

Covid-19 and the Civil Contingencies Act (2004)

Summary

The ability to use the CCA lawfully depends on the conditions for its use being satisfied. There is a doubt that the 'urgency' safeguard for the CCA would be met by declaration of a Covid-19 Reasonable Worst Case Scenario (RWCS). This entails the legal risk that CCA measures, as secondary legislation, could be struck down and leave the government without the powers it needs to prepare for and respond to a RWCS outbreak.

Further, the CCA requires substantial and repeated Parliamentary scrutiny of its emergency powers. These must be laid before Parliament as soon as is reasonably practicable, and will lapse if not approved within 7 days. If either House is in recess, compulsory recall within 5 days is required. The CCA also requires Parliamentary debates every 30 days to approve and prevent the expiry of new regulations. Even in the event that Parliamentary approval was continually granted, the duration of requirement for certain measures entails a likelihood that primary legislation may also be needed.

Background – Civil Contingencies Act (2004)

CCA Part 2 allows the Government to make urgent, necessary, limited, temporary legislation (emergency regulations) to prevent, control or mitigate an aspect or effect of an emergency. The CCA powers have always been presented as a last resort, before which all alternatives must be considered. Their first use is likely to be controversial and might be seen as an overreaction or failure to prepare. As secondary legislation, emergency regulations are open to challenge in courts and could be struck down, unlike primary legislation.

There is a commitment to hold an independent review within a year of any use of the powers which would include whether the safeguards had worked in practice and scrutinise the extent to which alternative options had first been considered.

'Triple Lock' Criteria

In order to employ emergency powers, three safeguard tests known as the 'Triple Lock' must be passed:

1. An emergency has occurred, is occurring, or is about to occur.
2. The provisions sought are necessary, proportionate and appropriate for the purpose of preventing, controlling or mitigating an aspect or effect of the emergency.
3. Is urgent, existing legislation is insufficient and other means would risk serious delay.

A Covid-19 RWCS may not pass the third test. CCA guidance reads:

'...it will be necessary to demonstrate why [provisions] are needed so urgently that it is not possible to bring forward a bill that would allow the usual parliamentary scrutiny instead. Therefore, if a bill can be fast-tracked through Parliament this must be used in preference.

The main argument for using a Bill is that it allows prior Parliamentary scrutiny. It is also less vulnerable to legal challenge. A Covid-19 RWCS is a 'rising tide' event which can be anticipated. WHO declaration of a pandemic or SAGE advice that a RWCS is likely provide approximately 8 weeks' notice of the pandemic's peak. This notice is sufficient that the peak will arguably not constitute an 'urgent' event if it is introduced in time to contain an expected outbreak.

Given the significance of those powers required in a RWCS, it is inadvisable to take on legal risks which could jeopardise the use of those powers. Emergency regulations as made by the CCA are secondary legislation, and can be struck down. If it was the opinion of the courts that any test of the Triple Lock had not been met, relevant CCA regulations could become void. As the CCA 2004 has never been used, there is real uncertainty as to how the courts would approach this question.

The Bill is now being *prepared*, but will be *introduced* only in event of RWCS notice. In the unlikely event that the Bill cannot pass through Parliament, on any grounds, and that no other possible avenue of attaining necessary powers is viable, use of the CCA could still be considered.

Parliamentary Scrutiny

The CCA Part 2 requires substantial and repeated Parliamentary scrutiny of its emergency powers. Regulations made under the Act will elapse unless a resolution is passed by each House of Parliament approving them within 7 days.

SAGE guidance outlines a Covid-19 RWCS timeline with a pandemic peak reached in 8 to 12 weeks. The legislative measures are needed in advance of that peak. Reliance on the CCA alone could fall in the Easter or a later Recess period. In this event, the CCA requires each Speaker to arrange for the House to be recalled to meet within 5 days.

If Parliamentary approval is granted, emergency regulations automatically lapse at the latest 30 days after they are made. Further 30 day regulations can be made if the emergency still requires but they again require approval by each House within 7 days, and compulsory recall if either House is in Recess.

In the event that regulations will be required for a period of months, CCA guidance notes that primary legislation should be considered to allow full prior scrutiny by Parliament. The consequence of relying on the CCA may therefore be to take on unnecessary legal risk, without the necessarily getting the benefit of avoiding primary legislation at a later stage.

Civil Contingencies Secretariat, 27 February 2020