Written evidence from Dr Alun Gibbs and Dr Asif Hameed (RCC 09)

Public Administration and Constitutional Affairs Committee
Responding to Covid-19 and the Coronavirus Act inquiry

We are Law academics at Southampton Law School. We specialise in public law and have written widely across the field.

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To assist the committee our submission focuses on questions 3 and 4.

Summary of our submission

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

We argue that there are advantages and disadvantages to a principally statutory route. A sound legislative approach, relying principally on statute or alternatively a blend of statute and secondary legislation, should accommodate the need to legislate rapidly with sufficient scope for scrutiny that will improve the legislation's quality and monitor its use. It is difficult to see how these considerations have been adequately met by the government's chosen approach.

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

We argue that the Civil Contingencies Act 2004 could have served as an appropriate basis for introducing necessary secondary legislation. We also argue that there are sound reasons to utilise that statute rather than emergency powers under the Public Health (Control of Disease) Act 1984.

Submission

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

1. Key puzzles surround the government's legislative choices in the coronavirus pandemic. A general regime on emergencies is provided under the Civil Contingencies Act 2004 ("CCA 2004") which empowers the government to enact secondary legislation. But the CCA 2004 has been left to one side. The government decided to pursue coronavirus-specific primary legislation in the shape of the Coronavirus Act 2020, which came into force on 25 March 2020.

The 2020 Act makes detailed provision for various sectors as well as empowering ministers to adopt secondary legislation. The government's preference for a more piecemeal legislative approach, rather than relying on the CCA 2004's general regime, was supported by the Opposition. For example, the Shadow Attorney General has suggested that specific primary legislation addressing the coronavirus situation would be preferable in potentially being more sensitive to the immediate circumstances, and also in triggering more focused and contemporaneous parliamentary scrutiny. Whether the government should have instead made some use of the CCA 2004 is addressed further below in our response to question 4.

2. As to whether the "lockdown" regime should have placed on a statutory footing under the 2020 Act, various sound approaches are available either in primary legislation, or in a mix of primary and secondary legislation. There is no uniquely correct method. At base, an appropriate legislative approach should accommodate the need to legislate rapidly with sufficient scope for scrutiny that will improve the legislation's quality and monitor its use. It is, however, difficult to see how these considerations have been adequately met by the government's chosen approach.

3. The government established the lockdown regime by means of secondary legislation – the first round of lockdown regulations being, in England, the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (SI 2020/350). These regulations were adopted under special emergency powers conferred by s 45R of the Public Health (Control of Disease) 1984. They came into force on 26 March 2020, one day after the commencement of the 2020 Act.

4. It should rightly be queried why the main substantive content of the lockdown regulations could not have been included in the 2020 Act, since the latter is itself highly detailed in places and sector-specific. The two instruments – the 2020 Act and SI 2020/350 – were drafted contemporaneously. We may also note, for example, that the 2020 Act, under Sch 21 para 24(1), revokes and places on a statutory footing earlier regulations (SI 2020/129, commencing 10 February 2020) also made under s 45R of the 1984 Act. Lastly, a statutory lockdown regime could be subject to rapid statutory amendment; we may note that the Coronavirus Bill itself completed all Commons stages in one day (23 March 2020). Alternatively, a statutory lockdown regime could provide a detailed framework, supplemented by limited powers to enact more granular secondary legislation for specific cases. The government could also have sought Henry VIII powers, subject in their exercise to proper parliamentary oversight, if secondary legislation amending the parent statutory regime was a particular necessity.

5. It is therefore clear that the main lockdown regime could have been placed on a statutory footing. At the same time, we should query what the benefits would be. Although we tend to view the parliamentary legislative process as the gold standard, the alacrity of the 2020 Act's passage inhibited scrutiny. The process was choked by the legislation's length and detail, and conceivably this may have been compounded if substantial swathes of the main lockdown regime were also included. There are broader and deeper constitutional questions about how best to strike the balance between governing through primary or secondary legislation, whether generally but also in emergency situations. In these circumstances, a sound approach acknowledges the need for rapid legislating while also deliberately making room for as much

as effective scrutiny as possible – this being especially critical given the significance of the lockdown regime.

6. Choosing a statutory route for the lockdown regime is likely to yield mixed results. In some ways that approach invites greater scrutiny. If included in the Coronavirus Bill, the lockdown regime could potentially have received more robust ex ante scrutiny as the Bill proceeded through Parliament. As mentioned, scrutiny was inhibited given the speed of the Bill's passage, but it is likely that minds would have been focused on the Bill's proposed lockdown regime. In addition, once enacted the Coronavirus Act's lockdown provisions would be amendable only by subsequent Acts of Parliament (absent relevant Henry VIII powers). Such amending legislation – eg on easing the lockdown – would also be a focus for significant ex ante parliamentary legislative scrutiny. On the other hand, the statutory route may also limit scrutiny in certain ways. If the government sought to place the lockdown regime on the statute book, it might also seek in the statute to insulate the statutory regime from review and possible expiry. In its current state the 2020 Act provides for expiry of its *temporary* provisions if the Commons so decides at the end of any six-month period, or of its temporary provisions two years after enactment. By contrast, lockdown regulations introduced under the 1984 Act's emergency powers face a more regular parliamentary review and expiry period under s 45R (and this is leaving aside any special self-expiry rules provided in the regulations themselves). Furthermore, unlike statute, secondary legislation is subject to judicial review. Indeed it is debated whether the 26 March lockdown regulations may have been ultra vires the 1984 Act.

7. Choosing secondary legislation as the main vehicle for the lockdown regime may also yield mixed results in terms of scrutiny – and this is especially so if the statutory powers chosen by the government exclude ex ante scrutiny, as is the case with s 45R of the 1984 Act. It is true that ex post scrutiny is available – see eg the Commons debate on the motion to approve the 26 March lockdown regulations on 4 May 2020. But it should be uncontroversial that regulations as significant as these must attract more than a minimal level of parliamentary scrutiny. Politically, the scope to challenge and potentially unravel the lockdown regime ex post facto is harder to accomplish in circumstances where the lockdown has been operational for weeks, attracting widespread public support and obedience. Ex post tinkering with the rules is also liable to confuse the public who require clear instruction. Prompt but robust ex ante scrutiny offers greater scope to adjust and refine proposed lockdown rules before they are brought into force and to the public's attention.

8. Deciding whether to place the lockdown regime on a statutory footing should be guided by sound considerations including the importance of close parliamentary scrutiny. It may appear that the government is evading parliamentary scrutiny, especially of the critical ex ante kind, by repeatedly preferring to enact secondary legislation under s 45R of the 1984 Act. At the same time, in choosing the path of secondary legislation rather than statute, the government is opening itself to subsequent legal challenge. That itself presents a risk to the lockdown regime – and could potentially be reduced if the benefits of ex ante parliamentary scrutiny of the secondary legislation were secured. The concern about legal challenge to the lockdown regime was, for instance, drawn out by Steve Baker MP in the Commons debate (4 May 2020) on approving the 26 March lockdown regulations.

9. All in all, it is difficult to discern clear and soundly reasoned bases for the government's legislative choices. The impression is of a somewhat haphazard strategy. More prosaically, the government had prior to the lockdown been enacting coronavirus-related regulations under s 45R of the 1984 Act (SI 2020/129 and SI 2020/327); perhaps the thought was simply to follow the same pattern with the 26 March lockdown regulations (SI 2020/350).

10. Lastly, we may query why lockdown regulations were not adopted under *powers* established under the 2020 Act, that being the most recent expression of parliamentary will. The 2020 Act came into force on 25 March, followed the next day by the 26 March lockdown regulations, but as we have seen the latter were adopted under s 45R of the 1984 Act. To the extent that the 2020 Act's powers were deemed insufficiently extensive, it is unclear why the government would not have thought to secure more expansive statutory powers. It has a decisive majority in the Commons, and there was cross-party support for bespoke primary legislation. Once more this is suggestive of a legislative strategy that was not fully thought out.

11. The government may in response defend its choice of the 1984 Act as the preferred legal basis for the lockdown regulations, rather than powers enacted under the 2020 Act, by arguing that it could not guarantee the safe passage of the 2020 Act or the impact of possible amendments. Accordingly, preparations for the lockdown regime needed to be made on some other basis. It is worth emphasising that this response would not by itself explain the choice of the 1984 Act over the CCA 2004. In addition, given the cross-party support for a lockdown, it is difficult to accept that Parliament would have blocked the conferring of necessary statutory powers in the 2020 Act – although it may have demanded some oversight of their exercise. Again, these matters could have been better anticipated by the government with sufficient forward-planning and cross-party cooperation, producing a more coherent legislative strategy.

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

12. With the CCA 2004 the UK has legislation which is capable of granting emergency powers to the executive at the same time as setting out a framework of legal and Parliamentary oversight and restraints. There are three inter-related issues regarding the nexus between the emergency legislative measures adopted in response to the pandemic. **First:** whether it is was possible to use the CCA 2004. **Second:** why the government chose not to use CCA 2004. **Third:** whether it might have been more appropriate to use the CCA 2004.

Was it possible to use the CCA 2004 to respond to COVID-19 pandemic?

13. Replacing older and more anachronistic legislation on the statute book to deal with emergencies (Emergency Powers Act 1920 and the Civil Defence Act 1947) the CCA 2004 set out to establish a clear set of roles and responsibilities for emergency situations at national and local levels; the powers under which responses could be framed and the democratic or constitutional checks on the operation of the emergency. The CCA 2004 in other words aims

to structure the planning and response to emergency situations in a proactive sense rather than being purely reactive.

14. Section 1 defines the emergency situations brought within the scope of the CCA 2004. The spread of coronavirus in the UK would be defined as an emergency situation under s 1(a) as the virus "threatens serious damage to human welfare in a place in the United Kingdom" and as per s1(2)(b) and (c) cause or may cause "loss of life" and/or "disruption of services relating to health." A designation of emergency enables regulations to be made by Order in Council s 19(1) or by a Minister of the Crown in s 19(2). Section 21 sets out three conditions for making emergency regulations: that the emergency situation is occurring or about to occur; that it is necessaryand that it is 'urgent'.

15. It follows from this that certainly the Regulations setting out the lockdown on the 26 March could have been introduced on the basis of the CCA 2004 rather than under s 45 of the Public Health Act 1984.

Why did the government not use powers under the CCA 2004?

16. During the passage of the main Coronavirus Bill through Parliament ministers were questioned at several points on both sides of the Commons about why the CCA 2004 was not being used. Penny Mordaunt responding for the government stated that:

"we cannot use the *Civil Contingencies Act 2004* to do this. If we have time to bring forward legislation, it is proper that we do that, and anything we did under the powers of the *2004 Act* would apply for only 30 days."

17. The first argument is based around introducing specific legislation *if there is time* rather than relying on regulations/secondary legislation. There is certainly no general rule that introducing new primary legislation is a proper way of dealing with an emergency situation if there is time. (See further our response to question 3 above.) Even so, it does not explain why the government decided to use the Public Health Act 1984 rather than the CCA 2004 as the legal basis for the lockdown regulations.

18. The second argument relies on the fact that one of the key restraints in the architecture of the CCA 2004 is that emergency regulations lapse after 30 days (s 26(1)). Perhaps it was felt that the measures required to deal with the pandemic might need to be extended for a longer period. However, s26(2) of the CCA 2004 allows for emergency regulations to be renewed. In summary, the government's *stated* reasons for not using the CCA 2004 are not sufficiently robust.

Would it be more appropriate to have used the CCA 2004?

19. There are two main ways to frame any enquiry into this question. In the first instance although we require the legal framework dealing with emergency situations to be effective, it also needs to be congruent with constitutional principles and values. In particular, this means

that the legislature should provide an appropriately rigorous check and review on the necessity of using emergency regulations in order to prevent abuse by the executive and to ensure there is political accountability through Parliament. The second issue concerns whether the architecture of CCA 2004 and the *timing* of the definition of emergency helps to frame a response to the emergency challenges. This latter point brings into play the interrelation between legal measures and policy decisions regarding the timing of actions.

20. Review powers under the Coronavirus Act 2020 are contained in the 6-month "Parliamentary Review" under s 98, which enables the expiry of the "relevant temporary provisions" before the statutory 2-year expiry period (s 89). We have concerns that expiry covers only temporary provisions, and that the wording of s 98 excludes a role for the House of Lords. The CCA 2004 provides a more robust parliamentary role: s 27 requires that emergency regulations be laid before Parliament as soon as is reasonably practicable. The critical role of Parliament in approving the emergency regulations is reinforced by s 28 which enables Parliament to be recalled to scrutinise the regulations even if Parliament is adjourned or prorogued. In this context it is worth pointing out that the regulations made under the Public Health Act 1984 offer no such protections to Parliament and in point of fact due to the Easter recess the 26 March lockdown regulations were not debated until 4 May 2020.

21. In considering the appropriateness of the CCA 2004 there is another aspect to be addressed. It has become clear that one of the critical aspects of the government's response to the pandemic was its *timing* in introducing the lockdown regime. Debate continues about whether the UK was too late in imposing a lockdown. What is clear is that, comparing the CCA 2004 and the Public Health Act 1984, there is a difference in the way that the *timing* of emergency regulations is conveyed. In the CCA 2004 there must be an "urgent" need for regulations whereas under the 1984 Act the threat must be "imminent" before regulations can be enacted. There is a distinction between urgent and imminent – the former connoting significant and pressing whereas the latter suggesting a threat "at that very moment". Had the lockdown regulations been imposed earlier in March (or even sooner) it would, we think, be *legally* more straightforward to argue that the threat was an urgent one rather than imminent, and would further strengthen the case for enacting the lockdown rules under the CCA 2004 rather than the Public Health Act 1984.

June 2020