HOUSE OF COMMONS

Public Administration and Constitutional Affairs Committee

Oral evidence: Coronavirus Act—Two Years On, HC 978

Tuesday 25 January 2022

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Watch the meeting

Members present: Mr William Wragg (Chair); Ronnie Cowan; David Jones; David Mundell; Tom Randall; Lloyd Russell-Moyle; Karin Smyth; John Stevenson.

Questions 1 - 36

Witnesses

I: Professor Jeff King, Professor of Law, University College London; Dr Ronan Cormacain, Bingham Centre for the Rule of Law; and Dr Ruth Fox, Director, Hansard Society.

Examination of Witnesses

Witnesses: Professor Jeff King, Dr Ronan Cormacain and Dr Ruth Fox.

Q1 **Chair:** Good morning and welcome to the Public Administration and Constitutional Affairs Committee. Today's evidence session is the first in our inquiry into the Coronavirus Act 2020, as it reaches nearly two years on our statute books and its inbuilt expiry date approaches. As we transition out of the Covid-19 pandemic, it is right that Parliament should review the emergency powers that have been introduced into our legislative landscape and examine the ongoing impacts and effects. In understanding this task, the Committee is very grateful to our expert witnesses for giving their time to provide evidence this morning. I am going to ask them to introduce themselves for the record.

Dr Cormacain: My name is Ronan Cormacain. I am a research fellow with the Bingham Centre for the Rule of Law, where one of our roles is scrutinising and advising on legislation. I should also say that I am a consultant legislative drafter and, in that capacity, I have written a number of coronavirus regulations for the Department of Health for Northern Ireland.

Dr Fox: Good morning. I am Ruth Fox, director of the Hansard Society. As many of you may be aware, the society has been conducting research into statutory instruments for the last decade and we are currently in the middle of a review of delegated legislation, which is pertinent to this inquiry.

Professor King: I am a professor of law at University College London. I was previously a legal adviser to the House of Lords Constitution Committee during the pandemic and assisted with legislative scrutiny of the Coronavirus Bill.

Q2 **Chair:** I am going to direct the first question to you, Professor King. The Coronavirus Act is a large, wide-ranging piece of legislation, passed in one day in the Commons, being necessary, as the Health Secretary said at the time, to protect life. To what extent has this Act proved necessary in the pursuit of that aim?

Professor King: It has been necessary. It was intended to supplement the powers in the Public Health (Control of Disease) Act 1984, which was updated in 2008, after the SARS crisis. Some of this enormous Act was based on draft legislation prepared after Exercise Cygnus.

One of the necessary things it did was legislate a regime of regulation-making powers for Scotland and Northern Ireland, based on a scheme in primary legislation. This would have been quite difficult to do using regulations under the Civil Contingencies Act 2004. It would have been even more untenable to have those powers renewed on a monthly basis under the 2004 Act.

The 2020 Act also suspended local elections. It passed section 76, a very thin provision, but it created the legislative basis for the coronavirus job retention scheme—furlough, essentially—which ultimately funded 11 million jobs during the pandemic. The Act also modified mental health legislation and the investigatory powers regime, and empowered the recruitment of many health workers. These were all things that might have been done under broad and sweeping regulations, but were best done using primary legislation.

Q3 **Chair:** How extensively has the Act been used?

Professor King: It has been relied on. Some of the direction-giving powers were not used extensively, and in some cases not at all. The detention powers under schedule 21 were not used extensively. This is largely because the regime contained in the 1984 Act was used for those types of powers, as was anticipated largely. There is no doubt that some of the provisions ultimately were not needed, but hindsight is certainly 20/20.

Q4 **Chair:** Yes, it is indeed. We were told that the powers in the Act would be activated only when needed and, indeed, deactivated when no longer needed. Do you think this has happened? Have the Government been prompt and sufficiently transparent in their decision-making process?

Professor King: There are many aspects of their decision-making process—

Chair: Sorry, to be more clear, that is with reference to the 2020 Act.

Professor King: Indeed, and the continuity votes, I imagine, in particular. There has been some concern with the transparency of that procedure. There has been very vocal concern about an up/down vote on the continuation of all provisions at the same time, which has obscured the process of parliamentary scrutiny, because the stakes for not continuing whatever the Government suggest were very serious indeed. There were transparency issues and impediments on Parliament's ability to give a genuine vote on continuation of each of the measures, because of the simple up/down vote that was an aspect of the continuity procedure.

Q5 **Chair:** I will go to Ruth Fox with the same questions: the necessity of the Act, how extensively used and whether justification was made for the activation and deactivation of its provisions.

Dr Fox: I broadly agree with Jeff on the question of the necessity of the legislation. I cannot comment on its use in terms of guidance, directions, charging powers and so on, but at the Hansard Society we particularly looked at the regulation-making powers for instruments laid before Parliament. Probably, it has been used less than was expected.

We monitor daily all statutory instruments laid before Parliament. By our count, since the start of the pandemic, as of last night, there have been 565 statutory instruments that in some way relate to management of the pandemic. Of those, only 27 have been laid using powers in the Coronavirus Act. Of those 27, three were expiry powers, so, in practice, only 24 have been used to initiate policymaking to manage the pandemic. If you look at how they have been used, the majority of them have been used for managing business and residential tenancy provisions, which obviously was designed to help people's livelihoods through the pandemic. Powers have been used on 11 occasions for that purpose, four times in relation to statutory sick pay and four times on what you might call management of local government-related matters.

They have been used less than people expected, but that is because so many powers in different Acts have been used during the course of the pandemic. By our count, 137 other Acts of Parliament have been used, of which, as Jeff alluded to, the most challenging is the Public Health (Control of Disease) Act 1984. A lot of the big measures have been used under that process.

In terms of the transparency, accountability and turning on and off of powers—and it was possibly unintended but you can see how it has happened—the combination of the six-monthly renewal requirement in the Act to come to Parliament to renew the provisions and the two-monthly reporting requirements has created a process whereby Ministers

have been reporting every two months on the status of the powers, but the six-monthly points have been the juncture at which decisions have been made about turning them on or off. Then the expiry regulations have been laid before Parliament to that effect.

The Government claim that about 50% of the powers are now deactivated, in their latest two-monthly report, back in November. The combination of that two-monthly and six-monthly review process has, in effect, bulked up the expiry process. It has not been an expiry process throughout the course of the 18 months, so it has created this peak and trough effect.

Q6 **Chair:** Dr Cormacain, I wonder if you have any thoughts on those themes.

Dr Cormacain: Aside from echoing what Jeff and Ruth have said, I would add two further points. The first is on this question of whether it is necessary to protect life. Some provisions certainly were necessary to protect life. Jeff has already mentioned the regulation-making power for Northern Ireland and Scotland. Those powers were clearly and definitely needed in order to protect life. A lot of the other provisions were helpful for us to manage to live with coronavirus, but I would not say they reached the bar of being necessary to protect life. Making it easier for things to be done was a helpful coping mechanism.

The second point is to expand slightly on what Ruth has just said. The Coronavirus Act itself is not a red herring, because it did and does important things, but it has not done the heavy lifting of the regulations and the way in which we have regulated the pandemic. The Public Health (Control of Disease) Act has done most of the heavy lifting and most of the stuff that has had an impact on our lives. Although the Coronavirus Act itself is important, it is not as important as the other legislative vehicles.

Q7 **Chair:** Ruth, you touched on the themes of my next question. Looking back at the operation of the Act, do you think it struck the right balance between substituting proper scrutiny of the Bill at its time of passage, due to the emergency of the pandemic, for subsequent accountability at those periodic reviews?

Dr Fox: It is better than what we see with a lot of legislation in which you also have very big, broad Henry VIII powers. The fact that a lot of the powers, at least in regulation terms, have not been utilised that much mitigates in favour of thinking that it perhaps was about broadly right.

That assumes that you think the starting point of a two-year period for the Act to be in place and the sunsetting arrangements are right. I always took the view that giving it two years was too long. It should have been six months to a year at most, and therefore your review process would have been shorter. One of the big problems as far as parliamentarians are concerned has been referred to as a devil's bargain.

You swap parliamentary scrutiny at the time the Bill is going through, as you say, pushing it through in a day, for subsequent accountability. There are serious questions about whether, essentially, a 90-minute debate on a "take it or leave it" proposition is the kind of subsequent accountability that Members want and need.

Q8 **Chair:** Sorry to interrupt you. Do you think the Government provided sufficient quantity and quality of timely information on the use of the Act to inform scrutiny, even in those very short debates?

Dr Fox: The quality of the two-monthly reports has improved, but it is still not ideal. For example, take the latest report that was published in November. We are expecting a subsequent one now, I guess later this month. The Government report on how the powers have been used, what has been turned off, when it has been expired and whether powers have been suspended. I know certain organisations, some of the civil liberties organisations for example, have concerns that the Government have not been particularly open about the critique of the use of the powers. They present a fairly positive impression.

In the two-monthly reports, for example, you will not find any reference to Crown Prosecution Service assessments of the way in which the powers have been used for charging purposes under certain schedules and where it found things to be wrongly charged. That criticism and critique is not in there. You have to look elsewhere.

In terms of the actual debates, a 90-minute debate, looking at all those provisions, is, arguably, inadequate. It is particularly so when you look at what was happening at the time of the second six-monthly review, where the Government combined a number of coronavirus-related matters in the debate. There were separate motions for division and the debate was extended in length, but they pushed a number of issues together. Consequently, you get a dilution of focus on the actual use of the powers themselves and the Act itself. You end up debating all sorts of aspects of the coronavirus challenge. That means Members' scrutiny is diluted.

Q9 **Chair:** Dr Cormacain, do you have any reflections on those themes of the scrutiny and whether, indeed, it might have been regarded as a bit of a tick-box exercise?

Dr Cormacain: Yes. In fact, I have just jotted down that exact point: "tick box." It seems as if it has nearly been treated as a parliamentary afterthought, something to get through Parliament, rather than a genuine attempt to engage on the merits.

The other general theme, which is not just for the Coronavirus Act but with regulation itself, is what I would call a lack of granularity, which means the inability of Parliament to pick and choose which provisions it likes in the Coronavirus Act or in an SI. Rather than being able to say, "We like this; we do not like that; can we have some more of this, but less of that?", it is a simple and straightforward, "Either accept

everything or reject everything." With that kind of approach, most sensible Parliaments around the world will simply accept everything, because the risk of rejecting everything is too great.

Professor King: I agree with what has been said so far. The continuity votes should have happened more frequently. Every three months would have been satisfactory. That would have been a good amount of time. Unbundling the motions, having a number of motions on different aspects of continuation, would have been better. It would have allowed for more focused interventions and the possibility that some would be discontinued, which would have made it more politically salient for Members to attend and take seriously those debates.

Dr Fox: It suddenly occurred to me that an additional point about the reporting is that the Government publish the reports, and they are reporting to Parliament, but who are they reporting to exactly? The scrutiny architecture in each House is not there to consider them. In the House of Lords, they were sent to the Secondary Legislation Scrutiny Committee, but its remit does not cover those reports and therefore it could not report on them. The question is whether they then go to a Select Committee in the House of Commons, which one and how it then reports on them in a timely way for that six-monthly review debate. It seems to me that that was a gap. That scrutiny did not happen.

Chair: That is a good point.

Q10 **John Stevenson:** Professor King, the UK Government adopted one approach when it came to the Coronavirus Act. They got it through Parliament at pace. How does that compare with the legislative reactions of other countries that have also been affected by coronavirus? What was their approach in comparison with ours?

Professor King: The approach in other countries varied significantly, depending on its legal and constitutional culture. For instance, many countries had no parliamentary scrutiny of individual regulations at all. Others had much shorter sunset periods and intensive scrutiny through interpolation in the Chamber. I will indicate what I think were some of the best lessons learned from the comparative experience.

They come down to these things. First, there was widespread reliance on a public health statutory framework, both existing powers such as, in our case, the 1984 Act, and Covid-responsive legislation, such as a coronavirus Act of some sort. There was much less reliance on an all-hazards emergency powers framework, either in constitutions or otherwise. That was the approach taken in Norway, New Zealand, Israel and Germany, this reliance on public health statutory legislation.

New Zealand and Israel, interestingly, relied on an all-hazards framework. In New Zealand, it was contained in legislation. In Israel, they relied on the basic law, which is their constitution, but only for the first couple of months. They quickly passed Covid-responsive statutes,

and that was the case in the majority of countries. In the main, a statutory framework was relied on.

Secondly, Bills of Rights were not suspended and courts stayed open for meaningful review, often through online hearings. In Germany and Austria, for instance, hundreds of cases were taken and this did not tend to gum up the public health interventions. Judicial restraint on the big issues was nearly universal, and vigilance on equality and process questions was common in the better countries.

On these first two points, the UK fared fairly well, but less so on the following ones. Many other countries used shorter and better sunset periods, both on the Covid-responsive statutes and on the emergency declarations that unlocked powers, as well as on regulations themselves. On Covid-responsive statutes, for instance, in some cases the sunset period was radically short. In France, the declaration had to be renewed initially on a monthly basis, by an Act of the legislature. In Norway, the fast-tracked corona law expired after two months. Germany's infection protection Act had to be renewed a year on.

None of those three countries actually had parliamentary scrutiny of the individual Covid regulations. New Zealand had that, but its continuity votes took place every 90 days, rather than six months. On sunset periods, the UK compares quite poorly.

Fourthly—and I will make just one point after this—the best countries had a sort of cross-party process for resolving questions of parliamentary procedure during the pandemic. Norway, for instance, had a presidium, which had cross-party representation and was independent of Government, that resolved all questions about how the Storting would function. Closer to home, Scotland had its parliamentary bureau, which also resolved these questions on a cross-parliamentary basis. Most other countries resolved these in a non-contentious way, which was radically different from how it was done in the House of Commons.

Lastly, and probably of very direct interest to the Committee, the UK actually fared better than most countries with parliamentary scrutiny of individual regulations, but it can still be improved. In a survey of 38 countries and territories that I have been doing in the context of the Lex-Atlas: Covid-19 project, 23 have no parliamentary scrutiny of Covid regs at all. Those include Austria, Canada, France, Germany and Sweden. Others had quite constrained scrutiny, but a few countries, arguably, had better scrutiny than the UK. I am happy to discuss those now, or perhaps the Committee would come to this issue at a later time. I would be happy to share what the form was.

Q11 **John Stevenson:** I do not think we need to go into specific depth, because, quite clearly, you are carrying out a report on it. If there was one particular country that you would take as an example of being better than our performance and use as an example for the future, which would it be?

Professor King: On the way the parliamentary process was run, it would be Norway. On the way the overall health response was run, not just on a policy level but on a constitutional level, New Zealand performed very well. Neither was perfect. Norway did not have regular review of its regulations and New Zealand's Covid-responsive statute had a sunset period of two years, which is probably longer than needed, although the system of parliamentary scrutiny of regulations in New Zealand was superior.

Q12 **John Stevenson:** What would be your principal take from the way other countries have approached it that would benefit us in the future when we are looking at emergency legislation for health emergencies? What would be your key take that could improve our system?

Professor King: There should be shorter sunset periods on the legislation and a mandatory sunset period for all Covid-19-responsive legislation. A public declaration of a public health emergency that comes before Parliament would also very much improve the situation here. The debates in Parliament tend to be wrapped around particular measures, rather than a general commentary on the Government's performance or the need to continue those measures. Lastly, a framework, either traffic light or alert system, could better align the law that is made and the public health advice to make it clearer to the population. It enables a simpler form of regulation making, rather than the quite dense and unreadable form that we have here.

Q13 **Ronnie Cowan:** For the benefit of our viewers, the Civil Contingencies Act 2004 is the main piece of legislation that equips the UK Government to respond to civil emergencies in the UK. Section 19 of that Act defines one of those emergencies as, "an event or situation which threatens serious damage to human welfare in the United Kingdom or in a Part or region".

This is initially to Dr Cormacain, but if Professor King and Dr Fox want to contribute, that would be great. You previously indicated that you thought the Civil Contingencies Act could have been used in response to the pandemic. The Government subsequently told this Committee that the Act was inappropriate for use in response to the pandemic because the problem was known about early enough for it not to qualify as an emergency under the terms of that Act. What is your view of the Government's assessment?

Dr Cormacain: On balance, using the Coronavirus Act 2020 and the various public health Acts was the correct way to respond at the outset. I still think it would have been possible to use the civil contingencies model at the very start of the pandemic, because of the nature of the emergency. I do not think it would have been ideal to have used the civil contingencies model for two main reasons.

The first is on devolution. Health is devolved in Scotland, Wales and Northern Ireland. For the Westminster Parliament to legislate, using the

Civil Contingencies Act, for those matters in Wales, Scotland and Northern Ireland would have been constitutionally unsound.

The second point is very easy now, looking back with hindsight, but perhaps the emergency was not such a serious emergency within the meaning of the Civil Contingencies Act that would necessitate using that Act. I am still of the view that it would have been possible to use the Civil Contingencies Act at the time, but the better model is to use the Coronavirus Act itself.

Ronnie Cowan: Do the other witnesses want to contribute?

Dr Fox: If you cast your minds back to March 2020, there was a good reason not to use the Civil Contingencies Act in relation to the regulations. That was that, under the terms of the Civil Contingencies Act, the instruments are actually orders in council, rather than regulation-making provisions. They have to be approved within seven days and Parliament has to be recalled. In late March 2020, it was realistic to be concerned about the ability of Parliament to assemble on a regular basis to approve those regulations, had they been required.

At that point, of course, the virtual Parliament did not exist. There were legitimate concerns about the question of whether and how the Privy Council would assemble for orders in council and how Parliament might assemble. If you remember, shortly after the Coronavirus Act was passed, Parliament went into an early recess and there were questions about how and when it was going to reconvene. To use the Civil Contingencies Act might, potentially, depending on what had happened in those early weeks, have caused some difficulties. As time went on and the virtual Parliament was established, those concerns would have faded away.

Comparatively though, if you take the civil contingencies provisions for regulations and their approval as the expectation of what Parliament wants in an emergency, given that the Government continued to use regulations, particularly under the 1984 Act, for such a long time, they could have moved closer to those provisions for scrutiny, even using the urgency procedure in the 1984 Act. They have actively chosen, largely, not to do so, which is why a way around this would be a bespoke procedure. There were practical reasons why it was difficult to use the Civil Contingencies Act back in March 2020.

Professor King: I agree with what has been said so far. I am more sceptical of the resort to the Civil Contingencies Act than some other commentators. It is a backstop for use in extreme urgency. Most other countries that relied on statutory all-hazards emergency legislation, as I said, migrated their regulation making to new statutory regimes.

Although the process of parliamentary scrutiny looks sterling, that regs have to be confirmed within seven days and renewed every 30 days, the amount of regulation-making would have meant that parliamentarians

would have been overloaded with new regulations, which would come up for repeated renewal. I worry that there would have been some kind of scrutiny theatre that would have been regarded as something between a farce and a sham.

Lastly, the Civil Contingencies Act allowed pretty much anything to be done using Henry VIII powers, whereas the 1984 Act did not. Even the Coronavirus Act, which was more liberal in using Henry VIII powers, had a more constrained regime.

Q14 **Ronnie Cowan:** Touching on that, do the provisions of the Civil Contingencies Act, and particularly the design of the emergency powers contained within that Act, provide for more transparency and accountability than those contained in the Coronavirus Act?

Professor King: I do not think the transparency procedures are improved in law under the Civil Contingencies Act. The rush to have measures approved could create actual transparency issues by having a deluge of regulations for approval that Parliament might not have been equipped to process so quickly.

Dr Cormacain: There is one additional matter on transparency and accountability in the civil contingencies model. Under that model, Parliament has the power to amend emergency regulations. This is not a power contained in the 1984 Act. That is somewhat of a double-edged sword. It gives greater accountability, because Parliament has that granularity to change the content of an emergency regulation.

In doing so, it could create chaos. The nature of these emergency regulations is oftentimes very technical, and tampering with one without a full appreciation of the effect could cause a lot of problems in how the regulations work. There would be greater scrutiny by virtue of the power to amend but, equally, that could cause greater complications if an amendment has an unintended effect.

Dr Fox: To add to something Jeff said, there is the concern that, given the sheer volume of regulations, it would have been very difficult for Parliament to have managed the scrutiny of instruments that had to be approved within seven days and approved for their continuation within 30, Parliament having to be recalled and so on.

You could make the counterargument that, had that scrutiny process been in place, the constraint would have been more on Government. Therefore, would the policymaking and legislation that flowed from that have been different? It is a counterfactual that we cannot answer.

If you look at summer and autumn of 2020, when we were getting repeated amendment of regulations very quickly, in a matter of days, it would have been very difficult, under the Civil Contingencies Act, to have managed that process. It might have forced the Government to take a step back to think about how policy was being developed and how these

regulations were being pushed through, if they had had to use those provisions, as opposed to the Coronavirus Act, the 1984 Act or, indeed, any of the other 130-odd Acts that they were able to use.

Q15 **Ronnie Cowan:** Looking forward, we are all hoping that we will finally get out from the grips of this pandemic, but we do not know what is further down the line for us. There must be lessons we can learn, in terms of legislation, looking forward, not knowing what the next emergency is going to be. How do you think the balance between the need to pass legislation in response to an emergency, urgently, and the need for appropriate and transparent oversight by Parliament and other stakeholders can be best achieved?

Dr Cormacain: Before answering that directly, I want to say what impact this all has on the quality of legislation. We are talking about the scrutiny. What impact does it have if you have legislation made in a rush? The first impact is on the quality of that legislation. If a policy is developed in a rush, there are going to be loopholes. If it is drafted in a rush, there are going to be mistakes in it. If it is rushed through Parliament, it will not be properly accountable. Parliamentarians will not be able to pick up on things that happen.

The outcome of all that means we have a huge mass of legislation that is indecipherable to most of the population. The speed at which the legislation is made means that most individuals have no idea what the actual rules are on a day-to-day basis. For parliamentarians trying to do their job in scrutinising the legislation, because there are so many amendments, trying to understand, "What is the impact of this latest regulation in front of me; what will it actually do?" is nearly impossible. Speaking as someone who has written many of these regulations, I do not know how anybody else could possibly understand them.

In terms of the balance you are asking to be struck, the key thing now in my mind is the lack of proactivity. Certainly at the start we were reactive, and we had to be, but two years on we are still using emergency procedures. We are still using the urgent procedures. We are still making legislation that is signed at 1 am and comes into force at 4 am on the same day. I do not think that is acceptable anymore. There needs to be more forward planning, looking down the road and thinking, "What will happen? What is likely to happen? What powers do we need to have in place to counter that?" That is one of the general lessons I would suggest we need to have: more forward planning, more proactivity and less reactivity.

Dr Fox: I would broadly agree with that. If you look back to the passage of the Coronavirus Bill, the provisions that traditionally Parliament and its Committees have recommended to be included in fast-track emergency legislation were there: review periods, sunset clauses and so on. The procedures that have been utilised for the regulations made under those powers are broadly the same as those that exist for normal statutory instruments. You can make made affirmatives not just under the 1984

Act, using that urgent power, as that provision exists in a number of other Acts of Parliament and is used across Sessions.

The balance would be that, if the Government need and want to push legislation through very quickly, the periods for sunset and review should be tighter. Arguably, a Bill should be in place only for six to 12 months and they have to come back and legislate again. The onus should be on the Government to do that. In terms of the regulation-making powers, it is fairly clear. We have talked about the problems with the potential difficulties arising from use of powers and procedures under the Civil Contingencies Act at the higher level.

Equally, we then have problems with use of the made affirmative procedure under the 1984 Act, because of the time the Government had to seek approval of those regulations and the problems of retrospective scrutiny. We have a problem with the use of the made negative procedure, where, for example, MPs cannot scrutinise very big decisions made in relation to the international travel regulations. You cannot get debates on those because of the scrutiny procedures.

It shows that, if Parliament is to get a handle or some kind of bite on scrutiny, we need bespoke scrutiny procedures. What we have at the moment does not quite fit. A bespoke model is needed.

Professor King: I agree that we need a different, bespoke model. Generally, the one provision that should not be in the Coronavirus Act is contained in section 90, which permits continuation of the provisions beyond the two-year expiry period. We might come back to that issue later on, but that essentially allows the Government to continue to loop the Act indefinitely, provided they have a vote every six months.

As for the regime in general, there are three key improvements that dovetail with what Ruth has said. The first would be a shorter duration for the made affirmative scrutiny period. I am thinking of something around 14 days of being made and not 28. That is an arbitrary number, but it would be better.

Secondly, we could consider reducing the use of the negative scrutiny procedure altogether. I believe New Zealand had used affirmative scrutiny in most, perhaps all, cases.

The third would be to use a statutory sunset cap on regulations, perhaps three months maximum. I believe this is what the Constitution Committee concluded. Where the Government wish to continue a regulation that is already in place, there should be a default use of the draft affirmative procedure, rather than the urgent procedure, to do that, so the debate is meaningful on continuity.

Lastly, and probably most importantly, it is about the drafting practices. The number of regs could be reduced. New Zealand had dozens of Covid-19 orders, not hundreds, and they are very clear. All of them are

available through the Oxford Compendium of National Legal Responses to Covid-19. One can read them, and they are legible. All the Covid-19 orders essentially restate the law. They are not a series of amendments to previous inaccessible measures. Legislation.gov.uk did a commendable job, an incredible job, at making the mass of regs as clear as possible, but the drafting of them and full restatement of the law in consolidation could have been done better.

Q16 **Karin Smyth:** Clearly, our concern is centrally scrutinising the parliamentary laws here in Westminster. The advantage of the Civil Contingencies Act is that the people operating those laws had a clearly defined role and operation within the local resilience forums. It may be outwith your individual expertise, but can you say something about what was missing from the emergency legislation we passed to ensure and support those local deliverers of said legislation to know that they were acting within the law in coming together to respond to the emergency? Clearly, that was a key part of the Civil Contingencies Act. They knew what they were supposed to do and how to step up into those roles.

We had a degree of confusion around the law, their own rules and the guidance, et cetera. Could something have happened better with the legislation we passed to bring them into the fold, so to speak?

Dr Cormacain: I cannot answer directly on the impact it would have with the local resilience units. In general, if we want individuals to be able to implement the law better, it needs to be less complex and it needs to change less rapidly. If a law changes on a Monday, changes on a Wednesday and then changes on the following Monday, there is simply no chance that anyone, any official, will be able to know what the law is at any point in time. There is that complexity and the rapidity of change.

Then there is the confusion that has arisen with the misuse of guidance masquerading as law. That is when there is a press release or ministerial statement that says, "You must do a certain thing," but the thing it says is not the thing that is in the legislation. That is hugely confusing for the population and the police as well. It is little extra things that get added into the public consciousness about "what I have to do" that have no basis in law. That has been prevalent right from the start of the pandemic.

I will give you one concrete example of the difficulty of implementing emergency laws. There was a very controversial funeral in Northern Ireland of a terrorist. A lot of the things that happened around the funeral seemed to be in breach of the law and there was a lot of public outrage around that. The police and the Public Prosecution Service looked at it and actually said in their statement, "The law has changed so frequently and at the last minute that we cannot possibly justify bringing a prosecution here." That is a failure not of the police or the prosecutors. That is a failure of the people who make the law.

Professor King: I would simply say that a clear distinction needs to be made between what is public health advice and what is the law. There has been a lot of criticism about guidance masquerading as law. The fact is that guidance is, for the average citizen, a statement not just of advice but also of the rules that they are required by law to follow. It is a thing available on a website or a phone somewhere. The thing that needs distinguishing is advice from law, and that could have been done more clearly in the guidance.

Many countries used a traffic light or alert level system, which simplified things. In this country, there was an incredible plethora of substantive rules: rules of six, local lockdowns, different tiers and so on. A simpler framework, even if it might not have been as engineered, let us say, to the precise epidemiological situation, would have been clearer and easier for citizens and law enforcement authorities to operate.

Q17 **Mr Jones:** Dr Cormacain, you have referred to the need for forward planning in terms of legislation. A lot of us thought that we had already planned for unforeseen crises, such as the one we are just coming out of, I hope, in the shape of the Civil Contingencies Act. Of course, as we have just been discussing, when the chips were down we decided not to use that piece of legislation but to go for a bespoke piece of legislation. How can Governments prepare for future, probably unforeseen crises, such as this, when legislation that we thought was aimed at addressing it is considered to be inappropriate when the time comes to use it?

Dr Cormacain: That is a very good question, and it is very difficult to answer. Bespoke legislation usually is the best way forward. The Civil Contingencies Act was bespoke legislation, but it was not quite suitable for this kind of public health emergency. The Public Health (Control of Disease) Act was a general public health Act that had some emergency powers and procedures in it, so it was not quite suited to this type of emergency.

Perhaps the best approach would be a bespoke public health emergency Act, which would set out in more detail a fairer and more balanced set of principles and approaches allowing for proper scrutiny and better policy development. It is very hard to do that in advance. It is very hard to do that in hindsight. If we do it now, which I think we probably should, the next emergency might be slightly different.

In terms of proper preparation and planning, what is necessary is nearly a menu of powers that Government could use in different situations, so these are the 10 different types of powers that we might have. If they are prepared in advance, not necessarily on the statute book, whenever a particular emergency comes the Government and the legal teams can lift them off the shelf and adapt them to that particular emergency. That sort of forward planning might be of some benefit.

Q18 **Mr Jones:** Is the Civil Contingencies Act redundant?

Dr Cormacain: No, I would not say it is redundant. It might be useful in certain types of emergencies. It has not been particularly useful in this emergency, but it might be helpful in the next emergency. It would be good to supplement it with a more specific public health emergency Act.

Q19 **Mr Jones:** Should the Civil Contingencies Act be reviewed and revised?

Dr Cormacain: It depends. The Civil Contingencies Act is more of a broader, overarching Act to deal with lots of different potential emergencies. Revising it so that it would cope more appropriately with this emergency might mean it is limited in coping with other emergencies. There is no difficulty in having a look at it again. If you try to redraw and refocus that Act to deal only with public health emergencies, you might make it redundant for other types of emergency. Rather than change that Act so it deals with this particular focused emergency, it is much better to have a more focused Act to cope with public health emergencies.

Dr Fox: The Act should be reviewed. It is clear that, at the time, back in March 2020, one reason that the Government articulated why they could not use the Act was that, in the Minister's words, it was not a bolt from the blue. The pandemic had emerged, was foreseen for some weeks, and therefore the Act could not be used.

Given the nature of the emergency we have been through, the question is in what circumstances, what kind of emergency, the Civil Contingencies Act would come into play. Given that, if not in Government, at least outside Government, many people did not realise that the measures that would be used to manage the pandemic were actually in the 1984 Act, it is worth looking right across the statute book at urgent and emergency provisions in other statutes that have been used during the pandemic, or that have not been used in this particular crisis but might be used in other types of crises, reviewing where they sit in relation to the Civil Contingencies Act and assessing whether everything would benefit from consolidation, in either a revised Civil Contingencies Act or a completely new statute.

Professor King: It would be good to have a review of the Act to allow those who are disgruntled about it not being used to have a full process to answer that disquiet. It is a fundamental constitutional measure. I do not see a case for reforming it, because it is there to allow the Government to have the powers to do virtually anything if it is strictly necessary that they do that. It is contemplated by the 2004 Act, where, if another option is available, it should be used, precisely because of the breadth of those powers.

In most countries that I have seen, either all-hazards legislation was avoided or it was used very briefly and then Covid-responsive statutes, in conjunction with previous public health epidemic legislation, were used. That is, effectively, the way the UK approached the question as well.

Q20 **Mr Jones:** We have had concerns expressed today about the level of parliamentary scrutiny of the legislation that was introduced. This clearly needs to be addressed. How could it be addressed in future? Could a new set of principles be employed to ensure that, when such legislation is introduced, a proper level of scrutiny is applied?

Professor King: A new pandemic response Act or public health emergency legislation that takes from the 1984 Act and combines some of the provisions, or certainly the insights of operating the Coronavirus Act, would be a good idea, with a model of parliamentary scrutiny that is tighter, effected through shorter periods for the made affirmative procedure, with possibly different categories of public health regulations that have different levels of scrutiny, and with determined sunset periods. All that should be done, and it would be good if that came out of this exercise.

Q21 **Mr Jones:** You would be in favour of consolidating legislation for this?

Professor King: Indeed, I certainly would be. There is no question but that the urgency procedure in the 1984 Act did not prove to be fit for purpose. The Coronavirus Act left those powers as they were. The experience in this country alone, which is also buttressed by comparative experiences, is that the features of the 1984 Act are not fit for purpose.

Dr Cormacain: I would broadly agree with that. It is also probably a matter of political culture and civil service culture. Once we get used to the habit of using emergency procedures, we will continue to use emergency procedures, or urgent procedures. It is quite difficult to shake that habit. Certainly at the start, as I said, urgent procedures were necessary. Two years in, the fact we are still using urgent procedures to make law at the last minute is increasingly unacceptable.

In terms of concrete ways to change that, we could have a check on the question of urgency. At the moment, it is simply enough for the Minister to say, "As a matter of urgency, we need to make these regulations now" and that is all there is. If there was some sort of check on that, either a judicial check or a legislative check, to say, "Can you demonstrate why this is urgent now and why you could not have introduced this using normal procedures?", that would be useful.

One example from France is the Conseil d'État, which is a constitutional court that has the power to review legislation before it is made, to check its constitutionality. They have a very different system from ours, but I was very impressed, speaking to one of the constitutional court judges, because they had the ability to look at a piece of legislation in advance of it being made and say, "We think that this particular provision in this Coronavirus Act is unconstitutional, so you cannot do it," so there is at least a check in the system.

There could perhaps be some sort of mechanism, equivalent to that, for saying, "Before you make this, you have to demonstrate this particular

point," or, "You have to jump over this particular hurdle," or, "You have to satisfy this particular office or institution that what you are doing is appropriate, necessary and justified in the circumstances."

Dr Fox: There are two elements to it, the first of which Ronan has talked about, in terms of the safeguards on the exercise of the urgent power, whether that is in the 1984 Act or using the made affirmative procedure in any other Act. There has to be a constraint on ministerial use of that. It cannot, or should not, simply be that the Minister can say, "I think this is urgent."

There are other Acts of Parliament where there are some constraints. They are not particularly strong ones. There is the Misuse of Drugs Act 1971. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 has a sunset clause that requires the Lord Chancellor to set out an urgency statement. One option would be that, if the Minister wants to move regulations under the urgency procedure, he or she has to come to the House and make a statement. That might challenge thinking a little bit more in Whitehall.

The other problem is the scrutiny clock. Under the made affirmative procedure, the 28 days, the scrutiny clock stops when Parliament is in recess, is adjourned for four days or more, which of course was the big problem in the summer of 2020, with the summer recess and the build-up of regulations. That could have been resolved if the Government had either decided, "We are getting a glut of these instruments; Parliament should be recalled," or taken an approach of timely tabling of debates and approval motions on that backlog of instruments when Parliament returned in September.

That was a political choice, in terms of how they managed their business. They could have done it better and more quickly; they chose not to. There was not an immediate political cost to that, although that subsequently led to a build-up of political opposition on the Government Back Benches in particular.

You could go down the route of saying, as Jeff has said, that you reduce the time period from 28 days to 14 days. In Parliament, we have seen a desire to consider and approve those regulations very quickly. Therefore the Government made the concession in September 2020 that they would bring forward an approval debate and vote as soon as possible after they had been laid. That brings a degree of accountability and approves the legislation, but it is not really detailed scrutiny. Members of Parliament cannot scrutinise effectively the technical detail of the instruments if they were published at midnight, came into force at 4 am and, within 24 hours of seeing the text and the explanatory memorandum, they are being asked to scrutinise it.

An interesting proposition that has been put forward in the House of Lords by its Secondary Legislation Scrutiny Committee and the Delegated Powers and Regulatory Reform Committee is the idea that you can have

the approval process early, so that it has the democratic legitimacy that brings. If the scrutiny Committees that look at regulations report in a negative way on the instruments, or if they report concerns, there should be an option to bring those regulations back for further, more detailed scrutiny, in the light of the Committee reports. It would, essentially, give Members a second bite at the cherry to consider them.

Given the volume, that raises questions about the management of time, both the Government's time in getting their business through and the time demand on Members of Parliament to be able to do that. It is pretty unsatisfactory whichever way you go, given the volume.

Q22 **David Mundell:** Mr Jones has touched on some of the issues that I was going to raise, in terms of the fitness for purpose of the Civil Contingencies Act and its potential to deal with issues in the future. I want to come to a point that you raised in your opening remarks, Dr Cormacain, about its intersection with the devolved settlements. Essentially, you seem to be saying that it would be impossible to use the Civil Contingencies Act for measures applying across the whole United Kingdom if some aspects of those measures were devolved.

Dr Cormacain: It is not impossible, but it would certainly break the constitutional convention, the Sewel convention, which is that Northern Ireland, Scotland and Wales are entitled to do whatever they think fit in relation to health measures. The idea that the Westminster Parliament could dictate—and that is what it would be doing—to Wales, Scotland and Northern Ireland what they should do, what the law should be in their devolved territories, is definitely constitutionally inappropriate.

Even now, there is a sense for the devolved jurisdictions that, although the Governments are all working together, there is a certain amount of pressure emanating from Westminster: "This is the way we think it should be done and therefore we think you should do it." There is sometimes a lack of resources in the devolved jurisdictions to go their own way and do their own bespoke, specific things.

There definitely would be a democratic deficit if the law on emergencies emanated from Westminster was applied throughout the UK, because it would not take into account local necessities. For example, in Northern Ireland there is a land border with a different country. That is not a consideration that would readily spring to mind as being important in Westminster.

As a very specific example, the international travel regulations created exemptions for sportspersons. In Northern Ireland there is a vibrant Gaelic games community. It is very important, but they are not professional sportspersons. This is the kind of thing that would not work in England. If the English rules applied in Northern Ireland, they simply would not be as effective. In answer to your question, doing it UK-wide would be constitutionally unsound and practically it would not give very good results.

Q23 **David Mundell:** I do not quite agree with your interpretation of the Sewel convention. The Sewel convention, of course, contains the expression "not normally". It is not an absolute provision. Perhaps we could hear from you, Dr Fox. Do you have any views on those issues?

Dr Fox: No, not particularly. You are right to say that the "not normally" provision is there in relation to Sewel, but it would be politically and constitutionally difficult, as Ronan highlighted, for Westminster to be legislating for health measures in what are devolved areas affecting Scotland and Northern Ireland. It may be legislatively possible but not necessarily a good idea.

Professor King: Yes, I broadly agree. The only thing I would add is that the spectacle of the House of Commons having a monthly vote on whether Scottish Ministers' powers to respond to the pandemic will continue seems a very difficult situation, to put the point at its lowest. It is not ideal. Therefore, conferring those powers of primary legislation to which the Scottish Parliament has given its legislative consent is a much better solution, in keeping with the principles of the devolution settlement.

Q24 **David Mundell:** That comes back to the Civil Contingencies Act not being usable, in its current form, for UK-wide emergencies that have a devolved element.

Professor King: I have not looked into that question in particular, but I would imagine it is suitable for that function. I would have to look to see whether the 2004 Act received legislative consent in anticipation of this kind of situation. I would not be surprised if it did. Clearly, the Civil Contingencies Act is intended to address emergencies that affect the United Kingdom as a whole. I do not know whether it makes any provision for whether its regulations should receive any form of consent, if not legislative consent, from the devolved legislatures, but there may well be procedures in place to allow that to happen.

Dr Cormacain: There is a provision in the Civil Contingencies Act, where regulations would have an impact in Scotland, Wales and Northern Ireland, for there to be consultation with Ministers in Scotland, Wales and Northern Ireland. Some sort of recognition of the importance of the devolved Parliaments is built in. More generally, it depends on the nature of the emergency. There could be some emergencies where it would be entirely appropriate and not stepping on devolved competencies for Westminster to legislate for the entirety of the UK.

Yes, you are absolutely right: the Sewel convention is not an absolute hard and fast rule; it is just that we would not normally do it. It is conceivable that there are some circumstances, such as a major nuclear incident that spread across the UK, where the Civil Contingencies Act model would be appropriate and could be used for everything. The other point about it is that there is nothing to stop regulations being made under the Civil Contingencies Act that apply only to England. That is

entirely possible. Then it could be left to Scotland, Wales and Northern Ireland to do their own regulations.

Q25 **John Stevenson:** Dr Cormacain, you have raised a concern in the past about the Government making rules through issuing guidance and that guidance not always linking up with the legislation or the law that has actually been passed. Has that continued throughout the pandemic, or did it improve?

Dr Cormacain: It has probably improved to a certain extent. I am struggling to think of specific examples, but certainly at the outset Ministers were saying, "This is what you have to do" instead of saying, as Jeff said, "This is what we advise you to do." I cannot honestly say with certainty whether it has definitely got better, but my sense is that it has got better and there has been less of the guidance masquerading as law.

Q26 **John Stevenson:** One of the problems that emerges is about how Parliament effectively scrutinises the guidance that is issued by Government. Parliament deals with law; this is about guidance. How does Parliament effectively scrutinise the actions of Government?

Dr Cormacain: That is more of a political question, to be quite honest. Sometimes there is procedure for guidance to be laid before Parliament and approved by Parliament. If an Act says, "The Minister may make guidance, and that guidance must be laid before Parliament," then there is a parliamentary route. A lot of the time in this pandemic it has not been official guidance, so to speak; it has merely been a Minister saying something.

There is no formal mechanism for that to be checked by Parliament other than by asking questions in Parliament. As you say, it is extra-statutory. Therefore, there is no basis in statute; therefore, there can be no legislative scrutiny. The only form of scrutiny is political scrutiny by asking political questions.

Professor King: The variety of guidance that needs to be published, and quickly, in different sectors would make it very difficult to have it approved before it is published. That would be impossible. It is conceivable that a code of guidance of some sort that amalgamates everything could be laid periodically before Parliament, but that code would need to be amended very frequently and amalgamating it would be complex. These are some of the challenges that face parliamentary scrutiny, but it is not impossible and it would be a good idea for these questions to come before Parliament periodically.

Dr Cormacain: I want to make a broader point. There has been an increasing reliance on non-statutory forms of regulation. The various Committees in the House of Lords have recently been speaking about the democratic deficit when things are done not by using primary legislation or even secondary legislation but by using guidance, codes, directions or ministerial directions.

That is, in constitutional terms, a slightly worrying development. If something is important, Parliament should debate it, pass it, agree it and enact it as a proper law. There is this tendency to push things more towards guidance, which does not have the proper parliamentary scrutiny and approval that it really deserves.

Q27 **John Stevenson:** You made a comment earlier that it makes it very difficult for the police when it comes to enforcement and interpreting what is the law and what is guidance.

Dr Cormacain: Exactly, yes. It is not that the police officer has legislation.gov.uk on their mobile phone and scrolls down through it, but there should at least be some option. There should be an official source on the legislation website that says, "This is what the law is." If it is guidance, it is not very easy to find and it does not have any proper authority behind it.

Dr Fox: I want to add something to what Ronan said earlier about the question of whether the situation has got better or worse during the pandemic. That is quite difficult to judge, but one of the most egregious examples of where the Government have legislated via regulation was in relation to the self-isolation requirements. Last autumn, we had to isolate for up to 10 days. In effect this has now been changed by guidance, but the Government have not updated the law. Prior to Christmas, the Government advice that was being promulgated through all their communication channels, press conferences, social media and so on was that you had to isolate for seven days, and that was then reduced to five days. They did not actually change the regulation. The regulation still says 10 days.

That is a pretty egregious example that has remained in place for several weeks and has not been rectified. It is an example of what happens when you have this discrepancy. How does that affect the police and the courts in terms of what they are expected to do? A Minister simply saying, "We expect the courts to be guided by the advice we put out and by the press release that has been issued in relation to the guidance," does not seem to me to be an appropriate way to conduct things.

Q28 **John Stevenson:** Dr Fox, just to finish, you have been very involved with criticism of the procedures, the SIs, and how it can be improved. How do we deal with guidance? How does Parliament effectively scrutinise guidance, in your view?

Dr Fox: In short, it does not. The House of Commons does not have a scrutiny Committee for delegated legislation, for statutory instruments. Scrutiny for the technical and legal issues in relation to instruments is done on a joint basis by the Joint Committee on Statutory Instruments, but it is not looking at guidance. The Secondary Legislation Scrutiny Committee in the House of Lords does at the edges, insofar as it relates to some of the instruments that come before it. As Ronan said, it has been highly critical of what it calls disguised legislation.

There is not really a scrutiny architecture in either House that can cope with the volume of guidance and relate it to the pandemic and the particular regulations that have been coming through. It is very ad hoc, where a Member picks up on it in a debate and so on.

Q29 **Mr Jones:** Professor King, you made the point that, although the Act contains a sunset clause, certain provisions can continue beyond the end of the sunset clause. In terms of sunset clauses generally, do you believe they are appropriate in this type of legislation? How is it possible to assess the perfect length of a sunset clause?

Professor King: They certainly are appropriate in this type of legislation, particularly because it was fast tracked. That is consistent with the guidance of the Constitution Committee of the House of Lords. The ideal period needs to be judged against the circumstances that justified introducing the Bill in the first place. In this case, a shorter period would have been more appropriate. Something like one year would have been quite appropriate.

Q30 **Mr Jones:** Forgive my interrupting, but how do you assess that? Is there some sort of calculation you can apply, or is it just a gut feeling?

Professor King: The calculation is that it should not impede the production of urgent public health regulations. That would be a mistake. Nor should it call for the complete revamping of the powers before there is enough time to see how they have been used in the interim. Something shorter is conceivable, but it would infringe on the ideas I was just mentioning. One year is enough time for the preparation and introduction of a proper Bill that can be scrutinised in the ordinary fashion.

That is the real issue. When can these powers be put through ordinary legislative scrutiny? That is roughly how I come to that number of one year.

Q31 **Mr Jones:** Would you say that the sunset clause included in this legislation has led to some powers remaining in place longer than they really ought to have remained?

Professor King: Yes, in a procedural sense. I am not saying the provisions that are currently in force are not needed. What I am saying is that it was possible to introduce legislation to have proper legislative scrutiny at an earlier point in time. The process of six-monthly reviews was no substitute for adequate legislative scrutiny.

Continuing the Act under the powers in section 90 would be a mistake for very similar reasons. The legislative scrutiny process that took place with the Coronavirus Bill was quite rapid. I found a statement from the Delegated Powers and Regulatory Reform Committee's report on the Bill, which says that the Committee believes "it is important for us to state clearly that, had the country not been in the midst of a developing national emergency, there are powers in this Bill, including far-reaching

Henry VIII powers, about which our commentary would have been far more trenchant and our recommendations far more robust." The Constitution Committee agreed with that statement.

The ordinary process of legislative scrutiny would allow both Committees to be more robust and trenchant, as well as Members of the House of Commons and other peers in the House of Lords.

Dr Cormacain: Sunset clauses are a good thing, but they can be a double-edged sword. They are good because they put a definite endpoint to a power that is otherwise very draconian, but they also mean that parliamentarians are more likely to vote for a draconian power on the basis that it will come to an end. The solution is what Jeff has alluded to, which is that the sunset clause should be shorter than the two years that it already is and it should be rigorously enforced.

The deal that Parliament struck when it enacted the Coronavirus Act was to say, "We will allow this to be rushed through on the basis that it will expire after two years." If we are now talking about extending bits of it, that would just be wrong. A much better approach would be for the Government now to identify the bits of the Act that they think are still useful; to introduce new legislation that would be enacted through the normal proper channels; to allow for proper debate, scrutiny and amendment in Parliament; and then for that new Act to come into force without the excuse of, "This is an emergency and therefore we have to do it in a different way."

The line now is that we have to learn to live with Covid. If we have to learn to live with Covid, we cannot be in a constant state of relying on emergency laws. We have to use our ordinary laws in order to regulate the pandemic.

Dr Fox: In most instances the reality of sunset clauses is that they are a combination of gut feeling and political negotiation. The sunsets that were arrived at were a combination of the Government trying to keep the Bill at two years where there was a clear desire in the Commons and the Lords for it to be shorter on the statute book. We arrived at a situation where the Government made some concessions around the six-month mark, which some Members had been talking about as where the expiry period ought to be. That was the concession. "Let us have a review period at those points."

In terms of Jeff's points on the concerns expressed by the Delegated Powers and Regulatory Reform Committee and others about the nature of the powers in the legislation, had this been a Bill in more normal times, not an emergency, you would probably have seen an attempt, particularly in the House of Lords, to introduce a strengthened scrutiny procedure to hedge them in—something like an enhanced affirmative procedure or even potentially a super-affirmative procedure.

In practice, that would not have worked in an emergency when it came to the regulations, because they take too long in terms of the scrutiny process. We ended up with sunsets as an alternative, absent the other options for hedging in very broad powers. As we have seen, the sunset periods operate using a combination of these two-monthly review periods and the six-monthly formal reviews on a Division in the House of Commons. If those procedures do not work very effectively, if Members do not have time to scrutinise the provisions or if it is a "take it or leave it" proposition on everything, in fact the scrutiny is really quite weak.

Q32 **Mr Jones:** The inclusion of a sunset clause, to many, might provide reassurance that the powers are at least not going to continue forever. When sunset clauses are included in legislation, to what extent is there a tendency to include more far-reaching powers than may be absolutely necessary?

Dr Fox: That is always possible. That is a product of the political negotiation. Unusually, the sunset clause was in the Coronavirus Bill when it first came forward. The Government offered that at the start, in part because they knew that, in terms of the political negotiations, it was where Members would be looking to get some concessions. Therefore, they offered that up first and pointed to the fact that this was the kind of provision that the Constitution Committee in the House of Lords had recommended for emergency fast-track legislation.

It does not quite apply here, but there has been a view that sunset clauses can be utilised as a way of bringing in the broadest powers that would otherwise be unacceptable and providing a degree of acceptability to them, which consequently enables Ministers to do more than they really ought to be able to do. Too often the focus is on the procedure and how you strengthen the scrutiny around the power rather than asking the first-principle question, "Should this power be on the statute book in this form at all?" That is a different debate to be had when you are looking at normal business, primary legislation in normal times, as opposed to those same powers in an emergency Bill.

Dr Cormacain: I have already alluded to this. You are exactly right: there is a risk. If something is dressed up with a sunset clause, we will let it go through when otherwise we would not let it go through. As Ruth has said, the sunset clause should be a factor, but the question still needs to be asked: do you absolutely need this draconian power now? If not, you should not have it.

Professor King: I broadly agree. Sunset clauses are part of the offer that the Government can make to justify extensive powers. Just as enhanced scrutiny is in the regular legislative scrutiny process, it is a concession that can lead to the acceptance of what are novel and very broad powers.

Sunset provisions are required in this situation. When there are conditions of uncertainty and an extremely important social objective, the

preservation of life, it is necessary to have some of these powers. The sunset clause is the best thing for making sure that the policy comes back to Parliament with the possibility of evidence on how it has worked.

Q33 **Mr Jones:** You say it is the best thing, but could some alternative approach potentially be adopted?

Professor King: It is hard to see that there could be, because generally these powers are used in conditions of uncertainty. It is about how you manage that uncertainty. Where states have chosen to take precautions to ensure disaster does not unfold, you will need to have powers that sometimes look like they might not be needed, but that, if they are needed, will have to be deployed, or you will have cataclysmic consequences.

Q34 **Chair:** I want to ask, in a quickfire way, if that is at all possible on this subject matter, about the draft pandemic flu legislation, particularly that produced in the wake of Exercise Cygnus, and how that was used as the basis for the Coronavirus Act.

Should it be the policy for draft emergency legislation to be drafted and, indeed, routinely updated? Linked to that, how do you see the role of Parliament in scrutinising such draft legislation and updates?

Professor King: It would be an excellent idea not only to prepare draft legislation, which on my understanding is what happened after Exercise Cygnus, but also to publish it for pre-legislative scrutiny. That will allow many stakeholders to have a voice and allow Select Committees to report.

As to the precise machinations of the scrutiny and whether there is a Joint Committee, that is an open question. I would not want to see the role of specialist Committees be muted as a result of there being an enormous focus on the report of the Joint Committee. Pre-publication and Select Committee reporting would be essential to the best regime.

Dr Cormacain: I absolutely agree. Making legislation in advance without the time pressure and without the pressures of the pandemic itself is an excellent idea. It will avoid technical mistakes and allow for proper consideration.

Secondly, it would be an excellent idea for it to be considered by Parliament in advance as well. That can only improve the quality of the legislation. There is more time to develop the policy, to draft the legislation, for parliamentarians to scrutinise it and then to ask the sorts of sensible questions that perhaps were not thought of in the original process. "What will this mean if X happens?" Then Government, the drafters and the lawyers can go back and say, "We did not think about that. Let us see whether we can cover that point." I absolutely agree on all aspects of that.

Dr Fox: I agree with what has been said about pre-legislative scrutiny. That is vital. I will add one additional point. No legislature was part of pandemic planning, such as Exercise Cygnus. Given we have seen through the pandemic that management of the legislative process and the parliamentary scrutiny process has been so vital—we have parliamentary Government—Parliament should be a stakeholder in those exercises and should be part of the planning process, so that those issues about legislative management can be considered as part of the exercise from Parliament's perspective, not just the Government's.

Chair: Thank you. That is helpful.

Q35 **Tom Randall:** One of the things this Committee has found is that ministerial accountability for ensuring decisions are underpinned by data is not always clear and that responsibility has sometimes been passed between the Cabinet Office and the Department of Health.

In your view, are thresholds and triggers built into policymaking? If so, how do they work in practice? How does that certainty of threshold weigh up against the inflexibility of having a threshold or a trigger? Could I come to Dr Fox first?

Dr Fox: This is not really my realm of expertise, I am afraid. I am not really in a position to comment in any particularly informed way. It is perhaps best left to others.

Dr Cormacain: I am afraid I might also give the same answer. I am not exactly sure about the process for assessing the rationality of the evidence and the decision-making process. I am sorry that I cannot be of more assistance on that question.

Tom Randall: It is over to you, Professor King.

Professor King: I will resist admitting that I do not really know and give you an answer anyway. My focus and perhaps that of Ruth and Ronan has been on the statutory framework. It is quite difficult to regulate the aspects of ministerial decision-making through the legal frameworks that you have just mentioned. I will have to pass on that one as well.

Q36 **Tom Randall:** For my final question, I will start in reverse order. Does the availability of data and evidence when the Coronavirus Act was brought in, compared with now, mean that the expectations of the scrutiny process are different from how they would have been?

Professor King: If we are comparing March 2020 with now, yes, certainly, the availability of evidence, the capacity to evaluate it and the creation of networks that will assist Members of both Houses to evaluate that evidence are better now. We are in a better position for that.

The Government will always retain the upper hand on evaluating that information, because time is of the essence and they get to see it first and carry out extended discussions. There would need to be serious

consideration of a process under which members of the Opposition and Members across the House would, via Committee or otherwise, have access to some of the expert information and participate in some of those longer discussions, not just those before SAGE but in general, so that, when the measures come up for a vote, they are as informed as they can be on what to do.

Dr Cormacain: I am very much in favour of evidence-based law making. There should be a sound empirical evidential base for all the laws we produce. There is sometimes a sense that the Government own the evidence. That is not helpful to the process of parliamentary scrutiny.

The more transparency on the evidence, the better. The more the policy experts are able to give evidence to parliamentarians—with notes, records, minutes of evidence, records of meetings, et cetera—and be questioned by them, the better. If the scientific evidence is available and the experts are there to explain it to parliamentarians, that will only improve the quality and the process of making that law.

Chair: Thank you very much indeed. With those questions, that concludes our session this morning. It only remains for me to thank our three witnesses, Dr Cormacain, Dr Fox and Professor King, for your time. We are very grateful indeed for all of your insight. If there is anything further that you wish to bring to our attention, do feel free to write. From us all, thank you very much indeed.