HOUSE OF COMMONS

Public Administration and Constitutional Affairs Committee

Oral evidence: Responding to Covid-19 and the Coronavirus Act 2020, HC 377

Tuesday 16 June 2020

Ordered by the House of Commons to be published on 16 June 2020.

Watch the meeting

Members present: Mr William Wragg (Chair); Ronnie Cowan; Jackie Doyle-Price; Chris Evans; Rachel Hopkins; Mr David Jones; David Mundell; Tom Randall; Lloyd Russell-Moyle; Karin Smyth; John Stevenson.

Questions 1 - 60

Witnesses

I: Raphael Hogarth, Institute for Government; Dr Ronan Cormacain, Senior Research Fellow, Bingham Centre for the Rule of Law, British Institute of International and Comparative Law; and Professor Aileen McHarg, Professor of Public Law and Human Rights, Durham Law School.

Examination of witnesses

Witnesses: Raphael Hogarth, Dr Ronan Cormacain and Professor Aileen McHarg.

Q1 **Chair:** Good morning and welcome to another virtual meeting of the Public Administration and Constitutional Affairs Committee. I am here in a Committee room in Portcullis House with a small number of staff to facilitate the meeting. My colleagues and our witnesses today are in their homes and offices across the country. The Committee is extremely grateful to our three witnesses on our panel this morning for making time to appear before us. I ask the members of the panel to introduce themselves for the record, starting with Professor McHarg, please.

Professor McHarg: Good morning. I am Aileen McHarg. I am Professor of Public Law and Human Rights at Durham Law School.

Raphael Hogarth: My name is Raphael Hogarth. I am an associate at the Institute for Government.

Dr Cormacain: Good morning. My name is Ronan Cormacain. I am a research fellow at the Bingham Centre for the Rule of Law and I am also a consultant legislative counsel.

Chair: Thank you ever so much. My colleague John Stevenson is going to start off with the questions today.

Q2 **John Stevenson:** Thank you, Chair. Could I start with you, Dr Cormacain? Was there enough accountability in the way that the Coronavirus Act was introduced and passed? Do you have any concerns about the speed at which the legislation was enacted?

Dr Cormacain: The short answer to your question is that I am concerned about the speed with which it was enacted, but I think that you asked about accountability. What we are talking about, really, is proportionate accountability. It is not an absolute value. In an ideal world we would have a large amount of time to debate these matters in Parliament but, given the circumstances of the pandemic, I think it was reasonable for it to be passed at breakneck speed.

That is something that applies to the Coronavirus Act itself. I am not sure if you want me to discuss the subsequent regulations that flow on from that but, I would say that for the Act itself, when it was passed, that was sufficient.

Q3 **John Stevenson:** Thank you. Professor McHarg?

Professor McHarg: Yes, I would agree with that. There is a long history of emergency legislation being passed very quickly. This was about six days, I think, from First Reading to Royal Assent, which is not unduly fast. The Bill was amended, so we can say that the scrutiny process at least worked to some degree. It is inevitable in these circumstances that we are going to see emergency procedures and that we are going to see quite a lot of Executive dominance in this process. That is by no means unique to the UK. That is a phenomenon that we see in every jurisdiction that has faced this pandemic or similar crises.

Q4 **John Stevenson:** Mr Hogarth, your observations?

Raphael Hogarth: I would agree with what has been said. I draw a very sharp distinction between the levels of accountability, as Dr Cormacain said, in the introduction and passage of the Coronavirus Act, where there was some genuine parliamentary scrutiny—there were amendments on things like religious burials and parliamentary review periods—and the enactment of the restrictions regulations; that is, effectively, the rules that gave effect to the lockdown. With those, there was really no accountability of that kind, and no parliamentary consideration before the fact.

Therefore, I would say: yes, in the circumstances there was a reasonable amount of ex ante accountability for the Coronavirus Act, but concerningly little for the restrictions regulations that gave effect to the lockdown.

Q5 **John Stevenson:** Can I come back to you, Dr Cormacain? How do the

provisions of the coronavirus legislation compare to those contained in the existing emergency powers, namely the Civil Contingencies Act?

Dr Cormacain: We need to draw a distinction between two things. The first is the post-legislative scrutiny of the Act itself, and the second is the post-legislative scrutiny of any regulations made under the Act or the Civil Contingencies Act.

In terms of the Coronavirus Act itself, there are some relatively good mechanisms for post-legislative scrutiny in place. A report must be made every two months on the status of the Act. Then we have the six-month review by Parliament, and then we have the one-year review.

To go back to your previous question about the accountability in the Act as it was made, the six-month review is a very good example of the benefit of making something of this nature by Act of Parliament, because the six-month review was introduced as a result of debate and scrutiny in the Houses of Parliament, so when the Bill was introduced there was no six-month review. The fact that there was proper political scrutiny, political debate and political accountability meant that the Government introduced an amendment, so I think that is one of the benefits of having legislation passed by proper Act of Parliament.

So that is post-legislative scrutiny of the Coronavirus Act. If you then look at the Civil Contingencies Act 2004, in terms of post-legislative scrutiny there is not much of the Act itself but there is better scrutiny of the regulations that are made under the Civil Contingencies Act. For example, any regulations that are made under the Civil Contingencies Act will automatically lapse after 30 days, which isn't the case with our lockdown regulations. Secondly, regulations made under the Civil Contingencies Act must be laid as soon as possible before Parliament and they will lapse seven days after they are laid before Parliament unless Parliament passes a resolution to approve them.

The post-legislative scrutiny under the Civil Contingencies Act is quite good. Post-legislative scrutiny under the Coronavirus Act is quite good. We haven't really mentioned the post-legislative scrutiny of the social distancing regulations because, of course, they are made under a third Act, but perhaps we can come back to that point if you want to discuss the Public Health (Control of Disease) Act later on.

Q6 **John Stevenson:** Overall, do you feel reasonably happy with the post-legislative scrutiny that is available?

Dr Cormacain: Yes. There are some ways that that could certainly be improved but there is a mechanism for post-legislative scrutiny. There is a parliamentary trigger for debate. There is a process that Parliament must agree to, and those are very important things. There is certainly room for improvement in terms of the debate around that and the information that could be given to Parliament to assist in that debate, but there is a mechanism that is quite an important procedural safeguard.

Q7 **John Stevenson:** Professor McHarg?

Professor McHarg: I just wanted to add that I agree with what has just been said about the provisions for the Coronavirus Act. The fact that the English and Welsh regulations are not made under the Coronavirus Act is quite important, though, because the lockdown regulations are. The review provisions in those regulations are entirely voluntary. They do not have to be there.

The Committee might be interested in the provision that has been made in Scotland in the second Scottish Coronavirus Act, because that brings into the Scottish Government's two-monthly reporting duty an obligation to report on all coronavirus-related Scottish statutory instruments.

Q8 **John Stevenson:** We will come to the devolution issue in due course, but thank you for that. Mr Hogarth?

Raphael Hogarth: I agree that it is a good thing that the Government put some mechanisms for post-legislative scrutiny into the Coronavirus Act. In some respects those provisions are lacking in comparison with the Civil Contingencies Act. I think that the post-legislative scrutiny in the CCA is more powerful. It is more powerful partly because, as Dr Cormacain says, the regulations automatically lapse sooner unless the Government seek renewed parliamentary consent for them. It is also more powerful because if there are defects or problems with the emergency legislation, under the CCA it is easier and more straightforward to sort those problems out. You can sort them out by a simple resolution, whereas with the provisions of the Coronavirus Act, you can only sort them out by primary legislation. That is because, by and large, you can only amend primary legislation with primary legislation, with some exceptions. The CCA provisions are more powerful.

It is good that there are provisions for these two monthly status reports and these six-monthly debates. It is not good that the duties placed on Government to provide information and evidence to Parliament on why they take the view that they do on whether provisions should stay in force or not, are so weak.

These two-monthly status reports require the Government to tell Parliament whether provisions under the Act have been in force, whether they have been suspended and whether the Secretary of State considers that the status of those provisions is appropriate. They do not require the Government to tell Parliament why the Government consider the status of those provisions appropriate, or on what evidence that judgment is based. It would be wise, first, for a Government voluntarily to provide a bit more information and reasoning to Parliament than it is strictly required to do under the Act and, secondly, for parliamentarians to press the Government to do so if they are not willing to.

Q9 **Chair:** Could I just interrupt there, John, with a follow up question to Mr Hogarth? That is a very interesting point that you raise, and one which I

raised yesterday evening with the Minister on the floor of the House. Could that be done, for example, by means of a written statement as to which measures were being eased or, indeed, not being eased and an explanation for those changes or non-changes?

Raphael Hogarth: Yes. Again, it is important to draw a distinction between provisions under the Coronavirus Act and the lockdown measures which, at least in England, do not fall out of that Act. They fall under restrictions regulations that are made under the Public Health (Control of Disease) Act 1984. When you talk about measures being eased, you might be referring to provisions under the Coronavirus Act, but that is normally a phrase that people use with respect to lockdown measures—that is, are the Government using the lockdown?

In a sense, if you bolstered the scrutiny provisions in the Coronavirus Act, it still would not place the Government under an obligation to explain more thoroughly what they were doing about the lockdown, although that would be very worthwhile in itself. As to the mechanism for doing so, yes, a requirement to put a written statement before Parliament on a regular basis is exactly the sort of mechanism the Government should be thinking about. It would be reasonable for the Government, in their regular reports on the Coronavirus Act, to provide more information than they are strictly required to do under the Act and, also, with respect to the lockdown provisions—that is, the restrictions regulations—to provide a written statement, which they are currently not required to do by the legislation.

In terms of the lockdown, all the Secretary of State is required to do is to review the restrictions regulations every four weeks. It was every three weeks. It is now every four weeks. Effectively, he has to apply his mind to the question of whether these restrictions are still necessary for the protection of public health. There is no current obligation to tell Parliament, or indeed to tell anybody, about why the Secretary of State has come to the conclusions that he has about whether the measures are necessary, and it would certainly be worthwhile to strengthen the obligations in that regime as well.

Chair: Thank you, Mr Hogarth. Sorry to interrupt you, John.

Q10 **John Stevenson:** I think Dr Cormacain wants to come back, and then I am finished.

Dr Cormacain: I want to make a slightly broader point about the choice of the legislative vehicle that is used to give effect to all these changes. The very broad idea is that we have three different pieces of primary legislation, the Coronavirus Act, the Civil Contingencies Act and the Public Health (Control of Disease) Act—and that is not counting in Wales, Scotland or Northern Ireland—and then we have a plethora of secondary legislation that we can use. One of the key questions is: which legislative vehicle is the most appropriate to use to give effect to all these sweeping changes that we are making?

The Coronavirus Act made a lot of changes but a lot of the detailed social distancing rules, the lockdown rules, are being done by secondary legislation. The clear distinction is that an Act of Parliament is something that you will see, debate, scrutinise and amend. The secondary legislation does not have that same level of parliamentary scrutiny. It is essentially for you to assent or disagree with but there is nothing more to it than that.

One of my concerns is about why really important matters are being dealt with by secondary legislation, not by primary legislation. The Bingham Centre did a report on delegated powers with Jack Simson Caird a couple of weeks ago. In that—flowing on from what Parliament has said and what the Joint Committee on Statutory Instruments has said—it was said that politically sensitive matters should, in principle, be dealt with through primary rather than secondary legislation. For me, that is one of the major concerns. Why are the Departments and the Executive passing all these pieces of secondary legislation that have a huge impact on us? Why is Parliament not passing those pieces of legislation itself?

John Stevenson: Thank you; that is an interesting point.

Q11 **Rachel Hopkins:** Reflecting on the limitations on the proper scrutiny of the coronavirus legislation as it went through Parliament because of the emergency nature of the legislation, has it been appropriately compensated for by subsequent accountability?

Raphael Hogarth: As I have said, with respect to the Coronavirus Act, it has been partially compensated for in so far as we have these review periods and opportunities for subsequent parliamentary consideration. It is worth acknowledging that, in any event, ex post scrutiny is a bit of a cheap knock-off of ex ante scrutiny, because you can cure problems but you cannot prevent them.

As soon as you start talking about ex post scrutiny you have to be on your guard for problems with the legislation. In terms of whether the compensation with respect to the Coronavirus Act is adequate, my view is that it is probably not, because of the issues that I have mentioned about the level of information that the Government have to provide. What I would suggest is that the Government either provide voluntarily, or be obliged to provide, some specific evidence about the use of the powers.

Let us take, by way of one example, the quite extraordinary provisions in the Coronavirus Act on social care that effectively allow for the relaxation of several duties that normally fall upon local authorities to assess the needs of people in their area for care, and to provide that care. The Government should be providing information on which authorities have used those easements and for how long.

There should be a statement on why the local authority considered that it was necessary to use easements. Ideally, there should be some quantitative evidence on the impact of those easements as well, like some evidence on the length of time between an individual requesting help and

a council finishing an assessment, or data on what proportion of requests for care resulted in the provision of care. Those data can then be compared against national averages and Parliament can make some genuine assessment of the impact of these provisions on the ground. That kind of stringent reporting obligation is what I would consider adequate compensation for the lack of scrutiny as these measures were going through Parliament.

Q12 **Rachel Hopkins:** Thanks. Professor McHarg?

Professor McHarg: I would agree what has been said about the thinness of the first two-monthly report. As I said earlier, there is an instructive contrast with the Scottish Government's two-monthly report. It is far longer and far more detailed, and it does provide a more detailed analysis of why it has been considered necessary to use particular provisions and the criteria that are being used to assess impacts. There is a model there that usefully be drawn upon.

The other ex post scrutiny I suppose we have seen is in relation to the lockdown regulations. These have been subject to subsequent parliamentary approval—although, in the case of the English regulations, rather delayed parliamentary approval. As Raphael said, ex post scrutiny is not as good as ex ante scrutiny because it is virtually inconceivable that Parliament would not have approved those regulations, and under the legislation that has been used there is no provision for amendment. If the Civil Contingencies Act had been used—and unusually that does allow for parliamentary amendment of the regulations—that would have provided a much stronger power. Given that the lockdown regulations were required, the idea that they would not be approved and that approval would not be, in effect, a formality—I think it was inevitable that that would be the case.

Q13 **Rachel Hopkins:** Thank you. Dr Cormacain?

Dr Cormacain: The scrutiny provisions in the Coronavirus Act are quite Spartan, although they are at least there. Section 97 simply says that in the two-monthly report, the Secretary of State must report on the status of the provisions and whether he is satisfied that the status is appropriate. That is a sparse amount of information required as set out in the Act.

I had a look at the actual two-monthly review and it is useful—limited but useful—because it does go through all the provisions in the Act and it says, "Is this enforced? Is it not enforced?" and why it is or not enforced. I found that useful information. However, it is only useful to a limited extent because it doesn't really give the detail justifying why it is still in force and how effective it has been. For me, that is one of the key requirements. Not simply, "Is it appropriate that this is in force?" but how effective it has been.

The other point about the two-monthly report is that it is not properly independent. It is not a proper independent critique of the effectiveness of the measure. It comes across more as a slightly self-congratulatory report

by the Government saying, "We have done a jolly good job here", because there are words in it like "huge effort" and "well done to the frontline staff"—stuff which is useful, but it comes across as a little bit of propaganda—rather than something that is properly independent and critical, which says, "This has worked, and this has not worked". I think that information would be useful.

The same kinds of things apply with the six-month review. We will have to see how that works out in practice, but the level of detail required in the legislation is relatively limited. It will be interesting to see in practice if the Government bring proper information and proper evidence justifying what they have done, and being open and honest and saying what has and has not worked.

Rachel Hopkins: Thank you.

Q14 **Mr David Jones:** The Coronavirus Act contains a range of emergency provisions to be used in the response to the coronavirus outbreak. Which would you say are among the most exceptional provisions contained?

Raphael Hogarth: I think of the emergency measures in the Act in three main buckets. The first of those is measures to manage or prevent the spread of disease, and these are probably the most jaw-dropping, eye-popping powers in the Act. In that part of the Act, you have powers for the Secretary of State and the devolved authorities to close schools and childcare providers or to authorise local authorities to do so; you have powers to stop gatherings and close premises; and you have powers for public health officers to take enforcement action against individuals who they have assessed at being at some risk of passing the virus on. That might be enforcement, screening or assessing or, in extremis, even detaining them or imposing restrictions on their movements, their activities or their contacts. That first bucket has probably the most striking emergency measures.

The second bucket is a bucket of measures to lighten the load or the burden on public services during the pandemic and, although those measures might appear a bit less jaw-dropping, they are pretty extraordinary and quite powerful in some cases. I have already mentioned the provisions allowing for the suspension of duties on local authorities under the Care Act. If a local authority triggers those provisions, its duties to assess and provide care are relaxed to a duty to do that only when not doing it would infringe somebody's human rights. There are various other public service duties that are relaxed, basically to make the lives of those delivering public services a little bit easier when it is anticipated that they might have a depleted workforce and depleted resources. So there are some duties relaxed with respect to vulnerable children, and duties relaxed with respect to the regime for those who are mentally incapacitated, the registration and certification of deaths—things like that.

The third bucket of measures include some economic support, protecting tenants from eviction, some statutory sick pay provisions and so on. At this

point, most of those kinds of economic responses are being done outside the Act rather than with provisions under the Act. Those measures are important, but this is not the place to go to understand the Government's economic policies.

Q15 **Mr David Jones:** Professor McHarg?

Professor McHarg: I would agree with Raphael's categorisation. I would add a fourth category of provisions under the Act, which we might call suspension of normal constitutional practice. There are provisions providing for the postponement of by-elections and suspension of local authority meetings. You might also put in that category the Treasury directions power. I think that should be regarded as a pretty extraordinary power, because it is being used to spend a huge amount of public money on the furlough scheme but without parliamentary scrutiny, with some question mark over the legal status of a Treasury direction. Is it a form of secondary legislation? What exactly is it? That would be my fourth category.

Q16 **Mr David Jones:** Dr Cormacain?

Dr Cormacain: In terms of exceptional measures and the Coronavirus Act, closing schools and delaying elections seems to me to be quite extraordinary. The broader point I would make is that it is not simply the Coronavirus Act that gives effect to all these changes; it is all the regulations that have been made outside the Act itself. If you go on to the Government's website, at last count there were something like 160 separate pieces of secondary legislation with coronavirus in the title, and they were all doing really key critical things. It is those secondary pieces of legislation that are not necessarily properly picked up.

Then we have other legislation. There is a Bill before Parliament today, the Corporate Insolvency and Governance Bill, which is being debated today in the House of Lords. Even though it is called Corporate Insolvency and Governance, it also contains coronavirus measures—maybe quite sensible things about a temporary restriction on the rules of company meetings or when you have to file accounts, or things of that nature. But it also contains coronavirus rules. It is like an octopus with its tentacles spread out across the statute book. So many different rules and laws have been made as a result of coronavirus and they are spread out everywhere. If we focus simply on the Coronavirus Act or even on the regulations, we miss out some of those really important changes that have been made to society.

Mr David Jones: Thank you.

Chair: I will bring Rachel Hopkins in again.

Q17 **Rachel Hopkins:** Thank you, Chair. The Government are committed to publishing sufficient information in good time to help to inform the six-month debate on the Coronavirus Act, but what information does Parliament need for that debate?

Dr Cormacain: That is a really good example, as I said before, of Parliament actually working. When the Coronavirus Bill was going through Parliament I worked with Lord Anderson to suggest an amendment to that provision. That amendment would have required the Government to provide concrete information. Unfortunately that amendment was not taken forward, but the key things I think you need are: what was the original justification for each individual measure? Why did we have that provision? Then the second question is: is that still justified? Then the third piece of information is: what is the evidence for the effectiveness of that provision?

To take an example, there was a relaxation on the rules on doctors' registration. The idea behind it was to allow retired doctors to come back into practice so there would be more medical support for the NHS. It needs to be explained that that was the original justification and then, for the six-month review, the Government need to explain whether that justification is still necessary. Are we still down on doctors? The third thing is the effectiveness. Has it been effective? How many doctors have come back? Are they working properly? Are they de-skilled? Do they have to be retrained? What kind of jobs are they doing? Are they providing an effective back-up? It is that level of granularity about the effectiveness for each provision in the Act, so the Government need to be able to explain what we did, why we did it and whether it is working; if it is a financial measure, whether jobs have been protected and how many; and how much it has cost.

What we are talking about is quantified evidence to prove it effectiveness because then you, as parliamentarians, can do your job and scrutinise and question those things.

Professor McHarg: I agree with what has been said. A useful way to think about this might be to think in term of impact assessments, to require the Government to go through a proper impact assessment for each provision. As Ronan said, what was the purpose of the measure? What alternatives might there be? At this stage that is extremely important. Are there less intrusive ways of achieving the same ends? What is the evidence as to what impact the measures have had, and so on? As part of that, I think you want a proper equalities impact assessment as well.

Parliament might also want to think about prioritising its reviewing process—so, which are the provisions that are of greatest concern? Thinking about the categories of extraordinary measures in the Act, I suppose I would place at the top measures that have impacts on human rights and equalities, that reduce necessary protections and that have coercive effects. I would then prioritise the kind of unusual constitutional practice provisions. I would be least worried about things like power to require information about the food supply chain. Things like that would not be terribly important to me, thinking about impact assessments and also prioritisation of Parliament's resources and Parliament's scrutiny time.

Raphael Hogarth: I agree with everything that has been said. I gave the example earlier of the quantitative information that I would seek on individual provisions, such as the care Act provisions.

I also agree with, and want to draw attention to, what Ronan said about the workforce. If you go back and look at the *Hansard* debates for the Second Reading of this Bill or any part of its passage through Parliament, there is an extremely important aspect of the Government's justification for the legislation, particularly with all its provisions relaxing duties on public services with the risk of a depleted workforce because people are ill or have to self-isolate. A really important aspect of the evidential picture is going to be: what has the impact on the workforce been in public services and in government?

On the information that Parliament requires, in addition to this important quantitative evidence, it will be important to get qualitative evidence from people on the ground affected by these measures—from service providers, from the third sector, from schools and so on. It important that in advance of the six-month review, departmental Select Committees and other Select Committees, like this one, assist the Government in collecting that evidence, calling witnesses and asking people what the impact of the measures is on the ground. That would be an excellent way to build the evidence base and enable parliamentarians to make the most informed possible judgment, when the six-month review comes, about which of these measures will need to be in force.

Q18 **Rachel Hopkins:** Thank you. Thinking about when decisions need to be made about whether temporary provisions should expire, is there anything you would like to add about the sort of criteria that should be considered?

Raphael Hogarth: Yes. For a lot of the provisions in the Act there are basically two key justifications that the Government brought forward: first, this will mitigate and deal with the impact of staff shortages, which I mentioned, and, secondly, these measures will contain and slow the spread of the virus. If you assume that those are the bases on which Parliament agreed to pass this Act with quite little scrutiny, at breakneck speed, those are the key criteria against which the measures should be judged—and, in particular, whether they are still necessary and whether they are the least harmful or the least interfering way of achieving those objectives when considered against available alternatives.

Q19 **Rachel Hopkins:** Thank you. Professor?

Professor McHarg: I have nothing to add.

Dr Cormacain: Just one additional point on the six-month review. It is a little bit of a blunt tool, because it is simply about whether Parliament passes a motion to accept or not accept. That does not really allow for individual decisions about individual provisions, which would have been much more helpful for you to debate. For example, do we need the power to investigate the food chain? Do we need the power to relax the rules on

social workers being registered? It is a very blunt "yes or no". In all honesty, I cannot see Parliament simply throwing out the whole Coronavirus Act, because I am sure there are some bits of it that we will still need. The lack of granularity or individual decision making is a bit of a defect in that six-month review provision.

Q20 **Rachel Hopkins:** We might explore that later. Thank you. One final question from me. I will start with Professor McHarg. Do you think the Government have a clear roadmap for how the temporary provisions in the Act will be turned off?

Professor McHarg: If they have one, I was not able to find it. There are some high-level principles in the Covid-19 recovery strategy, but there isn't that level of detail in the two-monthly report. Again, contrast that with the Scottish Government's approach, where they are at least promising in their next two-monthly report to publish a framework for analysis, a framework of how they might approach that kind of issue.

This is one area where you probably do need a set of overarching principles. You also need to drill down to each area because the considerations that apply to different powers will be different. Having a detailed set of criteria for each set of powers is necessary. As I say, if it is there, I have not been able to find it.

Q21 **Rachel Hopkins:** Thank you. Dr Cormacain?

Dr Cormacain: I agree with Aileen. I am not really qualified to say, but it does seem to be a little bit haphazard. That is inevitable in the crisis. We do not really know what is going to happen next and what measures will work, but there does not seem to be a clear or coherent strategy to remove measures in a particular order or in response to particular criteria.

Raphael Hogarth: I have nothing to add.

Rachel Hopkins: Thank you.

Q22 **Tom Randall:** My question is on the two-monthly report, which I think you have all touched on at various points up until now. The Government published the first two-monthly report in May on the non-devolved provisions in the Coronavirus Act. Could you tell me how helpful you found that report and what other information the Government ought to publish in any subsequent reports?

Dr Cormacain: I touched upon this earlier but I will briefly recap: it is useful but limited. It is useful in the sense that it gave a brief description of each provision and said whether it was in force or not. That in itself is useful. For example, I learned that the powers around the food supply chain are not in force. Then there was a very brief explanation of why it was in force or why it was not in force.

It was very useful to have that piece of information but, in terms of a greater level of detail, it was not as helpful because it did not really have

the hard quantifiable data saying how effective the measure was, or how effective it would have been if we had tried something different.

The only requirement on the Secretary of State is simply a statement to say what the status is and whether that status is appropriate. That is very limited in terms of scrutiny. To give credit to the Government, there was much more detail about the Government's general approach, but the tone of that approach was a little bit self-serving and it did not have the necessary ring of independence or authority that I think would allow you to rely upon it properly. It was a little bit too much about congratulating themselves rather than proper, independent questioning.

Let us take a body like the UK Statistics Agency, which has made some quite critical reports about the Government. That makes it more independent and more trustworthy, because you know it will not simply follow what the Government have said. Or take something like the Office of Budget Responsibility, which is semi-independent of Government, which means that it does not simply regurgitate or repeat or reiterate what the Government have said; there is more independence. I think if there was some sort of mechanism in that two-monthly review or some independent or semi-independent analysis of how effective the provisions have been, that would make the two-monthly review much more useful.

Q23 **Tom Randall:** Thank you. Mr Hogarth, do you want to add to that?

Raphael Hogarth: Yes. I agree with Dr Cormacain in his broad assessment of the two-monthly report. The first one is primarily descriptive. It is a sort of "Coronavirus Act on the ground 101" but not much more detailed than that. The idea of introducing some independent aspect of the process I think is an interesting one.

One of the things that I find frustrating when reading the two-month report is in one sense that it is not partial enough, in that I would like to see the Government making their case in that report for why they have come to the view that they have come to on the appropriateness of the status of provisions. It is important that there is a forum for the Government to do that—that there is a forum for the Government to say, "Here is our evidence. Here is why we think we need these provisions. Here is how the evidence supports our view," and then parliamentarians can scrutinise that evidence base and that reasoning.

In a sense, I would like to see more partial reasoning in the two-month status reports, albeit not the kind of sloganeering and propaganda that Dr Cormacain said he was worried about.

Q24 **Tom Randall:** Thank you. Professor McHarg?

Professor McHarg: I agree about the limited usefulness of the report. It is not unuseful, but it is of limited usefulness. We talked earlier about the kinds of additional information that could be usefully included. I said earlier that it would be useful to extend it to all coronavirus-related legislation, including secondary legislation, or at least the more important aspects of

that. That would be something that Parliament itself could possibly give a steer on as to what it is most concerned about.

In terms of independent scrutiny, I have some concerns about the impact on the timeliness of these reports, so I probably agree more with Raphael that having some subsequent process for scrutiny of these reports by Parliament and by parliamentary Committee may be more appropriate.

Tom Randall: Thank you.

Q25 **Chair:** Thank you, Tom. Now it falls to me to ask a couple of questions related to the lockdown regulations, and changes to those so-called lockdown regulations. I want to ask about the use of the urgent procedure—that is to say, without consulting Parliament, if we are talking about scrutiny. Can I first ask Mr Hogarth his view? Was this urgency and lack of consultation justified?

Raphael Hogarth: No, I don't think it was. Throughout the process, when the Government introduced the lockdown regulations and on each occasion when they have amended those regulations, they have used that urgent procedure. That is, they have enacted the new legislation before consulting Parliament and then held a debate in Parliament to approve the legislation after the fact, on some occasions when that legislation is already in force and on some occasions when the legislation has stopped being in force because it has been replaced by new legislation.

There are a few problems with that. First of all, it is just objectionable in democratic principle for major changes to the law, touching on the most fundamental and intimate aspects of human life, to be enacted by ministerial fiat rather than by the legislature. Once you get away from that abstract principle, I think there are also several practical problems that this approach to legislating has generated.

First of all, it leads to mistakes. If parliamentarians had had a chance to have a look at the first set of restrictions regulations they might have spotted things like the fact that there was a power for the police to enforce some of the restrictions with reasonable force but not others. They might have tidied that up. They might have raised concerns from constituents about certain reasons for going outside that might not have been covered by those regulations that maybe should be, like going to an ATM. That was subsequently inserted in amendment regulations.

They might have asked the Government why some of the rules about when you could go outside, which appeared in the regulations, were so different from the guidance that the Government were putting online and that was being delivered by Ministers to the public in press conferences. A bit of proper scrutiny might have ironed out some of those mistakes.

Second of all—and this may be something that we get on to later in more detail—if you proceed using secondary legislation in this way, you might introduce statutory instruments that are unlawful. The restriction

regulations, that is the lockdown rules, may still be found unlawful by the courts—

Q26 **Chair:** That is right, Mr Hogarth. Thank you for that. We are going to touch on that. It is a pertinent point that you raise, and we will be coming on to that shortly. Could I first ask Professor McHarg, please, to give her view on the use of the urgent procedure?

Professor McHarg: I find myself in two minds on this. On the one hand, I think there are undoubtedly considerations of urgency here. That applies not just to the initial imposition of the lockdown but also to the lifting of the lockdown. They place extremely significant restrictions on people's human rights and so those restrictions need to be lifted as quickly as can possibly be managed.

In addition, we have to be mindful of the imposition on drafters and on civil servants to come up with these regulations. They are not sitting and twiddling their thumbs, not bothering to publish things. They are working on these round the clock and up to the wire, so I think there are arguments for urgency.

On the other hand, I completely take Raphael's point about the fact that if there had been at least some opportunity for parliamentary scrutiny, some of the problems might have been picked up. We have seen very, very heavy use of judicial review or resort to judicial review on all sorts of issues in relation to Covid-19 regulations and guidance. Some of those have produced changes in the guidance. I do not think that is very desirable. I do not think people should have to threaten to go to the courts to resolve issues that might have been picked up earlier.

We are in difficult territory. It would obviously not be appropriate for the normal affirmative resolution procedures to apply. Those take too long, so whatever process is available has to operate within relatively restrictive timeframes.

Q27 **Chair:** Thank you. Dr Cormacain, any reflections on the use of the urgent procedure from your perspective?

Dr Cormacain: Yes. For the very first step of lockdown regulations it was appropriate to use the urgent procedure. There was a clear need for it to happen and the Executive was entirely justified to use the urgent procedure to make that happen. However, as the lockdown has progressed, I think there is less and less justification for using that urgent procedure, and it seems to be simply a habit that the Government have got into that this is the way to do things. When we are reaching this stage, there is less and less obvious need for a particular relaxation that is said to be urgent.

I will give one very specific example: the No. 2 amendment regulations for England—it seems so long ago now, to be honest—that relaxed the rules on outdoor exercise. Those regulations were made on 12 May. The No. 3 regulations were made on 31 May, and the No. 4 regulations were made on 12 June. The No. 2 regulations were then debated in the House of Lords

on 15 June, so the House of Lords were yesterday debating something that had been superseded by two different sets of regulations. The thing that they were debating was literally pointless. It had no effect, but they were expected to debate it anyway. That sort of time delay between the Government making something via urgent procedure and something then getting into Parliament to discuss seems to make a little bit of a mockery of the whole point of democratic scrutiny. The longer things go on, the less validity there is, I think, for these things to be done by the urgent procedure—by secondary legislation—and the greater the need for Parliament itself to properly debate them.

If I could just make two broader points on this: I have been reading a paper from the Czech Republic on the use of their emergency legislation. The author made two really good points. He said that Parliament is really good for providing legitimacy for the lockdown regulations because you get to debate it. You didn't delay the views. You scrutinise it in public, and that means people will be listening and hear the justifications for doing that. When we have lockdown regulations, we do not have that legitimisation function.

The second point is about effectiveness. Whenever an Act of Parliament is made, your constituents, lobbying groups, interest groups and NGOs will write to you and say, "This has this particular effect in my sector, my community or my area, and this is a really bad thing to do". Then you have the opportunity as parliamentarians to lobby and to change that. That works with primary legislation or Acts of Parliament, but when everything is being done by secondary legislation and using the urgent procedure, you do not have that direct ability to effect that change and make the legislation more effective.

Q28 **Chair:** Could I ask about the delay, Dr Cormacain? Yesterday evening the Commons debated the No. 3 regulations, which has a two-week lag period. I am a great fan of hypothetical questions sometimes. What would have happened had the Commons declined that regulation yesterday evening?

Dr Cormacain: If they had have declined it, we would have been in a very awkward constitutional position because the No. 4 regulations were already in force on 12 June. You would have a slightly awkward situation that would be like a building with a first floor, a second floor and a third floor, and the second floor has suddenly been removed but you still have the third floor in place, and the third floor might not quite work on top of the second floor. The bits that the Executive had done in the No. 4 regulations would still be effective, but they might not work properly because the No. 3 regulations had been removed. The answer is: it is all very messy, and you would need some very complicated way of working out what was going on.

That perhaps makes the point that parliamentary approval is a fairly blunt instrument. I cannot imagine Parliament refusing to approve regulations, simply because there would be chaos if it did so. That perhaps indicates why secondary legislation is far too blunt a tool for making these really important constitutional changes.

Q29 **Chair:** Thank you. That is a very pertinent observation, and I am grateful. Could I move us on? Mr Hogarth, you touched on this before I rudely cut you off. Could I ask about the extent to which there is a risk that the original lockdown regulations were ultra vires of the Public Health Act 1984?

Raphael Hogarth: There is a substantial risk that the initial regulations were ultra vires, which is to say that the Government did not have the power under the parent legislation—the Public Health (Control of Disease) Act 1984—to enact the restrictions that they did enact. The issue, in very summary terms, is that that parent legislation gave the Government the power to make regulations imposing restrictions on persons or groups of persons who may be infected concerning where they go or with whom they have contact, but did not have the power under that legislation to put anybody into isolation or quarantine, and that is made quite clear in the legislation.

The legal questions are basically: first of all, can you really say that the entire population is a group of persons; secondly, can you really say that the entire population may be infected with coronavirus; and, thirdly, can you really say that telling people they cannot leave home except with reasonable excuse or for particular purposes is a mere restriction on where people go or with whom they have contact, or does it look like a rather more fundamental restriction than that?

Obviously, to some extent the question of whether those initial regulations were ultra vires is becoming more academic because the restrictions are changing. I suppose the risk that the regulations are ultra vires is getting lower because, as the regulations get less restrictive, it becomes more and more likely that these restrictions are mere restrictions on where people can go or with whom they can have contact—

Q30 **Chair:** Sorry to interrupt you, but on that point, do you therefore believe that the most recent lockdown regulations have a much diminished risk or still a certain risk of that same problem?

Raphael Hogarth: I think there is still a certain risk, in so far as it is still the case that the current regulations are only lawful if the entire population constitutes a group of persons who may be infected with coronavirus. I think you can still legitimately question whether that is a proper position that you can sustain with common sense. The risk is lower because, on that other point I mentioned about whether the nature of the restriction goes further than the Act allows, that worry is lessened by the fact that the restriction itself is not as stringent as once it was. It is no longer the case that you cannot leave home except with reasonable excuse.

Q31 **Chair:** I am grateful for your answer there, Mr Hogarth. Sorry to press you. Could I ask for reflections from our two other members of the panel, starting with Professor McHarg, please?

Professor McHarg: I would just add a few qualifications. One is to note that the potential challenges to the validity of the lockdown regulations are

not just on whether it is ultra vires the parent Act, but there is also the possibility of human rights challenges, arguing that they constitute disproportionate interferences with a whole range of different convention rights.

Another qualification is in relation to the strict vires question. It is a question of how you read the legislation. We have to bear in mind that there might be slightly different issues in relation to the Scottish and Northern Irish regulations than there are in relation to the English and Welsh regulations, because with the Scottish and Northern Irish regulations, although the powers are very, very similar under the 1984 Act, these are powers conferred under the Coronavirus Act. I think that context changes how you would read those particular provisions. It is much more plausible in those circumstances to say, "Well, yes, it was in contemplation that these would be used for whole population lockdown measures".

If you are in the situation of saying, "Well, on one reading, the English and Welsh regulations may be ultra vires but the Scottish and Northern Irish ones are intra vires", you are in problematic territory. You are also in problematic territory with any suggestion that these regulations are ultra vires, because the consequences of that are extremely serious. Potentially, if the regulations are quashed—which is not inevitable, but it is a possibility—that would open the Government to enormous potential financial liability. You could have huge financial liability for unauthorised interferences with convention rights. You could possibly have a number of very, very costly claims from businesses for interference with contract and so on.

I am somewhat sceptical that a court could be persuaded to strike down these regulations, given the consequences and given that it is not unarguable that they are intra vires.

Q32 **Chair:** Thank you, Professor. Dr Cormacain, please.

Dr Cormacain: I would generally agree with what Aileen has just said. I think I would disagree with Raphael, certainly on the very first set of regulations. The power to make regulation is for preventing, protecting against, controlling or providing a public health response in respect of infection or contamination. The vires are set out in the Public Health Act 1984. If we take a broad purposive approach and ask, "What was the purpose of that Act in 1984?" it was to prevent the spread of disease. What have the Government done in those regulations? They have sought to prevent the spread of disease. I would therefore conclude that the regulations under the Public Health Act were intra vires.

Perhaps that is setting the bar at quite a low level, and perhaps Parliament might want to consider not simply, "Have we just scraped through and said that this is lawful," but, "Is it in accordance with good, democratic law making practice?" Whenever you consider that, then you consider whether this is something that Parliament should be doing itself rather than relying upon the Executive using an urgent procedure.

Raphael Hogarth: I absolutely agree with what has been said. I think that a court would be reluctant to find these regulations ultra vires. All I have been saying is that there was a genuine risk that they were ultra vires. The Government ought to have been aware of that risk. In the circumstances, where there was that risk, it is quite surprising that the Government proceeded using a pretty legally risky procedure, rather than just doing the primary legislation and so avoiding that risk—especially since the Prime Minister announced the lockdown to the nation on the same day that primary legislation on coronavirus was going through the House of Commons anyway.

Chair: Thank you for that.

Q33 **Lloyd Russell-Moyle:** Hello there. How are you doing? During the original lockdown days, the Government initially said that people should restrict their exercise to once a day, although this was not specifically required under the regulations. There were some mumblings that it should be about an hour, but again that was never fully explained. On 10 March, the Government said people could take unlimited exercise, and could sit and sunbathe, but there were no changes to the regulations. Does this pose a risk for the rule of law and create a system where curtain-twitching vigilantes are more able to enforce a kind of social law than police authorities in any written law?

Dr Cormacain: That is an excellent point, and it is a question that I have posed several times in a couple of blog pieces. The example of the so-called change in the exercise regime is extremely problematic for the rule of law.

Just to confirm, the actual law said that you can take outdoor exercise. There was no limitation on the frequency or the duration of that exercise, so that was very clear in the rules. I should add a caveat to that: the rules in England. In Wales, they did have a rule that said you can exercise once per day, and that is a perfectly acceptable position to take on either side.

The huge difficulty was that the Government said, "You can exercise once a day", and then Michael Gove came out and said, "You can go for a run for 30 minutes or you can go for a cycle for an hour. That seems reasonable to me". The only people who can make the rules are you in Parliament, sitting as Parliament. That is the source of authority. This is constitutional law 101. This is going back to the Bill of Rights 1688. It is for Parliament to decide what happens, to make the law. It is not for the Executive to simply speak and that becomes the law. That became even more problematic because we have a real conflation of what the rules say, what the Minister says the rules say, what the guidance is, what the guidance represents as sensible advice and what the guidance says is a rule. Throughout the course of the pandemic, there has been a huge conflation of the two things together.

Going back to the exercise rule, on 12 May the rules changed so that you could exercise with one person from another household, but the Prime

Minister said, "We have changed the rules, so you can have unlimited exercise". That is simply not the case. The actual coronavirus FAQ on the Government's website said, "We have now changed the rules so that you can exercise outdoors as much as you wish". That is a complete misrepresentation of what the actual law says. It is really bad for the rule of law if it is seen to be the case that what comes out of the mouth of the Minister is, by virtue of it coming from the mouth of the Minister, an actual law, because that abrogates the rule-making power of Parliament to make these rules.

One slightly related point, if I may. There has been a lot of discussion about the 2-metre rule. There is no such thing as the 2-metre rule. I went online yesterday just to check that I have not imagined this, but in England there is no such thing as the 2-metre rule. However, if you go to Wales, there are 16 references to a 2-metre rule in its regulation. If you go to Scotland, there are six references to a 2-metre rule in its regulation. If you go to Northern Ireland, bizarrely, there is a 2-metre rule for tenants of burial grounds where you have to keep 2 metres apart, but there is no other reference to it.

There is a huge amount of misrepresentation and mischaracterisation of what is happening. If something is really important, make it a law. If it is important for the Welsh and the Scots and the Northern Irish to have a 2-metre rule, then put it into their regulations. If it is not that important, do not make it a law, but do not characterise something as a "rule" when it is not a rule.

Q34 **Lloyd Russell-Moyle:** Thank you very much. Even more confusing is that they say, "2 metres or 6 feet", which are not the same measurements, so you have two different measurements even in England. Of course, I suspect that contradiction between what Ministers say and what Ministers' advisers do causes confusion about what the regulations are. Mr Hogarth, do you have views on this?

Raphael Hogarth: Yes. I have a little bit of sympathy for the Government on the guidance issue, in so far as if you go back and look at the SAGE minutes for late March and the advice that the Government's behavioural scientists were giving on the guidance as it stood then, there was obviously some concern in Government that the guidance was basically a bit soft. It said things like, "Everyone should try to follow these measures as much as is practicable", and the scientists said, "Don't tell people to try to do it. Just tell people to do it, and don't introduce ambiguous phrases that are open to interpretation, like, 'As much as is practicable'". It is not surprising that the Government wanted to state what people ought to be doing to restrict the spread of the virus as clearly and unambiguously as possible.

The problem the Government had is that they started mistaking being clear and simple for being wrong, and they started using some mandatory language on their website and in public statements when they were just giving advice. They should have been saying, "We advise you to exercise only once a day. You should not travel far from your home when you do

exercise". They should not have been telling people, "You must not", because in so doing they were implying to the public and to the police that these were legal restrictions, and they were not.

Q35 **Lloyd Russell-Moyle:** It seems strange to me that on 10 May, when the PM announced you could exercise with other people, my understanding was that you could always exercise with another person if you were social distancing. It is almost like on 10 May they were introducing restrictions that never existed, which they were then lifting. That was extremely confusing to people who had been doing those things already, and the guilt—I was following the law, not necessarily what Ministers were pronouncing.

Do you think, Aileen, that this is a particular problem for the rule of law if we do not quite know where people stand, and even the authorities do not quite know where the law stands?

Professor McHarg: I think there is a legitimate role for guidance here. There is a very important accessibility justification. Ordinary people cannot be expected to go and read regulations. They need some accessible source of the rule. It is perfectly reasonable to use guidance where an enforceable rule would not work. For the advice around handwashing, for instance, it is perfectly appropriate for that to be guidance, not legal rules. How could you enforce it? Even with the 2-metre rule, there are circumstances in which, in the Scottish, Welsh and Northern Irish regulations, there are references to it, but it is not a general rule. It would be impossible to enforce as a general rule. If I am within 2 metres of somebody, is it my fault? Is it their fault? To avoid it, I would have to step out on a busy road. It is difficult to make that an enforceable rule. I think that is perfectly fine.

It is also perfectly fine to give interpretive guidance, so I have no problem with the legal rule being you can leave the house for exercise, but guidance being, "We recommend that you do so only once a day or for no more than an hour or within your local area". I have no problem with that.

Problems arise in three situations. The first is where the distinction between the legal rule and the guidance is not made clear, and clearly those two things have been confused repeatedly. The second is that it is obviously highly problematic if the guidance contradicts the legal rule, if it is different from it and just wrong. In that case, again, you are misleading people as to what they are permitted to do, and that has happened. The third thing that is really problematic is when the police are attempting to enforce the guidance and not the law. If you want to make it enforceable, it has to be in a legally enforceable form. That appears to have been a messaging problem, a training problem—one which I think has got slightly better, but perhaps has not been eradicated completely.

Q36 **Lloyd Russell-Moyle:** I must say, to be fair on the police, that the initial actions may have been confused, but the police themselves then issued clarifying guidelines based on the law because it was so confusing.

Dr Cormacain: Just one minor point to illustrate that: "Eat five portions of fruit and vegetables a day." Very sensible public health advice and guidance, but no one is going to be confused into thinking that they are going to be arrested by the police for not eating their five fruit and vegetables a day. With the coronavirus advice, the whole thing is bundled up together into a package, laws and guidance, with the very strong implication that these are all laws that you must follow. Certainly, you pointed out quite rightly that at the start there were instances of the police thinking, "Well, I heard the Prime Minister saying it. Therefore, it must be a law. Therefore, someone must be punished, penalised or criminalised for it". It does undermine the rule of law.

I absolutely see the important role for sensible guidance and health advice, as long as it is set out as, "We recommend that you do these things", and then clearly, "You must do these other things".

Q37 **Lloyd Russell-Moyle:** "Eat five fruits a day" is an interesting analogy, because it is about personal welfare. With some of *[Inaudible]* it is not just about personal welfare, but doing this for a greater good. Could there have been a distinction in the advice about what you should do for your personal welfare—such as, "We recommend that you exercise", because there is no greater good particularly to exercise, apart from your personal health and, I assume, the NHS maybe down the line—compared with what people needed to do for the greater good? Not just in terms of a legal distinction, but also in the advice there needed to be more nuance for people to be able to have confidence in abiding by it.

Dr Cormacain: That is a question that is probably better directed at behavioural psychologists, as a way to encourage people to follow the rules, but certainly, if there is a clear moral undertone to things, then people are more likely to follow them.

Q38 **Lloyd Russell-Moyle:** Yes. Moving on to a slightly different question, the Government recently changed the review period for lockdown regulations from 21 days to 28 days, effectively adding a week, saying that that would allow decisions to align more closely with the period to assess the impact of previous changes because of how long it takes for the R rate, the death rate and so on to come out. Do you think this is justified, and do you think the Government are publishing sufficient data for us to be able to scrutinise and review these decisions at the end of each lockdown, whether it is 21 days or 28 days? There is no point extending it if data are not there.

Raphael Hogarth: On the first question of whether 21 days or 28 days is more appropriate, I do not know. That is a question for a public health expert who could take a considered view on how long you need from the point when a rule is changed to see the impact of it in the data.

On the question of whether the Government are publishing sufficient information at their review periods, I think the Government have got a lot better on this. If you go back and look at what the Government said in the first couple of review periods, particularly the first review in mid-April, the

Government's statement was essentially, "We have received advice that relaxing the restrictions currently in place would risk a second peak, and so we are not going to do it". There was not that much discussion of the evidence underlying that conclusion and judgment.

Obviously, the Government came under quite a lot of pressure to publish more information, particularly in its press briefings, about numbers of cases, numbers of deaths, testing and admissions. They are now doing that. When the PM announced changes to the rules around gatherings in a press conference, he supported his conclusions on each of the Government's so-called five tests for relaxing restrictions with evidence relevant to those tests. I thought that was a much better way of approaching the review period than what we had seen in earlier reviews.

There are just a couple of issues outstanding. One of them is that the Government have now placed themselves under a couple of different conceptual frameworks on which they propose to justify changes in the rules. On the one hand, you have the coronavirus alert levels, and there is some suggestion that the Government will change the rules if the alert level changes, and then on the other hand you have the five tests for relaxing the rules, which are not the same as the alert levels. There is potentially a little bit of confusion about what reasoning processes Ministers are going through in order to make decisions on this, particularly given that, in any event, those alert levels and tests are only about the public health picture anyway, and there is clearly increasingly some economic dimension to these decisions as well.

The other issue—and I know I keep banging on about parliamentary scrutiny—is that I still think it is wrong and strange that the provisions are for reviews that take place inside the Minister's mind, outside Parliament. In my view, it would be more appropriate and more consummate with our broader emergency legislative framework for the Minister to have to come to Parliament with the results of these reviews, say something about the review, and get a view from Parliament on the conclusion that he has come to.

Q39 **Chair:** Could I rudely interrupt? I am grateful for all of this, but there are bonus points for concision in our questions and our answers. Sorry to interrupt you, but let us press on to the next member of the panel.

Professor McHarg: In the interests of concision, I do not have very much to add. I would just say that one of the things that has probably encouraged greater justification and scrutiny of these review decisions is divergence between the four UK nations, because then you have evidence that a different political calculation could be made or that a different interpretation of the expert advice could be made. In those circumstances, it is not surprising we are seeing a greater attempt to justify greater scrutiny.

Dr Cormacain: I have no particularly strong views on the 21 to 28-day change. I have one very minor additional point in relation to the rules and

guidance issue. I was giving a webinar to the Business Network at the Bingham Centre last week, which was advice to in-house company lawyers, and I told them that they should basically ignore what the Government says and instead look at what the actual rules say. That was because of the difficulty of knowing what the actual law is by reference to what a Minister said, and how it is much more important to look at the actual source of the rules themselves.

Q40 **Tom Randall:** If I could move on to the Civil Contingencies Act, the Government said that the Civil Contingencies Act could not have been used for the measures to address the coronavirus pandemic. Professor McHarg, do you agree with that analysis?

Professor McHarg: It is not entirely clear why they thought that. It seems to me that the nature of the pandemic clearly does fall within the scope of the Act. Section 19 clearly envisages an event that threatens severe damage to human welfare, including loss of human life and human illness, so it is within the scope of the Act.

There are some conditions on use of the Civil Contingencies Act part 2 powers. There needs to be an emergency that has occurred or is about to occur. It needs to be necessary to make provision and that needs to be done urgently. Where the problem might arise, though, is that you cannot use part 2 of the Civil Contingencies Act if there is existing legislation in place that is suitable to use and can be used appropriately quickly. I suspect that that may have been the issue. Given the existence of the powers under the 1984 Act, a view may have been taken that they should not use the Civil Contingencies Act.

Of course, as has already been said, the powers under the 1984 Act only apply to England and Wales. Lockdown powers had to be taken for Northern Ireland and Scotland under the Coronavirus Act. It was perhaps thought to be more consistent with devolution to act via fresh primary legislation subject to devolved consent, rather than the very UK Government-centred approach under the Civil Contingencies Act, which requires consultation with the devolved authorities but not consent. I think that is probably the issue.

There is a general assumption in the Cabinet Office guidance that the Civil Contingencies Act will only be used in very extreme circumstances. The assumption is that if you have existing powers, you use those existing powers.

Q41 **Tom Randall:** Given this experience, do you think the Civil Contingencies Act is fit for purpose?

Professor McHarg: I am going to preface this by saying I am by no means an expert on emergency powers. I think it may be fit for certain purposes. One of the criticisms you find of the part 2 powers is that they assume a very top-down, command-and-control model. The argument is that that is not appropriate in many circumstances where relevant powers are

dispersed, whether that is among devolved authorities, local authorities, private sector parties or other bodies. The Cabinet Office guidance suggests the use of the Civil Contingencies Act only in the most extreme circumstances, where that top-down approach is appropriate.

The other thing you might say about fitness for purpose is that, like a lot of framework legislation in the UK, this is in effect an opt-in. It is used or not used as Government see fit. If they can use other legislation or they can get Parliament to enact new legislation, they do not have to use the powers under the Civil Contingencies Act. We see that in relation to the Inquiries Act, the Statutory Instruments Act and all sorts of framework legislation. If that is a defect, it is a defect in our constitutional arrangements, rather than a defect in the Act.

Dr Cormacain: In simple answer to your question, in my view the Civil Contingencies Act could have been used. I looked at the criteria for the exercise of powers under it, and, as Aileen has said, all those criteria have been ticked for me and I do not see why it could not have been used.

Raphael Hogarth: I have nothing to add to that analysis.

Tom Randall: Thank you.

Q42 **Mr David Jones:** Continuing that discussion, we have already discussed whether the use of the 1984 Act might have been ultra vires. Why do you think it was used, as opposed to the Civil Contingencies Act, to impose the lockdown restrictions?

Raphael Hogarth: There are probably a couple of reasons. First of all, with respect to the lockdown restrictions, there may have been some worry in Government about a provision of the Civil Contingencies Act that says that you cannot use the CCA when you have a power to do the relevant thing already, unless it would cause serious delays to rely on that existing power or it might be insufficiently effective. There may have been some worry about that.

I suspect that the decision not to use the CCA and to rely on the 1984 Act instead was primarily driven by a more political reasoning that using the CCA really feels like slamming the hammer through the glass and acknowledging that this is a proper, bona fide emergency. I suspect the Government were just reluctant to use a piece of legislation that everybody knows is for the worst kinds of emergency, and that has never been used before, if they could avoid using it.

Professor McHarg: You see several suggested reasons. The regulations under part 2 of the CCA can only remain in force for 30 days, so that might well be regarded as too short. As Raphael said, there seems to be a general reluctance to declare an emergency. Some people have suggested that it was motivated by a desire to avoid the scrutiny provisions in the CCA or, more charitably, by a concern that it might not be possible to meet the parliamentary scrutiny requirements for practical reasons. The Parliament might not be able to meet.

As I said earlier, the very top-down, almost militaristic command-and-control nature of the legislation was probably regarded as inappropriate for this kind of emergency, particularly given that the key powers in relation to health, but other powers as well, rest in the devolved nations. The idea that the UK Government could bypass them was a non-starter.

Q43 **Mr David Jones:** That might have resounded particularly in Scotland, I guess.

Professor McHarg: Perhaps.

Dr Cormacain: Very briefly, there are greater safeguards and greater scrutiny rules for Parliament under the Civil Contingencies Act. To be more charitable about it, if the Executive saw the need to act nimbly, fast, without recourse to Parliament, then they could use the Public Health (Control of Disease) Act. If you have to go through the Civil Contingencies Act, Parliament has a greater role. It can amend things. Things lapse much more quickly, and Parliament has to approve them seven days after they are made, rather than 28 days. There is a greater role for Parliament to have some say in things if you go by the Civil Contingencies Act route.

Mr David Jones: Thank you.

Q44 **Karin Smyth:** Just picking up the last point about devolution, it was of course the case that the Government got into some problems with regard to Northern Ireland and differences across the island of Ireland. Bypassing the issue is pertinent not just to Scotland, but Wales had done different things, and the Northern Ireland situation is also difficult.

My question is about what will happen if the Coronavirus Act does lapse. What could be covered in the Civil Contingencies Act? What would it pick up?

Also, Dr Cormacain, could you add to your earlier point here? I think you said 160 pieces of secondary legislation are now on the Government's website. If the Act lapses, how will we pick up those as well as the provisions in the Act?

Dr Cormacain: The point about the volume of legislation is an important one. I said 160, but that was probably last week. It is probably 200 by now, because more and more regulations have been added on each day. These are not necessarily key things for restricting personal liberties. It is the little, minor technical points, such as relaxing the rules on financial instruments so that you can make loans without going through the necessary procedures—the little, minor tweaks.

They are not all being made under emergency powers. Some of them certainly are. We have talked about the lockdown rules. They have been made under emergency powers, but a whole host of other legislation has been made through a different way.

One very useful thing that the Government have done is that on the legislation website for Government there is a list. You can search for all

legislation that has the word "coronavirus" in the title. If you do that, it is relatively easy to find this very, very long list. That is something certainly that is to the credit of the Government.

One of my concerns is that emergency law is normally seen as a separate, distinct body, which is separate and distinct from the ordinary laws and should not contaminate the ordinary laws. They are the kinds of things that we would not do in ordinary times. There is a serious risk at the moment with emergency laws and ordinary laws starting to mesh together. I gave the example earlier of the Corporate Insolvency and Governance Bill, which is before Parliament now. You would not know from the title, but half of it is about coronavirus. Even in the table of contents, you cannot easily figure out whether this is a temporary measure in respect of coronavirus or a more sensible, long-term process. The fact is that that Bill has gone through Parliament in something like 20 days because it is seen as important for coronavirus, even though it does not have coronavirus in the title and even though some parts of it are nothing to do with coronavirus.

There is that real danger that our ordinary constitutional process for making laws has been mixed together with the emergency process, and that is something that does concern me. Ordinary laws should be separate from emergency laws and they should be subject to proper parliamentary scrutiny and debate.

Q45 **Karin Smyth:** I just want to come back on that, because I threw in something else. The heart of it was about: if the Coronavirus Act lapsed, what would be picked up by the Civil Contingencies Act? Part of what you are saying is that because of the meshing and confusion, that in itself will perhaps be more complex.

Dr Cormacain: Yes. It will require a lot of unpicking. If the Coronavirus Act is repealed tomorrow, a lot of rules will disappear but a lot of rules will remain outstanding because they are made under lots and lots of different powers. In devolution terms, if the Coronavirus Act disappears, then the changes made in Scotland and Northern Ireland, the lockdown rules, will automatically disappear as well, because they are made essentially under the Coronavirus Act. However, in England and Wales, those lockdown rules will still remain, so there is a bit of a strange overlap there. The English and Welsh regulations will continue onwards.

In direct response to your question, if the Coronavirus Act is repealed, then there seems to me to be much less justification for using the Civil Contingencies Act to make emergency laws any more. If we have got rid of the Coronavirus Act, it is not an emergency any more, and if it is not an emergency, we cannot justify using the Civil Contingencies Act, in which case we are back to ordinary, normal legislative processes throughout the four jurisdictions of the UK.

Professor McHarg: Ronan has just made the point that I was going to make. If in the six-month review period there is no need for the Coronavirus Act, then there is no need to use the powers under the Civil

Contingencies Act. Of course, however, things could change, in which case there may be a range of other statutory powers that could be relied on or the Civil Contingencies Act could be used.

There are some substantive limits on that power, but it is very, very broad. It is an extremely broad power, subject to some limitations. You cannot introduce conscription. You cannot outlaw industrial action. There are limits on the kinds of criminal offences that can be created. You cannot amend the Human Rights Act. If the triggering conditions apply, it is a very, very broad piece of legislation, and a very broad regulation-making power.

Raphael Hogarth: I agree that if you did try to use the CCA, there is probably a lot of the Coronavirus Act that you could bring under the CCA, but if you have got rid of the Coronavirus Act, it would be highly inappropriate to do so.

Before we leave the CCA, there is one more thing that we have not touched on that I think is quite important. A particular feature of making legislation under the CCA is that it can be struck down for incompatibility with human rights, whereas primary legislation cannot be struck down for that incompatibility. The courts can say it is incompatible, but the legislation still has full force. That is a potentially quite powerful safeguard that we lost by not using the CCA, and I think that is something that the Government need to be mindful of going forward in their implementation of the Coronavirus Act. They need to make sure that they are adopting quite a constructive posture on any human rights challenges to what they are doing under the Coronavirus Act, effectively attempting to remedy any potential incompatibility, rather than defending themselves against allegations of unlawful conduct. If we had proceeded with our pre-existing emergency framework under the CCA, a human rights challenge would be available.

Karin Smyth: Thank you all.

Chair: Thank you. Karin, do you want to carry on with your next question, please? We will just have a slight rejig, if that is all right with you. Thank you ever so much.

Q46 **Karin Smyth:** Witnesses, now we are rejigging without rejigging.

We wanted to come on to talk about part 1 of the CCA, which has not been looked at much, and category 1 responders. I remember in 2012-13 working in the PCT to CCG changeover on emergency planning, and there was a great deal of concern voiced by the experts at that point around lack of capacity in the system to respond to an emergency. Local authorities, the police, NHS, ambulances, the Department for Work and Pensions and even the fire brigade were all driven to take capacity, both buildings and background managerial staff, out of the system.

We talked recently with the Secretary of State, Mr Gove, who talked about how the Civil Contingencies Secretariat in the Cabinet Office were not directly responsible for assuring risk mitigation plans but, where necessary,

Departments or local responders could alert to the obligations under the CCA. Essentially, there is this disconnect between the very local and Cabinet Office, Government and where we as MPs scrutinise.

The question is about whether we were prepared and how we as MPs can scrutinise part 1 of the Act, and understanding what is happening with regard to the capacity and the ability of those local responders to respond.

Raphael Hogarth: I would caveat anything I say on this with the point that a lot of evidence on this is going to emerge later. I have colleagues at the Institute for Government who are doing some work on the preparedness of public services, looking among other things at how well part 1 worked. It is very, very early to say very much about this.

There are a couple of things we can say. First of all, it looks from the early picture like compliance with the letter of everybody's part 1 duties was quite good. Authorities had assessed risk and had plans in place to mitigate risks. The question is whether compliance with those duties was good enough to prepare those responders for the emergency.

One thing that I think bears on that is that quite a lot—an unusual amount, in recent times—of emergency planning in some respects had been done because there had been a lot of planning for a potential no-deal or no-trade-deal Brexit. In some respects, those plans were very helpful in so far as responders had looked at things like food supply chains and medical supply chains. In some respects, obviously, planning for one potential eventuality saps resource away from planning for others, so I imagine we will find that there are some bits of contingency planning that did not get done because resources were being used in other places.

In terms of scrutiny, as you say, the way this is meant to work is that local responders are effectively plugged in to the machinery of central Government. At the local level you have local resilience forums, which are connecting those actors on the ground who might need to respond to an emergency, sharing information and sharing practice. Where they need to channel information up or get instruction down from Cabinet Office, basically from the COBRA structure, they can do that. One important question to ask is: how effective was that channelling up of information and channelling down of instruction?

I also think that we need to have a careful look at how transparent authorities are being about their part 1 planning. In so far as planning had been done for pandemics, were those plans published? Was there any opportunity to scrutinise them? We are aware of the fact that there were some high-level simulation exercises for a pandemic in the form of Operation Cygnus, the results of which were published. We also need to take a look at how transparent the Government are being about their emergency planning and whether there is any way of improving it through greater scrutiny.

Dr Cormacain: I am not really qualified to answer that question so I will just make one or two very brief observations.

If we have the second or third highest number of deaths in the world and one of the highest death rates per capita in Europe, clearly, we were not prepared. On an anecdotal level, my wife is a GP, and her cousin is making face masks and delivering them to her so that she can spread them around her practice and patients. On that very anecdotal level, I do not think we are prepared.

Q47 **Karin Smyth:** Professor McHarg, about the scrutiny that we have on that preparedness—the link—how do we in this forum get down to that level?

Professor McHarg: Again, I have nothing sensible to add on that, other than to point out that under part 1 of the Civil Contingencies Act, preparedness responsibilities are shared between the UK and devolved Governments. Any scrutiny needs to take account of that devolution dimension.

Q48 **Karin Smyth:** Thank you. Mr Hogarth, can I go back to you? You mentioned Operation Cygnus, which we have discussed in other forums as well. Do you think, when we do get to the bottom of what came out of that, we will be able to get a picture of how those local preparedness plans meshed together?

Raphael Hogarth: It is incredibly difficult to comment on what we will learn about it before we have seen it.

Chair: Could I just interject on that? I can tell from my experience of the Cabinet Office last week that the leaked report on *The Guardian*'s website is exactly the same as the official report, so we need not detain ourselves too long on that particular question. I am just conscious of time. Was there anything else, Karin?

Karin Smyth: No. That is fine, thanks, Chair.

Q49 **David Mundell:** Can I begin with you, Professor McHarg, and perhaps follow on to a response that you gave to Mr Jones? Do you believe that the framework in which the arrangements have been made across the UK involving the devolved Administrations was the only way that could have been adopted in relation to these issues, given the proportion of issues that were devolved?

Professor McHarg: You can answer that from different perspectives. From a legal perspective, if the UK Government did not want to use their powers under part 2 of the Civil Contingencies Act but wanted to take control of the competencies currently exercised at devolved level, they would have had to pass primary legislation giving them those powers, which would have been subject to the Sewel Convention, and I very much doubt that consent would have been forthcoming. The devolved Governments have been very willing to co-operate with the four-nation approach, but co-operation, of course, does not mean takeover. The legal problem could have been overcome, but not without difficulty.

For me, the more pertinent issue is the capacity issue. Health, education, the justice system, social care and so on—these are all devolved matters, and it seems to me to be unrealistic to think that the UK Government could suddenly step in and start running these devolved public services. That just does not make sense.

Of course, on the flipside, there are capacity limitations and legal competence limitations for the devolved Governments. There are certain things that they could have done unilaterally, but not everything. It seems to me that the approach that was taken of attempting to co-operate was the sensible one. It is the approach that the Cabinet manual on emergency responses assumes. It assumes that there will be a co-ordinated response respecting the division between reserved and devolved matters.

Whether that has worked perfectly is a different question. Whether there has been sufficient clarity of messaging, whether there has been sufficient consultation and whether there has been genuine, co-operative decision-making is a different issue. In terms of the principle of the approach, I think it is perfectly reasonable.

The other thing that may be worth mentioning is that we have seen in many other countries regionally differentiated approaches. That in itself is not unusual. In so far as there have been, as the pandemic has progressed, different political choices to be made about how you balance the risk to health versus the risk to the economy and so on and so forth, accountability for those decisions also matters. The primary accountability for the devolved Governments rests in the devolved Parliaments. That could be quite significantly bypassed if the devolved Governments were simply acting under dictation from the UK Government.

Q50 **David Mundell:** An issue that Mr Jones might touch on in a moment is that it is quite difficult for the public to understand exactly who is accountable when there is a range of messages, and sometimes conflicting messages, being given to them. I will allow him to ask that question.

On a more technical matter, what would be the impact on the devolved Administrations if the temporary provisions in the Coronavirus Act lapse?

Professor McHarg: Provisions that affect clearly devolved matters are not subject to the six-monthly review provision, so they are expressly excluded from it. The only risks to the devolved Administrations are from the lapse of UK-wide powers, and that is primarily the Treasury directions. The furlough scheme is the big one, and the social security decisions and the ports power, although I do not think that has been used. The bits of the Act that are clearly devolved are excluded, so there is no risk of those lapsing without the decision of the relevant devolved Administration.

Q51 **David Mundell:** We have touched on the benefits or risks of adopting a separate but co-ordinated approach compared to a centralised UK decision-making approach. Do you think that we have managed to achieve the optimum approach across the United Kingdom, considering the devolved

arrangements that are in place?

Professor McHarg: Clearly, there have been some problems in messaging. That has probably been less of an issue from the point of view of the devolved nations because we are used to the fact that decisions are announced as if they are for the UK when they are for England. Certainly in Scotland, which is where I am, the Scottish Government have been quite good at getting their announcements in first so that people up here are clear what it is that is different.

The UK Government quite clearly have not been so good at certain times, particularly around the shift from "stay home" to "stay alert", that the decisions they were making were decisions for England only. That did give rise to some problems where you had people crossing borders into Wales, not realising that the rules may be different there. Some of those problems of people crossing the Welsh border to go to the beach go back to our earlier discussion about confusion of law and guidance. I am not sure that that was contrary to the law. On the other hand, if somebody today were to try to travel from London to Edinburgh to take advantage of bubbling with another household, they would find that bubbling is still not permitted in Scotland. Any attempt to bubble would be unlawful.

Q52 **David Mundell:** I will be very careful not to bubble when I go back to Scotland, of course, unless the First Minister announces on Thursday that I—not me specifically, but I am sure others across Scotland—am allowed to bubble.

Could I ask our other witnesses whether they feel that we have achieved an optimum outcome in relation to achieving a UK-wide approach while respecting the devolution settlement?

Dr Cormacain: I think that it is a necessary by-product of devolution that there are different rules in the different jurisdictions, and I agree wholeheartedly with what Aileen has said. Decisions are probably best taken at a local level, so Scotland can do its own thing. Speaking as someone who also drafts legislation for Northern Ireland, sometimes certain things need to be done for Northern Ireland that would fit better for Northern Ireland but would not work for Wales or England or Scotland. It is a necessary consequence of that that you will have different rules in different parts of the UK. It certainly should be co-ordinated.

One additional point I would just make is about the capacity and resources of the devolved jurisdictions if they were to go on a radically different path to the rest of the UK. We did have a huge amount of difficulty in Northern Ireland with the renewable heat initiative scandal, where the Northern Ireland Government took a different route than the rest of the UK and ended up with a lot of public money being wasted. The judicial inquiry that came out of that said that Northern Ireland should be very careful that it has the capacity and the capability and resources if it wants to do something quite different from the rest of the UK. That is the only slight

caveat, I would say—the slight problem with doing something quite different from the rest of the UK in one of the devolved jurisdictions.

Professor McHarg: Can I just come back on that? Capacity is important. Financing is extremely important as well. It is all very well to say that Scotland, Wales and Northern Ireland might maintain the lockdown or reimpose the lockdown, but if there is not the financial support coming from the UK level, that becomes very, very difficult. It may be possible technically in Northern Ireland and Scotland, where there are social security powers to do something equivalent—not the same, but equivalent—but that would have huge financial costs. The legal powers of the devolved Governments here are constrained both, as Ronan said, by technical and expert capacity but also by financial considerations.

Raphael Hogarth: Just to add one very brief point, I think the most difficult and controversial aspects of a differentiated response or a localised response are probably still to come. Although so far there has been some differentiation in different parts of the UK as a result of devolution, the Government have suggested that the next phase of their response will involve significantly more differentiation, which is to say there will be powers somewhere to impose restrictions at a hyper-local level—perhaps even a local authority level—in response to local outbreaks of the virus. There are probably lessons from confusion of messages between different parts of the UK that we can look at once that happens, but also it would be quite useful if the Government, some time reasonably soon, told us something about how that system was going to work, what legal powers it was going to be based on, and what the regime for those hyper-localised differentiated responses was going to be.

Q53 **David Mundell:** Do the provisions that we have in place allow sufficiently for different decisions to be made at different times across the UK as we move through the disease? For example, are we clear that if a part of the UK determined that there was a need for a further lockdown or a tightening of the lockdown, that could be done, subject to the points that Professor McHarg made earlier in relation to the financial consequences of doing that?

Raphael Hogarth: Yes, and it depends on what you mean by "part of the UK". If what we wanted was to measure the change in one of the devolved nations, then there are powers under the 1984 Act that the devolved Administrations have already been using, which allow for plenty of differentiation.

If we wanted differentiation at a more granular level—to be able to impose a mini-lockdown in one local authority or one neighbourhood—then I am not sure the powers are there at present. There are powers under the Coronavirus Act, as I mentioned earlier, for public health officers, who could be in local authorities, to impose restrictions on individuals they assessed or tested, and there are also powers for local authorities to apply to the magistrates' court to impose restrictions on individuals or groups of individuals. I am not sure the current framework would let local authorities

impose at a local level a lockdown of the type we had at national level. If the Government do want that to be possible, I think we are likely to see further legislation.

Professor McHarg: Just to clarify that, the regulation-making powers under the 1984 Act probably could be used to impose localised lockdowns, because they talk about groups of people and they can be in particular geographic areas. Those would be lockdowns imposed by the UK Government on particular local authorities. A similar approach would be taken in the devolved nations.

Dr Cormacain: Just one very brief point. There is a lot that could be learned from across the individual jurisdictions. The English regulations fixed the loophole that the Northern Ireland regulations have not spotted and fixed yet. The Scottish and the Welsh have done really useful stuff on a 2-metre rule. The Northern Ireland regulations had a special provision allowing a wedding for someone who is on the verge of dying—a relaxation of that rule. There is a tremendous amount of learning that could be got between what the different jurisdictions have done, and you can say, "That was a really great idea in Wales. Let's put that in Northern Ireland". This can go across all four nations.

David Mundell: Thank you very much.

Q54 **Jackie Doyle-Price:** Hello. We have had a marathon two-hour session, so my final question is this. It is looking increasingly like we will have a public inquiry of some kind into how the Government have handled this whole pandemic. I just wanted to see what your views would be about what the terms of reference for such an inquiry should be and what kind of format might be effective.

Raphael Hogarth: There is a conversation to be had about the terms of reference of, if you like, the big inquiry. A very pressing matter is to hold a smaller, rapid review as soon as possible—this is something that the Institute for Government has advocated—in order effectively to learn lessons from the first wave. Full public inquiries can take a pretty long time. There can be lots of argument about what the eventual report says. If there is a risk that the UK or any part of the UK experiences any kind of second wave, then we cannot afford for that process to run its course.

What we have suggested is that the Government set up a rapid review, not necessarily under the terms of the Inquiries Act, and have that review pretty narrowly focused not necessarily on apportioning accountability, but just on learning lessons and how to do it better if another wave happens. That review should be conducted by experts in public health, rather than individuals who might be better suited to apportioning accountability like senior judges.

To some extent, if the Government do that and we do get an opportunity to learn lessons, there will be an opportunity to have a more detailed

conversation about the terms and structure of the big inquiry and make sure we get that right.

Q55 **Jackie Doyle-Price:** It is the challenge of being fleet of foot while also being thorough. Do you have any observations, Professor McHarg?

Professor McHarg: I agree with the two things that were said. There is a question of what is the purpose of an inquiry. There could be multiple purposes. I absolutely agree that preparing for the second wave would be very, very important. There will be duties under Article 2 of the ECHR for deaths of healthcare workers. That is a different kind of inquiry. There could be an inquiry into the whole question of preparedness. There could be an inquiry into the state of emergency legislation and how we deal with that. Which of these things need to be done at different points is important, and probably not trying to bundle everything up together because that will just delay and cost a fortune and not be as useful. I would be inclined to parcel up the different purposes into different inquiries or different processes.

Dr Cormacain: Very briefly, there is a need for an independent chair, scientific input and a focused question for any inquiry, and perhaps it might be worthwhile considering not apportioning blame as a way to get to the best result. Not so much, "What did you do wrong?" but more a case of, "What can we do better the next time?" That might produce a less defensive attitude from Government, Public Health England and the NHS, for example.

Q56 **Jackie Doyle-Price:** Just looking at particular models, on the basis of what you said, we have the CSA-style inquiry, which is multi-layered, and there are a series of reports. You could also have a Hillsborough-style panel, which can be very focused and probably quicker, or a judge-led inquiry. Do any of you have any thoughts on which of those models would be more effective?

Raphael Hogarth: We are doing some work on this at the Institute, and I do not want to prejudge the findings of that. We have firm views on what needs to happen now. In terms of the best models for the long-term inquiry, there is more work to be done on that. There is a particular challenge in designing the bigger inquiry, which does not always arise or does not often arise with public inquiries, which is that you are effectively going to have the Government commissioning an inquiry into themselves. They are going to be still the sitting Government, so it is going to be more important and potentially more difficult than normal to ensure that that inquiry is robustly independent and has all the powers it needs to inquire into the events of the pandemic response.

Dr Cormacain: I should say that I do not know which is the better model, but one possible model is the Hart inquiry into institutional child abuse in Northern Ireland, which worked very well, it seemed to me, because it was relatively focused. It did not direct itself so much to blaming individuals. It was more a case of finding out what happened and what went wrong,

rather than pointing a finger, although criticism may be inevitable as a result of that sort of inquiry.

Anecdotally, it is really good to have a grumpy judge who does not care about what Government think and just goes ahead and does what is necessary, rather than worrying too much about what the Government think. Again, we do not need an inquiry that spreads out over a large number of subject areas. It is much better if it is focused on particular questions, which would prevent it from taking forever and not getting anywhere.

Professor McHarg: I agree with the need for independence, but there is a balance to be struck between independence and credibility. That to me would suggest probably a panel approach rather than a single person doing the inquiry. That might include a judge but also medically qualified staff, and people with experience of public administration—a balanced panel that gives it that credibility as well as independence.

Jackie Doyle-Price: Thank you.

Q57 **Mr David Jones:** Do you think that such an inquiry should ideally include the work of the devolved Administrations, and would it be legally possible to set up such an inquiry?

Professor McHarg: Anything is legally possible if it is authorised by primary legislation.

Q58 **Mr David Jones:** Would it require the consent of the devolved Administrations, then?

Professor McHarg: Would it require the consent? I am going to duck that question because we would want to look in more detail at exactly the reservations there. I do not think there are any relevant reservations, but there might be.

Certainly, one element for a big inquiry would be that question of how we have managed relations between devolved Governments and the UK Government and what it tells us about the adequacy or otherwise of the intergovernmental decision-making framework. That might be something that you would want to do separately.

Q59 **Mr David Jones:** Could you maybe let us have a note on that point, Professor McHarg?

Professor McHarg: I will have a look at it.

Q60 **Mr David Jones:** Thank you. Dr Cormacain, do you want to add to that?

Dr Cormacain: Very briefly, I think you could probably do it UK-wide or each devolved jurisdiction could do its own one. Any possible defect could be cured by passing a legislative consent motion by each of the devolved jurisdictions, which would avoid the need for that sort of bun fight between them. It would be a little bit insular simply to have separate inquiries for

separate parts of the UK, because so much of what we have done is the same and is reliant upon the same advice.

Raphael Hogarth: I have nothing to add.

Chair: Thank you very much to our three witnesses for that very thorough session. I am grateful to you for sharing your expertise with the Committee. There may be a couple of things that we follow up with you, and I think David Jones's final question was one that swings to Professor McHarg in writing. If you could reply at your earliest convenience, we would be very much obliged. It remains to thank colleagues and to thank our witnesses and the broadcast team in the Committee room.