HOUSE OF COMMONS

Justice Committee

Oral evidence: Covid and the criminal law, HC 1316

Tuesday 27 April 2021

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Watch the meeting

Members present: Sir Robert Neill (Chair); Paula Barker; Rob Butler; Janet Daby; James Daly; Miss Sarah Dines; Maria Eagle; Kenny MacAskill; Dr Kieran Mullan; Andy Slaughter.

Questions 63-153

Witnesses

I: Beverley Higgs JP, Chair, Magistrates Association.

II: Gregor McGill, Director of Legal Services, Crown Prosecution Service.

III: Kit Malthouse MP, Minister for Crime and Policing, Lord Bethell of Romford, Parliamentary Under Secretary of State, Department of Health and Social Care, and Lord Wolfson of Tredegar QC, Parliamentary Under Secretary of State, Ministry of Justice.

Examination of witness

Witness: Beverley Higgs JP.

Chair: Good afternoon, everyone, and welcome to this meeting of the Justice Committee of the House of Commons. This is the concluding evidence session in our inquiry into covid 19 and the criminal law. We have three sets of witnesses who will talk about various aspects of this topic. Before we start, Members will make their declarations of interest, as we must on every occasion. I am a non-practising barrister and a former consultant to a law firm. Are there any others?

Maria Eagle: I am a non-practising solicitor.

Rob Butler: Prior to my election, I was a non-executive director of Her Majesty's Prison and Probation Service and a magistrate member of the Sentencing Council.

Miss Dines: I am a barrister, but I have not taken a case since my election.

James Daly: I am a practising solicitor and a partner in a firm of solicitors.

Andy Slaughter: I am a non-practising barrister.

Q63 **Chair:** Our first witness is Beverley Higgs, Chair of the Magistrates Association. Thank you for coming to give evidence to us again, Beverley. I know that this is not your first time. One thing in which we are particularly interested is that it is clear that many covid 19 offences have been dealt with through the single justice procedure. That is something which you and our Committee have talked about in the past. Your predecessor as Chair of the association has also given evidence on how the single justice procedure operates. We are interested to know how that works in relation to covid 19 offences in particular, which have some distinct characteristics. For the record, will you explain how the single justice procedure works?

Beverley Higgs: The single justice procedure was introduced by the Criminal Justice and Courts Act 2015. It allows for a single magistrate to deal with adult, summary-only, non-imprisonable offences for guilty pleas and proof in absence cases. The majority of cases are motoring offences such as speeding, TV licence evasion and transport ticket evasion. Those are the kinds of offences for which it is mostly used. It was put in place to avoid what used to happen: where courtrooms with three magistrates and a legal adviser would sit through long days of cases of people doing 33 mph in a 30 mph limit, which seemed somewhat wasteful in terms of time and resources. The single justice procedure came in and has been working since shortly after the 2015 Act came into effect.

Generally, it works with a single magistrate sitting with a legal adviser outside a courtroom, without a defendant or prosecutor present. These cases are what some might term administrative, although they are still

obviously judicial. At the time the Act was introduced, one of our concerns was harking back to the adage of justice being seen to be done. Of course, it is not: it is done in a room, often not a courtroom, without public access. We were worried about the lack of transparency at the time. It has still not been addressed by HMCTS or the MoJ in terms of these kinds of cases.

Q64 **Chair:** How will people know if a single justice procedure sitting is going on? How are the cases listed?

Beverley Higgs: I am not sure how they are notified to the public in advance, or even if they are. That would be a question for HMCTS administration. Subsequently, however, a list is published of the single justice procedure cases that have happened and the results of them. Unfortunately, this creates a twin-track system because cases that go through courtrooms are not similarly listed and notified to the public. Those are the ones that are perhaps more serious and may have led to, for example, disqualification of a driving licence or something of that nature. There is some inconsistency of approach to transparency there.

Q65 **Chair:** I understand that. So your court is not able, off its own bat, to put up a list saying that certain cases are subject to the single justice procedure?

Beverley Higgs: No. The way in which these things are notified is entirely down to HMCTS administration and decisions made by them and the MoJ.

Q66 **Chair:** The other point that goes with transparency is fairness. Obviously one wants to make sure that the system is seen to be fair, but equally you yourselves when sitting will want to make sure that the system is fair, because you have a duty as magistrates to do that. How do you achieve that? As you say, often the defendants are not represented.

Beverley Higgs: One of the better ways to explain that is to consider the single justice procedure as a kind of triage system. The simple, uncomplicated and non-contested cases are taken out of the system. Where a case is deemed by a magistrate to require a trial, it gets referred back to the court system and is listed in the usual way. Likewise, a defendant can request a court process. From both sides, there is the possibility of going through a normal courtroom process.

Q67 **Chair:** In your experience, do defendants often take that up?

Beverley Higgs: Some plead not guilty, or some people come to court. They may want to plead not guilty to a drink-drive charge or something of that nature. Very often cases will go through a single justice procedure and a fine is issued for speeding, say, and the person who owns the car says, "Actually, it was not me driving", and comes to court after the event. We often reopen cases. There is that fallback so that we can correct anything that goes a bit awry.

Q68 **Chair:** In some cases, they will be strict liability offences—

Beverley Higgs: Indeed.

Chair: But provided that it was the person who was driving the car at the time, it will be all right. It was also envisaged originally, was it not, for things like TV licence non-payment and things of that kind?

Beverley Higgs: That happens, yes.

Q69 **Chair:** These offences are rather different. Have you noticed any change in the number or the impact, or any difficulties arising because of covid-19?

Beverley Higgs: We almost need to take a step back. Much of the legislation around the covid pandemic emergency was premised on fixed penalty notices and fines – for example, not stopping children breaking the rules or refusal to disperse, as we saw very publicly, or not informing your employer of your stop and start dates for isolation. Many of these were dealt with by fixed penalty notices and that comes before any engagement with the court processes.

I did some data searching this morning and, for the benefit of Members, I would say that out-of-court disposals were 144,000 in 2019. Up to September alone in 2020 there were 162,000 and the December data will be available in May. So there has been an exponential rise in out-of-court disposals and those numbers exclude cautions. The police were obviously taking different approaches and you would need to ask them about the kinds of offences for which they were issuing those out-of-court disposals.

About three or four years ago, the Magistrates Association successfully initiated what we call an out-of-court disposal scrutiny panel with some police forces. This is where senior police officers, relevant people in HMCTS and magistrates sit together and select a random number of out-of-court disposals and decide whether they were appropriate, inappropriate or needed some guidance notes. This is really important and it has been very successful from the point of view of public confidence in, and independent accountability over, these out-of-court disposals made by the police. It has also helped the police to understand the appropriateness of some of the disposals made. Obviously, police and crime commissioners should be interested in it, too. It has taken back down to police forces guidance and training needs around certain types of offending and the way in which they can be dealt with.

We would like all police and crime commissioners and chief constables to have an out-of-court disposal scrutiny panel on their force. That is not the case at the moment, but if any of those people want to contact the Magistrates Association, we can blueprint how a successful panel can run.

Chair: Perhaps we can move on a little. I will bring in Maria Eagle, who is going to follow up on some of those points.

Q70 **Maria Eagle:** I wonder whether you have any concerns, having seen the single use justice procedure being used to deal with covid-19 offences, which are much more complicated than the usual run of offences that would be dealt with under that procedure?

Beverley Higgs: No data is available to the Magistrates Association to tell us how many cases specifically related to covid-19 have come before the courts; that would a matter for HMCTS.

Anecdotally, my colleagues say that they do not recall hearing of or seeing any particular covid-19 cases come through, and that those that did were dismissed by the time they got into the courtroom.

A very large majority of this kind of offending was designed to be dealt with at the fixed penalty notice level rather than the courtroom level. It is early days and I think that HMCTS would need to provide you with that data.

Q71 **Maria Eagle:** Do you have any concerns over the use of the single justice procedure for covid-19 offences?

Beverley Higgs: Two things. The single justice procedure ran during covid-19 by remote access. A legal adviser was in a courtroom or another building and often the magistrate was at home. This was successful in keeping the backlog down, in making sure that judicial work continued, as far as possible, uninterrupted, and in keeping magistrates safe working from home, so there were definite advantages.

Those who are concerned would say that the disadvantages were that magistrates were being asked to work in their own homes, using their own home equipment without encryption of any confidential data that might have been sent. There were concerns around confidentiality and support for IT—

Q72 **Maria Eagle:** I am sorry to interrupt, but I am asking you not about home-working, which everybody has had to cope with one way or another, but whether you have any concerns over the use of the single justice procedure to deal with covid-19 offences.

Beverley Higgs: As I said, we are just not aware of that many coming through the system.

Q73 **Maria Eagle:** So you are not handling any single justice procedure cases, or have not done so yet.

Beverley Higgs: It is possible that some will come through, but trial listings have quite long lead times, as you know.

Q74 **Maria Eagle:** We know that about half of the fixed penalty notices that have been issued have not been paid, so one assumes that they are in the pipeline somewhere. The reality is that magistrates are not getting any of them through yet. Is that what you are saying?

Beverley Higgs: That is possible, but it is possible that they may never come through. Unpaid fines are not a matter for magistrates any more and are dealt with by HMCTS fines officers and fines offices. They would not come before the court unless a phenomenal amount of money had been owing for years. It is unlikely a magistrate would see that.

Q75 **Maria Eagle:** If covid-19 cases come through to you, will they be dealt

with using the single justice procedure?

Beverley Higgs: If they are appropriate for that level. Offences under the legislation were largely drawn up to be dealt with by fixed penalty notices.

Q76 **Maria Eagle:** They are being dealt with largely by fixed term penalty notices, partly because many of them are charged under the Public Health (Control of Disease) Act 1984, not under the Coronavirus Act 2020, which requires that offences be summary only and not imprisonable. In that sense it seemed convenient, at the very least, for those contemplating this to use fixed penalty notices.

I am trying to tease out whether you, as a representative of magistrates, think that the single justice procedure, which was designed for simple cases, is appropriate for dealing with coronavirus fixed penalty notices and charges. Are those offences suitable for use under the single justice procedure? That is simply what I am trying to get you to address.

Beverley Higgs: The CPS would put forward a suitable charge and it could come through to the single justice procedure. It could also go straight into the courtroom. They do not always go through the single justice procedures, but it would be down to the CPS to make that decision. It is not for magistrates to say what charges are appropriate or what route: that is a matter for the CPS.

Q77 **Maria Eagle:** I understand that. To what extent are covid-19 cases different from other types of cases that use the single justice procedure?

Beverley Higgs: I am not familiar with any cases that have come through the single justice procedure, or anything different. The charging would be down to the CPS and the cases would be dealt with exactly the same as any other.

Let us take the hypothetical scenario that someone was threatening to spit or cough over police officers. That would be dealt with and it would be a heavily aggravating factor. People have received sentences for that.

Q78 **Maria Eagle:** I am trying to tease out whether you have any opinion on whether single justice procedures should be used for serious offences. Is it being used for more serious offences such as assault and battery, for example?

Beverley Higgs: The short answer is that the single justice procedure is not suitable for serious cases or assault and battery. Those cases are likely to involve victims. Even if the defendant pleads guilty, they are likely to need a stand-down report.

As I said at the outset, the single justice procedure happens with the magistrate and the legal adviser in a room. There is no prosecution and no defence. With those kinds of cases you need that input, even where someone pleads guilty. You need to see their conviction record. There may be mitigation. There may be some assessment by the mental health representative in court. There may be a need for a stand-down report

from probation. The single justice procedure is absolutely not suitable for those kinds of cases, no.

Q79 **Maria Eagle:** Do you accept that some of the coronavirus charges are based on quite complicated law—more complicated than under previous instances of the single justice procedure? I do not want to press you if you do not want to say anything about that, but I am trying to get at whether you think the single justice procedure is appropriate for some of the complicated Public Health (Control of Disease) Act cases? They may be summary only and they may originally have been dealt with using fixed penalty notices, but some of the penalties can be up to £10,000.

Beverley Higgs: Given the terms in which you have couched your question, I suggest that the CPS is likely to put such matters straight into a courtroom rather than through the single justice procedure.

Q80 **Paula Barker:** I don't think you will be able to address the first part of my question because you spoke of not being aware of any covid-19 cases being tried under the single justice procedure. We have been advised that the defendant does not enter a plea in 88% of single justice cases. I was going to ask whether that matched your experience, but clearly it does not.

In your experience of single justice cases, what difference, if any, does the absence of a plea make to a magistrate's examination of a case?

Beverley Higgs: May I take the first part of your question? Not entering a plea happens, as you say, in about 88% of cases. If the evidence is there to uphold the charge and a guilty plea is made, it generally means that the defendant has not returned a means form. The magistrate and legal adviser would make an assumption and either fine and sentence on £120 a week, which is the benefit level, or £440 a week for somebody who is working.

People receive the results of the case that has taken place without them, which usually concentrates minds and they contact the court. They often say they were not aware of the case or that some of the facts were wrong. It is then up to a magistrate and the legal adviser whether to accept a stat dec—a statutory declaration—and reopen or revoke.

There are a number ways of winding back a few stages to let the person make their case. Without that information we assume people are working and give the higher level, with full costs being awarded. That tends to concentrate minds and people end up coming to court.

Will you repeat the second part of your question, please?

Q81 **Paula Barker:** What difference, if any, does the absence of a plea make to a magistrate's examination of a case?

Beverley Higgs: That is it, essentially. We have to assume that, unless we have evidence to the contrary. We have some evidence on paper—names, addresses and so on—which may have been gathered at the time

of the offending, so sometimes we can work it out. But at other times we cannot.

Q82 **Paula Barker:** May I clarify something that I think I heard you say? The first part of the question was that we were advised that in 88% of covid-19 cases that were dealt with through the single justice procedure people did not enter a plea.

Beverley Higgs: Of all cases, not covid-specific ones.

Q83 **Janet Daby:** Good afternoon, Beverley. My first question is about how magistrates calculate the appropriateness of a fine, how you come to that type of decision and if you have any guidance on that. If someone is convicted of an offence under the covid-19 regulations, how do magistrates calculate the appropriate level of fines?

Beverley Higgs: Given the caveat that, at this stage, we are unaware of what may have gone through court, or may come through court, we would use exactly the same processes as you are aware of, including the structured decision making process, the appropriate fines matrix and obviously our legal adviser will assist with any information. We have a broad guideline and then take account of any mitigating and aggravating circumstances. Some of the aggravation could be covid specific—for example, if the act or behaviour had some relation to covid.

Q84 **Janet Daby:** Have you received additional guidance because of the virus?

Beverley Higgs: Not in terms of sentencing that I am aware of.

Chair: I think that you have dealt with most of the issues, Beverley. You have raised your broader concerns about some elements of transparency, which was very helpful to us. Thank you very much.

Examination of witness

Witness: Gregor McGill.

Q85 **Chair:** Our second witness is Gregor McGill, Director of Legal Services at the Crown Prosecution Service. Mr McGill, thank you very much for coming to give evidence to us today. Can you just help me: how has the CPS been able to contribute to the Government's policy on covid-19 and criminal law? Have you contributed?

Gregor McGill: Indeed, Chair, we have, yes. We were fortunate enough to be asked to engage by the relevant Government Departments and feed back some information relating to how the regulations were drafted, and how they were formulated—except of course that legislation is entirely a matter for Parliament; it is not a matter for prosecutors. But we were asked to feed back and we fed back about how they were formulated, and the language, and how they were set out. That enabled us to feed in some information right at the beginning and enabled us to prepare for these regulations and the law coming in.

Q86 **Chair:** We have seen quite frequent changes to these regulations. What impact has that had on the CPS's role in dealing with them?

Gregor McGill: Every time the regulations change—and they have changed on a number of occasions—our legal guidance has to be updated, because we have to ensure that when we take cases to court we are applying the right law, and charges are applied under those regulations. So rather than the legislation itself just being complex—and the legislation is complex—the amount of times it has changed and the speed at which it came in, and the frequency with which it has been changed has, I have to say, presented some problems for prosecutors keeping up with those changes; but each time they have changed we have been consulted, and we have fed back, which has enabled us, if you like, to get ahead of the game and prepare our legal guidance to ensure that our prosecutors have the right assistance to enable them to deal with these cases when they are faced with them in court.

Q87 **Chair:** How often are CPS asked to advise in such cases?

Gregor McGill: Do you mean by the police—

Chair: In general, in policy terms. Were you asked to advise in each of these changes of policy?

Gregor McGill: I believe we were. Whether we were in every single case—I wasn't involved, but I understand we did have that opportunity. In each individual case that a police officer has, we only advise a police officer as and when then come to us and ask for advice.

Q88 **Chair:** I understand. How often is that?

Gregor McGill: Infrequently in summary-only cases, as these generally are.

Chair: Thank you very much. That is very helpful. I am going to hand over to Kenny MacAskill and I shall ask Maria Eagle to take the Chair, if I may, briefly, because I have to make a brief contribution in the Chamber, and I shall return shortly.

[Maria Eagle took the Chair]

Chair: Kenny MacAskill, please.

Q89 **Kenny MacAskill:** Mr McGill, may I ask you just generally what role the CPS plays in the charging and prosecution of these covid-19 offences under the single justice procedure? More specifically, what steps are you aware of the police taking before they decide to charge after a fixed payment notice period has elapsed?

Gregor McGill: The answer in respect of the single justice procedure is that the CPS plays no role in the single justice procedure.

Just so that I can let you know, under section 3 of the Prosecution of Offences Act 1985, in England and Wales the CPS takes over prosecutions instituted by the police unless those offences are specified. If they are

specified, they are allowed to be prosecuted by the police and go through the single justice procedure.

In respect of the single justice procedure the CPS only becomes involved—if a fixed penalty notice has been issued, has not been paid, the police have decided to issue a summons, they will take it through the single justice procedure. If the individual to whom the summons has been sent pleads not guilty, effectively it becomes a de-specified case. It comes to the CPS, which will review that case in accordance with the code for Crown prosecutors and will see whether there is sufficient evidence to prosecute and whether that is in the public interest. It is only at that stage that the CPS becomes involved.

Q90 **Kenny MacAskill:** I don't know whether you are able to advise on this: what steps have the police taken? Are you able to speak on their behalf about moving from the FPN payment period? We were discussing that earlier and it may be useful to know whether there had been any discussion by the police or with you about how long the penalties will remain extant as possible prosecution.

Gregor McGill: I cannot help with that because it is a matter entirely within the gift of the police, because they are the prosecutor in those cases. The decision about whether to translate those unpaid fixed penalty notices through to starting a prosecution to take it through the single justice procedure is entirely a matter for the individual police forces that have issued those fixed penalty notices.

Q91 **Kenny MacAskill:** I don't know whether if you are capable of asking this, but as a prosecutor, do you have any view about what time scale would be reasonable, and whether there should be one?

Gregor McGill: You will be aware that in legislation there is, generally, a statutory time limit. The police being the prosecutor in this case, they are required to bring a prosecution within six months of becoming aware of the full facts and having a file of evidence that they can determine. It being a summary-only matter, and a six-month time limit, you would assume that a prosecutor would want to institute any proceedings that they were going to institute within that six-month period. Otherwise, they would be statute-barred.

Q92 **Kenny MacAskill:** Thank you. Can you set out the role that the CPS plays in reviewing finalised cases involving covid-19 offences?

Gregor McGill: Yes, Sir. We were concerned that some cases were being improperly charged. We instituted a procedure in the middle of last year whereby we check every single finalised coronavirus legislation case. We checked 1,597 completed and finalised coronavirus offence cases between the end of March 2020 and the end of February 2021. We found that 465 were incorrectly charged.

Q93 **Kenny MacAskill:** What action did you take with regard to them?

Gregor McGill: We found that 213 of those cases were charged under the regulations. We ensured that every single one was returned to the

relevant CPS area to ensure that, if the case had to be returned to court to be amended and particularised properly or if it was simply withdrawn, we could do that. We found that 168 were simply withdrawn on the day that they appeared in court, because the prosecutor immediately picked up that they were improperly charged. There were 252 cases under the Coronavirus Act that were improperly charged, and they were all properly withdrawn. We are confident that we have reviewed every case that has come to us and we have taken appropriate action in every case to ensure that the right person has been prosecuted for the right offence, where necessary.

Q94 **Kenny MacAskill:** The evidence suggested that there were some common mistakes, such as wrong activation in the regulations. Were they pointed out, to ensure they were followed up on, as well as the review? There seems to be no progress or improvement in the incorrect charging of covid-19 offences. Was a policy direction being sent out?

Gregor McGill: We work closely with our police colleagues. In this jurisdiction, of course, the police investigate and charge; we have no power to direct the police to do anything. We work closely with our police colleagues, and I work closely with NPCC colleagues, to try to improve those matters.

It does look from the figures like fewer mistakes are being made, although mistakes are still being made. I think that is probably a result of the complexity of the legislation and the fact that the legislation has changed on so many occasions. The common mistakes, as you have pointed out, are often that the English regulations have been charged in Wales and vice versa, and that a charge has been put under the wrong iteration of the legislation. I think that is just a symptom of how many times the regulations have been amended.

Q95 **Kenny MacAskill:** Is there anything beyond that that could or should be getting done, as opposed to accepting that it is complex and that perhaps greater care needs to be taken, given the changing legislation, by the individuals who are drafting it?

Gregor McGill: For the way that we would normally do it—I make no criticism of anyone in saying this—these regulations came in very quickly because they had to. Generally, we have a lead-in time for us to train our prosecutors, and to train the police. The vast majority of these cases are police-charged cases. The speed at which they have come in has meant that we have not had the same amount of time as we normally have to prepare for legislation. That was a symptom of the way the legislation had to come in at pace, and over the past year, there really has not been a chance for our police colleagues in particular to train their officers sufficiently, I think, in those offences.

We have trained our prosecutors remotely. We were able to do a training session for all our prosecutors, which we rolled out across the whole country, and we regularly update our guidance, so that every time the regulations are amended, they get updated guidance as to what the new

regulations are. We carry out our check as an ex post facto matter, so that on a completed case, if there has been a concern or a mistake, we pick it up and rectify it, and we feed those back.

Other than that, and improving and finding time to do the training, I do not know what else to suggest.

Kenny MacAskill: Thank you. I have no further questions, Chair.

Q96 **Chair:** Before I move us on to Rob Butler's questions, may I ask for a point of clarification, Mr McGill? You suggested during your replies to Mr MacAskill that there was a six-month time limit on the offences that are charged under the covid-19 offences. Is that your understanding?

Gregor McGill: Under the regulations, yes.

Q97 **Chair:** Is it not the case that the vast majority of offences, either charged or for which fixed penalty notices have been issued, fall under the Public Health (Control of Diseases) Act 1984, and that there is no time limit of six months attached to offences under that legislation?

Gregor McGill: I do not know the direct answer to that question, Chair. I can find out as much as I can if you would like me to. I have been looking at the coronavirus legislation.

Q98 **Chair:** Okay, but there have been virtually no charges under the coronavirus legislation; they have all been under the Public Health (Control of Diseases) Act 1984. I understand that there is no six-month time limit attached to that legislation. I would be grateful for any clarification you might be able to produce for us on how you are proceeding in respect of those fixed penalty notices if most of them are being charged under legislation where there is no limitation. That does have a different implication than if they are being charged under legislation for which there is a time limit.

Gregor McGill: Can I clarify one matter, though, Chair? We play no part on the issue of fixed penalty notices—that is done entirely by the police. If a fixed penalty notice is not paid, then the police have to make a decision as to how they are going to proceed. If they decide to proceed, they often charge a case under the coronavirus legislation. As they are the prosecutor, it is entirely a matter for them what offence they charge. We play no role in the fixed penalty notice procedure at all. We only become involved if they ask for a criminal offence to be charged right at the beginning, or if they take a fixed penalty notice matter through the single justice procedure and that person pleads not guilty. Then it comes to the CPS.

Chair: I understand. We do know that payment has not been made for half of all the fixed penalty notices that have been issued. I see that our Chair is back so I will hand back to him, but not until I have asked Mr Butler to come in and ask his questions.

Q99 **Rob Butler:** Thank you very much indeed. I rather suspect we might know the answer to this, but I am going to ask the question so we can

put it on the record. Mr McGill, you have talked about the prosecutions that have been reviewed by the CPS because they were brought by the CPS. Would I therefore be right in thinking that you have not reviewed any of the single justice procedure cases because you didn't bring them?

Gregor McGill: That is correct, yes.

Q100 **Rob Butler:** Do you have a view as to whether or not any of them should be reviewed, given the concerns I think you will have heard expressed with our previous witness?

Gregor McGill: I cannot express a view on that, because for specific reasons they fall outside of our jurisdiction and it would be a matter for the police to determine, whether they should do that. All I would say is that if that was suggested, depending on who did that, it would be a significant resource requirement. I think there have been close to 90,000 fixed penalty notices issued, so there would be a significant amount of cases to look at. That would be a significant resource burden for whoever had to do it.

Rob Butler: In evidence that we have been looking at, Her Majesty's Inspectorate of Constabulary and Fire and Rescue Services provided a report on policing in the pandemic, which said, "A particular concern for some forces was the CPS decision to charge other offences in preference to coronavirus offences. This resulted in coronavirus regulation charges sometimes being dropped as they did not increase the length of people's sentences." Would you concur with that analysis?

Gregor McGill: No, I would not, although I do accept that on certain occasions there will be instances where the coronavirus cases will not be proceeded with. For example, if there was a night-time burglary of commercial premises where a defendant left his fingerprints at the scene and was identified, and that person had left their house in breach of the regulations and travelled to commit that burglary, the prosecutor would have to look at the totality of offending when deciding what to charge, and how to give the sentencing judge sufficient sentencing powers to deal with that matter.

So what the prosecutor may look at in those circumstances, irrespective of whether the person has previous convictions, is that the sentencing powers for night-time commercial burglary are up to 10 years' imprisonment. A prosecutor may say that the circumstances of the offence do not require a separate coronavirus offence charged, because the judge has sufficient sentencing powers there and it is an aggravating feature of the burglary.

On a slightly different iteration, if instead of leaving fingerprints there, the suspect was apprehended at the scene by two police officers, and when being arrested spat at the police officers and assaulted them, a prosecutor may then say that, looking at the totality of the offending, those assaults on the two police officers require separate charges because that might require a consecutive sentence. So the prosecutor may put two offences of

assault on an emergency worker on that. It does depend on the individual circumstances of the case.

What the prosecutor must do is look at each case on its own facts and give the courts sufficient sentencing powers. Does that help?

Rob Butler: Absolutely; it is very clear indeed. On a similar theme, I wonder whether you can tell us a little bit about how covid-19 has affected the way that the CPS prosecutes criminal offences more broadly.

Gregor McGill: It has not affected the way that we prosecute offences. The code for Crown prosecutors has remained the same: we look at each individual case on its facts, and we ask ourselves, "Is there sufficient evidence to provide a realistic prospect of a conviction, and is it in the public interest to prosecute?" Practically though, it has been very difficult, because with social distancing, it has been difficult to get our people to court. There has been a limit to how many people you can have in a court room and a limit to how many courts can be put on by HMCTS, which has caused, as is well known, a backlog of cases, both in the magistrates court—less so now—and in the Crown court. Our Crown court caseload now is about 70% higher than it was in the pre-lockdown period, and it will take a significant amount of time and resource to deal with that backlog. There are logistical changes to how we operate, but no change in the way that we actually operate our test or the way that we ask our prosecutors to make decisions.

Rob Butler: Thank you. That is very helpful indeed.

[Sir Robert McNeill resumed the Chair]

Chair: Thank you very much, Mr McGill. I am very grateful to Ms Eagle for taking the Chair briefly while I went to speak on a constituency matter in the Chamber.

Examination of Witnesses

Witnesses: Kit Malthouse MP, Lord Bethell of Romford and Lord Wolfson of Tredegar QC.

Q101 **Chair:** For the first time, we have a trio of Ministers before the Committee. We have had two before, but this is the first time we have had three. Welcome to the three Ministers: Mr Malthouse, Lord Wolfson and Lord Bethell of Romford, a seat that I represented on the Greater London Council many years ago, as I think Lord Bethell knows, when his father was still very active in politics too. It is very good to see you all, gentlemen. We will assume there is a social distance between their two lordships.

Perhaps I can start with all three of you, if I may. It is quite confusing for us and other parliamentarians, never mind members of the public, to work out at times who actually owns the regulations. They deal with

public health matters—in policy terms—and are frequently brought before the House by Ministers from the Department of Health and Social Care, but at the same time they frequently give significant powers to the police, so there is a significant policing element to them. Of course, they create criminal offences, which then come into the criminal justice system and are the responsibility of the Ministry of Justice. If somebody were to ask me, "Who is responsible for this set of regulations?", which of the three of you would be the person that I should go to?

Lord Bethell: I can start and then maybe hand over to colleagues. I will try to put it briefly, but the answer to that has evolved over time. At the beginning of the pandemic, the pandemic was very much owned by the Department of Health and Social Care, and the policy and impetus were very much driven from the Department. Our No. 1 emphasis was to try to take the population with us and to focus very much on providing guidelines to the public, believing that the British public would comply in the great British way in which they do. I am pleased to say that, in very large part, that is exactly what happened.

I would say, though, that competing layers of guidelines became difficult to understand. One of the great benefits of bringing guidelines into law is the clarity with which the legal process brings the thinking and advice from Government. As the pandemic emerged we actually found benefits from bringing guidelines into law so that the communication to the general public avoided duplication and could be consistent and clear in its messaging. That is one of the reasons why we began working more and more closely with colleagues from the MoJ and from the Home Office, and policy entered, as you know, into the COBRA and then into the Covid-O decision making processes. So the origins of a lot of policy began at DHSC but became more cross-governmental in their implementation. Since then we have moved, now, to creating the UK Health Security Agency, and it is envisaged that in the future UKHSA will play a really important role in public health policy, and the expertise and legal guidance, and the pandemic preparedness necessary to build a really good regime around this will come from UKHSA. That has been a really good development, I think.

Q102 **Chair:** Where will the ministerial accountability for UKHSA sit?

Lord Bethell: I am the Minister for UKHSA.

Q103 **Chair:** So ultimately they are answerable to you, and if we have a policy issue we go to you and the Secretary of State around that. So it is the Department of Health lead, as far as that is concerned. But then, Mr Malthouse, in terms of the role of the Home Office, to what extent does the Home Office have ownership of discrete policy areas in relation to this?

Kit Malthouse: First, thank you for having me and allowing me to appear from Chatham police station, where I have had a successful afternoon—it will be well known to you from a previous life. As Lord Bethell said, the generation of the regulations became much more of a partnership as time drew on, not least because we were learning as we went, particularly

about the impact of the regulations, but also what the impact was on policing on the frontline, and where we were likely to see issues arising that we felt needed enforcement.

So, for example, one of the phenomena which emerged through the early days of the pandemic was this issue of unlicensed music events—UMEs that were taking place particularly in large conurbations, where the police did not necessarily have powers to deal with those that they felt were impactful enough or commensurate with the problem that was emerging. What we found was that because we were in an almost constant conversation with the police about the regulations initially, as Jim said, coming out of the Department of Health, we were able to translate back through the system pretty effectively, and at speed, what the impact might be, into the collective decision making process, as the police signalled to us what they felt was going on in reaction to the regulations that came on board, and indeed to the real-life scenarios that police officers were being faced with. So we were able to be much more agile. That, obviously, was led by the Home Secretary through the normal situation and up into the various Cabinet Committees that approve these things.

Chair: I get that; but obviously some of the policy would involve public order issues—the creation in effect of a public order element, to put it that way, into certain of the offences, or offences which have a public order dimension to them. Given that you will want to make sure they are aligned with other relevant public order legislation, for example, who takes the ultimate policy decision there? Is that the Home Secretary, rather than the Secretary of State for Health?

Kit Malthouse: All these decisions are subject to collective agreement, so the decision was effectively taken—

Q104 **Chair:** But who drives it? Who drives that aspect of it?

Kit Malthouse: It is an ongoing conversation between, obviously, the police and the Home Secretary, who then make recommendations into the Cabinet Committee, but fundamentally that has to be blended with the observations and the requirements from the Department of Health around regulations to reach a collective decision through the Committee.

Q105 **Chair:** And who chairs the Cabinet Committee? Do you happen to know that?

Kit Malthouse: The XO I think was chaired by the Chancellor of the Duchy of Lancaster on the occasions that I attended.

Q106 **Chair:** Thank you. I had forgotten there is obviously Cabinet Office involvement, too, but we couldn't get four people around here for a Zoom, I suspect. Lord Wolfson, among other things you are the courts Minister. There is a clear impact on the workload of the courts and potentially, in the more serious cases, an impact on the prison system and other elements—not in the majority, but in certain more extreme cases, which may be imprisonable, there is clearly an impact on the

workload of the courts. To what extent is the Ministry of Justice involved and consulted on those impacts, and the nature of the criminal offences which are created?

Lord Wolfson: Our involvement, obviously, is that if a fixed penalty notice is not paid and we go into the single justice procedure, or another alternative procedure invariably in the magistrates court, my Department gets involved and, in particular, HMCTS. The critical point, as far as we are concerned, is that the single justice procedure is both appropriate and suitable for these offences. The alternative would be, as your question implies, to overwhelm magistrates courts with these offences. We get involved with the back end of the process, you might say, when it becomes a court issue.

Q107 **Chair:** I do not know whether you heard Ms Higgs, the chair of the Magistrates Association, earlier?

Lord Wolfson: I am afraid I did not.

Q108 **Chair:** She sits as a chair of a bench herself. Her experience was that she has seen little of these events coming through the single justice procedure, which is perhaps surprising in practice. Does that surprise you?

Lord Wolfson: Over the period, there has been a change in whether the offences go through the single justice procedure, because they have to be certified by the Attorney General. I can give you the timeline as to when that applies or not, and it has applied to certain regulations at times and others at other times. The bulk of the work through the single justice procedure, we believe, has worked extremely well. It may be that some areas have seen more of it than others. I can give you the figures overall of how it has operated. The important thing about the single justice procedure is that the alternative—to have a full hearing before a bench of three magistrates—would be massively resource intensive and could overwhelm the magistrates courts. This is the same procedure used for lots of other fixed penalty notice-type offences.

Q109 **Chair:** We heard that the percentage of unpaid fixed penalty notices for coronavirus offences is significantly higher than for the norm. We also heard that the six-month time limit for bringing prosecutions for non-payment of fixed penalty does not apply—was specifically disapplied to the coronavirus legislation. Does that raise the concern that there is risk of a backlog building up which may, if not overwhelm, put that significant pressure on the courts of which you referred?

Lord Wolfson: Of course, we have to keep an eye on that. I do not believe, at the moment, that there is a risk of a significant backlog of these offences overwhelming the courts. Looking at the figures, for example of those who plead guilty, plead not guilty or do not respond for notices in this area, they are not a million miles away from the general figures for other fixed penalty notices. We have to remember that we are dealing with new offences, it is novel for people, and, frankly, in the middle of a pandemic, everybody was learning. When we look back, we

should not forget something that is easy to overlook—that throughout this we kept a justice system operating. I know that we might take that for granted, but we should not. To keep a justice system operating during a pandemic was no mean feat, but we did it, and the single justice procedure was a large part of that.

Q110 **Chair:** I wonder whether any of you gentlemen could help on the rationale for excluding the normal six-month time limit in which a prosecution must be brought for non-payment of fixed penalty notice? It is a departure from the normal approach, so there must have been some underlying policy consideration for that. Can anybody help on that?

Lord Bethell: Chair, I do not think we have that to hand, but we will write to the Committee with an answer, if we can reach for one.

Chair: Of course, but I just wondered if you might remember a sub that came through to you with that on it?

Lord Bethell: I am afraid there was quite a lot going on at the time and that particular sub escapes me right now.

Q111 **Chair:** Mr Malthouse, you are well acquainted with these matters as Policing Minister—nothing rang a bell with you about a submission?

Kit Malthouse: It is a very good question, Mr Chairman, and I am racking my brains to remember why. If I had to guess, I would think that it was possibly to do with the ability of the courts to process numbers. Initially when these things were brought in, frankly, we didn't know how many fixed penalty notices were likely to be issued, or what the volume might be. I have to confess I am guessing; I can't remember, to be honest. There were so many bits of paper that came through at the time. However, I am sure that, as Jim says, we can come back to you with that.

Q112 **Chair:** Okay. And Lord Wolfson, are you going to rely on an alibi—"I wasn't in the Government by then?" *[Laughter.]*

Lord Wolfson: I certainly do have that alibi, but I wasn't going to rely on it. I am afraid, Chair, that I was going to take issue with the premise of the question. I must admit that I hadn't picked up—let me put it that way—that the six-month limit was automatically disapplied. I am aware that there are cases where the prosecutor finds out about the offence more than six months later, and in those circumstances the six-month limits can be disapplied. But are you putting to me that the six-month limit has been disapplied generally?

Q113 **Chair:** We are informed that in a significant number of cases—it may not be right to say "generally"—they are disapplied. And that would be in itself unusual.

Lord Wolfson: I am wondering whether we might be slightly at cross-purposes. I wonder, therefore, that what might be the case is where there is a significant number of cases where the prosecutor is bringing the prosecution late, rather than there being a change in the law—in other words, the ability to bring the case after six months, if you find out about

it after six months, is being relied on. We will write to you, but I wonder whether—

Q114 **Chair:** I just wonder, because—as I am sure you will know, and certainly those of us who practise in the criminal law will know—generally there is a presumption that you will bring the case within six months of the offence coming to your knowledge. And there may be perfectly good reasons why that wasn't applied in certain cases. But I am just interested in trying to find out why that was, because you would imagine that would be flagged up, as I was saying to your fellow Ministers, in the subs.

Q115 ***Lord Wolfson:*** I think, Chair, that is my answer—that I don't believe there has been a general disapplication of the six months. I think the issue is that where offences have come to the knowledge of people after six months, then, in those cases, it would be disapplied.

Q116 **Chair:** Okay. Well, if you are able to find out more on that, then I am sure we would be very grateful to you, just for the sake of clarity, because it has caused some confusion to people who have given evidence to us and to others who have been in contact with the Committee. It would be very helpful to know in relation to that.

Are the Law Officers consulted at all about the appropriate levels of penalty, or other related legal matters, or not? Or does it essentially go through the Ministry of Justice?

Lord Wolfson: It is not my understanding that the Law Officers are consulted.

Q117 **Chair:** Fair enough. That is helpful enough.

Just thinking about it, Lord Bethell made the point that there was a desire to make sure that the messages were clearer, in a move from guidance to creating offences, in effect to put it on a legal basis rather than a guidance basis. Socially distanced, as you are, in the same office, are you currently complying with law or guidance?

Lord Bethell: We are—well, social distancing is in the steps regulations. That is in—

Q118 **Chair:** Is it the law or is it the guidance?

Lord Bethell: That is a bit of a pub quiz, but I think it is in the steps regs, which came through in January, and therefore it is in law. So, it is totally unambiguous.

Q119 **Chair:** The only reason is that, because all of us have to think about that—perfectly understandably—for a few minutes to get there, I reckon that the member of the public may well have to think about that as well, and it raises the issue from a rule-of-law point of view about law being certain and the basis upon which certain behaviour might be criminalised being certain. That is the serious point behind the pub quiz-sounding question.

Lord Bethell: If I can build on the gist of what you are getting at—at least, I think I understand it. You make a very good point. This was one of

the challenges that we faced in February and March. We found that we had inadvertently created layers of guidelines so that even the most diligent person, if they went on the internet, could find contradictory guidelines on the same matter. One of the benefits of putting things into law is that that duplication and contradiction is stripped out, because the system of law ensures that that does not happen. On the point that you asked and on any other point, were you to give me 30 seconds on the internet, I could get to exactly the right answer. That was a problem, I think, at the beginning of the pandemic. It is one of the reasons why we moved the way we did.

If I may just emphasise, a lot of the regulations that we brought in were under the Public Health (Control of Disease) Act 1984, so they were not public order offences.

Chair: Thank you very much. I call Andy Slaughter.

Q120 **Andy Slaughter:** It is an interesting view that we need more legislation so we can know what it says. I must admit I thought that save in specific circumstances, in the hospitality industry and so forth, that social distancing was guideline rather than regulation. But I want to ask about legislative scrutiny. We did not introduce the first lockdown until we were in the middle of the pandemic, so I think there was a wide acceptance that quite extreme restrictions on people's liberty were necessary and the process had to be very swift. That is over a year ago and we are still using the urgent procedure, and in the interim we have had many, many different layers of regulation to the extent that in some cases Parliament was discussing one set after another set had already come into effect. That must surely bring matters into disrepute. I don't know which one of you is best placed to answer this, but why are we relying on the urgent procedures still?

Lord Bethell: The Public Health (Control of Disease) Act 1984 is the piece of legislation that Parliament has given us in order to bring about these measures. It was updated after SARS-CoV-2 to bring in the precise arrangement that we are using today, which is the affirmative procedure to bring in restrictions such as the tiering and pandemic response procedures. That was done very thoughtfully at the time, so we are using exactly the legislation in the way that it was designed to be used, and it has proved to be as agile as was needed to be able to give us the kind of response that we needed from an epidemiological and pandemic point of view, and also to take it through Parliament.

This has been a very long pandemic, and your point, Mr Slaughter, is entirely right. We are still implementing extremely onerous regulations on people a year in, but they have been through Parliament, and Parliament has been able to sit. What we have sought to do is to use the tools that were available to us in the way in which they were intended, and I think that that was the right approach.

Q121 **Andy Slaughter:** You will remember Sir Jonathan Jones from his time in Government until recently. He gave evidence to us last week and he said,

"legislation very often has only been made available and has only been published with very little notice…there has been no meaningful parliamentary debate or scrutiny before the law comes into force." I am not sure I accept the answer you have given us so far, but nobody else wants to answer it. Why are we still rushing matters through in the way that we are and making changes with only a patina of parliamentary scrutiny?

Lord Bethell: I have taken more than 200 regs through the House of Lords, so I can give some account to that. I would slightly disagree with his analysis. On the question of debate, having been at the receiving end of those debates, I can tell you that they have been extremely forceful at times. They have held the Government to account, and we have been highly influenced by the debate. When we draft policy, we have it in mind that it needs to be taken through Parliament, and the influence, challenge and scrutiny of Parliament is very much brought to bear. I can tell you that it has been very emphatic at times.

In terms of the timing of the regulations, that has been in part in the hands of the party managers—the usual channels—who are in charge of the sequencing. That is outside the control of Ministers. I would also add, though, to be on the level with you, that the virus has changed at short notice without giving us very much warning of its intention, and some of our measures have worked well or badly to a surprising degree.

I was reminded of that yesterday: when we brought through the pharmacy regulations we brought in a pilot on the distribution of tests through pharmacies and it had been massively more successful than we had previously thought. It was certainly much more successful that I had thought it would be, and therefore we sought to get behind that and to really expand it dramatically. That required regulations to tweak some of the arrangements around our relationship with pharmacies. That had to be done at extremely short notice. It was regretful, and I regret that we had to surprise Parliament with regulations at short notice, but it was not through lack of planning or strategy or grip on the part of the Government; it was because we were trying to get behind a successful measure.

Q122 **Andy Slaughter:** I am sure that both Houses do the best they can in terms of scrutiny, but it is quite difficult to do that if—I have been in this position—you are sitting on an SI Committee talking about regulations that have already been superseded. Government delay in making decisions to bring matters in is very much in the news now. They do not need to publish regulations only an hour before they come into effect. What have you thought about over the last year to enable Parliament to do its work of scrutiny better? It seems that you are saying, "Que sera, sera."

Lord Bethell: I am going to hand to my colleague in a second, but I absolutely do not take the point of view of, "Que sera, sera." I have a huge amount of gratitude for the scrutiny that Parliament has brought, and it is undoubtedly the case that when we have had the opportunity for

meaningful debate and scrutiny, the scrutiny of parliamentarians has improved regulations—it has improved their accuracy and thoughtfulness—and wherever possible we have sought to do that.

On things being published sometimes at the very last minute, I have complete sympathy with your point. It is extremely frustrating for parliamentarians. But can I just reassure you that the cause of that is an absolute commitment on the part of officials to table regulations under very difficult circumstances that do not have errors in them, that have a very large amount of cross-Government sign-off and that are the best they possibly can be for the debate? This is not caused by either a sloppy attitude or a conspiracy on the part of the Government; it is trying to make the most of the situation that we are in.

My approach, candidly, is that we have the tools at our disposal, and we are still in the middle of a pandemic. It might not feel like that today to some people, but I assure you that we are still very much focused on trying to get rid of the disease that we are fighting at the moment. There may well be a time when victory has been declared and we can step back and reflect on this. I gave evidence to the Constitution Committee of the House of Lords, who are looking at emergency legislation and will be bringing forward recommendations on that. That, to me, feels the right time to try to change the system we have got.

Q123 **Andy Slaughter:** I take that point. One final question, if I may, which maybe more for Lord Wolfson. If Parliament is prevented from doing its job properly, a fall-back position is then to rely on judicial review and the courts looking at the regulations that have been passed. You are currently undertaking another review of judicial review, with some quite fundamental reforms about prospective-only remedies and ouster. Is that not going to limit the ability to challenge emergency legislation in this way?

Lord Wolfson: That is subject to consultation. The first thing I should say is that we welcome involvement from everybody to respond to the consultation. The judicial review proposals will give the courts more tools in their toolbox. At the moment, there can be quite a blunt choice for a judge between the regulation being struck down ab initio—if I can still use the Latin—or not doing anything at all.

So, the ability to act prospectively only, in suitable cases and with suitable safeguards, is something that we think is worthy of consideration. That is why it is in the consultation. With respect, I would not draw a line from these regulations to the review of judicial review. The question of parliamentary oversight is one issue; the question of judicial review is another.

Let me come back to the substantive issue of parliamentary oversight. The regulations that we are talking about here are not MoJ regulations. The MoJ does not sign off on all criminal offences across Government before they are put into effect, obviously.

Let me give you an example from something that was looked at by the MoJ. There were a number of regulations, as you know, dealing with eviction during the pandemic, to try to strike a balance between renters and landlords. One of the criticisms I had was why have you got such a short time period for these regulations? Why don't you give people greater notice of what is going to happen over the next few months? The short answer is that we don't know what the pandemic is going to do over the next two or three months.

There were debates where I was able to give forward notice to the House of where we were going to go. Even if on 8 March we were debating regulations that would terminate on 31 March, I would give notice as to the new SI we were going to bring in place, so people did have some forward notice. You can do that on some occasions; you cannot do that on others. As a group, we have tried to ensure that we have given proper notice of all regulations, so that you can have proper parliamentary oversight.

Q124 **Maria Eagle:** I have had the same experience as Mr Slaughter, in that I have also sat on SI Committees technically scrutinising something that has already been superseded by regulations that have come into force, which makes a farce, in my view, of the concept of scrutiny by Parliament. That is not something that we should be seeking to replicate in any way if it can be avoided. It can have other implications, can't it?

Can I ask Mr Malthouse whether he believes that those responsible for enforcing the rules and the law—the police—have a clear understanding of what conduct is criminalised by the covid regulations?

Kit Malthouse: I believe they do, although it was evident in the early days of the first lockdown that the regulations and the law could only take us so far. It was extremely difficult to embrace, in the variety of regulations, the entire nuance of human existence. In the initial period, we found that after each stage of the regulations there was a bedding-in period where the police and the public would reach a settlement, if you like, about how the regulations should be interpreted.

We tried very hard to keep up a constant conversation with the police and, through them and the College of Policing, to issue guidance to the frontline as swiftly as we could, certainly latterly before regulations came in. We were moving at such speed in the early days that often the guidance would come in shortly thereafter. One of the innovations that the college brought in halfway through the first lockdown was a set of real-life scenarios that could be presented to frontline officers as part of the guidance so that they would have an idea about where they went.

If you remember, a number of those teething issues hit the media in a big way. There were the two women who were having a cup of coffee in a park in Derbyshire. The one that was open to question in the first lockdown was whether driving to walk the dog was acceptable. There was a variety of nuances of human existence that required a bit of common sense on both sides, but I think in the end we got there.

Q125 **Maria Eagle:** Do you believe that that was the case for the public as well? Did they have a clear understanding of what activity was criminalised by the regulations?

Kit Malthouse: For the most part, yes, and we see that, frankly, coming through in the numbers. You had a conversation with the witness just before us about fixed penalty notices. If you look at the scale of fixed penalty notices—90,000 or so against a population of 60 million people—it is a tiny number of people who contravened to the extent that enforcement was necessary.

Of course, the police posture—the famous four Es—was designed to allow an element of education, if you like, of the public about what they were doing and whether it was correct, and to give them the space to comply if they weren't complying. I think, broadly, that most people did.

There were some nuances that caused some different interpretations. I did a media appearance where the issue of staying local was discussed—what does local mean? Well, local, if you are walking, means something different from what it means if you are on a bicycle. It means something different if you are living in the Scottish highlands from what it means if you are living in central London. Those kinds of interpretations caused some, shall we say, discussion among the public, but in the end I think most people got the broad thrust of what we were trying to do.

Q126 **Maria Eagle:** Do you accept that some of the fixed penalty notices that have been rescinded or charges that have been made and then dropped have come about as a consequence of a lack of understanding of what the law was, and perhaps of using guidance rather than law? Is that an indication that, in some instances, the police and the public do not have a proper understanding of what conduct was criminalised by the regulations?

Kit Malthouse: It is hard for me to say that, because obviously the fixed penalty notice system allows for individuals to make representations to forces about mitigations as to why they incurred the fixed penalty notice. The force, at their discretion, can decide whether to pursue or not. They can decide they are not guilty and not contest it. Obviously, the FPN goes through quite an extensive checking system, both at force level and at ACRO, then back again at force level if it is not paid. Then, although there is not a formal appeal, there is the possibility to make representations to a force about what the mitigations might be.

I don't know how many of the number that have been rescinded were because of error by a police officer—that may well be the case, and certainly in the case of the famous two women who were having a cup of coffee in a park in Derbyshire, the force withdrew those fixed penalty notices—and how many were because of legitimate mitigations on behalf of the recipient of the FPN. If your question is whether the police have made a small number of errors at the front end, yes, of course. Could there have been a number of people who had legitimate mitigations for incurring the FPN? Absolutely. But we have reached a good understanding.

As I say, the overall number of 90,000 against this huge population—bear in mind that we issue over 1 million fixed penalty speeding notices every year—indicates the scale of the success.

Q127 **Maria Eagle:** Her Majesty's inspectorate of constabulary and fire & rescue services has produced a report, "Policing in the pandemic", which states that "the pace of change in legislation and associated advice was a problem." Do you accept that?

Kit Malthouse: I do accept that we were moving very, very quickly and intense work was required for the policing guidance and promulgation of that out to the frontline, to keep up with the speed of legislation. And certainly we found, in the early days, when we were necessarily, because of what Jim Bethell said, moving at high speed with a virus about which we knew very little, not least its lethality, that an agility was required that took a little bit of time for policing to catch up with. We did have circumstances where regulations would come in and guidance would follow a few days later. We got, latterly, into a better situation, but it did require a constant conversation. I and the Home Secretary were on daily calls with the National Police Chiefs' Council, their Op Talla team, and with officials from the Home Office, in the morning, to make sure that if there were issues or problems that we could help with, we were able to be briefed on them. Yes, speed was a challenge at the start, but I think that was true for everybody.

Q128 **Maria Eagle:** The same report also says: "Some forces expressed concern that they first heard of certain changes at the 5pm daily televised government briefings." Do you think that is acceptable, and do you think it was avoidable?

Kit Malthouse: I don't think it was necessarily avoidable, given the requirement for speed at the start. Don't forget that the primary objective—I am sure Jim will back me up on this—was to communicate to the public about what they needed to do to keep themselves, their families and their communities safe. The reason for that 5 o'clock or teatime press conference was to do exactly that—to have a moment in time when, frankly, millions of people could tune in and hear the message direct about what changes were going to be made, sometimes in the next few days or few hours.

Following that—either shortly thereafter or as soon as we could afterwards—I would hold calls with chiefs collectively, and with police and crime commissioners, to explain to them what was happening, what was coming, to take their questions and issues and to try to get them to cascade that information out. At the same time, Op Talla at the National Police Chiefs' Council, working closely with the College of Policing, would be beavering away to get the guidance ready, to fire it out as quickly as we possibly could.

But the primary communication was to the public, and the lack of coincidence, sometimes, between the regulations coming into force and

the guidance following—while the gap was a few days, the urgency was for the public to amend or change their behaviour, and the vast majority did.

Q129 **Maria Eagle:** Lord Bethell, Mr Malthouse has just explained how, from the Home Office's point of view, there were ongoing discussions, consultations and meetings with police forces, which after all did have to implement the regulations and the changes that were being made. The report that I have been referring to states: "Op Talla provided evidence to us"—those who produced that report—"that its access and influence with the Home Office didn't extend to the Department of Health and Social Care", so were Ministers in your Department talking closely to the police and understanding what the implications of your regulations and guidance would be in terms of enforcement?

Lord Bethell: As Kit explained quite well, there is cross-Government co-ordination through the Covid-O mechanism, so these decisions are not made unilaterally—or at least they haven't been since, I think, around July last year—and as a result a large amount of paperwork and consultation is brought together by the Cabinet Office to ensure that this kind of co-ordination works well. So at the Department of Health, we would rely on that system to get a lot of feedback, through the Home Office, from the police force.

We would also get feedback through the Government Legal Service, which is well co-ordinated, and the Government Legal Service in DH would be talking to the Home Office Government Legal Service. That would be a useful source of intelligence, but no, it is not the role of the Department of Health to engage with the police directly: that would be for the Home Office to do. We would be brought in to talk to not just police stakeholders, but the very large number of stakeholders that would be affected by a major regulatory change, and that would include MHCLG, BEIS, and the devoled Administrations. All those were channels that we communicated actively through, and when they raised questions, we often published substantial FAQs—sometimes dozens and dozens of pages—in order to answer specific, detailed questions, exceptions, and specific concerns.

Q130 **Maria Eagle:** So we have the law, which is changing frequently, repeatedly, and often before it has been scrutinised by parliamentarians. We have guidance that does not always reflect the law—sometimes it is more ambiguous, and it does not reflect what the law actually says—and then we have reams and reams of frequently asked questions and Q&As that you are sending out as well. Is it any wonder—this is a question for all the Ministers, really—that there has been confusion, wrongful charging, and a general lack of understanding among the public about what on earth is lawful and what on earth is not?

Kit Malthouse: I understand what you are saying, but I am not sure that the numbers necessarily illustrate that. There is no doubt that we had enormous and much more successful compliance than we expected. The compliance, certainly in the first lockdown—I am sure Jim will back me up on this—was significantly ahead of what the expectation was at the time.

The very small number of fixed penalty notices and the largely good-natured engagement between the police, who did an incredible job in difficult circumstances, and the public illustrate that most people got it. It was summed up for me by that fellow—I think he was a plumber or an electrician—who appeared on the TV in the autumn of last year, who was pilloried for saying, "Look, most people get it." Actually, they did.

That does not mean that there was not some discussion about the interpretation, as I said: about what was meant by "local" or whether people were a bit foxed about whether they could drive their car to go and walk their dog at a local beauty spot, or some of those issues, but I think it is worth remembering what I said at the start. You as a senior legislator will know, because you have been at this game for a long time, that we are constantly adjusting legislation in the House of Commons to embrace human behaviour, because it moves, adapts and changes. There are aspects of human behaviour that you just cannot embrace in legislation, and it was in those areas where there was some nuance and difficulty and, frankly, co-operation required, which is broadly what we saw the British people do in their millions.

Lord Wolfson: Can I just add to that? If I can just pick up the phrase "people got it", I think people did get it. Between August and November last year, the percentage of defendants who pleaded "not guilty" when they received a single justice procedure notice was 4%. To put that in context, if you look at 2019—that is, pre-pandemic—and traffic and transport proceedings, 2% pleaded not guilty, so we do not have a raft of defendants who received a single justice notice and said, "Just a minute. I didn't do anything wrong. I've been sent this for no good reason." I would endorse that approach: most people understood what was required, and understood when they were within the rules and when they were outside them.

Q131 **Maria Eagle:** Lord Bethell, anything to add?

Lord Bethell: No, I think Kit and David put it well. The only thing I would add is that your characterisation gave the impression that it was the Government changing the whole time, confusing people. I would just like to emphasise the obvious point that it was the virus that kept changing, and we have a health emergency. At various times, different things were working and different things were not, and lots of people were dying. What we did was try to save lives, and that is what drove our actions. It was not in any way a deliberate attempt to confuse the public.

Maria Eagle: Thank you, Chair.

Kit Malthouse: Chair, may I come back on the police engagement piece? It is worth saying that while I acknowledge what was said in the HMI report, it would be wrong to get the impression that the police were not engaged at a number of levels. Obviously, there was the Home Office constant conversation and there were daily meetings, and senior police officers met on a regular basis with the Prime Minister to talk about these issues. Of course, the joint biosecurity centre—where there were meetings

about local measures, infection rates and all that kind of stuff—was taking place. Obviously, I had regular calls with chiefs and police and crime commissioners, as well as the ongoing engagement. We were joined at the hip, frankly, for much of it. The HMI report obviously covers only up to November last year, and we have seen significant improvement since. We were learning as we went, but they definitely were able to make their voices heard.

Chair: Thank you very much.

Q132 **Rob Butler:** On the same theme—I will not labour the points for too much longer—Mr Malthouse, perhaps I could pick up where you were, in terms of the police on the frontline. I had some police officers contact me as constituents. They were concerned that they were sometimes being asked to enforce guidance rather than enforce the law. I wonder whether you felt that was a widespread challenge that needed to be addressed at some stage in the process.

Kit Malthouse: I do think there was a question about what is law and enforceable, and what is guidance. Of course, given that the first three of the four E's covered both the regulation and guidance, it is possible to see a misinterpretation whereby people might go on to do the fourth E around something that was guidance only. However, I think there was some confusion about that as well. For example, at one stage there was no ban on travelling, although the guidance was that you should not travel, but there was in regulation a restriction on the reasons you could be out of your home. It was perfectly possible for you to go to Euston station or wherever, get on a train and travel hundreds of miles. You were going against the guidance but, actually, the offence you were committing was being outside your home for a reason other than the seven reasons, or whatever it was, that were possible. There was a possibility for guidance and regulation to coincide in the same event but for the police possibly to have the two in their minds.

Q133 **Rob Butler:** You mentioned the concept that people got it, as did Lord Wolfson, but I wonder whether the degree of compliance was because people were worried that they were breaking the law, when in fact they might not have been—it may have been guidance, and they were almost too strictly interpreting guidance—or whether, indeed, that matters at all. I would be interested both in your view, Mr Malthouse, and in the view of Lord Wolfson from the Ministry of Justice perspective.

Kit Malthouse: It is hard from me to read their minds. From my point of view, the compliance was frankly astonishing. Tens of millions of people recognised our individual duty towards our collective health, and they stayed at home. They grumbled about it and were fed up about it—maybe we all were—but in the end, they all got it. The very small numbers of people who transgressed were largely dealt with by the first three of the four E's, and then an even smaller number were eventually enforced against. To me, that looks like success. I am the Policing Minister, right? So I am indifferent as to whether they did it because of the guidance or the regulations—I am just glad they did.

Q134 **Rob Butler:** Lord Wolfson, do you have a view on that—whether people were behaving one way because they feared they might be breaking the law, when in fact they wouldn't have been, or does that not matter, because it was for the greater good of public health?

Lord Wolfson: From a strict legal view, of course, the law is the law and guidance is guidance—it is not the law. That is important to state. You can only be charged in a court or convicted of breaking the law if what you have broken is the law and not guidance. However—it is a very important "however"—in this context, I think the guidance played a very important role, not least because the legislation had to be drafted quickly.

Let me give you an example to concretise the point. The original legislation provided that you could not leave your home without a reasonable excuse. That would mean that it wouldn't be an offence if you left your home to go shopping for necessities, but once you were out, you decided to hold a barbecue on the village green. I would venture to suggest that nobody but a silk from Lincoln's Inn would take the view that that was permissible. The reason that, if I may say, the ordinary person took the view that obviously that would be against "the law" is because the guidance made it very clear what the aim of all of this was.

Now, the law caught up on 22 April, when the offence was changed to leaving or being outside the home, but I think that is a good example of how the guidance actually played a very important role of sending a message. I wouldn't normally see the job of the criminal law as to send messages, but, actually, in the middle of a pandemic, the law is doing two functions. It is trying to make sure that people behave properly in a sense of obeying the law, and it is also directing people as to the sorts of sensible behaviours which they should be undertaking. I think that is a valid approach.

Q135 **Andy Slaughter:** Can I come in briefly? I wasn't going to, but I was a bit worried by those last answers. I am sure we all agree that the public have behaved remarkably and that we want people to follow the guidance—just as we want them to follow the law. That is taken as a given.

I agree with what Lord Wolfson said initially, but I think he went off-piste. I don't understand what Mr Malthouse said. We are not social scientists; we are the Justice Committee. We are interested in the law and whether the law has credibility and whether it is followed.

The Institute for Government told PACAC that, "The government published guidance which misrepresented the law, for instance, telling people when they could only exercise once a day when the…law did not, telling people that they could not travel for exercise when the law did not, and telling people that they could only leave home for certain specified purposes, when in fact those purposes were just examples in the open category of 'reasonable excuse'." This went seriously wrong, didn't it? And you don't seem to be worried about it.

Kit Malthouse: I don't think it did go seriously wrong for the vast majority of people in this country. As I say, most people complied. From my point of view, both the guidance and the law had a purpose and that purpose was achieved, and sometimes that purpose would be, I guess, indivisible. To me, as a lay person—I am not an esteemed lawyer like you—the difference between the two wouldn't necessarily be apparent to me immediately.

I am trying to think of a parallel. If you look at speeding, for example, speed limits are not a target—they are a point above which you incur an offence, but below which there is still an expectation in guidance that you would drive responsibly and safely. The vast majority of people on the roads do, but if you go above 70, you pay a fixed penalty notice. The same is true here. There was general guidance about behaviour and then regulations in law, which could be enforced, but both of them come together to enable us all to drive or live safely during a pandemic.

Andy Slaughter: We could go on, Chair, but I am not sure it is going to take us much further—

Kit Malthouse: As I say, I am not a lawyer. I leave that to your much greater brains than mine.

Chair: We will not go into that field of debate, because we don't have enough time for wide-ranging topics of law. I would like to come on to Dr Mullan.

Q136 **Dr Mullan:** Thank you, Chair. I am sure there is a diversity of views on the Committee about the points you have made about the justice system being maintained, overall, us achieving our objectives of overall having people comply. Personally, I am not bothered if someone did not do something that they knew was against the law, but it was just against guidance and they could have got away with it. I can live with that. Let us remember that miscarriages of justice take place in completely ordinary circumstances, with all the safeguards in place, so the idea is that in the midst of a pandemic, the odd person might end up with an FPN which is perhaps not ideal—again, we have to be realistic.

It is important, however, that we explore the fact that FPNs are perhaps typically used—or almost exclusively used—for offences that are black and white, in the sense that there would not be much arguing about whether or not someone committed an offence. So, we have used a method of enforcement that is not suited naturally to regulations and laws that have, as we have discussed, more—*[Inaudible.]*. The Committee has been drawn to figures that highlight a very high number of outstanding FPNs, certainly in terms of payment and numbers.

For example—*[Inaudible.]*—police issued fines for £3.5 million, but have received just over £0.5 million. *[Inaudible.]*—understand is why is that. Is that typical for FPNs, in terms of the non-payment over the time involved? Is that because people have been contesting them, which would be important for the courts? Is it the sudden progression of these cases to magistrates courts? Do we have an understanding of the

outstanding fines—why they are outstanding and what is likely to happen to them?

Chair: Who wants to take that one?

Lord Bethell: We think it is one for Kit.

Kit Malthouse: Do we? Okay. That's fine. FPNs were, I think, selected because they are a known science. They are a familiar part of the landscape and are proportionate in terms of us dealing with human behaviour. From speeding to dog fouling or littering, an FPN is an easy and quick way to make an enforcement point that we felt would be recognised and understood by the public.

Anecdotally, as we heard earlier, the payment rate is broadly not dissimilar to where we see ourselves with other FPNs. We will have to see how the remainder make their way through the SJP. I think we have had about 5,000-odd, from memory, through the SJP, or something like that—out of the 94,000-odd. As I say, a number will be on their way to and from ACRO, in review at force level for the first and second times, and subject to representation by individuals—but I do not have those numbers for you, I am afraid. There will be a bit more time before we see the final shake-out.

As I said, though, in terms of the familiarity of the public with the method, it seemed to be the best way. To be honest with you, other than there being a specific crime committed, which would be that much more of a palaver for the courts, it seemed like a good and efficient way to deal with the problem.

Q137 **Dr Mullan:** Yes, I agree. I am sure there were many alternatives, but it is highlighting that sense that even though FPNs might have been the best of the available options, they are not naturally a fit for some of the offences that we are dealing with. I recognise that you talked about how, anecdotally, there is no sense of anything unusual happening with them, but I feel that the Committee would be reassured if there was a better handle on that. Do we know for certain that there is not a whole load of people contesting them?

Lord Wolfson: I am sorry, but there is a bit of a delay on the screen. Penalty notices for disorder, which are another sort of FPN, are used in cases of public disorder or criminal damage. I would suggest that the nature of those offences and of the defences that might be raised are likely to be more complex than the sort of defences to a covid FPN. Most people will know, "Were you there?", "Was it you?", "Were there six of you?", "Were there four of you?", "Were you inside or outside?"

Q138 **Dr Mullan:** I accept that, but the difference is that the police and the courts were very well versed in the law and practice in relation to those offences. Yes, there is some subjectivity in some FPNs, but decades of experience and cases enable the police to understand, in reality, what would make up a successful FPN, and more importantly, the legal advice that would be given to individuals that might make up a successful

appeal. We are dealing with brand-new law without much precedent. That is why we seek a better understanding of exactly what is happening with these.

To us, it seems that there are a large number of fines outstanding. The Committee is separately looking at, as you will be aware, the strain on the justice system, in terms of backlogs and all those other things, so we need to have an idea of whether, down the line, problems will be forthcoming. Do you feel that the public have a good enough understanding of this area and the subjectivity and their ability to contest these fines? There is this process for sending it back to the force, but it is not really described as an appeal. I am not sure it is clear to people that it is down to discretion—that they could just say no and wait to see whether the police choose to push it to a prosecution.

Lord Wolfson: The FPN is not an MoJ issue; it is a Home Office and police issue. The next letter in the scheme, if I can put it that way, if you do not respond to the FPN is that you are sent the single justice notice. I asked to look at that myself, and if I may say, that is clarity in drafting. It makes it very clear what your options are, what you can do, what you do not have to do, the implications of—

Dr Mullan: I appreciate that.

Lord Wolfson: The court service at that stage did a very good job of telling people what their rights were.

Q139 **Dr Mullan:** I think it is that in-between stage. Not everybody's case gets on the front page of the *Daily Mail* website and has the police look at it again. That is the simple way to put it. I can understand that there is maybe a sense that you do not want people to feel as though they have a really good chance of appeal; you want them to feel as though the police will typically make the right choices. It is not good for civil order to have a sense that FPNs should be challenged left, right and centre just for the sake of it; people must have some grounds. As I said, these were areas of uncertainty, and I am not sure that people necessarily understood how to get the police to look at their case again, aside from the odd case that got in the media.

Kit Malthouse: Obviously, the individual force is responsible for the FPN and then the notice to prosecute and what have you. I think it is worth saying that the FPN system was designed to be relatively light touch. There is a big discount for early payment. It has to go quite a long way before one is issued. A relatively small number per force were issued. I acknowledge that to quite a lot of our fellow citizens £100 is a lot of money, nevertheless it is not a huge sledgehammer of a penalty designed to encourage compliance.

Much of the notion behind FPNs is almost a psychological game. We put up dog fouling notices everywhere that say someone will be issued with an FPN, but in fact, if you look at boroughs across the UK, hardly any of them ever issue one of these things. They just never get issued. It is a psychological game that is being played. While I understand that your

Committee will naturally be concerned about the integrity of the system, I do not think that, as yet, we are able to point to anything unusual about covid FPNs that we do not see with other FPNs. That may well emerge as the data becomes clearer and as we are able to collect the data from individual forces, but for the moment we do not necessarily see anything different with this FPN from the others.

Q140 **Dr Mullan:** In terms of the fine amounts, do you think a £10,000 FPN is proportionate and a safe thing to ask an individual police officer and their senior to decide, without the involvement of the courts or, potentially, the CPS?

Kit Malthouse: Jim can comment on the quantum. The £10,000 fines came about because we were seeing these gatherings taking place indoors—unlicensed music events and other gatherings—where the scientific evidence was pointing to what was called a super spreader event. There was a strong perception that these were extremely dangerous gatherings, very often taking place in virus hotspots. We wanted a serious deterrent to communicate—as I said earlier, the FPN is as much about communication as anything—the very significant consequences of this kind of event.

Having said that, like every FPN that is challengeable in court, it is for the court to decide what is proportionate for the individual circumstances. If you are Rita Ora, who happened to fall foul at one point, then probably £10,000 might be proportionate given that she is a very talented performer with enormous success internationally—that might be a fine that is proportionate. For others who committed the same offence but want to challenge it in court, it is for the court to decide how they can achieve the same financial impact on that individual. Jim may want to come in on that thinking.

Lord Bethell: Kit, you put it really well indeed. The epidemiological threat was very serious. This was exactly what we were worried about, large groups of people indoors, breathing on each other and creating these super spreader events. The jeopardy was very large.

I would also add that we were aware that younger people might have the idea that they were not themselves at risk of serious disease. While they might be vectors of transmission, they might think that there wasn't actually any personal threat to them. We wanted to convey a really clear message about the severity of the situation they were creating and to really clamp down emphatically on these house parties. The message was really important.

From that point of view, it worked because not many of these fines were actually issued; the message was received loud and clear.

Q141 **Dr Mullan:** You are happy with that, that the low level of fines means that people are compliant rather than under-reporting them?

Kit Malthouse: That's exactly right. The other issue to bear in mind is that, as you will know from your background with the police, these

gatherings are extremely difficult for the police to deal with. They are very often quite confrontational, often alcohol has been taken and they can be quite difficult. Because they are indoors, the police have to gain entry; they are in a confined space, you are exposing officers to possible infection. The necessity for a strong deterrent seemed compelling.

Q142 **Dr Mullan:** At the other end of the spectrum, some people might argue that you didn't consider a custodial sentence for someone who perhaps holds a super spreader event and further down the line people may well pass away as a result. Was that ruled out?

Kit Malthouse: You're now into the wider realms of the criminal law. It's an interesting criminal question that my learned friend will no doubt be able to answer, as to whether if you knowingly infect people, you are committing a criminal offence.

Chair: I am not sure it is one that we can go into too much today.

Q143 **Dr Mullan:** There was a clear decision not to introduce custodial sentences for any of these offences, and I just wanted an articulation of the reasoning for that.

Lord Bethell: You are absolutely right. We very much wanted voluntary compliance, so were treading this fine line between trying to have a softer touch and depend on the four E's wherever possible, but also trying to be clear and emphatic, and send the right signal. That's why we ended up with the £10,000 fine, because it felt like it was on the right side of being reasonable without throwing the rule book or using the heavy hand of the law.

We had in mind other countries that had taken a criminal approach. As you probably know, some countries in Europe have policemen standing on the corner, and in Europe policemen have guns. They will stop you and ask you for your certificate when you are walking along. We never had that in the UK, and that was the situation that of course we wanted to avoid. That is not how we roll in this country. We were exploring the very fine line between trying to communicate really clear signals and clamping down on excess behaviours, but not criminalising behaviour, at which point we feared that we might lose the sentiments of the public. That did not happen, I am pleased to say.

Kit Malthouse: It is worth pointing out that the closest we came to any kind of detention was, in the early days, taking the power to detain individuals who were knowingly infected. If you remember, in the early days we were confining people to a centre, I think on the Wirral, from which we were concerned that people might abscond, but that was the closest that we came to any kind of detention.

Lord Wolfson: I want to add a point that I think is important on the context of the single justice procedure. The fact that there is no imprisonment available means that you cannot issue a warrant to require the defendant to come to court. That means that your effective choice is between using the single justice procedure, where the defendant is not

there, and a hearing that the defendant cannot be compelled to attend and would probably not be there. The fact that there is no imprisonment has an important knock-on effect when you are considering the next stage of the process—that is, what the most effective process is in the magistrates court.

Q144 **Dr Mullan:** Okay. I think it would be good to get figures on decisions not to prosecute failure to pay due to be seen in the magistrates court, so that we understand what is happening.

Kit Malthouse: Yes, absolutely.

Q145 **Chair:** I think, gentlemen, you said that you would try to get us some figures on how many cases have gone through the single justice procedure. I think Lord Wolfson made a fair point about the absence of imprisonment, and that that is why the single justice procedure is used. Mind you, when the single justice procedure was introduced one of your predecessors—Mr Vara—when he was the Under-Secretary said that they were for low-level, routine offences. I suppose that there is a conundrum. People might ask of a £10,000 fine, or whatever, whether everything under that is low-level and routine—or was that just a necessary trade-off?

Lord Wolfson: Forgive me if I did not make myself clear. I was not saying that the fact that there is no imprisonment is why the single justice procedure is used. I was saying that the fact that there is no imprisonment means that you do not have an option of requiring attendance. Your options are either the single justice procedure, and no defendant, or a "normal" hearing, which it is very likely that the defendant will not attend. That is the point that I am making. In both cases, you are going to be proceeding in the absence of the defendant physically anyway. Therefore, the criticisms of using the single justice procedure are, I think, misplaced, because you do not end up with a substantially different procedure in any event.

Q146 **Chair:** Do you not think that the fact that these were, in some cases, wholly exceptional intrusions on people's normal liberties made it undesirable that even uncontested matters should be dealt with through the single justice procedure with much less transparency?

Lord Wolfson: Let me deal with both points. On there being much less transparency, it could actually be argued that there is more transparency, because you can obtain the underlying information in the single justice procedure if you are a member of the media in a way, frankly, that you cannot if you are sitting at the back of the magistrates court. That is the transparency point.

The second point is that nobody is forced into the single justice procedure. It is only used if the defendant agrees for it to be used. There is no question of anybody being forced into the procedure against their will. The single justice procedure is only available if both the prosecution—that is, the police—and the defendant are willing for it to be used. I think on both

transparency and being forced into the procedure, the SJP actually stands up extremely well.

Q147 **Chair:** Why then has the Magistrates Association, whose members broadly carry out the single justice procedure, been consistently pretty critical of it on transparency grounds?

Lord Wolfson: It may be that what one is used to, one thinks is always the best. If you just imagine a journalist walking into a magistrates court and sitting at the back, there is lots of material that the journalist does not see. But when you are in the single justice procedure, the statement of the prosecution and the defence is available to be looked at. Arguably, there is actually more transparency in the SJ procedure than in the traditional procedure.

Q148 **Andy Slaughter:** I am sure you are familiar with the CPS prosecution figures. Of 1,345 prosecutions brought under the coronavirus regulations, 16% were not correctly charged—one in six were not correctly charged. Under the Act, all 252 of the offences charged were incorrectly charged and therefore discontinued. Was that acceptable?

Lord Wolfson: Are you talking about the SJP or the CPS?

Andy Slaughter: These are the figures that were supplied to us by the CPS. These are matters going forward for prosecution.

Lord Wolfson: My understanding is that, in May 2020, cases were being prosecuted under what you might call the traditional procedure and reviewed by the CPS. My understanding is that, at that stage, 65 out of 231 cases—28%—prosecuted by the CPS in the early months of lockdown had errors. HMCTS did a review of 5,156 SJP cases dealt with between 1 September and 30 October 2020, and legal advisers and justices identified errors in 10% of those cases. We have to be bit careful, because the CPS figures are where the CPS was deliberately going through and looking for errors, so it is more likely that they are going to spot them.

Where you get to, frankly, is that whether it is the CPS, or whether it is the SJ procedure, there are a number of errors. There are a number of errors, if I may say, even in what might be called common and garden traffic offences—there are still errors in those cases. I am willing to accept that the error level here is higher, but I must say that I do not find that surprising, given that people are dealing with—I think this was a point that you made, or it might have been one of your colleagues—new legislation. The critical point is what we did when we found that those errors were going on. In the MoJ or HMCTS, we were liaising back with magistrates courts, and from there with the police, and saying, "Look, these are the sorts of errors we are finding. For example, you are not putting the words 'without reasonable excuse' in the charge. They have to be there, because it is part of the offence." Therefore, there was a constant learning exercise going on—a constant attempt to reduce errors and to improve accuracy. I accept that there were errors—of course there were.

Q149 **Andy Slaughter:** That is fair comment. It was a new procedure and

things were being done. But do you feel now, with the experience of that, that there is sufficient scrutiny and checking of what is happening?

Lord Wolfson: The level of scrutiny and checking is certainly much better than it was. Yes, it is appropriate. Can it be better? I imagine it can always be better. I would make one point, though. The new regulations—if we are talking about the steps regulations—have not been certified by the Attorney General, so you cannot use SJP for those regulations. I know this sounds terribly technical, and forgive me for it, but we have to remember, at each stage of the process, which regulations were certified and therefore went through SJP, and which went through the normal route.

Q150 **Janet Daby:** Thank you very much for all your contributions so far. I have been listening in, and one of the things that you were just saying, Lord Wolfson, is that you recognise that there is a number of errors, and obviously it is new legislation. John Apter, chair of the Police Federation, said: "A recent survey that we did showed that nine out of 10 officers felt that the regulations were not clear. They are the ones who are having to deal with it out on the street." I raise that because my question is about the FPNs and there not being a way of administrative review or appeal; the challenge would be by going to court. You have already heard about the number of errors that could happen. It is very stressful for people to have to take things to court to challenge them if there is not some type of appeal process. So the question is really this: why did the Government decide not to include a legal mechanism in the regulations to allow an individual to challenge an FPN by way of an administrative review or appeal?

Lord Wolfson: I think I ought to pass that one over. You have to remember, I'm afraid, the role of the MoJ here is when you get to the courts system. As I said earlier, it is not the case in Government that every time you create a criminal offence, it goes through the MoJ. The FPN procedure was used here, as I understand it, because it was felt—in my view, correctly—that that was the appropriate procedure. The FPN procedure does not have that level of review, because if you think you have been served the FPN incorrectly, you don't pay—you don't have to pay. And then you have all the options available when you get the next letter, the single justice notice. So from my perspective, the system operates well, and I am not sure we would want to over-complicate it at an earlier stage of the process. Lord Bethell may have something to add here.

Lord Bethell: I think it is worth remembering that these FPNs were issued under the health protection regulations under the 1984 Public Health (Control of Disease) Act. That Act does not provide for regulations that lead to imprisonment, so there is a cap, a limit, on what kind of regulations we can create. And once the FPN has been issued, the recipient gets 28 days to either pay the FPN or decline it, so forces do have an opportunity to review the issue of an FPN, on request. That provision is built into the system.

Q151 **Janet Daby:** It still does not build in the capacity for someone to go

through some type of review or appeal. Minister Kit Malthouse, would you like to contribute?

Kit Malthouse: As Jim said, there is a number of stages. The force has to review the FPN. It goes off to ACRO, which reviews it. If it comes back unpaid to the force, they review it again to make sure it's compliant. The individual can make representations to the force and, as Lord Wolfson said, in the end it can go to court, and they can make their representations there if they wish.

We need to bear it in mind that this was designed to be a proportionate system, not just for the individuals concerned but, frankly, for us as taxpayers, so that we were not involved in a massive machinery of appeal and all the rest of it and that we would follow broadly the same situation we do with other FPNs, whether they are for dog fouling or speeding, which is this: you get an offer, and you can pay the fine early and get a discount, or you can dispute it or not pay it. And at some point, you get the right to end up in front of m'learned friends, who will decide the merits of your case or otherwise. Given the level of the fine, it seems perfectly reasonable to me.

Q152 **Janet Daby:** What lessons have the Government learned from their approach to the criminal law during the pandemic, and what would you change?

Lord Wolfson: I will start if I may—let me stand back. The lesson I think we have learned—I think this is important thinking about planning for future pandemics—is that it is very easy, when you are thinking about planning for a future pandemic, to think of PPE, ventilators, shots in the arm, medicines and all that sort of thing. I think that, for future pandemics, we need to bring criminal law into the planning. That is one thing we have learned. If you go back a number of years, I am not sure that people would have thought that when thinking about pandemic planning, you would think about the lawyers. You might think about it in a very general sense, but we have seen that, in any future pandemic—please God, there won't be one—we need to be prepared for the criminal law to have the granular detail, which is where we have got to now.

Q153 **Janet Daby:** Anyone else on lessons learned?

Lord Bethell: From our end, I mentioned at the beginning the creation of the UK Health Security Agency. One of its objectives will be to make a much clearer link between the epidemiology and the regulations. Having that facility helps to explain to people why we have brought in the regulations that we have. I think that most people did get it, like the plumber said, but making sure that we have a really firm, easily explained intellectual link between why we are doing something and the regulations helped with voluntary compliance. It helped with the British way of doing things, which is to get people to step up to their responsibilities, and it helps in the explanation of it all. That is something that we are keen to firm up.

Kit Malthouse: From my point of view, there a couple of things. First, I think the FPN system worked and has been a success. The small number that have been handed out is indicative that the communication about the four E's and enforcement worked in a population of our size. I completely agree with what Jim said; one lesson could be about explaining more clearly the rationale for some of the issues that were put in place.

One of the challenges I had—and you will have had as a constituency MP—was, "Why can I do this but I can't do that, when they are broadly similar?" One of the issues that we tried to explain to people was that it is not necessarily just about the form of contact that you have but the frequency. We are privileging what we think are most important contacts—whether that is business or people's ability to go about their work—over less important ones, possibly such as social or otherwise, to minimise the number of contacts. That was the challenge for us.

Janet Daby: Thank you,

Chair: It has been extremely wide-ranging, gentlemen, I am grateful to you for your time and your evidence. I am sure you will be out of the police station before too long, Mr Malthouse. If not, I have a friend who practises in Chatham.

Kit Malthouse: Very kind, At least for the moment I will be RUI rather than on bail.

Chair: On that note, I will draw the session to an end.