

Written evidence submitted by Dr Klearchos A. Kyriakides (DEL0037)

Introduction

1. I refer to the Inquiry entitled 'Delivering Core NHS and Care Services during the Pandemic and Beyond', details of which were published by the Health and Social Care Committee of the House of Commons ('the Committee') on 23 April 2020.¹

2. Accordingly, I have composed this Written Evidence ('Evidence') in answer to the Committee's Call for Evidence and, more specifically, its request for 'suggestions of key questions we should be considering.'² I am grateful to the Committee for issuing this Call.

3. At the outset, I should make a declaration of interest. I have personally benefited from the National Health Service ('NHS'). So, too, have several of my relatives, including my parents, who live in the United Kingdom ('UK'), plus all four of my late grandparents. I do not work, nor have I ever worked, in either the NHS or the care sector. I am submitting this Evidence in my capacity as a legal academic, who is also a non-practising solicitor of England and Wales and a London-born citizen of the UK who has been living as well as working in the Republic of Cyprus since 2015.³ The contents reflect purely personal views.

4. The aforementioned realities form the background to this Evidence. As does the colossal loss of life induced by coronavirus (COVID-19) (hereafter referred to interchangeably as 'coronavirus' or 'COVID-19'). According to the Department of Health and Social Care, as of 5pm on 25 April 2020, 20,732 hospitalised persons have died in the UK after testing positive for coronavirus.⁴ These include members of staff in the NHS. On 22 April 2020, Dominic Raab MP, deputising for the Prime Minister, announced that his 'understanding' of 'the latest figures' was 'that 69 people in the NHS have died of coronavirus.'⁵ Many more with coronavirus have lost their lives in care homes and other non-hospital settings.

5. Before I proceed, I express my sincere condolences to all those in the UK – and elsewhere – who have lost a family member with coronavirus. I also express my deep gratitude to the workforces of the NHS and of other health services around the world, including the one in the Republic of Cyprus where I now live. They have been working courageously under exceptionally difficult circumstances.

Questions

6. I respectfully recommend that the Inquiry should consider the various questions articulated in bold wording below under the headings entitled 'Question 1', 'Question 2' and 'Question 3'. I have articulated each question in the light of two matters. One is the Inquiry's preoccupation with 'the planning and delivery of other essential NHS and care services during the pandemic and beyond'. The other is what appears to be the systemic marginalisation – by HM Government – of the rule of law, the fundamental right to life and other cornerstones of proper healthcare in a democratic society.

Question 1

7. Why have so many coronavirus-related official statements and publications of HM Government failed to make any express mention of (i) the rule of law, (ii) the word 'law', (iii) the fundamental right to life, (iv) other human rights and (v) other rights, including those of patients and staff under the NHS Constitution? Have these omissions been intentional or unintentional? Do these omissions foreshadow any Government-led initiative to reform, repeal or replace the Human Rights Act 1998? Looking ahead, will HM Government undertake to place the matters listed at (i) to (v) at the centre of its decision-making processes and at the forefront of its public pronouncements vis-à-vis the NHS?

8. Question 1 flows from a conspicuous and somewhat alarming pattern since coronavirus entered the UK. The pattern is illustrated below. This is a representative sample of coronavirus-focused statements and publications in which HM Government has failed to make any express mention of the rule of law, the word 'law', the fundamental right to life, other human rights and other rights.

- the statement of Matt Hancock MP, the Secretary of State for Health and Social Care, as delivered in the House of Commons on 27 January 2020;⁶
- the statement of Professor Chris Whitty, the Chief Medical Officer for England, as delivered on 31 January 2020;⁷
- the *Coronavirus Action Plan*, as published by the Department of Health and Social Care on 3 March 2020;⁸
- the 45-page *COVID-19 Hospital Discharge Service Requirements*, as co-published by HM Government and the NHS on 19 March 2020;⁹
- the 'Address to the Nation', as delivered by Boris Johnson MP, the Prime Minister, on 23 March 2020;¹⁰ and
- the statement of the Prime Minister outside 10 Downing Street, as delivered on 27 April 2020.¹¹

9. The pattern and recent events beg a number of ancillary questions. Below are just a few.

10. Amid the pandemic, are the rights of 'patients and the public' under the NHS Constitution being universally upheld? These rights include the following, as set out in the NHS Constitution, which are particularly relevant to the pandemic:

- 'You have the right to be treated with a professional standard of care, by appropriately qualified and experienced staff, in a properly approved or registered organisation that meets required levels of safety and quality.'
- 'You have the right to be cared for in a clean, safe, secure and suitable environment.'

- 'You have the right to be treated with dignity and respect, in accordance with your human rights.'
- 'You have the right to be protected from abuse and neglect, and care and treatment that is degrading.'¹²

11. Amid the pandemic, are the rights of NHS staff being universally upheld?

Under the NHS Constitution, these include the pivotal right to 'have healthy and safe working conditions and an environment free from harassment, bullying or violence'.¹³

12. Amid the pandemic, why have Ministers repeatedly called for action to 'save lives', but repeatedly failed to mention in public the right to life?

13. As the future unfolds, will HM Government change tack and, in its actions and public pronouncements, give the aforementioned matters the attention, which they unquestionably deserve?

14. In view of its criticality, I should add a word or two on the fundamental right to life.

15. Under section 6 of the Human Rights Act 1998: 'It is unlawful for a public authority to act in a way which is incompatible with a Convention right.' One such right is the right to life under Article 2 of the European Convention on Human Rights, as introduced into domestic law by section 1 and Part I of Schedule 1 of the said Act.¹⁴

16. In paragraph 30 of his judgment in *R v Secretary of State for the Home Department ex parte Amin* [2003] UKHL 51, Lord Bingham of Cornhill, the then Senior Law Lord, affirmed that:

'A profound respect for the sanctity of human life underpins the common law as it underpins the jurisprudence under articles 1 and 2 of the Convention. This means that a state must not unlawfully take life and must take appropriate legislative and administrative steps to protect it. But the duty does not stop there. ...'.

17. The scope of this duty was helpfully summarised by Lord Dyson in his 'outline' of Article 2 in paragraph 12 of his judgment in *Rabone & Anor v Pennine Care NHS Foundation* [2012] UKSC 2. (In the same case before the Supreme Court of the UK, Lord Brown described the judgment of Lord Dyson as 'the leading judgment in this appeal'.) To quote Lord Dyson:

'Before I come to the issues that arise on this appeal, I need to set the scene by making a few introductory comments about article 2 of the Convention which provides: "Everyone's right to life shall be protected by law". These few words have been interpreted by the European Court of Human Rights ("the ECtHR") as imposing three distinct duties on the state: (i) a negative duty to refrain from taking life save in the exceptional circumstances described in article 2(2); (ii) a positive duty to conduct a proper and open investigation into deaths for which the state might be responsible; and (iii) a positive duty to protect life in certain circumstances. ...'.

18. The Supreme Court of the UK has recently commented on the right to life, albeit in the context of the death penalty in the US. At paragraph 14 of a judgment handed down on 25 March 2020 in *Elgizouli v Secretary of State for the Home Department* [2020] UKSC 10, Lady Hale observed: 'The most fundamental of the rights protected by the European Convention is the right to life.' Meanwhile, at paragraph 176, Lord Reed (with whom Lady Black and Lord Lloyd-Jones agreed) quoted the following observation of Lord Bridge of Harwich in *R v Secretary of State for the Home Department, Ex p Bugdaycay* [1987] AC 514 at p. 531: 'The most fundamental of all human rights is the individual's right to life ...'.

19. As explained by the European Court of Human Rights in its 'Guide on Article 2', as updated on 31 December 2019, the right to life has clear implications for the 'Protection of persons in the context of healthcare'.¹⁵

20. To sum up, the right to life is of the utmost importance. HM Government must not only treat it as such. HM Government must be seen and heard to be treating it as such.

Question 2

21. Has the Attorney General of England and Wales ('Attorney General'), any other Law Officer of the Crown or any other legal adviser been involved in the coronavirus-related decision-making processes of the Prime Minister and Cabinet, particularly those with implications for the NHS? Have all coronavirus-related decisions with implications for the NHS been preceded by the provision of legal advice, as well as medical and scientific advice? If not, why not? If so, why have Ministers of the Crown repeatedly stressed that they have been following medical or scientific 'advice', or both, but simultaneously failed to disclose whether they have been following legal advice? Looking to the future, how should legal, medical and scientific advice be blended to ensure the best possible outcomes for the NHS, its patients and staff?

22. Question 2 flows, in part, from another conspicuous pattern. This one relates to Suella Braverman QC MP, who was Called to the Bar in 2005, appointed Attorney General on 13 February 2020 and sworn into office on 24 February 2020.

23. The Attorney General is *inter alia* the chief legal adviser to the Crown and the guardian of the public interest. Even so, she does not appear to have played any visible part in the public presentation of HM Government's policies on coronavirus.

24. I venture these thoughts in view of three pieces of evidence as they stand at the time of writing – on 27 April 2020.

25. Firstly, on the official website of the Attorney General's Office, the official list of 'announcements' of the Attorney General and the Solicitor General, her deputy, embodies no announcement relating to coronavirus.¹⁶

26. Secondly, the website of the UK Parliament indicates that Ms Braverman has not spoken in the House of Commons since 10 February 2020. Thus, she has not spoken in the House since her appointment as Attorney General.¹⁷

27. Thirdly, unless I am mistaken – and I stand to be corrected if I am – the Attorney General has never appeared in any of the coronavirus-focused ‘daily press briefings’ held at Downing Street between 25 March and 26 April 2020, as posted by 10 Downing Street on its Youtube channel.¹⁸

28. Question 2 also flows, in part, from yet another conspicuous pattern. Ministers of the Crown, including the Prime Minister, have repeatedly stressed that they have been following medical or scientific ‘advice’, or both, but the same Ministers have failed to disclose whether they have been following any legal advice. Below are some examples.

29. Firstly, on 16 March 2020, the Prime Minister delivered a statement on coronavirus, which embodied the following assertion:

‘As we said last week, our objective is to delay and flatten the peak of the epidemic by bringing forward the right measures at the right time, so that we minimise suffering and save lives. And everything we do is based scrupulously on the best scientific advice.’¹⁹

30. Secondly, on 16 March 2020, Matt Hancock MP, the Secretary of State for Health and Social Care, delivered a parliamentary statement on coronavirus, in which he affirmed the following: ‘We will do the right thing at the right time, based on the best scientific advice.’²⁰

31. Thirdly, on 25 March 2020, the Prime Minister responded to a parliamentary question on coronavirus by Jeremy Corbyn MP, the then Leader of HM Opposition, by claiming:

‘What we are not doing – and this is fully in accordance with the scientific and medical advice – is closing down the whole UK economy, and he will understand the reasons for that.’²¹

32. As I am the author of two publications focusing on the advisory functions of the Attorney General²² and the Law Officers of the Crown respectively,²³ I am fully aware of the nature and implications of the Law Officers’ Convention. Thus, as a means of pre-empting any effort by the Attorney General or HM Government to invoke that Convention as a pretext for refusing to answer Question 2, I have composed the next paragraph.

33. On 25 September 2019, amidst the furore caused at the time by the prorogation of Parliament, Geoffrey Cox QC MP, the then Attorney General, articulated the essence of the Law Officers’ Convention as it now exists. He did so as follows: ‘the views of the Law Officers are not disclosed outside the Government without their consent.’ That being said, Mr Cox recognised that, in certain exceptional circumstances, ‘the public interest might require a greater disclosure of the advice given to the Government ...’²⁴. In view of the exceptional circumstances

undoubtedly caused by coronavirus, I would respectfully submit that, on this occasion, 'the public interest' should lead to the disclosure by HM Government of the answers to Question 2. In other words, HM Government should not shelter behind the Law Officers' Convention.

Question 3

34. Amid the pandemic, is the provision of healthcare by the NHS being helped or hindered by: (i) the exit of the UK from the EU on 31 January 2020; (ii) the quadripartite constitutional sub-division of the UK into four countries, three of which, Northern Ireland, Scotland and Wales, but not England, are endowed with devolved organs of governance; (iii) the institutional sub-division of the NHS on a similar quadripartite basis; (iv) the existence across the UK of four separate health ministries, four chief medical officers and four public health bodies, including Public Health England; (v) the multiplicity of Royal Colleges, Faculties, other representative bodies and regulators associated with the healthcare professions; and? Are these multiple bodies co-ordinating their respective approaches in the interests of 'joined up' governance and healthcare?

35. What has prompted me to pose Question 3 is a remark made by Dr Richard Horton, the Editor of *The Lancet*, on 2 April 2020: 'One sad conclusion of the confused, fragmented, and variable response of the NHS to COVID-19 is that...we do not have a National Health Service at all.'²⁵ Indeed, the UK appears to have four largely autonomous national health services with each one functioning amid the complications caused by Brexit and exacerbated by the pandemic – and *vice versa*. Hence, my articulation of Question 3.

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ENDNOTES

¹ 'Delivering Core NHS and Care Services inquiry launched', UK Parliament website, www.parliament.uk/business/committees/committees-a-z/commons-select/health-and-social-care-committee/news/nhs-care-services-inquiry-launched-19-21/ and 'Delivering Core NHS and Care Services during the Pandemic and Beyond: Inquiry', UK Parliament website, <https://committees.parliament.uk/work/277/delivering-core-nhs-and-care-services-during-the-pandemic-and-beyond/>

² 'Call for evidence Delivering Core NHS and Care Services during the Pandemic and Beyond', UK Parliament website, <https://committees.parliament.uk/call-for-evidence/131/delivering-core-nhs-and-care-services-during-the-pandemic-and-beyond/>

³ In the interests of transparency, I have made a declaration of interests in my biographical profile on the UCLan Cyprus website, www.uclancyprus.ac.cy/academic/dr-klearchos-kyriakides/

⁴ Twitter account of the Department of Health & Social Care, 26 April 2020, <https://twitter.com/DHSCgovuk>

⁵ Hansard, *House of Commons Debates*, 22 April 2020, Column 43, UK Parliament website, <https://hansard.parliament.uk/commons/2020-04-22/debates/ECA737FF-6432-42BE-94DE-958E6956C6E7/Engagements>

⁶ Hansard, *House of Commons Debates*, 23 January 2020, Columns 432-436, UK Parliament website, <https://hansard.parliament.uk/Commons/2020-01-23/debates/38D462B1-70F8-4CC6-AABD-2CCF4E271C34/WuhanCoronavirus>

⁷ 'CMO confirms cases of coronavirus in England', 31 January 2020, Department of Health & Social

Care, UK Government website, www.gov.uk/government/news/cmo-confirms-cases-of-coronavirus-in-england

⁸ 'Coronavirus action plan: a guide to what you can expect across the UK', Department of Health & Social Care, 3 March 2020, UK Government website, www.gov.uk/government/publications/coronavirus-action-plan and www.gov.uk/government/publications/coronavirus-action-plan/coronavirus-action-plan-a-guide-to-what-you-can-expect-across-the-uk

⁹ 'COVID-19 Hospital Discharge Service Requirements', 19 March 2020, UK Government website, at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/880288/COVID-19_hospital_discharge_service_requirements.pdf

¹⁰ 'PM address to the nation on coronavirus: 23 March 2020', Prime Minister's Office, 10 Downing Street, www.gov.uk/government/speeches/pm-address-to-the-nation-on-coronavirus-23-march-2020

¹¹ 'PM statement in Downing Street: 27 April 2020', Prime Minister's Office, 10 Downing Street, www.gov.uk/government/speeches/pm-statement-in-downing-street-27-april-2020

¹² 'The NHS Constitution - the NHS belongs to all of us', p. 7-8, UK Government website, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/480482/NHS_Constitution_WEB.pdf and www.gov.uk/government/publications/the-nhs-constitution-for-england

¹³ *Ibid*, pp. 12.

¹⁴ Human Rights Act 1998, www.legislation.gov.uk/ukpga/1998/42/contents

¹⁵ 'Guide on Article 2 of the European Convention on Human Rights: Right to Life Updated on 31 December 2019', European Court of Human Rights website, www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf

¹⁶ See: www.gov.uk/government/people/braverman#announcements

¹⁷ See: <https://members.parliament.uk/member/4475/contributions#expand-3871914>

¹⁸ These are archived on the Youtube channel of 10 Downing Street at www.youtube.com/user/Number10gov/videos

¹⁹ 'PM statement on coronavirus: 16 March 2020', Prime Minister's Office, 10 Downing Street, UK Government website, www.gov.uk/government/speeches/pm-statement-on-coronavirus-16-march-2020

²⁰ Hansard, *House of Commons Debates*, 16 March 2020, Column 697, UK Parliament website, <https://hansard.parliament.uk/Commons/2020-03-16/debates/235689EC-0A18-4488-BFCF-9F012A1A0C1B/Covid-19>

²¹ Hansard, *House of Commons Debates*, 25 March 2020, Column 341, UK Parliament website, <https://hansard.parliament.uk/Commons/2020-03-25/debates/E02BF9C1-538F-49C0-B79D-3CC56E2B6309/Engagements>

²² K.A. Kyriakides, 'The Advisory Functions of the Attorney General,' *Hertfordshire Law Journal*, Vol. 1, Issue 1, Spring 2003, pp. 73-94, University of Hertfordshire website, <https://uhra.herts.ac.uk/bitstream/handle/2299/2514/902833.pdf?sequence=1>

²³ Klearchos A. Kyriakides, 'The Law Officers of the Crown and the Rule of Law in the United Kingdom', in Gabrielle Appleby, Patrick Keyzer & John M. Williams (eds.), *Public Sentinels: A Comparative Study of Australian Solicitors-General* (Ashgate Publishing Ltd, Farnham, 2014, republished in 2016), pp. 185-207.

²⁴ Hansard, *House of Commons Debates*, 25 September 2019, Column 652, UK Parliament website, <https://hansard.parliament.uk/Commons/2019-09-25/debates/F3541B98-D4E9-487F-BE17-D51C6EF870F2/LegalAdviceProrogation>

²⁵ Twitter account of Richard Horton, 2 April 2020, <https://twitter.com/richardhorton1?lang=en>