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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 (PAC) 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 Committee ought to seek evidence specifically on rights-related dimensions of the Government procurement process and the availability of PPE to the NHS and social care organisations. In particular, the Committee should focus on the implications of Government procurement process on the right to life and right to non-discrimination.
- We note the National Audit Office (NAO) has made findings which connect the Government’s procurement process with a lack of access to PPE and a lack of protection of the right to non-discrimination. In particular there is evidence that the Government did not adequately protect the rights of BAME workers and people with disabilities in the manner in which it procured and distributed PPE.
- We submit that if the Committee finds that there is a connection between the manner in which procurement contracts were handled by the Government and a systemic shortage of PPE to NHS and social care organisations, the Committee should recommend this matter be made subject to a public inquiry pursuant to Article 2 of the European Convention on Human Rights.

**1. Human rights and the Public Accounts Committee’s remit**

**1.1** We note that the remit of the PAC 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’.<sup>1</sup> 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, including decisions about the funding of local authorities which have rights-fulfilling roles including in social care and housing provision, 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.

**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 PAC has a legitimate role in assessing the extent to which the Government is fulfilling its human rights obligations in the expenditure and arrangement of public funding.<sup>2</sup> 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: *Government procurement and supply of personal protective equipment*’ in order to assist the Committee in integrating human rights analysis in its inquiry.

## **2. Human rights implications of Government procurement and provision of PPE**

**2.1** The manner in which the Government has procured PPE is linked to the availability of, and therefore access to, PPE. Access to PPE has a number of human rights implications including for the ‘right to life’, protected by Article 2 of the European Convention on Human Rights (ECHR) and Article 6 of the International Covenant on Civil and Political Rights (ICCPR). Both Article 2 ECHR and Article 6 ICCPR impose positive obligations on states to take steps to protect the lives of those within their jurisdiction.

**2.2** Article 6 ICCPR requires states to undertake reasonable positive measures, which do not impose on them impossible or disproportionate burdens, in response to foreseeable threats to life.<sup>3</sup>

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<sup>1</sup> Rule 148 (1) Standing Order.

<sup>2</sup> Description of the Public Accounts Committee provided on the Committee webpage: <https://committees.parliament.uk/committee/127/public-accounts-committee/>.

<sup>3</sup> Communication No. 1862/2009, *Peiris v Sri Lanka*, Views adopted on 26 Oct. 2011, para. 7.2

**2.3** The ECHR imposes positive obligations on states to ensure the ‘practical and effective protection’ of rights,<sup>4</sup> by taking ‘reasonable’ and ‘adequate’ measures<sup>5</sup> where this does not impose an ‘impossible or disproportionate burden’ on the state.<sup>6</sup> As has already been noted by a number of leading UK human rights lawyers,<sup>7</sup> and the Joint Committee on Human Rights,<sup>8</sup> there is a strong case for Article 2 ECHR imposing a number of specific duties on states with respect of the provision of PPE.

**2.4** In the first instance, Article 2 imposes a general or systemic duty on states to protect the right to life.<sup>9</sup> This duty extends to matters of public health. For example, states must have in place regulations requiring hospitals to take appropriate measures to protect their patients’ lives.<sup>10</sup> The duty also arises in respect of training and the procurement of equipment,<sup>11</sup> and has been applied in the UK in relation to the supply of appropriate equipment to members of the armed forces.<sup>12</sup> Linked to this systemic duty is an operational duty imposed by Article 2 ECHR, which requires the state to protect individuals where there is a ‘real and immediate’ threat to their life of which the state is, or ought to be, aware.<sup>13</sup> The risks posed by the pandemic to those working on the frontline in the NHS and social care organisation are real and immediate, and are risks of which the Government was aware. Thus, there is a strong case for the UK being obliged to provide adequate supplies of PPE to these persons under Article 2 ECHR.

**2.5** The provision of PPE also implicates right to non-discrimination under Article 14 ECHR and Article 2 ICCPR. We note the following observation from the Joint Committee on Human Rights:

It is also arguable that when it became clear that black, Asian and minority ethnic communities were suffering disproportionately from the effects of Covid-19, the right to life (Article 2 ECHR) read together with the right to non-discrimination in the enjoyment of the substantive ECHR rights (Article 14 ECHR) should have required the prioritisation of the allocation of PPE to (for instance) BAME doctors and nurses. We have received evidence that in some cases the reverse has in fact been the case.<sup>14</sup>

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<sup>4</sup> For example, see *Valiulienė v Lithuania* [2013] App. no. 33234/07, para 75.

<sup>5</sup> See *Opuz v Turkey* [2009] ECHR 870, paras 136 and 153.

<sup>6</sup> See *Osman v UK* [1998] ECHR 101, para 116.

<sup>7</sup> For example, see 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/>; Paul Bowden QC, “Learning lessons the hard way – Article 2 duties to investigate the Government’s response to the Covid-19 pandemic” *UK Human Rights Blog*, 4 May 2020 <https://ukhumanrightsblog.com/2020/05/04/learning-lessons-the-hard-way-article-2-duties-to-investigate-the-governments-response-to-the-covid-19-pandemic-paul-bowden-qc/>.

<sup>8</sup> Joint Committee on Human Rights, *The Government’s Response to COVID-19: Human Rights Implications*, 7<sup>th</sup> Report of Session 2019-21. HC 265, paras 68 – 72.

<sup>9</sup> *Stoyanov v Bulgaria* [2012] ECHR 184, paras 50 to 61.

<sup>10</sup> *Tarariyeva v Russia* [2006] ECHR 1096, para 73.

<sup>11</sup> *Oneryildiz v Turkey* [2004] ECHR 657, para 89.

<sup>12</sup> *Smith and ors v Ministry of Defence (No 2)* [2013] UKSC 41.

<sup>13</sup> *Osman v UK* [1998] ECHR 101, para 115.

<sup>14</sup> Joint Committee on Human Rights, *The Government’s Response to COVID-19: Human Rights Implications*, 7<sup>th</sup> Report of Session 2019-21. HC 265, para 69.

**2.6** This observation makes clear the potential discriminatory effects of the manner in which PPE was provided to NHS, social care organisations and other frontline public services. Such discriminatory effects may arise in respect of disparities in the provision of PPE to different social groups, or in respect of a failure to prioritise the provision of PPE to social groups with particular vulnerabilities.

### **3. Evidence of shortcomings in the Government procurement process**

**3.1** We note that the NAO has highlighted a number of questionable practices regarding the Government's procurement of PPE process that may be linked to a lack of access to PPE with negative implications for the right to non-discrimination. They may be summarised as follows:

- Out of a total of £17.3 billion spent on new PPE contracts during the pandemic, £10.5 billion was awarded directly without any competition, while only £0.2 billion were awarded using a competitive tender process or using a competitive bidding process from a framework agreement.<sup>15</sup>
- Around one in ten suppliers of PPE were processed through a 'high-priority lane', subject to fewer in-depth checks and balances. However, the sources of the referrals to the high-priority lane were not always recorded on the team's case management system and the NAO has found a case where a supplier was added to the high-priority lane in error.<sup>16</sup>
- The NAO found 'inadequate documentation' in a 'number of cases' on how the risks of procuring suppliers without competition had been mitigated.<sup>17</sup> The NAO found examples of where departments failed to document fully the consideration and management of risks, such as the justification for using emergency procurement, why particular suppliers were chosen, or how any potential conflicts of interest had been identified and managed.<sup>18</sup>
- The NAO highlighted there was not always a clear audit trail to support 'key procurement decisions'.<sup>19</sup> In particular, it has noted that there were some gaps in the documentation to support key procurement decisions, such as why some suppliers which had low due diligence ratings were awarded contracts. The NAO also found gaps or limited documentation to support some key decisions made in the risk-based sample of 20 contracts it examined, including PPE contracts.<sup>20</sup>
- The NAO has further emphasised that many of the PPE contracts awarded during the pandemic were not been published in a 'timely' manner. Of the 1,664 contracts awarded across government up to the end of July 2020 with a contract value above

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<sup>15</sup> Ibid, para 2.5.

<sup>16</sup> Ibid, paras 3.10 and 3.12 - 3.14.

<sup>17</sup> Ibid, paras 3.17 -3.23.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid, paras 3.20 - 3.23.

<sup>20</sup> Ibid.

£25,000, 55% had not had their details published by 10 November 2020, at the time the NAO was conducting its examination.<sup>21</sup>

A common theme in the issues described above is a lack of transparency on the part of the Government, and a tendency towards making errors in the procurement process. These features suggest that at least in some circumstances, the Government did not always take the necessary steps to maximise delivery of adequate PPE. That such steps were not taken in a manner which undermined delivery of adequate PPE is supported by a number of significant shortcomings that can be identified in the delivery of PPE.

**3.2** The NAO has highlighted a number of shortcomings in the delivery of PPE.<sup>22</sup> These include the following:

- Lack of access to PPE – The NAO has noted a number of issues with access to PPE during in the pandemic. Many front-line workers in health and adult social care reported not having access to the PPE they needed during the height of the shortages.<sup>23</sup> For example, member surveys by the British Medical Association, the Royal College of Nursing, the Royal College of Physicians and Unison in April and May 2020 showed that a significant proportion (at least 30%) of participating care workers, doctors and nurses reported having insufficient PPE, even in high-risk settings.<sup>24</sup> In addition Directors of Adult Social Care stated that essential supplies were not getting through to the social care front-line.<sup>25</sup> The NAO’s findings in this regard are supported by other testimonies from social care providers. For example, Edel Harris of Mencap described the experience of social care providers trying to access the PPE to the Women and Equalities Committee. She described it as ‘a roller coaster right the way from the start’ and a ‘daily challenge, not helped by, in the first few weeks, the guidance [regarding PPE] chang[ed] all the time’.<sup>26</sup>
- Lack of adequate PPE – The NAO has also confirmed that a significant proportion of the PPE that was provided was not adequate for the purpose of protecting frontline workers. Across two contracts within the NAO’s audit sample, the Government had ordered 75 million respirator masks that the NHS was not able to use for its original purpose.<sup>27</sup> These masks cost £214 million. The NAO has further emphasised that ‘tens of millions’ of respirator masks ordered from other suppliers and some other types of PPE are also likely to have problems.<sup>28</sup> Indeed, the Government has informed the NAO that 195 million items bought on the basis of procurement contracts for PPE are ‘potentially unsuitable’ for providing the required protections for frontline workers.<sup>29</sup>

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<sup>21</sup> Ibid, paras 3.24 – 3.27.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid, paras 3.7, 3.8 and 3.17 - 3.19.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Women and Equalities Committee, *Unequal Impact? Coronavirus, disability and access to services: full Report*, Fourth Report of Session 2019 – 21 (2020) HC 1050, para 72 available at: <https://committees.parliament.uk/publications/4068/documents/40461/default/>.

<sup>27</sup> National Audit Office, *The Supply of Personal Protective Equipment (PPE) during the COVID-19 Pandemic* (2020) HC 961, paras 2.16 - 2.20

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

## 4. Human rights implications of shortcomings in the Government procurement process

4.1 The problems with the Government's procurement process and the subsequent problems in the delivery of PPE have a number of implications for human rights.

### *a. Shortages of adequate PPE and the right to non-discrimination*

4.2 The shortages of adequate PPE described above are linked to a lack of protection for the right to non-discrimination as the shortages appear to have disproportionately affected groups of people with protected characteristics. For example, only 49% of nurses from BAME backgrounds, responding to a Royal College of Nursing survey, reported that they had been adequately 'fit tested' for a respirator (to ensure a sufficient seal) in May 2020 compared with 74% of white British nurses.<sup>30</sup> We further note that in the NHS non-white ethnicities accounted for 75.8% of all staff deaths, despite making up only 21% of all staff.<sup>31</sup> These figures highlight that there may be a link between the manner in which the Government handled the distribution of PPE and a failure to protect BAME workers from discrimination, which the Committee must investigate further.

4.3 There is also evidence that those with disabilities may have been disproportionately impacted by the lack of adequate PPE in care homes. The rate COVID-19 deaths for adults with learning disabilities in residential care was higher than the rate of COVID-19 rates of people in the same category generally.<sup>32</sup> Moreover, we note that a third of people with learning disabilities who have died as a result of COVID-19 were living in residential care.<sup>33</sup> Such figures highlight that there may be a link between the manner in which the Government handled the distribution of PPE and a failure to protect groups of people with disabilities from discrimination. We urge the Committee to investigate this matter in more detail.

### *b. Systemic shortages of adequate PPE and the right to life*

4.4 We note that the findings from NAO as described above suggest there may be evidence to establish a link between Government procurement and a systemic shortage of PPE to NHS and social care organisations. Moreover, we note that the NAO's findings that that employers of health and care workers have reported 126 deaths and 8,152 diagnosed cases of COVID-19 linked to occupational exposure.<sup>34</sup> These figures suggest a *prima facie* link between the manner in which the UK Government handled the procurement of PPE, systemic shortages of PPE for those working on the frontline in the NHS and social care organisations, and a significant number of deaths of health and care workers. Such a link, if supported by evidence to the Committee, should result in a public inquiry to fulfil the state's obligations under Article 2 ECHR. We therefore urge the Committee to

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<sup>30</sup> Ibid, para 3.19.

<sup>31</sup> Levene LS, Coles B, Davies MJ, Hanif W, Zaccardi F, Khunti K. 'COVID-19 cumulative mortality rates for frontline healthcare staff in England' (2020) *Br J Gen Pract* 70:327-8.

<sup>32</sup> Public Health England, 'COVID-19 deaths of people identified as having learning difficulties (12 November 2020), para 133 available at: <https://www.gov.uk/government/publications/covid-19-deaths-of-people-with-learning-disabilities>.

<sup>33</sup> Women and Equalities Committee, *Unequal Impact? Coronavirus, disability and access to services: full Report*, Fourth Report of Session 2019 – 21 (2020) HC 1050 available at: <https://committees.parliament.uk/publications/4068/documents/40461/default/>.

<sup>34</sup> Ibid, paras 3.17, 3.22 – 3.23.

recommend that such an inquiry takes place if the evidence it receives supports a link between procurement of the PPE by the Government and a systemic shortage of PPE to NHS and social care organisations.

## **5. Concluding remarks**

**5.1** This evidence has argued that the Committee ought to seek evidence specifically on rights-related dimensions of the Government procurement process and the availability of PPE to the NHS and social care organisations. We have highlighted that the NAO has made findings that connect the Government's procurement process with a lack of access to PPE and potential violations of the right to non-discrimination and the right to life. In particular there is evidence that the Government did not adequately protect the rights of BAME workers and people with disabilities in the manner in which it procured and then distributed PPE. We urge the Committee to investigate these matters further. We have also emphasised that if the Committee finds that there is a connection between the manner in which procurement contracts were handled by the Government and a systemic shortage of PPE to NHS and social care organisations, the Committee should recommend this matter be made subject to a public inquiry pursuant to Article 2 of the ECHR.

## **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.