

# Coronavirus Bill: A Rule of Law Analysis (Supplementary Report – House of Lords)

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## Executive Summary

The Coronavirus Bill is a response to a genuine public health emergency and contains the most sweeping powers ever taken by the UK Government outside of wartime. There is absolutely no doubt that the Government needs to take swift and bold measures to protect citizens, and that some of these measures will unavoidably impinge upon personal liberties in a drastic way. The role of Parliament in scrutinising these measures is even more important during an emergency. Neither law nor Parliament should fall silent in the war on Covid-19.

This Report for the House of Lords stages of the Bill supplements our previous Report. For this Report we focus on three issues

- new six monthly parliamentary review provision
- effectiveness of the procedure for reporting to Parliament
- importance of legal certainty and accurate Government communications about the rules that apply

We welcome the Government's amendment, in clause 98, to introduce a six monthly review of the Bill, with the possibility of a vote which will lead to an expiry of the temporary provisions.

**We recommend that clause 98 be amended to allow Parliament the opportunity to decide which temporary provisions are extended and which expire; or alternatively that the Minister undertake that Parliament will be provided with such an opportunity.**

As well as requiring emergency powers to be limited to a duration strictly justified by the nature of the emergency, the Rule of Law also requires there to be meaningful parliamentary scrutiny of the exercise of the emergency powers granted, to ensure that Parliament remains supreme over the Executive even during an emergency.

The Bill contains mechanisms for reporting to Parliament on its operation. Every two months a report must be laid before Parliament. The report is only on the status of the provisions, whether they are in force, and whether it is appropriate that they are in force.

**We recommend that reports to Parliament should contain more details.** Parliament needs to know whether the individual provisions in the Bill are working and why they are working.

- How effective have the emergency measures been in combating the threat of coronavirus, and what is the evidence for this?
- How often have the emergency measures been used, applied or implemented - either a specific figure, or a general approximation, whichever is more practicable.
- Have the emergency measures generally been complied with, or what is the level of non-compliance?
- What sanctions have been imposed for non-compliance?
- What is the scientific justification or evidence that the emergency measures in the Bill continue to be necessary?

**We recommend that the Minister be asked to undertake that reports to Parliament will include such information.**

**We also recommend that there is greater Parliamentary scrutiny of the implementation of the emergency legislation than is currently provided for, and that consideration is given to creating specific scrutiny arrangements, such as an ad hoc joint committee of both Houses of**



**Parliament, to oversee the operation of the emergency legislation. We recommend that the Minister be asked to undertake that the Government will do all it can to maximise such opportunities for parliamentary scrutiny.**

Finally, we consider the Government's recent text message stating "new rules in force now: you must stay at home." Given that this Bill has not been enacted, this message is not accurate, and risks compounding the legal uncertainty to which the emergency has given rise. In this time of crisis, it is imperative that citizens be able to trust what the Government says. The Government should continue to give robust advice, guidance and directions to citizens on what is acceptable behaviour. **But the Government should be careful to ensure that it does not compound the legal uncertainty caused by the emergency by making ambiguous statements about what rules apply, when they apply, and the consequences for people if they are breached.**



## 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 a new 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.

The Report has been prepared by Dr Ronan Cormacain, Consultant Legislative Counsel and Senior Research Fellow at the Bingham Centre. Dr Cormacain is leading this Project.



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## Introduction

The Coronavirus Bill went through all its stages in the House of Commons on Monday 23 March 2020 and will go through all its stages in the House of Lords on Wednesday 25 March 2020.

The Bingham Centre's first report focused on the principles for scrutiny of the Bill, the duration of the Bill and review mechanisms.

This Supplementary Report does not repeat the analysis made in the initial report, save where necessary to illustrate a point. The points in the initial report remain valid and may also be used to assist in the scrutiny of the Bill in the House of Lords.

There are very many points in the Bill which impact upon the Rule of Law, human rights and civil liberties. Normally, these would be subject to detailed scrutiny. During the House of Commons stages, Steve Baker MP said that

When I got into politics, it was with the purpose of enlarging liberty under parliamentary democracy and the rule of law. When I look at this Pandora's box of enlargement, discretion and extensions of power, I can only say what a dreadful, dreadful thing it is to have had to sit here in silence and nod it through because it is the right thing to do.<sup>1</sup>

With this sentiment in mind, it would simply not be possible for this report, nor for the House of Lords to consider the Bill in any more than a cursory way. We share the view of Jeremy Hunt MP in the debate on second reading when he said that "There are many questions about this legislation, but we are in a national emergency and every day we delay could cost lives".<sup>2</sup>

Therefore, this report focuses solely on just two main issues: (1) the duration of the Bill, and (2) the mechanisms for parliamentary review and oversight of its operation. It is vital that, if there is some inappropriate measure in the Bill, there exists an established procedure to remedy it. In the absence of an opportunity for the House of Lords to amend the Bill, ministerial undertakings should be sought on these issues.

The report concludes by commenting briefly on the importance of clear and accurate information from the Government during the current emergency, including about the legal status of this Bill while it is still a Bill.

## Duration of Bill

Originally, the Bill had a sunset clause which meant it would expire after two years. In the House of Commons, there was a cross-party amendment to shorten this to 6 months. The Bingham Centre supported this amendment on the basis that it would bring the Bill into line with international standards and best practice on emergency legislation of this kind.

The Government accepted the merit of the proposed amendment and brought forward its own proposals to allow for this. The cross-party amendment was withdrawn, and the Government introduced what is now clause 98 of the Bill.

98 Six-monthly parliamentary review

(1) If the House of Commons rejects a motion in the form set out in subsection (2), moved in accordance with subsection (3) by a Minister of the Crown, a Minister of the Crown must exercise the power conferred by section 90(1) so as to ensure that the relevant temporary

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<sup>1</sup> *Ibid.* Col 142.

<sup>2</sup> Hansard 23 March 2020 Volume 674 Col 61.



provisions expire not later than the end of the period of 21 days beginning with the day on which the rejection takes place.

(2) The form of the motion is—

“That the temporary provisions of the Coronavirus Act 2020 should not yet expire.”

(3 ) So far as practicable, a Minister of the Crown must make arrangements for the motion mentioned in subsection (1) to be debated and voted on by the House of Commons within a period of 7 sitting days beginning immediately after each 6 month review period.

Subsection (4) goes on to define those terms and clause 90 sets out the necessary power to alter the expiry date. This provision co-exists with the original 2 year sunset clause which is now contained in clause 89.

### House of Commons debate on this point

During the debate on second reading in the House of Commons, David Davis MP asked the following question:

in the event that the House decides that one element of the Bill is working badly, will we be able to amend or strike out that element, or will we have to take the whole thing or reject it at that six-month point<sup>3</sup>

Andrew Mitchell MP followed that up with this point:

I hope, therefore, that he will see the six-month review not just as a rubber-stamping effort, but as a chance to improve the legislation, should it require that improvement<sup>4</sup>

Johnathan Ashworth MP progressed this point further by arguing that “we cannot just have a take-it-or-leave-it approach to these things”.<sup>5</sup> Chris Bryant MP echoed this take it or leave it argument saying “you’ve either got the whole Act and all the provisions carrying on for another six months or you’ve got to leave it”.<sup>6</sup> This was a very common point during the debate in the House of Commons with Sir Edward Davey MP saying “we need to look carefully at the review process. When it comes, it should enable amendments to this law, and the other place needs to be allowed to vote on it too”.<sup>7</sup>

### Recommendation

**We share the concerns expressed cross-party in the Commons about the Bill’s provision for parliamentary review. Rule of Law standards require emergency legislation to be limited to a duration which is strictly required by the nature of the emergency, and for there to be adequate parliamentary scrutiny of the operation of the emergency legislation and an opportunity to bring to an end any emergency measures which are no longer required or otherwise considered to be unnecessary or undesirable.**

The Bill as it stands does not satisfy these minimum requirements. There is no granularity in this provision, it only allows for a binary choice between accepting all the temporary provisions of the Act or rejecting all the temporary provisions. It does not allow for individual consideration of which temporary provisions ought to continue and which ought to expire. The scientific consensus may change over what works and what doesn’t work. But this provision will result in a take it or leave it

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<sup>3</sup> Hansard 23 March 2020 Volume 674 Col 37.

<sup>4</sup> *Ibid.* Col 38

<sup>5</sup> *Ibid.* Col 57.

<sup>6</sup> *Ibid.* Col 117.

<sup>7</sup> *Ibid.* 79.

motion. Such a motion is a blunt tool for Parliament to express its wishes or have oversight over the implementation of the Bill. This provision will reduce the power of Parliament to exercise effective oversight, as it is unlikely that Parliament will reject all provisions just in case some of them are still necessary. The Bill needs to be proportionate to the threat, and those provisions which are not strictly necessary should not remain law any longer than necessary.

**We recommend that clause 98 is amended to allow Parliament the opportunity to decide which temporary provisions are extended and which expire. In the absence of an opportunity to amend the Bill, we recommend that the Minister be asked to undertake that Parliament will be provided with such an opportunity.**

## Reporting and scrutiny mechanisms

This issue of duration and expiry of the Bill is one point. A closely related, but equally important point, is reporting to Parliament on the implementation of the Bill, and a chance for Parliament to consider the effectiveness of the Bill. This is scrutiny only, a review of the effectiveness of the Bill, not an opportunity to repeal it.

The Bill has many provisions which are intrusive, or relax normal safeguards, or which remove the liberty of individuals. These are generally justified by the exigencies of the situation and the need to combat coronavirus.

However, draconian measures in an emergency must be balanced by careful and detailed scrutiny of their exercise. Many Bills will have a reporting mechanism contained within them, a requirement for a Minister to come before Parliament and explain how the Bill is being implemented. The need for an adequate reporting mechanism is overwhelming in view of the substance of this Bill.

This was also the subject of cross-party concern in the House of Commons. Ian Blackford MP, for example stated that “I hope that the Government will look carefully at the safeguards of regular reporting, review and renewal if it is required”.<sup>8</sup>

Penny Mordaunt MP stated that

We are therefore ensuring that the support that people need is there, with regular reports and debates in Parliament, to ensure proportionate accountability that does not itself make the management of this outbreak harder than it already is. These mechanisms currently include Ministers reporting to Parliament every two months on how we have used these powers.<sup>9</sup>

Unfortunately, the actual wording of the Bill does not set out a satisfactory reporting procedure.

Clause 97 requires the Secretary of State to

- Publish a report on the status of the provisions of the Bill, and
- Include in that report a statement that the Secretary is satisfied that the status of those provisions is appropriate

“Status” of a provision is then defined to mean whether the provision is in force.

Clause 99 requires parliamentary consideration of the one-year status report. However, all that is necessary is that a Minister make arrangements for a motion in neutral terms to be moved in the House of Commons, and a motion for the House of Lords to take note of the one-year status report. A motion in neutral terms allows Parliament to consider or debate a topic, but does not allow for Parliament to take a view, or make a decision on an issue.

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<sup>8</sup> *Ibid.* Col 70.

<sup>9</sup> *Ibid.* Col 133.



There are two very significant defects with these reporting mechanisms

- The obligatory content of the report is threadbare
- There is a lack of an effective mechanism for parliamentary scrutiny of reports

### Content of report

The only thing that a report need contain is a statement on which provisions are in force, and whether it is appropriate that they are in force. This does not provide Parliament with any information that it can use to determine whether the Bill is working in practice and whether the powers continue to be necessary. If the Government is taking very serious measures, it needs to justify to Parliament the continuing need for them. The report needs to be far more detailed. It needs criteria to measure its success. Richard Fuller MP argued that

First, we need to set a clear goal. Secondly, we need to outline the reasonable, measurable benchmarks needed to show that we are making progress in achieving that medical goal.<sup>10</sup>

**We recommend that clause 97 be amended so that there is more detail on what is required to be in the report.** Parliament needs to know what is working, what is not working, and why it is or isn't working. For example, this provision could be amended to include a requirement for the report to provide the following:

- How effective have the emergency measures been in combating the threat of coronavirus, and what is the evidence for this?
- How often have the emergency measures been used, applied or implemented - either a specific figure, or a general approximation, whichever is more practicable.
- Have the emergency measures generally been complied with, or what is the level of non-compliance?
- What sanctions have been imposed for non-compliance?
- What is the scientific justification or evidence that the emergency measures in the Bill continue to be necessary?

**Alternatively, we recommend that the Minister be asked to undertake that reports to Parliament will include such information.**

### Parliamentary consideration of reports

We previously commented on the fact that, under clause 99, Parliament need only consider the one-year report, and that that consideration was limited to a motion in neutral terms. One recommendation was that the one-year report be made more frequent, and that there ought to be substance to parliamentary consideration.

Given that the Government has now amended the Bill to include the 6 monthly review (see above), our previous recommendation is less compelling.

However, there is still **a need for a dedicated Parliamentary body which can meet relatively easily and at short notice to scrutinise the implementation and effectiveness of the Bill.** Given the extraordinary nature of the emergency powers in this Bill, and their cross-departmental nature, we recommend that Parliament should consider the creation of an ad hoc Joint Committee to scrutinise the operation of the Act in practice, drawing on the expertise from different departmental select committees. A smaller committee would find it easier to arrange for video hearings and take on board the views of Government experts and experts from outside Government.

**We recommend that the Minister be asked to undertake that the Government will do all it can to maximise such opportunities for parliamentary scrutiny.**

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<sup>10</sup> *Ibid.* Col 144.

## The importance of legal certainty in Government communications

At the time of writing (Wednesday 25 March 2020) the Bill is still a Bill. It is not an Act, it hasn't been brought into force, and no regulations have been made under it. It is not law.

The Government is of course expected, obligated even, to give advice and guidance to people and businesses. It can and should give this in a firm and definite way, even using the language of obligation. It can tell people that they must remain at home, that they should not go out unless absolutely necessary, and that they ought to maintain social distance. And once this Bill becomes an Act and comes into force, the Government will be entitled to enforce that guidance as a law and back it up with legally effective sanctions. It will be able to order citizens to follow these emergency measures as a matter of law.

However, in this time of great legal uncertainty, when the Government's official guidance is already creating considerable doubt about what counts as essential and non-essential activity, it is important that the Government does not make the legal uncertainty worse by making inaccurate statements about these directions being binding law ahead of it actually becoming law. On 24 March 2020, the Government sent out the following text message to people:

GOV.UK ALERT CORONAVIRUS new rules in force now: you must stay at home. More info and exemptions at [gov.uk/coronavirus](https://gov.uk/coronavirus) Stay at home. Protect the NHS. Save lives

It is not accurate to state that these new rules are "in force" now. They will most likely be in force within a few days, but they are not in force now.

Trust in Government, in official messages and scientific advice is vital at this time. As Ian Blackford MP said at second reading "In passing these emergency measures, we have to be fully transparent and open".<sup>11</sup> Accurate communication from the Government is vital to maintaining that trust.

**The Government should be careful to ensure that it does not compound the legal uncertainty caused by the emergency by making ambiguous statements about what rules apply, when they apply, and the consequences for people if they are breached.**

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<sup>11</sup> *Ibid.* Col 65.



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