response to the pandemic, including its support for CEV people during the pandemic.

4.2 We also note that the very short turnaround from the publication of the NAO Report to the close of the call for evidence for this inquiry may frustrate attempts from persons most impacted by the programme, including CEV persons, to inform the Committee with their experience. We encourage the Committee to ensure longer windows for submissions in future inquiries.

About Us

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The **COVID-19 Review Observatory** is a UKRI-funded (AHRC) research initiative located at Birmingham Law School, University of Birmingham. It tracks, assesses, and engages with parliamentary reviews of responses to the COVID-19 pandemic with a view to ensuring effective consideration of rights protection, and to enhancing accountability and legitimacy by supporting parliamentary review. A key part of its work is participating in such reviews by, for example, submitting to committee inquiries.

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