

## Independent Commission – Evidence of Dr Ronan Cormacain

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Thank you for the invitation to give evidence to the Commission. I drafted a number of coronavirus (international travel) regulations for the Northern Ireland Department of Health. I work as a consultant, not an employee of the Department. Any views I express are my own only. I previously worked for the Bingham Centre for the Rule of Law and in that capacity I analysed several pieces of coronavirus legislation for the purposes of assisting parliamentarians (at Westminster) in their scrutiny of that legislation.

### Question 1

Yes, legislation for public health emergencies must absolutely contain provisions for laws to be made urgently. Urgent law making should not be the norm, but in exceptional circumstances (like a public health emergency) it is necessary.

### Question 2

There is a jurisdictional point not addressed by this question which concerns the status of the Public Health Act (NI) 1967, with the temporary insertion of provisions into it by the Coronavirus Act 2020 (in Schedule 18).

There is a need for permanent public health emergency legislation (eg the framework), which contains powers to make temporary emergency legislation during the emergency. But for Northern Ireland, the framework legislation is itself temporary, tied as it is to the Coronavirus Act 2020. When that Act expires, the entire edifice of public health emergency legislation in NI disappears. Sch 18 has been extended twice now, so that the provisions in the PHA 1967 continue to exist.

Sch. 18 continued until 24.9.2022 (23.3.2022 at 3.30 p.m.) by The Coronavirus Act 2020 (Extension of Powers to Act for the Protection of Public Health) Order (Northern Ireland) 2022 (S.R. 2022/157), arts. 1, 2

Sch. 18 continued until 24.3.2023 (24.9.2022) by The Coronavirus Act 2020 (Extension of Powers to Act for the Protection of Public Health) (No. 2) Order (Northern Ireland) 2022 (S.R. 2022/224), arts. 1, 2

This is not satisfactory from a constitutional perspective. NI needs its own permanent framework legislation on public health emergencies. The content could be exactly the same as the changes made to the PHA 1967 by Schedule 18 of the 2020 Act, but it needs to be proper, permanent legislation.

To reiterate – the power to make emergency laws needs to be in place on a permanent basis, even if they are only exercised for temporary time periods. But for NI the Department has to be concerned about whether the power in the 2020 Act will expire, thus leaving NI without the vires to make emergency regulations.

2(a). It does so to a certain extent. However, there is no effective way for anyone to challenge whether there is actually a need for the regulations. So, the legislation states that emergency regulations can be made if

“a declaration that the Department is of the opinion that, by reason of urgency, it is necessary to make the regulations without a draft being so laid and approved”

There is no parliamentary mechanism for challenging this, or requiring it to be justified in any way, the simple statement of the Minister / Department is enough. Some sort of evidential basis / challenge procedure would be helpful here.

However, the enemy of all this is time – policy is developed and regulations drafted to ridiculously tight deadlines. There is simply no time slack in the system for additional consultations or draft sharing in advance with parliamentarians.

2(b) The process for human rights proofing of regulations is, in my view, too ad hoc, and too much reliant upon individual lawyers picking up points. On a few occasions, the only time a particular provision was dropped was because I spotted a human rights dimension in the policy and (with agreement of departmental officials) excised something which would otherwise breach the ECHR. This was more likely to happen because I was a consultant lawyer, not an in-house civil servant, and had a certain degree of detachment. An internal challenge function within the team in charge of developing policy and drafting the legislation would be helpful – someone whose job it is to question why a particular provision is actually needed.

2(c). The time frame for submitting coronavirus regulations before the legislature is woefully inadequate. There is zero point in debating regulations which were made 4 weeks ago, and which have already expired. I don't know if this is due to slowness on the part of Ministers, or difficulties with parliamentary timetables, or simply down to institutional factors. I don't think this is deliberate, but it does negate the effectiveness of scrutiny if the thing being scrutinised is on its 3<sup>rd</sup> iteration, but you are still looking at the first iteration.

The time frame for publication is also unsatisfactory. Publishing at 3 am and coming into force at 4am does not give anyone sufficient time to know what the law is before they are liable under it. However, from personal experience, sometimes the law isn't drafted until 2 am, then signed, then uploaded and then into force. I am not sure how to resolve the absolute need to have something in force at within an extremely short deadline, and having accessible legislation.

Inability for parliamentarians to amend the regulations is a problem. Consider the current proposals by the Hansard Society for SIs more generally. These include a power for Parliament to pass a motion suspending an SI until it is amended in a particular way.

3. Having a fixed time (at least 1 day) between publication and coming into force.

Having an automatic defence that no penalty / prosecution unless at least 1 / 2 days have passed since the law was published.

It would be worthwhile considering the decision not to prosecute for breach of covid regulations in NI because of the difficulty in accessing / understanding those regulations in the case of the Bobby Storey funeral. See report here <https://www.justiceinspectors.gov.uk/hmicfrs/news/news-feed/confusing-covid-19-regulations-caused-problems-for-police-service-northern-irelands-handling-of-bobby-storey-funeral/> See in particular the prosecutors explanation of why no prosecution. Very worthwhile reading - <https://www.ppsni.gov.uk/publications/public-statement-regarding-bobby-storey-funeral>

4.

The extreme rush to pass the primary legislation at the start of the pandemic was justified. However, it could have been sunsetted much earlier, and then replaced by a piece of primary legislation which passed through parliament much more conventionally (i.e. with proper time for debate and scrutiny).

It is rather odd that the key legislation on lockdown was not made using the powers in the 2020 Act (except for Scotland and NI) and instead used powers set out in the public health legislation.

5

It would be a huge mistake to allow parliamentarians to directly amend secondary (emergency) legislation as it passes through Parliament. SIs are complex and very technical. One seemingly minor tweak could have a catastrophic effect upon the integrity of the legislation. This is not a criticism of parliamentarians, merely a recognition of the skill involved in preparing legislation. Much better instead to have a procedure where parliamentarians can make some form of narrative statement about what changes they want to see, vote on it, and then it is for the government officials to make the necessary drafting changes to give effect to that policy.

6.

During an emergency, the executive naturally have to take more control of the law-making process, simply because a deliberative legislature do not have the time or capacity to do this.

There wasn't enough proper scrutiny of legislation by parliaments, but I think that the legislation itself was reasonably balanced in terms of complying with human rights and the rule of law. The civil service isn't a "blob" out to make life more difficult for citizens. They think long and hard about striking the correct balance, and making tweaks to make things work better for people. For example, in Northern Ireland, there was a huge amount of effort put into making laws that would allow certain (amateur and professional) sporting events to take place, with bespoke covid mitigation strategies built into the legislation.

8.

I can't speak about the totality of different interest groups, but I know that grass roots sporting bodies and their representatives were heavily consulted when it came to making legislation in NI which would cater to their needs. Policy was changed in response to their requests.

However, it is very difficult to have effective consultation if there is a 1 week period to make a fresh SI.

In some SIs there was clearly some care taken to consider other marginalised groups, eg reasons for leaving home during periods of self-isolation included seeking medical advice, accessing social services etc.

9.

In my opinion the offences were proportionate to the risks caused by covid. The only issue was sufficient publication in advance of the offence.

What was clearly wrong however was misapplying these offences to situations they did not cover. For example, conflating “what the minister says” with “the law” is not acceptable.

Structurally, removing prosecutorial input into FPN from the police was wrong. There was no effective internal check on whether a particular FPN had been correctly imposed, and non-lawyers cannot be expected to know whether their FPN is in fact correct. The Justice Committee at the House of Commons looked into this provision and I recommend studying their conclusions.

The other issue when it came to formulating the law was the ridiculous continuation of exempting the Crown from its application. I previously wrote about this point in: Cormacain, ‘Queen’s Consent and the Crown’s exemption from lockdown rules – are we all in this together?’, U.K. Const. L. Blog (15th Feb. 2021) (available at <https://ukconstitutionallaw.org/>)

10.

An internal human rights check / fresh pair of eyes when the offences are being drafted would be a very good idea.

11.

FPN are good for straightforward offences like speeding. But they were used in SI lockdowns for more complex points where there was a factual matrix to consider, and lots of reasonable excuses. As above, having a review of them by the DPP rather than simply relying upon police issuing them would be much better.

12.

Some divergences were practical. For example, the international travel rules for England needed to contain material on the channel tunnel, which obviously doesn’t apply for the other nations. Equally, Northern Ireland had to have different provisions as it had a land border with a separate state.

Divergence is one of the points of devolution, so it should not, in itself, be seen to be a bad thing. For example, different sporting exemptions applied in Northern Ireland due to the importance of amateur sporting events run by the Gaelic Athletics Association. There were also cultural differences around attendance at funerals and graveyards which were properly reflected in NI rules.

Having different jurisdictions also allowed for different structural approaches. For example, NI was the first to have a table in its international travel rules listing the separate categories of exemption and which specific rules they applied to. At the time, the English model was impossible to understand as each separate rule was related to the exemption categories from the previous rule, requiring readers to jump through several mental hoops to know if this particular exemption applied to this particular rule. See Schedule 4 of the Health Protection (Coronavirus, International Travel) Regulations (Northern Ireland) 2021, which is available [here](#), which sets out in a simple (albeit long) table which exemptions apply. But if you look at (for example) Art 4(13) of the Health Protection (Coronavirus, International Travel) (England) Regulations 2020, as in force on 15/1/2021, available [here](#), then the conditions for exemption require far too many cross references to understand.

Furthermore, different ministers from different jurisdictions will have different approaches to risk. They are accountable to their own electorate, and if they wished to have a harder or softer lockdown, that is their democratically legitimate decision. Secondary legislation imposed from London for all 4 nations would have been democratically illegitimate and would not have allowed for necessary adjustments for each of those 4 nations.

As another example, Wales made express provision for a 2 metre rule. There was no such rule in the rest of the UK (no matter how many times repeated by UK ministers). The 2m rule in Wales was a proper rule and its approach should have been adopted by the other jurisdictions.

13.

The above examples arose because different lawyers had slightly different ideas, and the best ideas could originate from NI, Scotland, Wales or England. There was close co-operation between NI and England from my personal experience. Not that they always took the same decisions, but they did work together and where there was a difference, it was intended.

14- 18

In general terms, scrutiny was insufficient. SIs were not reviewed in a timely fashion. There was no proper assessment of whether each SI was actually “urgent”, merely an acceptance that it was. The urgent button was pressed too frequently by departments and ministers.

One positive feature was the practice of expressly accepting mistakes made in secondary legislation, at least in Northern Ireland. On several occasions, amending rules were expressly stated to be “correcting errors” in previous rules. At this speed of enactment, mistakes are inevitable, and it does a disservice to the rule of law if there is any attempt to “hide” them. See for example regulation 4 [here](#). The title of this is “Correction of the date on which extension of time for requirement to provide passenger information comes into force”. The nature of this is also express in the explanatory memorandum, which states “This Regulation also corrects an error made in an earlier commencement provision.” Available [here](#). At least the officials were honest when they made mistakes ...

21.

Both law and guidance can be justified in a public health emergency. What is absolutely wrong is conflating one with the other. I have lost track of the number of times that “you must” was wrongly used instead of “we advise you to”. Even worse when the coercive power of law (FPN) was used to enforce guidance. Question 22 makes this mistake itself by referring to law and guidance to “impose” interventions. Only law can impose an intervention, guidance can merely suggest or at most implore it.

In public health more generally, we usually only use law when health to others will suffer (so a legal ban on smoking in enclosed public places), and rely upon guidance when it is only ourselves who will suffer (guidance to eat 5 portions of fruit and veg a day). So in a public health emergency, law is constitutionally appropriate to keep other people safe – it prevents the selfish from ignoring good practice which would keep others safe.

To repeat, law and guidance are both appropriate, so long as it is made abundantly clear what is what.

22.

No strong feelings, save that (as above) distinction between law and guidance should be clear.

23.

Ultimately for elected politicians to decide, not scientists. We are not in a “technocrats autocracy”. However, politicians must be guided by the science, and be clear when they have decided to go against that advice.

24.

Not really clear, and not really accessible in a timely fashion.

NI did do some consolidations of their international travel regulations, which was at least an attempt to simplify. By contrast, the English regulations worked on by a process of accretion, layering more and more new rules on top of the existing structure. At some point, it would have been better to stop and restate them from scratch.

In this context, consolidation doesn’t simply mean legislation.gov.uk doing a consolidated version of the rules, it means starting afresh and redrafting the rules in a more coherent way.

25.

I covered this above, in brief, clearly distinguish between what is law and what is guidance.

26.

Don’t have ministers making stuff up when they don’t know what the law is.

Issues not arising out of the questions

1. Law breaking in government

Partygate, the cover-up of partygate, Cummings at Barnard Castle. These things fatally undermine confidence in rules, laws and government. I am disgusted that 10 Downing Street was party-central when everyone else was in lockdown: (a) they made the rules, they ought to have been following them (b) they ought to be setting the right example, (c) myself and my colleagues in the Northern Ireland Civil Service certainly weren't flaunting the rules we prepared. The rule of law means we are all subject to the law. This is so basic, it is embarrassing that we even have to mention it. I hope the Commission will find some space to address this point.

2. The work done by civil servants

I worked with civil servants who worked incredibly hard on the covid regulations. They had a mountain of material to consider, and they were extremely diligent when it came to getting things right. Even after a 14 hour day, we were still agonising over what precisely ought to go into the rules. I have drafted regulations until 2 am, sent them to a civil servant who was still awake, who then formatted them, woke another civil servant to sign them, got them online, so they could go into force at 4am. We didn't have the exposure to harm that medics (and others had) but we were conscientiously doing all that we could to help.

When criticisms of the regulations are made (which is inevitable) I hope that there will also be recognition of the dedication, professionalism and commitment of the civil servants who prepared and drafted these regulations.