

Liam LAURENCE SMYTH CB
Clerk of Legislation, House of Commons (in personal capacity)

Thank you for the invitation to respond to the call for evidence.

I joined the House of Commons as an Assistant Clerk in 1977, and I have worked in a variety of Clerk posts in the House of Commons since then, becoming Clerk of Legislation in 2014. I am not a lawyer; my expertise is in the application of parliamentary procedure in the legislative process.

The answers below are my own, and do not represent the views of the House of Commons, or of my colleagues in the House of Commons Service. Please check with me before any public attribution of these opinions.

Topic 1: Existing legislative options during a public health emergency (pages 9-14)

1. The Commission's starting point is that any primary legislation designed to address public health emergencies must contain provision for urgent law making. Do you agree with this position? If not, why?

Yes, but. The Government should have a clear-eyed strategy based on intended outcomes. If the overarching requirement is to change behaviour, then imposing legal restrictions backed up by penal sanctions is not necessarily the best, and certainly not the only, way to achieve that objective. The decline in smoking tobacco was what enabled a ban on smoking in indoor public spaces to be effective. The penalties for smoking cannabis have not eradicated that habit. It is understandable that those in power who are faced with an immense threat experience a frenetic desire to pull levers just to "do something".

2. To what extent does existing primary legislation available for use in a future public health emergency allow for urgent law-making while:

a. promoting adequate levels of accountability, transparency and appropriate parliamentary control of executive action in the context of an emergency situation;

b. complying with the UK's international legal obligations, including those relating to human rights; and

c. otherwise reflecting Rule of Law values?

What is "adequate" or "appropriate" are value-laden assessments.

Our law-making is transparent, with requirements for legislation to be laid before Parliament at the earliest opportunity. That basic level of accessibility in literal terms of publication is a long way from intelligibility. The style of drafting successive regulations as modifications of earlier regulations meant the state of the law was a palimpsest that any Member of Parliament, let alone a member of the public, would struggle to comprehend.

I cannot comment on (b) and (c).

3. What, if any, changes should be made to the existing legislative framework for public health emergencies to facilitate urgent law-making while also satisfying (a), (b) and (c) above?

The framework is adequate, though policy choices made in the pandemic might be questioned. "Made affirmative" regulations, which come into effect before approval and lapse if not approved with 28 days, are appropriate when drastic action is urgently needed. There is a risk in roll-over where new regulations are made before the 28 day period has expired, so the approval of the original regulations becomes moot.

Affirmative regulations require a least a perfunctory debate before approval; the Government was never at risk in the pandemic of having regulations defeated, however uncomfortable it may have been on occasion to have suffered rebellion on their own backbenches.

Regulations subject to annulment are typically made/laid 21 days before they come into effect, and are rarely debated; they are virtually never annulled.

Topic 2: Legislation enacted during the Covid-19 pandemic (pages 14-18)

4. During the Covid-19 pandemic, bespoke primary legislation was made by the UK and Scottish Parliaments. How far did these pieces of legislation allow for urgent law-making while also:
- promoting adequate levels of accountability, transparency and appropriate parliamentary control of executive action in the context of an emergency situation;
 - complying with the UK's international legal obligations, including those relating to human rights; and
 - otherwise reflecting Rule of Law values?

At Westminster the House of Commons swiftly adopted a hybrid model of proceedings, predicated on continued use of the Chamber combined with facilitating remote participation by Members. Primary legislation was taken through all stages only on the floor of the House, bypassing the more forensic scrutiny normal in public bill committees. Some of the primary legislation which was presented as urgent, or at least pandemic-related, could on closer examination be revealed arguably to contain policies of longer standing for which Departments had been seeking a legislative opportunity for some time. Acts which might reward closer scrutiny in this respect include the Business and Planning Act and the Corporate and Insolvency Act. Even the Coronavirus Act may be found to have contained some provisions intended to persist beyond the pandemic.

Legislation fast-tracked in pandemic conditions may not have received the fullest scrutiny, but that is not to say that it necessarily fell short of the standards indicated in your Question 4.

5. What measures should be taken to ensure that primary legislation made during a future public health emergency allows for urgent law-making while also satisfying (a) (b) and (c) above?

There is a legitimate tension between urgency and scrutiny. Not all of the elements of Bills containing some urgent pandemic-related measures shared the same imperative need for immediate action. It might have been appropriate to have some kind of parliamentary filter, in the form of a Business Committee, certification by the Speaker, or permission of the Liaison Committee, to fast track only the parts of primary legislation which were genuinely urgent.

If pandemic conditions made scrutiny by public bill committees unworkable, then departmentally select committees could have been invited to play a role, at least in facilitating stakeholder engagement before legislative proceedings in the Chamber.

6. How far do you consider that secondary legislation made in response to the Covid-19 pandemic facilitated urgent law-making while:
- promoting adequate levels of accountability, transparency and appropriate parliamentary control of executive action in the context of an emergency situation;
 - complying with the UK's international legal obligations, including those relating to human rights; and
 - otherwise reflecting Rule of Law values?

In general, I consider there was too much hasty and panicky secondary legislation, with inadequate evidence linking successively tightening or loosening of restrictions to actual outcomes in terms of public behaviour and caseload in the health service.

The baneful legacy of legislating in the pandemic is twofold: an excessive reliance by decision-makers in Whitehall on law-making instead of other ways of influencing behaviour, and a corrosive lack of respect for the law among the population at large for rules which most people will have incidentally given themselves "permission" to flout in minor ways, if only by being flexible in defining a "bubble" or sitting on a bench while out for exercise.

7. What measures should be taken to ensure that secondary legislation made during a future public health emergency facilitates urgent law-making while also satisfying (a), (b) and (c) above?

First, make less law.

Second, be clear about expected outcomes from proposed laws.

Third, publish evidence to demonstrate the extent to which expected outcomes have been achieved.

Fourth, assess that evidence before making new laws.

8. Were the concerns and interests of different groups, in particular marginalised and disadvantaged groups, properly taken into account in the formulation and review of emergency powers? If not, how could this be improved in future public health emergencies?

I don't know. I have the impression that insufficient priority was given to addressing the needs of elderly and infirm people in social care.

I have the impression that freedom of religion was to some extent compromised by regulations that made insufficient allowance for the conduct of religious ceremonies and services during the pandemic.

Topic 3: The creation of offences and enforcement powers (pages 18-20)

9. Did the creation of new offences and the legal framework for enforcing these offences during the Covid-19 pandemic reflect Rule of Law values? If not, how could this be improved in future public health emergencies?

No. For a specific example, see the comments by Rt Hon Mark Harper MP on the power of arrest being conferred on people not trained in the proper use of physical restraint: Delegated Legislation Committee 19 October 2020.

In future health emergencies, enforcement should be provided for only when actually needed, rather than laws being made to send a message that may or may not have achieved the desired outcomes in terms of containing the incidence of an infectious disease.

10. Do additional safeguards need to be put in place to ensure that the creation of new offences and the legal framework for enforcing these offences are compliant with human rights law?

It is unlikely that any additional safeguards would withstand the claimed urgency of legislating in emergency circumstances.

11. Is the use of fixed penalty notices and/or the Single Justice Procedure an appropriate and proportionate way of enforcing emergency public health restrictions? If not, how should emergency public health powers be enforced in the future?

Yes: swift disposal of cases is appropriate for offences with relatively minor penalties.

Topic 4: Divergences throughout the UK (pages 20-22)

12. What were the key divergences in the legislative responses to the coronavirus

pandemic in England, Wales, Scotland and Northern Ireland? What caused these divergences?
Sorry I cannot answer this question.

13. *Did such divergences:*

- a. demonstrate best practice that could be instructive to the work of the Commission; or*
- b. impact upon the Rule of Law in ways that could be better managed in future public health emergencies?*

See answer to Q12.

Topic 5: Parliamentary scrutiny processes (pages 22-25)

14. *Did existing parliamentary scrutiny processes facilitate urgent law-making while enabling appropriate scrutiny of legislation made during the Covid-19 pandemic? If not, why?*

Yes depending on your reading of “appropriate” — a rather value-laden term.

15. *Could parliamentary scrutiny processes be improved to facilitate urgent law-making while enabling appropriate scrutiny of legislation in future public health emergencies?*

Possibly, depending on your sense of what is “appropriate”. It is not necessary in a genuine emergency for parliamentary approval to be secured before legislation comes into force. Parliamentary approval before regulations are made might lend the regulations greater legitimacy and so enhance their effectiveness where perceived legitimacy influences compliance. Accountability can be achieved through debate and scrutiny after regulations have been made and come into force.

16. *Do additional measures need to be taken to ensure that the UK and Scottish Parliaments, Welsh Senedd and/or Northern Ireland Assembly have appropriate oversight of the use of urgent procedures to enact secondary legislation in public health emergencies?*

No.

17. *Were the UK and Scottish Parliaments, Welsh Senedd and/or Northern Ireland Assembly provided with sufficient information and evidence to properly scrutinise Government use of emergency powers during the Covid-19 pandemic? If not, how could this be improved in future public health emergencies?*

Yes.

In general, the level of public understanding of data remains poor and it is rare for politicians to make nuanced use of statistical analysis if doing so might get in the way of making their point.

18. *How far did the four parliaments in the UK work together during Covid-19? Are there improvements that could be made in future public health emergencies?*

I did not notice much inter-parliamentary joint working in my own field, of primary legislation.

Topic 6: The adaptation of parliamentary procedures (pages 26-28)

19. *How successful was the adaptation of parliamentary procedures in order to manage the meeting of the UK and Scottish Parliaments, Welsh Senedd and/or Northern Ireland Assembly throughout the Covid-19 pandemic and facilitate parliamentary oversight of executive action?*

In the case of the House of Commons, moderately successful.

20. Could any improvements be made in future public health emergencies?

Electronic voting worked perfectly well and would have been preferable to mass proxies, with hundreds of votes cast by no more than a handful of individuals.

Topic 7: The use of guidance vs. law (pages 28-29)

21. When it is constitutionally appropriate to use guidance rather than law to respond to public health emergencies?

When guidance will be more effective in achieving the desired result. The disease is not deterred by sanctions, but its spread can be limited by changes in public behaviour.

22. Was the right balance struck during the Covid-19 pandemic between the use of law and guidance to impose non-pharmaceutical interventions? If not, what could be improved in future public health emergencies?

No. Media stories during the pandemic indicated inconsistency of enforcement across the two score and more police forces in the UK, partly owing to confusion between guidance and law.

In a future health emergency there should be a clear-sighted strategy on what kind of behaviour change among the public needs to be achieved.

Imposing law in the hope of influencing behaviour, rather than just penalising transgressive conduct when it comes to light, demands a strong prior consensus between government and governed.

23. How and when was public health guidance incorporated into law during the Covid-19 pandemic? Were any Rule of Law issues caused by this incorporation and, if so, how could these be addressed in future public health emergencies?

I don't have any specific examples of this, though I am sure they could be found.

Topic 8: Legal clarity (pages 29-32)

24. Were the emergency public health laws governing the Covid-19 pandemic sufficiently clear and accessible? If not, how could this be improved in future public health emergencies?

It seems to me that there was insufficient distinction made between guidance and regulations backed by penal sanctions.

25. How far did the use of Government guidance affect public understanding of restrictions imposed during the Covid-19 pandemic? Could improvements be made in future public health emergencies?

Guidance ought to have been paramount in persuading the public to change their behaviour in order to limit the spread of disease.

26. Are there any other matters that affected the clarity and accessibility of coronavirus legislation and guidance? Could improvements be made in future public health emergencies?

There could have been better presentation of comprehensive, consolidated and up-to-date guidance distinguishing clearly between primary legislation, regulations and guidance with complete clarity over which items had altered in each iteration.

It was very hard to debate new regulations which made the minimum necessary verbal changes to previous legislation which had already been altered many times.

It is a constant struggle for the drafter to be very clear about ~~both~~ what precise change is being made, for the benefit of the expert practitioner, as well as providing at the same time complete clarity of the overall picture for the general reader.

Topic 9: International comparisons (page 32)

27. Are there any examples of best practice from other jurisdictions that could be instructive for the work of the Commission?

I am not aware of any.