**Written evidence from The Institute for Government (RCC 12)**

The Institute for Government is a politically non-partisan think tank whose mission is to make government more effective. This written evidence is submitted to supplemented the oral evidence session on Tuesday 16 June.

**1.What should be the criteria for maintaining the Coronavirus Act 2020 as a whole and any regulations made under it?**

The Coronavirus Act was passed at breakneck pace and, therefore, with relatively little scrutiny. It as, as Matt Hancock told the House of Commons, "to deal with the current coronavirus emergency", and is "only for coronavirus". In particular, the government justified the provisions of the Act by reference to some key objectives, which included the need to:

- Mitigate and deal with the impact of staff shortages in public services and the management of the deceased; and
- Contain and slow the spread of the virus.[1]

The key test for whether measures still in the Act should be kept in force is whether the measures are still **necessary** and **the least harmful way** to achieve those objectives. This is also true of several statutory instruments made to deal with the crisis.

For instance, Matt Hancock justified changes to the Mental Health Act, including provisions allowing extension or removal of legal time limits governing the short-term detention of mental health patients, by reference to "circumstances in which staff numbers are severely affected" and "staff shortages due to the virus". He said that powers allowing local authorities to prioritise the care services they offer "would only be activated in circumstance where staff numbers were severely depleted". He said that measures for managing the deceased were needed in circumstances where "many of those involved in the management of death will themselves be self-isolating". When these provisions come up for review, the key question will be whether there are still workforce problems created by the pandemic and whether the emergency measures are the least harmful way of dealing with those problems.

Likewise, he said that powers to restrict or prohibit events and gatherings, shut down premises, forcibly isolate someone who may be infectious, and close schools and childcare providers, were "absolutely necessary" in circumstances where the government's goal was to "protect life, protect the vulnerable and protect the NHS by flattening the curve and minimising unnecessary social contact". The key question, with respect to these powers, are whether they are still necessary to contain the spread of the virus and protect life and the least harmful way of doing so.

Crucially, if a measure in the Act has made the delivery of public services cheaper or more efficient, or local authorities or those delivering public services think that services work better with the measures in force, then *that is not a good enough reason to keep the measures in force*. If the government considers that there is a case for medium-term or long-term policy change, for instance with respect to the public authorities' duties under Care Act 2014, or the Mental Health Act 1983, or the Children and Social Work Act 2017, then it must make the case for those changes in parliament on the understanding that they are medium-term or long-term policy changes justified on their own merits, not on the understanding that they are short-term stopgaps to deal with an emergency.

**2.Is the framework for Parliamentary scrutiny under the Coronavirus Act 2020 appropriate?**

No.

[1] In addition, the government cited as objectives the need to "support people according to the principle that no one should be punished for doing the right thing and self-isolating if they or someone in their household has symptoms", though measures outside of this Act are now the government's predominant means of doing so.

The scrutiny framework has three key components:

- Every two months, the Secretary of State must produce a status report under s97 on the non-devolved provisions of the Act, which specifies whether the provisions are in force and whether they have been suspended or revived, and whether the date for their expiry has changed. The report must also say whether, in the minister's view, the status of the provision is "appropriate".

- Every six months, a minister must "as far as practicable" arrange for MPs to vote on whether to keep temporary provisions of the Act (that is, most of them) in force. If MPs vote against keeping the provisions in force, the minister must exercise his powers to ensure that the provisions expire within 21 days.

- After one year, there must be a parliamentary debate in both houses on the non-devolved provisions of the Act.

That framework alone is insufficient for effective scrutiny, for the following reasons.

1. **The status reports must contain reasons and evidence**. The minister should not only say *whether* it is appropriate to keep provisions in force, but **why and based on what evidence**.

    - For example, the Act contains several "care easements" which suspend duties on local authorities to comply with their ordinary duties under the Care Act 2014. In respect of those provisions, status reports should specify which authorities have used the care easements, for how long, and should include a statement on why the local authority considered that it was necessary to use the easement.

    - In addition, the government should collect, and include in the report, **basic quantitative evidence on the impact** of using these provisions. The Care Act provisions, for example, relaxed requirements in respect of preparing and reviewing care plans. The government should require local authorities to collect data on the length of time between an individual requesting help and a council finishing an assessment and publish these in the reports, to test whether care was becoming less accessible as a result of the easements. Likewise, the government should collect from local authorities who use the easements data on what proportion of requests result in care being provided; these data can then be compared with annual national statistics[2] to ascertain whether care was becoming less extensive due to the easements.

    - Furthermore, the government (and parliamentary select committees) should seek **qualitative evidence from service providers** and the third sector on the impact of these provisions on the ground, and include key messages from this evidence in its status reports.

2. **Six months may be too long to wait for a parliamentary debate and vote.** One of the reasons it is so important for the two-monthly reports to contain reasons and evidence is that it may emerge from that evidence that provisions need to expire or be amended before the six-month mark. Although no major problems with the operation of this legislation have emerged so far, it is important to remember that many of its most controversial provisions – for instance, those relating to the closure of individual schools and premises or powers to forcibly

[2] https://digital.nhs.uk/data-and-information/publications/statistical/adult-social-care-activity-and-finance-report/2018-19

isolate those who have tested positive for the virus – have not been used and may become more important in the coming months as the government attempts to make its virus response more targeted. If parliamentarians do identify problems with those or other provisions of the Act, then parliament should be able to express a view on whether provisions require amendment or expiry before the six-month mark.

3. **There are gaps in devolved scrutiny.** The two-monthly reports and six-monthly reviews are obligations on the UK government in respect of provisions for which it has competence in England. There are no equivalent obligations on the devolved administrations in respect of provisions for which they have competence in the devolved nations, even though the Act gives them several similar powers. If a devolved administration has decided that it wants to turn a provision of the Act off then the devolved legislature does need to approve that decision, but there is nothing in the Act that allows the devolved legislatures to direct that a provision be switched off before the devolved administration has made that decision. The governments of the UK should work together to fill those gaps, building on commitments already given by the devolved administrations to their own legislatures (detailed in our paper of 17 April).

## 3.Should the "lockdown regulations" have been included as part of the Coronavirus Act 2020?

Yes.

When parliamentary democracy is operating as normal, big decisions on changing the law are made by parliament using primary legislation. Smaller ones can be made by the government using secondary legislation, but even then, they are at least explained and justified to parliament, and parliament's agreement in principle is often sought.

The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (the "**lockdown regulations**") amounted to the biggest change in the law in living memory, in that they criminalised leaving home without reasonable excuse. The lockdown policy which these regulations implemented was announced by the prime minister in an address to the nation the same day (23 March) that the Coronavirus Bill had its second reading in the Commons, and two days before the bill had its second reading in the Lords. It is therefore surprising that the government chose to introduce the restrictions by secondary legislation under powers in the Public Health (Control of Disease) Act 1984, and more surprising still that the government chose to do so using the urgency procedure in s45R of that Act, which allows the government to make regulations of this kind without a parliamentary vote, the day after the Act got Royal Assent and the day that parliament rose for Easter recess.

The government's decision to proceed with secondary legislation had some adverse consequences. First, the regulations contained some **inconsistencies, mistakes and defects** which proper parliamentary scrutiny might have averted. For example, had the restrictions been scrutinised, parliamentarians might have asked why the rules put before the Welsh Assembly limited exercise to once a day while the ones put before the UK and Scottish parliaments, and the Northern Ireland Assembly, did not. Parliamentarians might have spotted that, in the UK restrictions, police had the power to enforce some of the restrictions with reasonable force, but not others – a drafting error that had to be cleared up with a set of amendment regulations.[3] Prompted by concerns from constituents, they might have probed the government on whether people could visit burial grounds to pay their respects, or walk to an ATM to take out cash, which both had to be cleared up too. Parliamentarians might also have anticipated problems with enforcement of the regulations and pressed the government

[3] http://www.legislation.gov.uk/uksi/2020/447/contents/made

over the differences between its guidance at the time and the content of the legal restrictions (discussed further below).

It is no defence for the government to say that there was no time for parliamentarians to engage with the restrictions meaningfully: parliamentary scrutiny resulted in substantive amendments to the Coronavirus Act, including an amendment in response to concerns about religious burials raised by Labour MP Naz Shah and backed by 100 MPs, to ensure that local authorities have regard to a person's religious beliefs when using their powers to dispose of dead bodies under the Act.

Second, the government's use of secondary legislation resulted in **a risk that the were unlawful**. The legal issue, in summary, is that it is not clear that those powers truly permit the government to introduce such wide-ranging restrictions of people's liberty. The government (along with the devolved administrations) has powers to provide that a group of persons who "may be infected" is subject to restrictions on where they go or with whom they have contact, and to "make provision of a general nature". The government has no power to order that anyone be "kept in isolation or quarantine".[4] Lawyers have questioned whether the entire population really constitutes a "group of persons", whether it can really be said that the entire population "may be infected", and whether such an extensive lockdown really constitutes a mere "restriction" on where people go or with whom they have contact.[5] The courts have said before that legislation can only authorise interference with fundamental rights, and can only authorise physical confinement, with clear words: ambiguous provisions will not do it.[6] It is no surprise, in that context, that a legal challenge to the regulations is ongoing.[7] The courts would, no doubt, be extremely reluctant to hand down a judgment that interfered with the government's pandemic response, but it is nevertheless surprising that the government took the risk.

Third, the use of secondary legislation resulted in **insufficient political and public awareness of the law** behind the guidance, which in turn may have contributed to **wrongful enforcement** of the law. The government published guidance which misrepresented the law, for instance, telling people when they could only exercise once a day when the (English) law did not, telling people that they could not travel for exercise when the law did not, and telling people that they could only leave home for certain specified purposes, when in fact those purposes were just examples in the open category of 'reasonable excuse'.[8] Given all that, it is no surprise that several police forces made mistakes in enforcement, paying too much heed to the guidance and too little to the law. For example, it was reported that police forces suggested they were monitoring the purchase of "non-essential" goods in supermarkets, threatened to set up "road blocks" and tried to stop a family from playing in their own front garden.[9] A review by the CPS found that, of 231 prosecutions relating to coronavirus, 56 were incorrect, that is, 1 in 4.[10] To date there has been no review of how many of the 14,244 fines meted

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[4] For England and Wales, the relevant power is in S45C(1) Public Health (Control of Disease) Act 1984, read with the "general nature" provision in s45G(1)(b), the special restriction categories at s45G(2)(d) and (j), and the bar on certain special restrictions in health regulations at s45D(3). Near-identical provisions in respect of Northern Ireland and Scotland can be found in Schedules 18 and 19, respectively, of the Coronavirus Act.
[5] On the first two issues, Craig op. cit. On the final one, also see Anderson op. cit.
[6] On fundamental rights, see Craig's (Ibid.) discussion of R (Simms) v SS for the Home Department [1999] UKHL 33. On authorisation of otherwise tortious conduct, including false imprisonment and trespass to the person, see Tom Hickman QC, Emma Dixon and Rachel Jones, 'Coronavirus and Civil Liberties in the UK', Blackstone Chambers, 6 April 2020 <https://coronavirus.blackstonechambers.com/coronavirus-and-civil-liberties-uk/>.
[7] https://wedlakebell.com/legal-challenge-over-lawfulness-of-government-lockdown-launched-by-entrepreneur/
[8] See the main "what you can and cannot do" page – version archived from 17 April, https://web.archive.org/web/20200417012916/https://www.gov.uk/government/publications/coronavirus-outbreak-faqs-what-you-can-and-cant-do/coronavirus-outbreak-faqs-what-you-can-and-cant-do
[9] Police forces
[10] review

out by police by the time of that review were lawful. Parliamentary scrutiny of the regulations would have increased awareness among ministers, MPs and the press of what the laws themselves said, allowing them better to hold the government to account over guidance and enforcement that departed from those regulations.

Fourth, the use of secondary legislation and the use of the urgency procedure were **contrary to democratic principle**. It is regrettable that, in a parliamentary decmoracy, the biggest restrictions on liberty in memory did not have democratic legitimacy conferred on them by a prospective parliamentary vote.

The demands of the crisis were acute in late March and ministers and officials were, no doubt, battling an enormous workload in conditions of intense urgency. The government's use of the urgent procedure, if disappointing, was most understandable at the point it introduced the restrictions in late March, when need for speed was greatest. It was still more disappointing, though, that even once parliament had procedures in place to allow for remote voting, the government continued to use that procedure for amendments to the restrictions, denying MPs a vote on the measures before they came into force. The Amendment No 2 Regulations, which introduced outdoor recreation as an example of a reasonable excuse were made using the urgent procedure on 12 May and came into force on 13 May. The Amendment No 3 Regulations, which removed the central rule about leaving home and replaced it with a rule about staying overnight away from home, and which permitted gatherings of up to six outside, were made using the urgent procedure on 31 May and came into force on 1 June. The Amendment No 4 Regulations, which permitted single-adult households to 'bubble' with another, and permitted non-essential retailers to open, were made using the urgent procedure on 12 June and came into force on 13 June and 15 June.

## 4.Would the Civil Contingencies Act 2004 have been an appropriate Act to use to introduce Covid-19 legislation?

With respect to the Coronavirus Act: the government's decision use new primary legislation rather than the CCA had two benefits. First, the bill was subject to some degree of ordinary parliamentary scrutiny, which allowed for some substantive amendments. Second, the Coronavirus Act (unlike any regulations the government might have passed under the Civil Contingencies Act) is not subject to judicial review, so the lower likelihood of a legal challenge increases legal certainty.

However, the government's choice to opt for primary legislation did allow it to evade some of the safeguards and scrutiny provided for in the Civil Contingencies Act. The Coronavirus Act provides for parliamentary reviews of its operation every six months, whereas regulations under the CCA must be reviewed every 30 days.[11] The Coronavirus Act could only be amended by further primary legislation, whereas any regulations passed under the CCA could have been amended by simple resolution at any time.[12] Further, the flipside of the legal certainty that comes with primary legislation is that a safeguard is lost: whereas regulations passed under the CCA can be struck down for incompatibility with the Human Rights Act 1998, the Coronavirus Act cannot.[13]

As far as the Coronavirus Act provisions are concerned, therefore, primary legislation with proper safeguards would have been preferable to using the CCA. As to whether primary legislation without proper safeguards (which is what the government brought forward) was preferable to using the CCA, that is a competition for a distant constitutional second place which does not deserve much attention.

Second, with respect to the lockdown regulations: for all the reasons we have outlined, the use of primary legislation with proper safeguards would have been the best vehicle for these restrictions. In

[11] S98 Coronavirus Act, read with s89 and s26 Civil Contingencies Act
[12] S27 Civil Contingencies Act
[13] S30 Civil Contingencies Act

the absence of such legislation, it is arguable that the government was not legally able to rely on the CCA rather than powers under the 1984 Act. Under s21(3) read with s21(6) CCA, the government may not make emergency regulations under the CCA *which could be made under existing legislation* unless it would cause serious delay to rely on the existing legislation, or to work out whether the existing legislation can be relied upon, or if the existing legislation might be insufficiently effective. Because the government did have powers for imposing restrictions under the Public Health (Control of Disease) Act 1984, it is arguable that those provisions of the CCA compelled it to rely on existing legislation rather than using CCA powers. Therefore, in the circumstances, the government's preference for the 1984 Act over the CCA is more understandable than its preference for the 1984 Act over primary legislation.

**Further issues concerning the 'lockdown' regulations and government guidance**

In a SAGE paper of 22 March 2020 published online, the government's then external advisers criticised its guidance at the time for being too woolly. For instance, the government's guidance on social distancing began "Everyone should try to follow the following measures as much as possible". SAGE said that the guidance lacked clarity and specificity. The advisers wrote: "Instead of the phrase 'try to', it should just say 'do'. Phrases such as 'as much as is practicable' […] are open to wide differences in interpretation. This can lead to confusion about exactly what people are being required to do." In those circumstances, it is understandable that the government tried to make its guidance as clear and unambiguous as possible.

However, as discussed above, the government occasionally confused clear and unambiguous guidance for guidance that was wrong in law. It is perfectly legitimate, in principle, for the government to publish guidance that goes further than the law. That is often what guidance is for. However, **the government should have made a sharper distinction between guidance *on the law*, about what people *must* do, and guidance *that went beyond the law* on what people *should* do**. In some cases, the government did this well: its website said "we advise you to stay local and use open spaces near your home", which is clearly a piece of advice and not a requirement.[14] However, that appeared on a webpage entitled "what you can and cannot do", which implied the opposite. At the top of that page, the government said that you should "only leave the house for very limited purposes". That was itself wrong (because reasonable excuse is an open category), the list of purposes itself included some inaccuracies (e.g. "one form of exercise a day"), and in any event the list left out several of the examples of 'reasonable excuse' enumerated in the law. Perhaps in response to criticism, the government subsequently updated that page to say "these reasons are exceptions and a fuller list is set out in the regulations."[15]

The blurred lines between law, guidance on the law and guidance outside the law also had the consequence that, in some cases, **the prime minister's word effectively was the law.** On 13 May, the prime minister announced that people could go for unlimited outdoor exercise, but did not chance the provisions on exercise in the regulations. This had the consequence, in England, that if there was any doubt previously about whether the second jog of the day was a 'reasonable excuse' to leave home, it was surely a reasonable excuse after the prime minister publicly gave his express authorisation for it. It is one thing for the executive to make laws of this kind by statutory instrument, but it is more constitutionally uncomfortable still for the prime minister to affect the law by his mere oral statements.

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[14] 'What you can and cannot do' as it stood on 26 April 2020, retrieved via the Wayback Machine at https://web.archive.org/web/20200426105520/https://www.gov.uk/government/publications/coronavirus-outbreak-faqs-what-you-can-and-cant-do/coronavirus-outbreak-faqs-what-you-can-and-cant-do

[15] 'What you can and cannot do' as it stood on 4 May 2020, retrieved via the Wayback Machine at https://web.archive.org/web/20200504111914/https://www.gov.uk/government/publications/coronavirus-outbreak-faqs-what-you-can-and-cant-do/coronavirus-outbreak-faqs-what-you-can-and-cant-do

**The legal framework for the next phase of 'lockdown'**

Ministers need to clarify their understanding of the legal framework for two aspects of the government's lockdown plans.

*Local lockdowns*

First, the government has said that it wishes to move to a system of 'local lockdowns' which allow it to respond to flare-ups in particular areas of the country. It is not clear on what powers the government proposes to rely. If the government wants decisions about these local lockdowns to be made in central government, then the government is likely to rely on the same powers it has relied on so far: namely, powers to make health protection regulations under the Public Health Act 1984.

If the government wants decisions about local lockdowns to be made locally, by local government, then there are various options. Local authorities could rely on powers in the Public Health Act 1984, under which a local authority can apply to a magistrate for an order to close or disinfect premises, isolate or disinfect "things" or impose various restrictions, including isolation, on persons who may be infected and present a risk to others. They could, alternatively, rely on powers in the Coronavirus Act 2020, under which if someone tests positive inconclusive, or a public health officer has assessed them and has reasonable grounds to suspect that they may be infectious, the officer can order them to self-isolate and the police can enforce this. The 2020 Act also allow the Secretary of State to direct that specific gatherings or types of gatherings are banned, and close premises.

However, if the government wanted local authorities to be able to impose local lockdowns with similar restrictions to the first phase of national one, it is doubtful whether these specific powers, targeted at those who test positive or may be infectious, would be wide enough to impose broad restrictions on perfectly healthy people.

Therefore, if the government is planning for local lockdowns similar to the first phase of the national lockdown, then it is likely to need further regulations for that purpose as well. The government should explain whether it does anticipate that local lockdowns will take that shape, state whether it considers that it needs new regulations for those lockdowns or intends to rely on existing powers, and commit to exposing any new regulations to parliamentary scrutiny rather than using the urgency procedure yet again.

*Test, trace and isolate*

Second, the government has said that the 'test, trace and isolate' system will be voluntary at first (as it is now), but that the government may move to mandatory and enforceable isolation if there is insufficient compliance with government advice to self-isolate. Again, the government should make clear *before moving to a mandatory system* whether it would rely on the powers in the Coronavirus Act 2020 to do so, or bring forward fresh legislation. If it does rely on the powers in the 2020 Act, it should explain what evidence it will collect on the use of those powers and enforcement action taken in connection with the system, and commit to putting that evidence before parliament in its regular status reports on the Act.

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