Select Committee on the Constitution

Corrected oral evidence: The constitutional implications of Covid-19

Wednesday 18 November 2020

9.15 am

Watch the meeting

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

Evidence Session No. 14 Virtual Proceeding Questions 183 - 192

Witnesses

I: Kirsty Brimelow QC, Barrister, Doughty Street Chambers; Tom Hickman QC, Barrister, Blackstone Chambers; Lord Sandhurst QC, Former Barrister, 1 Crown Office Row.

USE OF THE TRANSCRIPT

1. This is a corrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.

Examination of witness

Kirsty Brimelow QC, Tom Hickman QC and Lord Sandhurst QC.

Q183 **The Chair:** This is the Constitution Committee of the House of Lords. We are looking today at the use and scrutiny of emergency powers during the pandemic. Our witnesses are Kirsty Brimelow QC, Tom Hickman QC and Lord Sandhurst QC. Good morning and welcome to you all.

I will start the session in a general way by asking you for your overall view of the use of emergency powers during this pandemic and, in particular, what kind of issues you think have been caused from your

point of view. We have all seen this as parliamentarians trying to grapple with the issues and the problems, but could you give us your experience and your thoughts on this?

Lord Sandhurst: It is a big question. There are a number of problems and they arise in particular from the use of the Section 45R procedure. That was obviously justified if we were going to use the Act at the beginning, but six months on we are still using it. It should be a 45Q procedure, which means that the regulations are made properly in advance and debated, and have to be approved by both Houses.

In a nutshell, there was a lack of parliamentary perusal before they were made, an absence of any debate of the detail because of the way it has been done, and a lack of parliamentary oversight. This has led to unsatisfactory drafting, leading to lack of clarity and certainty. An obvious example was in the original Regulation 6, what is a reasonable excuse for leaving the house, which was later changed to "or be away from", I think it is.

There was, certainly initially, considerable unhappiness on my part about the width of the enforcement powers, the absence of any express requirement for reasonable grounds on the part of the relevant person before using reasonable force, lack of clarity about powers of arrest, and then, moving on to more general points of principle, discrepancies between written guidance and the regulations and discrepancies between what was actually in the written guidance and what Ministers were saying on their feet or in interview.

That was all complicated by the fact that, by virtue of the emergency and the epidemic, either the House of Commons has not sat at all—it did not sit for the first six weeks, or certainly not for the first four weeks—or it has sat remotely or on a hybrid basis, which has made things less satisfactory. That would be my overview.

Kirsty Brimelow: The starting point is that the restrictions are the most draconian since World War II. My message would be that Parliament needs to confront what is actually happening and the extent of the interference with fundamental rights, rather than putting the cart before the horse and looking at the pandemic.

We have had a bewildering array of restrictions, amendments to restrictions, the lifting of restrictions and then the re-imposing of restrictions. They have been introduced in a way that has caused maximum confusion—in announcements from government that have been different from the law that has then come in. The guidance has been different and more restrictive than the law, and this has continued.

There was a period when it got better; when the guidance was being aligned with the law. However, even recently, it has taken 14 days to change the guidance to align it with the law, which indicates currently, with Regulation 6, that you are prohibited from leaving where you are living or from being outside "without reasonable excuse"; the guidance

had said, "unless there are specific exceptions". I have also had cases where there have been arrests by officers—I have one at the moment going through the courts—where they have relied upon the guidance to carry out the arrest. So we also have the issue with enforcement and overreach of powers.

I would add, on the issue of enforcement, that the divergence from the criminal justice system, which is introduced through fixed penalty notices, has not been working, in that they also are imposed arbitrarily. We have seen statistics from the police that show that how likely you are to get a fixed penalty notice depends on the postcode you are living in. We also have the exposure by these regulations of overreach by those with powers. That was initially the police, and then we saw it more recently with local authorities/universities in that they were locking up their students. So enforcement is a big issue.

Finally, because I appreciate that there is limited time, it is being suggested that the Regulations further burden the courts. There are super-fines of £10,000, which are absolutely eye-watering and cannot be afforded by the majority of the population. As of yesterday, some police forces were proposing that these are now not done by fixed penalty notice but are substituted by a summons and that the person is then summonsed to the magistrates' court. That, again, is putting somebody in the criminal justice system.

My overarching concern, from the start of these emergency regulations being brought in on 26 March and the continuation of them, is the criminalisation of people and the lack of clarity in the law itself, which has also led to the unlawful criminalisation of people. That has broken down trust in the community and in society. We are now seeing that many people are simply not bothering with the regulations at all, which is bad for the rule of law.

Tom Hickman: I agree with pretty much everything that has been said. I will try to answer the question in two ways. First, I will try to summarise or group together the concerns that have been raised in three points.

First, there has been a lack of legal certainty. That has manifested itself in confusion between law and guidance, and lack of notice and transparency when regulations are brought in at the last minute and published very shortly before they take effect, for example.

Secondly, there has been overbreadth in the rules. In their essentials they are no doubt justified, but they have gone too far in some respects, including criminalising and imposing extreme fines by fixed penalty notice.

The third group of concerns relates to accountability, in particular to this Parliament but also to the other legislative bodies in the UK. Those seem to me to be the three main concerns: legal certainty, overbreadth and accountability.

I also want to take a step back to try to answer the question in a slightly different way by identifying what I consider to be an overarching constitutional issue here, mindful of the fact that this is the Constitution Committee.

The UK Government's response to the pandemic has been characterised by the use of ordinary powers and ordinary laws, albeit brought in on an urgent basis. There has been no resort to the Civil Contingencies Act or derogation from the European Convention on Human Rights. This has exposed an overarching issue, which is whether in times of crisis and emergency it is preferable for the Government to use ordinary laws or be subject to an emergency powers regime.

The consensus position internationally, which is based on the experience of Weimar Germany when emergency powers were too frequently used and were then seized upon by the Nazis, is that the emergency powers should be limited as far as possible to where ordinary powers cannot do the job. However, this is problematic, and this is the constitutional issue here, because the ordinary powers tend to get stretched and used in ways that were not foreseen when Parliament brought them into law.

In my view, that has been the case here. So there has been a squeeze. On the one hand, the ordinary powers are not sufficiently tailored to what is actually required to meet the needs of society during this pandemic. On the other hand, the emergency powers regime is extremely draconian and is intended to be used only in the most exceptional situations when ordinary powers are not necessary. If we could use the parable of the three bears, it seems to me that the ordinary powers are too cold and the emergency powers are too hot. What we are looking for, and what this pandemic has exposed, is the need for something that is just right, in between.

To conclude these thoughts, it seems to me that the problem is that we are viewing this whole situation through the lens of an emergency powers discourse or an emergency powers paradigm. I do not think that is the correct way to look at it. There was an emergency in March, but there is not an emergency now. There is a crisis now but there is not an emergency. What ought to have happened—this is the constitutional issue—is that there ought to be a framework in which, once we move from an emergency to a crisis, a properly tailored regime is introduced that is framed to meet the needs of what we have learned and what we know we need as we pass from the emergency into the crisis. That is what is shown to be lacking, and that is the big constitutional lesson for the future.

The Chair: Thank you. Those are very interesting opening remarks, and I think many of those will be followed up by subsequent questions.

Q184 **Lord Pannick:** There are three linked legal issues, on all or some of which I know Tom Hickman and Lord Sandhurst in particular have written. The first is whether the Public Health Act is a legally adequate basis for the restrictions that have been introduced. The second is

whether the Government were right to say that there were doubts as to whether the Civil Contingencies Act 2004 could lawfully have been used to introduce regulations. The third is whether it would have been preferable to use the Civil Contingencies Act, assuming that it could be used.

I am a little bit surprised by what Tom Hickman said: that these emergency powers are too hot. Surely it would have been highly desirable to use the Civil Contingencies Act, because regulations lasted for only 30 days and then required renewal. Also, crucially, Parliament has a power under the Civil Contingencies Act to amend regulations—most exceptionally; normally in the Commons or the Lords we can either approve or disapprove regulations. Under that Act, we can amend regulations, so that would seem to me to be far more suitable. I would be very interested in your comments on these questions.

Lord Sandhurst: I am surprised as to the first question. Mr Justice Lewis, in his obiter judgment, dismissed the Dolan proceedings and said that there was power under the Act. I must say that when I first approached this it was very much just as an ordinary citizen who was a lawyer back at the end of March/beginning of April. I did not even look at vires at all. It was not on my horizon; I just assumed it was in vires. It was not a very satisfactory way to go forward, but I am prepared to assume that it was permissible under that Act. I know that the Court of Appeal, with the Lord Chief Justice, has heard argument on that now.

More to the point, I cannot understand why the Civil Contingencies Act was not used, because the whole point is that it is to meet a national emergency. If you look at the introductory words to the regulations when they were brought in, they were laid and made virtually simultaneously, and the whole basis for not giving the House an opportunity to approve them was the urgency. Now, if that is not an emergency I do not know what is, so it would surely have come within the CCA.

The whole point about that then is that the regulations lapse after 30 days, unless they are renewed, under Section 26. Section 27 provides for parliamentary scrutiny, so they lapse automatically within seven days of being laid before Parliament unless both Houses pass a resolution approving them. That is a similar sort of procedure to Section 45Q in the Public Health Act, which has been bypassed again.

Whatever the justification at the outset, that has not been justified since mid-April or the beginning of May. I just do not understand that, other than that it is obviously jolly convenient for the Ministers, because they do not have to put things before Parliament and nobody has to look at them. If regulations are laid in draft and people are given not just six hours' notice to look at them but a day or two, they will pick up drafting errors and say, "Hang on, Minister, this won't work", or, "This goes too far". The Minister might agree, and then he can publish an amending regulation immediately to revoke that and go forward.

It would be better to deal with it when amending, and not just bits and pieces. Each time there is an amendment, a composite new regulation should be produced, because everybody has to look at this and the CPS has to read it. About 300 regulations are being published about this. It is a nightmare to look through them and try to follow what is going on, and I am an experienced lawyer. How anyone in a local authority or whatever is supposed to follow this, I simply do not know.

Tom Hickman: There are two parts to the question. The first is about the Public Health Act. There are two ways to answer it. One is a more technical argument, and it is about whether Section 45G(2)(j), which is the power restricting who people can meet with and where they may go, is sufficient legal basis for most of the regulations and the social-distancing measures. Association, staying at home, the lockdown, how many people you can meet with outside and inside, and so on, all hinges on that power.

Conventional principles that one would apply in an ordinary situation, not an emergency situation, are that unless that power expressly authorises serious intrusions into individual liberty, such as requiring people to stay at home, it is not sufficient to authorise that. Therefore, in my view, unless one takes a different approach to statutory interpretation, that provision is doing more work than it should be doing and is not sufficient for the extraordinary laws that have been premised upon it. Whether the court will reach that view, looking at this matter so long after the event that it is, is perhaps a different question. That is the legal analysis that I would adopt.

The other way of answering this question is to take a step back and to look at the powers in the Act, in particular the special restrictions and requirements that a Minister can impose. They do not bear a great deal of resemblance to what is required in this pandemic. They talk about disinfecting people, requiring people to wear protective clothing and so on and so forth, requiring health to be monitored.

The provisions of the Act as a whole fit very poorly with the actual measures that have been enacted. There is a specific measure that restricts the holding of gatherings. Of course, there are measures restricting the holding of gatherings, but we have also had measures restricting gatherings, people meeting in the streets, which is not expressly addressed in the Act.

The measures that the Secretary of State is expressly precluded from imposing, which include imposing isolation on people or requiring people to be detained in an establishment, seem to be much closer to the sort of measures that we have had. If you get notified by Public Health England that you have been in contact with somebody who has tested positive, you are required to stay at home and self-isolate on pain of criminal sanctions, and of course that is entirely justified. You are required to be there—you cannot leave, you cannot go to the shops unless you absolutely have to, you cannot take exercise—yet the Act prohibits the imposition of isolation on people.

Taking all those things together, it seems to me that the Act is a very poor fit with what has been required. That goes back to the first point I was making, which is what we really need here is a legal basis for making law that fits much better to what we have learned that we need.

That brings me on to Lord Pannick's second question, which is about the Civil Contingencies Act. There are features of the Civil Contingencies Act that demonstrate exactly the form of accountability that we need and have needed over the last few months. These include the ability of Parliament to amend regulations, the requirement in the Civil Contingencies Act that regulations are laid as soon as reasonably practicable, and the requirement for Parliament to approve the regulations after seven days and then after 30 days. All that is absolutely right and should be a feature of the legal regime that applies.

Just because that is a feature of the legal regime that applies does not mean that the Civil Contingencies Act is capable of being used or that all the features of the Act are what are required. The Act has extremely draconian powers. The Secretary of State can pretty much make any regulations that the Secretary of State considers to be necessary, subject only to the restraints of the Human Rights Act, including setting aside primary legislation. That is why I say it is too hot, because it is not tailored to this particular pandemic.

The other problem with the Act, which is where I think you are really pushing me, is whether it can be used at all. I have said that we have moved from an emergency to a crisis, but I suspect we would satisfy the test in the Civil Contingencies Act even now for an emergency. The problem is that it is, I think, Section 21(3) which requires that the legislation be used only where necessary. That section goes on to talk about existing laws and that existing laws might not be sufficient.

On my analysis, because I do not think that the Public Health Act was an adequate basis for the laws—certainly there was a degree of risk there—you could have justified using the Civil Contingencies Act on that basis. However, even on that analysis there are laws that you could have enacted under the Public Health Act. There are laws that would be covered by the Public Health Act; I have mentioned already holding gatherings, which is expressly mentioned in the Public Health Act restrictions on holding gatherings.

So the problem with the Civil Contingencies Act is twofold. First, the powers that it confers are too hot in certain respects. albeit the degree of parliamentary accountability is highly desirable and much better than what we have had. Secondly, it applies this internationally recognised principle that you go to emergency powers only when it is necessary, and that has problems when you apply it to a concrete situation. Here, it would mean that you could have one foot in the Civil Contingencies Act where you want to do things that are a little bit beyond the Public Health Act, but one foot outside the Civil Contingencies Act where you can use the Public Health Act. That seems to me to be a rather undesirable situation.

The appropriate solution, I would suggest, is to have a modified emergency powers regime that has two levels: you move from an emergency to a crisis, so heightened parliamentary scrutiny and accountability but a provision for more bespoke arrangements once you know what you need; or this matter is put on to a proper basis in primary statute with a coronavirus Act II, setting out the powers that we now know we need, and Parliament can provide for the accountability that it sees fit.

Kirsty Brimelow: I and a number of other barristers acted for an NGO called Big Brother Watch and applied to intervene in the Court of Appeal in the Dolan case. The Court of Appeal judgment on whether the regulations are ultra vires the Public Health Act has not been handed down yet. We applied to intervene, and unfortunately, because we were quite late, we were not granted leave to intervene. However, our arguments will be published over the next couple of days. As to whether the regulations are ultra vires, having analysed them we came to the conclusion that they are. We will see what the Court of Appeal says.

In essence, to summarise, whilst we have the Public Health Act 1984, it is important to note that this Act, but it was amended in 2008 in response to international health regulations. One of the arguments used by the Government for that amendment was that the Public Health Act was out of date. It dealt with old diseases and old types of restrictions, whereas in moving into the world of SARS and so on we are dealing with populations. However, nowhere in the international regulations is there a regulation setting out any power to lock down an entire population. So that seemed to us to be a fallacious argument.

The question here is: where are the powers to lock down, to bring fundamental restrictions? These are fundamental rights and interferences in and with an entire society, an entire population. Basic constitutional law says that you cannot override fundamental rights with general and ambiguous words, so broad language will not cut it. There are many Supreme Court cases that set that out, as well as European jurisprudence, so that is very well established.

What we have here are general words that have been interpreted and taken from the Public Health Act to give a Secretary of State extremely wide-ranging powers—powers to lock up the whole population and to prohibit the entire population from leaving where they are living, from working, and from carrying out trade, powers to prohibit the entire population from carrying out worship, from associating and from various aspects of their private lives.

However, no specific power can be pointed to that allows that. There are powers in the Public Health Act covering individuals and groups, but I do not think anyone could argue that a group would mean an entire population. There are other powers for individuals and groups where they are potentially infectious or are infectious. That is regulated by a magistrate, and there are appeals systems. And so looking at whether there could have been parliamentary intention for this amount of

restriction with absolutely no court process regulation, it does not fit with parliamentary intention. But that is an overview of some of the arguments about the regulations being ultra vires.

Moving on to the Civil Contingencies Act question and addressing Tom Hickman's arguments more specifically, my position is that the Civil Contingencies Act should have been used right at the beginning in March rather than trying to stretch Part 2A and Section 45 of the Public Health Act to bring in these regulations.

I agree with the premise of Lord Pannick's question that then there would have been safeguards, and I agree with the other evidence we have heard that those safeguards will weed out errors in drafting. There has not only been confusion but there have been errors. When the regulations came in on 26 March, by 2 April they were back for another amendment, which related to having a reasonable excuse for leaving the place where you were living but also added a reasonable excuse for being outside, because that was causing confusion. That is one example of an error in drafting. There are others. That could have been picked up in a parliamentary debate.

On the question of what is an emergency and what is not, the Government's arguments that I have seen as to why they have not used the Civil Contingencies Act have included this not being enough of an emergency. Picking up on the point about whether it was necessary, the situation in March was not a bolt out of the blue. At the same time, the other message was that this was an absolute emergency, so it had to be brought in with very little notice. The two messages did not come together correctly, and they do not sit together well.

The position we are in eight months on is that there is absolutely no need to use emergency legislation now. I suggest that emergency primary legislation should have been brought in months ago, perhaps in the first month. After that, I have seen no justification for carrying on with an emergency law process. We have observed the dangers which the safeguards of Parliament are there to prevent, and we have seen those dangers practically. I am sure we will come on to that in the rest of the session.

Lord Sandhurst: When I looked at this with Benet Brandreth QC in mid-April, we suggested that the Coronavirus Act be amended and provision made so that regulations could be made under it affecting England and Wales, or at least that the Welsh Government should have the same devolved powers as Northern Ireland and Scotland. Then they would have all the safeguards within the Act in relation to how long regulation should last, and so on. However, absolutely nothing has been done. It is not good enough to have allowed six, seven months to go by and still pretend that it is the crisis that it was in late March when the hospitals were filling up. They are not filling up in the same way at the moment. They may do, but it will be a more measured process.

Tom Hickman: I agree that the Civil Contingencies Act needed to be used initially unless the powers could have been put into the original Coronavirus Act. I am not suggesting that that was satisfactory. There was no entirely satisfactory solution, if we are honest, because obviously the Coronavirus Act went very quickly through Parliament. Once the true emergency abated, exactly as we have just heard from Lord Sandhurst, proper legislation should have been put in place. Parliament could and should have insisted on protections such as the ability to amend regulations. That is critical, because what we have had here and what we have seen is the profusion not only of new regulations but of amendment regulations.

One of the features that I have found, from a slightly technical legal perspective that is quite interesting, is what would have happened if Parliament had refused to accept any of these amendment regulations. The true answer is that nobody knows. It was raised in one of the delegated legislation committees early on: "What would happen if we did not approve this amendment?" Nobody knew. The only answer, which was suggested by the Opposition, was that the fines would have to be repaid, but that was the wrong answer. The answer is that there is no clear legal answer, but it would have been enormously administratively disruptive if any of the amendments had been refused. For that reason alone, it was highly unlikely that they would have been.

My only other observation, which is the point that was raised by Kirsty Brimelow, is that when the Coronavirus Act came up for consideration in Parliament in March, the Government said that the Civil Contingencies Act could not be used if primary legislation could be brought forward. That, I do not think, is correct. There is nothing in the Civil Contingencies Act that says that. It says that it should not be used if there is existing legislation that can be used; it does not say that you have to bring forward legislation on an emergency basis.

It is a puzzle why the Government did not make further provision for the lockdown, which they said they had imposed on 23 March in the Coronavirus Bill, which went through Parliament on 24 and 25 March. Why did they not put proper provision in the Bill for that eventuality? It is a bit of a mystery, because it seems an obvious thing for them to have done.

I have no idea whether this is a possibility, but perhaps they did not want the complication of doing so in circumstances where everyone was proceeding on the basis that the lockdown was in effect. As we all know, between 23 March and 26 March the lockdown was not in effect. It had been announced, we had been told to stay at home, and police were trying to enforce, but there were no powers of enforcement. That is a question that I do not know the answer to, but the Government should be asked.

Baroness Corston: My question has already been answered so I suggest that we move on.

The Chair: Let us go to criminalisation then, and to Lord Beith's question.

Q185 **Lord Beith:** Could I ask Kirsty Brimelow to put her mind back to the Newcastle Station case, which was at the very early stage when everything went wrong in respect of criminal offences? The British Transport Police got it wrong, the magistrates got it wrong, the Crown Prosecution Service got it wrong. Why do you think that happened?

Kirsty Brimelow: That case resulted in a conviction on 30 March, so literally four days after the emergency regulations came into force. Everybody got it wrong, and not only the British Transport Police but another police force, the Northumbria Police, because she was taken to a police station in Northumbria. She was kept in police cells for two nights, but there was and is no power to detain people in police cells under the regulations, so she was unlawfully imprisoned. Then she was produced at the magistrates' court, and the district judge got it wrong and convicted her; she was sent down to the cells because she was not speaking, so the district judge considered that she was not co-operating. Entire swathes of fair trial rights, as established under Article 6, under our own domestic law—the Human Rights Act—and under our own criminal legislation were breached. She was represented by a duty solicitor who also did not see that the offence did not exist.

Why did it all go wrong? First, what was interesting was that the British Transport Police immediately publicised the success of the first prosecution under the Coronavirus laws. They subsequently apologised, but you can infer signalling from the attitude, "We've arrested someone and they've been convicted". We had started to see messaging from the chiefs of the police forces that there had to be this macho-type of policing. Instead of using the options of directing people to go home, of communicating with people, we were getting that signalling of enforcement and using force- as expressed under law- in the legal way of powers of arrest, detention, and so on. That was also the same kind of messaging that we saw coming through and being directed by government. The messaging was completely wrong. We are a liberal democracy, we police by consent. That kind of messaging still needs to change, but it has got better.

Secondly, this has exposed the weaknesses of our criminal justice system and the funding that had been stripped away from the Crown Prosecution Service. The CPS has recently had more funds put in, but if you keep stripping away and stripping away from a service, you start to drive down quality. The same is true with the structure of the people sitting in magistrates' courts.

Another issue is the training that was brought in with the new regulations. Why was there no training package for district judges? I am not sure whether that is still the case, other than what the district judges themselves have put together. There should have been centralised consideration of that, and centralised consideration of proper training for the police when they were given these new powers, because they

applied, and continued to apply, the Coronavirus Act, which applies only to potentially infectious persons. They should have been seeking to apply Regulation 6, as it was then, of the public health regulations.

Ultimately, the message that came out of this, which is important, is that none of this enforcement assisted the public health response. That young lady was placed in contact with more people and was put in insanitary environments in a police station and in cells and in a court system, but her suspected offence was that she was standing on her own at a train station.

That is why, in answer to the question about what has gone wrong, I started by commenting on the way the emergency laws have been looked at. They have been looked at the wrong way around. They have been about the ends justifying the means rather than looking at the severe interference in fundamental liberties. If we can start moving the legal thinking back to people's fundamental rights, we will stop seeing these types of cases. I then was involved in about half a dozen other cases, all while working pro bono, I should say. I worked with the *Times* newspaper, and we got these convictions overturned through the *Times* publishing them, because it was quicker than going through any appeal process.

Lord Sherbourne of Didsbury: My question has been answered, because the witnesses have said the fines and penalties are disproportionate, so I am happy to move on.

The Chair: Let us get back to legal certainty then.

Q186 **Baroness Fookes:** There has been some disparity between verbal guidance or guidance in documents and the law itself. I feel particularly strongly about this, but I will be interested to know what the witnesses think.

Tom Hickman: I agree. First, let us talk about the positives. The Government have communicated quite effectively through guidance. Individuals cannot be expected to read the regulations and laws in their native form. They need to have them translated into an accessible form. There is a website that does that. In general terms, that is a very good thing. The problem is in the way the laws have been presented; they have been entirely commingled with advice. There are examples of statements of law and statements of advice being entirely mingled together, one of the infamous examples being the requirement to exercise only once a day, unless you lived in Wales. So the legal requirement was that you can take exercise, but the advice was that you could not exercise more than once a day. There was no way of discerning the difference.

I wrote a paper on this, which I am very happy to supply to the Committee if that would be of assistance, which sets out a whole range of examples to this effect. I concluded essentially two things: there needs to be provision for guidance, and guidance needs to be regulated in the

applicable legislation. I do not think it was foreseen, when the legislation came into effect, that there would be all these regulations and that guidance would play such a prominent role.

There is no statutory regulation of guidance, and there needs to be. That is one of the lessons of this emergency or crisis. One of the principles that need to be adhered to is that guidance needs to be formalised, promulgated in a formal way, and probably laid before Parliament. I set out in the paper six principles that I said had not been observed and would need to be observed. I know that we are short of time, so I will not read them out—as I said, I can supply the paper—but one, for example, is the importance of clearly distinguishing between a statement of the law and a statement of public health advice, which is a critical principle that was not observed in the published guidance.

The Chair: We would be happy to receive your paper.

Lord Sandhurst: I endorse everything Tom Hickman has said. It was that very point that caused me to write my first paper at the beginning of April, because once you looked at the regulations you saw that they did not say what Ministers were saying, which was that you could go out for exercise only once a day. One Minister said, "And only for an hour". It was not in the regulations. If they did not want us to do it, they could advise us against it. Then there was the shopping business, saying in the original FAQ that one should leave the house only to shop for basic necessities such as food and medicine. But when you looked at the schedule to the regulations you saw that you could buy all sorts of things and that off-licences were open; obviously, alcohol is a necessity in a crisis, it would surprise some of us to learn that.

There are plenty of examples like that, but it should be put right. The Prime Minister and the Secretary of State should not, before the regulations are in force, say, "You're all locked up". That happened two or three days beforehand. That seems to be pretty outrageous. It is done with the best of intentions, but they should have said, "Please stay at home".

Kirsty Brimelow: I agree with what has been said. Another issue has been that not only have Ministers got their own laws entirely wrong on mainstream platforms when they have been asked, "What do the new laws say?", but there has also been an issue with the media. There need to be those on the programme who know what the laws say who take on the Minister.

Journalists are very busy, for example with the "Today" programme on Radio 4. They have a high turnover of news items, but this is very important. They need to have an expert alongside to be able to say to Matt Hancock, Mr Shapps, the Prime Minister that they have all misstated what the law is when they have said: "These are the restrictions. This is what you cannot do". The police have then acted on that. I am currently dealing with such cases going through the courts, which already have massive backlogs. The Q and A in the initial period with the Secretary of

State Matt Hancock or the Prime Minister plus the SAGE expert, with questions coming in from journalists, was not sufficient scrutiny.

The second point, which is of real concern, is Ministers saying something that is guidance, and the police then acting on it. Constitutionally, that is the structure of dictatorship. It might seem quite shocking to say that when we are all sitting here feeling comfortable in our liberal democracy and talking about the laws, but it is a totalitarian state that uses that messaging. The police should not be acting on the messaging of Ministers. We started to see the police acting on announcements from the Prime Minister or the Secretary of State, and again I have seen this in cases. That is a dangerous path to be on constitutionally, and it comes back to my point that Parliament needs to confront what is happening.

Q187 **Lord Howell of Guildford:** I would like to put two questions to our witnesses. The first is a rather narrow question, and then there is a broader one.

What have been the consequences of legal divergence across the United Kingdom during the Covid pandemic? I imagine that the answer is "not much", as obviously Scotland has a separate legal system anyway. My broader question is: has the whole experience of Covid enormously accentuated the differences between England, Scotland and Wales, and maybe Northern Ireland, even to the point where we have heard talk about frontiers between Wales and England and frontiers between Scotland and England? I have heard it said in quite high quarters in government that, if we had used the Civil Contingencies Act instead of the Public Health Act, that would have reduced all these incredible differences, which have greatly increased and will cause a lot of new problems.

Lord Sandhurst: I do not find this an easy one. It is noticeable that the Coronavirus Act gave express powers to Northern Ireland and Scotland, but those powers are being used in the same way. I can see that with a health emergency, which this is—this is not a nuclear explosion, a bomb or anything like that—there is a case for regional divergences, because if the island of Ireland was clear of coronavirus, you would not want to impose a whole lot of regulations on them that locked everybody up and stopped them going to work. In the case of England, Wales and Scotland it is difficult, because there are boundaries and they are not customs boundaries or anything like that. The police look at the registration numbers.

I found this question difficult when I saw it, and I did not think I could give a helpful answer, so I will ask Tom Hickman if he has a better one.

Tom Hickman: I am not sure that I have. To begin with, while we were in an emergency rather than a crisis, it was unhelpful that there were differences—I have already mentioned the one about the exercise, and so forth—because ultimately the decisions that were being taken at that point in Westminster and the relatively minor differences in the regulations across the UK were simply apt to confuse. Once we moved

from the emergency period, in general it was appropriate that the devolved institutions set their own rules.

There are two points which the Committee may want to press further, not necessarily with us witnesses but in general. The first is the question of the devolved justice and policing powers, which I understand have been a bit of an issue in Wales because it does not have sufficiently complete devolved powers to cope perfectly with different criminal laws that need enforcement by the police and so forth.

Secondly, of course, there is the big issue of central government funding for people who cannot go to work. That seems to have drawn attention to the funding issue, because normally public health measures are funded through ordinary health resources, which are devolved. But these are exceptional measures and the economic impacts require them to be subvented by the central, Westminster, Government. That has meant that laws can be introduced in, say, Scotland, but the money to pay for them has to come from Westminster. That is not a point I am in a position to speak to any further, but it is something that the Committee might want to look into.

The Chair: Kirsty Brimelow, I know you have to leave very shortly because you have a court case.

Kirsty Brimelow: Yes, forgive me for interrupting you. I am here with a court case, but fortuitously I can stay until the end of the session this morning, so there is no problem.

The Chair: Thank you. Is there anything you wanted to add on this? I will bring in Lord Wallace in a moment.

Kirsty Brimelow: It is a difficult one. The only points I would make from my legal expertise, rather than from a more general political standpoint, which is not my expertise, is that the starting point of the rule of law applies across all our devolved nations and requires clarity, accessibility, and a lack of arbitrariness. The difficulty with the different regulations in the different nations is that they have impacted disproportionately dependent upon which side of the border you are on.

In one case, I advised a lady who lived between Scotland, England and Wales and had relationships with family and friends in those three nations. As a result of the regulations, particularly in the period of the "spy on your neighbour" signalling, she found a slight change in how her neighbours treated her when she travelled into one of those nations. There are potential concerns about the breakdown between nations or rather the strengthening of borders between the nations because of those differences in regulations.

Leaving to one side the wider arguments about whether the regulations are ultra vires or not, the regulations are empowered only if they address a particular purpose, which is the prevention of the spread of Covid. Outside the English cases, I have worked mainly on cases in Wales. I struggle with why some of the differences in Wales are there and what

effect they have on addressing the virus. It seems that some of them might be looking more to the economy, which is a political decision that is being weighed up.

The question is a very good one, and all the devolved nations would benefit from co-operating more on this and putting it at the heart of what they do. Consideration should be given to whether changes to the regulations seem illogical when we stand back and look at them. If, for example, you can only buy basic necessities or essential goods in a lockdown in Wales (to protect closed small businesses) but it is different somewhere else, and everyone can access shopping online in any event, it will not seem logical to members of the public. That is also damaging if it is placed in a law as opposed to guidance. Government should be stripping out a lot of these differences in laws and placing them in guidance to people so that the rule of law remains strong.

Q188 **Lord Wallace of Tankerness:** To what extent are the difficulties attributable to legal divergence as opposed to messaging divergence, such as UK Ministers not making it clear what was for England only and what was for the whole of the UK, particularly in the early stages.

Also, before the most recent national lockdown in England there were three different tiers in England, which I assume meant a different legal regime for each of them. Do you think that has been handled in a way that has allowed citizens to know what the law is?

Lord Sandhurst: I certainly heard someone on the radio, or television, yesterday talking about differences in different parts of Lancashire, not even between England and Wales or Manchester and Liverpool. They were in the same tier but negotiated different bells and whistles.

It is fine for the Mayor of Manchester or the Mayor of Liverpool and his officials, but it is not very good for the ordinary Joe on the ground. This is very important. What you want is compliance, respect and people to live their lives as best they can, not to fall out with the Government, get cross and then disobey them. Clarity is important, and we should all learn from this and try not to overregulate in the future.

Kirsty Brimelow: I agree with Lord Sandhurst. My primary criticism has always been: why are we placing all this within law? Not only is it within law, but there are enforcement powers that are ultimately enabling criminalisation. We have ended up with a casual criminalisation of people. Even with the fixed penalty notices there have been a number of freedom of information requests about whether an enhanced check on somebody will reveal that they have one. So far, there has been no response to that. Certainly, if somebody is convicted in the magistrates' court they will have a criminal record, which really impacts on people's lives—on when they can travel again, on applications for work and so on. A lot of this just needs to be taken out of the law and the enforcement revised.

Another point about fixed penalty notices, because this is very important, is that currently there is no appeals system for them. Either the person who is issued a fixed penalty notice has to pay it or, if they dispute it,

they can make representations to their police force. If the police force says, "No, you must pay", they have to take their chances in the magistrates' court; they have to decide: "Am I going to risk being convicted of an offence?" Many either pay a fixed penalty notice, which has been unlawfully issued and which they cannot afford to pay, or they take their chances in the magistrates' court. Statistics published today or yesterday show that many people are now refusing to pay fixed penalty notices.

If the CPS then decides to prosecute all those who are refusing to pay or who specifically seek out the magistrates' court, that will divert resources away from cases that need attention. There is already a massive backlog. You are potentially criminalising a large section of our population for behaviour that, let us not forget, would probably have been seen as normal social activity, normal living, only in February.

Coming back to Lord Wallace's question, when you also have confusion about what people can and cannot do, you have the added layer that some people are just frightened to go out. That is not successful messaging or a successful use of the law in a liberal democracy.

The Chair: I am tempted to follow up, but we are short of time, so I will bring in Baroness Drake.

Q189 **Baroness Drake:** We have reflected on what has happened, but looking ahead to the coming months, because we are not at the end of this pandemic, the Coronavirus Act 2020 passed into law in just four sitting days. Most coronavirus-related statutory instruments have come into law without parliamentary approval. If there had been greater opportunities for parliamentary scrutiny of the Government's response, to what extent do you think some of the problems discussed today might have been avoided?

Tom Hickman: A lot of problems could have been avoided, particularly if Parliament had the opportunity to amend delegated legislation. I am not sure that it is generally a good idea for Parliament to be able to amend delegated legislation, but when you are in a situation like this it is a good idea. There is no real possibility of Parliament rejecting the regulations.

A lot of issues, such as the scope of police powers and the precise framing of the rules, which have had no proper parliamentary scrutiny at all, would have been much improved if Parliament had got its teeth into them. The fixed penalty notice issue, which Kirsty has mentioned, is one such issue. It has not been looked at sufficiently. It is a real problem when you say to people, "You can go to court and risk getting a criminal offence or you can pay up". By paying up, you are not accepting that you have committed an offence. You are not even accepting that there was an offence. If you read the regulations, you are discharging any possible liability that there might or might not have been an offence. Questions should be asked about whether it is appropriate to enforce regulations that intrude so deeply into personal relations.

Lord Sandhurst: I agree with Tom. We are out of the immediate emergency of March, and this is a point I have made before. The argument of necessity, which is what the Secretary of State says when laying something six hours before it takes effect, is a dangerous handmaiden that means that Parliament has no oversight at all. If these regulations were laid 14 days beforehand, there would be debate about them and he could then bring in an amending regulation with immediate effect. There is no discussion of that. There are details in these regulations that say later on, "We have to do this", or, "We have do that", and, "We should not have said it that way". There is too much of it.

The Hansard Society said on 16 November that there were 298 regulations. I have not looked this morning. That is a phenomenal number. A lot of them have been correcting errors and just finetuning.

I also thought about this last night: on 2 December, the existing lockdown in England comes to an end under the existing regulations. They must have some idea about what they may want to do, so why can draft regulations not be produced and simply debated—namely, what we will do for tiers 1, 2, 3 and 4—if that is what they want to do? Why can they not bring them in, give them to the House and say, "Look at these. Do you think this is a fair way of operating tier 2"? The decision as to whether you go down to tier 2 or tier 3 is obviously an executive decision for those who have the scientific information.

As to what should happen within a particular category, why can the draft not be looked at with a degree of leisure a few days beforehand? What will happen? Will it simply be produced on 1 December? Will there again be problems with it? It seems to me that we have now got beyond that.

The Chair: Lord Faulks, this is probably an appropriate time to bring you in.

Q190 **Lord Faulks:** Lord Sandhurst has rather answered the question I was going to ask, which is that, we are where we are for all the unsatisfactory reasons that you have described, but what would you advise the Government to do now? Many people have suffered real restrictions, both economically and personally. The pandemic will not disappear shortly, so how do the Government approach the question now in a more satisfactory way so that they have buy-in from the public and the legal certainty and the clarity that you have all said is desirable?

Lord Sandhurst: I discussed these questions with Benet Brandreth yesterday or the day before, and we thought that there should be something along the lines of a pandemic Bill, certainly looking further forward, if not in the immediate month. This ties in with what Tom Hickman has been saying. We learn the lessons and you bring forward a proper Bill for dealing with this type of event—a public health emergency that is much bigger than anything we have had but which may come again in the future. SARS did not, so we were lucky there, but we have this one.

As for the rest, there is simply no justification for the Secretary of State saying that it is so urgent that he can make the regulations before anyone has looked at them. Parliament should not be allowing that.

Q191 **Lord Hennessy of Nympsfield:** Would it help, as part of a wider renegotiation of the state's duty of care for its citizens post Covid, if Parliament made an attempt to fill what one might call the scrutiny void? Perhaps the principles could be captured in a protocol and adopted by resolution of both Houses. One would need to keep it lean and mean, the principles would be in emergencies, and regulations and law should be necessarily lean, loose and limited in duration. It could be quite a simple resolution. Do you think that would help?

Tom Hickman: First, there needs to be primary legislation. Whether it amends the Public Health Act, the Coronavirus Act or is freestanding I do not think matters. One of the things it needs to do is set out how Parliament wants to scrutinise coronavirus regulations going forward—whether it wants to be able to amend them, how much notice it thinks it requires and so forth. It might also deal with the guidance issue. That needs to occur.

You then have a general question about whether there should be a protocol about how regulations are produced in an emergency. I am afraid my view is that it does not go far enough. One of the things that this pandemic has exposed is the frailty of the parliamentary checks and balances on the use of delegated legislation, how easily the Government can sidestep the draft affirmative procedure under the public healthcare Act and use the urgency procedure and so forth.

What is clearly required is a more thorough review of how delegated legislation is reviewed. Rather than a piecemeal approach, which is dependent on each particular Act, there should be a principled approach that clearly demarcates and sets out the parliamentary scrutiny required for different types of delegated legislation. I appreciate that that is a longer-term project. You cannot simply look at the lessons of the last few months and say, "Well, that won't happen. That doesn't tell us anything about a non-crisis situation". It does. It tells us quite a lot about the imperfections and weaknesses in the mechanisms for scrutinising delegated legislation.

Q192 **Lord Howell of Guildford:** My question follows directly from that. There has been a lot of talk about no primary legislation and a lot of talk about parliamentary teeth. Do our witnesses think that Parliament has the teeth that it needs? Indeed, does it have the right set of teeth to tackle these extraordinary unparalleled situations, given that here in the United Kingdom the Executive control the parliamentary agenda, whereas in almost every other Parliament in any other democracy that is not the position?

Lord Sandhurst: The experience of this last six months suggests not. I do not think I can produce an answer, because I am not an expert on

parliamentary procedure, but it has to be looked at and it has to be improved.

Tom Hickman: I think the answer is that clearly Parliament does not have the teeth, and there are numerous examples that one could give from the last few months. One is the use of urgency procedure. There was one parliamentary censure in which the SLSC censured the Government—I think it was in the case of the face-covering regulations—and the Department for Transport for not producing the regulations sooner and using the urgency procedure, but it fell on deaf ears. There is nothing that Parliament can do.

It is clear that Parliament needs to have more teeth, and in these kinds of situations Parliament needs to have more control over the use of parliamentary time, the ability to schedule debates quickly, promptly and at sufficient length and, as necessary, setting aside standing orders to achieve that.

Kirsty Brimelow: It has been quite astonishing how this emergency period has shown how quickly Parliament has been able to be bypassed, and with little resistance from Parliament, until recently when we obviously had the speech from our Speaker. That was after a rebellion from Conservative Back-Bench MPs.

As to where we go, and taking all the questions together on a resolution between the two Houses, that is not within my expertise, but it would not seem to me on that summary to go far enough. One aspect that has been lacking—even now, we have some debate on the regulations that perhaps started in July—there is no power to amend, so the debates have made no difference. Then there was the timing: we saw the third set of regulations, for example, being debated when the fourth set of regulations had already come in, and the fourth set of regulations were not debated at all.

The court system is also under pressure. I brought the first case that judicially reviewed the regulations. This was during Ramadan, and my client brought a judicial review on the restriction on his right to manifest worship. One argument put forward by the lawyers for the Government and repeatedly used is, "Your argument is academic, because those regulations are now no longer in force".

With the courts, there is a constantly moving target, so by the time you actually get to court, if there is pressure from litigation—we have just seen this with the care homes—there is then change. It is taking that pressure to cause change. That pressure should be coming from the parliamentary process, so my respectful suggestion to those who know much more about political processes than I do is that there is a real root and branch look at how the principle of legality is being supported here, and using this as an object lesson.

In the short term we need primary Bills. We are eight months in now, and there is absolutely no excuse to still be using emergency laws. I have

seen no justification for it. To put this in context, one set of regulations were published 15 minutes before they came into force, so we have seen increased confidence in ruling by decree and giving no notice at all.

At least a clear timetable should be set so that this cannot happen again, because it makes those regulations potentially unlawful in themselves because they are inaccessible to people. Nobody can get on top of regulating their behaviour if they have only 15 minutes to understand what the law says. That is a fundamental rule of law principle; so there are a lot of issues.

The other practical point I would suggest is that Parliament looks at setting up review panels on fixed penalty notices and putting an appeals system in place that is outside the courts, so that people who are disputing a fixed penalty notice can go through an appeals process, in the same way you can when you get a parking ticket. Currently that is not there, and this developing more and more into a perfect storm.

The Chair: Thank you very much to all three of our witnesses this morning. You have been very helpful.