



Select Committee on the Constitution

Uncorrected oral evidence: The constitutional implications of Covid-19

Wednesday 18 November 2020

10.40 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. 15

Virtual Proceeding

Questions 193 - 210

Witnesses

I: Dr Joelle Grogan, Senior Lecturer in Law, Middlesex University; Dr Joe Tomlinson, Research Director, Public Law Project; Professor Alison Young, Sir David Williams Professor of Public Law, University of Cambridge.

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Examination of witness

Dr Joelle Grogan, Dr Joe Tomlinson and Professor Alison Young.

Q193 **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 are Dr Joelle Grogan, Dr Joe Tomlinson and Professor Alison Young, so welcome to you all.

I will start with a very general first question. To what extent has Parliament has been effective in its responsibilities to scrutinised legislation properly and to respond to what the Government have been doing with regard to the pandemic.

Professor Alison Young: I would argue that there has not been sufficient opportunity for Parliament to engage in effective democratic scrutiny. That was very clear in the witness statements in the previous session, particularly with regard to delegated legislation and the use of a procedure that restricted Parliament's ability to be involved at all in these particular mechanisms.

The Coronavirus Act was enacted very quickly by Parliament with very little scrutiny, but the gap between the First Reading and the Second and Third Readings and Committee, which took place in one day, did give Parliament the opportunity to scrutinise it. There were suggestions of amendments to improve the provision of the legislation, particularly where provisions might not take full account of different religious requirements for burials and cremations, for example.

One of the big problems with the renewal of the Coronavirus Act was the restriction of the debate to 90 minutes and the restriction of Back-Bench MPs' speeches to three minutes. There was no justification for that. I believe a question was raised in Parliament about the 90 minutes, and the Speaker confirmed that the debate could have been longer. This is a real problem.

Another problem was the fact that, because of the provisions of the Coronavirus Act 2020, there was no ability at the renewal stage to propose or even to put amendments to the renewal debate. That was problematic, because a number of MPs raised problems, particularly with regard to Schedule 21, and suggested that perhaps that aspect of the Coronavirus Act should not have been renewed. But there is no ability to amend. The wording of such a Motion is problematic, because the emphasis is on the element of it being sustained. It is phrased in a way that almost tips it towards sustaining it rather than re-debating whether there still is justification to maintain the Act.

Those are key elements I would add to what was said by the witnesses in the previous session.

Dr Joe Tomlinson: I agree with Professor Young. I would approach this question by dividing it into three main parts. There is the primary

legislation, the Coronavirus Act, which was made in response, and I agree with what Professor Young said in that respect.

There is also the question of the lockdown regulations, and the debate the previous panel had about the most appropriate legislative frameworks used there is important. The key point is that the scrutiny and accountability mechanisms that were available for the lockdown regulations were not as good as they could have been, although they have been improved slightly over the last few months.

The final and potentially the most important part, which has been overlooked to an extent, is delegated legislation more broadly. There were 295 Covid-related SIs as of yesterday. The vast majority of them are not related to what we might call lockdown restrictions. There are rules and regulations that change different parts of public services, different parts of the state, and they are incredibly important.

My main finding at this stage of the pandemic, on the basis of those regulations, is that those regulations highlight problems in the delegated legislation system that have existed for an awfully long time. In the last few years prior to the pandemic we saw an awful lot of things like the use of the urgency procedure. Part of the experience that we have seen with legislation during the pandemic is extraordinary in some respects, but at the same time it highlights the flaws in the system that have been there for quite some time.

Dr Joelle Grogan: As a first point, I would echo Professor Young and Dr Tomlinson in saying that it would be very difficult for anyone to conclude that there has been sufficient or even adequate parliamentary scrutiny of any aspects of the primary legislation or the 295 emergency-related statutory instruments.

As a preliminary point to all the responses that I will give this morning, between March and May 2020 I ran a global symposium studying the use of executive power, parliamentary scrutiny and the use of legal measures in 74 countries worldwide, including the United Kingdom. Everything that I say this morning will be layered with essentially comparative constitutionalism: how have other states responded? With that in mind, I will obviously focus primarily on the UK and England.

Many of the regulations and the concerns that we will be highlighting relate to England and Wales. However, to summate the points that have just been made by both Professor Young and Dr Tomlinson, we can identify four critical aspects of the rule of law that are appearing to us.

The first is the critical issue of the lack of legal certainty. The second is the lack of clarity for the public. The third is the issue of transparency, by which I mean: who is making the decisions, and on what basis are the decisions being made and by what process? Finally, there is the lack of co-ordination, or the seeming lack of co-ordination. However, again, I would underline that I do not think that any one of us will be concluding that there has been sufficient scrutiny of relevant measures.

The Chair: Thank you. Baroness Fookes may want to follow up on some of the aspects that you talked about.

Q194 **Baroness Fookes:** Our witnesses have made it clear that they think that the scrutiny of emergency powers has been weak or perhaps even non-existent. Do they feel that Parliament sitting remotely has further undermined any controls?

The Chair: Professor Young, you are nodding.

Professor Alison Young: Yes. Obviously, it has added to the difficulties. In particular, it might explain why it was so much harder to scrutinise right at the beginning, once the Coronavirus Act had been put in place and we were moving into lockdown. Obviously, there would be great difficulties if Parliament was seen to be breaching the lockdown provisions by meeting, so there needed to be a lot of discussion as to how Parliament would be able to meet in this particular circumstance. You can understand difficulties surrounding lack of scrutiny there.

We need to think very carefully about how well the hybrid procedure is working and whether sufficient information is being communicated. We are all aware from using technology that it can sometimes not perform in the way we would wish it to, which can make further difficulties with regards to democratic scrutiny, so I fully understand the difficulties of trying to ensure that we have proper procedures.

Particularly at the beginning, there were not sufficient provisions in place. We are now moving towards a better understanding of the hybrid proposals of scrutiny. It takes time for them to be set up, which would have had an impact, particularly at the beginning, on the extent to which we could have effective democratic scrutiny.

Dr Joelle Grogan: I would certainly echo that. I would also underline the time difference, exactly as Professor Young did. It is eight months since the UK Government quite seriously began to address the pandemic, and when it comes to parliamentary scrutiny—and, for me, when it comes to education—we are still adapting, as we all know all from our Zoom adjustments right now.

However, we have seen increasing use or familiarity with, and adaptation of, technology as regards parliamentary procedure. It is far easier and far faster for sharing information. Thus, it is very important to underline that the lack of rationale, and the lack of scrutiny, is not justifiable when we all have access to the same technologies.

Dr Joe Tomlinson: I would agree. I think this experience will be an opportunity for learning about how hybrid scrutiny processes work. I would also add that not all emergencies are the same, and this is one emergency where people being together and discussing legislation has obvious problems.

On the question debated in the earlier session about whether this emergency comes within the Civil Contingencies Act, I think there is a tension in these debates about what kind of emergency are we dealing

with. We can imagine some emergencies where Parliament can meet and debate instruments effectively, and in this situation that was not the case.

That gives rise to the question: should we be thinking about tailored legislation with regard to pandemic responses? Pandemics in the arc of history are not that rare. We have gone quite a long time without one, but it is foreseeable that there will be another situation like this in the future, and a tailored legislative response that includes hybrid scrutiny processes may be better.

Q195 **Baroness Fookes:** I want to look at another aspect. Parliament has been sidelined as a result of press conferences when one would have expected Statements to be made to the House of Commons and copied to the Lords. Do you have any views on that? Was that necessary? Was it undesirable? Could it have been dealt with another way?

Professor Alison Young: I share your concerns. In particular, as was discussed earlier, there has been very little ability to debate recent delegated legislation when there would have been an opportunity for Parliament to scrutinise it. I do not think there is the same justification for the urgency procedure of the later measures as compared to the first health regulation.

There are a number of problems with using press announcements. I will draw attention to three specific problems. The first problem is that it can undermine democratic scrutiny, because rather than presenting this to Parliament so that Parliament can debate a particular policy direction that could then be communicated to the people through the media as the general policy direction, with perhaps a draft regulation that could be scrutinised and then come in, you have the expectation of a policy before that has been debated. I think that detracts from proper democratic scrutiny.

My second concern is that these announcements are often phrased in such a way that they give the impression that this is the law and this will come into force. That can cause all sorts of confusion about what the law is, as we have discussed. What is a guideline on how to implement or enforce the law and what is just advice? It is a problem if advice is presented in a manner that looks like it is a law. We would draw particular attention to the text message that was sent about the new rules. They could easily have been construed as now being in force as opposed coming into force. That could give the public a very misleading impression.

My third concern is that these press announcements need to be co-ordinated. If you have a press announcement from the Prime Minister, the perception is that this is an announcement for the entire UK. Often it is not recognised that there is complete divergence and that health is a devolved issue, so the regulations in Scotland, Wales and Northern Ireland need not necessarily be the same as they are in England. But the public's perception is that when you see an announcement from the

Prime Minister of the United Kingdom it can lead to further confusion as to whether this is the UK, England, Scotland, Wales or Northern Ireland. That can also cause problems.

Q196 **Lord Howarth of Newport:** Looking forward a month or so to the introduction of a new pattern of daily televised press conferences from No. 10 Downing Street, what do you think the impact of that may be upon the role of Parliament on the rule of law and on the devolution settlement?

Dr Joe Tomlinson: The key point is that, when communicating with the public, the Government have a certain set of aims or parameters in mind that are not necessarily the same purposes that you have when legislating. Clarity, for instance, can sometimes lead to reducing complexity, so trying to convey a message as clearly as possible to the general population may lead to communications misleading the public about the exact nature of the law. I think there is a tension there.

If messages are put out in those kinds of fora as to what is lawful and what is not lawful, there needs to be reflection about how they are conveyed and to make sure that they are conveyed accurately. It will be interesting to see how those tensions play out. There are potentially unforeseen consequences of that development.

Dr Joelle Grogan: It should not be absurd to say that there should be a symbiosis between law and policy. If we are coming to the stage at which there are daily press conferences, there should be an expectation—again, I echo Dr Tomlinson here—that obligations to the public are communicated in a very clear way and clear distinctions made between the different countries of the United Kingdom and between what is law and what is guidance.

We should also have the expectation that this comes hand in hand with law that is being laid before Parliament being given adequate scrutiny. I would underline here—again, I will call on comparative context and comparative global trends—that it has been shown that the more review there is of the law, the more review there is of policy.

As regards the pandemic and measures taken in response to the pandemic, the better the law, the better the policy and the higher the levels of public compliance, simply because there is a higher level of public trust not only in democratic legitimacy and parliamentary accountability but simply in being able to spot the errors and the inconsistencies, as we have been discussing all morning in the context of guidance and measures with regard to the coronavirus pandemic.

The Chair: Thank you. We now move on slightly with a question from to Lord Pannick.

Q197 **Lord Pannick:** Can you think of any good reason why the Government, in whatever legislation they use to deal with the pandemic, should not recognise the substance of the protections of parliamentary scrutiny that we find in the Civil Contingencies Act: that is, that regulations that

radically affect people's liberty should last for only 30 days, unless renewed, and that the House of Commons and the House of Lords should have powers to amend the regulations and not just say yes or no? Whatever the legislation, that parliamentary scrutiny protection, at a minimum, should be included.

Professor Alison Young: I agree. It is very problematic, and we have seen this in particular with the contrast between the use of the Public Health (Control of Disease) Act 1984, as amended, and the Civil Contingencies Act. What is problematic is that, because there is not necessarily an element of joined-up thinking between those two provisions, you almost end up with the odd constitutional conundrum that you cannot use the Civil Contingencies Act unless it is necessary, and it will not be necessary if there is other legislation empowering you to bring in those measures. That could be problematic if that other legislation empowers you to bring in measures with less democratic scrutiny, which is exactly the conundrum we would face with regard to the Civil Contingencies Act and the Public Health (Control of Disease) Act.

If we are dealing with emergency situations and urgent regulations, I see no justification for not having those similar democratic protections. I can understand there being difficulties with a particular pandemic and that it might be problematic for Parliament to meet, but, again, provisions can be put in for those elements to ensure that there is still effective democratic control over those particular measures.

It is very important when you are dealing with emergency-level legislation to ensure that there is an ability to amend delegated legislation to spot areas where there is perhaps insufficient clarity, gaps or various problems that Parliament can bring to the Government's attention and amend those provisions in the delegated legislation.

Dr Joelle Grogan: My position on the use of emergency powers has always been the same, which is that they are legitimate in so far as there are effective safeguards and those effective safeguards are effectively used.

I would echo Lord Pannick in outlining a concern about why there was ostensible avoidance of those very important safeguards on the use of these powers. I believe that the Government made representation to the Public Administration Committee—forgive me if I am mistaken on that—in which they indicated that there was a reticence to rely on the Civil Contingencies Act for fear that it could be subject to legal challenge. Now, we are seeing legal challenges begin, and I would expect them to be used increasingly, but that was my understanding of the initial avoidance of the Civil Contingencies Act.

Dr Joe Tomlinson: The short answer to the question is, no, there is no good reason for not having those safeguards. It is important to think about them as safeguards, but the power to amend regulations, for example, is also an important tool for improving the quality of laws. There have been multiple instances in the last few months where it would

probably have helped the Government's cause to amend regulations that were being debated—I am thinking of the curfew law in particular. Those mechanisms are not just about safeguards but about improving the quality of the laws and debating the underlying policy. They are very important.

More generally, the urgency point in some of these debates was an ongoing feature of delegated legislation before the pandemic. In the context of Brexit regulations, for example, we saw lots of urgent SI procedures being used. Mechanisms such as powers to amend and so on might be more broadly useful in the delegated legislation system. So a broader review of how delegated legislation is used would be appropriate in due course.

Lord Pannick: That is very clear. Thank you very much.

Q198 **Lord Howell of Guildford:** We are now in the heart of this discussion, are we not? All our witnesses this morning have made very clear that they think that parliamentary scrutiny is inadequate and weak and that some major reforms are needed. Indeed, one witness in the earlier session talked about root and branch reform, implying major constitutional change. The former Prime Minister, Gordon Brown, spoke with great authority at the weekend when he said that root and branch constitutional reform is needed not only for better scrutiny but for holding the United Kingdom together.

Our question to the experts must be: where do we proceed? Dr Grogan hinted that in the Zoom age we will need a completely new approach to this. Are we talking about empowered committees that have great influence and contact with the media, in better ways than the rough and tumble of the main assembly in the parliamentary Chamber? What do you think is the way forward? It is easy to analyse, but we have got to the stage now where we need some clear procedures on how we reform.

Dr Joelle Grogan: I will make two initial points. Certainly, there must be systemic and systematic reform of statutory instruments of the affirmative and negative procedures, if they are still fit for purpose. This should, on a long-term scale, be systematic, constitutional reform. I would necessarily qualify that immediately by saying that that must be at a time of calm waters, for want of a better way to describe it. We must be doing this without the context of the constitutional tsunami of Brexit and the current crisis of the coronavirus pandemic.

However, as an immediate point, there could be changes that do not necessarily require reform but that will still improve the current context. An immediate recommendation that we could start seeing today would be the publication of the rationale behind statutory instruments and, critically, behind the use of the emergency procedure. If we began to see publication of the rationale underlying the use of these procedures, that would be a very helpful first step that would not necessitate large-scale reform.

Dr Joe Tomlinson: Regarding the way forward, it is important to separate out pandemic situations, emergency situations, from general scrutiny issues. There is a clearly a need for a review of the appropriate legislative framework to be used in a context such as emergencies, and particularly pandemics.

There needs to be a review particularly in relation to the scrutiny of delegated legislation. I would not necessarily say that it has to be root and branch review. I spent quite a lot of time looking at the delegated legislation system, and there could be great improvement in that system through lots of incremental changes. For instance, the Explanatory Memoranda attached to delegated legislation could be more detailed and more helpful in getting people to engage with the content of the instruments. It is a very basic change but one that would have a potentially dramatic effect.

Another would be simply trying to keep a limit on the length of some statutory instruments. Some statutory instruments run to hundreds of pages, as you are all very much aware. That seems to me to inhibit scrutiny under the existing procedures. A systematic review is needed, but with regard to improving the system to make sure that we all have better-quality laws, the changes that could be made could be incremental and have a dramatic effect.

Professor Alison Young: I would also add that this raises deeper issues, again. I echo the idea that there needs to be better scrutiny of delegated legislation. This can be done through publication and Explanatory Memoranda, but for legislation more generally going forward we need to think about when we use the affirmative, the negative, and the super-affirmative resolution procedures.

More immediately, there are issues to do with the Standing Orders in Parliament. It is the Standing Orders in the House of Commons in particular that cause these issues. Standing Order 14 in the House of Commons, which prioritises government business subject to certain exceptions, can make it incredibly difficult for the House of Commons in particular to raise a Motion to use the negative resolution procedure to vote against statutory instruments, because there is just no time to bring in a prayer Motion to vote against it.

We have seen particular criticisms of the House of Lords using its powers to vote against delegated legislation, leading in one instance to the Strathclyde review, whose recommendations were rejected by this Committee—rightly so, as they would have reduced the powers of the House of Lords to scrutinised delegated legislation. I do think that there are things we can do with Standing Orders specifically in relation to time to scrutinise delegated legislation, and perhaps more generally we should think about whether there should be less prioritisation of government business.

Q199 **Lord Faulks:** Dr Tomlinson, you said that there had been slight improvements since March in the levels of scrutiny. Whatever the

desirability of root and branch reform—we are likely to get some more regulations very shortly—are there any quick wins that you can identify whereby we can approach scrutiny of the next regulations better without embarking on yet more radical reform?

Dr Joe Tomlinson: Obviously the improvements that we see include promises of votes on significant national measures. It is not entirely clear what “significant” means in that context, but there is a reasonable level of clarity. They are something of a sticking plaster. We will see more debates where the issues are ventilated.

In relation to the current situation, it is difficult to imagine in the short term what procedures could be improved if the same powers are used and urgency procedures are still relied on. Potentially—this may sound very basic, but it is important—very clear explanations of the basis of laws, the science behind the rules, the public health advice behind the rules and the considerations that have gone into the rules themselves would be hugely helpful. More broadly, there is a need for a systematic review that will address structural issues within the delegated legislation system.

Professor Alison Young: I would add only that we need to think very carefully, particularly when we are looking at coming out of lockdowns and moving forward, at whether there is a need for the urgency procedure in those circumstances. Where the Government have a good policy idea of where they are moving forward—for example, announcements are made and sufficient time is given for people to be aware of what the lockdown measures will be in order to prepare for them—there is also space in that period for draft legislation to be scrutinised to pick up on possible errors.

I will give an example from the most recent legislation. One provision referred to exceptions for both Armistice Day and Remembrance Sunday. Another provision forgot Armistice Day and only had Remembrance Sunday, so there needed to be a quick amendment to deal with that. Errors like that could be picked up very quickly in scrutiny to give clarity from the beginning.

Dr Joelle Grogan: I have little to add to what Professor Young has just said, other than to underline and advocate for more medium and long-term planning. We have moved from urgent emergency to management and control of the crisis. Ideally, I would like to see a staged process of exit from emergency and from lockdown. We have seen in our close geographic neighbours, and as a matter of best practice internationally, a staged process of moving between tiers and of exit from lockdowns. I would like to see in press conferences beginning next week or tomorrow exactly this kind of medium and long-term planning, which can be subject to scrutiny to find those inconsistencies, to find the missing Armistice Day.

Q200 **Lord Sherbourne of Didsbury:** I want to move to a different area, and I want to confine this question to England. It has been very difficult for

the public to understand the finer details of all the regulations, laws and guidance and to keep up to date with all the changes that are happening all the time. How could we make things easier for the public?

Dr Joelle Grogan: Simply, we should rely on the same principles of certainty, clarity, transparency and try to avoid changes and rapid changes as far as possible. I would highlight the fact that a majority of regulations that were introduced came into force either on the same day or within two days of being laid. One of the most concerning examples was the introduction of the £10,000 fine within hours of it being introduced.

Going forward, the best advice—I hate to keep saying based on global best practice—is always to communicate clearly, accessibly and consistently what is being expected of those in England, and distinguishing consistently, clearly and with transparency between Scotland, England, Wales and Northern Ireland for anyone listening to the news.

Professor Alison Young: I would echo those principles but would add that when moving forward we have seen confusion about the situation where we had local devolution and local mayors. Understanding across England of these different types of settlements, particularly because they can be bespoke deals, is not great. There has not necessarily been a huge amount of communication between local elected mayors and central government when we are looking at restrictions in tiers in certain areas of the country.

This is another area where we need to be clearer about how these different regulations work in different parts of the country when they are needed. We need greater clarity as to what the tier levels can be, when they can be triggered, how they are triggered, and a greater understanding of where the lines might be. This is incredibly problematic, particularly when the same street is half in tier 3 and half in tier 2. We do need to think about how we can communicate those detailed aspects more clearly to the public.

Dr Joe Tomlinson: I agree with what Professor Young and Dr Grogan have said. There are some basic principles about clarity of rules and things that might seem obvious such as not changing the rules too quickly without due communication.

I have been running a project funded by the Nuffield Foundation, which tries to gather empirical data on the nation's understanding of lockdown rules. We have been doing a series of national surveys and have had dozens of interviews with focus groups to see what people understand of the rules and if their understanding is correct.

A few things that jump out at me from doing that work is that most people said they were very confident in understanding the big general rules about, say, mask wearing or the basic lockdown rules in place in late March. Most people knew most of the rules, but if you asked about

more specific exceptions there was a much greater lack of understanding. Where there were exceptions to mask rules or general rules, the public seemed to struggle to understand them. Communication about those exceptions, which are very important to particular groups, is an important improvement that could be made.

Another feature of the data that we have gathered for our project is that it is quite clear that even the people who said they were very confident in understanding the rules that were in force felt that change was more difficult to manage. If rules change more quickly, people will understand them less. They find it more difficult to keep up. That was particularly true with the tier system. The more rules that come into effect, the more complexity there is and the more people struggle to manage keeping track of the change.

A final point that started to come up in some of the interviews that we undertook with the public is that there is an element of fatigue about the pandemic. People are getting tired not necessarily of following rules but of keeping up to date on what the rules are. People followed the initial lockdown rules quite closely, it would seem, but there was more difficulty in keeping people engaged as the pandemic went on. In fact, a number of people said to us in interviews that they were actively not watching the news because they did not want to hear about the pandemic all the time. There was advice on some mental health sites to reduce the amount of time you watched the news for.

There are definite challenges going forward, and I would agree that clear communication and less quick changes would be hugely beneficial.

Q201 Lord Sherbourne of Didsbury: I completely understand the concern about having constant changes, but when people talk about clear and better communication, what form would that communication take?

Professor Alison Young: One thing that has been useful is the use of the media to communicate effectively and the use of websites that people can access. It is very easy for me as somebody who is constantly engaged in legal research to immediately think, "Now I know there are new regulations, I will find the regulations and chase the guidelines, and then I will be able to go away and understand what is going on".

There needs to be a shorter element of communication on websites that can summarise things. Often, because those summaries have to be shorter, they can confuse. We have seen evidence of this confusion, which was also raised in the previous session, about things like only be able to exercise once a day or the two-metre rule. It needs to be clear. We should use social media as well as the internet for clearer rules, as well as more traditional sources of the media. There need to be links to the guidelines that can perhaps give a little bit more detail about those particular provisions. There also needs to be a run-in announcement that the rules will be changing in the following week and that this is where you can go to find out more. That would help.

Dr Joe Tomlinson: I agree that more notice is important to allow messages to filter through to public. I follow the regulations very closely, but the general public get their information in a variety of ways—social media, the news—and more notice is very important.

There was a great degree of confusion particularly in relation to local lockdowns or tiered lockdowns. There was a great deal of confusion in trying to find the rules that applied to your specific local area and the rules that you had to follow, particularly if you had to travel to work in a different area. If we move back to a tiered system, better communication about the tiered system is particularly important.

Dr Joelle Grogan: It would be very helpful to circulate accessible guidance not only to the public through social media, the press, government websites and other points of government access but to local councils, libraries, schools, universities. There are many avenues through which this communication can be made, but it has to be premised on the same principles of certainty, clarity, notice and clear communication.

One aspect that has been raised not only in the UK but elsewhere is the difficulty in communicating with vulnerable groups. I do not just mean the deaf community or those with English as a second language but general vulnerable communities that do not necessarily have access to the internet and might rely on the BBC and their local news channels for any degree of information. Identifying vulnerable communities and having accessible communication with them is very important.

Q202 **Lord Beith:** On the point about looking for clarity, you have to remember that the government's guidance is often much more restrictive than the law itself. That is all right if the Government are simply saying that "The law says this", but we would like you to go further to avoid doing this or that so that it is clear that it is advice. It has not been clear at all, and all our witnesses in this session have used the word "rules" quite often.

What do you mean by rules? Government Ministers sometimes use rules to mean the regulations and sometimes to mean the guidance that they are giving, particularly any strong guidance they want to lay emphasis on. Have the Government found a way of making clear the difference between what they are encouraging people to do of their own free will in the public interest and the things that they have placed into law and that could be an offence to disobey?

Dr Joe Tomlinson: From a constitutional perspective, the division between guidance and law has been very concerning. Particularly in communications, conferences and so on, there has been quite clear blurring of instructions and the basis for those, and there has certainly been a great degree of confusion about what is law and what is guidance. That is something we have picked up in our data in the research project. There are potentially obvious solutions to those, and Professor Hickman has set up principles about the approach to that.

I speak about rules so much in general because of the work that I am leading at the moment trying to understand the public perception. The

public do not generally see a huge difference between guidance and laws in this context. They see the rules by which they live their lives. Just to give an example of some of the level of confusion that we see between guidance and rules, the law requiring people to wear face masks inside shops is a key rule in the Government's approach and it is also something that has been in effect for some time now. Thirteen per cent of the public thought that was just guidance, 86% thought it was law and 1% were unclear. A significant minority of people seem to be unclear about the status of that key rule. I suspect that if you get into the particular exceptions to rules and more specific rules, the confusion grows.

The short answer to your question is that there has been no clarity on that. At the same time, there is a genuine point to make about how realistic it is to expect the general public to develop a nuanced understanding of what is guidance and what are rules. That is a very important factor here. With a law, the people who probably struggle the most with a lack of clarity are those who are leading organisations, who have to engage with what we would call the regulatory environment. There are different layers to this puzzle. There are certainly failings, but we have to be realistic about what can be achieved.

Professor Alison Young: I completely agree with Dr Tomlinson's point, and I would reinforce that this element of confusion between regulation, guidance and advice can lead to two deeper problems in addition to the lack of certainty, which raises rule of law problems from our constitutional perspective.

First, it can lead to a lack of democratic scrutiny over these guidelines. Most organisations that are meant to implement the rules will follow the guidelines because they will be directed to a particular sector. Coming from the university sector, we will be following guidelines from the Department for Education, because it is geared to the university sector. But if it is not made clear that this is the rule and this is the guidance on how we think you should be implementing the rule, that could give rise to all sorts of enforcement issues as different sectors implement them in different ways. There is a lack of democratic scrutiny over those guidelines, and sometimes there is not sufficient joined-up thinking between different departments within government as to how to produce those guidelines, which can lead to further problems.

My second, deeper, problem is that that can also undermine legal scrutiny. This was seen in particular in the Dolan case, which as we have heard is on appeal to the Court of Appeal. One of the original reasons for refusing judicial review of one aspect of that case was that this was the advice that was given to local authorities on when to close schools and that advice is not a rule, so it could not be subject to judicial review.

That is in contrast to a conclusion that was reached in New Zealand with regard to advice to individual citizens to remain indoors for nine days, which was deemed to have the same effect on citizens as if it was a rule. That was one of the justifications given for why, although the restrictions were proportionate with regard to rights, they had not been by law

because they had been through advice. We need further understanding of when we use rules, when we use advice and when we use guidance to maintain proper democratic scrutiny and proper legal accountability.

Lord Beith: One of the ways in which guidance is more complicated than that is that some of the regulations refer to guidance and effectively require businesses to have regard to guidance in organising the various protective measures that allow them to be open, otherwise they cannot be open. Guidance can become relevant in insurance matters or civil proceedings as evidence of having acted reasonably in a protective way, and therefore puts businesses in the position of saying to their customers, "This is the guidance. We have to do it and you have to obey it".

Professor Alison Young: I agree. There are also examples of empowerment to provide guidance that businesses must obey, and not just with regard to coronavirus; we have also seen it with regard to guidance from the data guardian, which is then imposed on care homes, for example.

You are raising a very important point: there needs to be proper scrutiny and accountability over this guidance because of the important role it can play in certain circumstances.

Dr Joelle Grogan: I would again echo all concerns about the democratic legitimacy, the enforcement and even potential criminalisation of what, in effect, is guidance only. I would also highlight that guidance fulfils a very important function. I know we have all had experience of trying to navigate our way through the regulations, so, as a matter of guidance, even simple language changes could significantly help such as, "You must do this as a matter of law", or, "You should do this as a matter of guidance". I would find that helpful myself.

Q203 **Lord Howarth of Newport:** In this context, can we consider for a moment the very important constitutional relationship between central and local government and the role and responsibilities of local government in the present situation that we are discussing? Some local authorities have been admirable in communicating online daily, or almost daily, with people living in their areas. Others have sent out the odd leaflet perhaps but have done relatively little in terms of public communication. Do you think there could have been more consistent engagement of local authorities to ensure that citizens know what their responsibilities and their duties are?

It is complicated by the fact that Covid has increased what was already an often stressed relationship between central government, mayoral government and local government. There have been some quite spectacular disagreements. There has also been abundant scope for confusion with the differentiation of the regime in different tiered areas. How is the poor citizen meant to end up knowing what on earth is going on and what they are meant to do? Are there ways in which we might get the system working together better to communicate?

The Chair: Before I ask our witnesses to respond to that, in the interests of time I will bring in Baroness Fookes as well, so all these aspects can be wrapped up together.

Q204 **Baroness Fookes:** Could our witnesses give a definitive definition of what is meant by guidance or guiding rules and advice, which could then be standardised and used by everybody so there is greater clarity?

Professor Alison Young: I will try. With regard to the first question, I agree and echo the concerns. There is a need to ensure greater co-ordination. We have evidence of the Westminster Government working with the devolved Governments, but there has been less of an element of co-ordination with local authorities that has led to deeper problems.

Going forward, in particular situations where we are dealing with emergency regulations or complex health regulations that can differentiate, there may be a need for a particular role within central government to be able to communicate to local authorities but also a need for local authorities to have the ability to make representations to central government so that they can take account of these differences and make sure that communication is effective and clear across the country.

With regard to the second question, I wish I could give an incredibly clear and precise differentiation, but part of the problem is that we are not used to this idea of advice. The Prime Minister, Ministers and First Ministers, devolved Ministers, appearing on the media and giving a succinct element of advice that has then caused aspects of confusion is a new, emerging element. Advice is advice. Yes, it is given by government and it is something you will think about, but there is no element of legal obligation to follow advice. It is for you to decide whether there are good reasons to follow that particular advice. The confusion comes in because we are not used to seeing this and we are not used to seeing where to put this.

Thinking about guidance and guidelines, there are differentiations within the law of how guidance and guidelines can be used. Sometimes there can be obligations to comply with guidelines that set more detailed ways in which you implement a legal obligation. Sometimes guidelines are there to help you to interpret how to apply a particular legal situation—the Highway Code can be applied to offences of dangerous driving, for example.

Sometimes guidelines are there just to give you an idea of how you may implement your particular responsibilities and powers. With the guidelines given to universities, universities are advised to think about which of their teaching can be delivered in person and which can be delivered online, and in doing so to take account of the importance of face-to-face teaching for the health of their students. That is giving us factors to think about, but it is not directing us or giving us a particular set of obligations.

The picture is confusing, I am afraid.

Dr Joe Tomlinson: There has been a lot of complexity in the experiences and performance of local government during the pandemic. There have clearly been different approaches within different local authorities, but there have also been very different starting points for those local authorities—they are in very different positions when it comes to their general organisation. They have also faced different challenges in relation to the pandemic. Some have had higher infection rates for longer periods of time and more economic challenges, and some areas have more tiers of governance to contend with—Manchester being a clear example of that. Councils were in play, the mayor system was in play, the national system was in play. There are a lot of quite important differences that need to be taken into account.

Different approaches locally could be helpful in some instances, but they can also lead to confusion. I would be very nervous about offering a conclusion about local government yet, but it is an area where, after the pandemic has passed, it is right for detailed investigation and something that could lead to best planning for the future. A general solution or a general conclusion is not helpful there. What is needed is a nuanced approach, a nuanced assessment and a nuanced strategy for situations like this.

I will dodge the definition question, as Professor Young did, because that is an enormously difficult question. I would add two points while dodging the main question.

First, we have expressed a variety of concerns about guidance and advice, but it also has lots of virtues. The guidance is not designed for public law academics to pore over and think about the definitions of various words; it is designed for the general public. While there may be various failings, the advice on the Government's website has been updated regularly, which is another virtue of advice-type systems. It has helped people to figure out what was going on, particularly in their local area.

While there are problems with scrutiny of guidance, accountability and clarity of guidance, there are also a lot of benefits. Again, a nuanced approach is necessary there.

A final comment on guidance. It has been striking that, in developing the rules, guidance and advice that we have seen during the pandemic, it is clear that public health advice has been taken very seriously. To an extent, advice from the Treasury has also been taken seriously. The Government have a very difficult balancing act to make between those two considerations.

There is a third part here that is important. It is about how government effectively designs laws for the public. Particularly in a situation where compliance is important, advice from behavioural scientists or those who investigated legal compliance would be very helpful. It strikes me that less of that advice has been given, when that could have been useful in the course of developing advice, guidance and laws.

Dr Joelle Grogan: I express my gratitude to Professor Young and Dr Tomlinson for speaking first and giving me a lot more time to think about these questions.

First, involving local authorities in decision-making has been shown to be profoundly important. Local authorities are more aware of the stresses on the health services and more aware of vulnerable communities. They tend to have more communication, again, with the most vulnerable communities in this country. As a matter of good practice, involving local authorities in policy, be it through co-ordination or co-operation through a lot of communication, is an effective strategy and one that should be advocated.

Again thanking my colleagues for dodging the question, I thought about this and my very quick response is to borrow heavily from the principle of persuasive precedent. If I am to offer a very poor man's definition of guidance, it constitutes a very strong reason for action. However, it may be overridden by any other reason for action, and you cannot suffer a legal consequence or be subject to a legal obligation. That is my poor man's definition.

The Chair: Thank you. You had time to think.

Dr Joelle Grogan: I thank my colleagues, it is full credit to them.

Q205 **Baroness Drake:** Looking forward, the coronavirus restrictions have already required significant changes to the way people live at personal and economic cost, and it is not clear at all how long the restrictions will last. There is the real risk of lockdown fatigue. You have all stressed clarity, but what considerations do you think should guide the Government to secure the continued compliance with restrictions that will be needed for the forthcoming months?

Dr Joe Tomlinson: There are the general good principles about clarity and so on, which we have all discussed so far, but at this stage in the pandemic there is now a growing evidence base about compliance during the pandemic, for instance with lockdown rules. The lessons you learn from that evidence are not necessarily ones that you rationally conclude. They may be, but there are also behavioural aspects of that evidence.

In research that I have been reading on compliance, there are a few things that have turned up already that seem to drive compliance significantly. If you perceive the Government to be sharing all the relevant information relating to the rules, that tends to drive up compliance. If people think that rules will lead to disapproval from their peers, their social circle, that will drive up compliance. Young people are generally a bit less compliant than older people, but if you persuade younger people of the efficacy of the rules in combating the virus you will see more compliance.

There are a lot of lessons, but those are a few headlines that have already been established. There is a lot of evidence of what drives compliance, and that evidence base should feed into the rules and the

guidance, which should be driven by public health advice and other policy considerations which the Government take into account, and into how they are communicated. As an example, a lot has been made about national and social solidarity during the pandemic. In terms of driving compliance, the evidence that is emerging seems to suggest that that is a less important factor than things like the perception of the risk to your own health if you were to catch the virus.

Regarding messaging, there are lessons to be learned from the evidence that we have already seen gathered.

Dr Joelle Grogan: My contribution beyond what Dr Tomlinson has just said is limited. I would underline the importance of the publication of rationale for decision-making, for rules, for guidance and for future measures.

I would also advocate increased external engagement with stakeholders on the very important health and scientific advice of SAGE, as well as reaching out to other experts to identify issues and problematic areas that can inform policy and inform those rationales. It is ultimately very often personal social responsibility that is the primary matter in public compliance.

Professor Alison Young: I wholeheartedly agree with the statements from Dr Tomlinson and Dr Grogan. If I had one further point to add it would be to ensure that there were sufficient avenues for potential participation, even if it was just a channel through which not just specific stakeholders but particular sections of the community could communicate some of the impact of the rules. Sometimes there can be a perception that a rule hits one particular section of the community more greatly than another. That perception may or may not be true, but the ability to communicate that, to investigate it and to make sure that the rules are fair and equal across all different aspects of the community would be a very useful principle.

Baroness Drake: Dr Tomlinson anticipated my follow up question, so I will not pursue it.

Q206 **Lord Howarth of Newport:** With public understanding and compliance and what may happen in the future, do any of our panellists think that the cuts in funding to law centres and in neighbourhood sources of advice provided by voluntary and charitable sectors in the community, and indeed the disappearance altogether of some of those sources of advice, may have a bearing? Would it be useful, even at this stage, to try to revive that capacity at local level?

Professor Alison Young: I agree that that has a bearing. A lot of information is communicated to large groups in society, particularly those who do not have access to social media or who need the extra help that is performed by the voluntary sector to understand the impact. It is important to ensure that that it is maintained. There is also recognition of this in the current coronavirus regulations, which give the ability to keep

aspects of some buildings open for particular voluntary services to continue to communicate. That cannot be done effectively without proper funding.

Q207 **Lord Hennessy of Nympsfield:** I would like to ask about the trust element in compliance. Every two years, Ipsos MORI conducts a great survey of which professions are most trusted. Doctors and medics are at the top, and politicians, red-top journalists and estate agents are at the bottom. You always find that there is a huge gap in the middle between Cabinet Ministers, government scientists and scientists generally. Do you find that the public are more likely to comply with advice if it comes from the mouth of a government scientist than if it comes from a Cabinet Minister? If so, what can be done about it?

Dr Joe Tomlinson: If all the information, particularly the public health information, is clear, the public are more likely to comply. There is an authority dimension in play there. One of the most important drivers of compliance that we have seen in the last few months has been what we would refer to as a general duty to obey the law. Among the population, people, to a greater or lesser extent, have a general sense of how much they want to obey the law. For some people, that is particularly strong, and for those people a Minister delivering a message may be more effective. A combination of the two is quite important.

It is quite difficult to answer the question head on, but the combination of public health experts and Ministers is an effective combination to convince both those demographics within the population.

Dr Joelle Grogan: I am wary of making definitive statements, but just based on comparative analysis of Governments who have prioritised spokespeople coming from a public health basis, it seems that public health officials, doctors and scientists have generally correlated with a higher degree of public compliance. That is not necessarily because there is a higher degree of public trust in those individuals by fact of their occupation or because of the perception that they are more trustworthy because they have not been elected. Rather, it is more likely to be based on the perception of the underlying rationale and justification for the measures and the communication that the measures are in place based on a very strong scientific basis.

To echo some trepidation in giving a conclusive answer, I would suggest looking primarily to the justification that is critical in public compliance and public trust.

Lord Howell of Guildford: Just to reinforce what Dr Grogan has just said, are we not slightly underestimating the central importance of a strong national narrative? That is particularly easy in war time, but in the unfamiliar situation we are in now it is obviously more difficult. There are obvious limits to how far the law can reach, whether it is bound up with guidance, advice or statute legislation.

I am at a certain age where I receive a string of advice almost every morning from the local authority, the borough, the National Health

Service and occasional telephone calls. It is presented as tips or advice that I might follow. One has to make a judgment using common sense, social responsibility and the national narrative: how serious is this? Is it an emergency or is it a crisis? These aspects seem to be the ones that the politicians and the leaders have to step in and provide. I am just reinforcing what Dr Grogan has just said.

The Chair: In that case, we will move on to Baroness Corston with our next question.

Q208 **Baroness Corston:** What have been the consequences of legal divergence between the constituent parts of the United Kingdom and England in responding to the pandemic? Do you think we have managed to achieve the optimum approach across the United Kingdom, considering the devolved arrangements that are in place?

Professor Alison Young: The consequences have been a lot of confusion and a lack of understanding, perhaps because there is less understanding in England of the way in which the devolution settlements work than there is in Scotland, Wales and Northern Ireland, which have had a longer understanding of devolution because they see this on a day-to-day basis.

There has also been further confusion because there are individuals who live in one nation but who work in another and who are used to crossing what in essence is an invisible boundary between England and Wales or England and Scotland in order to carry out their normal business. This has thrown up deeper questions as to how we ensure co-ordination.

There is a need to recognise that the devolved legislatures have control over health; it is a devolved issue, and there can be specific local issues in local areas that require differential treatment. There is a need for greater co-ordination and co-operation. There were some aspects of intergovernmental discussion to co-ordinate at the beginning. That needs to be continued to ensure that there is a joined-up plan to further this understanding of how it works.

Dr Joelle Grogan: To echo Professor Young, we are seeing critical issues of confusion arising from that divergence. We are also seeing the introduction of measures at very different times, exactly as Professor Young has just outlined, which critically affects those who live on one side of a border and work on the other. A solution to this—respecting the fact that the constitutional settlement means that health is a devolved competency, so this is, and should be, a matter for local government—is exactly that: it is intergovernmental co-ordination and co-operation, finding a common strategy for all countries of the United Kingdom but with the capacity for local adaptation.

I would also underline in this context how important that is to do. As was highlighted this morning, there is also a divergence between health policy as a devolved competence and the funding for any degree of coronavirus response and funding generally. That divergence should be highlighted.

Dr Joe Tomlinson: There is a legal component and a political narrative component to this, picking up on Lord Howell's point. Some of the confusion stems not just from the rules but from the way different decision-makers make different decisions on similar facts at seemingly the same point in time. Somebody sitting in England might question why Wales is taking a particular approach and England is taking a different one. There is a tension there that potentially adds to complexity but also to how much the decisions are trusted by the general public.

The other point to make about devolution is that, as we saw more and more tiers and zones being brought in, in different nations but also within those nations, the rules became increasingly more complex. As different requirements were negotiated, they became more differentiated and it became increasingly difficult to communicate what the rules were. That is a very good example of why, in developing a policy response to these kind of issues, you need public health experts and policy experts such as economists, but you also need people who are expert in developing rules that are clear, simple and manageable for the general public and are easy to comply with.

Q209 **Lord Dunlop:** We have certainly covered a lot of ground this morning. I want to invite the panel to try to draw together the threads with a couple of questions.

Looking to the future, what lessons can be learned about the way the Government have prepared for and Parliament has scrutinised the extensive measures taken to control the virus? What do you think we could do differently the next time there is the need for substantial emergency legislation?

My second question is specifically to Dr Grogan. What can we learn from other jurisdictions about the way Parliaments and Governments have worked together to respond to the pandemic?

Dr Joelle Grogan: I submitted 30 recommendations and eight principles of the rule of law and good governance that should guide public health emergencies. They were written with Nyasha Weinberg of the Bingham Centre for the Rule of Law. It was based on our analysis of those 74 countries. I believe it was submitted to Parliament, but I am happy to ensure that it is also submitted to this Committee.

Broadly, we can look at international best practice. International best practice again premises the idea of certainty, clarity, consistency, transparency but also ongoing review and reform. I have not seen a country yet that has associated or correlated with lower infection rates, lifting restrictions sooner, shorter restrictions that are very onerous, and ultimately lower mortality rates that has not engaged in parliamentary scrutiny and review. There is a very clear connection between good law and good policy and ongoing review and scrutiny. Again, I am happy to ensure that those recommendations are submitted.

One country whose legal system we could say is broadly similar is New Zealand. It has an uncodified constitution, and I will focus on that. It had

a mix of emergency powers and ordinary legislation but, critically and importantly, it had from central government and the Prime Minister, Jacinda Ardern, a concept of social nudges based on compassion. This was broadly similar to guidance except that it was clear, consistent and constant. There was a targeting of vulnerable communities to ensure that everyone was aware of the rules and that they were consistent.

As a final point, and then I will answer a few more questions about the way forward, I would highlight another best practice that we are certain of: that early reaction is best. Early reaction leads to lower infection rates and lower mortality rates. Urgency necessitates early reaction. Any delay whatever has led to higher rates.

It would be disingenuous of me not to highlight the point that we are focusing on in this Committee with regard to the legislation that was introduced in March and the 295 statutory instruments that have been introduced since: that timing is important. We started seriously considering this two months after the WHO's declaration of a global health emergency, and two weeks after lockdown had been introduced in our closest geographic neighbours. Essentially, we seem to be constantly operating at a delay but still under urgency when we should be moving to forward thinking and planning how to exit emergency.

Very briefly, on the question of short-term changes, we should see clarity, we should see rationales being produced, we should see as much physical scrutiny and debate in Parliament as possible. In the medium-term, we need to see planning, exit strategies, and clear guidance on how to move between tiers if the tier system comes back in the following lockdown.

In the long term, we need to look at the reform of emergency legislation and the use of ordinary legislation. The Public Health Act is an ordinary Act of Parliament. We also need to look at how authorities have co-ordinated and co-operated in this emergency.

I realise that that was quite a long answer, but I thank you for your patience.

The Chair: Thank you, we will look forward to reading your report.

Professor Alison Young: I agree with what Dr Grogan has so clearly presented. In particular, I would commend to the House of Lords Constitution Committee a report of the New Zealand House of Representatives by the Regulations Review Committee of December 2016, which looked into the emergency regulation in New Zealand in response to the earthquakes. It sets out some very clear provisions, including ensuring that there is sector specific emergency legislation. A review of emergency powers, looking at sector specific emergency legislation and how that interacts with the Civil Contingencies Act, is a good long-term goal when looking at this particular provision.

With regard to short term, there is no justification for using the urgency procedure at the moment. We could use the different procedures under the Public Health Act. More appropriately, the time is now right for a coronavirus Act II that looks specifically at coronavirus and puts these powers on to a clearer legislative basis, so that there is not the same need for delegated legislation and we have a clearer account of different stages of moving into and out of lockdown.

The only other thing I would add is the need to think very carefully about how we co-ordinate all the different layers of power within the UK, be that within different governmental departments, between Westminster and the devolved legislatures in government, or between Westminster and local authorities.

Dr Joe Tomlinson: I agree with what has been said. There are two key areas that need to be focused on in the long term. In terms of emergencies, there is now a very big question as to why the Civil Contingencies Act was not used. Going forward, if it was not suitable for a pandemic on this occasion, what will the approach be in a future instance, and does there need to be a further solution that provides an adequate framework for circumstances such as the ones we have just experienced?

I said this before, but I just want to reiterate the point. This period in Parliament through the pandemic has highlighted flaws in the delegated legislation system that have been there for a long time. Having looked in close detail at a lot of the statutory instruments that have been made during this period, I can say that there are some extraordinary features in some ways but that in many ways it is business as usual. The flaws that we are discussing today are the urgency procedures potentially being overused, the lack of clarity and clear explanation in explanatory material, as well as the lack of clear communication and lack of understanding of the impact of particular measures.

These are flaws that are in the system more generally. It is not just a case of building in more and more checks on statutory instruments. The case for a wider review of delegated legislation is that it is about improving the quality of laws. You have seen during the pandemic that when there are ambiguous laws or laws that could have been improved and made clearer, people, businesses and so on suffer.

You are seeing writ large the effects of poor scrutiny of delegated legislation, and, in the medium to long term, that is the lesson that should be learned from.

The Chair: Thank you. This Committee has said quite a lot about this issue in the past, so I think we understand what you are saying.

Q210 **Lord Hennessy of Nympsfield:** Following on from Lord Dunlop's and Lord Faulks' questions earlier about the parliamentary scrutiny deficit, do you think there is merit in Parliament swiftly finding a way to distil from the frenzy principles that should apply to its handling of emergency legislation?

Professor Alison Young: Yes, there is. It is excellent that this Committee is looking at that issue. There is a need to think carefully about principles, particularly with regard to how far you can question the use of urgency procedures and procedures that diverge from democratic debate, and whether there is an ability to question that, to scrutinise that and to hold the Government to account when it is used and it is not urgent, as well as looking at provisions to provide for sufficient parliamentary time to debate issues that might override various aspects of Standing Orders in the House of Commons in particular.

The Chair: I can see our other two witnesses are nodding in agreement with you on that. This might be a good time to end the session. We are grateful to you all for giving up your time and having thought through these issues. We look forward to the extra information that you have offered to send. Thank you to our witnesses today.