

**M Gardner  
Claimant  
1<sup>st</sup>  
20/05/20  
MG1-4**

**IN THE HIGH COURT OF JUSTICE**

**CLAIM NO.**

**AND IN THE MATTER OF THE HEALTH PROTECTION (CORONAVIRUS, RESTRICTIONS)  
(ENGLAND) REGULATIONS 2020;**

**AND IN THE MATTER OF THE PUBLIC HEALTH (CONTROL OF DISEASES) ACT 1984;**

**ADMINISTRATIVE COURT**

**BETWEEN**

**THE QUEEN**

**on the application of**

**SIMON DOLAN**

**Claimant**

**and**

**(1) THE SECRETARY OF STATE FOR HEALTH & SOCIAL CARE**

**First Defendant**

**(2) THE SECRETARY OF STATE FOR EDUCATION**

**Second Defendant**

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**WITNESS STATEMENT OF  
MICHAEL GARDNER**

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**I, MICHAEL GARDNER, of 71 Queen Victoria Street, London EC4V 4AY, WILL SAY as follows:**

**1. INTRODUCTION**

1.1 I am a solicitor and partner in Wedlake Bell LLP. My firm represents Mr Simon Dolan the Claimant, in this matter. I make this statement in support of the Claimant's application for judicial review against the Secretary of State for the Department of Health and Social Care

("the SoS"). The details of that claim and the grounds on which it is based are set out in the claim form and statement of grounds. The Secretary of State for Education is also included as a second defendant for the reasons explained in paragraph 5 of the Claimant's statement of grounds because of the circumstances under which schools and educational establishments have been closed.

1.2 The facts I refer to in this statement are, unless otherwise indicated, within my own personal knowledge. Where I refer to facts which are not within my own personal knowledge, I state the source of my information.

1.3 As is explained in the statement of grounds, the application for judicial review arises from the legislative measures taken by the UK Government in order to combat the spread of the virus identified as SARS-COV-2 which causes the condition known as COVID-19. For ease of reference, in this statement I shall refer to the virus simply as "Covid-19".,

1.4 The Claimant claims that:

1.4.1 certain secondary legislation introduced by the Government purportedly under The Health Protection (Control of Disease) Act 1984 ("the 1984 Act") is ultra vires;

1.4.2 that those same regulations disproportionately breach various rights of individuals and businesses contrary to the Human Rights Act 1998 ("the HRA") which incorporates the European Convention on Human Rights ("the Convention");

1.4.3 that by imposing on itself five tests for varying or terminating the restrictions contained in the regulations it introduced under the 1984 Act, the Government has fettered its discretion and failed to take into account a range of other important factors which ought to mitigate in favour of relaxing or terminating those restrictions; and

1.4.4 the Government's decision or direction to close schools and educational establishments in March should be quashed.

1.5 In the relatively short time since the Covid-19 outbreak started, there has been an ever increasing amount of academic, scientific and medical literature and articles published and put into the public domain. The purpose of this statement is to place before the Court, such material from the public domain which the Claimant considers to be relevant to his judicial review proceedings and to highlight the pertinent points which emerge from those materials. Necessarily, for reasons of space and the limitations imposed by new Court guidelines for e-bundles, it is not possible for me to physically exhibit all of the available material. For ease of reference, therefore, and to minimise the size of the exhibits to this statement, I have

wherever possible placed hyperlinks directly to the material referred to using footnotes. I have also set out in the body of this statement certain passages from the documents which I consider relevant. As a result, this statement is necessarily a lengthy one. However, in view of the fact that the hearing of this matter may have to be held via video link, I hope it will assist the Court to have the fullest possible material "on paper".

1.6 Regrettably, much of the material which appears to have been relied upon by the SoS in making his decisions concerning the implementation of the "lockdown" measures has remained secret. For example, although the Government has published a small number of materials which it says were documents that have been seen by its Scientific Advisory Group for Emergencies ("SAGE"), these are evidently only a small selection of the total. From my viewing the relevant SAGE website pages, I note that the Government has so far published a list of 122 papers seen or relied upon by SAGE, of which less than a third have so far been made available in public. Further, despite a request contained in the Claimant's pre-action letter for the minutes of SAGE meetings to be published, in their response, the Government's lawyers have refused this request.

1.7 In this statement, I shall do the following:

1.7.1 set out the background and relevant chronology leading to the introduction of the secondary legislation on 26 March 2020 which is the subject of these judicial review proceedings and the subsequent amendments to that legislation;

1.7.2 describe the Claimant's pre-action steps and correspondence with the Government Legal Service prior to the issue of the proceedings;

1.7.3 exhibit the evidence which supports the Claimant's claims that the legislation imposed by the Government breaches the proportionality test in the 1984 Act and is disproportionate and overly restrictive in breach of the HRA;

1.7.4 deal with the "five tests" created by the Government as pre-conditions for easing the lockdown measures;

1.7.5 explain why the Claimant is seeking disclosure of minutes of SAGE meetings.

1.8 There is now produced and shown to me marked Exhibit "**MG1**", which appears at Tab D1 of the e-bundle, and to which I shall refer via direct hyperlinks in footnotes and with bundle references in this part of my statement. Reference to Tabs in this Witness Statement are to the Tabs in the e-bundle.

## **2. THE BACKGROUND**

2.1 In December 2019, reports began filtering through to Western news media that a new form of "coronavirus" had been identified in hospitalised patients taken ill in the Chinese city of Wuhan.

2.2 An article I have read which was published in the Lancet on 24 January 2020 provides a useful summary:

*"Coronaviruses are enveloped non-segmented positive-sense RNA viruses belonging to the family Coronaviridae and the order Nidovirales and broadly distributed in humans and other mammals.*

*Although most human coronavirus infections are mild, the epidemics of the two betacoronaviruses, severe acute respiratory syndrome coronavirus (SARS-CoV) and Middle East respiratory syndrome coronavirus (MERS-CoV) have caused more than 10 000 cumulative cases in the past two decades, with mortality rates of 10% for SARS-CoV and 37% for MERS-CoV.*

*In December, 2019, a series of pneumonia cases of unknown cause emerged in Wuhan, Hubei, China, with clinical presentations greatly resembling viral pneumonia.*

*Deep sequencing analysis from lower respiratory tract samples indicated a novel coronavirus, which was named 2019 novel coronavirus (2019-nCoV). Thus far, more than 800 confirmed cases, including in health-care workers, have been identified in Wuhan, and several exported cases have been confirmed in other provinces in China, and in Thailand, Japan, South Korea, and the USA."<sup>1</sup> (see Tab D1.1 pages 275 to 284)*

2.3 Initially, there was some uncertainty as to how serious the Covid-19 infection was, how contagious it was and whether it could be transmitted from person to person. There is still controversy about its exact origins and the extent to which the Chinese authorities may have concealed what they knew about Covid-19, at least in the initial stages of its spread. I am also aware of some press reports that suggest the disease might have reached Europe earlier than previously thought, back in 2019. The World Health Organisation (WHO) declared the

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<sup>1</sup> [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)30183-5/fulltext#%20](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30183-5/fulltext#%20)

Covid-19 outbreak a "Public Health Emergency of International Concern on 30 January 2020."<sup>2</sup> (see Tab D1.2 pages 285 to 287)

### **Covid-19 reaches the UK**

- 2.4 The first officially documented case of Covid-19 occurred in the UK on 29 January 2020, when two Chinese travellers in York tested positive for the virus (see Tab D1.3 pages 288 to 290).<sup>3</sup> On 28 February, the first incident of where someone had caught Covid-19 in the UK was documented and the first confirmed death from Covid-19 took place when a 70 year old woman with underlying health issues died in hospital in Reading on 4 March (see Tab D1.4 pages 291 to 293).<sup>4</sup> Thereafter the spread of Covid-19 increasingly dominated news bulletins in the UK, as the virus spread through Europe.
- 2.5 The UK Government published its Covid-19 Action Plan on 3 March. This document set out in some detail how the UK proposed to approach dealing with the potential spread of Covid-19 (see Tab D1.5 pages 294 to 310).<sup>5</sup>
- 2.6 On 11 March the WHO finally declared the spread of Covid-19 as a pandemic (see Tab D1.6 pages 311 to 313).<sup>6</sup>

### **Government announcements in the run up to the lockdown**

- 2.7 It appears from pronouncements and documents that the Government had been concerned by the spread of Covid-19 for some time. According to Sir Patrick Vallance, the Government's Chief Scientific Adviser, the SAGE committee had met to discuss Covid-19 for the first time on 22 January 2020 and thereafter had met frequently through February and into March. Eventually, on 12 March, the Prime Minister, Boris Johnson personally addressed the nation in a speech from Downing Street. He confirmed that he had chaired a meeting of the Government's emergency committee "COBR" to discuss Covid-19. In his statement, he

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<sup>2</sup> [https://www.who.int/dg/speeches/detail/who-director-general-s-statement-on-ihr-emergency-committee-on-novel-coronavirus-\(2019-ncov\)](https://www.who.int/dg/speeches/detail/who-director-general-s-statement-on-ihr-emergency-committee-on-novel-coronavirus-(2019-ncov))

<sup>3</sup> <https://metro.co.uk/2020/04/19/first-case-coronavirus-uk-covid-19-diagnosis-12578061/>

<sup>4</sup> <https://www.independent.co.uk/news/health/coronavirus-death-uk-outbreak-hospital-berkshire-nhs-a9379696.html>

<sup>5</sup> <https://www.gov.uk/government/publications/coronavirus-action-plan/coronavirus-action-plan-a-guide-to-what-you-can-expect-across-the-uk>

<sup>6</sup> <http://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/news/news/2020/3/who-announces-covid-19-outbreak-a-pandemic>

warned of the potential impact that the Covid-19 pandemic might have on the country and explained what the Government proposed to do about it (see Tab D1.7 pages 314 to 316).<sup>7</sup>

2.8 He explained the rationale for the Government's proposed actions as follows:

*"Because this is now not just to attempt to contain the disease as far as possible, but to delay its spread and thereby minimise the suffering. If we delay the peak even by a few weeks, then our NHS will be in a stronger state as the weather improves and fewer people suffer from normal respiratory diseases, more beds are available and we'll have more time for medical research.*

*We can also act to stretch the peak of the disease over a longer period so that our society is better able to cope.*

*The Chief Medical Officer will set out our lines of defence. We have to deploy these at the right time to maximise their effect. The most important task will be to protect our elderly and most vulnerable people during the peak weeks when there is the maximum risk of exposure to the disease and when the NHS will be under the most pressure. So the most dangerous period is not now but some weeks away depending on how fast it spreads."* [emphasis added]

2.9 Mr Johnson also said this in relation to outdoor events involving the public

*"We are considering the question of banning major public events such as sporting fixtures. The scientific advice as we've said over the last couple of weeks is that banning such events will have little effect on the spread."* [emphasis added]

2.10 As far as school closures was concerned, the Prime Minister said:

*"We are not - repeat not - closing schools now. The scientific advice is that this could do more harm than good at this time."* [emphasis added]

2.11 On 13 March, Sir Patrick Vallance had spoken of how so-called "herd immunity" could be beneficial in combatting the epidemic and avoiding a potentially dangerous second wave of infections. But the Government was coming under severe pressure in the media to copy the more severe lockdown measures increasingly being implemented in other countries in Europe (see Tab D1.8 pages 317 to 319).<sup>8</sup> By this stage, news reports from Italy were suggesting that hospitals in the worst affected regions in the North of the country were in danger of being

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<sup>7</sup> <https://www.gov.uk/government/speeches/pm-statement-on-coronavirus-12-march-2020>

<sup>8</sup> <https://www.ft.com/content/38a81588-6508-11ea-b3f3-fe4680ea68b5>

overwhelmed by the sheer numbers of cases requiring treatment. The same later happened in Spain.

- 2.12 On 16 March, the SoS made a statement to Parliament announcing that the new Coronavirus Bill would be introduced to the House of Commons. He also signalled the Government's intention to announce the shielding of people in vulnerable groups (i.e. the elderly and those with underlying health conditions) for up to 12 weeks (see Tab D1.9 pages 320 to 323).<sup>9</sup> He indicated that significant measures would be contained in the new legislation:

*"Mr Speaker, on Thursday we will introduce the Coronavirus Emergency Bill.*

*This Bill will give us the powers to keep essential services running at a time when large parts of the workforce may be off sick.*

***Some of these measures will be very significant and a departure from the way we do things in peacetime.***

***These are strictly temporary and proportionate to the threat we face, and I hope that many will not have to be used at all.***

***They will only be activated on the basis of scientific advice and will only be in place for as long as is clinically necessary.*** [emphasis added]

- 2.13 There was no mention anywhere in the SoS's statement, of any intention to use the provisions of the 1984 Act, as opposed to the soon to be passed Coronavirus Act 2020. As a result, I note that at no stage were any proposals for lockdown laws placed before MPs or peers to scrutinise or debate.

- 2.14 Also on 16 March, scientists from Imperial College led by Neil Ferguson produced a report ("the Ferguson Report")<sup>10</sup> (see Tab D1.10 pages 324 to 343) which attracted a great deal of publicity in the media. The Ferguson Report concluded, based on modelling projections of how Covid-19 was likely to spread in the UK, that without the introduction of "suppression" strategies as opposed to "mitigation" strategies, it was likely that the NHS in the UK would be overwhelmed by a surge of hospital admissions that would far exceed its critical care capacity. The Ferguson Report predicted that if nothing was done to suppress the spread of Covid-19, there could be many hundreds of thousands of deaths. Speeches by the Prime

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<sup>9</sup> <https://www.gov.uk/government/speeches/controlling-the-spread-of-covid-19-health-secretarys-statement-to-parliament>

<sup>10</sup> <https://www.imperial.ac.uk/media/imperial-college/medicine/sph/ide/gida-fellowships/Imperial-College-COVID19-NPI-modelling-16-03-2020.pdf>

Minister, the First Secretary of State, the Health Secretary and senior Government advisers (set out below) establish that the Government based its decisions on advice based upon the Ferguson Report; and that it abandoned the idea of a strategy based around herd immunity in view of this report (see Tab D1.11 pages 344 to 349).<sup>11</sup>

2.15 As time has progressed, however, the Ferguson Report and its conclusions have come under increasing scrutiny and criticism which I examine in paragraphs 5.25 – 5.44 of my statement. The first analysis revealing serious mistakes was from leading statistician Professor Sir David John Spiegelhalter OBE FRS, Chair of the Winton Centre for Risk (on 22 April 2020) and Nobel Laureate for Chemistry Michael Levitt, Professor of Structural Biology at Stanford University (on 25 March 2020), both before the Original Regulations were imposed (see para 5.31, below). However, this, as I shall demonstrate, has not prevented the Government from continuing to place reliance on its conclusions.

2.16 The Prime Minister also made a statement on 16 March. In that statement he exhorted people to self-isolate for 14 days if they were experiencing symptoms of Covid-19, namely a temperature or continuous cough. This also included cases where people in the same household had such symptoms. The Prime Minister also requested people to stop unnecessary contact with each other and non-essential travel. He announced that whilst large outdoor gatherings were deemed to be "relatively low risk" the emergency services would be withdrawn from supporting such gatherings (see Tab D1.12 pages 350 to 352).<sup>12</sup> This essentially mirrored what the SoS had told the House of Commons earlier in the day.

2.17 The following day, in his next statement, the Prime Minister said this about the measures he had announced on 16 March:

*"That is why we announced the steps yesterday that we did – advising against all unnecessary contact – **steps that are unprecedented since World War 2.**"<sup>13</sup>*  
[emphasis added] (see Tab D1.13 pages 353 to 354)

2.18 On 18 March, the Prime Minister's statement included the following comments in relation to school closures:

*"And we come today to the key issue of schools where we have been consistently advised that there is an important trade off. And so far **the judgment of our advisers***

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<sup>11</sup> <https://foreignpolicy.com/2020/03/17/britain-uk-coronavirus-response-johnson-drops-go-it-alone/>

<sup>12</sup> <https://www.gov.uk/government/speeches/pm-statement-on-coronavirus-16-march-2020>

<sup>13</sup> <https://www.gov.uk/government/speeches/pm-statement-on-coronavirus-17-march-2020>

***has been that closing schools is actually of limited value in slowing the spread of the epidemic.***

***And that is partly because counterintuitively schools are actually very safe environments. And in this disease and epidemic children and young people are much less vulnerable.***" <sup>14</sup> [emphasis added] (see Tab D1.14 pages 355 to 357)

2.19 Meantime, the Secretary of State for Education, Gavin Williamson had announced in Parliament that all exams due to be held in schools and colleges in the summer of 2020 were to be cancelled (see Tab D1.15 page 358).<sup>15</sup> As per paragraph 5 of the statement of grounds, schools and educational establishments were closed (other than for those still providing facilities for children of so-called "key workers" shortly thereafter. The Claimant seeks clarification of the basis on which this was done and for the relevant decision or direction to be quashed by the Court.

2.20 On 19 March, the UK declared that Covid-19 would no longer be classified as a "High Consequence Infectious Disease" (HCID). The declassification was announced on the Government's website:

*"The 4 nations public health HCID group made an interim recommendation in January 2020 to classify COVID-19 as an HCID. This was based on consideration of the UK HCID criteria about the virus and the disease with information available during the early stages of the outbreak. Now that more is known about COVID-19, the public health bodies in the UK have reviewed the most up to date information about COVID-19 against the UK HCID criteria. They have determined that several features have now changed; in particular, more information is available about mortality rates (low overall), and there is now greater clinical awareness and a specific and sensitive laboratory test, the availability of which continues to increase."*<sup>16</sup> (see Tab D1.16 pages 359 to 363)

2.21 On 20 March, the Prime Minister appeared at the Government's press conference and called upon various types of businesses to close their doors. He said:

*"We are collectively telling, telling cafes, pubs, bars, restaurants to close tonight as soon as they reasonably can, and not to open tomorrow.*

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<sup>14</sup> <https://www.gov.uk/government/speeches/pm-statement-on-coronavirus-18-march-2020>

<sup>15</sup> <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2020-04-28/HCWS206/>

<sup>16</sup> <https://www.gov.uk/guidance/high-consequence-infectious-diseases-hcid>

*Though to be clear, they can continue to provide take-out services.*

*We're also telling nightclubs, theatres, cinemas, gyms and leisure centres to close on the same timescale."*<sup>17</sup> (see Tab D1.17 pages 364 to 366)

- 2.22 On 22 March, the Prime Minister's statement included a passage about protecting the most vulnerable people.

*"I said the moment would come where we needed to shield those with serious conditions. There are probably about 1.5 million in all.*

*And in a minute Robert Jenrick will set out the plan in detail.*

***But this shielding will do more than any other single measure that we are setting out to save life. That is what we want to do.*** [emphasis added]

- 2.23 As I have said, it has been repeated many times in the press and media that it was the Ferguson Report which was instrumental in persuading the Government that it could not continue with its "herd immunity" policy and that more drastic social distancing and suppression measures were required in order to tackle the spread of Covid-19 (see Tab D1.18 pages 367 to 372).<sup>18</sup> Whereas prior to 23 March the Government had apparently been reluctant to legislate for a compulsory "lockdown" – and indeed did not include any such measures in the new Coronavirus Act - this attitude changed on the evening of 23 March. The Prime Minister made a broadcast to the nation on television on that evening when he announced that the time had come to go further than the measures he had previously announced. He stated:

*"And so tonight I want to update you on the latest steps we are taking to fight the disease and what you can do to help.*

*And I want to begin by reminding you why the UK has been taking the approach that we have.*

*Without a huge national effort to halt the growth of this virus, there will come a moment when no health service in the world could possibly cope; because there won't be enough ventilators, enough intensive care beds, enough doctors and nurses.*

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<sup>17</sup> <https://www.gov.uk/government/speeches/pm-statement-on-coronavirus-20-march-2020>

<sup>18</sup> <https://www.newstatesman.com/politics/uk/2020/04/real-reason-uk-government-pursued-herd-immunity-and-why-it-was-abandoned>

*And as we have seen elsewhere, in other countries that also have fantastic health care systems, that is the moment of real danger.*

*To put it simply, if too many people become seriously unwell at one time, the NHS will be unable to handle it - meaning more people are likely to die, not just from Coronavirus but from other illnesses as well.*

*So it's vital to slow the spread of the disease.*

*Because that is the way we reduce the number of people needing hospital treatment at any one time, so we can protect the NHS's ability to cope - and save more lives.*

*And that's why we have been asking people to stay at home during this pandemic.*

*And though huge numbers are complying - and I thank you all - the time has now come for us all to do more.*

*From this evening I must give the British people a very simple instruction - you must stay at home.*

*Because the critical thing we must do is stop the disease spreading between households.*

*That is why people will only be allowed to leave their home for the following very limited purposes:*

- shopping for basic necessities, as infrequently as possible*
- one form of exercise a day - for example a run, walk, or cycle - alone or with members of your household;*
- any medical need, to provide care or to help a vulnerable person; and*
- travelling to and from work, but only where this is absolutely necessary and cannot be done from home.*

*That's all - these are the only reasons you should leave your home.*

*You should not be meeting friends. If your friends ask you to meet, you should say No.*

*You should not be meeting family members who do not live in your home.*

*You should not be going shopping except for essentials like food and medicine - and you should do this as little as you can. And use food delivery services where you can.*

*If you don't follow the rules the police will have the powers to enforce them, including through fines and dispersing gatherings.*

*To ensure compliance with the Government's instruction to stay at home, we will immediately:*

- close all shops selling non-essential goods, including clothing and electronic stores and other premises including libraries, playgrounds and outdoor gyms, and places of worship;*
- we will stop all gatherings of more than two people in public – excluding people you live with;*
- and we'll stop all social events, including weddings, baptisms and other ceremonies, but excluding funerals.*

*Parks will remain open for exercise but gatherings will be dispersed.*

*No Prime Minister wants to enact measures like this.*

*I know the damage that this disruption is doing and will do to people's lives, to their businesses and to their jobs.*

*And that's why we have produced a huge and unprecedented programme of support both for workers and for business.*

*And I can assure you that we will keep these restrictions under constant review. **We will look again in three weeks, and relax them if the evidence shows we are able to.***<sup>19</sup> [emphasis added] (see Tab D1.19 pages 373 to 375)

2.24 Although his announcement of these lockdown measures was made on the evening of 23 March, it was not in fact until the morning of 26 March that the legislation to give legal force to the lockdown measures was actually implemented.

2.25 Several commentators have commented on this rather unusual scenario, whereby the Government announced that it would "Immediately" do things and that the police would have the power to enforce them at a point in time when no law enabling any of this had yet been

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<sup>19</sup> <https://www.gov.uk/government/speeches/pm-address-to-the-nation-on-coronavirus-23-march-2020>

brought in. Writing in the Sunday Mail, Former Supreme Court judge Lord Sumption referred to the Government as having "*legislated the lockdown on the hoof in a late-night press conference*."<sup>20</sup> (see Tab D1.20 pages 376 to 380) Former minister Steve Baker MP, writing in the Telegraph noted that the police had begun enforcing the new measures even before the legislation was in place. He said "*Whatever the necessities, that the rule of law should have been overthrown in this period is extraordinary and deeply troubling*".<sup>21</sup> (see Tab D1.21 pages 381 to 384)

- 2.26 On 24 March, clearly anticipating the enormous economic impact that the lockdown measures were likely to cause, the Chancellor of the Exchequer, Rishi Sunak made a written statement to Parliament confirming that the Bank of England was to have the facility to increase its Asset Purchase Scheme by £200 billion (see Tab D1.22 page 385).<sup>22</sup>

### **The Regulations are implemented**

- 2.27 On 26 March 2020 – nearly three days after the Prime Minister's announcement of a lockdown - the SoS laid before Parliament the Health Protection (Coronavirus, Restrictions) England Regulations SI2020/350. (Although these regulations were later to be amended, for ease of reference I shall refer to the regulations (including in their amended form) as "the Regulations" up to the point when they were further amended, at which point I will refer to them as "the Original Regulations").

- 2.28 As far as the Claimant is concerned, the Regulations contain some of the most dramatic, draconian restrictions he can remember being placed on the population of this country in his own lifetime. Former Supreme Court judge Lord Sumption, in a BBC radio interview on 11 May was to describe them as "the worst interference with personal liberty in our history". They confined the entire population to their homes and ordered the forced closure of a list of many types of businesses. Various exemptions were made for essential services and for certain retail outlets and essential places to remain open. Exceptions were included for individuals to leave their homes such as to work if it was not reasonably possible for them to work from home. But the practical effect of the Regulations was to close down vast swathes of the country's businesses and economic activity. Many employers were in reality unable to take the risk of keeping their premises operating even if they were not strictly forced to close

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<sup>20</sup> <https://www.dailymail.co.uk/debate/article-8281007/Former-Supreme-Court-judge-LORD-SUMPTION-gives-withering-critique-Governments-lockdown.html>

<sup>21</sup> ." <https://www.telegraph.co.uk/politics/2020/05/03/boris-johnson-must-end-absurd-dystopian-tyrannical-lockdown2/>

<sup>22</sup> <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2020-03-24/HCWS184/>

by law. Many other businesses had no choice but to close because of the impact on their customers.

2.29 It is not necessary for me to traverse each of the provisions of the Regulations. Suffice to refer to some examples. Regulation 7 banned all gatherings of more than 2 people, thus at a stroke curtailing completely the right of public protest and political meetings.

2.30 Regulation 6 (1) (as originally introduced) stated:

*"During the emergency period, no person may leave the place where they are living without reasonable excuse".*

2.31 The list of examples of what would amount to a "reasonable excuse" were set out in reg 6(2) of the Regulations. But for anyone to leave their homes without "a reasonable excuse" had the effect of criminalising a whole raft of everyday activities that people would normally have taken for granted. For the example, the following actions became, at a stroke, illegal:

2.31.1 making social visits to friends, family (including close family members) or relations;

2.31.2 visiting friends, family (including close family members) or relations in hospital;

2.31.3 sitting on park bench reading a newspaper;

2.31.4 driving to the countryside or driving to visit other people;

2.31.5 travelling to a second home;

2.31.6 gathering socially in a group of more than two people if not from the same household;

2.31.7 attending a political gathering or protest;

2.31.8 going on holiday;

2.32 For many businesses, the direct and indirect impact of the Regulations were equally draconian – and catastrophic. Regulations 4 and 5 of the Regulations imposed severe closures and restrictions. Those types of businesses listed in Part 1 of Schedule 2 to the Regulations (restaurants, cafes, bars and pubs) were required to close their premises or parts of the premises which were used for offering food or drink for consumption on the premises. They were permitted to offer takeaway food for off premises consumption. The businesses listed in Part 2 of Schedule 2 were literally required to close and cease offering their services

during the emergency period. Those businesses effectively forcibly shut down by the Regulations included, inter alia, cinemas, theatres, nightclubs, museums, casinos, spas, nail & beauty salons and barbers, indoor gyms, pools and playgrounds. Any business not listed in Part 3 of Schedule 2 whose business involved selling or hiring goods from a shop was required to close any premises used for that purpose except that they were allowed to continue selling via online, via mail order or in response to telephone orders. Thus were most shops on the high street forced to close their doors. The Regulations also required, subject to some exceptions, hotels to close. Places of worship were another category of places required to close. Again some limited exceptions were provided for such as in relation to funerals.

2.33 In short, the whole essence of ordinary life for most of the population was changed at a stroke – all via a statutory instrument which was neither debated nor voted on beforehand in Parliament.

2.34 The Regulations were purportedly made by the SoS under the 1984 Act. It is the Claimant's case that the Regulations are ultra vires the 1984 Act. An examination of the wording of the 1984 Act, the Claimant submits, does not give the SoS the power to impose blanket measures on the country and all the people in it as he has done. Rather, the power is limited to imposing restrictions on individuals and groups of individuals and only then if carefully drafted safeguards are complied with, which are further set out in the 1984 Act and in a statutory instrument implemented pursuant to the 1984 Act. Further, the Claimant submits, that even if the SoS did have power to introduce the Regulations using the 1984 Act, the Regulations fall foul of the specific requirement in section 45C of the 1984 Act that any such measures must be "proportionate". That obligation – to consider the proportionality of the restrictions imposed by the Regulations - is a continuing obligation, or at the very least must form part of the periodic reviews of the Regulations that have to be undertaken.

2.35 The Claimant also contends that irrespective of the arguments concerning their legality under the 1984 Act, such are the draconian restrictions imposed by the Regulations, that they are in breach of various Convention rights enjoyed by English citizens and businesses. The Government has the right to derogate from the ECHR but it has chosen not to do so in relation to the matters covered by the Regulations. That being the case, whilst the Government can still interfere with and restrict Convention rights – particularly where that is necessary to protect human health - it can only do so to the extent necessary and in a way that is proportionate. It must adopt the least restrictive measures necessary to achieve its objective. The Claimant submits that the drastic restrictions imposed by the Regulations go far beyond what was necessary or proportionate to the specific harms posed by Covid-19, especially when set against the enormously damaging impact of the Regulations. As with the challenge based on s45C of the 1984 Act, this challenge to the proportionality of the

Regulations applies also to those in force at the date of the hearing of this application as well as to the situation at the time the Regulations were introduced.

- 2.36 In section 6 of this statement I examine more closely the impact of the Regulations on the various aspects of life and activities that are protected by the ECHR.

### **Lack of Parliamentary scrutiny**

- 2.37 It is worth noting that the Regulations formed no part of the parliamentary time that was given to the debate in relation to the Coronavirus Act 2020 – the primary legislation that was brought in by the Government on an expedited basis, to provide relevant powers believed to be necessary to deal with the Covid-19 issue. Despite the enormity of the powers contained in the Regulations over the lives of every citizen and business in England (and via separate, similar regulations in the other parts of the United Kingdom) no Parliamentary time whatsoever was allocated for Parliament to consider the Regulations or debate them in the weeks that followed. This was in spite of the fact that they were reviewed on 16 April and the subject of an amendment on 22 April. It was not until the evening of 4 May 2020 – 39 days after they had become the law and only after thousands of people had committed offences under the Regulations, that the House of Commons was finally allocated time to debate the Regulations. This was a two hour debate (with no division at the end of it) carried out mostly through remote video access. I watched it. Less than 20 MPs were able to speak during the debate.

- 2.38 This event on 4 May and a short debate in the Lords on 12 May were thus the sum total of the contribution made by Parliament to considering – and only after the event - some of the most draconian laws ever imposed in our history as a democratic country. Whatever justification the Government might say it has for having originally introduced them on 26 March without debate, this surely cannot be sufficient justification for not allowing a much more serious Parliamentary scrutiny of them several weeks on. In its response to the pre-action letter, the Government refers to the fact that the Regulations were "approved by Parliament" without a division on 4 May (in the Commons) and 12 May (in the Lords). In reality, this was little more than a cursory rubber stamping exercise via video link and it was of course carried out long after the Regulations were introduced.

- 2.39 I respectfully submit that in the absence of any effective Parliamentary debate or scrutiny of the Regulations prior to the making of them and in connection with the review of them, it is all the more important that the Claimant's application for judicial review be heard as a matter of urgency so that the impact of the Regulations and the draconian restrictions they impose should continue in place, can be scrutinised by the Court. It is true that a Chairman's briefing paper concerning the Regulations was produced for the Joint Committee on Human Rights on

8 April 2020 which raised a number of concerns about the proportionality of the Regulations (see Tab D1.23 pages 386 to 401).<sup>23</sup> Also, I have learned that the Committee is currently taking evidence in relation to the human rights implications of the lockdown legislation. However, the evidence taking stage for that does not end until 22 July and there is no indication as to when the Committee will report or what will happen after that. Whatever transpires, it will be far too late given the huge damage being done by the lockdown in the meantime.

2.40 Steve Baker MP was one of the MPs who spoke during the belated "debate" on the Regulations in the Commons on 4 May. That same day he had said this in an article published in the Telegraph (see Tab D1.21 pages 381 to 384):<sup>24</sup>

*"Only today do those rules enforcing the most draconian restrictions in British history come before the Commons for retrospective endorsement with just two hours debate and no division. We have lived under house arrest for weeks by ministerial decree – a statutory instrument that parliament had no foresight of and no opportunity to scrutinise or approve before it changed life in this country as we know it. The situation is appalling.*

*As I conceded on March 23, there were good reasons for ministers to take rapid action. The public would expect nothing less. The first responsibility of any government is to protect the lives of its people and faced with the uncertainty of this awful virus, the instruction for us all to stay at home to save lives was the right call.*

*But this suspension of freedom comes with a cost too. Millions of people in our country have been plunged into idleness at public expense and unemployment, facing financial and psychological hardship on a scale never seen before. Thousands of people have missed life-prolonging health appointments. Vulnerable people are isolated and domestic violence has soared. Soon will come the full economic impact on all our lives.*

*These extraordinary measures require not only legal authority but democratic consent. There is a real possibility that they have had neither."*

*A judicial review is being brought against the lockdown laws, claiming they are ultra vires – that is, that ministers have no legal authority to impose them in the way they*

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<sup>23</sup> <https://publications.parliament.uk/pa/jt5801/jtselect/jtrights/correspondence/Chairs-briefing-paper-regarding-Health-Protection-Coronavirus-Restrictions-England-Regulation-2020.pdf>

<sup>24</sup> <https://www.telegraph.co.uk/politics/2020/05/03/boris-johnson-must-end-absurd-dystopian-tyrannical-lockdown2/>:

*did – and that they incur a disproportionate interference with fundamental rights and freedoms. There is serious legal scholarship supporting that view. I fear the present rules may be unlawful.*

*Meanwhile, the CPS is reviewing every single charge, conviction and sentence brought under emergency powers after civil liberties group Big Brother Watch detailed [a string of wrongful convictions](#) in a damning review. The zealous criminalisation of people for activity that, until a few weeks ago was entirely ordinary, has concerned many, including me. I am horrified by the expansion of the surveillance state, with thermal imaging cameras, drones, ANPR and location tracking being deployed at the drop of a hat to police the nation into imprisonment at home."*

A legal article entitled "Government by Decree" by K D Ewing, published on 13 May 2020 makes similar points (see Tab D1.25 pages 403 to 428).<sup>25</sup>

2.41 There is no doubt that the Government realised that these measures would have a profound and serious effect on the economy. Within days of the lockdown measures being imposed, Rishi Sunak, the Chancellor of the Exchequer, announced new schemes aimed at trying to protect the jobs and incomes of employees affected by the shutdown. These measures included the "Furloughing" of employees so that the Government would pay up to 80% of their salaries subject to a maximum of £2500 per month. Further measures were announced aimed at mitigating the lockdown's effects on small businesses. These included provisions for emergency loans and deferment of VAT payments. The deadline for paying the usual July instalment of income and corporation taxes in July was postponed.

2.42 I deal further with the economic impact of the Regulations in section 6 of this statement below.

### **Inconsistent "guidelines"**

2.43 From the moment the Prime Minister announced the introduction of the lockdown measures for the first time on 23 March, one of their features has been the lack of consistency between what the Government and the authorities in general have been telling the public are the requirements of the lockdown measures and what the Regulations – i.e. the law - actually says.

2.44 For example, the Government had long been publishing on its own website explanatory documents setting out what people can and cannot do. One of the guidelines stated that people could take "one form of exercise a day".

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<sup>25</sup> <https://www.tandfonline.com/doi/full/10.1080/09615768.2020.1759398>

2.45 There never was a restriction anywhere in the Regulations that limited the number of times anyone can exercise outside the home a day or what form (or forms) of exercise they can choose to take. (Curiously, in the separate regulations that apply to Wales, there was a specific restriction to one form of exercise a day, but this has never been the case in England). The Government's "guidance" has therefore been at odds with the law. It is no wonder that this has caused confusion and also led to inconsistencies in the way the police have sought to enforce the Regulations. There were many reports in the press of instances where the police had gone well beyond their powers in seeking to enforce the lockdown measures. One force infamously used a drone to photograph some ramblers walking on the moors of Derbyshire (see Tab D1.26 pages 429 to 432).<sup>26</sup> Other reports were of the police wrongly telling people outside exercising that they had exceed their one hour of exercise (see Tab D1.27 pages 433 to 437).<sup>27</sup> The evident confusion about precisely what was written in the law<sup>28</sup> (see Tab D1.28 pages 438 to 440) was, I submit, highly likely to lead to people being fined under the Regulations for engaging in perfectly lawful activities. It was no surprise that at the beginning of May it was reported in the press that the Crown Prosecution Service was reviewing "every charge" brought under the Regulations (see Tab D1.29 pages 441 to 443).<sup>29</sup> It is evident that there was confusion about the use of emergency powers by the police. On 15 May, the Independent reported that all prosecutions under the Coronavirus Act 2020 had been found to be unlawful and that 14,000 fines had been issued under the Regulations. A review by the CPS of 187 charges under the Regulations found that 175 were correct. But with over 14,000 fines issued and with the risk of the fines increasing if unpaid, one wonders how many ordinary citizens would have felt confident of challenging a fine anyway.

2.46 When it comes to accessing public transport, the Mayor of London Sadiq Khan was repeatedly tweeting or stating that the tube is only for "essential" or so-called "critical workers". Signs were placed by Transport for London outside tube stations reinforcing this misleading message (see Tab D1.30 page 444).<sup>30</sup> In fact there was no such legal restriction. Under the Regulations, anyone who cannot reasonably work from home is entitled to use the tube to travel to a place of work if they need to. Indeed, the same is true of anyone using the tube for any other reason permitted by the Regulations such as to travel to the shops.

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<sup>26</sup> <https://www.businessinsider.com/coronavirus-uk-police-are-using-drones-to-lockdown-shame-walkers-2020-3?r=US&IR=T>

<sup>27</sup> <https://www.spiked-online.com/2020/05/09/in-london-today-the-police-behaved-disgracefully/>

<sup>28</sup> <https://www.wired.co.uk/article/police-powers-coronavirus-lockdown>

<sup>29</sup> <https://www.thetimes.co.uk/article/cps-will-review-every-charge-under-coronavirus-law-0l37rsg8f>

<sup>30</sup> <https://twitter.com/BeingCharley/status/1259758606716678145/photo/1>

2.47 These public pronouncements and the guidance given by the Government are important. This is because the majority of the public, I suggest, are more likely to rely on such directions than they are to locate, scrutinise and construe the Regulations themselves. I respectfully submit that it is disingenuous of the Government to try to suggest in their response letter that the restrictions imposed in the Original Regulations were flexible when the strong and overwhelming tone and content of Government communications was that people should "stay at home". Indeed, the documents that have been disclosed by the Government suggest that the messaging put out by the Government was deliberately strong so as to encourage voluntary compliance.

### **Review of the Regulations & the "five tests"**

2.48 Under reg 3(2) of the Regulations, the SoS is obliged to review the need for the restrictions or requirements imposed by the Regulations at least once every 21 days. On 6 April, the Prime Minister had been admitted to hospital following a worsening of his own Covid-19 symptoms and he was to be out of commission for over three weeks. On 16 April, the First Secretary of the Treasury, Dominic Raab – then effectively the acting Prime Minister - announced that following this first review, there was to be no loosening of the lockdown measures. In his speech that day, Mr Raab also unveiled what he styled as "five tests" which the Government had decided needed to be met before the lockdown measures could be eased. He said:

*"Now, in terms of the decisions that lie ahead, we want to be as up front with the British people as we possibly can. So, let me set out 5 specific things which the government will need to be satisfied of before we will consider it safe to adjust any of the current measures.*

*First, we must protect the NHS's ability to cope. We must be confident that we are able to provide sufficient critical care and specialist treatment right across the UK. The NHS staff have been incredible. We must continue to support them as much as we can.*

*Second, we need to see a sustained and consistent fall in the daily death rates from coronavirus so we are confident that we have moved beyond the peak.*

*Third, we need to have reliable data from SAGE showing that the rate of infection is decreasing to manageable levels across the board.*

*Fourth, we need to be confident that the range of operational challenges, including testing capacity and PPE, are in hand, with supply able to meet future demand.*

*Fifth, and this is really crucial, we need to be confident that any adjustments to the current measures will not risk a second peak of infections that overwhelm the NHS. The worst thing we could do now is ease up too soon and allow a second peak of the virus to hit the NHS and hit the British people. It would be the worst outcome, not just for public health, but for the economy and for our country as a whole.*

*So, the current restrictions will remain in place. The government will continue to monitor the data on the impact of the virus"<sup>31</sup> (see Tab D1.31 pages 445 to 450)*

2.49 This was the first time that the Government had introduced publicly its "five tests" for easing the lockdown measures. I deal further with these in section 7 of this statement.

### **Amendment of the Regulations**

2.50 Less than a week later, the SoS laid a new statutory instrument before Parliament, the Health Protection (Coronavirus) England Amendment Regulations 2020. This made some changes to the Regulations. In particular, it tightened up the wording of regulation 6 by adding the words "or being outside of" to reg 6(1) so that instead of reading:

*"During the emergency period, no person may leave the place where they are living without reasonable excuse"*

it now read

*"During the emergency period, no person may leave the place where they are living or be outside of it without reasonable excuse"*

2.51 On 28 April the SoS made the following written statement to Parliament to explain why he had introduced the amendment to the Regulations and he specifically confirmed the importance attached to the "the five tests" <sup>32</sup> (see Tab D1.32 page 451).

*"On 26 March 2020, the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 came into force, detailing Regulations on social distancing and business and venues closures. These Regulations set out that a review of these Regulations must take place every 21 days to ensure they are both necessary and*

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<sup>31</sup> <https://www.gov.uk/government/speeches/foreign-secretarys-statement-on-coronavirus-covid-19-16-april-2020>

<sup>32</sup> <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2020-04-28/HCWS206/>

proportionate. The Government completed the first review as required on 16 April 2020.

*In this review it was agreed that no change would be made to the existing restrictions and that they would remain in place for at least three more weeks. Recognising the potential for harm to public health and the economy if measures were relaxed too soon, it was agreed that five conditions **would need to be met** before the measures are eased. These conditions are: 1) Evidence that NHS critical care capacity across the UK will not be breached; 2) there is a sustained and consistent fall in the daily death rate; 3) infection rates decrease to an acceptable level; 4) supplies of PPE and testing meets future demand; and 5) clear evidence that changes won't risk a second peak in the virus.*

*However, a small number of minor amendments are required to clarify the Regulations and ease the operation of the Regulations. They relate to enforcement of the measures, and businesses and venues affected.*

*Publicly available Government guidance on Gov.uk is being updated **to ensure it fully corresponds with the amended Regulations**. These are strict measures, but they are measures that we must take in order to protect our NHS and to save lives."*  
[emphasis added]

2.52 Although the SoS's statement ended with a pledge that the Government's guidance would be updated so that it "fully corresponds" to the amended Regulations", this was not in fact done. As of 1 May 2020 that guidance continued to state that the public were allowed "one form of daily exercise". Yet as I have said, that restriction to one form of daily exercise has never been part of the Regulations as implemented in England (see Tab D1.33 pages 452).<sup>33</sup>

### **Questions arise as to the legality of the lockdown**

2.53 It was around this time in April that there began to be more voices calling for a rethink about the lockdown measures and the degree to which they were necessary or even lawful. Some articles began to be published questioning the legality of the measures. These were published in journals that would have had, I would imagine, a fairly small and specialised audience.

2.54 It has been suggested by the Government in pre-action correspondence that it is too late for any challenge to be made to the Regulations (including to the latest incarnation of them)

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<sup>33</sup> <https://www.gov.uk/government/publications/coronavirus-outbreak-faqs-what-you-can-and-cant-do/coronavirus-outbreak-faqs-what-you-can-and-cant-do>

because of delay. In particular, the Government has said that "*the unprecedented nature of the Regulations, their effect, and the public awareness of them means that the duty on [the Claimant] to act promptly was a particularly strong one.*" In the circumstances, I submit that these characteristics are all the more reason why this challenge should be allowed to proceed on its merits, rather than being precluded by the suggestion of delay. Further, as I shall explain below, the Government's stance on delay is totally unfounded, for a number of reasons.

2.55 First, there has been no material delay on the part of the Claimant in bringing this challenge to the Court. The Claimant can demonstrate this by reference to the chronology that I believe speaks for itself.

### **No delay by the Claimant**

2.56 In its response to the pre-action letter, the Government has cited the fact that a number of commentators had written about the possible illegality of the Regulations as a factor that should have prompted a legal challenge before now. Searching online has enabled me to locate articles by Tom Hickman & Ors<sup>34</sup> (see Tab D1.34 pages 453 to 472) published on Blackstone Chambers' website; Djen Basu QC<sup>35</sup> (see Tab D1.35 pages 473 to 479), Jeff King (which argued the lockdown was legal)<sup>36</sup> (see Tab D1.36 pages 480 to 484), Lord Sandhurst QC & Bennet Brandreth QC<sup>37</sup> (see Tab D1.37 pages 485 to 503) and Anthony Speaight QC<sup>38</sup> (see Tab D1.38 pages 504 to 506). With the greatest of respect to the chambers and publications concerned, none of these items were published in what could be said to be high circulation or mainstream online publications where they would have been widely read by members of the public. They are also, by their nature, dealing with a dense legal subject matter. This is not a patent case where even just one publication of prior art regardless of its obscurity can invalidate a patent. Just because some lawyers have written opinion pieces on the internet which are unlikely to have been read by 99.99% of the public, does not, I submit, mean that the clock started running for the Claimant for judicial review purposes from that point.

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<sup>34</sup> <https://coronavirus.blackstonechambers.com/coronavirus-and-civil-liberties-uk/>

<sup>35</sup> <https://ukpolicelawblog.com/index.php/coronavirus/255-the-lawfulness-of-the-coronavirus-restrictions-legislation-imposing-lockdown>

<sup>36</sup> <https://ukconstitutionallaw.org/2020/04/01/jeff-king-the-lockdown-is-lawful/>

<sup>37</sup> [https://e1a359c7-7583-4e55-8088-a1c763d8c9d1.usrfiles.com/ugd/e1a359\\_e1cc81d017ae4bdc87e658c4bbb2c8e1.pdf](https://e1a359c7-7583-4e55-8088-a1c763d8c9d1.usrfiles.com/ugd/e1a359_e1cc81d017ae4bdc87e658c4bbb2c8e1.pdf)

<sup>38</sup> <https://www.politeia.co.uk/the-law-and-the-lockdown-by-anthony-speaight-qc/>

- 2.57 The first time that I am aware that one of these articles was published in anything remotely resembling "mainstream media" was when an article written by Francis Hoar<sup>39</sup> (who is junior counsel for the Claimant in this claim) (see Tab D1.39 pages 507 to 511) and published for the first time on 21 April on UKhumanrightsblog.com was reported in the Express in an article published at 23.01hrs on 22 April (see Tab D1.40 pages 512 to 516).<sup>40</sup> On the very next day I was contacted by Mr Hoar who notified me that the Claimant had been in contact with him after reading the Express article. I first spoke to the Claimant myself on the morning of Friday 25 April – just two days after he had seen the article.
- 2.58 Thereafter events moved very quickly. All law firms have to carry out due diligence measures and attend to client registration formalities in order to start working for clients. My firm is no exception. There was also in this case the fact that the litigation was likely to be of a kind that created public exposure which was a further factor for us to consider internally. The Claimant was also keen that members of the public should be able to show their support for what he was doing via a crowd funding site and this was set up. Meantime the letter before action – which runs to 22 pages – was being prepared. It was sent to the SoS on the afternoon of Thursday 30 April. This was less than 5 working days from when I had had my first conversation with the Claimant.
- 2.59 In those circumstances, the Claimant rejects the suggestion by the Government's lawyers that there is any merit in a defence of delay. Within just one week of reading the Express article, the Claimant had reached out to Mr Hoar, chosen and instructed a firm of solicitors, set up a crowd funding site and his legal team had carried out all due diligence and client registration formalities and drafted and dispatched the detailed pre-action letter before to the SoS.
- 2.60 The second point the Claimant makes is that since the Regulations were first introduced on 26 March there have since been important decisions made about them on two occasions (16 April and 7 May) which amount to reviews of the Regulations. Both of those review decisions must, the Claimant submits, be judicially reviewable decisions in their own right. Similarly, there have been new statutory instruments amending the Regulations implemented on 22 April and 13 May. Even if it were somehow too late to review the implementation of the Regulations when they were originally introduced (which the Claimant does not accept), it cannot seriously be argued that it is too late to review the subsequent reviews and amendments.
- 2.61 Thirdly, allowance must be made for the fact that suing the Government is a daunting proposition for any citizen regardless of their personal circumstances. Very few people could

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<sup>39</sup> <https://ukhumanrightsblog.com/2020/04/21/a-disproportionate-interference-the-coronavirus-regulations-and-the-echr-francis-hoar/>

<sup>40</sup> <https://www.express.co.uk/news/uk/1272479/UK-coronavirus-lockdown-European-Court-of-Human-Rights-Boris-Johnson-latest>

contemplate taking on exposure to the very significant costs which will be incurred in this case. A reasonable allowance must be made for the fact that in the real world people do not and cannot make instant decisions about legal action – let alone legal action of this scale and nature. As I have explained above, on any basis, the Claimant acted very swiftly once he became aware of the issues having noticed the Express article.

2.62 Fourthly, the matters raised by this case are not only of profound importance to the country but in legal terms raise complex issues of statutory construction and the application of the principle of proportionality to a variety of Convention rights. To expect a citizen of this country to have leapt into action in March and to mount a legal challenge, let alone a properly prepared judicial review, where the case must be prepared on a "front loaded" basis is unreasonable and would produce injustice.

### **3. THE LEAD UP TO THE CLAIMANT'S APPLICATION FOR JUDICIAL REVIEW**

3.1 My firm's pre-action letter to the SoS was sent by email to him at the Department of Health and Social Care on Thursday 30 April 2020. The email and attachments were copied to the Government Legal Department. There is now produced and shown to me marked Exhibit **"MG2"** a copy of the letter and the two Appendices that accompanied it (see Tabs D2.1 to D2.3 pages 883 to 914). The Claimant relies upon the documents referred to in the Appendices to the extent not referred to in this statement.

3.2 Given the increasing urgency and huge damage being done by the continuation of the lockdown measures, we gave the SoS until 4pm on Thursday 7 May by which to respond to the letter. The deadline coincided with the date by which, under reg 3(2) of the Regulations, the SoS was obliged to review the need for them.

3.3 I did not immediately receive a response from the SoS or the Government legal dept to the letter and so sent a follow up email to the Government legal service. This prompted a response by email on 1 May in which receipt was acknowledged.

3.4 On 4 May I had noticed that in two places in the letter an error had been made wrongly giving the month in which the Regulations were introduced as March instead of April. I sent an email to the GLS notifying them of the error and with a version of the pre-action letter suitably corrected (see Tab D2.4 pages 915 to 916).

3.5 On 6 May I received a response from the GLS requesting an extension of time to the deadline for the SoS's response from 7 May to 14 May (see Tab D2.5 pages 917 to 918).

- 3.6 By this time, the Government had indicated that notwithstanding the fact that it was obliged by the Regulations to have reviewed their continuance by no later than 7 May, the Prime Minister was apparently going to address the country on Sunday. That would be when the changes (if any) arising from the review would be announced.
- 3.7 I responded to the GLS's request for an extension on the same day (6 May) (see Tab D2.6 pages 919 to 920). I pointed out why I did not consider it was necessary for them to require so much extra time to answer the pre-action letter. This was because given that the matters to which it pertained, these were matters that were almost all within the Government's own knowledge. I nevertheless acknowledged that since the Prime Minister was now to make a statement on 10 May, it was reasonable to allow them some additional time after that within which to respond. My letter back to them therefore gave them until 5.30pm on Tuesday 12 May by which to respond. Copies of a further exchange of letters over the weekend are at Tabs D2.7 to D2.8 pages 921 to 925 of MG2. In the event, the Government's response to the pre-action letter was not finally received until 14 May 2020 (see Tab D2.9 pages 926 to 938).

#### **The Prime Minister's return to work**

- 3.8 Returning to the chronology of events, following his recovery from the effects of Covid-19, the Prime Minister had by now returned to work and led the Government press conference on the evening of 30 April. In his opening statement, he referenced the figures in the Ferguson Report by stating that it was thanks to the Government's measures and the compliance with them by the public that:

*"we avoided an uncontrollable and catastrophic epidemic where the reasonable worst case scenario was 500,000 deaths..."*<sup>41</sup> (see Tab D1.41 pages 517 to 521)

#### **The Foreign Secretary's announcement on 7 May**

- 3.9 On the evening of 7 May, the daily press conference was led by Dominic Raab, the Foreign Secretary. Mr Raab reiterated that the Government continued to take advice from SAGE in relation to whether or not it should lift the lockdown measures and the primacy of the "five tests:

*"Three weeks ago, before the Easter bank holiday weekend, I set out five tests for the UK to move on to the next phase in this pandemic. Then, just as now, there were calls to ease up on the restrictions. But as the science made clear, we couldn't responsibly do that. In fact, the advice from the group of scientific experts, SAGE,*

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<https://www.gov.uk/government/news/prime-ministers-statement-on-coronavirus-covid-19-30-april-2020>

*who advise the government made it very clear that there weren't any changes at all that we could confidently take, Without risking a second peak of the virus..."*

*"...Today the Cabinet was updated on SAGE's advice on the progress that we've made to date..."*

*"...And, it's important to say this, at each point along the way when we take these decisions, they will be based on the five tests and the scientific advice that we receive..."*

*"...So having prepared carefully, and based on the updated advice from SAGE, this weekend, the Prime Minister will set out the roadmap for the next phase, along with the conditions for reaching each milestone...."<sup>42</sup> (see Tab D1.42 pages 522 to 526)*

- 3.10 Mr Raab's statement thus included no specific details of any changes to the Regulations. It is to be inferred from his statement that in carrying out the review of the restrictions and impositions of the Regulations, the Government considered its five tests and not the many other factors such as the effect of the lock down on non-Covid health conditions, the economy and so on. I note that Mr Raab and other Government spokesmen have continued to maintain that each of the five tests had to be met and that unless all of them were met, there was no space for the Government to take other considerations into account.

### **The Prime Minister's speech on 10 May**

- 3.11 The Prime Minister broadcast a message to the UK public at 7pm on Sunday 10 May (see Tab D1.43 pages 527 to 532).<sup>43</sup> This had been billed as being the point at which he would outline how the UK would come out of the lockdown. I watched his speech. In fact it contained few specifics and the overall theme seemed to me to be very much that we would all have to carry on in much the same vein as we had been doing since the Regulations were first imposed. However, he did suggest that there would be some easing of the lockdown measures, even if it was very difficult from listening to him to discern what changes would actually be made to the Regulations.
- 3.12 In his opening remarks he repeated his claim made previously on 30 April at the scale of the health crisis that, so he claimed, had been avoided:

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<sup>42</sup> <https://www.gov.uk/government/speeches/foreign-secretarys-statement-on-coronavirus-covid-19-7-may-2020>

<sup>43</sup> <https://www.gov.uk/government/speeches/pm-address-to-the-nation-on-coronavirus-10-may-2020>

*"It is a fact that by adopting those measures we prevented this country from being engulfed by what could have been a catastrophe in which the reasonable worst case scenario was half a million fatalities. "*

- 3.13 He referred to the fact that from Wednesday, people would be able to take "unlimited outdoor exercise". This I submit, was confusing since the Regulations did not impose any restriction on exercise anyway. The reference to people being able to "sit in the sun in your local park" and being able to "drive to other destinations" were suggestive of an easing of restrictions. But the Prime Minister also hinted at strengthening the enforcement powers of the police against those who breached the lockdown laws:

*"You must obey the rules on social distancing and to enforce those rules we will increase the fines for the small minority who break them."*

- 3.14 The Prime Minister's message to the workforce seemed to me to be in line with the existing Regulations as he suggested people who could not work from home should go to work. But his comments were accompanied by a contradictory message about how people might travel to work:

*"We now need to stress that anyone who can't work from home, for instance those in construction or manufacturing, should be actively encouraged to go to work.*

*And we want it to be safe for you to get to work. So you should avoid public transport if at all possible – because we must and will maintain social distancing, and capacity will therefore be limited.*

*So work from home if you can, but you should go to work if you can't work from home.*

*And to ensure you are safe at work we have been working to establish new guidance for employers to make workplaces COVID-secure.*

*And when you do go to work, if possible do so by car or even better by walking or bicycle. But just as with workplaces, public transport operators will also be following COVID-secure standards."*

- 3.15 No details were given about the "new guidance for employers to make workplaces COVID-secure". Nor was there any suggestion that if people have to drive to work, that they would have any help from local authorities relaxing parking restrictions and enforcement. There was

no detail as to how public transport could sensibly function if social distancing had to be enforced on it, thus drastically limiting the capacity of the system.

3.16 The Prime Minister also suggested that new quarantine restrictions on incoming travellers to the UK would be implemented in due course, although he gave no details of what those would be.

3.17 On the important question of reopening of schools, he stated:

*"In step two – at the earliest by June 1 – after half term – we believe we may be in a position to begin the phased reopening of shops and to get primary pupils back into schools, in stages, beginning with reception, Year 1 and Year 6."*

3.18 As far as other openings were concerned:

*"And step three - at the earliest by July - and subject to all these conditions and further scientific advice; if and only if the numbers support it, we will hope to re-open at least some of the hospitality industry and other public places, provided they are safe and enforce social distancing."*

3.19 Finally, the Prime Minister stated that even economic necessity would not be enough to drive the Government to ease the lockdown measures:

*"Throughout this period of the next two months we will be driven not by mere hope or economic necessity. We are going to be driven by the science, the data and public health."*

### **The Prime Minister's statement in Parliament on 11 May 2020**

3.20 Following on from his speech on television on Sunday 10 May, the Prime Minister made a statement in the House of Commons on 11 May in which he sought to expand on some of the points he had made the previous day in relation to mapping the UK's emergence from the lockdown (see Tab D1.44 pages 533 to 537).<sup>44</sup>

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<sup>44</sup> <https://www.gov.uk/government/speeches/pm-statement-in-the-house-of-commons-11-may-2020>

#### **4. THE REGULATIONS ARE AMENDED – THE CURRENT LOCKDOWN LAW NOW IN FORCE**

- 4.1 On the same day as the Prime Minister's statement to Parliament, on 11 May a number of documents were published by the Government to provide guidance and explanations of the plans outlined by the Prime Minister (see Tab D1.45 pages 538 to 578).<sup>45</sup> There was also a set of FAQs published by the Government<sup>46</sup> (see Tab D1.46 pages 579 to 589) and further documents purporting to advise people how to return to work in offices, on construction sites and so on.
- 4.2 The Prime Minister and the documents published by the Government on 11 May all referred to the new rules coming into force as of Wednesday 13 May. But there was no sign of any new secondary legislation to amend the Regulations in England – although an amendment to the equivalent regulations in Wales was implemented on 11 May.
- 4.3 Finally, overnight on 12 May, the Government published the *Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No.2) Regulations 2020* so as to amend the Regulations and accord with the announcements made by the Prime Minister and others. This statutory instrument, like its predecessors contained the following introductory note:
- "the Secretary of State is of the opinion that, by reason of urgency, it is necessary to make this instrument without a draft having been laid before, and approved by a resolution of, each House of Parliament."*
- 4.4 Given that there was time for Dominic Raab to make an announcement in Parliament on 7 May, ahead of a speech by the Prime Minister on 10 May and an address to Parliament by the Prime Minister on 11 May, it is not understood why it was so "urgent" that this legislation could not be scrutinised by Parliament in advance.
- 4.5 In the rest of this statement I shall refer to the Regulations as amended by this statutory instrument as "the Current Regulations" and the Regulations in force prior to 13 May 2020 as "the Original Regulations".

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<sup>45</sup> <https://www.gov.uk/government/publications/our-plan-to-rebuild-the-uk-governments-covid-19-recovery-strategy/our-plan-to-rebuild-the-uk-governments-covid-19-recovery-strategy#fn:17>

<sup>46</sup> <https://www.gov.uk/government/publications/coronavirus-outbreak-faqs-what-you-can-and-cant-do/coronavirus-outbreak-faqs-what-you-can-and-cant-do>

## **The Current Regulations**

- 4.6 The Current Regulations made some modest changes to expand the list of places listed in Schedule 2 that could be opened to the public to include outdoor sports courts and garden centres. But other than that, there has effectively been no change to the restrictions on the operation of businesses and those businesses forced to close by the Original Regulations, must remain closed.
- 4.7 No change was made to regulation 7 which bans gatherings of more than 2 people. Thus there remains a complete blanket ban on all forms of peaceful protest by people, political meetings and group religious worship. The most "significant" changes to the Current Regulations compared to the Original Regulations are to be found in regulation 6 which is the provision imposing a qualified house arrest on the entire population.
- 4.8 Whereas previously the list of "reasonable excuses" for a person to leave or be outside of the place they were living did not allow them to do so for the purposes of exercise with anyone outside their own household, the Current Regulations now expressly permit persons to visit an open space or take exercise with up to one person who is not from their household.

## **Irrationality?**

- 4.9 These changes, however, have some apparently bizarre effects which would apply to the Claimant, to his crowdfunding supporters, to me and to the general public. It is permissible for someone to visit a public place (i.e. where other people may be present in large numbers) with one person from another household, but not to do the same in a private place. So for example, I could meet a friend in Battersea Park, surrounded by hundreds of other people walking around, but I could not meet that same person in the garden of their house where no one else is around. This is the effect of the Current Regulations. I submit that this makes no sense in the context of laws whose primary purpose is to protect the public from the harm caused by Covid-19. How can it be better from that perspective for the Claimant to have to go to a public place where there are hundreds of other people if he wishes to meet a friend or family member if he could do so more safely in a private place? These changes still continue to impinge upon the Convention right to private and family life by forcing people to meet each other in public rather in private.
- 4.10 If a person knows a couple and wants to see them, he or she can only visit the park or another public place with one of them, not with both members of the couple at the same time. Yet that same person's partner could meet with the other half of that couple independently in the same public place in proximity to their own partner. Would such a meeting be in breach of the law? If so, how could any enforcement officer determine otherwise? Moreover, how

could this ridiculous legal restriction make any difference to the risks of transmission of Covid-19?

- 4.11 These are but a few of the myriad of examples that could be made from the Current Regulations. But looking down the list of things that are now permitted there are some even bigger anomalies. For example, in an evident attempt to enable people to begin buying and selling (or renting) properties, the Current Regulations now permit persons to visit an estate agents' office and to view properties with an agent with a view to buying or renting out a property. Thus, anyone would be perfectly entitled by law to be accompanied by an estate agent to see numerous properties for sale including flats where the residents might well (unbeknown to them) be infected with Covid-19. Or the would-be buyer might themselves be infected. Yet the buyer could lawfully enter and explore those properties, touching things, coughing, breathing, and interacting with their occupants. But on the other hand, if that same person had a second home that was lying empty, he would not be allowed, under the Current Regulations, to drive there on his own for the purposes of sitting alone there in the garden – thus exposing no one to any risk of infection by Cov19. Again, in the context of the Current Regulations which are aimed at preventing the spread of Covid-19 how can such restrictions possibly be justified?
- 4.12 If a person wants to visit an elderly parent at their house, he or she could not do so under the Current Regulations. Even if that person followed all sensible guidelines and remained outside their house and followed all appropriate social distancing measures (in other words exercised common sense) this would be a criminal offence and punishable by fines that have been increased in size under the Current Regulations.
- 4.13 Someone who has been living on their own throughout the lockdown period would still, under the Current Regulations, be prohibited from meeting another person and starting a physical relationship with them. Or they would have to claim that there was a reasonable excuse for them to do so under the provisions of reg 6(iii)(ba) on the basis that they were visiting a public open space for the purposes of open-air recreation "to promote their mental health or emotional wellbeing."
- 4.14 But if people follow the Guidelines in the Government's various documents, then they most certainly cannot form new physical relationships with other people (outside of their own household) because the Guidelines stipulate that social distancing should be practiced whereby no one should be within 2 metres of each other. The use of the "2 metre rule" and social distancing appear nowhere in the Current Regulations. The 2 metre rule is not a legally enforceable rule yet it is everywhere.

4.15 The Claimant submits that the much documented overcrowding on public transport – especially the tube in London – makes a complete nonsense of all these measures since it is perfectly lawful for a person to take the tube to work - if that person cannot reasonably work from home – to the shops, to visit properties for sale or for the purposes of exercise, even if the tube carriage is packed with other commuters. There one would be mixing with people close up in an enclosed environment. The so-called "2 metre rule" would not work on public transport. It is unworkable. The guidelines cannot possibly be complied with.

4.16 Furthermore, as with the Original Regulations, the guidance being given by the Government is not consistent with the legislation it has passed. For example, even as late as 17 May, at the daily press conference, the Business Secretary purported to summarise what people were now able to do under the lockdown laws. He said,

*"You can meet 1 person outside of your household in an outdoor public place, provided you stay 2 metres apart".<sup>47</sup> (see Tab D1.47 pages 590 to 593)*

4.17 There is nothing in the Current Regulations that requires anyone to stay 2 metres apart from anyone else. The Claimant submits that Government ministers should not be telling the public what they can and cannot do as though it is the law of the land when in fact it is not.

## **5. PROPORTIONALITY OF THE REGULATIONS**

5.1 The Claimant is a businessman, not a scientist. The Claimant cannot understand how the Current Regulations with all their contradictions and inconsistencies can be a "science based". There is no attempt made in the Current Regulations to target the protective measures at vulnerable groups such as care home residents. Instead, the Government has continued to apply blanket restrictions to everyone, despite the now clear evidence as to the effects of Covid-19 and the minimal risk it poses to the majority of the population – in particular the population of school and working age people (see Tab D1.48 pages 594 to 601).<sup>48</sup> The risks to the vast majority of the population remain tiny when set against the hugely costly and disruptive lockdown measures imposed and maintained by the Government.

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<sup>47</sup> [https://www.gov.uk/government/speeches/business-secretarys-statement-on-coronavirus-covid-19-17-may-2020?utm\\_source=d71e4388-d36f-4089-b980-47dd67df410d&utm\\_medium=email&utm\\_campaign=govuk-notifications&utm\\_content=immediate](https://www.gov.uk/government/speeches/business-secretarys-statement-on-coronavirus-covid-19-17-may-2020?utm_source=d71e4388-d36f-4089-b980-47dd67df410d&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate)

<sup>48</sup> [https://www.telegraph.co.uk/news/2020/05/13/analysis-danger-coronavirus-compares-risks-everyday-life/?WT.mc\\_id=e\\_DM1246462&WT.tsrc=email&etype=Edi\\_Edi\\_New\\_Reg&utm\\_source=email&utm\\_medium=Edi\\_Edi\\_New\\_Reg20200514&utm\\_campaign=DM1246462](https://www.telegraph.co.uk/news/2020/05/13/analysis-danger-coronavirus-compares-risks-everyday-life/?WT.mc_id=e_DM1246462&WT.tsrc=email&etype=Edi_Edi_New_Reg&utm_source=email&utm_medium=Edi_Edi_New_Reg20200514&utm_campaign=DM1246462)

- 5.2 I suspect the Government would say that in framing these rules it is seeking to strike the correct balance between the need to prevent the spread of Covid-19, whilst acknowledging the need to ease the strict lockdown measures on people and to encourage a return to normal activity. I submit, that all the Government has succeeded in doing by implementing the Current Regulations, is to make a wholly contradictory and inconsistent regime that seeks to do the impossible, namely to micromanage and restrict human interaction. Moreover it does so in a manner that is confusing but above all still disproportionate and unnecessary.
- 5.3 How can it be justified to prevent human beings from forming relationships? How can it be justified to prevent people from visiting relatives – even if they adopt responsible, sensible precautions which do not risk transmission?
- 5.4 Despite all of the evidence that now confirms Covid-19 to have very low mortality rates for the vast majority of the population (minute in the case of children and young people), despite the record numbers of NHS critical care beds available and with the very significant new testing capacity in place, we all remain stuck in a lockdown. How can it possibly be proportionate for the SoS to continue to impose such blanket restrictions on the personal liberty of every citizen in the country in those circumstances?
- 5.5 The Claimant cannot see how it can be appropriate for the Government to be trying to directly legislate at this level of granularity, over the ordinary, everyday interactions of people, bearing in mind the nature of the health threat posed by Covid-19 and the enormous harms which the Current Regulations will continue to cause millions of people and the nation as a whole. The Current Regulations, as with the Original Regulations, are a disproportionate interference with the Convention rights of the public.
- 5.6 As I have said, former Supreme Court judge Lord Sumption, commenting on the Original Regulations in the light of the amendments being made to produce the Current Regulations, described the lockdown rules as "the worst interference with personal liberty in our history." The Claimant agrees with him. It must follow, in my submission, that there needs to be an intense scrutiny of whether or not they were justified and are still justified.
- 5.7 Like the Original Regulations, the Current Regulations are purportedly made by the SoS pursuant to s45C of the 1984 Act. But it is an express requirement of that section that before imposing any restrictions, the SoS must consider whether or not they are proportionate to what is sought to be achieved by imposing them.
- 5.8 The Claimant submits that the SoS has manifestly failed to consider a number of relevant considerations before deciding whether or not to impose the Original Regulations. Further, more than 7 weeks on, armed with all the additional information we now have about Covid-19,

he has similarly failed to consider those matters during each of the two reviews of the Regulations and when making the Current Regulations.

5.9 Those considerations include:

5.9.1 the uncertainty of scientific evidence about the effectiveness of the restrictions and in particular, serious doubts about the credibility of the Ferguson Report;

5.9.2 the growing body of data that has since emerged about Covid-19 in terms of who is most at risk from the virus, what its mortality rates and infectivity are etc

5.9.3 the degree to which lockdown measures could be targeted at the most vulnerable individuals and sectors such as care homes

5.9.4 the effect of the restrictions on public health, including deaths, particularly from untreated or undiscovered cancer and heart disease and mental health and the whole manner in which the Government's approach has deterred people from seeking diagnosis and treatment from the NHS; ;

5.9.5 incidences of domestic violence which have hugely risen during the lockdown;

5.9.6 the economic effects of the restrictions in the short, medium and long terms – which are universally disastrous and threaten to create terrible problems for the country;

5.9.7 whether, in the light of a proper consideration of the above factors, less restrictive measures than those adopted would have been a more appropriate means of obtaining the objective of restricting the spread of coronavirus without causing disproportionate harms;

### **More proportionate responses?**

#### **Care homes**

5.10 According to the Office of National Statistics, over a third of all deaths attributed to Covid-19 have been in care homes. Care homes are an obvious area where the Government ought to have been far more proactive in its protective measures. Care homes contain the most obviously vulnerable population of people whose susceptibility to Covid-19 is well documented. Yet care homes would be one of the most straightforward types of premises to impose lockdown procedures on. After all, the residents of care homes are people who almost exclusively stay put, do not take public transport, do not go shopping and rarely leave

the premises where they are being looked after. The risks to them are from exposure to staff, visitors and contractors who may be infected. A targeted regime of restrictions on visitors, testing of employees and contractors would be a proportionate response to the threat posed by Covid-19 as it would be targeting a key area of the population (currently amounting to around 40% of all Covid19 deaths) and would have minimal impact on the economy. I submit that this is an example of where a targeted approach to tackling Covid-19 would be a more proportionate response as envisaged by the 1984 Act.

- 5.11 In conducting the proportionality exercise that it has been obliged to do whenever it has considered making, reviewing or keeping the lockdown measures, the Government should have had regard to protecting care homes. Instead, there is substantial evidence that in its rush to clear beds to free up capacity for Covid-19 patients, the NHS shipped care home patients back into care homes without adequate testing with the result that Covid-19 was able to spread through this very vulnerable section of the population. (see for example these news reports in the Sunday Times <sup>49</sup> (see Tab D1.49 pages 602 to 604), the Independent<sup>50</sup> (see Tab D1.50 pages 605 to 606), the Telegraph<sup>51</sup> (see Tab D1.51 pages 607 to 609) and ITV News<sup>52</sup> (see Tab D1.52 pages 610 to 616). By contrast, the Government chose to lock down the entire population of the country and in so doing cause massive social, health and economic damage.

### **Hospital acquired infections**

- 5.12 It has been very difficult to uncover statistics showing how many Covid-19 deaths occurred among patients who were already hospitalised before the pandemic. However, like care homes, hospitals are obviously places where there are a high concentration of vulnerable people (i.e. patients with other serious health conditions). As part of a proportionate response to the pandemic, the Claimant submits that the Government ought to have concentrated resources on ensuring that hospitals and hospital workers were tested for infection and kept away from vulnerable patients. It is not clear how effective the NHS was at protecting them. Reports in the press suggest that a significant proportion of patients dying with Covid-19 were already in hospital for something else and acquired the infection whilst they were there. One such report in the Guardian quoted NHS managers as having admitted

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<sup>49</sup> <https://www.thetimes.co.uk/article/thanks-to-nhs-managers-ive-now-got-two-care-homes-infected-with-covid-19-xk2n8f6nx>;

<sup>50</sup> <https://www.independent.co.uk/news/health/coronavirus-care-homes-nhs-deaths-statistics-a9500326.html>;

<sup>51</sup> <https://www.telegraph.co.uk/news/2020/04/24/care-homes-ordered-take-patients-suspected-coronavirus-nhs-hospitals/>;

<sup>52</sup> <https://www.itv.com/news/2020-05-14/care-homes-coronavirus-crisis/>

that up to a fifth of patients with Covid-19 in several hospitals contracted the disease over the course of the pandemic while already being treated there for another illness (see Tab D1.53 pages 617 to 619).<sup>53</sup>

### **School closures and childrens' infections**

- 5.13 All schools in England have been closed since around 20 March (except in respect of some which have continued to take pupils who are the children of so-called key workers.
- 5.14 There has been what I submit is an overwhelming weight of data that shows school age children to have a vanishingly low risk of suffering serious illness or death from Covid-19. For example, the Office of National Statistics (ONS) data published on 15 May shows that out of all of the deaths attributed to Covid19 during that month in the UK, none were children. As well as the obvious conclusion from studying death statistics by age, there have been numerous studies indicating that children are not severely affected by Covid-19. For example a survey in Iceland in April found not only that children were less likely to be infected than adults but they appeared not be very infectious themselves (see Tab D1.54 pages 620 to 633).<sup>54</sup> There was also the well documented report of the nine year old boy in France who, despite being Covid-19 and showing symptoms did not infect any of the 172 people he came into contact with (see Tab D1.55 pages 634 to 636).<sup>55</sup>
- 5.15 Until very late in March, statements by the Government continued to stress that according to the science, closing schools was not likely to make a huge difference to controlling the spread of Covid-19 and that doing so would create other problems.
- 5.16 A study published in the Lancet on 1 May 2020 contains an authoritative analysis of the impact of school closures as a means of tackling the spread of Covid-19 (see Tab D1.56 pages 637 to 644).<sup>56</sup> It is accepted that school age children have very low susceptibility to Covid-19 and that cases of hospitalisation or death among that age group are very small. So it is not necessary to worry about imposing social distancing as between the pupils in school. Further, schools are not places where a large concentration of adults need to stand in close proximity to each other whilst performing their work. In relation to those who are potentially at risk from catching Covid-19 (i.e. the adults) who could be teachers, teaching assistants,

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<sup>53</sup> <https://www.theguardian.com/world/2020/may/17/hospital-patients-england-coronavirus-covid-19>

<sup>54</sup> <https://www.nejm.org/doi/full/10.1056/NEJMoa2006100>

<sup>55</sup> <https://www.theguardian.com/world/2020/apr/21/boy-with-covid-19-did-not-transmit-disease-to-more-than-170-contacts>

<sup>56</sup> [https://www.thelancet.com/journals/lanchi/article/PIIS2352-4642\(20\)30095-X/fulltext](https://www.thelancet.com/journals/lanchi/article/PIIS2352-4642(20)30095-X/fulltext)

cleaners, security guards and canteen staff, schools are ideally placed to practice social distancing if they so choose.

5.17 One of the source materials for the Lancet article is a study for the Dept of Health on the Impact on an Influenza Pandemic of School Closures (see Tab D1.57 pages 645 to 796).<sup>57</sup> It is clear from this research that in relation to tackling the spread of influenza, the evidence that school closures play a decisive role in slowing or halting its spread is far from conclusive. This perhaps explains why the Government was reluctant to close schools early in the pandemic and why it referred to the scientific advice as not being promising.

5.18 But the study also makes the following important points. At the first point 3 on the same page, the report concludes:

*"3. It is unclear to what extent changes in contact patterns and transmission occurring during seasonal influenza and past pandemics may be extrapolated to a future pandemic. Data from the 2009 pandemic support the conclusion that school closures can reduce transmission of influenza in contemporary settings; however, the results from these studies may not be applicable to a new pandemic virus which may have different epidemiological properties (e.g. a higher case fatality ratio **or more uniform age-specific attack rates than those seen during previous pandemics**)"*  
[emphasis added]

5.19 In its conclusions at the second point 3 on page 33 the document states:

*"3. School closures are able to reduce transmission amongst children. Evidence regarding the effects on adults is less consistent, **but generally transmission amongst adults appears to be relatively unaffected by school closures**".*[emphasis added]

5.20 The point here is that we now know that Covid-19 does not cause serious illness or deaths of school age children. The people most at risk in schools are adults and yet *"transmission amongst adults appears to be relatively unaffected by school closures."* . If children aren't affected and transmission among adults is not worsened, then what is the rationale for continuing with school closures?

### **Freedom of assembly**

5.21 As regards the restrictions on freedom of assembly, no attempt has been made in the Current Regulations to ease the blanket prohibition on freedom of assembly. I submit that this blanket

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<sup>57</sup> [https://researchonline.lshtm.ac.uk/id/eprint/4647891/1/School\\_Closures\\_Evidence\\_review.pdf](https://researchonline.lshtm.ac.uk/id/eprint/4647891/1/School_Closures_Evidence_review.pdf)

prohibition on more than 2 people gathering together cannot be justified. The freedom to protest and the ability of political parties to organise political meetings is a precious democratic right. The fact that we are in the middle of a pandemic does not abrogate the need to protect this right. On the contrary, the lives of millions of people are being affected – in many cases irrevocably – by a Government that is exercising huge powers via statutory instrument guided by scientific advice that we are not being allowed to see. I submit that in such circumstances, it is more important than ever that freedom of assembly be protected.

- 5.22 In the circumstances, if it is acceptable for people to have to cram onto packed tube trains to travel to work and it is acceptable for people to visit public spaces for exercise, sunbathing or other activities, how can it be proportionate and necessary to continue a blanket ban on gatherings for political purposes? For meetings being held outside it would be feasible to legislate, if necessary, for social distancing.
- 5.23 The above are just some examples of how the Government could, in my submission, have taken a more proportionate response than it has done in the way it has legislated to impose restrictions on the whole population.
- 5.24 Before proceeding to look at the harms that have been caused by the Regulations and are continuing to be caused by the Current Regulations, I believe it is important to take into account some of the circumstances that have changed since the Original Regulations were imposed. In my submission, these are important factors that the Government ought to have taken into account and which mitigate against the continuation of the lockdown measures.

### **The Ferguson Report**

- 5.25 The Ferguson Report and the modelling of Covid-19 scenarios it contains appears to have been highly influential in the decision of the Government to introduce the Regulations. But it still seems to be a significant factor in the Government's decision making. As I have pointed out at paragraphs 3.8 and 3.11 above, in his speeches on 30 April and 10 May, the Prime Minister claimed that the lockdown measures had prevented a "reasonable worst case scenario" of half a million deaths. This was the figure contained in the Ferguson Report. Also, among the documents published by the Government on the SAGE web page is a document dated 25 March created by SPI-M-O, one of the working groups established by SAGE. This so the document says was to be put before SAGE at its meeting on the same day (although according to other information on SAGE's website the meeting did not take place until 26 March) (see Tab D1.58 pages 797 to 800).<sup>58</sup> The SPOMO document

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/882723/26-spi-m-o-working-group-scenario-planning-consensus-view-25032020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/882723/26-spi-m-o-working-group-scenario-planning-consensus-view-25032020.pdf)

confirmed that out of models produced by three competing research teams, the figures from the Ferguson Report were adopted as the "reasonable worst case scenario" because they were more pessimistic than the other scenarios forecast by the other models. In particular, they assumed a high rate of infection (a reproduction number of R2.8 and the shortest interval between the doubling of cases (3.3 days). This is a little hard to understand since the Ferguson Report used a reproduction number of 2.6 and assumed doubling of cases every 5 days.

5.26 It is worth quoting the following passages from this document:

"1 .A working group of SPI-M-O has agreed scenarios for government planning. These are to be put to SAGE at their meeting of 25th March. Two scenarios have been agreed accounting for the policy measures put in place to date: a Reasonable Worst Case scenario, where measures do not control the epidemic, and an optimistic scenario, where control is achieved.

2. These are scenarios and not forecasts. It is not possible to meaningfully forecast the epidemic at this stage, as:

*its epidemiology is still uncertain, although our picture of it is improving.*

*it is not yet possible to assess how contact patterns have changed, will change over time and, crucially, the impact of that on transmission rates. It is not the case that, for example, a reduction of leisure activities of 80% would reduce transmission from leisure activities by 80%.*

*the impact of interventions will become apparent in around 3-4 weeks.*

3. The fewer cases that happen as a result of the policies enacted, the larger subsequent waves are expected to be when policies are lifted. As we cannot predict how policies will change, the terms "Reasonable Worst Case" and "Optimistic Scenario" are only in relation to the number of deaths seen in a first wave."

5.27 Thus at the time the Ferguson Report had been provided to SAGE and the Government had made its decision about the imposition of the lockdown measures, it would appear that SAGE were telling the Government that it was "not possible to meaningfully forecast the epidemic at this stage". They also said that the "impact of the interventions will become apparent in around 3-4 weeks". Yet the Government relied upon the results of a modelling by Professor Ferguson which given his previous track record was all the more surprising.

- 5.28 But what this document also does is to make an observation that is also noted in the Ferguson Report. This is about one of large downsides of a country going into lockdown. As paragraph 3 of the SPIMO document says "*The fewer cases that happen as a result of the policies enacted, the larger subsequent waves are expected to be when policies are lifted.*" This is precisely the point that has been made about locking down by numerous other experts. The more you hide the population away from the virus, the less "herd immunity" you create so you make it more likely there will be further spikes in infections once the regime is lifted. Common sense suggests that the longer such a lockdown continues, the more it will store up that problem of a further wave of infections.
- 5.29 Prof Ferguson himself has since resigned from SAGE following revelations about his own personal failure to comply with the Regulations. But more serious questions have been raised about the conclusions in the Ferguson Report itself. These, I submit, ought to have caused the Government to review its reliance on Ferguson's modelling – especially now that several weeks have elapsed since the Ferguson Report was prepared and there has been a change of circumstances and much more in the way of data available to policy makers.
- 5.30 Serious doubts about the results produced in the Ferguson Report have been expressed in the media who have pointed to Prof Ferguson's previous predictions with regard to illnesses such as Bird Flu, Swine Flu and Variant CJD (see Tab D1.59 page 801).<sup>59</sup> <sup>60</sup> (see Tab D1.60 pages 802 to 804) Ferguson had predicted that over a 130,000 people could die of Variant CJD in the UK. In fact, there were only 178 deaths up to 2020 (see Tab D1.61 page 805).<sup>61</sup> His predictions in 2005 of the possible impact of Asian bird flu (H5N1) and the millions of deaths that might be caused worldwide by it led to the UK government buying large quantities of Tamiflu, a drug for treating the expected epidemic. In fact, globally, H5N1 killed just over 500 people worldwide (see Tab D1.62 pages 806 to 809).<sup>62</sup>
- 5.31 It is not just the scale of his predictions, compared to the reality of what actually happened that has led to these attacks. One of the earliest analyses of the mathematical modelling within the Ferguson Report was made on 21 March 2020 by Professor Sir David John Spiegelhalter OBE FRS, statistician and Chair of the Winton Centre for Risk (see Tab D1.63 pages 810 to 815).<sup>63</sup> Using the below table, he pointed out that the risk of mortality of

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<sup>59</sup> [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(05\)73948-9/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(05)73948-9/fulltext)

<sup>60</sup> <https://www.nytimes.com/2001/10/30/health/estimates-of-future-human-death-toll-from-mad-cow-disease-vary-widely.html>

<sup>61</sup>: <https://www.cjd.ed.ac.uk/sites/default/files/figs.pdf>

<sup>62</sup>: [https://www.who.int/influenza/human\\_animal\\_interface/2020\\_01\\_20\\_tableH5N1.pdf?ua=1](https://www.who.int/influenza/human_animal_interface/2020_01_20_tableH5N1.pdf?ua=1)

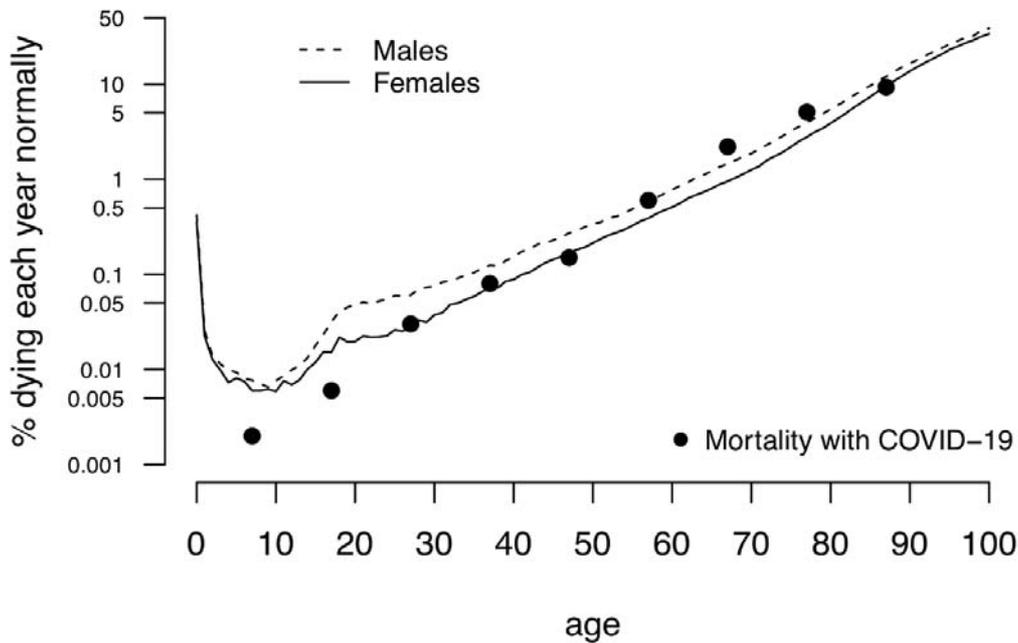
<sup>63</sup> <https://medium.com/wintoncentre/how-much-normal-risk-does-covid-represent-4539118e1196>

individuals who contracted SARS-Cov-O2 – *projected within the Ferguson Report* – was similar to their risk of mortality in any given year.

**Table 1: Current estimates of the severity of cases. The IFR estimates from Verity et al.<sup>12</sup> have been adjusted to account for a non-uniform attack rate giving an overall IFR of 0.9% (95% credible interval 0.4%-1.4%). Hospitalisation estimates from Verity et al.<sup>12</sup> were also adjusted in this way and scaled to match expected rates in the oldest age-group (80+ years) in a GB/US context. These estimates will be updated as more data accrue.**

Age-group (years)	% symptomatic cases requiring hospitalisation	% hospitalised cases requiring critical care	Infection Fatality Ratio
0 to 9	0.1%	5.0%	0.002%
10 to 19	0.3%	5.0%	0.006%
20 to 29	1.2%	5.0%	0.03%
30 to 39	3.2%	5.0%	0.08%
40 to 49	4.9%	6.3%	0.15%
50 to 59	10.2%	12.2%	0.60%
60 to 69	16.6%	27.4%	2.2%
70 to 79	24.3%	43.2%	5.1%
80+	27.3%	70.9%	9.3%

5.32 Professor Spiegelhalter then stated that *'these can be superimposed on the background mortality to produce the figure below— they are plotted at year 7 of the decade as this more accurately represents the age at which this risk, averaged over the whole decade, pertains. The agreement is remarkable, showing the Covid risk follows a similar pattern as the background risk.'*



5.33 This report was commented upon by the Nobel Laureate for Chemistry Michael Levitt, Professor of Structural Biology at Stanford University in an academic article published on 25 March 2020 (one day before the Original Regulations were imposed) (see Tab D1.64 pages 816 to 817).<sup>64</sup> In this article, he used the example of the Diamond Princess, a cruise ship with disproportionately elderly passengers in which the virus spread throughout the passengers, to correct the estimates of total fatalities on the basis of the imposition of no restrictive measures. His calculations led to a prediction of just over 65,000 deaths in total, against the prediction of the Ferguson Report of 510,000 deaths – both on the basis of no restrictive measures being imposed.

5.34 Both the above analyses by leading international experts were available to SAGE, the Government's chief scientific adviser and the Government before the Original Regulations were imposed; and had been available for over three weeks before the first review (on 16 April 2020) in which the Secretary of State decided not to terminate any of the Regulations.

5.35 More recently, observers have focussed on the very coding used in the modelling underlying the Ferguson Report. For example, the blogsite "Lockdown Sceptics" published an article by

<sup>64</sup>

[https://www.dropbox.com/s/35e12dfdgd46on/5.a.%20How%20accurate%20are%20the%20number%20of%20UK%20and%20US%20Deaths%20Predicted%20by%20Ferguson%20et%20al%202020\\_by\\_Michael\\_Levitt-v2.pdf?dl=0](https://www.dropbox.com/s/35e12dfdgd46on/5.a.%20How%20accurate%20are%20the%20number%20of%20UK%20and%20US%20Deaths%20Predicted%20by%20Ferguson%20et%20al%202020_by_Michael_Levitt-v2.pdf?dl=0)

an author (admittedly under a pseudonym) who claimed to have worked for Google previously and to have 30 years of experience in coding (see Tab D1.65 pages 818 to 823).<sup>65</sup> This article heavily criticised the coding used by Professor Ferguson and the Imperial College team. This was followed up by a second article (see Tab D1.66 pages 824 to 827)<sup>66</sup>. These were impressive and persuasive critiques and prompted significant numbers of comments. They cannot be easily dismissed.

5.36 Also, they are given more credence by what Professor Ferguson has said himself. On 22 March, he tweeted this:<sup>67</sup> (see Tab D1.67 page 828)

*"I'm conscious that lots of people would like to see and run the pandemic simulation code we are using to model control measures against COVID-19. To explain the background - I wrote the code (thousands of lines of undocumented C) 13+ years ago to model flu pandemics..."*

5.37 It is therefore indisputably the case that Professor Ferguson by his own admission:

5.37.1 created the code for his pandemic model over 13 years ago;

5.37.2 failed to document his coding work; and

5.37.3 the coding was done for the purposes of modelling the spread of influenza, not Covid-19;

5.38 There have been huge and undeniable changes in working practices and human behaviours in the UK over the last 13 years. The growth of mobile and remote working technology in particular has been phenomenal. There are a large number of assumptions built into Mr Ferguson's model. The margin for error is clearly significant. Plus as far as Covid-19 is concerned, he was working from various assumptions as to its reproduction rate, the number of days for infections to double, the percentage of the overall population who would become infected and the Case Fatality Rate. The Ferguson Report was not peer reviewed.

5.39 On 30 April an article by Philip W Magnees was published on the website of the American Institute of Economic Research (see Tab D1.68 pages 829 to 833).<sup>68</sup> This highlighted

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<sup>65</sup> <https://lockdownsceptics.org/code-review-of-fergusons-model/>

<sup>66</sup> <https://lockdownsceptics.org/second-analysis-of-fergusons-model/>

<sup>67</sup> [https://twitter.com/neil\\_ferguson/status/1241835454707699713](https://twitter.com/neil_ferguson/status/1241835454707699713)

<sup>68</sup> <https://www.aier.org/article/imperial-college-model-applied-to-sweden-yields-preposterous-results/>

criticisms of Ferguson Report and the unanswered questions about the code on which the modelling that appeared in it had been run:

*"Although the ICL model's [main paper](#) has been out for over a month, an odd series of missteps continue to hamper external scrutiny of its predictive claims. In an unusual break from peer review conventions, the ICL team [delayed releasing the source code](#) for their model for over a month after their predictions. They finally [released their code](#) on April 27, 2020 through the popular code and data-sharing website GitHub, but with the [unusual caveat](#) that its "parameter files are provided as a sample only and do not necessarily reflect runs used in published papers."*

*Put another way, they released a heavily reorganized and generic file that would permit others to run their own version of the COVID model. They do not appear to have released the actual version they ran in the March 16<sup>th</sup> paper that shaped the US and UK government policies, or the results that came from that model (a distinction that was immediately noticed by other GitHub users, prompting [renewed calls](#) to release the original code).*

*As of this writing, the data needed to fully scrutinize the model and results behind the March 16<sup>th</sup> ICL paper remains elusive. There may be another way though to see how the ICL model's COVID projections are performing under pressure."*

5.40 This reflected the original criticisms by Prof Spiegelhalter and Prof Levitt and other articles to which I have referred which had also critiqued Ferguson's approach to building his model. But plenty of others have also been critical of Ferguson's coding work. An article in the Telegraph by David Richards and Konstantin Boudnik were reportedly "profoundly disturbed" by what they found and described the model as "unreliable" (see Tab D1.69 pages 834 to 837).<sup>69</sup>

5.41 The AIER article also referenced a study from Sweden by Upsalla University <sup>70</sup> (see Tab D1.70 pages 838 to 868) in which a group of Swedish researchers had sought to use the methodologies of the Ferguson Report to try and forecast the impact of anti-Covid-19 measures. Sweden's refusal to impose a compulsory lockdown in the same vein as other European countries has been a stand out feature of the pandemic.

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<sup>69</sup> <https://www.telegraph.co.uk/technology/2020/05/16/neil-fergusons-imperial-model-could-devastating-software-mistake/>

<sup>70</sup> <https://www.medrxiv.org/content/10.1101/2020.04.11.20062133v1.full.pdf>

- 5.42 The findings of the Upsalla University study were interesting (see Tab D1.70 pages 838 to 868).<sup>71</sup> They predicted that the pandemic would peak in Sweden in May and forecast that without the introduction of a lockdown, total deaths would be 96,000 by 1 July 2020 (see page 12). As the graph on page 29 of their report shows, their estimate of deaths as of 1 May 2020 was 40,000. In fact, Swedish deaths attributed to Covid-19 stood at 2,462 as of 29 April. It is also worth noting that in the Upsalla University study, they predicted 10,000 – 20,000 deaths by 1 May if the Swedish Government brought in the most severe lockdown measures by 10 April. One of the architects of this approach, Johan Giesecke has summarised why he believes it will prove to have been the right approach in an article published in the Lancet on 5 May 2020 (see Tab D1.72 page 870).<sup>72</sup>
- 5.43 The huge disparity between the actual deaths in Sweden and those predicted by the Upsalla University model demonstrates how dangerous it is to rely on these sorts of models as being able to accurately forecast the death toll from Covid-19. This is a point made by others about epidemiological models (see Tab D1.73 pages 871 to 875).<sup>73</sup>
- 5.44 An article by Johan Norberg published in the Spectator on 12 May<sup>74</sup> (see Tab D1.74 pages 876 to 879) under the title "Can we trust the Covid Modelling – More Evidence from Sweden" is a useful summary of how what has happened in Sweden has cast serious doubt on the death figures in the Ferguson Report.
- 5.45 Further, at the time of the Government's implementation of the Original Regulations, it was clear that Government scientific advisers were aware that they could not forecast what would happen because they had insufficient data (see point 2 of paragraph 5.26 of my statement).
- 5.46 When it comes to Ferguson's previous forecasting records in relation to swine flu and the threat of cases of new variant CJD this must have given pause for thought.
- 5.47 In the circumstances, I submit that for the Government to still be basing its decision-making on the Ferguson Report when there are clearly so many questions about its credibility, is unacceptable.

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<sup>71</sup> <https://www.medrxiv.org/content/10.1101/2020.04.11.20062133v1.full.pdf>

<sup>72</sup> [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)31035-7/fulltext#coronavirus-linkback-header](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)31035-7/fulltext#coronavirus-linkback-header)

<sup>73</sup> <https://judithcurry.com/2020/03/25/covid-19-updated-data-implies-that-uk-modelling-hugely-overestimates-the-expected-death-rates-from-infection/>

<sup>74</sup> <https://www.spectator.co.uk/article/can-we-trust-covid-modelling-more-evidence-from-sweden>

## Covid 19: mortality rates and threat

- 5.48 Covid-19 is a new illness and as such there was no large body of scientific evidence available about its characteristics when the virus first spread towards Europe.
- 5.49 However, from the experiences of the last few months, there is a growing body of data available from which I believe certain conclusions can be firmly drawn. All of these conclusions are relevant to the question of whether or not the Government's lockdown measures are necessary and proportionate to the threat now posed by Covid 19. Moreover this is information which has been available for some time and well before the most recent review of the lockdown measures was undertaken.
- 5.50 First, whilst the virus is undoubtedly highly contagious, the majority of those who will become infected by it suffer either no symptoms at all, or else very mild symptoms from which they make a full recovery. This was repeatedly emphasised by the Government's own senior health advisors at press conferences. The fact that Covid-19 produces significant numbers of asymptomatic cases is well known.
- 5.51 Secondly, Covid-19 does not appear to present any threat to the health of children or more generally young people. As I have commented at paragraphs 5.13 – 5.20 above, this is not only the consensus of the science but is borne out by the statistics for deaths from Covid-19. For example, according to NHS England figures, in England, out of 23,953 Covid-19 deaths in hospital between 1 March and 14 May just 12 have been in the under 19 age group (see Tab D1.75 page 880)].<sup>75</sup> Those same figures show 184 deaths in people under 40 years old. It is also the case that only 253 people under ~~65~~60 with no pre-existing health conditions died in that period. Yet they are probably the population least likely to have positively shielded themselves and the most likely to have contacted the most number of people. MG
- 5.52 This data can be seen in the table below from NHS England statistics (taken from the page "Covid-19 all deaths by condition.") (see Tab D1.76 page 881) <sup>76</sup>. It should be noted that these statistics do not include care-home deaths, leading to the conclusion that the proportion of fatalities in the older age ranges is far greater than appears in this table.

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<sup>75</sup> (To put this in perspective, in an average year, child mortality in England and Wales is around 1000 deaths over a 12 month period as is shown in table 1 of the file for 2018 in ONS statistics at <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/deaths/datasets/childmortalitystatisticschildhoodinfantandperinatalchildhoodinfantandperinatalmortalityinenglandandwales>

<sup>76</sup> <https://www.england.nhs.uk/statistics/statistical-work-areas/covid-19-daily-deaths/>

**Title:** COVID-19 daily deaths summary  
**Summary:** Deaths of patients who have died in hospitals in England and had tested positive for Covid-19 at time of death. All deaths are recorded against the date of death rather than the day the deaths were announced.  
**Period:** All data up to 5pm 12 May 2020  
**Source:** COVID-19 Patient Notification System  
**Basis:** Provider  
**Published:** 14 May 2020  
**Revised:** -  
**Status:** Published  
**Contact:** [england.covid19dailydeaths@nhs.net](mailto:england.covid19dailydeaths@nhs.net)

**Breakdown by pre existing condition**

Age group	Pre existing condition			Total
	Yes	No	Unkown presence of pre-existing condition	
<b>Total</b>	22708	1245	0	23953
0 - 19 yrs	9	3	0	12
20 - 39	142	30	0	172
40 - 59	1685	220	0	1905
60 - 79	8732	541	0	9273
80+	12140	451	0	12591
Unknown age	0	0	0	0

5.53 Thirdly, and as can be seen from the above table, of those who have become seriously ill with Covid-19 and who have needed hospital treatment or who have died, have overwhelmingly been elderly or had underlying medical conditions (or a combination of both). According to the latest figures from the ONS, 91% of deaths attributed to Covid-19 have been in patients with an underlying health condition. As far as hospital deaths recorded in England by NHS England are concerned, the percentage is even higher with 94.8% of Covid-19 deaths having occurred in people with such health conditions. Plus the fact that a patient who had died had tested positive for Covid-19 does not necessarily mean that Covid-19 was the cause of death or the main cause of death. The basis on which Covid-19 is recorded on death certificates has itself been the subject of some debate in the material I have seen.

5.54 Fourthly, the weight of evidence from various studies from around the world strongly suggests that the Infection Fatality Rate (IFA) for Covid-19 (i.e. the percentage of infected people who will die from Covid-19) is significantly less than the 0.9% used in the Ferguson Report. Such studies and testing data that has been collected strongly suggests that infection rates for Covid-19 are also significantly less than the 81% that was assumed in the model assumptions used in the Ferguson Report.

5.55 For example, at Tab D3.1 of MG3 is a copy of a spreadsheet which has links to a number of reported studies of testing for Covid-19. The median IFR for the virus from these real life samples is just 0.37% (see Tab D3.1 pages 957 to 959).<sup>77</sup> Meanwhile, the percentage of the relevant populations infected is also less than half that assumed in the Ferguson Report.

<sup>77</sup>

[https://docs.google.com/spreadsheets/d/1zC3kW1sMu0sjnT\\_vP1sh4zL0tF6fIHbA6fcG5RQdqSc/htmlview?pru=AAABchl72Ys\\*ioqbzr7-CYWVzRnYsbt5g#gid=0](https://docs.google.com/spreadsheets/d/1zC3kW1sMu0sjnT_vP1sh4zL0tF6fIHbA6fcG5RQdqSc/htmlview?pru=AAABchl72Ys*ioqbzr7-CYWVzRnYsbt5g#gid=0)

- 5.56 I submit that these characteristics are such that the Government ought to have considered more carefully the nature and scope of the measures it imposed in the Original Regulations, and when it reviewed them and made the Current Regulations.
- 5.57 Several weeks on from the original decision to implement the lockdown, the huge harms that continue to be caused by the lockdown are, I submit, out of all proportion to the threat to human health posed to the majority of the population by Covid-19. The blanket prohibitions on the population as a whole are unjustified.
- 5.58 As Lord Sumption and others have argued, surely now that we are in possession of so much more information about Covid-19, I submit that it is appropriate that individual citizens should have the right to make risk evaluations and judgments of their own about what they choose to do. If grandparents wish to see their grandchildren and are prepared to take the risk of doing so, in the light of the substantial evidence that they pose no or the most minimal risk of infection, should they not be allowed to make that decision for themselves?

### **Critical care capacity of the NHS**

- 5.59 Time and again, the justification for originally imposing the lockdown measures and continuing to impose them has been given by the Government as being to "protect the NHS". This "protection" is protection from being overwhelmed by cases of Covid-19 patients exceeding its capacity to treat them. When the Ferguson Model was originally produced, it put the total critical care capacity of the NHS at a static level of 5000.
- 5.60 When the pandemic arose, I think it is now clear that the UK, as with many other European countries, was simply not adequately prepared for what was to come. In particular, the NHS had relatively low levels of critical care beds for seriously ill patients and limited supplies of ventilators and PPE to protect its workforce. Testing capacity was clearly inadequate and the UK did not appear to have any technological innovations for helping track and trace infected persons.
- 5.61 The aim of the lockdown and the stated justification for it was to flatten the expected spike in cases so that the NHS would not be overwhelmed by too many Covid-19 case admissions and this flattening of the pandemic would buy critical time for the Country to improve its ability to cope.
- 5.62 Despite suggestions by its critics that the Government failed to impose the lockdown measures early enough, no one has suggested that at any stage of the pandemic, the NHS as a whole has been overwhelmed. No critically ill person has died because no ICU was

available to treat them. There may well have been cases where individual hospitals' ICU beds reached maximum capacity and it was necessary to send "overflow" patients to other hospitals. But that is routine management of surges which can happen just as easily during a typical winter flu season.

5.63 The SoS has made periodic statements at Press conferences about the numbers of critical care beds. He has said as follows:

5.63.1 On 3 April, he said:

*"Since the start of this crisis, we've boosted the number of critical care beds to care for coronavirus by over 2,500 – that's before the addition we'll get from the Nightingale hospitals".*

*And the result of this extraordinary work is that, in every hospital in the country, we have managed to expand capacity and, as we stand today, over 2,000 critical care beds are free and available and are ready should they be needed, and that's before the Nightingale hospitals come on stream."<sup>78</sup> (see Tab D3.2 pages 960 to 962)*

5.63.2 On 5 April he said *"There are currently over 2,336 spare critical care beds for the NHS in England. And over 9,000 ventilators are now available to NHS coronavirus patients across the country,"<sup>79</sup> (see Tab D3.3 pages 963 to 965)*

5.63.3 On 12 April, he said *"The latest figures show that in Great Britain we have 2,295 spare critical care beds, up 150 from yesterday".<sup>80</sup> (see Tab D3.4 pages 966 to 970)*

5.63.4 On 15 April (believed to be around the peak of the outbreak of Cov-19) he announced that *"spare capacity in critical care in the NHS today has reached a new record high of 2,657 beds"<sup>81</sup> (see Tab D3.5 pages 971 to 974)*

5.63.5 On 27 April, the SoS announced that the NHS had *"3,190 critical care beds and 42% of oxygen supported beds were empty."<sup>82</sup> (see Tab D3.6 pages 975 to 978)*

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<sup>78</sup> <https://www.gov.uk/government/speeches/health-and-social-care-secretarys-statement-on-coronavirus-covid-19-3-april-2020>

<sup>79</sup> <https://www.gov.uk/government/speeches/health-and-social-care-secretarys-statement-on-coronavirus-covid-19-5-april-2020>

<sup>80</sup> <https://www.gov.uk/government/speeches/health-and-social-care-secretarys-statement-on-coronavirus-covid-19-12-april-2020>

<sup>81</sup> <https://www.gov.uk/government/speeches/health-and-social-care-secretarys-statement-on-coronavirus-covid-19-15-april-2020>

- 5.63.6 On 4 May the SoS led the daily press conference and announced that as of that day the NHS had 3,413 spare critical care beds.<sup>83</sup> (see Tab D3.7 pages 979 to 982)
- 5.64 The Nightingale Hospitals are believed to have treated hardly any patients and have, to all intents and purposes now been mothballed. They provide substantial overflow capacity of thousands of beds.
- 5.65 It is undeniable, therefore, that as of now, the critical care bed capacity of the NHS is substantially ahead of where it was before the pandemic started and that there continues to be significant headroom in that capacity to deal with an increase in infections. Presumably, every day that goes by, more Personal Protective Equipment (PPE) is being produced by manufacturers the world over and global supply shortages are diminishing.
- 5.66 There is no doubt that from very early on, the UK did not introduce enough testing for Covid-19 with the result that the Government lost track of how many people were being infected. Also, with no testing available, healthcare workers in hospitals and care homes will unwittingly have passed the virus to patients and assisted in spreading infection among the most vulnerable groups. This may prove to be one of the most tragic and avoidable errors of the whole UK experience.
- 5.67 The Government has since drastically ramped up testing so that it is regularly hitting over 80,000 tests per day. Reports say that new anti-bodies tests will soon be made available on a large scale so that people can see whether or not they have been infected and have antibodies to the virus.
- 5.68 The Government has belatedly developed a new mobile application so as to enable more real time mapping and tracing of Covid19 infections. This has been the subject of a pilot project in the Isle of Wight before being rolled out more generally.
- 5.69 But despite all of these developments which represent massive step changes in the country's ability to tackle Covid-19, the Government has largely maintained the hugely disruptive, intensely damaging lockdown measures and has insisted upon continuing to apply its "five tests" all of which are focussed on Covid-19 and which fail to take into account the huge harms referred to below.

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<sup>82</sup> <https://www.gov.uk/government/speeches/health-and-social-care-secretarys-statement-on-coronavirus-covid-19-27-april-2020>

<sup>83</sup> <https://www.gov.uk/government/speeches/health-and-social-care-secretarys-statement-on-coronavirus-covid-19-4-may-2020>

5.70 I now turn to the harms caused by the Original and Current Regulations.

## **6. HARMS CAUSED BY THE ORIGINAL REGULATIONS AND THE CURRENT REGULATIONS**

### **Harm to the economy**

6.1 For obvious reasons, the imposition of the Regulations has led to a well-documented and massive collapse in UK economic activity. The full effects of the Regulations on the UK economy have yet to become clear. But as a matter of common sense it will clearly do the following:

6.1.1 Significantly reduce tax receipts for the Government as businesses and individuals' earnings are severely curtailed;

6.1.2 Hugely increase Government spending in order to pay for all the financial rescue measures such as the Furlough scheme and the additional welfare payments that will inevitably grow with the increase in unemployment;

6.1.3 Massively increase Government borrowing because at the same time as the spike in spending hits, the tax revenues will have plummeted;

6.2 The net effect of the above is sure to result in higher taxes, lower living standards, less money for spending on health education and other public services and a higher burden of debt interest for the UK.

6.3 The unprecedented costs to the economy from the policies being pursued by the Government are not in dispute. The Government's own Covid-19 Recovery Plan document published on 11 May<sup>84</sup> (see Tab D3.8 page 983) included some striking statistics at paragraph 5.10:

*"This is in addition to support for businesses, including:*

- *VAT deferrals until the end of June that provide a direct cash injection of over £30bn, Self-Assessment tax deferrals from July to next January, providing a cashflow benefit of £13bn and more than 64,000 tailored Time to Pay arrangements agreed with businesses and individuals;*
- *A business rates holiday worth £11bn to businesses;*

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<sup>84</sup> <https://www.gov.uk/government/publications/our-plan-to-rebuild-the-uk-governments-covid-19-recovery-strategy/our-plan-to-rebuild-the-uk-governments-covid-19-recovery-strategy>

- *Direct cash grants worth £10,000 or £25,000 for small businesses including in the retail, hospitality or leisure sectors, worth over £12bn in total;*
- *£1.25bn support for innovative firms;*
- *A rebate scheme to reimburse SMEs for part of their SSP costs worth up to £2bn for up to two million businesses; and*
- *A package of government-backed and guaranteed loans, which make available approximately £330bn of guarantees.*

*The Government is also supporting the NHS and other public services in the fight against the virus. So far more than £16bn from the COVID-19 Response Fund has gone towards the effort.*

*The Government recognises that many charities are working on the frontline to support people including hospices, citizens advice and support for victims of domestic violence and has provided a £750m package to enable those working on the frontline to continue supporting UK communities.*

*However, these measures are extraordinarily costly and cannot be sustained for a prolonged period of time. Precise costs will depend on a range of factors including the impact of the crisis on the wider economy and the level of take up for each scheme. The Office for Budget Responsibility has estimated that the direct cost to the Government of the response to COVID-19 could rise above £100bn in 2020-21. In addition to this, support of approximately £330bn (equivalent to 15% of GDP) in the form of guarantees and loans has been made available to business."*

*".....800,000 employers had applied to the Coronavirus Job Retention Scheme to help pay the wages of 6.3m jobs, as of midnight on 3 May."*

*"..Unemployment is rising from a 40-year low at the start of the year; around 1.8m households made claims for Universal Credit between 16 March and 28 April. The OBR has published a 'reference' scenario which suggests that, if the current measures stay in place until June and are then eased over the next three months, unemployment would rise by more than 2 million in the second quarter of 2020. The OBR's scenario suggests that GDP could fall by 35% in the second quarter of this year – and the annual contraction could be the largest in over 300 years.*

*Workers in those sectors most affected, including hospitality and retail, are more likely to be low paid, younger and female. Younger households are also likely to be disproportionately hit in the longer term, as evidence suggests that, following recessions, lost future earnings potential is greater for young people.*

*The longer the virus affects the economy, the greater the risks of long-term scarring and permanently lower economic activity, with business failures, persistently higher unemployment and lower earnings. This would damage the sustainability of the public finances and the ability to fund public services including the NHS. It would also likely lead to worse long-run physical and mental health outcomes, with a significant increase in the prevalence of chronic illness..."*

- 6.4 On 12 May, the Chancellor announced that the Furlough job protection scheme would be extended to October at an estimated cost of £8 billion per month. The Government published details of this extension on its website<sup>85</sup> (see Tab D3.9 pages 984 to 987). These gave updated figures for, amongst other measures, the Furlough scheme. As of 9am on 13 May, a staggering 7.1 million jobs were on Furlough from nearly 1m employers at a total cost to date of £10.1 billion. In addition, the support for businesses announced on the same web page showed that loans and grants worth more than £14 billion had been committed.
- 6.5 The cost to the taxpayer of all this Government assistance is huge – and unsustainable. The payments of VAT, business rates and the first instalment of income and corporation taxes have all been postponed. All of this will have a huge impact on the tax receipts of the Government and its ability to pay for public services. Government borrowing will undoubtedly push the UK's debt to GDP burden well beyond 100%.
- 6.6 The toll that the Regulations and their effect is having on whole sectors of the economy is already evident. Airlines and travel companies are without any means of earning revenues but are having to pay billions of £s in refunds to travellers' whose flights or holidays have been cancelled. Airline fleets lie grounded. Thousands of potential redundancies have been announced. At least two airlines – Virgin Atlantic and British Airways have suggested they may have to close their operations at Gatwick Airport – with a resulting loss of jobs not only of those employed directly by the airlines, but the jobs of other airport workers. Rolls Royce, the UK's premier aircraft engine manufacturer is facing huge reductions in revenue and will be forced to lay off thousands of workers.
- 6.7 On the already embattled High Street, a number of well-known retailers and restaurant chains have already been plunged into administration by the impact of the Regulations. Other companies have been in the headlines for closing outlets and trying to agree rent reductions.

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<sup>85</sup> <https://www.gov.uk/government/news/chancellor-extends-furlough-scheme-until-october>

- 6.8 For landlords – both commercial and private – the hit to economic activity has made it more difficult to collect rent from tenants.
- 6.9 The construction industry has been very badly hit by the lockdown. Building sites throughout the country have been deserted during the period of the lockdown. The need for new houses in the UK is always in the news. The stoppage in the construction sector will mean that no new houses will be built, worsening the imbalance in housing supply versus demand.
- 6.10 It is not just big businesses that have been severely impacted. The vast majority of the UK's businesses (over 99%) are small businesses employing fewer than 250 employees. Many millions of people are literally self-employed. For those on the list of businesses that have had to close under the Regulations, the impact has been to stop their owners and workers from earning a living. Those who only became self-employed after 6 April 2019 are not eligible for assistance payments under the Government's scheme.
- 6.11 Millions of people have, at a stroke, effectively been deprived of their businesses and ability to earn a living.
- 6.12 The lockdown measures and the reams of Government guidance emphasising social distancing and placing almost impossible requirements on employers will not only add hugely to the costs of many businesses. But they will also impede the ability of those businesses to make money by reducing the capacity and efficiency of workforces. Only a drastic easing of the lockdown measures and a repeal of the Regulations will offer any prospect of the UK beginning a process of recovery. There is now talk of a quarantine measure for travellers which will do further damage.

### **Harm to private & family life & liberty**

- 6.13 Under the Regulations, the restrictions on people leaving their homes "without reasonable excuse" were draconian. Other than for limited purposes set out in the Original Regulations it was not possible for anyone living in a separate place to friends or family to visit them – even if strict social distancing measures were practiced. This obviously constituted a massive interference with the private and family life of millions of people. It was a blanket restriction.
- 6.14 The Current Regulations have barely changed things. Regulation 6 now allows a person to visit a public place with one person who is not from their household. So this means that for the first time since 26 March, it is lawful for someone to leave their accommodation so as to meet up with a friend (or a member of their family). Yet they would not be permitted to visit that same person at their home – irrespective of whether or not they live on their own or

whether when visiting they do not enter the home but instead go in through a side entrance and sit two metres away from them in their garden. Or if someone has to drive a distance to visit an elderly relative, the relative would have to be taken to a public place for the meeting. That is at odds with Government guidance on being outdoors where the advice is to stay away from crowds.

- 6.15 It remains the case that following the Current Regulations and the Government's Guidelines, it is not possible for two people (who aren't already in the same household) to start a physical relationship with each other. Thus, the most basic fundamental human interactions remain prohibited by the State.
- 6.16 I submit that there is no justification for such arbitrary restrictions on the private and family lives of the whole population. If people want to interact with family members in particular, they should in my submission be allowed to make sensible, common sense judgments about how they go about it without the threat of criminal sanctions being imposed on them.
- 6.17 In his comments introducing the new lockdown measures, the Prime Minister referred to the common sense of the public. I submit that it is not proportionate to subject the whole population to these continuing stringent and oppressive legal restrictions on their right to family and private life and to enjoy their personal liberty. There is also the question whether Article 5 of the Convention allows the detention of healthy people to prevent the spread of a disease.<sup>86</sup> (see Tab D3.10 pages 988 to 991)

### **Harm to Education**

- 6.18 As I have said, in the Government's announcements prior to the implementation of the Regulations, it was stressed that even back in March it was accepted that Covid-19 posed very little risk to school age children. The Government also stated that the advice it had received was that closing schools would not have a significant impact on slowing the spread of the virus. Substantial evidence has emerged since early March about the minimal to non-existent risk of children infecting others and the exceptionally small mortality rate (only 3 children and teenagers under the age of 20 have died of Covid-19 in England without pre-existing conditions and only nine with them).
- 6.19 Among the documents seen by SAGE that have been disclosed by the Government, is a document dated 6 March which contains a matrix setting out the likely impacts of certain forms of actions designed to slow the spread of Covid-19 (see Tab D3.11 pages 992 to

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<sup>86</sup> States should declare a State of Emergency using Article 15 ECHR to confront the Coronavirus Pandemic', Green, A, Senior Lecturer in Law at Birmingham Law School, Strasbourg Observers (<https://strasbourgobservers.com/2020/04/01/states-should-declare-a-state-of-emergency-using-article-15-echr-to-confront-the-coronavirus-pandemic/>) 1.4.2020

999)<sup>87</sup>. I have extracted the relevant information and reproduced it below. According to that matrix, which was not informed by the subsequent evidence, the closure of schools is stated to have little impact on a pandemic and noticeably what is described as a "modest" impact of less than 5% in terms of the effectiveness in reducing cases and deaths.

Potential effectiveness in containing an outbreak	Potential effectiveness in delaying an outbreak	Potential effectiveness in reducing the peak of an outbreak	Potential effectiveness in reducing total number of cases and deaths, excluding excess deaths caused by lack of NHS capacity
Unlikely to contain an outbreak on its own	No more than 3 weeks delay to peak and possibly much less	If children have similar role in transmission as in pan flu, c.10%-20% reduction in peak hospital demand with closures of 8-12 weeks	Modest impact (<5%)

6.20 Despite this, schools did close for the vast majority of school children on or around 18 March and have remained closed ever since, except for the children of so-called "key" workers.

6.21 The impact of the lockdown on children is unprecedented. Millions of children are now living in closed environments and for those who do not have brothers and sisters they are being denied the opportunity to interact with other children which is a normal part of their development.

6.22 There is supposed to be home schooling available as a substitute for classroom learning. But reports I have seen suggest that availability of online lessons is patchy and in some cases non-existent (see Tab D3.12 pages 1000 to 1003).<sup>88</sup> So many children are literally not being educated. Some have parents who have to work or who are unable themselves to home educate their children. Inevitably the adverse impact of the school shutdown will hit the poorest and most deprived children harder than it will those whose parents are in higher income groups. According to research published by the Institute of Fiscal Studies, almost 60% of the parents of primary school children and nearly half of the parents of secondary school children reported that they are finding it quite or very hard to support their children's learning at home (see Tab D3.13 pages 1004 to 1006).<sup>89</sup>

<sup>87</sup>

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/874290/05-potential-impact-of-behavioural-social-interventions-on-an-epidemic-of-covid-19-in-uk-1.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/874290/05-potential-impact-of-behavioural-social-interventions-on-an-epidemic-of-covid-19-in-uk-1.pdf)

<sup>88</sup> <https://www.theguardian.com/education/2020/may/04/i-cant-get-motivated-the-students-struggling-with-online-learning>

<sup>89</sup> <https://www.ifs.org.uk/publications/14848>

6.23 The cancellation of exams this year will have a serious impact on children who would have been expecting to sit exams. They will have lost the opportunity to obtain exam results which may have been better than the level their teachers had been predicting.

6.24 This is bound to have a serious and continuing impact on their education.

*"...reviews have also noted the adverse effects of school closure, including economic harms to working parents, health-care workers, and other key workers being forced from work to childcare, and to society due to loss of parental productivity, transmission from children to vulnerable grandparents, loss of education, harms to child welfare particularly among the most vulnerable pupils, and nutritional problems especially to children for whom free school meals are an important source of nutrition."*

### **Harm through domestic violence**

6.25 The lockdown has led to a dramatic rise in domestic abuse incidents as people have been compelled to live together and those abused unable to find shelter or move out of their accommodation to escape abusive partners.

6.26 According to a letter written to Parliament on behalf of 22 organisations concerned with this sector, calls to the national domestic abuse helpline run by the charity Refuge were 49% higher in the week prior to 15 April than the average prior to the pandemic. On 6 April, traffic to the helpline website increased by 700% compared to the previous day (see Tab D3.14 pages 1007 to 1013).<sup>90</sup>

6.27 The same letter said that Chayn, a website that addresses gender-based violence, said that *"analysis of online traffic showed that visitors to its website had more than trebled last month compared with the same period last year."*

6.28 Further extracts from the same letter are even more horrifying:

*"The organisation Counting Dead Women has calculated that there were fourteen domestic abuse killings of women and two of children between 23 March and 12 April. Its founder Karen Ingala Smith has written that the number of women killed by men in the three weeks between 23 March and 12 April is the highest it has been for at least 11 years and is double that of a hypothetical average 21 days over the last 10 years; the average she has calculated for the same three week period between 2009 and 2019 is five domestic abuse killings of women"*

*"The Men's Advice Line for male victims of domestic abuse had an increase in calls of 16.6% in the week of 30 March, and a 42% increase in visits to its website and the Respect phone line, which offers help for domestic abuse perpetrators who want to change and stop being violent, had a 26.86% increase in calls in the week of 30*

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<sup>90</sup> <https://publications.parliament.uk/pa/cm5801/cmselect/cmhaff/321/32105.htm#footnote-113>

March, while its website received a 125% increase in visits in the same period compared to the week before.....

*It is clear that the lockdown measures are having a mammoth impact on children:*

*"...Anna Edmundson from the NSPCC told us that "children are feeling the impact of this crisis particularly". Data from Childline indicated that, as well as being concerned about coronavirus, children and young people are very concerned about abuse now that they are unable to leave the house to get support at schools, clubs, friends' or relatives' houses."*

*The publication acknowledges that families are being profoundly impacted by the restrictive lockdown measures with the risk that cases will fall through the net and children will be left behind "as the closure of schools and children's services has meant that "a lot of children who would be picked up and noticed [ ... ] when things are going wrong become invisible. The Local Government Association raised concerns that referrals to children's social care have fallen since 'stay at home' guidance was issued. While councils ordinarily receive, on average, almost 1800 referrals per day, anecdotal evidence suggested that referrals had fallen by more than half in some areas...."*

## **Harm to public health**

6.29 The massive effort to upscale critical care capacity in the NHS and brace for the pandemic has led to NHS managers cancelling elective surgery, including surgery for potentially life threatening conditions. The ordinary non-Covid medical conditions that the NHS treats have not gone away. According to figures from Cancer Research, around 165,000 people a year die from cancer in the UK. According to a report published by University College London on 29 April, an estimated 20% more newly diagnosed cancer patients could die that as a result of the Covid-19 impact (see Tab D3.15 pages 1014 to 1015).<sup>91</sup> Footnote 17 to section 2.1 of the Govt's covid-19 recovery plan in England admits there has been a 53% drop in urgent cancer referrals for the week of 27 April and 20% drop in cancer treatments for the week of 20 April (latest available). (Source: NHS England)

6.30 The Government's own Covid-19 Recovery Plan also recognised the impact of rising unemployment on public health (footnote 18 to section 2.1):

*"The IFS recently estimated that the fall in employment over the 12 months after the 2008 crisis caused an increase in the prevalence of chronic illnesses in those of working age of around 900,000. The IFS use evidence from Janke et al (2020) which showed that a 1 per cent increase in employment leads to a 2 per cent fall in the prevalence of chronic health conditions among the working age population"*

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<sup>91</sup> <https://www.ucl.ac.uk/news/2020/apr/deaths-people-cancer-could-rise-least-20>

- 6.31 According to a report by Edge Health, a provider of data to NHS Trusts, there are likely to be new waves of non-Covid deaths as a direct result of the fewer numbers of people accessing primary healthcare services in the normal way (see Tab D3.16 pages 1016 to 1021).<sup>92</sup> People have become fearful of visiting hospitals and GPs surgeries, no doubt in part due to the Government's own messaging about Covid-19.
- 6.32 The effect on the mental health and wellbeing of the population as a result of the lockdown measures is another serious factor (see Tab D3.17 pages 1022 to 1024).<sup>93</sup> The impact on many families in particular of being confined to small flats and dwellings for an extended period under the restrictions can only be imagined.

### **Harm to freedom of assembly**

- 6.33 As I have explained, the Current Regulations have maintained the total prohibition on gatherings of more than 2 people. This is a serious interference with the freedom of assembly, another human right under Article 11 of the Convention. The imposition of what amounts to a complete ban on all marches, political meetings, rallies and other forms of protest is unprecedented. It has now been in force for nearly two months.
- 6.34 On 16 May there were protests in various places, including in London's Hyde Park about the lockdown measures. In the Hyde Park incident, the Guardian (see Tab D3.18 pages 1025 to 1027) <sup>94</sup> reported that ten fines were issued by the police but that 19 people (including Jeremy Corbyn's brother, Piers) were arrested – some at Speakers Corner (see Tab D3.19 pages 1028 to 1029).<sup>95</sup>

### **Religious gatherings**

- 6.35 I am aware from emails received by my firm that nearly 200 people who have supported the Claimant's crowdfunding case have stated that they have been prevented from attending religious ceremonies and gatherings by the lockdown regulations. The Current Regulations continue to make such gatherings impossible. This affects people of all faiths.

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<sup>92</sup> <https://www.telegraph.co.uk/global-health/science-and-disease/two-new-waves-deaths-break-nhs-new-analysis-warns/>

<sup>93</sup> <https://www.telegraph.co.uk/news/2020/05/01/mental-health-impact-lockdown-will-be-seen-years-says-nhs-chief/>

<sup>94</sup> <https://www.theguardian.com/world/2020/may/16/piers-corbyn-among-those-held-in-coronavirus-lockdown-protests>

<sup>95</sup> <https://www.royalparks.org.uk/parks/hyde-park/things-to-see-and-do/speakers-corner>

## **7. THE FIVE TESTS FOR EASING OR LIFTING THE LOCKDOWN**

- 7.1 The Claimant's case is concerned with removing the disproportionate and excessive restrictions on people's liberty, livelihoods and businesses as soon as possible so as to bring an end to the terrible damage the Regulations are doing to the country. As I have described in paragraph 2.48 the Government announced for the first time on 16 April that it had formulated five tests that it said would have to be met before there could be any easing of the lockdown. It has repeatedly referred to these tests at daily press conferences, when Government ministers have been interviewed and in official documents.
- 7.2 The Claimant's case is that these tests, focussing as they do almost exclusively on the Covid-19 situation to the exclusion of all else, amount to an unacceptable fettering by the Government of its discretion. The decision to ease or remove the restrictions set out in the Regulations ought not, the Claimant submits, be decided purely on the basis of the Government's tests.
- 7.3 But as the speeches made by the Prime Minister since 16 April have confirmed, the Government has not even been consistent in applying its own tests. It has been increasingly focussing on the R number for infections of Covid-19 - 19 – a number that, bizarrely, includes infections acquired in hospitals and care homes by people who cannot have been shielded from infection through the 'lockdown' restrictions.
- 7.4 The problem with these tests is that make absolutely no allowance for all the many and significant consequences of the Regulations on public physical and mental health, living standards, jobs, the economy and the ability of the UK to sustain the massive costs of State support and the huge drop in GDP.
- 7.5 I would suggest that the Government cannot ignore these other factors in assessing whether or not it should relax or ease the lockdown measures. It had a duty at the outset to come to a conclusion based on reliable evidence that the lockdown measures would have a beneficial impact on the contagion of Covid-19. It should have taken into account the harms that the lockdown would have on all of the above elements (i.e. the economy, non-Covid healthcare etc), take into account the potential risks and benefits of less restrictive measures and finally decide whether the lockdown, or its continuance, was the least restrictive means of reducing contagion.
- 7.6 It must also be borne in mind that there is a statutory requirement on the SoS to consider whether the restrictions and requirements imposed by the Regulations are proportionate to what they seek to achieve, which is a public health response to the threat posed by Covid-19.

There is also the requirements proportionality and necessity which are imposed on the Government under the HRA.

- 7.7 The Claimant submits that it is clear that the Government's five tests completely fail to meet those requirements and that as a consequence, the SoS has failed to review the Original Regulations properly when introducing the Current Regulations.
- 7.8 In its response dated 14 May to the Claimant's pre-action letter, the Government has, at paragraph 56, attempted to suggest that in fact the five tests are *not* the basis of its decision-making in relation to the lifting of lockdown measures.

*"...They seek to explain how the Government will approach assessing the public health side of the balance it is continually striking and reviewing in the Regulations... They do not purport to set out the only factors the Government will take into account,... Nor do they, or could they, supplant a holistic assessment of the proportionality of the Regulations; rather, they inform how that assessment will, in part, be carried out. "*

Thus, there is an attempt to explain away the five tests as being only the "public health side of the equation". I submit that this explanation is highly unconvincing for two reasons. First, if the five tests are merely the "public health side" of the balancing exercise the Government is performing, then the Government is still manifestly failing to take into account the multitude of other public health considerations beside Covid-19. These include the well-publicised problems with a blockage in NHS operations, the drastic and disastrous drop in cancer diagnoses and referrals, the effect on physical and mental health of incarcerating people in their own homes and denying them access to friends and family etc.

- 7.9 Secondly, the Government's suggestion that the five tests are merely "part of" the balancing exercise it is carrying out flies in the face of how every Government spokesman, Minister and the Prime Minister have presented the five tests in public. As I have quoted in the above passages, they have always said that each of the five tests has to be satisfied before the restrictions can be eased. What they have not said is that the lockdown will be eased, even if the five tests are not met, should the economic or other public health damage to the country become too great to justify against the threat posed by Covid-19.
- 7.10 The passage in the Government's response letter is also at odds with what is said in the Government's own 60 page "Covid Recovery Strategy"<sup>96</sup> (see Tab D1.45 pages 538 to 578) published on 10 May. This document repeatedly confirms that the five tests are not simply

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/884760/Our\\_plan\\_to\\_rebuild\\_The\\_UK\\_Government\\_s\\_COVID-19\\_recovery\\_strategy.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/884760/Our_plan_to_rebuild_The_UK_Government_s_COVID-19_recovery_strategy.pdf)

part of the "public health side" of a balancing equation. It says they are determinative. For example, on page 11, the document sets out the five tests and states this underneath:

*"The Government's priority is to protect the public and save lives; **it will ensure any adjustments made are compatible with these five tests.**"* [emphasis added]

7.11 On page 30 of this document under the heading Step Two, the Government says:

*"The content and timing of the second stage of adjustments will depend on the most up-to-date assessment of the risk posed by the virus. **The five tests set out in the first chapter must justify changes, and they must be warranted by the current alert level.**"*

*"...The current planning assumption for England is that the second step may include as many of the following measures as possible, **consistent with the five tests....**"*  
[emphasis added]

7.12 On page 31 under "Step Three" the further easing of the lockdown is:

*"....subject to the five tests justifying some or all of the measures below..."*

7.13 In the circumstances, it is difficult, on the face of it, for the Claimant to accept that the Government is placing such apparent importance on the five tests in public as being determinative of what it may or may not do next, whilst in private it is doing something different. Yet that is what the Government's response letter is suggesting.

7.14 Meantime, other European countries continue to remove or ease their own lockdown restrictions. At Tab D3.21 of MG3 is a table summarising the state of play regarding other countries lockdown easing. This may need to be updated nearer to the hearing of the Claimant's application (see Tab D3.21 pages 1031 to 1046).<sup>97</sup>

## **8. SCIENTIFIC ADVISORY GROUP FOR EMERGENCIES (SAGE)**

8.1 At all material times during the Covid-19 pandemic, the Government has frequently made reference to the fact that it has taken the advice of SAGE. That continues to be the case. Ministers repeatedly say in their press conferences that they are "following the science." Yet, they seem reluctant to be transparent with the public about what the science is telling them. The advice they receive from SAGE remains secret. The Claimant cannot understand why this is justified.

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<sup>97</sup> Table prepared by Wedlake Bell

8.2 In the pre-action letter sent to the SoS by my firm on 30 April, we requested that the SoS disclose copies of the SAGE meeting minutes that relate to the Covid-19 situation. In its response letter on 14 May, the Government has refused to disclose the Minutes.

8.3 In this section, I deal with the question of disclosure of the SAGE Minutes.

### **SAGE and Scientific Advisory Committees**

8.4 SAGE is a scientific advisory committee ("SAC") which, as its name suggests, is formed to assist the Government deal with emergency situations.

8.5 The role and governance of SAGE are set out in in a Cabinet Office paper entitled "*Enhanced SAGE Guidance: A strategic framework for the Scientific Advisory Group for Emergencies (SAGE)*" (see Tab D3.22 pages 1047 to 1114).<sup>98</sup> This describes the role of SAGE (see page 12 of this document) in the following terms :

*"SAGE aims to ensure that coordinated, timely scientific and/or technical advice is made available to decision makers to support UK cross-government decisions in COBR"*

8.6 At paragraph 19 of the Introduction to the Framework, there is a reference to the "*Principles of providing scientific advice to the Government*" (see Tab D3.23 pages 1115 to 1118).<sup>99</sup>

8.7 These are set out in a Government paper of that title dated 24 March 2010 ("the Principles"). Their purpose is described in that document as follows:

*"The 'Principles of scientific advice' set out the rules of engagement between government and those who provide independent scientific and engineering advice. They provide a foundation on which independent scientific advisers and government departments should base their operations and interactions.*

*The principles apply to ministers and government departments, all members of Scientific Advisory Committees....."*

8.8 Thus, the Principles apply to SAGE, as they do to any other SAC.

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/80087/sage-guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/80087/sage-guidance.pdf) .

<sup>99</sup> <https://www.gov.uk/government/publications/scientific-advice-to-government-principles/principles-of-scientific-advice-to-government>

8.9 Paragraph 3 of the Principles deals with "Transparency and Openness". The first bullet point under that heading states:

*"Scientific advice to government should be made publicly available unless there are over-riding reasons, such as national security or the facilitation of a crime, for not doing so."*

8.10 The Principles go on to state in Paragraph 4 under the heading "Applying the Principles" as follows:

*"Scientific Advisory Committees, Councils and government departments should consider the extent to which the principles in this document are reflected in their operation and to make changes as necessary. Issues relating to the function and working of scientific advisory bodies that are not reflected in these high-level principles are discussed in more detailed guidance such as the ['Code of practice for Scientific Advisory Committees'](#) or the ['Guidelines on scientific analysis in policy-making'](#)"*

8.11 The "Code of Practice for Scientific Advisory Committees" ("the Code") was last revised in 2011 following a public consultation (see Tab D3.24 pages 1119 to 1158).<sup>100</sup> The preface to the revised edition suggests that it is not mandatory in its application but is intended as a "guidance framework". The relevant introductory passage is as follows:

*"The Code is intended to be a guidance framework rather than a set of instructions. It is equally applicable to any form of Scientific Advisory Committee or Council, regardless of breadth of remit or type of constitution – being as relevant to advisory Non-Departmental Public Body (NDPB)s as to expert scientific committees<sup>1</sup> that are not NDPBs. It will ultimately be for the relevant sponsoring organisation and committee to determine the best approach for their specific circumstances."*

8.12 "Communication and Transparency" are dealt with at Chapter 6 of the Code. This clearly envisages that SACs should publish their minutes and background documents. The relevant passages from the Code are as follows:

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/278498/11-1382-code-of-practice-scientific-advisory-committees.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/278498/11-1382-code-of-practice-scientific-advisory-committees.pdf)

### **"Publication of documents – general**

*"116. The SAC should establish a policy on what documents are to be published based on principles of openness and transparency. Subject to the paragraphs below, all committees are expected to publish, as a minimum, programmes of work, meeting agendas, minutes, final advice (where appropriate) and an annual report. Unless there are particular reasons to the contrary, they should also consider routinely publishing supporting papers. Openness from the outset about risks and concerns can sometimes prevent difficult situations arising later on in a committee's work."...."*

### **"Publication of minutes**

*121. SACs should publish minutes of their meetings. It is good practice for the secretariat to prepare minutes within two weeks of the meeting and after initial amendment/approval by the Chair to circulate them to meeting participants for comment. The committee should generally approve minutes at the meeting following the one to which the minutes relate and publish the final version as soon as possible thereafter"*

*22. SACs should have a set format for their minutes. Minutes will generally be written in an unattributable form.*

*123. The minutes should accurately reflect the proceedings of the SAC. They should be written in terms that make it easy for a member of the public to understand the process by which a decision has been reached. Where it is necessary for the minutes to contain substantial technical detail, there should be a 'lay' summary comprehensible to a member of the public.*

*125. Advice should be in terms that can be understood by a member of the public. It should explain the reasoning on which the advice is based; make clear what principles, if any, of risk management are being applied<sup>24</sup>, include assumptions underlying the advice and identify the nature and extent of any uncertainty.<sup>25</sup> (See also paragraphs 79-84 above).*

*126. In situations of uncertainty, SACs may offer a range of options or interpretations to their sponsoring departments. If so, they should distinguish between options which are alternative interpretations of the scientific evidence, those which relate to uncertainty in the evidence itself and options which involve other factors such as social, ethical or economic considerations.*

127. SAC reports and advice should indicate where, in forming a view, the committee has relied on any external advice or information provided by others which the committee has not reviewed.

128. Advice should normally be made public by the SAC at the time it is given to the sponsoring body(ies), or as soon as reasonably practicable thereafter. Where there are circumstances which justify giving advice on a non-disclosed basis, committees should consider publishing the advice as soon as is consistent with the reasons for non-disclosure. Reasons for nondisclosure should be consistent with the principles of Freedom of Information legislation."

- 8.13 The Code thus makes clear that publication of minutes and supporting papers by a SAC should be standard practice in accordance with "the principles of openness and transparency". As regards publication of background information the Code specifically continues:

**"Publication of background documentation**

133. In order to help provide a full appreciation of its advice and decisions, the SAC should, where appropriate, facilitate public access to documents or information used in the formulation of its advice."

**Failure to publish minutes and documents**

- 8.14 SAGE has so far failed to publish any minutes of its meetings which relate to the Covid-19 situation and has so far published only a small fraction of the background documents. This is in spite of the clear policy underpinning the Principles and the Code.
- 8.15 In the circumstances, this is a highly unsatisfactory position given the huge importance of the work being done by SAGE and the enormous consequences of the actions taken by the Government based on its advice. Prior to the sending of the pre-action letter, the subject of SAGE secrecy had already been raised by Parliamentary figures as well as the press.
- 8.16 On 4 April 2020, following an appearance by Sir Patrick Vallance before the Commons Scientific and Technology Select Committee, he wrote to the Committee's Chairman, the Rt Hon Greg Clark MP in relation to this and other matters. In his letter<sup>101</sup> (see Tab D3.25 pages 1159 to 1160) Sir Patrick gave his reasons for refusing to disclose the names of the SAGE members:

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<sup>101</sup> <https://publications.parliament.uk/pa/cm5801/cmselect/cmsctech/correspondence/Patrick-Vallance-to-Greg-Clark-re-SAGE-composition.pdf>

*"on advice from the Centre for the Protection of National Infrastructure and that it was in line with the standard procedure for COBR meetings. This contributes towards safeguarding individual members personal security and protects them from lobbying and other forms of unwanted influence which may hinder their ability to give impartial advice."*

8.17 Sir Patrick did confirm in his letter that steps were being taken to publish some of the material "which have formed the basis of SAGE's discussions and advice material". However, as I have noted, publication of these is still very incomplete with only around 30 published out of 122 documents listed on the SAGE website.

8.18 On the subject of disclosure of SAGE meeting minutes, he stated:

*"Once SAGE stops convening on this emergency the minutes of relevant SAGE meetings, supporting documents and the names of participants (with their permission) will be published."*

8.19 It should thus be noted that Sir Patrick gave no reason why – contrary to the Principles and the Code – SAGE would not be publishing its minutes "as soon as possible" after they had been prepared. But he did indicate that the minutes would, in time be published as they have been for previous scenarios where SAGE has been formed to advise the Government.

8.20 I have reviewed what the Framework has to say about the subject of transparency when it comes to SAGE. There are some passages in the Framework which appear relevant to this discussion:

***"Ensuring transparency and protecting sensitive information***

*49. Transparency is an important element of democratic decision making and the evidence used to inform decision should be published. In accordance with this, SAGE papers and products should be published in accordance with the Freedom of Information Act . In certain circumstances the MOD may be required to establish and chair a separate SAGE sub-group of security cleared individuals where the outcome is not published.*

***Publishing minutes and SAGE advice***

*50. The SAGE secretariat should ensure that minutes are recorded for both SAGE committee and sub-group meetings. Minutes should be prepared in accordance with*

*standard practice for a scientific advisory committee. These should be cleared by SAGE members for technical accuracy. The SAGE secretariat should also act as the information manager for all SAGE products, storing and circulating them and publishing them as and when appropriate. It is likely that the policy development, national security and/or personal information FOI exemptions may apply and this may mean that some information needs to be redacted or omitted before publication. The timing of publication will also need to be considered, with the most appropriate timing, often being after the emergency is over.*

*51. Most emergencies attract significant media interest and experts are likely to want to talk about their work, the SAGE secretariat should provide SAGE members with clear guidance on confidentiality. This should explain what can and cannot be said for security reasons and the requirement to take account of the FOI Act."*

- 8.21 The reference to "security reasons" for withholding publication of information and to the possible need to have sub-groups of "security cleared individuals where the outcome is not published" suggests to me that there will be occasions where there are good reasons not to publish documents such as for reasons of national security.
- 8.22 However, on the face of it, I cannot see any such "national security" issues here. SAGE, we are told, has been advising on the likely spread and impact of Covid-19 and in relation to the measures it has recommended be adopted by the Government to best combat the spread of Covid-19.
- 8.23 The potential of Covid-19 to spread quickly and lead to too many hospital admissions at any one time which might overwhelm the critical care capacity of the NHS is the principal reason that has always been given by the Government for it introducing the Regulations and maintaining them in force. That much is already in the public domain.
- 8.24 The Framework does refer to the fact that the "timing of publication" of SAGE minutes needs to be considered and that "the most appropriate timing" would "often" be after the emergency is over. However, I submit that this cannot be assumed to apply here.
- 8.25 It is clear from the Principles and the Code that the default position is that the minutes of meetings of SACs and the documents they have seen and relied upon should be made available in public. It is true that the Framework does raise the subject of minutes in the context of SAGE. But it is not good enough, the Claimant submits, for the Government to simply say that the minutes will be published when "the emergency is over".

- 8.26 We are now more than 7 weeks on from the decision to implement the Regulations back on 26 March. There have since been two statutory reviews of the Regulations, both of which have so far resulted in no changes being made to them – ostensibly on the advice of SAGE. In those circumstances and given the enormous implications of continuing with the lockdown, it is more important than ever that there be transparency about the reasons for the Government's decisions. Otherwise, there is effectively no means of testing or scrutinising those decisions. The huge impositions on the freedoms of individuals and businesses will remain in place with the consequences set out elsewhere in this statement.
- 8.27 The former cabinet minister David Davies is reported in the Financial Times on 27 April as having said that "he hoped Boris Johnson's *“commitment to transparency means we will see the minutes, recommendations and dissenting opinions of Sage published soon, so we can properly debate when and, as importantly, precisely how we exit lockdown.”*<sup>102</sup> (see Tab D3.26 pages 1161 to 1163)
- 8.28 Since Sir Patrick wrote his letter to Greg Clark, the Government has since published the names of all but two of the members of SAGE (see Tab D3.27 pages 1164 to 1173).<sup>103</sup> It is therefore to be assumed that the reasons for keeping them secret as put forward by Sir Patrick no longer apply.
- 8.29 Presumably the minutes of SAGE meetings are in the same format as those which have previously been published in relation to other emergencies. I note that those minutes are in the form suggested by the Code i.e. they are unattributable to any SAGE member. So it can hardly be a good reason for not publishing them that any one or more members of SAGE could be picked out as having taken a particular stance.
- 8.30 As regards the publication of supporting documents, as I have observed, the SAGE information page on the Government's website lists a total of 122 documents apparently seen by SAGE of which only around 30 have been made public.
- 8.31 Given the clear presumptions in favour of openness and publication set out in the Principles and in the Code, if the Government wishes to maintain its stance on withholding disclosure, then the onus is on the Government to give sound, cogent reasons for doing so.
- 8.32 On the face of it, I cannot see why these cannot be published in a timely manner. We are at a critical stage in the UK's response to the Covid-19 outbreak and it is surely a matter of huge

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<sup>102</sup> <https://www.ft.com/content/948fe678-a9da-4b71-8dac-85716a85b035>

<sup>103</sup> <https://www.gov.uk/government/publications/scientific-advisory-group-for-emergencies-sage-coronavirus-covid-19-response-membership/list-of-participants-of-sage-and-related-sub-groups>

public interest to know the reasons why the Government is so reluctant to lift the extremely onerous and damaging lockdown measures. If, as Ministers have repeatedly said, they have been "guided by the science" and relied on SAGE's advice, then I fail to see why they should be so reluctant for the public to see what that advice has been. Publishing the SAGE minutes would also enable other scientists to comment on SAGE's advice and where appropriate to challenge it. That is surely a healthy state of affairs. Instead, we have politicians telling us they are following SAGE's advice, but we cannot see that advice for ourselves – even though we are all living with the consequences of it.

8.33 It is also the case that as was made clear by Dominic Raab in his statement on the day of the last review of the Regulations on 7 May, that the Government would be guided in its assessment of whether or not the 5 tests had been complied with, by the advice from SAGE.

8.34 The time has surely come when the public should be able to see that advice. It is most regrettable that in its response to the Claimant's pre-action letter, the Government has maintained its refusal to make the SAGE Minutes available. It is noticeable that no real attempt is made to justify the continued secrecy of the Minutes.

## **9. STANDING**

9.1 In paragraphs 11 – 14 of their response to the pre-action letter, Government appears to have accepted the standing of the Claimant to dispute the *vires* of the lockdown legislation. However, it has questioned his standing to bring claims for interference with certain Convention rights. In paragraph 13 of its letter, the Government has dismissed the notion that our client can rely on the fact that he has thousands of supporters via his crowdfunding campaign because "nothing was known" about those supporters.

9.2 As the Claimant describes in his statement, on 18 May he sent an email to his crowdfunding supporters asking them to respond to certain questions. The email responses were sent to the email address [lockdown@wedlakebell.com](mailto:lockdown@wedlakebell.com) which was set up by my firm and to which I have access. Hundreds of responses were received within hours of the Claimant's email and at the time of writing this statement there were well over 600 responses. I had my colleagues collate the emails received and the results of their analysis of the first 500 emails were as follows:

9.3 There is now produced and shown to me marked Exhibit "**MG4**" a bundle comprising copies of a small selection of those responses (see Tab D4 pages 1175 to 1192). (Personal details have been redacted out of respect for the privacy of the individuals concerned). For the moment, I have not exhibited all of the emails of which there are over 600 currently.

- 9.4 In my submission, these emails from the Claimant's supporters is powerful evidence of how the Claimant is not just bringing this claim on behalf of himself, but on behalf of thousands of ordinary people who are directly affected by the lockdown and the Government's draconian legislation. The survey responses show that there are hundreds, if not thousands of people who have pledged financial support for the Claimant's action and whose Conventions rights are being interfered with.
- 9.5 On 19 May I wrote to the Government legal service pointing this out and requesting that they agree to drop the objection to the Claimant's standing in this matter as regards his grounds based on Convention rights. This was on the basis that he clearly represents not just himself but a significant number of individuals who are victims of interference in their Convention rights. I suggested that there were sound case management and costs reasons why it was undesirable to have to put in further evidence from these individuals or join them as additional claimants to the proceedings. A copy of that letter is at MG2 (see Tab D2.10 pages 952 to 953). A copy of the Government's response dated 20 May 2020 is at Tab D2.11 pages 954 to 955. This took matters no further.

## **10. CONCLUSION**

- 10.1 For the reasons set out above and in the Claimant's statement of grounds, I submit that it was not proportionate or lawful for the Government to introduce such drastic lockdown rules as those brought in on 26 March 2020 in the form of the Original Regulations. The same applies to the two subsequent reviews of the Regulations on 16 April and 7 May and to the amendment of the Regulations to tighten up on them on 22 April.
- 10.2 But regardless of whether or not those now historical events were lawful exercises of the SoS's powers, on any basis I submit that there is no justification for the lockdown to be continued in its current form as embodied in the Current Regulations. Further, the almost unbelievably complicated and arbitrary new guidelines – not adequately reflected in the Current Regulations – are symptomatic of a Government that is seeking to impose a degree of control and micro-management over the lives of its citizens that is wholly incompatible with Convention rights and that is not proportionate to the harm that the rules are designed to combat.
- 10.3 But for a few minor concessions to the modified house arrest to which the whole population has been subject since 26 March, the public are still in the grip of what Lord Sumption has called "the worst infringement of personal liberty in our country's history". Extraordinarily elaborate and complicated rules have now been imposed on the whole population – irrespective of whether they are in high risk groups or not. This is despite the overwhelming evidence that now exists as to the risks of Covid-19 being largely confined to those in

vulnerable groups, not the vast majority of the population who are subject to the same restrictions.

- 10.4 The Current Regulations and the guidelines that accompany them are complicated, arbitrary and, the Claimant submits, totally unworkable in practice. Worse, just as it was guilty of doing with the original version of the Original Regulations, the Government has again said one thing in its guidelines (e.g. the "2 metre rule") but actually legislated for something different. This can only increase the scope for more wrongful criminalisation of law abiding citizens and make life almost impossible for the police when it comes to enforcement.
- 10.5 All this is in spite of the fact that there have been a number of important developments since the original decision to impose a lockdown which have, in the Claimant's submission, greatly reduced the purported justification for the continuing lockdown measures.
- 10.6 These have included the significant growth in NHS critical care capacity with the addition of thousands of ICU places and the huge overflow capacity in the Nightingale hospitals. The Government has boasted of its growing capacity in relation to testing, the imminent roll out of its track and trace mobile application, the impending availability of mass-antibodies testing and growing confidence in the supplies of PPE.
- 10.7 In short the Government has now protected the NHS and no longer feels it necessary to use the "protect the NHS" slogan as part of its communications strategy.
- 10.8 It is also the case that more and more data and information have emerged about Covid-19 since the lockdown began. We know more about its mortality rates (very low) and which populations it affects most (overwhelmingly those with underlying health conditions and the elderly). It is, I submit, indisputable that Covid-19 presents virtually no risk at all to children or young people and overall very low risks to people of working age in general. The lockdown amounts to a continuing and serious interference with the rights and freedoms of the whole population, despite only a tiny fraction of that population being at risk of death or serious illness. This is unprecedented. I submit that for all the tinkering with the lockdown that has recently taken place, the measures are not proportionate to the real threat of harm posed by Covid-19. Moreover, when balanced against the huge harms that are the direct result of continuing with the lockdown measures – even in their modified form - I submit that the case for the Government's continuation of the measures is even weaker still.
- 10.9 Meanwhile, catastrophic long term destruction is being wreaked upon the UK economy. The Government has itself acknowledged the huge cost and damage already being done to the country by maintaining the lockdown. The extra borrowing that the UK will have to undertake

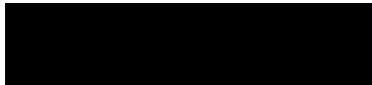
if the Government's approach is pursued will saddle this and future generations with an enormous extra national debt.

10.10 Yet despite all the change of circumstance since it originally brought in the lockdown, the Government has insisted upon imposing a narrowly based set of tests for lifting the country out of it which take no account of any factors beyond the Covid-19 infection. It has also avoided much parliamentary scrutiny of the Original Regulations and the Current Regulations by using mechanisms provided for under the 1984 Act, rather than other more appropriate legislation that imposes tighter Parliamentary controls.

10.11 On behalf of the Claimant, I respectfully request that the Court give permission for the Claimant to bring these judicial review proceedings and that it grants the relief sought by the Claimant.

**Statement of truth**

I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.



Signed.....

Dated...20 May 2020

Michael Gardner