BIG BROTHER WATCH

Written Evidence to the Public Administration and Constitutional Affairs Committee's Inquiry: Responding to Covid-19 and the Coronavirus Act 2020

June 2020

About Big Brother Watch

Big Brother Watch is a civil liberties and privacy campaigning organisation, fighting for a free future. We're determined to reclaim our privacy and defend freedoms at this time of enormous technological change.

We're a fiercely independent, non-partisan and non-profit group who work to roll back the surveillance state and protect rights in parliament, the media or the courts if we have to. We publish unique investigations and pursue powerful public campaigns. We work relentlessly to inform, amplify and empower the public voice so we can collectively reclaim our privacy, defend our civil liberties and protect freedoms for the future.

Contact

Silkie Carlo
Director
Direct line: 020 8075 8478
Email: silkie.carlo@bigbrotherwatch.org.uk

We welcome the opportunity to submit written evidence to this important inquiry.

Since the Coronavirus Bill was first introduced, we have been scrutinising emergency powers, providing policy analysis and emphasising the importance of close parliamentary scrutiny. We have been producing monthly reports on the Government's response to Covid-19, emergency powers and their impact on civil liberties and parliamentary democracy, and have circulated the reports to parliamentarians.[1]

In this briefing, we aim to provide the Committee with responses to inquiry questions 1, 2, 4 and 6.

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

a. How and by whom should these criteria be measured and judged?

The Coronavirus Act contains the most draconian powers ever seen in peacetime Britain. It is right that Government takes action to protect public health in the Covid-19 pandemic and that the State is equipped with the powers and resources it needs to steer us safely through this difficult time. Extraordinary times require extraordinary measures, from the public and the Government alike. The Coronavirus Act contains many such measures. However, these extreme powers must be strictly necessary, proportionate and time-limited. Strict time-limitations imposed via parliamentary review and sunset clauses should ensure that the powers expire if they do not meet this test.

It is our recommendation that powers exercised under the Coronavirus Act should be subject to a much shorter sunset of one month, as per under the Civil Contingencies Act 2004, to ensure prompt review of the necessity and proportionality of such extreme measures.

Duration

The Coronavirus Act endures for at least two years (s.89). Powers exercised under the Act can last for six further months, meaning the Act could last 2.5 years; and the Act gives far-reaching powers to ministers to extend the Act beyond two years simply by regulation (s.90). This is an extraordinary expansion of ministerial power and an unacceptably long time for exceptional, emergency powers to be at the disposal of Government.

To maintain the presumption against exercise of emergency powers, they should not be open to use for such a long period of time. Powers exercised under the Act should be subjected to a strict sunset clause – ideally monthly, as per the Civil Contingencies Act 2004 - to ensure prompt review of the necessity and proportionality of such extreme measures.

1Emergency Powers and Civil Liberties Reports (April and May) – Big Brother Watch: https://bigbrotherwatch.org.uk/campaigns/emergency-powers/

Six month parliamentary review

Big Brother Watch published a briefing on the (then) Bill before it was debated in parliament,[2] and successfully campaigned with parliamentarians of all parties[3] to secure an amendment for a six month review of the Act, which is otherwise set to be in force for at least two years. As such, Parliament will have an opportunity to vote again on the Coronavirus Act in late September of this year (if Parliament is sitting; otherwise, after conference season in October).

Regrettably, the amendment passed only provides for a vote on the whole Act rather than the continuation of certain powers within it. Therefore, it is only likely to function as an extreme safeguard of last resort rather than a meaningful review mechanism.

Two month Ministerial report

Section 97 of the Act requires the Health Secretary to report to Parliament on key provisions in the Act every two months. The first report was published on 29th May. As Dr Ronan Cormacain pointed out when speaking to the Public Administrative and Constitutional Affairs Committee on 16th June, the tone of report is "self-congratulatory" and "comes across as a little propagandistic rather than something that is properly independent." **We are also concerned at the lack on independent analysis of these measures.**

Predictably, the report states that although some of the provisions have not been needed so far – during a peak of the pandemic - "it is too early to tell whether they can be completely dispensed with."[4] For example, the modification of mental health legislation under s.10 and Schedule 8 of the Act has not been needed, yet despite this apparent failure to meet a strict necessity test Government is retaining the power.

Schedules 21 and 22

Of particular concern to us are the broad detention and dispersal powers in the Act – Schedules 21 and 22 respectively. They contain powers to detain and test potentially infectious members of the public, including children, in unidentified isolation facilities; and powers to shut down any gathering, which could impede the ability to protest against the overall handling of the crisis or against the abuse of the powers themselves.

2Big Brother Watch Briefing on the Coronavirus Bill, 23rd March 2020: https://bigbrotherwatch.org.uk/wp-content/uploads/2020/03/briefing-coronavirus-bill-final.pdf

3"Two Years Is Too Long" for "Draconian" Coronavirus Bill, Warn MPs & Rights Groups – Big Brother Watch, 23rd March 2020: https://bigbrotherwatch.org.uk/2020/03/two-years-is-too-long-for-draconian-coronavirus-bill-warn-mps-rights-groups/

4Two monthly report on the status of the non-devolved provisions of the Coronavirus Act 2020 – Department of Health and Social Care, 29th May 2020, p.6: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/888602/coronavirus-act-2-month-report-may-2020.pdf

The Department of Health and Social Care's two monthly report on the Coronavirus Act states that Schedule 21 has been used in "fewer than 10 cases across the whole of England."[5] However, there is no further explanation or transparency as to why and how powers under the Schedule were used, or how this was recorded. Furthermore, there is no mention of the fact that 100% of the prosecutions brought under Schedule 21 have been unlawful – 53 in total, with the figure expected to rise as cases progress. This was identified after the CPS responded to calls from Big Brother Watch and others and initiated monthly reviews of prosecutions brought under emergency powers. Two reviews have since taken place, and given that the CPS has twice found that 100% of the prosecutions under the Act were unlawful, the risk of misuse of restrictions, directions and other powers is very serious.

One example, identified through our research, was that of Lewis Brown, an 18-year-old from Oxford charged under Schedule 21 of the Coronavirus Act, para. 67(a)and (b), after reportedly visiting his vulnerable mother to give her money. There is nothing to suggest that Mr Brown was considered potentially infectious, or that the officers involved sought the advice of a public health officer. It is even more concerning that Mr Brown, in England, was charged under the Schedule 21, para. 67 - the Welsh section of the Schedule. This is a very basic failing and points to a total lack of training for police officers and magistrates on these new powers. The confusion and misuse associated with Schedule 21 should surely play into any meaningful review. Schedule 21 of the Coronavirus Act poses an extraordinary risk to fundamental rights and has proved of little use for public health despite the country enduring a peak of the pandemic. **Schedule 21 should be urgently repealed.**

The Department of Health and Social Care's report acknowledges that Schedule 22 powers have not been exercised by the UK Government. It makes no further assessment of their necessity and does not explain why they need to remain in place.[6] As we have warned throughout the pandemic response, extraordinary powers afforded to the state will not always be necessary or essential, but 'nice to have' – and moreover, excessively difficult to repeal. Schedule 22 of the Coronavirus Act has not been used at all during the pandemic yet contains draconian powers to restrict gatherings and protests that remain on the statute books. **Schedule 22 should be urgently repealed.**

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

5Two monthly report on the status of the non-devolved provisions of the Coronavirus Act 2020 – Department of Health and Social Care, 29th May 2020, p.6: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/888602/coronavirus-act-2-month-report-may-2020.pdf
6Ibid.

The greater the powers a Government requests, the greater scrutiny, caution and safeguards the powers require. However, this Government rushed a 342-page Act, with a range of new offences and unprecedented powers that will last up to 2 years, through Parliament in three days.

The parliamentary debate on the (then) Bill did not provide meaningful scrutiny. Parliamentarians were naturally mindful of the urgency of the situation and the gravity of the request to equip the Government with the powers it requested to protect public health – but were also concerned by the short time afforded to consider the incredible powers within. We are concerned that there was more time available to engage Parliament on the legislative response to the emergency than the three days afforded. The Health Secretary Matt Hancock delivered the Bill to the House of Commons with the apparent reassurance that,

> "... the Bill has been drafted over a long period, because it started on the basis of the pandemic flu plan that was standard before coronavirus existed and has been worked on over the past three months at incredible pace by a brilliant team of officials right across Government."[7]

However, this raises the question as to why Parliament was not engaged sooner in those three months.

The undermining of parliamentary scrutiny has set a poor precedent – through this period we have seen many pieces of extremely significant legislation passed with no parliamentary debate, or debate which has come far too late to be of any value. For example, on the same day The Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 4) Regulations 2020 came into force, the House of Commons was debating The Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 3) Regulations 2020 whilst the House of Lords simultaneously debated The Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 2) Regulations 2020. This is absurd and highlights how during this period meaningful scrutiny of Government powers has been desperately lacking.

The two-month Ministerial report is, as demonstrated, an insufficient mechanism to provide the necessary level of scrutiny. The report needs only detail which powers have been used and whether the Minister still considers them necessary. A fuller assessment of the human rights impact of the measures used, including proportionality, is essential to ensure adequate scrutiny. Independent and parliamentary analysis of how and why powers have been used would also be a significant improvement.

7HC Deb (23rd March 2020) vol. 674, col. 38: https://hansard.parliament.uk/Commons/2020-03-23/debates/F4D06B4F-56CD-4B60-8306-BAB6D78AC7CF/CoronavirusBill

The Coronavirus Act also allows for significant amounts of secondary legislation to be made under the made affirmative procedure and the negative procedure. For example, statutory instruments that postpone certain elections and referendums (s. 61) can be made through the negative procedure and contain no link to public health emergencies or coronavirus. It is not clear why such a significant power does not require Parliament scrutiny.

The Act also contains significant Henry VIII powers. For example, S.22, which deals with the appointment of temporary Judicial Commissioners, contains powers which amend the Regulation of Investigatory Powers Act 2000 and the Investigatory Powers Act 2016. Despite this, legislation made under s.22 is only subject to the negative procedure. Indeed, on 26th March 2020, a new statutory instrument was made under the Coronavirus Act: The Investigatory Powers (Temporary Judicial Commissioners and Modification of Time Limits) Regulations 2020. This allows for the appointment of temporary Judicial Commissioners to approve authorities' use of investigatory powers including highly intrusive bulk powers. These Regulations bypass the requirement to consult senior figures on appointments. Such an amendment should not be subject to the negative procedure.

These procedures mean that he lockdown period has been effectively dictated by Ministerial rule, in a manner that contradicts the principle of parliamentary sovereignty – the heart of our constitutional democracy.

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

Yes: the Civil Contingencies Act 2004 (CCA) is permanent legislation designed precisely to provide a mechanism by which regulations can be introduced in times of national emergencies. The Covid-19 pandemic evidently meets the criteria of 'emergency' as set out in the CCA (s.19(1)(a)). As such we believe it should have been used to manage the pandemic. Under the CCA, emergency regulations must be considered by Parliament within 7 days of being laid and lapse no longer than 30 days after they are made (CCA s.26(1)(a)). This would have provided for more thorough and frequent parliamentary scrutiny. It is vital that emergency powers carry emergency time limits.

The CCA allows ministers to make emergency regulations if there is an emergency "which threatens serious damage to human welfare", including "loss of human life… human illness or injury" in the UK. The powers to make emergency regulations are broad, allowing for the making of "any provision which the person making the regulations is satisfied is appropriate for the purpose of…protecting human life, health or safety", among others.

The emergency regulations allowed under the CCA include measures which:

- prohibit, or enable the prohibition of, movement to or from a specified place;
- require, or enable the requirement of, movement to or from a specified place
- prohibit, or enable the prohibition of, assemblies of specified kinds, at specified places or at specified times;
- prohibit, or enable the prohibition of, travel at specified times;
- prohibit, or enable the prohibition of, other specified activities;

as well as the ability to create offences of failing to comply with any of the above regulations.[8]

When questioned by Conservative Adam Afriyie MP, "is there a particular reason why the Civil Contingencies Act 2004 was not used? It already contains many of the safeguards that I suspect the House will wish to see", the Leader of the House Jacob Rees-Mogg claimed it could not be used as, "the problem was known about early enough for it not to qualify as an emergency under the terms of that Act."[9] This is plainly wrong.

David Davis MP requested on a Point of Order the opinion of the Speaker's Counsel as to whether the CCA could have been relied on for emergency regulations for the present crisis.[10]The Speaker's Counsel was unequivocal:

> "The 2004 Act (which I wrote), including the powers to make emergency provisions under Part 2, is clearly capable of being applied to take measures in relation to coronavirus."[11]

Michael Gove, when speaking to this very Committee, reaffirmed that Government's position that the CCA could not be used as it is "designed to be used for something that is unforeseen."[12] In response, Ronnie Cowan MP pointed out the irony of Gove defending Government failings such as PPE shortages on the basis that the virus had moved so quickly, whilst simultaneously claiming that the Government was too prepared for the virus to use the CCA:

> "I am staggered to hear that this is not a bolt out of the blue. Given the speed with which this virus has ripped through the United Kingdom, and has killed over

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8Section 22

9HC Deb (19th March 2020) vol. 647 col. 1177: https://hansard.parliament.uk/Commons/2020-03-19/debates/073B7E0C-31AF-424A-95AD-89B1F8F54EFE/BusinessOfTheHouse

10HC Deb (19th March 2020) vol. 647 col. 1188: https://hansard.parliament.uk/Commons/2020-03-19/debates/71E712D1-F20F-414D-AA69-DDE7124167B4/PointsOfOrder

11David Davis, Twitter,23rd March 2020: https://twitter.com/DavidDavisMP/status/1242005618581483523/photo/1

12Oral evidence: The work of the Cabinet Office, HC 118, Public Administration and Constitutional Affairs Committee, 29th April 2020, Q212: https://committees.parliament.uk/oralevidence/326/default/

> 20,000 people, are we saying we were not surprised? If we were not surprised by it, why were we not better prepared?"[13]

Furthermore, the Committee Chair asked:

> "The Civil Contingencies Act exists for contingencies. If this is not an occasion on which that would be necessary, when would be?"[14]

However, Gove maintained that the Government was too prepared for the pandemic to rely on the CCA. Yet, the Coronavirus Act was worked on for three months prior to being laid before Parliament for rushed three-day scrutiny.

By pushing new legislation onto the statute books rather than laying regulations under the CCA, the Government has been endowed with extreme powers and minimised parliamentary scrutiny of them. This creates the real risk of enduring and excessive emergency powers.

6. **To what extent should there be alignment throughout the UK on the response to Covid-19, and ending lockdown restrictions?**

As the pandemic has unfolded, the Government has been increasingly unable to command a UK-wide response. Devolved administrations have each adopted their own measures, managed lockdowns at their own pace, and developed their own tests for lifting restrictions. This makes it impossible for the Prime Minister, or indeed anyone in central Government, to speak to the country and communicate the rules as a whole.

This problem was raised in some of the short parliamentary debates on the Regulations. Baroness Wilcox reported that the Welsh First Minister, Mark Drakeford, experienced insufficient communication and had waited three weeks for Michael Gove to reply to him about improving communications between devolved administrations and central Government.[15]

One of the key principles in the Government's recovery strategy is to pursue "work in close cooperation with the devolved administrations in Scotland, Wales and Northern Ireland to make this a UK-wide response: coherent, coordinated and comprehensive."[16] In reality, there has been a divergent four-nations response. We have documented extensively the constantly shifting approaches to lockdowns across the four nations,

13Ibid, Q220
14Ibid, Q215
15HL Deb (12th May 2020) vol. 803, col. 602: https://hansard.parliament.uk/Lords/2020-05-12/debates/CE14A068-E2C5-4D31-856B-3DF650DAFEBB/HealthProtection(CoronavirusRestrictions)(England)Regulations2020
16Our Plan to Rebuild: The UK Government's COVID-19 recovery strategy – HM Government, 11th May 2020: https://www.gov.uk/government/publications/our-plan-to-rebuild-the-uk-governments-covid-19-recovery-strategy/our-plan-to-rebuild-the-uk-governments-covid-19-recovery-strategy

often with each nation's legislation and guidance being at odds with each other as well as at odds with the rest of the UK.[17] Currently there are vast differences in where an individual can travel to, how many people they can meet, and the reasons they are allowed to leave their home.

The fact that these complex Regulations diverge across the nations of the UK makes it incredibly difficult, arguably impossible, for any citizen of the UK to understand and observe the differences. The stakes are very high – these Regulations must be accessible, foreseeable and practicable for the public at large if the purported benefits are to be achieved. Adherence to the lockdown Regulations requires major behavioural change on a scale never seen before – but this can only happen if the law is clear and coherent.

The Regulations should, as far as possible, be harmonised across the nations of the United Kingdom to avoid arbitrary discrepancies and public confusion, and to enable clear, unified Government communications about the restrictions.

a. To what extent is there scope for divergence in policy for devolved administrations and local authorities, in particular in relation to easing lockdown restrictions and Covid-19 testing capacity?

Any new legislation brought in to enable local authorities to preside over 'localised lockdowns' must be carefully scrutinised by Parliament before it is passed, not after. We have detailed the serious confusion wrought by divergence between nations and the blurred lines between guidance and law. This does considerable damage to the rule of law. If local authorities are granted powers to enforce lockdowns, there is even greater risk of public confusion and arbitrary policing, and so the need for Parliamentary approval is paramount.

Local authorities must be legally mandated to provide clear explanations of what measures are in place, and the necessity and proportionality of such measures. They must also be legally required to frequently and comprehensively report on the impact of such measures, as well as reviewing their necessity. These reports must be made public to ensure transparency and scrutiny.

17See Emergency Powers and Civil Liberties Reports (May), p.45 – Big Brother Watch: https://bigbrotherwatch.org.uk/wp-content/uploads/2020/06/Emergency-Powers-and-Civil-Liberties-Report-May-2020-Final.pdf