

**Independent Commission on UK Public Health Emergency Powers**  
**Comments from Sir Jonathan Jones KC (Hon)**

1. I offer the following high-level observations to the Commission. By way of introduction, I was Treasury Solicitor and Permanent Secretary of the Government Legal Department during the early part of the covid pandemic and played a role in the government's response, in particular the legal and legislative aspects. I tendered my resignation from the civil service in September 2020 and formally stood down in December 2020. Since March 2021 I have been a Senior Consultant in Public & Constitutional Law at Linklaters LLP. These comments are made in a purely personal capacity.
  
2. All I will say specifically about the government's early response to the pandemic is that:
  - a. It will be obvious that decisions, in particular about legal measures, were being made at very high speed and announced at very short notice. In some cases it was not clear – even to lawyers drafting the legislation – what controls were to apply until the Prime Minister personally announced them, sometimes just hours before they were intended to take effect. That inevitably had implications for the coherence and clarity of policy; the opportunities (if any) for consultation or Parliamentary scrutiny; the quality and timeliness of the resultant legislation; the blurring of the boundaries between legislation, guidance and mere ministerial exhortation; and the ability of the public (and in some cases the police and other enforcement authorities) to know with certainty what the rules were at any given time. Many of these issues remained features of the pandemic as it progressed. I discuss them further below.
  
  - b. Despite all these challenges, I saw a huge commitment from the civil service to respond to the utterly exceptional demands of the pandemic, to support the government and to serve the public. Perhaps I can say that I was especially proud of the contribution of government lawyers, many of whom worked tirelessly round the clock to provide legal advice, draft the necessary legislation and (later) respond to legal challenges – all of course while being subject to the same dislocation to their lives as the rest of the population.

3. As a further preliminary point, the Commission will of course be aware of the Hansard Society review of the use of delegated legislation<sup>1</sup>, drawing in part on the experience of the covid pandemic (though the review goes beyond the question of emergency powers). I am a member of the advisory panel for that review and some of its conclusions are reflected in my comments below, though I do not try and repeat or summarise them here.
4. Clearly there need to be statutory powers for the government to respond to public health emergencies. In my view it is inevitable that this will include powers for Ministers to make secondary legislation by way of statutory instruments, for a combination of reasons including the need (sometimes) for extreme speed, the potential volume of legislation required, and limitations on Parliamentary capacity.
5. But this should not mean giving Ministers a blank cheque. The core question will be how to balance the need for government to have the powers and the flexibility to take the required action, if necessary at great speed, against the other factors discussed below.
6. First, reliance on *emergency* powers should be confined to those situations where the introduction of a particular measure, at a particular time and in a particular way, is genuinely and demonstrably justified by the emergency. The existence of a health emergency does not mean that every legislative response to it is urgent, or needs to rely on the most extreme version of the emergency powers. For example, where introduction of a control is initially urgent, later relaxations of it, or other changes to it, may not be urgent (and therefore may not need to entail truncation of time limits or Parliamentary procedures).
7. Moreover, what may be unavoidable or justifiable at the height of an emergency should not become a normal or acceptable way of legislating. I believe the experience of the pandemic may have led Ministers into bad habits, in terms of over-reliance on secondary legislation and minimising the opportunities for Parliamentary (or other) scrutiny. The Retained EU Law (Revocation and Reform) Bill is the most recent (egregious) example of that.

---

<sup>1</sup> [Delegated Legislation Review \(hansardsociety.org.uk\)](https://www.hansardsociety.org.uk/delegated-legislation-review)

8. Second, even (or especially) in an emergency, policy should as far as possible be developed in a coherent way, reflecting expert scientific, health and other policy advice and the available evidence. There may be a need for the most difficult and sensitive decisions, balancing (for example) the respective impacts on public health, personal freedoms and the economy; on different sectors, societal groups, or parts of the United Kingdom; or long-term and short-term effects. That in turn argues for as much consultation as time and circumstances permit with expert bodies, different parts of government, Parliament (see below), and the devolved administrations. Decisions taken on the hoof by a small cabal of Ministers behind closed doors, or in a WhatsApp group, are unlikely to meet these tests.
9. Third, such decisions and legislation should be subject to the maximum degree of Parliamentary and democratic scrutiny and accountability. The prospect of such scrutiny is an incentive to better policy-making and law-making in the first place. And if scrutiny is real – involving an opportunity for debate, probing and at least suggesting changes – it can lead to improvements. But such scrutiny is also necessary if legislation – particularly where it imposes exceptional constraints on society, the economy and the lives of individuals – is to have democratic legitimacy and command public confidence. Such legitimacy is lost when the link between the law, legislator (MP) and citizen (constituent) is broken – and bluntly when, as happened at some points during the pandemic, MPs have no clue about what the law is going to be until Ministers publish it.
10. Fourth, even – perhaps especially – during an emergency, legislation should be clear, comprehensible and accessible. The rule of law requires this. People need to know where to find the law, see what it says, take advice on it if appropriate, have at least some opportunity to take the necessary steps to comply with it, and understand what the potential consequences are of failing to comply with it.
11. Legislation can only be as clear as the policy which it implements. If policy is not well thought-through, or last-minute changes are made, concessions granted, exemptions inserted, this will tend to produce less coherent, more complex legislation, with the risk of errors, anomalies and unintended consequences. And even in an emergency, legislation takes time to draft properly. If sufficient time is not allowed (or again if very

late changes are made) this will tend to produce drafting errors or unnecessary complexity. In turn this may mean that the legislation needs to be amended quickly, adding to the risk of confusion or disruption.

12. Accessibility means simply being able to find out what the law is. This is all the more crucial if new laws are to take effect at very short notice. There were times during the pandemic when new legislation had been announced but, right up until the last minute, social media was alive with lawyers and others asking if anyone had been able to track down the text of the new law. To avoid that situation, there needs to be clarity and certainty about where (including of course on-line) legislation will be published; and Ministers and officials need to factor in time for the publication process to take place well before the legislation comes into force. It is not acceptable for publication to occur a matter of an hour or so before changes are to take effect; as a general rule a period of (at least) some days' notice should be required.

13. Often new legislation will amend existing legislation. An instrument which makes multiple textual amendments to existing legislation, inserting or substituting new text, can be impossible to understand on its own. There is therefore a strong case for producing and publishing, at the same time, a consolidated version of the amended text (a so-called "Keeling schedule"). This will aid clarity and comprehensibility of the law, particularly again when changes are being made at short notice.

14. The rule of law also means being able to discern what *is* the law, and what is not. Guidance from the government or other public bodies (like the police) may be helpful when complicated new rules are introduced at speed. But the format, framing and language of such guidance (and the way in which it is deployed, e.g. by Ministers) should make it clear it is not the law. Otherwise a number of risks arise. They include:

- a. Ministers (or the police etc) in practice arrogating to themselves powers – for example to control behaviour or regulate business – which the law does not in fact confer on them, and which are not subject to the controls or checks (such as Parliamentary procedures) which apply to actual law-making.
- b. Confusion on the part of citizens about what the law actually says, and what are the consequences of breaking it.

- c. Similarly, confusion or inconsistency on the part of the police and other enforcement bodies in their interpretation and (purported) enforcement of the law, potentially leading to flawed prosecutions or other enforcement action.
- d. Overall, a chilling effect on behaviour beyond what the law itself mandates.
- e. Conversely, an undermining in public confidence in, or respect for, the law as a whole, a tendency to regard it as a lottery or as a something to be “gamed”.

15. So on this point I respectfully agree with the conclusion of the House of Commons Justice Committee, which considered that the blurring of the line between legislation and guidance:

*“... has potentially damaging long-term consequences, including for the rule of law. In a free society that respects the rule of law, only legislation can criminalise conduct, and it should be open to a person to decide whether to follow government guidance. The Government has a responsibility to ensure that the public and the police have a clear understanding of the distinction between guidance and the law”<sup>2</sup>.*

Jonathan Jones  
16 March 2023

---

<sup>2</sup> [Covid-19 and the criminal law \(parliament.uk\)](https://www.parliament.uk), paras 17 and 44.