HOUSE OF LORDS

Select Committee on the Constitution

Corrected oral evidence: Constitutional implications of Covid-19

Wednesday 11 November 2020

10.15 am

Watch the meeting

Members present: Baroness Taylor of Bolton (The Chair); Lord Beith; Baroness Corston; Baroness Drake; Lord Dunlop; Baroness Fookes; Lord Hennessy of Nympsfield; Lord Howarth of Newport; Lord Howell of Guildford; Lord Pannick; Lord Sherbourne of Didsbury; Lord Wallace of Tankerness.

Evidence Session No. 13 Virtual Proceeding Questions 169 - 182

Witnesses

I: Dr Ruth Fox, Director and Head of Research, Hansard Society; Raphael Hogarth, Associate, Institute for Government; David Allen Green, Financial Times.

Examination of witnesses

Dr Ruth Fox, Raphael Hogarth and David Allen Green.

Q169 **The Chair:** This is the Constitution Committee of the House of Lords. Today we are looking at the use and scrutiny of emergency powers during the pandemic. Our witnesses today are Dr Ruth Fox, David Allen Green and Raphael Hogarth. Welcome to you all.

It seems a long time since the start of the pandemic and the first emergency legislation that the Government introduced. We will start by asking you to go back to the beginning and think about how the Government responded. Was their initial legislation, the Coronavirus Bill, the right approach? Do you think the right balance was achieved between giving the Executive the powers that they undoubtedly needed and having sufficient parliamentary oversight and ability to approve and hold the Government to account? Who would like to start?

Raphael Hogarth: I can say something about that. On the question of whether the Coronavirus Bill was the right sort of legislative vehicle to bring forward the Government's response at that time, if you take as a starting point that the Government needed new powers that they did not have—powers to prevent the spread of infection, powers to ease the burden on public services during the pandemic and various other things—together with the fact that they needed those powers very quickly, straightaway that sets up a position in which the Government cannot proceed under existing powers because they are not there, and they cannot proceed using primary legislation on the normal timetable of primary legislation.

They basically have two options, which are to bring forward primary legislation on an extremely compressed timetable, which is what they did with the Coronavirus Bill, or to use the Civil Contingencies Act 2004 to make regulations, make secondary legislation, which is subject to its own process of fast-track scrutiny under the 2004 Act. I think there were considerable benefits in principle in choosing to use primary legislation, as the Government did. One of those was that the Bill was subject to some degree of ordinary ex-ante parliamentary scrutiny. Certain provisions in the Bill are there because parliamentarians raised concerns as the Bill made its way through Parliament, such as on statutory sick pay, protection for tenants from eviction during the pandemic, the democratic safeguards applied to the Bill and religious burials. That was one benefit of using primary legislation.

Another arguable benefit of using primary legislation is that it increases the legal certainty of the response. If the Government had used secondary legislation under the Civil Contingencies Act, that legislation would have been vulnerable to judicial review in a way that the provisions under the Coronavirus Act are not.

But I think that the safeguards that were included in the Bill were not adequate. The Government were right to use primary, but they should have had a strong system of safeguards with that primary. The review of

the provisions in the Coronavirus Act after six months is significantly weaker than the ex-post scrutiny you have would had under the Civil Contingencies Act and also the opportunities for Parliament to revisit the substantive provisions and amend them. That is non-existent under the Coronavirus Act because you can only amend it using further primary legislation, whereas under the Civil Contingencies Act Parliament could have amended provisions by a simple resolution at any time afterwards. My headline is right to use primary, but wrong not to include more robust constitutional safeguards for ex-post scrutiny in that primary.

Dr Ruth Fox: I broadly agree with Raphael. I would add that the idea of having a stand-alone bespoke Bill to deal with an emergency pandemic was part of government's emergency pandemic planning for over a decade. In a sense, the Government were following the plan that had been signed up to by successive Governments of different political hues. There had always been an expectation that this would be an influenza pandemic planning Bill, but my understanding is that the draft Bill that they had on the stocks as part of their emergency planning was adapted in February/March for the purposes of coronavirus.

On whether it was the right approach or not, with the benefit of hindsight, knowing that in practice the Government have used the powers on only 17 occasions—16 if you exclude the one where they have turned off the mental health provisions—you can possibly argue that it was unnecessary, that they might have been able to do things such as statutory sick pay and the changes to business and residential tenancies using other powers on the statute book. Ten of the 16 powers were used in conjunction with other powers in other Acts, for example.

With the benefit of hindsight you can question whether it was the right approach, but at the time, at the beginning of a pandemic, they were following the approach that had been set out in prior emergency planning. I agree with Raphael that the safeguards were not sufficient, given the nature of the emergency. The Government put in the safeguards that this Committee has asked for previously in relation to fast-track legislation, but they did so with the lowest level of commitment to safeguards that they could get away with, given how quickly the legislation was going through both Houses.

The Chair: Thank you. Before I call David Allen Green, I am reminded by the logo behind Ruth's head that I should declare an interest as chair of the Hansard Society at the moment, but you are speaking on behalf of the society, not me, and I am not speaking on behalf of the society either. David Allen Green, would you like to come in with some general early remarks?

David Allen Green: Thank you. I broadly support and endorse what has been said by Raphael and Dr Ruth Fox, but there are a couple of points I would like to make at this stage. By way of background, I happen to be a practising solicitor and a former central government lawyer. I am also a blogger and legal commentator, including for the *Financial Times,* and I have a particular interest in fast-moving, uncertain legal/political

situations, the outcome of which you do not know. I am less interested in black-letter law. I like trying to work out what is happening before anybody else has worked out what the consequences are.

A year or so ago, during Brexit, I took a particular interest in the contingency powers Act, because at that stage there was serious discussion—or seemingly serious discussion—that the Government might try to use emergency legislation in respect of a no-deal Brexit. I was interested in this because using emergency powers is not something to be done lightly.

When the coronavirus pandemic emerged, I was already in a position where I had an interest in the use and abuse of emergency legislation. I had already spoken to various people in government and in law enforcement about how you would use emergency legislation in certain circumstances. At this stage I thought that of course for government we would be using the Civil Contingencies Act. At this point I just had that as an assumption. I did not think the Government would seek to use emergency powers under the Public Health Act. This is the first point I would like to make about the legislative response to the pandemic. At the time, having spoken to various people, I gained the clear impression that there was a deliberate decision to use emergency powers under the 1984 Public Health Act rather than the contingency powers Act because they would be less amenable to judicial review and less amenable to judicial scrutiny—that you would not have the risk of a court stepping in and saying that these regulations were ultra vires.

The second point I would like to make about the primary legislation is that, speaking to people at the time, there was a lot of concern among officials and government lawyers that a piece of legislation such as the Coronavirus Act, which goes across many departments, was a very difficult thing to do at speed. It is difficult enough to get primary legislation through when there is only one government department involved but to have co-ordination between multiple departments at speed, between officials and their respective legal teams, and at times external legal advice, was just too cumbersome. That was a further reason why I understand certain officials and government lawyers were quite happy about putting as much as possible through regulations, because it meant that there was less cumbersome co-ordination needed than for putting powers into primary legislation.

Q170 **The Chair:** Thank you. We will come on more to civil contingencies. One of the problems that Parliament has when faced with emergency legislation is that it often accepts the need for the legislation but is very constrained by time in scrutinising the proposals adequately. Do you think that Parliament did scrutinise that Bill adequately?

David Allen Green: No.

Dr Ruth Fox: No. Nobody could say that effectively three days of scrutiny across both Houses for 300 pages of legislation was adequate, but I think that is the devil's bargain with emergency legislation. You

trade scrutiny of the primary legislation at the first stage for—you hope, anticipate and want—better accountability afterwards in the Government's approach. I do not think we got that, despite the fact that there were plenty of people in both Houses and the Committees of the Lords arguing for improvements to things such as the sunset clauses, the review process and so on. We did not get that. Would more time have allowed us to get there? Possibly, but with a Government with a fairly decent majority, certainly the tenor of the debate, particularly in the Commons, was very much, "We do not like this. It would be unacceptable in any other circumstances but, given the circumstances, we have to move on and accept it".

The Government did not give way. I think the Public Administration and Constitutional Affairs Select Committee in the Commons raised an interesting question as to whether or not the Civil Contingencies Act could have been used as a stop-gap to legislate for the first month or so, to enable more time to be spent on the Bill. But that raises questions about where we were in March with the expectations, in both Government and Parliament, with lockdown coming and concerns about the spread of the virus, about the extent to which Parliament in particular was going to be able to function as normal. Of course, in March this was before the technology was in place to run hybrid proceedings or a fully virtual Parliament.

I think the view then was that we might not have the time in March, April, possibly into early May, and it might be quite difficult to operate. You can see from the Government's perspective, playing devil's advocate, why they might have taken the approach that they did. But clearly the scrutiny provisions for accountability afterwards have been inadequate.

Raphael Hogarth: A brief word on that, if I may. On the question of whether the scrutiny was adequate, I think Parliament comes out of the story pretty well. As I said, with ordinary ex-ante legislative scrutiny you can see, even in the very short time that Parliament had to scrutinise the legislation, the mark that Parliament made on it, in getting substantive provisions in there that Members and their constituents were concerned about.

It might be worth saying a brief word about why the post-legislative accountability is not very good. There are three components to it, I suppose. The first is that every two months the Government have to report on whether various provisions of the Act are in force and whether the Minister considers it appropriate, for each provision of the Act, whether it is in force or not at the moment. I have had a look at some of those reports and there is some helpful information in them about the view that the Government are taking of the provisions and, for instance, their engagement with local authorities on what powers are required, given the pressures on public services in local areas, but it is pretty cursory, high-level stuff. There is no hard quantitative data, for instance, on the use of the social care easements or the impact on outcomes in local authority areas where those easements have been used, because

there is no requirement in the Act for any kind of serious justification of the Minister's position to be given.

Then you have the six-monthly debates and votes on whether to keep the provisions of the Act in force. As I think this Committee has discussed before, one of the most important reasons why that is inadequate is because it forces Parliament to take a view on everything at once. Contrast that with the Civil Contingencies Act framework, where Parliament can dip in and amend little bits of the legislative framework with individual resolutions. In the Coronavirus Act framework it has to say, "It all goes or none of it goes".

Finally, there is the two-year sunset, which is extendable by the Minister. You need some kind of sunset and it is all very well, but at the end of the day it does not help Parliament very much at the moment or for the next few months if it is trying to have an impact on which of these provisions are in force and the way in which they are used.

Q171 **Lord Howell of Guildford:** There is another aspect of the legislative path chosen that you have mentioned, which is of course that it allowed the two major devolved regions, Edinburgh and Cardiff, to pursue their own policies and make their own rules. Some would say that was excellent for them, but others would say it caused considerable confusion as to what the overall view and handling of the United Kingdom was. What is your opinion of that? If you think of devolved Administrations in other countries, such as Germany, you do not get every Land prime minister and parliament standing up and making their own rules. The whole thing is done centrally and I think the same is done in France, which is of course a less devolved system. Was it a good idea to have legislation that allowed a different voice and different rules in Wales and Scotland?

Dr Ruth Fox: Yes, that was clearly one of the reasons why, going back to the pandemic planning, it had been highlighted previously that they needed, as part of Operation Cygnus and civil contingencies, to look at these things. They needed a legislative basis to match the Public Health Act provisions, in particular for Scotland and Northern Ireland. Was it a good thing? Conversely, you can say if it had not been done it would have caused a different set of problems.

There is the question about whether, by separating the legislative approach from the intergovernmental approach, you could adequately have the legislative basis for the devolved nations to act themselves. But, if there had been more intergovernmental co-operation and liaison, we might not have seen some of the problems that we have seen—although I am not saying that they have all come about simply because the Scots, the Welsh and the Northern Irish had their own legislative vehicle.

David Allen Green: A couple of points. First of all, obviously Scotland and Wales are not mere regions but separate nations, so in one way they were perfectly entitled to have their own national response to a crisis such as this. But, on the other hand, looking at this as I tend to do

through social media, it caused a lot of confusion. A lot of people, citizens, police officers and administrators were going on to the legislation.gov.uk website to try to work out what the position was day to day, week to week, and often it was quite confusing which legislation applied to Wales, which legislation applied to England, which legislation applied to Scotland.

So from a point of first principle, yes, a separate nation should be able to do their own national response. But the way it was done as a matter of reception and communication was quite poor and a lot of people were needlessly confused because of the various sets of regulations for different parts of the United Kingdom.

Raphael Hogarth: I will add one small thing. To the extent that the different nations of the UK are autonomous in respect of their response to the pandemic, that is not a function of the pandemic-related legislation or even public health legislation, it is a function of the devolution settlement. Health is devolved, to put the matter simply, but some of the levers that the Government have to pull in the course of their pandemic response are not devolved. The macroeconomic levers are not devolved. I think a very important lesson to come out of this is the importance of good intergovernmental relations and co-operation when you have to match the response using devolved levers and the response using non-devolved levers. Economic support for areas that go into lockdown is controlled from London, but whether they go into lockdown is not. It is all the more important that the Governments of the UK are talking to each other and co-operating to make sure that these aspects of the four-nation response can be matched and complement each other effectively.

Q172 **Lord Beith:** When we were considering the coronavirus legislation, I do not remember the Government saying, "So far as restrictions on the public are concerned, we are not going to use this legislation in England, we will use the Public Health Act 1984". Do we think that they had already made that decision before we embarked on the coronavirus?

The Chair: Does anyone want to come in on that?

Raphael Hogarth: I am so sorry, but I did not quite hear the question.

The Chair: We have lost Lord Beith again. He was asking whether the Government never intended to use some of the powers that they were taking and that they were always going to use some of the public health legislation.

David Allen Green: My understanding from talking to people in government at the time was that there was a moment where they were comparing the merits of using the 1984 Act and the civil contingencies legislation. Advice was taken that they would be less open to successful judicial review if they adopted the wide provisions of the 1984 legislation, which had far fewer procedural safeguards, so as a matter of convenience they decided to go down the 1984 route as opposed to the civil contingency route.

The Chair: I think this might be a point to bring in Lord Pannick, who wanted to make some comments on this.

Q173 **Lord Beith:** One further question about it. Did that lead to confusion on the part of the police and the prosecution services as to what to charge people under?

David Allen Green: My understanding was that the police were genuinely quite confused by the legal position all along, because there is not very good communication between central government and the police. The College of Policing did a very good job as quickly as it could in trying to grasp what the law was. Obviously policing often is based on settled areas of law, so you do not have to keep on looking up the law every day or every week to find out what the police powers are. There was a lot of confusion. That would have happened anyway with any fast-moving legal regime. The College of Policing did a very good job in trying to co-ordinate what the legal position was, even though there was very bad communication from central government.

The 1984 Act is not a very easy piece of legislation to follow. If you look at the statutory instruments made under the 1984 Act, you find that most of the regulations have parent provisions all over the Act. It is not, for example, a regulation made under a specific section of the Act. It is often regulations made under a number of sections of the Act, partly because different parts of the 1984 Act deal with different things. Even for an experienced former government lawyer such as myself, I was finding it difficult to track exactly what the legal position was under the 1984 Act. It would have been easier had it been done under the Civil Contingencies Act, because that is a cleaner and clearer piece of legislation. So, yes, using the 1984 Act did lead to needless confusion, more than would have happened anyway.

Q174 **Lord Pannick:** Whatever the intentions of the Government, it does seem clear, as Mr Hogarth has said, that the decision not to use the 2004 Act has had very adverse consequences for parliamentary scrutiny. Am I right that there are two: that, first, under the 2004 Act, regulations have to be renewed every 30 days and, secondly, that Parliament has an express power to amend the regulations? As Mr Hogarth said, normally you either approve or disapprove, and a power to amend is a very important parliamentary scrutiny power. My question is: have these issues been put to the Government in parliamentary debates and what is the answer of the Government on why they are not prepared to accept this greater and necessary parliamentary scrutiny?

Raphael Hogarth: I suppose there are two sides to that question: why did the Government not use the 2004 Act and why did they not accept equivalent safeguards in the legislation that they did use? As to why the Government did not use the 2004 Act and so automatically take on the amending power and the renewal duties that Lord Pannick mentions, I think there are a couple of possibilities. First, there is a sort of cynical view that they did not use the 2004 Act precisely in order to evade the safeguards in that Act. I do not see any evidence for that position, but

perhaps it may be inferred. Maybe I am just being naive by looking for evidence for it.

The second view, which is the view that the Prime Minister gave when asked this question in PMQs a week or two ago, is the legal position, which is that under the 2004 Act you can do something only if you do not have the power to do it elsewhere or if it would take too long to work out whether you have the power to do it elsewhere. The Prime Minister said, "We thought we did have powers to do things under the 1984 Act, so we thought we could not use the 2004 Act". That may be right.

There is a third and in my view probably more persuasive view about why the Government did not use the 2004 Act. It is the broader political view that the CCA has a bit of a toxic brand. David mentioned how in 2019 there was some discussion in the media about using the Act in a no-deal Brexit scenario. When those headlines hit the front pages, they described the use of the Act as the imposition of martial law, which it is not but that is certainly the brand that the Act has. If you look at Cabinet Office guidance on the use of the Act, it describes it as an absolute last resort, which is entirely proper, but I think there is a sense that using the 2004 Act is smashing through the glass, setting the alarm bells ringing.

Why the Government did not use the Act itself to some extent is probably just because they felt it looked bad. Why they did not nevertheless accept the safeguards in the Act attaching to whatever legislation they did use is more of a mystery to me. In a paper that the Institute for Government published a few months ago, we recommended that the Government should voluntarily subject themselves to CCA-equivalent safeguards in all pandemic-related legislation, to the extent that that is procedurally possible. In my view, that would still be a proper thing for the Government to do.

In particular, as Lord Pannick mentions, there is a duty to renew regulations made under the CCA once a month or, to put it a bit more precisely, they lapse after a month. If the Government want them to continue to subsist, they need to come back to Parliament and lay them again. When you think about the fact that things like the self-isolation regulations, the original lockdown regulations, were in force for quite a long time before Parliament even took a look at them—then once Parliament did get a look at them that was Parliament's only look at them—that is quite a starkly different position. I completely agree that the Government ought to have committed to at least a more regular parliamentary review of those regulations, and ideally regular parliamentary renewal of those regulations.

Dr Ruth Fox: There is a third advantage to the Government in not using the Civil Contingencies Act in addition to those that Lord Pannick has mentioned: the renewal every 30 days and Parliament not having the power to amend the regulations. The scrutiny of the instrument itself had to happen within a week and Parliament could be recalled if it was in recess. That is also something the Government do not want to face.

The Public Health Act provisions had been used by the time the Coronavirus Bill was introduced and it was mentioned in the debate, certainly in the House of Commons. It was clear that that was the legislative vehicle that was going to be used for some of the regulations. The Government's argument for using the Public Health Act rather than the Civil Contingencies Act seems to have been that the Civil Contingencies Act was designed to address—in Michael Gove's words—sudden unanticipated events rather than the gradual onset of an epidemic. I do not think that stacks up for either the provisions of the Act or the subsequent non-statutory guidance on the Act that has been published over a number of years. But that was part of their argument as well.

Given that a lot of the Government's political problems around the regulations under the Public Health Act have built up because of the delay in both Houses being able to scrutinise the instruments, particularly after the summer recess, the sheer number of withdraws because of errors and omissions, the sheer number of revocations of instruments, has created both a backlog and a real sense, particularly in the House of Commons, about the inability of MPs to scrutinise these. Therefore, there is this concern that Ministers are engaged in a power grab and acting in a dictatorial way. An interesting question to ask is: if the Civil Contingencies Act provisions had been used, would that have provided a framework of sufficient pressure that it would have improved the production of regulations? Would that also have forced the Government to regulate in a different way? By contrast, the main urgent procedure in the Public Health Act has been so easy, certainly up to the summer recess. To be able to use that, they are just swapping instruments in and out with great regularity.

Given how they have pursued policy and regulated, if they had used the Civil Contingencies Act and come across the same problems—we do not quite understand what the drafting and preparation issues are upstream in Whitehall and how much time there is between the policy decisions being made and then the drafting before publication—because of the way the Government were pursuing their policy, we would have had a whole different set of political problems around the regulations on the Civil Contingencies Act and we would have had a real pile-up in Parliament as well.

So I am not sure that necessarily using a different Act would have avoided some of the political and scrutiny problems; it could have created a whole different set of problems.

David Allen Green: I can make a couple more observations on this point, just going back through what happened back in March and April. Although the coronavirus restriction regulations were done nominally under the Secretary of State for Health, the administrative spade-work for the restrictions regulations was done by the Home Office officials and legal teams. I gained a sense that the Home Office preferred going through the Public Health Act route rather than the Civil Contingencies

Act route because it would be easier to legislate for criminal sanctions and creating offences. If you look at the text of the legislation, it is relatively easy under the 1984 Act and less easy under the 2004 Act.

The second point is that the coronavirus restrictions regulations were, in substance, public order provisions rather than public health provisions, by which I mean they were about regulating the conduct of people in public spaces by use of the criminal law. The police very much at that stage understood the public health regulations to be public order regulations and policed as such. That had the unfortunate consequence of lack of social distancing by the police in enforcing the regulations at early stages because they believed it was their job to disperse people, forcefully if necessary, rather than ensuring that the disease was not spread quickly and easily. So there was a conceptual misunderstanding at an early stage; although it was supposedly public health legislation it was treated as if it was public order legislation.

Q175 **Baroness Corston:** According to the Hansard Society, the Government have laid 278 coronavirus-related statutory instruments before Parliament since January 2020. To what extent has Parliament been able to scrutinise these coronavirus-related statutory instruments effectively?

The Chair: Dr Fox has done a lot of work on this.

Dr Ruth Fox: Since your briefing was produced there has been a further 10. As of 4 pm last night, we were on 288 Covid-related instruments. I should perhaps explain what we mean by that. There are various sources for coronavirus SI lists. Legislation.gov.uk lists those that have coronavirus in the title, for example. Secondary legislation creating and committing the laws has its own list, but obviously it does not cover common-zone SIs. We take a fairly broad approach, which is that if the Government indicate in the Explanatory Memorandum that in some aspects the instrument is to deal with the pandemic, we include it in that count. That highlights one of the issues, which is conflict in the definition of emergency and using the urgent procedures and so on. The Government are sometimes mixing normal policy business with emergency provisions, which itself is problematic in scrutiny, but the instruments are therefore included in that count.

It has been very difficult to scrutinise them. We go back to the story of inadequate scrutiny of statutory instruments, across Parliament but particularly in the House of Commons. This, like Brexit, has revealed again the difficulties with scrutiny generally. I think you can point to some very specific Covid-related problems in the way that the Government have regulated through this emergency, which have made scrutiny very difficult. I alluded to them earlier.

One is repeated and rapid amendment. We had statutory sick pay regulations back in March that were amended twice within four days. We had protected area regulations affecting parts of the north of England, which were amended twice in 12 hours. We had wearing a face covering regulations amended by three SIs in two days. In the last couple of days

we have had a further amendment to the current lockdown regulations because the Government forgot to include today, Armistice Day, in the list of exceptions. We effectively have a one-line SI to amend the lockdown regulations. We have had several amendments already since the end of last week to the international quarantine regulations in relation to Denmark. This constant amendment, withdrawal and relaying of SIs is problematic, and that is why the number is so great—because of the scale of change.

A big problem, though, which we do not normally see in a Session, is the rapid revocation of instruments. We did an assessment at the time the Brady amendment was going through on the coronavirus six-month review in the House of Commons at the end of September. Eight of the first 60 coronavirus-related instruments using the "made affirmative" procedure had been revoked before Parliament had debated them. We have had situations in the Commons where an SI has been debated but has then been revoked before it has been approved. I am pretty sure that there are several instruments that have been voted on and approved, in the Commons certainly, which had already been revoked earlier in the week. So there is a scrutiny problem but there is also an administrative problem in the relationship between government staff and parliamentary staff in the communication of all of these issues.

In the Commons particularly, you get the scheduling problems with the "made affirmatives" as a result of the parliamentary recess, which is what created all the difficulties the Government had back at the end of September. The gap between an instrument being laid and it being debated by both Houses was significant but was bloated by the fact that Parliament did not sit through the summer. The recess exacerbated those problems and made them more difficult.

The Chair: I think this is an appropriate time to suspend the Committee for a couple of minutes.

Sitting suspended.

On resuming—

The Chair: Dr Fox, you were telling us about some of those very real difficulties. Is there anything else you wanted to add on that?

Dr Ruth Fox: Just two points, very quickly. The first is the excessive use of the urgent procedure when it is arguably not justified. That is what we saw with the face-covering regulations, where policy was announced and there was quite a long period of time before the face-covering regulations were introduced, and they were introduced under the urgent procedure in the Public Health Act. I think many people felt that that did not rise to the level of urgency, given when the Government had announced the change.

A regular problem with SIs, even during normal times, is that Members, particularly in the House of Commons, cannot get to debate some of the politically controversial instruments that they want to because they are

introduced under the "made negative" procedure. We have had instruments on things such as the international travel and quarantine regulations, where the Government have not provided time for debate on them other than in very general Covid debates. We had prosecution of offences and custody time limit regulations, which extended permissible pre-trial custody and so on. Those are arguably politically and legally important matters that Members might want to debate, and they were not able to because of the way the scrutiny procedures work, even in normal times.

The Chair: Thank you. Do our two other witnesses want to come in on this?

Raphael Hogarth: I will add one or two very brief bits. I completely agree with what Ruth has said about the consequences of the Government proceeding in this way. There are adverse consequences, on the one hand, of the Government using the emergency procedure and, on the other hand, of the Government proceeding to quite this extent by way of statutory instruments rather than primary legislation.

Regarding the adverse consequences of the Government proceeding by SI at all, one of the consequences of that is, of course, that it limits the opportunity for constructive scrutiny and allows in the kind of mistakes, defects and inconsistencies that Ruth has mentioned. The one that always sticks in my mind from the first lockdown is the fact that in Wales the lockdown regulations limited exercise to once a day and in England they did not. I think if parliamentarians had had an opportunity to have a look at those they might well have said, "Hang on, what is going on here? Is there any sound evidential scientific basis for this?"

Another consequence of the Government proceeding to this extent by secondary legislation is legal risk. A case challenging the first lockdown regulations by way of judicial review has been brought. Permission for judicial review has been rejected by the High Court. It is on appeal to the Court of Appeal, so that may not go anywhere, but there is legal uncertainty there with potentially very wide-ranging consequences, given the fact that a lot of businesses closed and lost a lot of money as a result of these regulations, people stayed at home as a result of these regulations, and there were fines issued under the regulations. It is a very serious matter if there is a chance that those regulations were ultra vires.

On the emergency procedure in particular, I completely agree with what David said, which is that putting the regulations in force before you air them in a democratic forum contributes to insufficient political and public awareness of the content of the regulations. That is part of the reason why you end up with Ministers getting the regulations wrong in the media. If the Minister has not had to stand up in the House and explain what the regulations do and why, maybe the Minister does not know what is in the regulations that well, and that is a very undesirable state of affairs.

David Allen Green: The Committee should be careful not to see the use and abuse of secondary legislation in respect of coronavirus in isolation but as part of a wider trend within government towards what you can perhaps call government by decree, whereby, as a matter of administrative and political convenience, Governments will seek to legislate through secondary legislation where just possible because it is easier to do so.

In a way, coronavirus is exceptional in providing a situation where Government have had to do this rapidly. My wider concern is that if the Government get used to legislating by secondary legislation in respect of coronavirus at the moment, they will seek to do so in other ways, especially with Brexit, for example, and the need for widespread secondary legislation in the next year or two as we go beyond the transition period.

My second point coming out from what Raphael has said is that this fast-moving situation in which SI replaces SI replaces SI effectively leads to people not having a legal remedy. In the recent litigation in the High Court, for example, Mr Justice Lewis said that a challenge to an SI that had already been revoked was academic. Technically, of course it is, because that SI is no longer there; it has been replaced by another SI. But, at the time, that SI had consequences which, for many individuals and businesses, were quite dire. However, because of the nature of English public law—obviously, I feel rather deferent giving evidence in this respect to a committee that has Lord Pannick, for example, on it—it will mean that people do not have a good legal remedy in respect of SIs that have adversely affected them, because by the time they get to court, the SI no longer has a live existence.

In future, next time this sort of thing happens, some thought needs to be given to making sure that there are effective legal remedies. One problem with the Government sidestepping the Civil Contingencies Act and using the Public Health Act is that it left a lot of people without an effective legal remedy in respect of arguably ultra vires pieces of legislation.

The Chair: I assure you that the Committee is very well aware of the wide trend to which you refer, and we have expressed our concern on many occasions about the increasing use and scope of SIs that are being introduced.

David Allen Green: My concern is that this will accelerate the use of them.

The Chair: Yes. I think that is a valid concern.

Q176 **Lord Sherbourne of Didsbury:** I want to ask two questions. We have been recognising this warning over the lack of scrutiny for this avalanche of statutory instruments, which of course are unamendable. My first question, therefore, is: can our witnesses give any example of where there has been effective scrutiny over the last few months?

The Chair: Who would like to have a go at that one? Dr Fox, you are looking very sceptical that there is a positive answer here.

Dr Ruth Fox: In terms of instruments, no, but that is generally par for the course for statutory instruments. We have maintained the position for a decade that scrutiny, particularly in the Commons, is inadequate. A concern I have is that efforts to try to improve that in the Commons as a result of the agreement that was cobbled together with Graham Brady around the time of the Coronavirus Act review have given MPs a little bit more bite in their ability to debate the regulations but will adversely affect scrutiny in the Lords, which is better than in the Commons. In a sense, we are levelling down scrutiny in the Lords compared with the Commons rather than trying to improve it across the board.

Things like the Secondary Legislation Scrutiny Committee reports on particular instruments have brought certain matters to light, but the Government fundamentally have not changed their approach. Improvements in the administration of the process, the error level, the omissions, and technical mistakes and so on continue apace. I do not feel that either House has been able to get a handle on the Government in terms of effective scrutiny in any form.

David Allen Green: The best scrutiny of the regulations has not been by Parliament. It has not been by the courts, which have dismissed challenges as academic. It has been by organisations such as the Institute for Government and the Hansard Society. Private bodies and other organisations have had to step into that vacuum in order to scrutinise, examine, set out and explain these regulations because there has been a failure by the judicial and legislative arms of the state. An immense amount of credit should be given to both the Institute for Government and the Hansard Society for what they have done in trying to get on top of these regulations.

On Twitter, a barrister called Adam Wagner, from Doughty Street Chambers, has been a one-person public service and is probably the only person who has read every regulation and tracked through every change. He is followed by a whole range of officials and law enforcement officers, because he is providing this service of keeping on top of what the regulations are. There has been scrutiny; it has just not been scrutiny from the arms of the state that should have been giving scrutiny.

Raphael Hogarth: If I could add one remark to David's extremely generous compliments to the Institute for Government and the Hansard Society, scrutiny comes from many directions in Parliament. I completely agree with everything that has been said about the inadequacy of scrutiny of Sis, but Parliament is very good at finding ways of making its views known where its opportunities are limited. The concessions, such as they were, that the House of Commons extracted from the Government in respect of nationwide regulations under the Public Health Act were extracted not using scrutiny proceedings under the Public Health Act; they were extracted using pressure which Parliament could exert through safeguards included in the Coronavirus Act, even though, of

course, the lockdown regulations do not come in under the Coronavirus Act.

Similarly, Select Committees have done valuable scrutiny work in their inquiries and their broader engagement with government on the measures being introduced. In the very early days of the pandemic, when the Government's economic response measures were evolving extremely quickly and the Government were trying to listen to the concerns that were being raised by different economic constituencies about the levels of support that they had, some of the new measures that were brought in, for instance for the self-employed, were brought in probably not wholly but at least partially as a result of pressure exerted in debates and by a letter from the then chair of the business Committee on the basis of concerns raised by their constituents. Again, that is not formal SI scrutiny, but it is scrutiny in general that takes place in Parliament that has an impact on the SIs that the Government bring forward.

A final example of good scrutiny that I alluded to before is the provisions in the primary legislation that are there as a result of amendment in the course of the Bill's passage through Parliament. In answer to the question, "What are examples of good scrutiny?", it is hard to find examples that you can hold up as a paradigm case of what parliamentary scrutiny should look like, but Parliament will always find ways in whatever proceedings are available to it to put pressure on the Government, and there are plenty of examples of Parliament doing that.

Lord Sherbourne of Didsbury: I sit on the House of Lords Secondary Legislation Scrutiny Committee, and I think we do some rather good reports of some of these regulations. Is there any evidence to suggest that the various commentaries made on regulations by Parliament itself, the House of Commons, and House of Lords, or by outside bodies, as has been mentioned, have had any subsequent effect on the way government has behaved in later regulations?

The Chair: I think Raphael Hogarth just touched on that.

Raphael Hogarth: It is always difficult to know, as somebody outside Government, whether the things that you write about what government should be doing better are being read by officials and Ministers in Whitehall. No examples spring to mind of where a Minister has stood up and said, "As a result of this report published by this committee or this think tank, we are taking a different approach", but one hopes that those things filter into the debate. I can have a think about whether there is any hard evidence of that and get back to the Committee in writing if I do think of an example.

David Allen Green: There are no substantive examples on the media side, but there are some trivial, minor examples. For example, there was a moment when the new regulations on restricting movement made, on the face of it, an exemption for travelling to work but not while being at work. That was widely ridiculed, so within days there was an amending

provision in the next set of regulations setting out that it was also an exemption from the restriction regulations to actually be at work.

There is some sort of exchange happening between those of us who are rotting it and those who are making the regulations, but not in respect of substantive, broad problems. It is almost as if there has been no awareness of the scrutiny and the complaints we have made about the regulations; the Government have just carried on with this track anyway.

Q177 **Lord Howell of Guildford:** You have all been talking about the utter inadequacy of parliamentary scrutiny in this whole saga, with which I agree. What are the lessons to be learned? What steps do we take for future emergencies, or maybe even for normal times, to improve the situation? What should be done differently?

I add a further question. Raphael Hogarth, you have a fascinating section in your paper, which we have been reading, on the role of committees. Is this a time for using the atmosphere of committees, which are much more like a courtroom in a way and can put policymakers under much greater testing and questioning? Is this a time for revising and increasing greatly the powers of committees? Should committees play a role instead of the Downing Street press conferences that we have? Should committees be given more powers over when they look at SIs and indeed even at the pace and organisation of primary legislation? These are big questions, I know, but do they not follow from what you are saying? Clearly something must be done. It is a very serious situation.

Raphael Hogarth: On the first question, about what lessons can be learned for next time in general, we have seen how legislation works during an emergency. Government drafts at speed in a situation of genuine emergency, as was the case at least in the early days of the pandemic. You can see really strong cross-party consensus in Parliament, and in the legislation the Government bring to Parliament they err on the side of more executive power rather than less. I think we have learned something about how the Executive and the legislature interact in a moment of emergency. Obviously to some extent that is contingent on the people in charge.

All that means that, next time, Parliament must to some extent be brave in the early days about working hard to protect its role and ensure safeguards in a situation where government is saying, "We need to move fast", there is broad cross-party consensus, and nobody wants to hamper the war effort. That means that Parliament needs to think hard, early, about what safeguards it puts in place. In practice, that means that there are debates to be had, some of which we have been having, about the right legislative vehicles for legislation in a moment of emergency.

For my part, I do not feel as though the big lesson from legislation in this pandemic is that one piece of legislation should be used over another—that you should use the CCA rather than the Public Health Act. Frankly, it will always be open to a Government with a majority in Parliament to bring forward primary legislation that sets out the scrutiny framework

that they want for their emergency response. The important thing is that there is a political culture in which the Government feel some pressure to set out an appropriate scrutiny framework and Parliament feels sufficiently emboldened to demand that.

On the specific question about the role of committees, I completely agree that committee questioning plays, and has played, an extremely important role in interrogating the basis for government decisions and the evidence for them. There is always a useful discussion to be had about appropriate committee powers.

One thing that I think it would be interesting to look at in future, both in committee proceedings and proceedings on the Floor of the House, is whether in the digital age, when decisions are being made that are reliant on quantitative evidence, often visualised in snazzy graphs, it would be a good idea to get those things into proceedings just as they are in the press conferences. At the moment, an advantage that the press conferences have over parliamentary proceedings is that evidence can be more effectively presented. It would be no bad thing, if Parliament is trying to get some of that scrutiny within its own walls, to look at whether to some extent that could be replicated in the Chamber or in committee proceedings.

Lord Howell of Guildford: We have a paper in from the great Lord Sumption saying that these procedures that we are all talking about—the negatives, the affirmatives, and so on and so forth, and the treatment of SIs—are just not fit for the age we live in. They are not fit for an age in which a vast Executive are "trying to marginalise MPs"—I think those are his words—and take more and more power into the Executive part of Government. Are you really saying that we should begin to look, as a result of this Covid period, at the way these procedures, which were designed for another age, will operate in the future?

David Allen Green: Emphatically yes. Although Lord Sumption has put his views forward in his typical way, they are hardly new observations. Another great legal figure, Lord Hewart, made very similar points in the 1920s about how a Government, if they were so minded, would be able to get away with abuses by use of secondary legislation.

There are three lessons learned that I would like to put before the committee. The first is as a former government lawyer. Thinking back to March and April and the conversations I was having with various people, there was a sense of improvisation about how different teams within government, within different departments and with different legal teams, were going to be able to work together. It was almost as if they did not know how they were supposed to work together—how the Home Office was supposed to work with the Department of Health and so on.

Given the nature of a pandemic, there will be a lot of cross-governmental work. It seems to me that the usual government departmental approach to putting forward legislation is that, for example, each department has its own legislative approach and timetable, and so on. Something needs

to be put in place that makes it quicker and more effective for teams within departments and their legal teams to co-ordinate their work more swiftly. I think part of the reason why there were a lot of delays in March and April in getting legislation out was that so many people needed to advise on it and to sign off on it before the SIs could be published.

Secondly, and here I have a slight disagreement with Raphael, it is important that there is a uniform approach to setting out these statutory instruments. The Public Health Act, for example, should not be used. There should be a uniform piece of legislation for such regulations: the Civil Contingencies Act.

I say that, because not everybody is a lawyer trained in drafting statutory instruments. In fact, very few people are. Police and law enforcement agencies need a settled, uniform regime which they can understand quickly and which they know will be used whatever the nature of an emergency, whether it is a pandemic or some other kind of emergency. Using the Public Health Act for certain things and the Civil Contingencies Act for other things means that law enforcement, officials and other public servants need to learn more than one regime, which is unrealistic. There should be just one uniform emergency legislation regime, and it should not be open to the Government to attempt to use any other statutory regime.

Thirdly, it was becoming preposterous, at certain points, that there were groups of people on social media, late at night on a Sunday, refreshing the legislation site again and again, until the SI appeared at, say, 11.30, some 30 minutes before it took effect. Even if Sis cannot be put on to the legislation site quickly, the Government should be urged to publish the SIs in draft at least so that people have some idea, at an early stage, of what might be coming, subject to changes, rather than keeping the cards very much to their chest until sometimes just minutes before the SIs take legal effect. It was a preposterous situation.

Q178 **Lord Hennessy of Nympsfield:** Could I ask first a preparedness question and then a what-should-be-done question?

Ruth mentioned Exercise Cygnus, the 2016 worst-case pandemic scenario exercise that was done with the devolved Administrations. The exercise produced a 2017 report, which was leaked. One of paramount recommendations was a review of the legislation that might be needed in such a contingency. Do any of our witnesses know whether work was done on that before the pandemic, before the pathogen struck for real earlier this year?

The second question is about one of the anxieties I have about this cataract of emergency legislation. After the Second World War, the orders under the defence of the realm legislation ran on for a very long time in the peace. Not until the 1964 Emergency Powers Act was passed by Parliament was it finally all wrapped up. Do you foresee the danger that, given that Covid will always be lurking—"we have to learn to live with it" is one of the clichés, despite the good news on the vaccine—we are left

with a residue from the experience of the last few months, which is inherently undesirable?

Raphael Hogarth: On the first question, about Cygnus, I do not know.

On the second question about the emergency legislation hanging over into peacetime, I was very worried about that during the passage of the 2020 Bill, because a lot of what that Act does is not just about lockdown—we have been discussing the lockdown provisions to a great extent in this session—but about the relaxation of duties on public services. The starkest of those is the relaxation of duties on local authorities in respect of social care, but there are many other little relaxations, such as registration of births and deaths, the involvement of juries in inquests, and certain duties in respect of vulnerable children and children with an education and healthcare plan.

My worry at that point was that a lot of these relaxations are probably, frankly, relaxations of duties that public authorities would not mind hanging over into peacetime, because they make public authorities' jobs a little bit easier and cheaper and the local authorities are under slightly less onerous legal duties.

I am not as worried about that anymore, for two reasons. First, there is a clear sunset in the Act; it expires after two years. Secondly, as Ruth mentioned earlier, most of these powers have not been used, although some of them have. That is not to say that this is not something that we should watch—we should always watch it and always make sure that none of the emergency powers becomes the new normal—but, so far, it does not look to me as though there is a desperate risk of that happening.

It is also worth saying that in all of the parent legislation that we have been talking about—the Coronavirus Act 2020, the Public Health (Control of Disease) Act 1984 and the Civil Contingencies Act 2004—instruments made under those Acts are all subject to maximum time periods, so there are some inbuilt safeguards there to prevent that sort of hangover.

Dr Ruth Fox: I agree with Raphael. Similarly, with regard to operation Cygnus, I do not know, but I presume, given that the coronavirus Bill was needed in part to deal with the devolved legislative basis, that some of the recommendations were not carried through, or certainly not in a timely way. This is one of the lessons to be learned for future: that Parliament as an institution, and parliamentary scrutiny by both Houses, has not been an intrinsic part of emergency planning in the sense that it has been done by government but Parliament as an institution has not been involved in that process. Parliament was not part of operation Cygnus in considering whether the legislative approach was appropriate and what kinds of parliamentary management problems there might be, depending upon how a pandemic or some other emergency might play out. It would be a good route in the future if Parliament had a more active role in that process.

With regard to the powers, I agree that the Coronavirus Act is time limited and has not been used much, as Raphael pointed out. For me, the big concern is the Public Health Act provision and the use of the urgent procedure, because there is no constraint on it at all. All the Minister has to do is say that, in his or her opinion, it is urgent. One can foresee a scenario in which, depending upon how the pandemic and potential future waves of the virus develop, Ministers can constantly utilise that power over quite an extended period of time.

The lesson here is that if an urgent procedure is to be inserted into legislation in future, there really should be more restraints on its use, even something as simple as requiring Ministers to explain why they think it is urgent. We had a debate on one of the regulations in September where the Health Minister could not answer the question about why it was urgent and said that she would have to go back to the department and get the answer. That is clearly not acceptable and suggests a sloppiness of approach and that they have just got used to using these powers. So one way is to look at constraining that urgent procedure.

Another, as part of emergency planning in the future, is to look at whether the scrutiny model—absent a wholesale review of procedures, which I would prefer and support and which we have been advocating for for a decade—needs a bespoke emergency scrutiny procedure. We have problems with the extensive use of the "made affirmative" procedure, but the alternative draft affirmative available to the Government does not work either in the context of an emergency, because it takes too long to get the instrument through both Houses, particularly if we are talking about this kind of volume.

If the Government are not going to undertake a wholesale review, we need some kind of bespoke model that works for both Houses. My fear at the moment is that the settlement that has been reached in the Commons to give MPs more bite in debating the instruments more quickly makes it more difficult for the Lords committees to do their screening of the instruments, which is so valuable.

David Allen Green: On what Dr Ruth Fox has said about the urgency procedure, it was often not clear to me and other observers at the time who was actually making the decision within government of the urgency. Although the regulations were nominally in the name of the Secretary of State for Health, the spadework was being done by the Home Office and their lawyers, as I have said before. It was often because of what the Home Office was doing that the regulations were made in the way they were.

It is one thing to say that there is an urgent procedure and somebody should explain why it is urgent, but what also needs identifying is exactly who within government is deciding on the urgency. It is an odd situation indeed where the Secretary of State for Health, on the face of it, is the one using the Public Health Act to make these regulations and so is the one who is presumably seized of the decision whether it is urgent or not, when in fact it has been made by a completely different department in a

different part of Whitehall and it just goes through on the nod once the regulations are published.

Q179 **Baroness Drake:** I have a question focusing on the clarity of the new pandemic requirement. The Government's guidance documents and statements have often been more restrictive than the law, as set out in primary or secondary legislation, or provided incorrect information as to what the law is. What issues do you think are raised by the differences between the law and guidance?

Raphael Hogarth: The short answer is that very serious issues are raised by the difference between law and guidance. Before saying what those are, I would give a short note of sympathy for the Government on this, which is that guidance does have to be simple to be effective. I remember reading papers put to the Government by SAGE in the early days of the pandemic that complained that the guidance was too complicated and woolly. It was telling people to try to do things as far as reasonably practical rather than just telling them, "Do this". There was a worry that that would reduce compliance and be confusing.

The other note of sympathy for the Government is that it is perfectly fine in principle for guidance to go further than the law. In an IfG podcast, which David was on, Tom Hickman QC made what I thought was an excellent point: that the guidance from Public Health England with which we are all probably most familiar is the guidance that you should eat five portions of fruit and veg a day. Nobody thinks that that guidance is guidance on what the law says. We recognise it as guidance, and that is fine.

The important thing is to make sure that when the Government issue guidance they are crystal clear on the difference between guidance on the law and guidance that is just guidance and goes further than the law. That is as simple as making sure that the guidance uses the word "must" and the word "should" in the right places.

In the early days of the pandemic, the Government were very bad at that and the guidance was extremely misleading as to the content of the law. The Government have listened to criticism on that. The current guidance on the GOV.UK website about the November national lockdown restrictions is much more carefully worded to differentiate between mandatory and advisory aspects of the Government's proposed restrictions.

On the problems that were generated by differences between guidance and the law in the early days of the pandemic, first, police get it wrong because they read the guidance rather than law and then they take enforcement action that goes beyond their powers. That is unlawful, causes harm to people and is very serious.

Secondly, even when enforcement does not enter the frame at all, law-abiding people are deterred from perfectly lawful, and in some cases

harmless, behaviour if they read guidance telling them that they must not do things that it is perfectly permissible in law for them to do.

Thirdly, there is a wider effect in trust and confidence in the Government's pandemic response. That is a problem, because people are more likely to follow the guidance of authorities if they trust them and the rule of law and the enforcement of the law more generally. That is a problem particularly in this country where there is a policing by consent model, so it is extremely important that the public trust the police and believe that the police are not taking wrongful enforcement action that they do not have legal power for. The entire model of policing in this country rests on that trust and consent.

Baroness Drake: On the point about the police reading the guidance and then taking enforcement powers, and looking at how this has evolved, how efficient, or less efficient, are the police becoming in distinguishing between guidance and when it is appropriate to deploy their enforcement powers, or is it still quite a significant problem?

David Allen Green: In practice, the College of Policing has done a sterling job in co-ordinating the guidance and making the distinction between guidance and the law clear to the police. That is part of the reason why the police have adapted relatively well to the guidance law distinction, but it should not have been left to the College of Policing to do that for the Government.

At the early stage of the pandemic, there was an interesting legal case in respect of guidance; the Committee may be aware of it, but it is worth mentioning. It was about the ability to take children a certain distance away from home for the purposes of recreation. It said that you should not travel far, but there were certain parents of autistic children and children with similar conditions who needed to take their children a further distance.

Bindmans, the law firm, sent a letter before action to the Government saying that the guidance was too restrictive. There is nothing in the law saying that parents could not take their children a distance in certain circumstances, but the guidance mandated that they could not. The Government swiftly changed their guidance in respect of that letter before claim. It might be interesting for the Committee to look at how the Government, in that particular example, were able to be quite flexible in amending the guidance, but it should not be left to a law firm sending a letter before claim for such guidance to be more sensible than it was.

Lord Beith: I remember that case very well. What happened immediately after it was that the media said the Government have changed the rules. The word "rules" comes into this rather a lot, because nobody knows what the law says or what the guidance says, but the media reporting generated by that case was very much that the Government have changed the rules.

David Allen Green: Yes, absolutely, but this is not a novelty: the whole of Brexit was premised on the Government having an obligation to leave the European Union, because they had said something in non-legislative materials, but the referendum Act did nothing other than set up a referendum. There is a general confusion between guidance, government publications and the law in the eyes of the lay person. Those of us who are experienced in either making or interpreting laws know the distinction, but the vast majority of people would not be able to distinguish between guidance and statutory instruments. They just see it as the rules, as you say.

Q180 **Baroness Fookes:** Perhaps I am being a bit cynical, but I can remember way back as a young councillor arguing with my local council, because it was interpreting guidance from the Department for Education as rules that absolutely had to be followed. There is a long history here with this muddle between guidance and rules or the law.

Do you have any suggestions for dealing with this now and in the future? Is there a case for trying to get the media to understand the difference? Would it be helpful if, when guidance is given, people are also given a link to something online that would give them more information about the guidance? If the parents of autistic children had had something that they could go to and get further help from, would that have helped?

David Allen Green: Better use of online resources would certainly help, especially as people at an early stage of this pandemic were googling, "What can we do?", and there was a whole range of websites coming up. It took some time for the government communications teams to get their act in order as to the message that was being sent out and what guidance was being published. Yes, it would be helpful if the Government linked to the law when they set out their guidance, and said, "This is the guidance position and this is the legal position".

That said, there is no longer a very sharp distinction in English public law between law and guidance, which at least one or two members of your Committee have been instrumental in creating. You can judicially review guidance. It is a defence for a local authority to have acted in accordance with guidance when exercising a legal power. It is not as if guidance has no legal consequences and no legal effects. The better position is to make sure that the law and the guidance cohere. There will be circumstances where it would be prudent for a local authority or another public body to act in accordance with guidance as if it is law because they could be judicially reviewed for not acting in accordance with guidance. People have a legitimate expectation that public bodies will act in accordance with guidance.

Raphael Hogarth: I have one more remark on the relationship between law and guidance, which is that quite a lot of the legislation enforced over the course of the pandemic is what you might call open textured. The initial lockdown regulations, and the lockdown regulations in force in England now, provide that you cannot do certain things unless you have

a reasonable excuse for doing so. What is a reasonable excuse? That will depend on the particular facts of the situation that you find yourself in.

Inevitably, even if the guidance is not given the force of law in legislation, what counts as a reasonable excuse will be informed by what the guidance says you ought to do and what you ought not to do. The consequence of that, as far as I am concerned, is that the Government need to be really careful about not making important decisions or important changes using guidance rather than law. The Prime Minister's pieces of advice in a press conference—"From now on we're no longer advising people to exercise only once a day; they can exercise as much as they like. We're no longer advising people to stay close to their home; they can go wherever they like"—were not given effect in legal rules; they were just changes in guidance. But they probably changed the legal position in respect of what counted as a reasonable excuse, or at least they might have done.

That meant that, that day, the Prime Minister's word was effectively the law. That is a very serious position from a rule of law perspective. That is much worse even than making a statutory instrument by a "made affirmative" procedure. It is not making a statutory instrument at all. There is no democratic process there. It is the Prime Minister making law orally from a lectern in a press conference. Where there is a relationship of that kind, significant changes need to be made via the law, not via the guidance.

David Allen Green: Absolutely. Government by decree is bad enough, but government by a stray remark is even worse.

The Chair: Dr Fox, did you want to add anything?

Dr Ruth Fox: No, it is not my area of expertise. I would simply question whether Ministers understand that what they might say at the press conferences could be interpreted in that way by the courts.

Q181 **Lord Dunlop:** I want to build on the last series of questions and ask about the general handling of communications during the pandemic. Clearly this is important when it comes to how measures are understood and enforced by the police and how they are understood and complied with by the public.

What is your assessment of the way communications have been handled during the crisis? I could include in that how data and evidence has been presented, as Raphael mentioned. Do you think communications have improved as the pandemic has gone on? In relation to the discussion we have just had—for example, drawing a clearer distinction between guidance and legal restrictions—how should new measures be communicated?

The Chair: Raphael, reference was made to what you said there. Do you want to follow up?

Raphael Hogarth: Communication in the course of the pandemic has been a mixed bag. There are a couple of problems. One has been the

presentation of quantitative evidence, which has often been difficult to follow, overly complex and not effectively synthesised. We are, however, now seeing the evidence, which is very welcome. We talked earlier about ways in which scrutiny has been effective or improved. The fact that the Government have started publishing SAGE minutes and communicating the quantitative data on the basis for which they are making decisions is a very positive step.

On communication of the restrictions themselves, I do not have much to add beyond what I said a moment ago, which was that you have to make the boundary between mandatory and advisory restrictions clear. A lesson that we have learned pretty early is that the police need their own communications, which are not the same as the communications that go to the public. David mentioned the slides that have been circulated by the College of Policing and the National Police Chiefs' Council. That is good, detailed, clear guidance for police officers on what the restrictions say, what they cannot enforce because it is guidance, and the more general approach that they ought to take to enforcement, which is to explain, engage and encourage before using their enforcement powers.

Next time around, we ought to bear in mind from the start that what you say to the public ought not to be exactly the same as what you say to the police.

David Allen Green: As a practising solicitor and former government lawyer, I would like to make a point about the presentation of the relevant law.

The legislation.gov.uk website is an outstanding resource and we are all very lucky to have it, but the primary purpose of that website is not to present emergency legislation in a clear and coherent way. A famous legal philosopher called Dworkin posited that a judge called Hercules might have infinite capacity to get on top of every legal authority in a particular case. I think Hercules, the judge, would have a problem getting on top of a statutory instrument regime in respect of the coronavirus on the legislation.gov.uk. website. It is impossible to work out which parts of the regulations are revoked, which ones are not, which ones are in force, and so on.

Next time there is some sort of emergency situation there should be a special website that presents only the legislation that is currently in force, which is updated and amended, so that anybody who is trying to work out their legal position and regulate their own behaviour in respect of the criminal law can work out what the position is. It would be impossible for even an experienced legal professional to feel confident about working out the legal position from the dozens and dozens of statutory instruments on the legislation.gov.uk website that have been revoked, replaced, removed and so on.

That is a highly important comms thing for the next time something like this happens, because unless people have access to the current legal position in a clear and coherent way they cannot regulate their conduct.

That then goes to the legitimacy and the credibility of enforcing regulations when those regulations need to be enforced.

The Chair: Dr Fox, you have done quite a lot of work on that. Do you want to add anything?

Dr Ruth Fox: No, just that the issue of accountability to Parliament first before major announcements are made at press conferences as a matter of principle would be helpful.

On David's point about the difficulty of following the changes in the regulations, clearly, as part of any post-pandemic review, there should be a question as to how information is circulated within government and the extent to which the Whips' Office is on top of which instruments have been revoked and removes Motions from the future business on the Order Paper. If they are not on top of it within Parliament, it is very difficult for anybody else to be on top of it. It reinforces the need to review the way the whole process has worked and what advantages the kinds of changes and improvements that David and Raphael have highlighted would have for the future.

Q182 **Lord Howarth of Newport:** In an earlier phase of this conversation, we talked about the lessons to be learned for the event of a future pandemic or other emergency.

I would like to ask our witnesses for their thoughts on lessons to be learned from the early phase of this pandemic for the months to come. Parliament has permitted central government to take extraordinary powers unto itself, with profound effects on the lives of citizens in respect of personal freedoms and the economic cost.

As we continue to deal with this pandemic, what principles do you think should guide government, and indeed Parliament, in seeking to confirm the legitimacy of the regime and to secure public consent, not just in England but in all parts of the UK?

David Allen Green: Ensuring senior government advisers act in accordance with the same regulations as the rest of us. It is not a flippant point.

The Chair: No, I know.

David Allen Green: It has not been mentioned so far, but it is significant that regulations such as this are enforced mainly through a sense of legitimacy, a sense of participation, and a sense that we are all in it together. The moment it is sensed that there is one set of rules for one and another set of rules for another, that is lethal to legitimacy. Any regulations that are put forward over the next period of lockdown have to be seen to be credible and fair and ones that are being followed, regardless of your position.

That goes to the credibility and legitimacy of the regulations as well as to any points about transparency. They have to be seen to be taken seriously by everybody.

Raphael Hogarth: Another principle I would add in relation to the perceived legitimacy of future restrictions is ensuring predictability. Behavioural scientists on SAGE have warned the Government throughout the pandemic that people are less likely to comply with restrictions that they see as arbitrary. There is always some risk of people perceiving restrictions as arbitrary, but those risks are greatest when restrictions change frequently and, in particular, when there are differences between the regulations that apply in different parts of the country. Somebody might very reasonably ask, "Why can I not go out at the moment when somebody on the next road can?" There does not seem to be a great deal of logic behind that. That is not particularly present in our minds right now in England, because at the moment there is a national lockdown, but the chances are that, after that, to some extent we move back to a local lockdown—the so-called whack-a-mole system.

We at the IfG has recommended that the Government should have clear criteria, by reference to key epidemiological indicators on the basis of which they are making their decisions, for areas moving between tiers. That avoids the unfairness and perceived unfairness of different parts of the country being subject to different restrictions that are not justified by different levels of risk.

It also increases predictability uncertainty for citizens and businesses who are having to plan their life. As an added benefit, it probably reduces the risk of political rows with local leaders, which the Government would be probably quite keen to reduce in the weeks and months ahead.

Dr Ruth Fox: I would add principles that have already been highlighted, such as transparency, and a version of predictability that is consistency of approach. On the regulations themselves, depending how long this will go on for, there is the question of the extent to which it would be valuable for everybody concerned, including the Government, sometimes to sacrifice a little bit on speed for improvements in accuracy and efficacy to try to reduce the volume of regulations and the rapidity of changes that are taking place.

The Chair: We have had a very long session and you have been very patient with us. I thank all three witnesses for their contributions.