18 Months of COVID-19 Legislation in England: A Rule of Law Analysis

Katie Lines, 16 October 2021
Executive Summary

This Report has been produced to assist Members of the House of Commons when they consider a motion to renew the temporary provisions in the Coronavirus Act 2020 on 19th October 2021. It is intended to provide Members with an overview of the broader legislative context within which the renewal debate is situated.

The Report reflects upon the last 18 months of coronavirus legislation through a Rule of Law lens, and asks how far the Government’s legislative response to the pandemic has respected the Rule of Law. In particular, it assesses the extent to which the Government's response changed over the last year to address Rule of Law concerns that were brought to the Government’s attention in the first six months of the pandemic.

We recognise that the Government has often had to act quickly to respond to an unprecedented public health crisis. However, the Rule of Law should not be set aside during a national emergency, but should instead form a core part of a state’s response to that emergency. Sustained compliance with the Rule of Law during a pandemic can actively assist “an effective pandemic response by promoting transparency, clarity, participation, engagement and representation, international cooperation, equality, accountability and anti-corruption, among other principles”.

In this Report, we find that:

Parliamentary scrutiny

- The Government is still failing to provide Parliament with impact assessments for coronavirus legislation, meaning that Parliament has often not had the information it needs in order properly to scrutinise measures which have profound social, economic and health impacts.

- The Government has made positive changes in increasing the transparency of scientific advice and evidence. However, there have continued to be occasions where the Government has not been sufficiently transparent as to how advice and evidence has fed into policy making.

- The Coronavirus Act 2020 received very little parliamentary scrutiny when it was made, and the mechanisms for ensuring post-legislative scrutiny and accountability have been largely ineffective. Every six months the House of Commons can choose whether the Act should continue to be in force. However, this is an all or nothing event: Members can either approve the continuation of the Act as a whole or vote to expire it. They cannot amend or expire individual provisions. Voting to expire the Coronavirus Act would have such significant practical and political consequences that the Commons only really has one option in practice: to vote to continue the Act. In addition, insufficient time has been allocated to the renewal debates, which has limited the House of Commons’ ability to provide effective post-legislative scrutiny of the Act.

- The Government has continued habitually to use unamendable, delegated legislation to introduce measures which substantially affect people’s everyday lives and criminalise ordinary behaviour. We query the necessity of using delegated – rather than primary – legislation to implement significant policy changes after the initial crisis stage of the pandemic had passed.

- In the first six months of the pandemic there was widespread concern at the Government’s use of the urgent procedure to make regulations that came into force before they had been debated or approved by Parliament. The Government has made positive changes in response to this criticism, and has ensured that Parliament has had the opportunity to debate and approve in advance of implementation most of the major,

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national coronavirus measures. However, the Government continues to use the urgent procedure to accelerate standard parliamentary timescales. Again, we query the need for the Government to prioritise an urgent response over proper parliamentary scrutiny at this stage of the pandemic.

**Accessibility and clarity of coronavirus legislation**

- New coronavirus laws have continued to come into effect at very short notice, even when there does not seem to be a need for an urgent implementation of the new law. This makes it virtually impossible for individuals and businesses to get fully up to speed on their rights and responsibilities before new legislation comes into force.
- Many significant coronavirus laws are still being introduced via amending regulations. Because these amending regulations have been introduced at very short notice, a consolidated version of the original regulations – incorporating the amendments - has not always been publicly available by the time the new laws have come into force. This makes it very difficult to make sense of how the law has changed.
- The Government has continued to portray its public health advice as having the force of law. This has caused confusion among the public and the police, and has resulted in police forces acting beyond their powers by enforcing Government guidance rather than the law.

We conclude that, in general, the Government’s response to Rule of Law concerns raised at the six-month mark of the pandemic has been limited. During the first six months of the pandemic, the Government centralised power in the executive in order to respond quickly to the developing public health emergency. We recognise that the Government needed initially to prioritise a rapid response to the emerging COVID-19 pandemic, and centralised executive power enabled them to do that. However, Ministers appear to have grown accustomed to the ease with which laws can be made when the Government has enhanced legislative control, and seem reluctant to relinquish law-making functions back to Parliament now that the urgency of the initial stages of the pandemic has passed.

There is an urgent need to distil the lessons we have learned in the last 18 months about the extent to which our current legal framework and institutional arrangements are able to ensure that our response to public health emergencies is also compatible with our commitment to the Rule of Law.
About the Bingham Centre for the Rule of Law

The Bingham Centre is an independent, non-partisan organisation that exists to advance the Rule of Law worldwide. Established in 2010 as part of the British Institute of International and Comparative Law (BIICL), the Centre was brought into being to pursue Tom Bingham’s inspiring vision: a world in which every society is governed by the Rule of Law “in the interests of good government and peace at home and in the world at large.” The Rt Hon Lord Bingham of Cornhill KG was the pre-eminent UK judge of his generation, who crowned his judicial career by leaving us arguably the best account of what the Rule of Law means in practice and why it is so important in any civilised society -too important to remain the exclusive preserve of courts and lawyers. One of our strategic aims is to increase discussion about the meaning and importance of the Rule of Law in the political process.

• We carry out independent, rigorous and high quality research and analysis of the most significant Rule of Law issues of the day, both in the UK and internationally, including highlighting threats to the Rule of Law.

• We make strategic, impartial contributions to policy-making, law making or decision-making in order to defend and advance the Rule of Law, making practical recommendations and proposals based on our research.

• We hold events such as lectures, conferences, roundtables, seminars and webinars, to stimulate, inform and shape debate about the Rule of Law as a practical concept amongst law makers, policy makers, decision-makers and the wider public.

• We build Rule of Law capacity in a variety of ways, including by providing training, guidance, expert technical assistance, and cultivating Rule of Law leadership.

• We contribute to the building and sustaining of a Rule of Law community, both in the UK and internationally.

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Rule of Law Monitoring of Legislation Project

This Report is part of the Rule of Law Monitoring of Legislation Project. The project aims to systematically scrutinise Government Bills from the perspective of the Rule of Law, and to report on Bills which have significant Rule of Law implications. The goal is to provide independent, high quality legal analysis to assist both Houses of Parliament with its Rule of Law scrutiny of legislation. Previous Reports have been on the EU (Withdrawal Agreement) Bill and the Terrorist Offenders (Restriction of Early Release) Bill as well as on various coronavirus laws. Dr Ronan Cormacain is leading this Project.

The Report has been prepared by Katie Lines, Research Fellow in Rule of Law Monitoring of Coronavirus Legislation.
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Introduction

1. On 19th October 2021, the House of Commons will be asked to approve the continuation of the temporary provisions in the Coronavirus Act 2020 for another six months. This Report has been produced to assist Members of the House of Commons during that debate. It is intended to provide Members with an overview of the broader legislative context within which the renewal debate is situated.

2. Over the last 18 months, a vast amount of legislation has been enacted to respond to the COVID-19 pandemic. The provisions in the Coronavirus Act 2020 have been central to the Government's response, but are only the tip of the iceberg when it comes to coronavirus legislation. Thanks to the important monitoring work being done by the Hansard Society, we know that no fewer than 510 coronavirus-related statutory instruments have been laid before Parliament.²

3. We recognise that the Government has often had to act quickly to respond to an unprecedented public health crisis. However, the Rule of Law should not be set aside during a national emergency, but should instead form a core part of a state’s response to that emergency. Sustained compliance with the Rule of Law during a pandemic can actively assist “an effective pandemic response by promoting transparency, clarity, participation, engagement and representation, international cooperation, equality, accountability and anti-corruption, among other principles”.³ Rule of Law issues identified with the Government’s initial pandemic response should have been addressed as quickly as possible.

4. Over the last 18 months, the Government has received many recommendations from MPs, Peers and parliamentary committees as to how to improve compliance with the Rule of Law. The Bingham Centre itself conducted two Rule of Law analyses of the Coronavirus Act during its passage through Parliament, and has published multiple reports on coronavirus-related statutory instruments.⁴ In these reports we have repeatedly raised a number of Rule of Law concerns about the marginalisation of Parliament as well as about the clarity and accessibility of coronavirus legislation.

5. This Report asks how far the UK Government has acted to protect the Rule of Law after concerns have been brought to its attention, building upon a joint briefing paper that we published earlier this year in collaboration with the Constitution Unit.⁵ The Report consolidates the various Rule of Law concerns that were raised in the first six months of the pandemic, and considers how far those concerns have been addressed in the last year, after the initial crisis stage of the pandemic had passed. The principal Rule of Law concerns raised by the coronavirus legislation can be broadly grouped into two categories: 1. The extent to which Parliament has been able to scrutinise new laws and oversee the law-making powers of the executive; and 2. The accessibility and clarity of coronavirus legislation itself. This Report considers both of these categories in turn, and ends by briefly considering how far the judiciary has been effective in compensating for Rule of Law deficiencies.

⁴ These reports can be found at https://binghamcentre.biicl.org/categories/covid19
⁵ Meg Russell, Ruth Fox, Joe Tomlinson, Ronan Cormacain, ‘The marginalisation of the House of Commons under Covid has been shocking; a year on, Parliament’s role must urgently be restored’ (27 April 2021) <https://binghamcentre.biicl.org/comments/111/the-marginalisation-of-the-house-of-commons-under-covid-has-been-shocking—a-year-on-parliaments-role-must-urgently-be-restored>
Parliamentary Scrutiny

6. The Rule of Law protects the supremacy of the legislature.\(^6\) Parliament must be supreme in deciding the content of the law, and any law-making powers of the executive should be prescribed and controlled by Parliament.\(^7\) Parliament will not be supreme in deciding the content of the law if it cannot properly scrutinise proposed legislation. Even during times of emergency, Parliament’s ordinary legislative functions and its ability to scrutinise executive actions should be preserved as far as possible.\(^8\) Maintaining proper parliamentary scrutiny is important not just as a matter of principle, but also to ensure that emergency legislation is proportionate, justified, and free of errors or policy defects.\(^9\)

7. During the first few months of the pandemic, concerns grew over the extent to which Parliament was being excluded from decision making. The six-month anniversary of the Coronavirus Act became a focal point for parliamentarians and legal commentators to bring to the Government’s attention the need for greater parliamentary involvement in the coronavirus response. Strong sentiments were expressed by the Speaker of the House of Commons on 30 September 2020, who stated that “[t]he way in which the Government have exercised their powers to make secondary legislation during this crisis has been totally unsatisfactory… I now look to the Government to rebuild the trust with this House and not treat it with the contempt that they have shown.”\(^10\)

8. The main areas of concern regarding Parliament’s ability to scrutinise coronavirus laws are as follows:

   a. The evidence made available to Parliament;
   b. The extent to which Parliament has been able to scrutinise the Coronavirus Act 2020;
   c. The use of delegated legislation; and
   d. The procedures used to enact COVID-19 delegated legislation.

Evidence Made Available to Parliament

9. In order to facilitate parliamentary scrutiny, the Rule of Law requires proposed legislation to be adequately justified.\(^11\) Where appropriate, Parliament should be provided with explanatory reports and impact assessments before legislation is adopted.\(^12\) Parliament cannot properly scrutinise proposed legislation without knowing the evidential basis underpinning it, and the impact that the legislation may have. In addition, if Parliament is unable to assess the likely impact of new legislative measures, then it cannot uphold other principles of the Rule of Law: i.e. that the law is non-discriminatory, promotes equality, and respects human rights law.\(^13\)

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\(^7\) Venice Commission, ‘Checklist’, Benchmarks A5 and C


\(^10\) HC Deb 30 September 2020, vol 681 col 331

\(^11\) Venice Commission, ‘Checklist’, Benchmark A5

\(^12\) Venice Commission, ‘Checklist’, Benchmark A5

\(^13\) Venice Commission, ‘Checklist’, Benchmark D
The Use of Impact Assessments – six months into the pandemic

10. Impact assessments are evaluative assessments of the costs, benefits and risks of a proposed Government policy, including the likely direct or indirect impacts that the policy will have on individuals, society and/or businesses. The Government can use targeted impact assessments to consider the impact a policy will have on a particular group. For example, equality impact assessments are used to consider how individuals protected under the Equality Act 2010 will be affected by Government decision making. In some cases, the Government is legally required to produce an impact assessment before a policy is introduced. For example, data protection law requires a Data Protection Impact Assessment to be carried out before the Government implements a policy where personal data will be processed which is likely to result in a high risk to the rights and freedoms of individuals.14 Even where impact assessments are not formally required, they are a useful tool to help the Government weigh up the pros and cons of a particular policy proposal, and to enable Parliament fully to assess proposed legislation and make an informed decision on whether that legislation should be approved.

11. The legislative measures introduced to respond to the coronavirus pandemic were almost entirely novel, and had an unprecedented impact on businesses, society, and people’s everyday lives. Parliament should have been fully informed of the predicted impacts of coronavirus legislation before it was asked to scrutinise and approve that legislation.

12. The Government prepared a general impact assessment and an equality impact assessment for the Coronavirus Bill in March 2020, although the latter was not published until 28 July 2020 and does not appear to have been made available to Parliament before that date.15 An impact assessment is of little use to Parliament if MPs and Peers do not have access to it when the relevant legislation is being debated, and it is unclear why the Government did not make the equality impact assessment available to parliamentarians as soon as it was made.

13. Unfortunately, the production of a general impact assessment for the Coronavirus Bill marks the high point of the Government’s publication of impact assessments in the first six months of the pandemic. We have reviewed many of the key statutory instruments enacted between March-September 2020, and each ends by stating that no impact assessment has been prepared. This statement appears at the end of the regulations which created the first national lockdown in March 2020;16 eased the lockdown over the summer of 2020;17 required international travellers to self-isolate upon arrival in the UK from June 2020;18 required people to wear face coverings on public transport and in certain indoor locations;19 restricted gatherings in August and September 2020;20 and made it unlawful for people not to comply with an instruction to self-isolate given by NHS Test and Trace.21 Given the extraordinary nature of many of these instruments, it would have been desirable for impact assessments to have been produced for the most significant coronavirus measures, and this would have greatly assisted Parliament in its scrutiny of these instruments.

14. MPs and Peers pushed the Government to publish impact assessments for coronavirus measures on multiple occasions during the first six months of the pandemic. When the July

14 Article 35(1), (3) and (4), UK GDPR
17 SI 2020/568
18 SI 2020/592 and 2020/791
19 SIs 2020/907 and 2020/986
20 SI 2020/1045
2020 lockdown regulations were debated in the Lords, Baroness Thornton asked why Parliament was “not seeing any impact assessments at all, on any of these statutory instruments. Surely that must be possible, and it is not respectful of Parliament and accountability that those have not been forthcoming.” Similarly, on 2 September 2020, Sir Christopher Chope MP tabled a motion in the Commons to discuss the Government’s failure to produce impact assessments, noting that it was essential to provide Parliament with impact assessments before legislation was introduced in order to facilitate “proper debate” and ensure that legislative scrutiny is not simply “a tick-box exercise.”

15. As the pandemic progressed, there was often a gap between measures being announced and legislation being introduced, but impact assessments were not carried out even in relation to such deferred measures. Lord Rosser made this point when international travel regulations were introduced in June 2020, which required travellers to self-isolate upon arrival to the UK. Lord Rosser criticised the absence of an “impact assessment with the regulations, which is due, we are told, to the rush with which they are being introduced. This is despite the fact that the Prime Minister gave notice of these quarantine measures nearly four weeks ago in his televised address to the nation.”

16. The Government’s response to these concerns was to note that a formal regulatory impact assessment was not required for temporary measures, and that the speed at which the Government was responding to the pandemic made the production of impact assessments “problematic.” But, as a part of good governance, the Government was no doubt assessing the impacts of proposed coronavirus measures while the policies were being formulated, and it is not clear why these informal impact assessments could not have been published. If the Government was not in fact assessing the impacts of significant coronavirus measures, then that would be concerning given the severe potential impacts of policies introduced in response to the pandemic. There is some evidence that this may have been the case for some measures. For example, in July 2020, the Government admitted that they had not undertaken a Data Protection Impact Assessment before rolling out the NHS Test and Trace service, despite this being required by law.

The Use of Impact Assessments – 18 months into the pandemic

17. The Government was therefore made well aware of the importance of impact assessments in the first six months of the pandemic. It has not, however, heeded that advice. Almost all the coronavirus regulations that we have reviewed during the last year end by stating that no impact assessment has been prepared. This statement appears at the end of the regulations introducing the three-tier lockdown system in October 2020, the second national lockdown in November 2020, the return to a three-tier lockdown system in December 2020, the creation of Tier 4 at the end of 2020, the national lockdown in January 2021, hotel quarantine in

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22 SI 2020/788
23 HL Deb 18 September 2020, vol 805, col 1561
24 HC Deb 2 September 2020, vol 679, col 256
25 SI 2020/568
26 HL Deb 4 June 2020, vol 803, col 1528
27 i.e. measure that last less than 12 months – see the provisions in the Small Business, Enterprise and Employment Act 2015, s.22
30 SIs 2020/1103, 2020/1104, 2020/1105
31 SI 2020/1200
32 SI 2020/1374
33 SI 2020/1611
34 SI 2021/8
February 2021, the Steps regulations which set out the spring/summer 2021 roadmap for leaving lockdown, and the regulations which allowed many double-vaccinated individuals to avoid self-isolating if exposed to Covid-19 or when entering England after visiting an amber list country. In the House of Commons debate on the Steps regulations which set out the spring/summer 2021 roadmap for leaving lockdown, Sir Christopher Chope MP queried how the House could support the regulations “when there is not even an impact assessment for them”.

18. An informal impact assessment was produced for the regulations introducing the return to a three-tier lockdown system in December 2020. This assessment was published after the regulations had been made and one day before they were debated by the House of Lords. However, it was roundly criticised by the Lords. Lord Hunt of Kings Heath called it a “cut-and-paste job, strewn with errors”, Baroness Neville-Rolfe said the assessment “barely helps at all”, while Baroness Noakes complained about the lack of a “proper impact assessment for the various Covid measures” and said that it was “difficult to find the right words to describe” the document “which was supposed to provide this analysis”.

19. Similarly, a brief statement of impact was produced for the health and social care regulations which require care home workers to be vaccinated from 11 November 2021 (“the Social Care Regulations”) – a significant and controversial measure with obvious wider implications. However, the statement of impact was published after the Regulations had been debated by the Commons, so was of no assistance to scrutiny in that House. The assessment was published only the day before the Lords debate, and some Peers appear to have been unaware of its existence in advance of the debate. The Lords also continued to query why a full impact assessment had not been published, and described the statement of impact as a “flimsy document” which “fails short of an impact assessment” and “does not provide the evidence for its assertions”.

20. The House of Lords Secondary Legislation Scrutiny Committee had previously recommended that Parliament’s consideration of the Social Care Regulations be deferred until a full impact assessment and operational guidance was available, because otherwise “effective parliamentary scrutiny is impossible”. It is not clear why the Government did not act upon this recommendation. There was plenty of time for a deferral to take place – the regulations were laid on 22 June 2021 and do not come into force until 11 November 2021.

21. When the Social Care Regulations were debated in the Commons on 13 July 2021, James Harper MP complained that “it is not good enough to expect us to vote on something that is difficult, controversial and complicated and not share with the House the information that the

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35 SI 2021/150
36 SI 2021/364
37 SI 2021/851 and 2021/865
38 HC Deb 25 March 2021, vol 691, col 1153
40 HL Deb 1 Dec 2020, vol 808, col 683
41 Ibid., col 692
42 Ibid., col 698
44 See comments made by Baroness Wheeler in HL Deb 20 July 2021, vol 814, cols 207
45 See comments made by Baroness Noakes and Baroness Briton in HL Deb 20 July 2021, vol 814, cols 214 and 224
Minister has at her disposal. It is an abuse.”47 Similar sentiments were expressed in the Lords debate on 20 July 2021, when Baroness Noakes accused the Department of Health and Social Care of showing “contempt for Parliament” by failing to provide a full impact assessment, noting that the “department has doggedly resisted releasing full impact assessments on Covid instruments.”48

22. It is disappointing that, despite being clearly told in the first 6 months of the pandemic about the importance Parliament attaches to impact assessments, the Government has continued to fail to provide Parliament with the information it needs in order properly to scrutinise measures which have profound social, economic and health impacts, even when there has been plenty of time for an impact assessment to be produced before measures are debated. As Baroness Neville-Rolfe put it in November last year: “[t]he House accepted a lack of cost-benefit analysis and impact assessment for the emergency measures in March. That was a failure of scrutiny by us but, deplorably, the Government have made it a habit.”49

Transparency of Advice and Evidence – Six months into the pandemic

23. As well as failing to provide Parliament with impact assessments, during the first six months of the pandemic the Government was widely considered not to have been sufficiently transparent in disclosing the evidence and advice upon which its decisions were based. At the start of 2021, the House of Commons Science and Technology Committee published a report considering the use of scientific evidence in the UK’s response to Covid-19 from the start of the pandemic up to November 2020. This report stated that “a central concern” of the Committee “from the beginning of the pandemic has been the initial lack of transparency of the science advice being utilised by the Government, and those individuals and bodies responsible for giving it.”50 Parliament cannot properly scrutinise Government decision making without knowing the advice and evidence upon which policy decisions are based.

24. The body primarily responsible for providing scientific and technical advice to the Government in emergency situations is the Scientific Advisory Group for Emergencies (“SAGE”), which first met to consider Covid-19 on 22 January 2020. SAGE’s initial publication schedule of the evidence considered at its meetings was delayed and sporadic. Evidence considered by SAGE was first published on 20 March 2020, but the next substantial collection of evidence was not published until 5 May 2020.51 By June 2020, the majority (92 out of 120) of the papers considered by SAGE had not been published, meaning that most of the evidence which informed SAGE’s decision-making was not publicly accessible.52 However, the Government took on board criticism it received, and by November 2020 a regular publication rhythm had been established.53

25. SAGE was also slow to start publishing minutes from its meetings. The Government’s initial position was that the minutes from SAGE’s meetings would not be published until the end of the pandemic. This was stated to be the normal procedure except in cases of national security.54 This lack of transparency was criticised by the Science and Technology Committee, which wrote to the Prime Minister on 18 May 2020 urging greater visibility of

47 HC Deb 13 July 2021, vol 699, col 272
48 HL Deb HL Deb 20 July 2021, vol
49 HL Deb 4 Nov 2020, vol 807, col 775
51 Ibid., p. 29
52 Ibid., p.62 and see the list of meeting papers published on gov.uk: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/883086/sage-meeting-papers.csv
53 Ibid., p. 35
54 See comments made by Lord Callanan in HL Deb 28 April 2020, vol 803, col 189
scientific advice either by publishing SAGE’s actual advice to Ministers, minutes from its meetings, or a summary of advice given to Government. The Government was also criticised by parliamentarians. In a debate on 11 May 2020, the Rt Hon Jeremy Hunt MP condemned the “secrecy that surrounds everything SAGE does,” explaining that “[b]ecause its advice is not published, it cannot be subjected to scientific challenge. Nor is parliamentary scrutiny possible, even when a Government say they are following the science”.

26. SAGE eventually began publishing the minutes from its meetings on 29 May 2020, four months after the group first met and two months after the UK entered the first national lockdown. However, the publication of SAGE’s minutes was not always timely, with a 2-5 week delay usually occurring between meetings taking place and their minutes being made public. The publication of some minutes was even more delayed – the minutes from SAGE’s 30 July 2020 meeting were not published until 11 December 2020. With the fast-moving pace of the Government's response to the pandemic, timely publication of SAGE’s minutes would have enabled government policy to be more effectively scrutinised with the benefit of the latest scientific information.

27. From a Rule of Law perspective, SAGE’s advice should at the very least be made available by the time Parliament is scrutinising the legislation to which the advice relates. Unfortunately, when parliamentarians asked to see the scientific advice that the Government had relied upon, the response was at times less than forthcoming. On 3 June 2020, for example, during a Commons debate on the introduction of a 14-day quarantine period for international travellers, the Home Secretary was asked whether SAGE was consulted on the new measures and whether its advice would be published. The Home Secretary’s response was that Ministers were guided by SAGE, and “SAGE publishes its advice accordingly”. The quarantine proposals were debated in the Lords the following day, and Peers again asked what scientific advice the measures had been based upon and whether that advice would be published. Baroness Williams of Trafford – the Minister of State for the Home Office - responded by stating that SAGE advised the Government and “it is for SAGE to determine when to publish its advice”. In a further debate a week later, Lord Balfe urged Baroness Williams “to say to SAGE that the advice must be published very soon if it is to have any credibility.” Baroness Williams remained steadfast in her position that “[i]t is a matter for SAGE when to publish its advice.”

28. More broadly, during the first six months of the pandemic there was a general lack of transparency as to how evidence and advice fed into government policy decisions, including what factors the Government had considered outside of medical science. The Science and Technology Committee’s report on the first six months of the pandemic noted that policy decisions had not been based solely on medical and epidemiological science, but had also involved the consideration of economic, social and other health impacts. Yet the Committee found that the Government had not made sufficiently clear the advice and evidence it had received outside of SAGE, and recommended that the Government “should, as a matter of urgency, publish the advice it has received on the potential indirect covid-19 impacts (e.g. economic, social and other health impacts) of the interventions it has undertaken, alongside the evidence base for that advice and should continue to commission such research.”

29. The Government should work with Parliament by explaining the advice upon which its decisions have been based and prioritising the publication of that advice where at all possible. Effective parliamentary scrutiny of coronavirus legislation requires Parliament to have access to the relevant scientific advice.

55 Science and Technology Committee, ‘The UK response to covid-19’, p. 63
56 HC Deb 11 May 2020, vol 676, col 59
58 HC Deb 3 June 2020, vol 676, col 871
59 HL Deb 4 June 2020, vol 803, cols 1531 and 1535
60 HL Deb 10 June 2020, vol, 803, col 1747
61 Ibid.
Transparency of Advice and Evidence – 18 months into the pandemic

30. The Government has made some positive changes in this area in response to criticism received in the first six months of the pandemic. SAGE is continuing to publish the minutes from its meetings, which are now usually available within a week of meetings taking place. The minutes from SAGE’s meeting on 9 September 2021 were published on 14 September, while the preceding minutes from SAGE’s 7 July 2021 meeting were published on 12 July.\(^63\) This is a welcome improvement in transparency.

31. SAGE is also continuing regularly to publish the evidence considered at its meetings, including publishing papers from previous meetings that had not been disclosed at the time. For instance, between October 2020 and September 2021 nineteen additional papers were added to the publications list for SAGE’s meetings from July 2020.\(^64\) In addition, the Government published an analysis by SAGE in February 2021 of the spring/summer 2021 roadmap for leaving lockdown, which fully footnoted the evidence SAGE relied upon.\(^65\) This evidence was taken not only from medical and epidemiological science, but also included a socio-economic analysis of each of the Steps in the 2021 spring/summer roadmap.

32. We note that a full list of the evidence papers that have been considered by SAGE, outlining which of those papers have been published, does not appear to be available on the Government’s website. A spreadsheet showing this information was previously updated and published on gov.uk until at least June 2020.\(^66\) We recommend that the Government resumes the publication of this information. Otherwise, Parliament will not know if there is any evidence considered by SAGE which has not yet been made public.

33. Despite improvements in the transparency of SAGE’s advice and evidence, there have continued to be examples of the Government failing to be sufficiently transparent as to how advice and evidence has fed into policy making. In March 2021, the House of Commons Public Administration and Constitutional Affairs Committee published a report on its inquiry into Government transparency and accountability during COVID-19. The report describes Ministers being unable to explain to the Committee how key decisions had been made during the pandemic, and what data underpinned these decisions. The Committee was of the opinion that this was a “lamentable and unacceptable” failure of Government and that fielding “Ministers who cannot answer questions is wilful evasion of scrutiny.”\(^67\)

34. Unless the Government explains how and what data factored into its decision-making, it is difficult for Parliament fully to scrutinise certain coronavirus measures. This is especially the case when those measures do not seem fully to follow the scientific advice that has been published. In February 2021, for example, the Government made regulations introducing a system of hotel quarantine, whereby travellers from certain “red list” countries were required to quarantine in specified hotels for at least 10 days after arriving in England.\(^68\) The explanatory notes to the regulations explained that hotel quarantine was necessary “to prevent the ingress from overseas of a variant of concern”. But shortly before these regulations were made, SAGE published minutes from a meeting at which it found that while “[t]he emergence of new variants of concern around the world presents a rationale for attempting to reduce importation of even small numbers of infectious cases. No intervention, other than a complete, pre-emptive closure

\(^63\) See: https://www.gov.uk/government/collections/sage-meetings-may-2021
\(^64\) See: https://www.gov.uk/government/collections/sage-meetings-july-2020
\(^68\) SI 2020/150
of borders, or the mandatory quarantine of all visitors upon arrival in designated facilities, irrespective of testing history, can get close to fully preventing the importation of cases or new variants. Reactive, geographically targeted travel bans cannot be relied upon to stop the importation of new variants, due to the lag between the emergence and identification of variants of concern, as well as the potential for indirect travel via a third country.”

35. The hotel quarantine regulations do not seem to be fully consistent with SAGE’s advice. Presumably, the Government made the decision to impose a reactive, geographically targeted hotel quarantine scheme, despite SAGE’s warnings, after balancing the public health risks against the economic and social impacts of a comprehensive hotel quarantine scheme. But the rationale and economic evidence supporting a partial hotel quarantine scheme was not explained to Parliament in the debates preceding the introduction of the regulations. After the regulations were made, Baroness Thornton tabled a regret motion about the hotel quarantine regulations because the scheme did not follow SAGE’s advice. At that point, Lord Bethell – the Parliamentary Under-Secretary of State for the Department of Health and Social Care – explained that a partial quarantine scheme had been adopted because:

“While we wait for the evidence to become clearer and more conclusive, we have to balance. On the one hand, there is the very natural, reasonable and pragmatic instinct to pull up the drawbridge and use our island status to protect ourselves from the unknown… On the other hand, there is accommodating the very reasonable, natural and human desire of the British public and those who live overseas to travel in and out of the country. It is a matter of national identity, economic value and diplomatic heft that we keep our borders open during this period. We are a trading nation, we work in partnership with other countries and we depend on other countries for essential supplies—not only medicines but food and others. Although we could put a haulier programme in place to protect our trade routes, it would be an enormous diplomatic blow and a decision that we would take with huge regret. That is the reason for the system that we have in place at the moment.”

36. This explanation is brief, and no data is cited in support. In addition, it is unfortunate that Parliament did not receive an explanation as to why the Government had not fully followed SAGE’s advice until a regret motion was tabled. For Parliament to perform its important constitutional function of effectively scrutinising policy and legislation, the Government must make clear to Parliament when coronavirus legislation is laid the scientific and other evidence and advice upon which that legislation is based. The Government should explain how this evidence and advice influenced policy making, including where and why the Government departed from advice it received.

### Scrutiny of the Coronavirus Act

#### Six months into the pandemic

37. When the coronavirus pandemic reached the UK, Parliament responded swiftly to pass the Coronavirus Act 2020 in four sitting days. The 2020 Act contains significant powers, including those used to introduce the furlough scheme, postpone elections, and prevent tenants in rented accommodation from being evicted. The 2020 Act received very little scrutiny at the time it was made due to the speed with which it was enacted, but it has two main mechanisms for ensuring subsequent scrutiny and accountability: every two months the Health Secretary must publish a report on the status of the non-devolved provisions in the Act; and every six months the House of Commons must vote on whether the temporary

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70 HL Deb 22 March 2021, Vol 811, Col 652
provisions of the Coronavirus Act 2020 should expire.\textsuperscript{71} Neither of these mechanisms worked particularly well during the first six months of the pandemic.

Two-month reports

38. The two-monthly reporting requirement within the Coronavirus Act is very minimal – the Act merely requires that reports be published “on the status of the provisions” in the Act, setting out which provisions are in force and whether the status of any provisions has changed (i.e. if provisions have been expired or suspended). The reports must also include a “statement that the Secretary of State is satisfied that the status of those provisions is appropriate”.\textsuperscript{72} The reports published by the Secretary of State in the first six months of the pandemic complied with these requirements but were otherwise lacking in detail. In September 2020, the Public Administration and Constitutional Affairs Committee found that the reports did not give enough detail to be an effective tool for scrutiny, and recommended that the Government includes in future reports “evidence-based arguments for why the provisions continue to be necessary and quantitative evidence on the impact of using those provisions.”\textsuperscript{73}

39. As such, the Committee recommended that the Government go beyond what the Coronavirus Act required. This is an indication that the drafting of the two-month reporting requirement in the Coronavirus Act was deficient, in that it did not ensure that the reports would contain enough detail to enable Parliament to provide effective post-legislative scrutiny of the Act. This defect was apparent when the Coronavirus Bill was first debated. In March 2020, the Bingham Centre published an analysis of the Bill, and noted that “the obligatory content of the [two-month reports] is threadbare” and there “is a lack of effective mechanism for parliamentary scrutiny”. We recommended that the Bill be amended to require the reports to contain more detail, such as information on how effective each provision in the Coronavirus Act had been at combating the threat of coronavirus, how often it had been used, and how far each provision had been complied with.\textsuperscript{74} Unfortunately, the Bill was passed without such an amendment.

Six-month reviews

40. The first six-month review by the House of Commons of the temporary provisions in the Coronavirus Act 2020 also proved to be an insufficient tool for scrutiny and accountability. There are two issues with the six-month review provision. First, there is an inherent problem with the drafting of the provision. The renewal vote is an all or nothing event: the House of Commons is required to vote on whether all the temporary provisions in the Act should continue to be in force. Members of Parliament can either approve the continuation of all the temporary provisions of the Act or bring them all to an end. There is no ability for Members to decide that only some of the provisions should cease to be in force. Only the Government has the power to suspend or expire individual provisions of the Coronavirus Act, via delegated legislation. As a result, the Coronavirus Act consolidates power in the Government rather than Parliament.

41. Fiona de Londras has noted that ‘all or nothing’ renewal motions “create the appearance of parliamentary control”, while actually imposing severe constraints on parliamentary agency.\textsuperscript{75} The weighty consequences, and potential political implications, of voting for the expiry of all the

\textsuperscript{71} Coronavirus Act 2020, sections 97 and 98
\textsuperscript{72} Coronavirus Act 2020, section 97
\textsuperscript{73} Public Administration and Constitutional Affairs Committee, \textit{Parliamentary Scrutiny of the Government’s handling of Covid-19} (2019-2020, HC 377), paragraph 64
\textsuperscript{74} Ronan Cormacain, ‘Rule of Law Monitoring of Legislation – Coronavirus Bill’ \textit{The Bingham Centre for the Rule of Law} (March 2020), p.17
Coronavirus Act’s temporary provisions are likely to make most MPs feel that they have no option other than to support the continuation of the Act. This means that the six-month review provision is drafted in a way that effectively guarantees the outcome will be a vote to renew the temporary provisions.\textsuperscript{76} This problem was raised when the Act first passed through Parliament. During the second reading in the Commons, David Davis MP stated that “we will perhaps be faced with eight good bits of legislation and one or two bits that are doing badly, and we will be forced to vote the whole thing through, rendering [the six-month review] a rubber stamp”.\textsuperscript{77}

42. The second Rule of Law concern is the limited time allocated for debate of the first six-month review motion on 30 September 2020. The debate was scheduled only for 90 minutes, with backbenches given a 3-minute time limit to their speeches. 90 minutes simply is not enough time for the House to debate a 348-page Act and its operation during the first six months of a pandemic. Members complained about the limited debating time, with Sir Charles Walker stating that: “Ninety minutes is an utter, utter disgrace. It is actually disrespectful to this House and it is disrespectful to colleagues.”.\textsuperscript{78} During the debate, the Health Secretary explained that the Standing Orders of the House only allowed the debate to be scheduled for 90 minutes, but the Speaker of the House contradicted this, stating “the Secretary of State said that the time could not have been extended. Yes, it could, and I would have agreed to it.”.\textsuperscript{79}

43. Even if the Government had its hands tied with the amount of time that could be allocated for the first six-month review debate, there were other ways to ensure that the House of Commons had a proper chance to scrutinise the operation of the Act and make recommendations as to which, if any, sections should be suspended or expired by Ministers. In September 2020, the Public Administration and Constitutional Affairs Committee recommended that the Government schedule thematic debates on provisions within the Coronavirus Act 2020, to allow the House an opportunity for greater scrutiny. The Committee recommended that each of these debates have a substantive motion for debate, which would not be legally binding, but would allow for the House to express a clear view.\textsuperscript{80}

18 months into the pandemic

44. This is an area where the Government has made some, albeit limited, attempts to increase parliamentary scrutiny, although we recognise that some of the problems we have identified arose from the drafting of the Coronavirus Act 2020 and not subsequent Government action or inaction.

Two-month reports

45. From November 2020 onwards, the two monthly status reports were expanded to include a section discussing in more detail the impact of some of the Coronavirus Act’s key provisions, and explaining why the Government felt that it was necessary for those provisions to remain in force. This is a positive change with the potential to significantly enhance parliamentary scrutiny. In practice, however, the Government’s expanded reports have often proved to be surface-level summaries of the Act’s purported achievements, without inclusion of all the information needed to enable Parliament properly to consider whether the provisions of the Act should continue to be in force.

\textsuperscript{76} Ibid.
\textsuperscript{77} HC Deb 23 March 2020, vol 674, col 70
\textsuperscript{78} HC Deb 30 September 2020, vol 681, col 411
\textsuperscript{79} Ibid., col 392-393
\textsuperscript{80} Public Administration and Constitutional Affairs Committee, \textit{Parliamentary Scrutiny}, paragraph 59
46. For example, the September 2021 report – the last report produced before the 18-month renewal debate scheduled for 19 October 2021 - discusses section 53-56 of the Coronavirus Act. These sections expanded the use of remote technology, including audio and video live links, in criminal proceedings. From reading the Government’s impact assessment, one would think that the expanded use of remote technology only produced positive results. For example, the report states that the increased use of digital hearings has allowed “the courts to deal promptly and safely with proceedings, avoiding unnecessary social contact and travel, whilst allowing key services within the justice system to continue to be delivered while upholding the principle of open justice.”

47. There is no candid discussion here of any potential negative consequences of expanding the use of technology in criminal proceedings. But concerns have been raised by the Joint Committee on Human Rights and the Select Committee on the Constitution about the potential negative consequences of the digitisation of criminal proceedings. The Select Committee on the Constitution conducted an inquiry into the operation of the court system during Covid-19, and concluded that “the shift to remote hearings may have undermined litigants’ ability to engage appropriately with courts and tribunals, potentially to the detriment of their own case,” and created difficulties for effective communication between court users and their legal advisers, which could be “undermining access to justice.” This is the type of information that the Government’s impact assessment should contain. Without a more balanced assessment of the impact of measures taken under the Coronavirus Act, it is hard for Parliament to reach a fully informed view on whether the Act should continue to be in force. More broadly, parliamentary committees have spent many hours carefully and thoroughly assessing the impact that coronavirus legislation has had on the UK. It seems a missed opportunity for the impact assessment in the Government’s two monthly reports not to draw upon this wealth of information.

Six-month review

48. At first glance, it appears that the time allocated to the one-year debate on the renewal of the temporary provisions in the Coronavirus Act on 25 March 2021 was an improvement on the time given to the six-month renewal debate. Much more time was allocated for the one-year debate: 3.5 hours compared to 90 minutes for the six-month debate. However, the one-year renewal debate was combined with debates on three further measures: (1) consideration of the one-year report on the status of the non-devolved provisions of the Coronavirus Act, (2) a motion to approve the regulations implementing the roadmap for easing lockdown restrictions, and (3) a motion to extend the temporary Standing Orders governing MP’s proxy voting and virtual participation rights during the pandemic. It makes sense for the debate on the renewal of the Coronavirus Act to be scheduled at the same time as the House of Commons’ consideration of the one-year report on the status of the Act. However, it is not clear why the other two motions were also debated during this time. All four motions would have been allocated more than a cumulative 3.5 hours debating time had they been debated separately. By rolling all the motions into one debate, the Government severely limited MP’s ability to comment on each of them. Predictably, the debate was oversubscribed, and backbenchers were subject to a speech limit of four minutes. This is only a one-minute improvement on the six-month renewal debate. MPs themselves were dissatisfied with the Government’s failure to allow them proper time to scrutinise the continuation of the Coronavirus Act and the other motions being debated. Jonathan Ashworth MP stated that “the Government could have found

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83 SI 2021/234
84 Meg Russell, Ruth Fox, Joe Tomlinson, Ronan Cormacain, ‘The marginalisation of the House of Commons’
85 Ibid.
time for this debate to take place in the House over a couple of days, so that Members could table amendments and we could properly scrutinise the legislation.”

49. The Government has also failed to implement the recommendation of the Public Administration and Constitutional Affairs Committee that thematic debates should be scheduled on the temporary provisions within the Coronavirus Act to allow Parliament more of a chance to make its views known to Government. However, debates have taken place on a wide range of coronavirus measures thanks to the initiative of individual MPs and Peers.

The Use of Delegated Legislation

Six months into the pandemic

50. While the Coronavirus Act 2020 is an incredibly important piece of legislation, many of the laws enacted in response to the pandemic have come not from the Act itself, but rather from a wide array of delegated legislation. By the end of the first six months of the pandemic, 247 coronavirus-related statutory instruments had been laid before the UK Parliament, only 16 of which were laid using powers conferred in the Coronavirus Act 2020.

51. Parliament’s ability to scrutinise delegated legislation is currently very limited. Delegated legislation cannot be amended by Parliament other than in exceptionally rare circumstances. Notably, one of those rare circumstances is provided for by section 27(3) of the Civil Contingencies Act 2008, which allows Parliament to resolve that regulations made under the Act “shall have effect with a specified amendment” (emphasis added). The Civil Contingencies Act is designed to give local authorities and Government the powers needed to respond effectively to emergencies, but it has not been used during the current pandemic. Instead, regulations have been made using Acts of Parliament that do not allow for amendments to the regulations made under them.

52. The general inability of Parliament to amend delegated legislation means that MPs and Peers are almost always presented with an all-or-nothing choice when scrutinising statutory instruments: either approve or reject the instrument in its entirety. Either House would be making a significant political statement if it were to reject a statutory instrument, and this rarely happens in practice. There is therefore very little scope for Parliament to push for changes to be made to the detail of proposed statutory instruments, and little incentive for the Government to compromise in response to Parliamentary pressure. In addition, Parliament spends far less time debating secondary legislation than it spends debating primary legislation.

53. We recognise that there has been a general trend, starting well before the pandemic, towards the increased use of statutory instruments to legislate in areas of principle and policy, rather than simply matters of administrative procedure or technical detail. However, the acceleration of this trend during the pandemic is concerning from a Rule of Law perspective, given Parliament’s limited ability to scrutinise delegated legislation. The Constitution Committee of the House of Lords has suggested that there should be limits to the type of laws that are made

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86 HC Deb 25 March 2021, vol 691, col 1122
88 For a discussion of how the Civil Contingencies Act could have factored into the pandemic response, see the House of Lords Select Committee on the Constitution, COVID-19 and the use and scrutiny of emergency powers (2021-22, HL 15), pages 10-13.
89 This point was made by the Constitution Committee in ‘Delegated Legislation and Parliament: A response to the Strathclyde Review’ (2015-2016, HL 116), at paragraph 25.
using delegated legislation, and that it is in general constitutionally unacceptable for delegated powers to institute significant constitutional change, or create regulations that will have a major impact on an individual’s right to respect for private life.

54. While many of the statutory instruments enacted in response to the pandemic dealt with minor matters, others instituted unprecedented changes to people’s everyday lives. In particular, during the first six months of the pandemic, regulations made under the Public Health (Control of Disease) Act 1984 were used to introduce a national lockdown and self-isolation regime in England. These regulations criminalised previously ordinary behaviours, like leaving one’s home and meeting friends outdoors, and were subject to stringent enforcement by the police. Ordinarily, it would be deeply concerning from a Rule of Law perspective for delegated legislation to be used to enact such extreme laws. However, the Government may need to use its delegated law-making powers in emergency situations in circumstances when this would otherwise be constitutionally objectionable, in order to facilitate a swift response to a dangerous or fast-changing situation.

55. The start of the pandemic was clearly such an emergency which called for a swift response, and prior Parliaments have authorised the Government using delegated legislation to impose wide-ranging restrictions in such circumstances. The sections of the Public Health Act 1984 that the Government used to create the lockdown regulations were inserted into the Act in 2008 in response to the SARS pandemic, so as to “allow a quick response to new or unknown diseases.” But the Secretary of State for Health at the time emphasised that the power to make public health regulations should be “used only when appropriate, and only to the extent necessary to secure the protection of public health.” This sentiment is consistent with the general Rule of Law principle that any changes to law-making procedures made in response to emergencies should be strictly necessary and proportionate to the emergency situation.

56. By the six-month mark of the pandemic, it was less clear why it was necessary for the Government to continue to use delegated legislation as the default means of implementing the wide-ranging restrictions enacted in response to the pandemic. By this time, the virus was better understood, and it seems that the type of interventions that may be needed could to a large extent be predicted in advance. We made this point in September 2020, when we noted that “as the pandemic progresses, it is less clear that we need the vehicle [for new coronavirus restrictions] to be secondary legislation.” Parliamentarians raised similar concerns. On 22 October 2020, the House of Lords debated the regulations introducing the self-isolation regime, which were made on 27 September 2020. During the debate, Lord Scriven stated that “[s]elf-isolation during a public health threat is not something that you cannot foresee. This should have been proper, primary legislation.” Similarly, in September 2020 the Public Administration and Constitutional Affairs Committee expressed concern that “Members have no mechanism to amend [coronavirus] legislation which is being made under statutory instrument”. The

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93 See the comments made by Alan Johnson, the Secretary of State for Health at the time, during the second reading of the Bill (HC Deb 25 November 2007, vol 468 col 44)
94 Ibid.
97 SI 2020/1045
98 HL Deb 22 October 2020, vol 806, col 1672
Committee recommended that the Government “gives higher priority to facilitating parliamentary scrutiny of such legislation in future”.99

18 months into the pandemic

57. The use of delegated rather than primary legislation is an area where the Government has made no changes in response to concerns raised at the six-month mark of the pandemic. The Government has continued to use delegated legislation to introduce measures that impose severe restrictions backed by criminal sanctions. Of particular concern is that a number of the most extreme legislative measures introduced via delegated legislation were announced weeks prior to their implementation, raising questions as to how necessary it was for the Government to use delegated rather than primary legislation. For example, on 22 February 2021 the Government published guidance outlining its proposed roadmap for leaving lockdown during spring/summer 2021.100 The roadmap was implemented via delegated legislation, which did not come into force until over a month later, on 29 March 2021.101 Another example is found in the regulations requiring care home workers to be vaccinated. These regulations were laid before Parliament in draft on 22 June 2021 and are not due to come into force until 11 November 2021.102 When the regulations were debated in the Lords, several Peers stated that the policy should have been made via primary legislation, noting that there was ample time for this to have taken place.103

58. The most recent major piece of coronavirus legislation that the Government has announced is mandatory Covid-19 vaccine certificates in venues and events, which may be introduced as part of the Government’s “plan-B scenario”. The Public Administration and Constitutional Affairs Committee has urged that any Covid-status certification system must be introduced “by way of primary legislation” to “allow for the full implications and ramifications of the proposal” to be fully and properly considered by the Government and “allow Parliament the appropriate amount of time to consider, scrutinise and where necessary amend the Government’s proposals”.104 Nonetheless, the Government has since stated that it expects “certification would be implemented by making regulations”.105

59. The continued, habitual use of delegated legislation to enact major pieces of coronavirus legislation suggests a seeming reluctance among Ministers to relinquish back to Parliament the expanded law-making functions that the Government understandably took to itself at the start of the pandemic.

Procedures Used to Enact COVID-19 Delegated Legislation

Six months into the pandemic

60. There are Rule of Law problems not just with the Government’s habitual use of delegated – rather than primary – legislation to enact significant coronavirus measures, but also with the procedures that the Government has used to make delegated coronavirus legislation. One of the most frequently raised concerns at the six-month mark of the pandemic was that the Government was routinely enacting coronavirus regulations using procedures which allowed

99 Public Administration and Constitutional Affairs Committee, Parliamentary Scrutiny, paragraph 48
101 SI 2021/364
102 SI 2021/891
103 See comments made by Lord Cormack and Baroness Noakes, HL Deb, 20 July 2021 vol 814, cols 217 and 214
for the minimal level of parliamentary scrutiny possible. Regulations were frequently made in a way which meant that they came into force before Parliament was able to consider and debate them. Of course, we recognise that it may be necessary to fast-track legislation in this manner to enable the Government to respond quickly to an emerging crisis. However, legislation continued to be fast-tracked after the initial emergency period had come to an end. In addition, Parliament was often not given a chance to scrutinise and approve coronavirus regulations until weeks, and in some cases months, after the regulations had come into effect. By this time many regulations had been superseded, rendering parliamentary scrutiny an academic exercise, and effectively preventing Parliament from having any meaningful involvement in the legislative process. There seems to have been nothing preventing the Government from scheduling debates in a timelier manner.

61. The introduction of the first English national lockdown regulations in March 2020 is a good example of the marginalisation of Parliament. As with all the lockdown regulations made in England, the first lockdown regulations were made under the Public Health (Control of Disease) Act 1984. Ordinarily, regulations made under this Act are subject to the ‘draft affirmative’ procedure, meaning that they must be laid before Parliament in draft and cannot be made into law or come into force until they have been approved by both Houses. However, section 45R of the Act allows the Government to forgo standard levels of parliamentary scrutiny in emergency situations. In cases of urgency, regulations can be made and come into force without a draft having been laid and approved by Parliament, so long as the Secretary of State makes a declaration that he “is of the opinion that, by reason of urgency, it is necessary to make the order without a draft being so laid and approved”. This means that Parliament does not need to approve or even have sight of urgent regulations before they come into effect: the Government is able to create and bring into force new laws without first seeking Parliamentary approval. Parliament still has some control over regulations enacted under the urgent procedure, as the regulations will lapse and cease to be law if they are not approved by resolution of each House within 28 sitting days of the regulations being laid. If Parliament is adjourned during those 28 days, time stops until Parliament resumes sitting, so in practice the 28-day period can be significantly longer if regulations are made shortly before recess. Overall, the procedure is an extremely weak and, before the pandemic, a very rarely used form of control. The urgent procedure is otherwise known as the ‘made affirmative procedure’.

Affirmative parliamentary procedures

Draft affirmative

- The instrument is laid in draft before each House and cannot be made unless approved by resolution of both Houses.

Made affirmative

- A version of the affirmative procedure that can be used in cases of urgency. An instrument can be made and come into force without parliamentary approval, but will expire within a specified period unless it is approved by resolution of both Houses.

62. The first English national lockdown regulations were made using the urgent, made affirmative procedure. These were the regulations that introduced the requirement for people to stay at home, closed businesses and premises, and placed restrictions on people gathering in public in groups of more than two people. The regulations were made at 1pm on 26 March 2020 and came into force immediately. They were laid before Parliament an hour and a half later, the day after Parliament had gone into Easter recess, and were not debated by the House of

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106 SI 2020/350
Commons until 4 May 2020 and by the Lords until 12 May 2020. By this time, the regulations – which contained some of the most unprecedented and extreme laws in recent history – had been in force for over 5 weeks. By the time Parliament was able to review and approve the regulations, they had already been amended.

63. There is of course a strong argument that the use of the urgent procedure could be justified at the start of the pandemic. But, as Tom Hickman QC has noted, it could also be argued that the Government could have “set a positive precedent for the involvement of Parliament” at the start of the pandemic by choosing not to use the urgent procedure. Instead, the Government could have modified standard parliamentary procedures and timescales to enable a draft of the first lockdown regulations to be considered and approved while the Coronavirus Act was passing through Parliament between 19-25 March 2020.

64. Even if the use of the urgent, made affirmative procedure was justified in the highly exceptional circumstances in which the first lockdown regulations were made, it is harder to justify the delays in scheduling parliamentary debates to approve the regulations. It is not clear why the Government made no effort to accelerate the parliamentary processes after Parliament returned from recess on 21 April, in order to prioritise both Houses debating the lockdown regulations as soon as possible. There was over a five-week delay between the first lockdown regulations being made and debated, which is not consistent with a commitment to ensuring timely scrutiny of coronavirus policy and legislation.

65. Throughout the first six months of the pandemic, the Government continued the precedent set by the first lockdown regulations: the use of the urgent, made affirmative procedure, regulations coming into force before they had been debated or even laid before Parliament, and debates on regulations occurring after the regulations had been superseded. A good illustration of this is the progress through Parliament of the regulations which made the fourth set of amendments to the original lockdown rules (“Amendment (No.4) Regulations”). The Amendment (No.4) Regulations were made on 12 June 2020 and came into force partly on 13 June and partly on 15 June 2020. They continued the gradual re-opening of society after the first national lockdown; introducing the concept of “support bubbles” and re-opening retail businesses and churches. This brought England into “step two” of the UK Government’s “recovery strategy”.

66. The Amendment (No. 4) Regulations were laid before Parliament only one day before most of their provisions came into force, leaving Parliament with virtually no opportunity for advance scrutiny. Surprisingly, this was an improvement on all previous versions of the lockdown regulations, which had been laid before Parliament only after they had already come into force. When the Amendment (No. 4) Regulations came fully into force, beginning step two of the Government’s recovery strategy, Parliament had still not had a chance to approve the previous two sets of regulations from step one of the recovery strategy. This left Parliament debating and approving regulations that had already been superseded.

67. Once Parliament had finished retrospectively approving step one of the recovery strategy, it was able to join the Government in considering measures from step two, including the Amendment (No. 4) Regulations. The House of Lords debated and approved the Amendment (No. 4) Regulations on 25 June 2020, but they were never debated or approved by the House of Commons. This is because the Regulations were revoked before the Commons had a chance to consider them and were replaced with a different set of lockdown regulations.

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108 Tom Hickman ‘Abracadabra law-making and accountability to parliament’, Parliaments and the Pandemic (Study of Parliament Group, January 2021), p. 46
109 Ibid., p. 46
110 Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 4) Regulations 2020 (2020/588)
112 Hickman ‘Abracadabra law-making’, p. 44
113 The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020 (SI 2020/684)
68. The progress of the Amendment (No. 4) Regulations through Parliament illustrates a near complete breakdown of Parliament’s ability to meaningfully scrutinise and approve delegated legislation. There was cross-party consternation as to how Parliament could provide effective scrutiny and approval when it did not have a chance to approve regulations before they were superseded or revoked. When the House of Lords came to debate one of the sets of lockdown regulations that had since been superseded, Lord Scriven described the debate as being “a charade—a mere illusion of scrutiny and accountability of government”\(^\text{114}\). In the House of Commons, Justin Madders MP noted that:

“It is important that this Chamber has a role because these are not minor or consequential changes that can be nodded through without debate. They affect millions of people’s lives, and we know that if we get it wrong, the consequences will be devastating. Debating them weeks after the event, and in some cases when they have been superseded by the next set of regulations, demeans parliamentary democracy… We are not merely a rubber-stamping exercise to create the veneer of a democratic process.”\(^\text{115}\)

69. Of course, we recognise that the Government had to legislate quickly at the start of the pandemic to respond rapidly to the developing public health emergency. A fast and nimble pandemic response was of the utmost priority. However, the Government appeared to have had no appetite to modify parliamentary procedures to facilitate greater levels of scrutiny, even within the framework of a rapid-response situation. Instead, the Government regularly used the urgent procedure to introduce legislation at breakneck speed while simultaneously being content to use the standard, non-emergency timescales for parliamentary scrutiny. There have been plenty of suggestions as to how standard parliamentary procedures could have been modified to ensure that the scrutiny process was not rendered academic.\(^\text{116}\) At the end of September 2020, for example, the Hansard Society noted that the Government had simply not prioritised time for scrutiny, and that the backlog of regulations awaiting debate could have been cleared relatively quickly if the Government had allocated sufficient time.\(^\text{117}\)

70. In addition, as the pandemic progressed and it became easier to anticipate the necessary public health interventions, it became less clear why regulations needed to be rushed through Parliament using the urgent procedure. Measures which had been announced weeks in advance of their implementation were made using the urgent procedure, and came into force less than 24 hours later. For example, the regulations which required people to wear face coverings on public transport were announced on 4 June 2020, but were not made until 14 June. They then came into force from midnight on 15 June 2020.\(^\text{118}\) It is not surprising that the Public Administration and Constitutional Affairs Committee concluded that, during the first six months of the pandemic, “the use of the urgent procedure has not always been justified”.\(^\text{119}\)

71. Parliament’s dissatisfaction with being side-lined came to a head shortly before the six-month review of the Coronavirus Act. In the Commons, a group of cross-party MPs led by Sir Graham Brady MP proposed an amendment to the Coronavirus Act 2020 that would have required Ministers to ensure that, as far as is reasonably practicable when exercising powers to tackle the pandemic, “Parliament has an opportunity to debate and to vote upon any secondary

\(^{114}\) HL Deb 15 June 2020, vol 803, col 2013-4

\(^{115}\) HC Deb 15 June 2020, vol 677, col 588


\(^{117}\) Fox, ‘Abracadabra law-making’

\(^{118}\) (SI 2020/592)

\(^{119}\) Public Administration and Constitutional Affairs Committee, Parliamentary Scrutiny, paragraph 51
legislation with effect in the whole of England or the whole United Kingdom before it comes into effect.”

Around the same time, Lord Robathan tabled a motion in the Lords calling upon the Government “to ensure that Parliament has an opportunity to debate and approve any national restrictions introduced to address the COVID-19 pandemic before any such restrictions come into force.”

72. Lord Robathan’s motion was rejected by 198 votes to 99, and the Speaker of the House of Commons did not select the Brady amendment, nor any other amendments, to the Coronavirus Act for fear of creating uncertainty as to whether the Act had been validly continued. Nonetheless, the Health Secretary attempted to quell parliamentary dissatisfaction by agreeing that “for significant national measures with effect in the whole of England or UK-wide, we will consult Parliament; wherever possible, we will hold votes before such regulations come into force.”

When MPs queried the means by which the Government would keep this promise, it was explained that the Secretary of State had committed to using “the made affirmative procedure, which entails the setting of a commencement date in the future for measures, which will allow for a debate and a vote to take place in advance of commencement. The House will therefore have that crucial ability to refuse consent.” In other words, the Government was committing to allow Parliament to debate and approve coronavirus regulations before they came into force, but was not agreeing to use the draft affirmative procedure, which would have allowed Parliament to scrutinise draft regulations before they were made.

73. While this concession was a welcome acknowledgment of Parliament’s important role in scrutinising coronavirus legislation, it was also a fairly limited promise. The Government only committed itself to seeking advance parliamentary approval for national, and not local, measures, no matter how restrictive those local measures might be. In addition, the Government committed to use the ‘made affirmative’ procedure, but this was the same urgent procedure that the Government had already been using to respond to the pandemic. The only change the Government was promising to make was to try and make sure Parliament could vote on legislation before it came into force. There are two problems with this. First, the Government seemed to assume that its default mode of law making would be the continued use of a procedure that they should only have been using in cases of urgency, even though concerns had been raised that blanket claims of “urgency” were no longer justified. Second, the urgent, made affirmative procedure affords Parliament only a very limited opportunity for scrutiny, because Parliament does not have a chance to scrutinise and reject draft regulations before they are made. That is why, six months into the pandemic, we recommended that all lockdown regulations from then on should be subject to the draft affirmative procedure, and not the made affirmative procedure.

18 months into the pandemic

74. Looking back over the last year, the Government has, for the most part, kept the limited promise that it made Parliament. The Commons was able to debate and approve in advance of implementation the three-tier lockdown system in October 2020, the second national lockdown in November 2020, the return to a three-tier lockdown system in December 2020, the Steps regulations which set out the spring/summer 2021 roadmap for leaving lockdown, and the regulations which allowed many double-vaccinated individuals to avoid

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120 See the proposed amendment at https://commonsbusiness.parliament.uk/document/40804/html#20200928-65
121 HL Deb 28 September 2020, vol 805, cols 96-98
122 HC Deb 30 September 2020, vol 681, col 388
123 HC Deb 30 September 2020, vol 681, col 402
124 Cormacain, ‘Parliamentary scrutiny’, p. 11
125 SIs 2020/1103, 2020/1104, 2020/1105
126 SI 2020/1200
127 SI 2020/1374
128 SI 2021/364
self-isolating if exposed to Covid-19.\textsuperscript{129} The Lords also debated and approved all of these regulations in advance of their implementation, aside from the regulations implementing the October 2020 three-tier lockdown and the January 2021 national lockdown, which were debated and approved the same day, or the day after, they came into force.

75. It is commendable that the Government has ensured that these significant regulations were debated and approved before, or very shortly after, they came into force. But the speed with which the Government was able to begin facilitating parliamentary scrutiny also highlights the limited justification for Parliament’s marginalisation in the first six months of the pandemic. Parliamentary scrutiny could have been prioritised at a much earlier stage if the Government had had the political will to do so. This must be one of the important lessons to be learned when the time comes to look back at how our democratic institutions dealt with this unprecedented public health emergency.

76. There are, however, some significant national measures which were not debated or even laid before Parliament before they came into force, notwithstanding the Government’s promise at the 6-month point. The fast tracking of some of these regulations is understandable, i.e. the regulations which introduced Tier 4 lockdowns shortly before Christmas, when it is arguable that there was an urgent need to control rising levels of the virus.\textsuperscript{130} However, other sets of regulations made important national changes, and the lack of the promised levels of scrutiny is harder to explain. For example, regulations were made using the urgent procedure which created a broad system of data sharing between the NHS Test and Trace service and the police, including allowing the police to have access to personal health information as to whether an individual had tested positive for coronavirus.\textsuperscript{131} These regulations were made on 28 January 2021 and came into force the following day, but were not approved by the Commons until 10 February 2021 and only debated and approved by the Lords on 1 March 2021, over a month after they came into effect. It is unclear why there was such a delay in scheduling debates for the regulations. A number of Peers queried why scrutiny had been so delayed, with Baroness Tyler expressing her concern that “these regulations, dealing with the sensitive issue of medical confidentiality and data sharing with the police, are being debated 30 days after they came into force. This has become a regular pattern in our scrutiny and a very unwelcome one, not least in this case because of the centrality of medical privacy to an effective public health system. We all understand the urgency of responding to the pandemic, but democratic accountability should not suffer in the process.”\textsuperscript{132}.

77. We have also seen the limits of the Health Secretary’s promise in action. As we noted above, the Government only promised to seek advance parliamentary approval of national – and not local - measures. After the three-tier system was introduced in October last year, a number of local regulations were made that moved parts of England into different tiers.\textsuperscript{133} All of these regulations were made and came into force without being debated by Parliament, and none of them received parliamentary approval before they were superseded by the second national lockdown on 5 November 2020. This is disappointing from a Rule of Law perspective, as the regulations significantly impacted vast swathes of the country, closing businesses, preventing people from gathering indoors, and banning overnight stays outside people’s local area.

78. Finally, the Government has continued to use the urgent, made affirmative procedure as its default means of law-making. Even when the content of regulations has been announced well in advance of their being made, claims of urgency have been used to rush regulations through Parliament. For example, the Government published its spring 2021 roadmap for easing

\textsuperscript{129} SI 2021/851
\textsuperscript{130} SI 2020/1611, SI 2020/1611
\textsuperscript{131} Health Protection (Coronavirus, Restrictions) (All Tiers and Self-Isolation) (England) (Amendment) Regulations 2021 (SI 2021/97)
\textsuperscript{132} HL Deb 1 March 2021, vol 810, col 1030-1031
lockdown on 22 February 2021.\textsuperscript{134} The regulations implementing this roadmap were not made and laid before Parliament until a full month later, on 22 March 2021, but were still made using the urgent procedure. Earlier this year, Justin Madders MP complained that the Department of Health and Social Care has “got itself into a very bad habit of equating the word “coronavirus” with the word “urgent”.\textsuperscript{135}

79. At the time of writing, according to the Hansard Society’s invaluable work tracking all coronavirus legislation, 21.2% of coronavirus-related statutory instruments laid before Parliament have been subject to the made affirmative procedure.\textsuperscript{136} This is only a slightly lower percentage than at the six month mark of the pandemic (24%).\textsuperscript{137} Throughout the last 18 months Ministers have made considerably more ‘made affirmative’ statutory instruments than normal, and considerably fewer ‘draft affirmative’ instruments.\textsuperscript{138}

80. The procedures the Government has used to make delegated legislation throughout the pandemic therefore tell a now familiar story. In the first six months of the pandemic, the Government centralised law-making power in the executive – arguably the most significant extension of executive law-making since the Second World War. Since then, despite growing anxiety about the compatibility of such executive power with this country’s traditional commitments to the Rule of Law and democracy, the Government has done little to ensure that Parliament was able to scrutinise coronavirus legislation, even when there was no longer a justification for forsaking proper scrutiny in favour of a rapid response. Some improvement was made after concerns were raised in the first six months of the pandemic, but the Government continues to appear reluctant fully to relinquish the extraordinary executive law-making power it accrued when first responding to the public health crisis.

Inaccessible or Confusing Laws and Messaging

81. A central component of the Rule of Law is that laws must be accessible and foreseeable, which includes legislation being published in advance of its implementation.\textsuperscript{139} Individuals cannot claim rights to which they are entitled, or perform their legal obligations, if they cannot reasonably discover what those rights and obligations are. It is of particular importance that legislation creating criminal offences is accessible and foreseeable, so that people know what they must or must not do in order to avoid criminal penalty.\textsuperscript{140}

82. One consequence of regulations continuing to be rushed through Parliament using the urgent procedure is that new coronavirus laws have come into force at very short notice. Even over the last year, when the Government has begun to facilitate Parliament approving laws in advance of their implementation, there was still often a very small window of time between regulations being made and them coming into force. This is understandable where regulations implement legal changes that need to be made quickly to respond to the pandemic, but the case for a fast implementation has not always been made.

83. To give a recent example, on 17 September 2021, the Government announced that restrictions on international travel would be eased from 4 October 2021.\textsuperscript{141} The relevant regulations were

\begin{itemize}
\item \textsuperscript{134} See https://www.gov.uk/government/publications/covid-19-response-spring-2021/covid-19-response-spring-2021-summary
\item \textsuperscript{135} HC Deb 17 March 2021, vol 691, col 6
\item \textsuperscript{136} Hansard Society, ‘Dashboard’
\item \textsuperscript{137} Ruth Fox, ‘Building on the ‘Brady amendment’
\item \textsuperscript{138} Hansard Society, ‘Dashboard’
\item \textsuperscript{139} Venice Commission, “Checklist” Benchmark B1
\item \textsuperscript{140} Bingham, Rule of Law, p. 37
\item \textsuperscript{141} See the announcement on the gov.uk website here: https://www.gov.uk/government/news/new-system-for-international-travel
\end{itemize}
laid before Parliament on 1 October and came into force only 3 days later.\textsuperscript{142} If the Government knew on 17 September that the law would change by 4 October, why could the regulations not have been published sooner, to give those effected by them more time to understand the new law? While we recognise the valid concern of the Government to remove coronavirus restrictions in a timely manner, the Government must also respect the crucial Rule of Law requirement that laws be foreseeable and accessible. It is virtually impossible for individuals and businesses to get fully up to speed about their rights and responsibilities under new coronavirus legislation, including seeking legal advice where necessary, when new laws come into effect only a few days after they have been made. We note that the Government has on occasion given advance notice that the law will change — which has been helpful — but individuals need to be able to see the actual legislation that will apply to them before they can properly determine their legal rights and responsibilities.

84. In addition, the police have expressed concern that they have not been given enough time to understand new coronavirus laws before they have been required to enforce them. A report on policing during the pandemic, published in April 2021 by Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services, noted that '[s]everal forces and NPoCC also expressed concern that they had not (up to the time of our inspection) been consulted in advance of legislation being announced, or given much advance notice that changes were being introduced… Some forces expressed concern that they first heard of certain changes at the 5pm daily televised government briefings. In some cases, the changes required immediate implementation and many forces felt disadvantaged by a lack of notice and consultation.'\textsuperscript{143}

85. The problems caused by legislation coming into force at very short notice have been compounded by many of the most significant legal changes being introduced via amending regulations. While this is not an issue in itself, it is very difficult to make sense of regulations which amend a previous set of regulations without seeing a consolidated version, incorporating the amendments. Otherwise, anyone wishing to know what the law says will have to compare line by line the amending regulations with the original regulations to see what changes have been made. Amending regulations are not usually the easiest documents to follow, and the coronavirus regulations have been especially convoluted. A typical paragraph from the hotel quarantine regulations reads as follows:

“In regulation 4 –

…

(f) in paragraph (5), at the beginning insert “Except where P falls within paragraph (1)(d)”;

(g) in paragraph (7)(a) for “last departed from or transited through a non-exempt country or territory” (5) substitute “arrived in England or, if later, the end of any period that applies by virtue of paragraph 2 or 3 of Schedule 2C”;

(h) omit paragraph (7A);

(i) after paragraph (7A) insert—

“(7B) Paragraphs (8) to (13A) do not apply where P falls within paragraph (1)(d) (and thus Schedule B1A applies).”\textsuperscript{144}

\textsuperscript{142} The Health Protection (Coronavirus, International Travel and Operator Liability) (England) (Amendment) (No. 13) Regulations 2021 (SI 2021/1107)


\textsuperscript{144} SI 2020/150
86. The Rule of Law requires amendments to legislation to be incorporated in a consolidated, publicly accessible manner. But amending regulations have been introduced at such short notice that a consolidated version of the original regulations has not always been publicly available by the time the new laws came into force. For instance, a consolidated version of the hotel quarantine regulations was not published on legislation.gov.uk until 6.52pm on 15 February 2021, when the law had come into force at 4am that day. This presents practical problems for parliamentary scrutiny and also greatly inhibits the ability for the general public to understand changes made to coronavirus laws.

87. Therefore, the Government’s continued use of the urgent procedure has further significant Rule of Law implications going well beyond concerns about limited parliamentary scrutiny. The speed with which coronavirus laws have been made has caused those laws to be neither sufficiently foreseeable nor accessible by those they directly affect.

Distinguishing Law from Guidance

Six months into the pandemic

88. As we have pointed out in a previous report, it is crucial that the Government’s explanation of coronavirus laws is clear and accurate. Inaccurate or confusing statements of the law undermine the Rule of Law. They are also likely to damage trust in Government messaging, which may have wider implications for the efficacy of the public health response to the pandemic. A review of studies on the coronavirus pandemic suggests that people are more likely to comply with measures designed to tackle the spread of coronavirus when they trust those who are giving the orders, and that public trust in Government increases where Government messaging is clear. Unfortunately, during the first six months of the pandemic, there were numerous instances where the Government did not make it sufficiently clear what was the law, and what was unenforceable guidance.

89. From the start of the pandemic, the Government’s public health advice has been more restrictive than the legal rules imposed by coronavirus legislation. For instance, during the first national lockdown the Government advised that people should only exercise once a day, whereas the lockdown regulations placed no limits on the number of times that a person was permitted to leave their home. Similarly, the Government advised people from different households to remain two metres apart, but no such requirement was ever included in lockdown regulations.

90. There is no inherent Rule of Law problem with Government advice being more restrictive than the relevant legal requirements. There is a place in policy making for both law and guidance. Legislation cannot cover every eventuality, and some matters – like the advice to remain two metres apart from other people – would be near impossible to enforce and are simply better dealt with in guidance. However, Government guidance published in the first six months of the pandemic did not clearly distinguish between public health advice and legal requirements. Commentators have analysed Government guidance published during the first national

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145 Venice Commission, “Checklist” Benchmark B3
146 Katie Lines, ‘Government messaging’
149 Ibid., p. 24
lockdown, and concluded that “it was not possible for people to know, without a high level of sophisticated legal knowledge, whether statements contained in the coronavirus guidance were statements of law, interpretations of the law or public health advice.” By portraying Government advice as having the force of law, the coronavirus guidance created the impression that the law was far more restrictive than it actually was.

91. From a Rule of Law perspective, it is concerning that Government messaging did not make clear what was a statement of the law, and what was Government advice. Government advice is un-enforceable, and no criminal responsibility can flow from its breach. While we of course recommend that people follow public health advice where at all possible, individuals are free to act against Government advice if they choose to do so.

92. There are two main practical problems with the Government portraying its public health advice as having the force of law, especially in circumstances where its advice is more restrictive than the law. First, members of the public are highly likely to be confused about what the law actually is. People are not able to make informed choices about their behaviour if they think that they will be breaking the law and may be arrested by acting in a certain way, when that behaviour is in fact lawful (if unavoidable).

93. Second, as we have seen during the pandemic, the police are highly likely to become confused and try to enforce public health advice. The police have no powers to do this. Public health advice is not enforceable. No-one should be sanctioned by the police for undertaking behaviour that goes against Government advice but is otherwise lawful. Her Majesty’s Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS) recently highlighted the ‘widespread confusion’ caused during the first lockdown by the Government presenting its guidance as having the force of law. HMICFRS found that “in some cases, police officers misunderstood the distinction, and appeared to believe that ministerial instructions were equivalent to criminal law.” This was reflected in reports of police forces exceeding their powers by issuing fixed penalty notices to people who had breached Government guidance – but not the law – by, for example, shopping to exercise.

94. More fundamentally, there are constitutional problems with the Government portraying its advice as having the force of law. The Rule of Law requires Parliament to have legislative supremacy so as to ensure that law-making is democratic and subject to proper scrutiny, and to protect against the arbitrary exercise of executive power. The Government effectively bypasses Parliament’s role in law-making when it portrays its advice as having the force of law, instead instituting what is in effect rule by Ministerial decree. The Government’s blurring of the line between law and guidance therefore further centralises power in the executive. It also weakens the Rule of Law by undermining the public’s trust in the institutions on which the Rule of Law depends.

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151 Ibid., p.21
152 Her Majesty’s Inspectorate of Constabulary and Fire & Rescue Services, ‘Policing in the pandemic’, p.35
95. The problems caused by the Government’s elision of law and guidance were brought to Ministers’ attention on multiple occasions during the first six months of the pandemic. In May 2020, Baroness Jones of Moulsecoomb tabled a motion in the Lords looking at the inconsistencies between coronavirus guidance and legislation. During this debate, Baroness Ludford noted that ministerial statements had ‘elided and thus confused’ law and guidance, which ‘often put the police in an invidious position’.\footnote{HL Deb 5 May 2020, vol 803, col 362} Lord Beith also emphasised that ‘people exercising authority must distinguish clearly between what the law requires and what is simply guidance... Otherwise, habits that would be damaging to our freedom and liberty will persist beyond this dreadful epidemic’.\footnote{Ibid., col 361}

96. In addition, in September 2020 the Public Administration and Constitutional Affairs Committee noted that there had been “disappointing” examples of the Government misrepresenting what the law actually was, and emphasised that Ministerial statements should not be treated the same as legislation.\footnote{Public Administration and Constitutional Affairs Committee, \textit{Parliamentary Scrutiny} paragraph 76} The Committee advised that, going forwards, the Government should ensure its communications are clear as to whether something is guidance or whether it is a requirement under law.\footnote{Ibid., paragraph 76} In response, the Government stated that it recognised the difference between law and guidance, and would “strive to ensure appropriate wording and clarity is given in future”.\footnote{Parliamentary Scrutiny of the Government’s handling of Covid-19: Government Response to the Committee’s Fourth Report of Session 2019–21 (8 December 2020, HC 1078), p. 11.}

18 months into the pandemic

97. Unfortunately, the blurring of the line between law and guidance is another area where there has been relatively little change in response to concerns raised six months into the pandemic. In February 2021, we warned that the Government’s official guidance still contained statements of both law and advice without differentiating between the two. For example, the guidance started by stating “You should follow this guidance immediately. This is the law.”\footnote{Katie Lines, ‘Government guidance’} This statement does not make it clear that the guidance contained many advisory statements that were not the law. It would be easy for someone without legal training to assume, upon reading that statement, that Government guidance in relation to the pandemic inherently had the force of law. The words “the law” were hyperlinked to the relevant regulations, but these were 130 pages long and difficult to navigate. Directing people to 130 pages of complex legislation is unlikely to remedy any confusion caused by stating that the guidance is the law.

98. The most recent iteration of the guidance is somewhat clearer. It no longer contains the misleading statement “You should follow this guidance immediately. This is the law”. However still now - 18 months into the pandemic - the guidance does not make sufficiently clear which instructions are legal requirements that carry a criminal sanction, and which are advisory statements that cannot be enforced. For example, the guidance contains some statements of law (i.e., “You must self-isolate if you test positive”) alongside Government advice (i.e., “You should wear face coverings in crowded and enclosed areas where you come into contact with people you do not usually meet”) without sufficient distinction.\footnote{https://www.gov.uk/guidance/covid-19-coronavirus-restrictions-what-you-can-and-cannot-do}

99. In addition, Government messaging on key COVID-19 policies has continued to blur the line between law and guidance, and to use non-statutory guidance to expand upon and/or fill gaps in the law. We recently published a report considering Government messaging on the Test
and Trace scheme from September 2020 to September 2021,\textsuperscript{164} where we found that the Government had, for example:

\begin{enumerate}
\item repeatedly portrayed its guidance as having the force of law, by suggesting that people have a legal obligation to self-isolate if pinged by the NHS app (when no such obligation exists); and
\item used non-statutory guidance to try and fill gaps in the law, by telling NHS and social care staff that in certain circumstances they would have a “reasonable excuse” for breaching a legal duty to self-isolate. The relevant regulations did not grant the Government any power to define or interpret the meaning of “reasonable excuse.”
\end{enumerate}

100. Given this context, it is unsurprising that there have been continued instances of the police acting beyond their powers by enforcing Government guidance rather than the law. In February 2021, we observed how the police were still issuing fixed penalty notices to people who had travelled to exercise, when the law at that time placed no limit on the distance a person could travel so long as it was “reasonably necessary” to take exercise outside.\textsuperscript{165} The police are currently conducting an ongoing review of prosecutions that occurred under lockdown regulations to determine how many were incorrectly charged. Of the 396 cases reviewed between July and September 2021, 52 were found to have been incorrectly charged.\textsuperscript{166}

101. More broadly, it is concerning from a Rule of Law perspective that the Government does not appear to believe there is any significant problem with it portraying its advice as having the force of law, despite the Rule of Law problems with this approach having been brought to its attention. While the Government may find it expedient for the public to believe that its statements are legal rules, it is constitutionally improper, and it undermines public trust in the institutions on which the Rule of Law depends. Again, Ministers appear to be unwilling to relinquish the centralised power that the Government assumed at the start of the pandemic.

**Judicial deference**

102. Judicial review is a key mechanism to ensure that the Government is held accountable for its decision-making, especially when the Government has enacted emergency legislation without the ordinary level of parliamentary scrutiny. As Sir Stephen Laws, former First Parliamentary Counsel, told the Public Administration and Constitutional Affairs Committee last year:

> “What you are usually doing with emergency legislation is substituting proper scrutiny for subsequent accountability, both because there is no time for the proper scrutiny and also because, very often in the sort of situation in which you are passing emergency legislation, there is not the political room for proper scrutiny either.”\textsuperscript{167}

103. It is constitutionally appropriate that the judiciary will accord a degree of deference to the Government when asked to review policy-making during a public health emergency. Nonetheless, the degree of judicial deference that is appropriate should take into account the extent to which such measures have received proper democratic scrutiny, and should not go so far as to create an accountability vacuum. The Rule of Law requires there to be effective

\begin{flushleft}
\textsuperscript{165} Katie Lines, ‘Government guidance’
\textsuperscript{167} Paragraph 17
\end{flushleft}
judicial review of the acts and decisions of the executive so as to prevent the misuse of power. This means that law making powers of the executive should be subject to judicial control, with effective remedies if the Government abuses or acts outside the limits of those powers.

104. So far, the judiciary has generally given the Government a very significant degree of deference when coronavirus regulations have been challenged. The courts have frequently afforded significant weight to the fact that the Government has had to make political assessments based on a wide range of evidence in response to a developing emergency situation, and the judiciary has appeared wary of finding that the Government has acted disproportionately, unreasonably or irrationally in its coronavirus response.

In Dolan v Secretary of State for Health and Social Care [2020] EWHC 1786 – a case involving a comprehensive challenge to the lockdown regulations – Mr Justice Lewis summed up the general mood of the judiciary when noting that the courts will accord ‘a degree of discretion to a minister “under the urgent pressure of events, to take decisions which call for the evaluation of scientific evidence and advice as to the public health risks” (per Lord Bingham LCJ in R v Secretary of State for Health ex parte Eastside Cheese Company [1999] 1 CMLR 123 at paragraph 50).

105. However, there are signs that the judiciary may be becoming more willing to interrogate executive decision making as the pandemic progresses, and as the limits of the democratic scrutiny of coronavirus laws become clear. A helpful comparison to illustrate this possible shift in judicial attitudes is the English High Court’s judgment in Hussain v SS Health and Social Care [2020] EWHC 1392 on 21 May 2020 compared with the Scottish Court of Session’s opinion in Philip v Scottish Ministers [2021] CSOH 32 on 24 March 2021. The Court of Session proved much more willing to interrogate the rationale behind Government decision making than the High Court had been at an earlier stage of the pandemic. This is the case even though in some ways the Scottish Parliament has been able to scrutinise decisions made by the Scottish Government more thoroughly than the UK Parliament has decisions made in Downing Street.

106. In Hussain, the claimant challenged the prohibition on attendance at Friday prayer at mosque in the first lockdown regulations, on the ground that this was contrary to his right to freedom of religion protected by Article 9 of the European Convention on Human Rights (‘ECHR’). The claimant sought both interim relief preventing the enforcement of the regulations in so far as they prohibited attendance at prayer, and permission to apply for judicial review. Swift J refused the application for interim relief but granted permission to apply for judicial review. A substantive hearing has not yet taken place, but Swift J was pessimistic as to the claimant’s chances of success. At paragraph 24 of the judgment, Swift J stated that ‘I do not think there is any realistic likelihood that the claimant’s case on Article 9 will succeed at trial. The infringement of his Article 9 rights is not disproportionate.’

107. The claimant had argued that the prohibition on using places of worship for prayer was disproportionate when many other activities were permitted, including indoor activities like

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168 Venice Commission Checklist, Benchmarks A1 and C
169 Venice Commission Checklist, Benchmark A4
171 This case was partially reverse by the Court of Appeal, but the judicial sentiment expressed remains valid.
visiting houses in connection with the purchase, sale or rental of a residential property. Swift J was dismissive of this point, finding that:

‘While the Secretary of State’s order of priorities is a legitimate matter for public debate, in terms of whether the decision on it contained within the 2020 Regulations is lawful, he must be allowed a suitable margin of appreciation to decide the order in which steps are to be taken to reduce the reach and impact of the restrictions in the 2020 Regulations. What steps are to be taken, in what order and over what period will be determined by consideration of scientific advice, and consideration of social and economic policy. These are complex political assessments which a court should not lightly second-guess….,The Secretary of State is entitled, in my view, to adopt a precautionary stance.”

108. In Philip, the Court of Session was asked to consider a virtually identical legal question, albeit at a much later stage of the pandemic. The petitioners were Protestant ministers and church leaders, and a Roman Catholic priest. Together they challenged the closure of places of worship in the Scottish lockdown regulations173 on the grounds that this was a disproportionate interference with their right to practise religion under Article 9 of the ECHR and their constitutional rights. The Court of Session found for the petitioners on both grounds. The Scottish Government had argued for a wide margin of appreciation to be given to the Scottish Ministers in making the regulations, because (1) a scientific judgment was involved, (2) the decision was one more suitably taken by the executive subject to parliamentary scrutiny than by the court, and (3) the regulations had been approved by the Scottish Parliament. The Court disagreed, finding that the decision to close places of worship did not involve “a scientific judgment best left to an executive armed with expertise and experience not available to the court”, since the “science is not in dispute… The scientific material on which the respondents based their decision is either available to the court or ought to have been made available”.

109. The petitioners advanced an argument similar to that made in Hussain – that the closure of places of worship was a disproportionate response to the pandemic given that other premises were allowed to stay open, including cinemas being used as jury centres where the risks of transmitting coronavirus were the same, if not higher, than in places of worship. The Court of Session was more willing to interrogate executive decision making than the High Court had been in Hussain. The Court agreed with the petitioners, stating that “as soon as [the Government] allows some exceptions to the “stay at home” rule and the corresponding requirements to close premises and restrict activities, it then falls on them to justify why other exceptions are not allowed”. Even though the Court recognised that “the decision [to close places of worship] is ultimately a political one”, it nonetheless found that the Court had the jurisdiction to scrutinise that decision, and ruled that the closure of places of worship was a disproportionate response to the pandemic.

110. The English courts have not yet been so robust as the Court of Session in their scrutiny of Government decision-making, but this may yet change now that the Scottish court has established a persuasive precedent.

Conclusion

111. The central theme that has emerged from our Rule of Law review of the Government’s coronavirus response is the centralisation of law-making power in the executive, and the corresponding marginalisation of Parliament. Ministers appear to have grown accustomed to the ease with which laws can be made when the Government has enhanced legislative control, and seem reluctant to relinquish law-making functions back to Parliament now that the urgency of the initial stages of the pandemic has passed. The Government has made some

173 Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No.11) Regulations 2021 (SSI 2021/3)
improvements in facilitating Parliament’s ability to scrutinise legislation as the pandemic has progressed. In particular, there has been a marked increase in the transparency of scientific advice and evidence. In addition, in response to widespread parliamentary discontent in the lead up to the six-month renewal debate on the Coronavirus Act, the Government has ensured that Parliament has had the opportunity to debate and approve in advance of implementation most major, national coronavirus measures. However, in general, the Government’s response to Rule of Law concerns raised at the six-month mark of the pandemic has been limited, and insufficient to meet the substance of those concerns. Moreover, the judiciary has been relatively deferential to Government decision-making, meaning judicial review has not been a sufficiently robust method of ensuring executive accountability to compensate for the limits of democratic scrutiny.

112. Looking back over the whole of the last 18 months, the irresistible conclusion is that the existing legal framework and institutional arrangements for responding to public health emergencies do not adequately protect the Rule of Law. The current system is not robust enough to ensure that:

   (1) Parliament’s ordinary legislative functions and its ability to scrutinise executive actions is preserved as far as possible during emergency situations, and

   (2) changes to law-making procedures introduced in response to an emergency are strictly necessary, time limited, and proportionate to the situation.

113. There is therefore an urgent need to distil the lessons we have learned in the last 18 months about the extent to which our current legal framework and institutional arrangements are able to ensure that our response to public health emergencies is also compatible with our commitment to the Rule of Law. Work should start now on distilling those lessons in a comprehensive and systematic way, to ensure that this important set of issues is firmly on the agenda of the public inquiry into the pandemic when it finally gets underway.