BIG BROTHER WATCH

Written Evidence to the Public Administration and Constitutional Affairs Committee's Inquiry: The Coronavirus Act 2020 Two Years On

January 2022

About Big Brother Watch

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

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

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

Since the Coronavirus Bill was first introduced, we have been scrutinising emergency powers, providing policy analysis and emphasising the importance of close parliamentary scrutiny. We have been producing regular reports and briefings on the Government's response to the Covid-19 pandemic, emergency powers and their impact on civil liberties and human rights, and have circulated the reports to parliamentarians.[1] Since March 2020 we have produced 12 Emergency Powers and Civil Liberties Reports, and sent briefings to parliamentarians on the status of the Coronavirus Act 2020 ahead of every debate in the Commons and Lords.

The operational effectiveness of the Coronavirus Act 2020 and its interaction with other emergency legislation, including the Public Health Act 1984 and the Civil Contingencies Act 2004

The Coronavirus Act 2020 contains extreme powers, the like of which have never been seen in peacetime Britain. The Government rushed the Act through Parliament in just 4 sitting days, meaning full and thorough scrutiny of the powers contained within the Act was impossible. It was passed at the onset of a national crisis, and as such, imbued ministers with far reaching powers to respond to the pandemic.

Many powers within the Act have not proved necessary and have never been activated. However, some that have been used, namely the broad detention and dispersal powers in the Act, have been used exclusively unlawfully.

Schedules 21 and 22

Schedules 21 and 22 contained powers to detain and test "potentially infectious" members of the public, including children, in unidentified isolation facilities (sch. 21); and powers to shut down any gathering, including protests (sch. 22). The Act contained threadbare safeguards for these extraordinary powers. We argued in our briefing on the (then) Bill that the Health and Social Care Act 2008 (s.45G)and the Civil Contingencies Act 2003 (s.22) contain more appropriate detention and dispersal powers and stronger safeguards.[2]

These Schedules have been recently expired by the Government after sustained pressure from MPs and civil society. It is right that these powers have been removed from the Act. However, they have been in force for almost 2 years without justification. During this period they have been used extensively and unlawfully by police forces across England and Wales.

Schedule 21 of the Coronavirus Act gave vast powers to the police, immigration officers and public health officials to detain members of the public, including children, potentially indefinitely. Schedule 21 of the Act stated that, if the Secretary of State was of the view that the transmission of coronavirus constituted a serious and imminent threat to public health and

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

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

declared a "transmission control period", police, public health officers and immigration officers could detain anyone they have reasonable grounds to suspect is "potentially infectious" (sch. 21, para. 6). This declaration was made on 17th February 2020, before the Act was passed.[3]

Big Brother Watch, alongside journalists and lawyers, investigated and analysed case studies of policing with Schedule 21 powers. We found that innocent and healthy individuals were being arrested and held in police cells, unlawfully.

One such example was Marie Dinou, who was arrested just days after that Act passed in March 2020. Ms Dinou was held overnight in a police cell and fined £660 for 'loitering' between platforms at Newcastle train station and refusing to tell officers her identity or reason for travel. Police alleged Ms Dinou committed an offence under Schedule 21, para. 23(1)(a) and (2) of the Coronavirus Act, as Schedule 21 broadly criminalises "failing without reasonable excuse to comply with any direction, reasonable instruction, requirement or restriction." However, the Schedule does not confer a general stop and account power to police. Police had no clear evidence to suspect that Ms Dinou was "potentially infectious". Similar cases followed across the country.

In response, the Crown Prosecution Service (CPS) initiated an unprecedented review of every single charge under the Coronavirus Act and has continued to conduct a monthly review for over 18 months. Every review to date has uncovered 100% unlawful prosecutions under the Act, a total of 307 charges.[4] It is unacceptable that the Government did not expire these powers as soon as it became apparent the extent to which they were being used unlawfully.

Schedule 22 conferred powers for the Secretary of State to issue directions in relation to events, gathering and premises. Under this Schedule the Secretary of State could declare a "public health response period" if the transmission of coronavirus constituted a "serious and imminent threat to public health" and the powers conferred would prevent, delay or control the transmission of the virus (sch. 22, para. 3). Declaration of such a period would have empowered the Secretary of State to "issue a direction prohibiting (...) the holding of an event or gathering" which may be a specific event or "events or gathering of a specified description" (sch. 22, para. 5). It also conferred powers to stop people entering premises, or force people to remain in them (sch. 22, para. 6), allowing the Secretary of State to "issue a direction imposing prohibitions, requirements or restrictions in relation to the entry into, departure from, or location of persons in premises." Such a declaration was not made in England.

However, figures released by the Ministry of Justice show that prosecutions under the Schedule 22 have occurred, despite it having never been activated.[5] These prosecutions were heard under the Single Justice Procedure, which allows people to be convicted in their absence, with a magistrate deciding the case on the basis of the evidence provided to them.

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3 Coronavirus – Serious and imminent threat declaration – Health Department, 14th February 2020, the London Gazette: https://www.thegazette.co.uk/notice/3495369

4 Crown Prosecution Service figures, obtained via email correspondence

5 Written answer: Chris Philip to Alex Cunningham, UIN 7818, 7th June 2021: https://questions-statements.parliament.uk/written-questions/detail/2021-05-26/7818

The choice to allow charges under the Coronavirus Act to be heard under the Single Justice Procedure was misguided, given that this novel piece of legislation has been poorly understood by police and prosecutors across the country.[6] Given the 100% unlawful prosecution rate uncovered by the CPS, these charges, some of which are still filtering through the criminal justice system, should be heard in an open court. Cases heard under the Single Justice Procedure are not covered by the CPS's review of coronavirus-related charges, making it likely that many more unlawful charges and prosecutions have proceeded than the 307 acknowledged by the CPS.

These charges and prosecutions have been brought without sufficient oversight, without any meaningful review process, and are resulting in guilty pleas and convictions for offences people have not committed, in a process they may also not be aware of. Big Brother Watch and other rights groups wrote to the Justice Secretary in June 2021, calling on the Department of Justice to suspend the use of the Single Justice Procedure for coronavirus-related offences and to ensure that all charges under the Coronavirus Act heard under the Single Justice Procedure were reviewed by the CPS.[7] Although Schedules 21 and 22 have now been expired by the Government, charges are still being heard. The Government should intervene to ensure that all charges are throughly assessed and withdrawn where necessary.

Use of the Public Health (Control of Disease) Act 1984

As of 29th December 2021, just 27 coronavirus-related statutory instruments have been laid under the Coronavirus Act.[8] The Public Health (Control of Disease) Act 1984 has been used to enact the majority of coronavirus-related restrictions.

This is likely because of the permissive nature of the Public Health Act's 'urgency procedure' (s.45R), which allows ministers to pass statutory instruments without laying them before Parliament, if "the person making it is of the opinion that, by reason of urgency, it is necessary to make the order without a draft being so laid and approved." Whether regulations are 'urgent' are left to the discretion of the Minister making them. The Institute for Government noted:

> "In some cases, the government's reliance on the urgency procedure appeared to have little justification. For example, between June and August 2020 several sets of regulations mandating the use of face masks came into force before being laid before parliament, despite the fact that the government had been advising the use of face masks since mid-May."[9]

6 Adapting the single justice procedure for Coronavirus (COVID-19) - HM Courts & Tribunals Service and Ministry of Justice, GOV.UK, 1st April 2020: https://insidehmcts.blog.gov.uk/2021/04/01/adapting-the-single-justice-procedure-for-covid-19/

7 Big Brother Watch sends joint letter on unlawful Coronavirus prosecutions to the Secretary of State for Justice – Big Brother Watch, 1st June 2021: https://bigbrotherwatch.org.uk/2021/06/big-brother-watch-sends-joint-letter-on-unlawful-coronavirus-prosecutions-and-convictions-behind-closed-doors-to-the-secretary-of-state-for-justice/

8 Coronavirus Statutory Instruments Dashboard – Hansard Society (updated 29th December 2021): https://www.hansardsociety.org.uk/publications/data/coronavirus-statutory-instruments-dashboard

9 Parliamentary Monitor 2021 – Institute for Government, 9th September 2021: https://www.instituteforgovernment.org.uk/sites/default/files/publications/parliamentary-monitor-2021.pdf

The Government's reliance on the Public Health Act and the urgency procedure has been criticised by a number of parliamentary committees, including the Lords Constitution Committee[10] and the Joint Committee on Human Rights.[11]

Big Brother Watch has maintained since March 2020 that the Civil Contingencies Act 2004 (CCA) should have been used to respond to the pandemic. By pushing new legislation onto the statute books and using the Public Health Act's urgency procedure rather than laying regulations under the CCA, the Government has been endowed with extreme powers and minimised parliamentary scrutiny of them.

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

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

as well as the ability to create offences of failing to comply with any of the above regulations (s.22).

When questioned by Conservative Adam Afriyie MP, "is there a particular reason why the Civil Contingencies Act 2004 was not used? It already contains many of the safeguards that I suspect the House will wish to see", the Leader of the House Jacob Rees-Mogg claimed it could not be used as, "the problem was known about early enough for it not to qualify as an emergency under the terms of that Act."[12] This is plainly wrong.

David Davis MP requested on a Point of Order the opinion of the Speaker's Counsel as to whether the CCA could have been relied on for emergency regulations for the present crisis.[13]The Speaker's Counsel was unequivocal:

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10 Covid-19 and the use and scrutiny of emergency powers: Third report of Session 2021–22 – House of Lords Committee on the Constitution, 10th June 2021: https://publications.parliament.uk/pa/ld5802/ldselect/ldconst/15/1502.htm

11 The Government's Response to Covid-19: Human rights implications: Seventh report of Session 2019–21 – Joint Committee on Human Rights, 21st September 2020: https://publications.parliament.uk/pa/jt5801/jtselect/jtrights/265/26513.htm

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

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

> "The 2004 Act (which I wrote), including the powers to make emergency provisions under Part 2, is clearly capable of being applied to take measures in relation to coronavirus."[14]

The CCA should have been used to respond to the coronavirus pandemic, to ensure meaningful parliamentary scrutiny and accountability.

The evidence and procedures underpinning the six-monthly and annual renewal processes for the Coronavirus Act 2020 since its entry into force in March 2020

Evidence

Section 97 of the Act requires the Health Secretary to report to Parliament on key provisions in the Act every two months. This is the only public assessment made by the Government of its use of the significant powers contained within the Act. As such, it should be detailed, accurate and provide thorough justification for any powers retained by the Government.

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

As Dr Ronan Cormacain pointed out when speaking to this Committee, the tone of reports are "self-congratulatory" and "[come] across as a little propagandistic rather than something that is properly independent." We are also concerned at the lack on independent analysis of these measures.

The reports also state that Schedule 21 has been used in "fewer than 10 cases across the whole of England."[15] This is evidently false, given the 307 unlawful prosecutions uncovered by the CPS's reviews. There is no explanation or transparency as to why and how powers under the Schedule were used, or how this was recorded. Furthermore, there is no mention of the fact that 100% of the prosecutions brought under the Act have been unlawful.

Procedures

Big Brother Watch has argued that emergency powers should should emergency time limits, and successfully campaigned with parliamentarians of all parties[16] to secure an amendment for

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

15 Two monthly report on the status of the non-devolved provisions of the Coronavirus Act 2020 – Department of Health and Social Care, 29th May 2020, p.6: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/888602/coronavirus-act-2-month-report-may-2020.pdf (similar statements have been made in every two monthly report)

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

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

The weakness of this amendment became apparent when faced with the Government's continued use of Schedules 21 and 22 of the Act. In the run up to the first parliamentary vote on the renewal of the Act (September 2020), Big Brother Watch campaigned for the repeal of Schedule 21, coordinating a campaign that saw tens of thousands of people emailing their MPs asking them to support an amendment which proposed to add "except for Schedule 21" to the renewal motion. The amendment was signed by 6 Conservative MPs, 10 Labour MPs and Green MP Caroline Lucas. The Speaker did not select this amendment, or any of other amendment on the grounds that "any amendment to the motion before the House risks giving rise to uncertainty about the decision the House has taken."[17] An amendment to the motion ("this House calls on Ministers to use their powers under section 88 of the Act to suspend the operation of Schedules 21 and 22 to the Act forthwith") was also laid at the second renewal vote, and was again not selected. This renders the renewal an 'all or nothing' motion, with ministers afforded total discretion as to what parts of the Act to retain.

As well as a narrow, binary choice of whether to renew or repeal the Act in its entirety, limited parliamentary time has been granted to MPs to debate the renewal of the Act. In September 2020, the debate on the renewal of the Act was just 90 minutes long – which backbench Conservative MP Sir Charles Walker branded "an utter, utter disgrace".[18] During the most recent renewal vote, the debate was held alongside the consideration of other coronavirus-related legislation, further limiting time given to MPs to question the Government's use of the Act. This is an unacceptable swerving of democratic accountability.

The scrutiny and transparency surrounding the use of the Act's powers has been severely lacking. In a parliamentary democracy, the Government is accountable to the public and to Parliament and must justify its use of the enormous powers afforded to it by the Act. In times of crisis, scrutiny is more vital than ever. Yet the Government has failed to provide accurate evidence on its use of the Act and has failed to provide a parliamentarians with a meaningful review process. This cavalier approach to such extreme emergency powers has undoubtably damaged trust in the Government's public health response and is a worrying blueprint for future crises.

The circumstances and process under which Section 90 of the Coronavirus Act 2020 can and/or should be used to extend measures beyond their sunset clause

The Coronavirus Act endures for at least two years (s.89). Powers exercised under the Act can last for six further months, meaning the Act could last 2.5 years; and the Act gives far-reaching powers to ministers to extend the Act beyond two years simply by regulation (s.90). This is an

17 Speaker's Statement (30th September 2020) vol. 681, col. 331: https://hansard.parliament.uk/commons/2020-09-30/debates/8160262B-DA85-4D6C-B7FF-86717C8261B2/Speaker%E2%80%99SStatement

18 HC Deb (30th September 2020) vol. 681, col. 410-1: https://hansard.parliament.uk/commons/2020-09-30/debates/AAB1B147-2F78-4F41-ADE6-F1E50B3F3ECB/CoronavirusAct2020(ReviewOfTemporaryProvisions)

extraordinary expansion of ministerial power and an unacceptably long time for exceptional, emergency powers to be at the disposal of Government.

The Act contains the most draconian powers ever seen in peacetime Britain. It was right for the Government to be equipped with the powers and resources it needed to face an uncertain and challenging period, when there were considerable unknowns about how Covid-19 would impact public health and the functioning of society. However, two years on, armed with vaccinations, new public health systems such as NHS Test and Trace, and a greater understanding of how Covid-19 transmits and impacts public health, these extreme powers cannot be justified. The Government should repeal the Act in its entirety.

If the Government believes any powers contained within the Act are necessary and useful for the long term protection of public health, such as the suspension of restrictions on the return to work for retired NHS staff, the powers should be retained through new primary legislation. This will allow them to be meaningfully and thoroughly scrutinised by Parliament and will guard against the dangerous normalisation of emergency powers.