

Response to Call for Evidence on UK Public Health Emergency Powers from the House of Lords Secondary Legislation Scrutiny Committee

Background

1. The [Secondary Legislation Scrutiny Committee](#) is a select committee that considers the policy content of all secondary legislation subject to procedure in the House of Lords. Through our weekly reports we draw to the attention of the House any instruments that we consider interesting or flawed in accordance with our [terms of reference](#).
2. From the start of the pandemic we added [a new section to our weekly reports](#) listing all the COVID-19 instruments received that week and providing a short description of each one to assist the House in keeping up with the volume and breadth of the legislation brought forward at speed to deal with the situation. [Those reports provide](#) an “as it happened” insight into the legislation laid to address the pandemic.
3. On our website the SLSC has [a complete list of all the instruments that it has considered that result from the pandemic](#). It should be noted that only 79% of those listed have the word Coronavirus in the title. Each instrument has a link to both the text of the original instrument on the Legislation.gov website and to the SLSC’s information on it.
4. Another useful resource for those wishing to explore the comments made in this submission further is the [Find an SI page](#) on the Parliamentary website. It allows searches by key word, by Department and by source Act: so, for example, a search for statutory instruments made under the Coronavirus Act 2020 identifies only 28 items.
5. The Secondary Legislation Scrutiny Committee considered every instrument subject to procedure laid during the pandemic period. Our [list of pandemic-related legislation](#) so far includes 534 instruments, with the most recent having been added on 17 February 2023. Where a COVID-19 instrument presented particular concerns it was also drawn to the special attention of the House in our usual way. In addition, our Special and Work of the Committee reports raised a number of concerns about the way that secondary legislation was presented and justified during the pandemic. See :
 - Interim report on the work of the Committee in Session 2019-21 [Thirty Ninth Report Session 2019-21](#)
 - [54th Report Work of the Committee in Session 2019–21](#)
 - [What next? The Growing Imbalance between Parliament and the Executive: End of Session Report 2021–22](#) 38th Report Session 2021-22
 - Government response to End of Session report 2021-22 [Eighth Report \(Session 2022-23\)](#)
 - [Government by Diktat: A call to return power to Parliament](#) 20th Report Session 2021-22
 - [Government response to the Government by Diktat Report](#)
 - [Losing Impact: why the Government’s impact assessment system is failing Parliament and the public](#) 12th Report Session 2022-23
 - Government response to *Losing Impact* report [Twenty Third Report Session 2022-23](#)
 - See also House of Lords debate on the special reports 12 January 2023 [Democracy Denied \(DPRRC Report\) - Hansard - UK Parliament](#)

Topic 2: Legislation enacted during the pandemic

Q 6. How far do you consider that secondary legislation made in response to the Covid-19 pandemic facilitated 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?**

Q7. 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?

Urgency vs scrutiny?

6. We fully understood that, particularly in the first months of the pandemic, urgent action was often needed to restrict certain activities or isolate certain areas, and agreed that, for health matters, the use of the made affirmative procedure was often necessary for reasons of speed. Although prior to the pandemic the use of the made affirmative procedure was rare (two in 2017 and four in 2018), during the period February 2020 to February 2022, 100 made affirmative instruments were laid under the Public Health (Control of Disease) Act 1984 alone.
7. The made affirmative procedure allows the Government to bring their legislation into effect before it has been laid and even before the instrument has been published. That can create some challenges for proper consideration in the Chamber and there were [strong concerns expressed by MPs](#) about the Government's perceived overuse of this mechanism, which led to [an undertaking being made on 30 September 2020](#) that the Government would change its approach.
8. This Committee normally considers instruments within 16 days of laying but we gave priority to those made affirmatives and considered them at the first possible meeting, to ensure that the House of Lords had timely information about any concerns. The Government also, wherever possible, coordinated the debates on made affirmatives to follow the publication of our reports. So normal scrutiny practice in the Lords was largely maintained.
9. We also monitored the number of instruments being brought into effect immediately or almost immediately. Our Work of the Committee report for 2021-2022 noted:¹

“A significant proportion of pandemic-related instruments continued to be brought into immediate effect during session 2021–22 even though most pandemic restrictions had been lifted. Of 86 instruments with “coronavirus” in their title:

 - 13 (15%) came into effect before being laid (and one came partially into effect).

¹ What next? The Growing Imbalance between Parliament and the Executive: End of Session Report 2021–22 [38th Report of Session 2021-22](#)

- 22 (26%) came fully into effect and nine (11%) came partially into effect within 48 hours of being laid (down from 35% and up from 5.2% respectively in session 2019–21).
 - 19 (22%) were made affirmatives and came into effect at short notice and before having been debated and approved by Parliament.
10. As these figures illustrate, the made affirmative procedure was not the only mechanism used to bring legislation into immediate effect - other policy areas, particularly the restrictions on flying in and out of the UK, used negative instruments. These invariably breached the convention that negative instruments should not come into effect until at least 21 days after laying to allow for scrutiny and dissemination. While such urgency was legitimate to respond to changes in the infection rates in other countries, we questioned why the same degree of urgency was applied to introducing exemptions for poultry slaughterers² and HS2 engineers³ – which did seem to us to be driven by commercial concerns rather than the requirements for isolating the virus.
11. There is a recurring theme in our reports during this period that makes clear that the Committee was often unconvinced that the policy being implemented justified the use of urgency provisions: for example
- *the Marriages and Civil Partnerships (Approved Premises) (Amendment) Regulations 2021 (SI 2021/775)* which allowed ceremonies to take place in certain outdoor spaces. It was brought into effect within 24 hours of laying, however this policy had been in development since 2019 and no aspect of its implementation met the usual criteria for emergency legislation, the main rationale given was to provide support for the “wedding industry”. (See [Ninth Report Session 2019-21](#) and follow-up correspondence in [Eleventh Report -Session 2019-21](#))
 - *Universal Credit (Exceptions to the Requirement not to be receiving Education) (Amendment) Regulations 2020 (SI 2020/827)* – where the pressures of COVID-19 were used as a cover for the real reason for legislating. (see page 5 [Twenty Sixth Report, Session 2019-21](#))
 - *Electric Scooter Trials and Traffic Signs (Coronavirus) Regulations and General Directions 2020 (SI 2020/663)* which expanded a pilot exercise to examine the viability of the scheme in four test locations into a limitless number in order, according to the Department for Transport, “to support the restart from COVID-19 and to help mitigate reduced public transport capacity”. (see in particular paragraphs 26-29 [Twenty Second Report Session 2019-21](#))
12. We also criticised long delays between restrictions being announced and the implementing legislation appearing, which lead to a degree of uncertainty about whether requirements to wear a mask, for example, were advice or law:
- see paragraph 2 [Nineteenth Report, Session 2021-22](#) and our subsequent commentary on *the Health Protection (Coronavirus, Wearing of Face Coverings on Public Transport) (England) Regulations 2020 (SI 2020/592)* in the following report [Twentieth Report, Session 2021-22](#)

² Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 24) Regulations (SI 2020/1292, page 6 [Thirty Fifth Report, Session 2019-21](#)

³ [The Health Protection \(Coronavirus, International Travel\) \(England\) \(Amendment\) \(No. 29\) Regulations 2020 \(legislation.gov.uk\)](#)

13. Additionally, we have expressed a view that, under the combined influences of first legislating for Brexit and then for the pandemic, both of which required some easing of normal legislative standards, Departments may have forgotten what those normal standards should be. Our reports have drawn attention to the Government continuing to use urgent legislation without meeting the expected criteria, for example:

- In March 2022 we held an oral evidence session about the *Universal Credit and Jobseekers' Allowance (Work Search and Work Availability Requirements—limitations) (Amendment) Regulations 2022 (SI 2022/108)*, which were laid on 7 February 2022 and brought into force the next day. The Regulations reduced the period during which claimants were permitted to limit their job search to the same occupation and level of remuneration as their previous employment from 13 weeks to four. The Minister was unable to explain what adverse effect would have occurred if the Regulations had been brought into force in accordance with the 21-day rule. We concluded that the claimed “urgency” was self-imposed and that there had been no compelling reason for curtailing parliamentary scrutiny. (See [Thirty Third Report, Session 2021-22](#))
- We also criticised the Ministry of Justice (MoJ) for laying, *the Coronavirus Act 2020 (Delay in Expiry: Inquests, Courts and Tribunals, and Statutory Sick Pay) (England and Wales and Northern Ireland) Regulations 2022 (SI 2022/362)*, on 23 March 2022 and bringing them into force the next day to extend certain temporary provisions in the Coronavirus Act 2020 for a further six months. We were not convinced by the MoJ's explanation for bringing the Regulations into force overnight when the date on which the Coronavirus Act 2020 would expire had been known well in advance. (see page 6 [Thirty Sixth Report, Session 2021-22](#))

Legislation that can be turned on and off

14. Another approach adopted during the early stages of the pandemic was COVID-19 instruments that gave a power to the relevant minister to turn the pandemic requirements on or off.⁴ While this was pragmatic it was not transparent, particularly as the Explanatory Memorandum (EM) often simply said that the decision would be published on the Covid page of the Gov.UK webpage which rapidly became very large indeed. We suggested that, in such cases, the EM should include specific information about how and where the outcome of any ministerial review is to be promulgated and how Parliament is to be kept informed. **Although Departments generally complied, we were sufficiently concerned to suggest that the correct balance between giving ministers the flexibility to act quickly and the need to keep Parliament informed should be examined in the evaluation of the emergency legislation.**

15. Another “post pandemic” issue of concern was the way that some of the temporary changes introduced during the pandemic have been made permanent. Much of the pandemic legislation was time-limited using a sunset clause, but in the later part of the pandemic we started to highlight in bold type any temporary provision being made permanent. Some changes were unexceptional, for example, pandemic measures to allow the use of remote testimony and

⁴ See for example (SI 2020/567) [The Health Protection \(Coronavirus, Public Health Information for Passengers Travelling to England\) Regulations 2020 \(legislation.gov.uk\)](#)

viewing in the law courts were found to work well and have been made a permanent feature using new powers in primary legislation.⁵

16. We were unhappy, however, about other changes, particularly in Town and Country planning matters where the Government used secondary legislation to make permanent certain changes originally brought forward under the pretext of the pandemic. Because those changes could have an adverse impact on businesses or members of the public, we took the view that they would have been more appropriate to primary legislation which provides the opportunity for robust parliamentary scrutiny: for example

- Town and Country Planning (General Permitted Development etc.) (England) (Amendment) Order 2021 (SI 2021/428) (see page 8 [Fifty Second Report Session 2019-21](#))
- Town and Country Planning (General Permitted Development etc.) (England) (Amendment) (No. 3) Order 2021 (SI 2021/1464) (see page 7 [Twenty Sixth Report, Session 2021-22](#).)

Learning points

17. The House of Lords' scrutiny of secondary legislation was almost uninterrupted during the pandemic. This Committee was well established in its scrutiny role and adapted very quickly to the challenging circumstances presented by remote working. This ensured that the House continued to receive both its usual scrutiny advice and a regular flow of information on the latest pandemic instruments.

18. We also observed that resources available to the public on the legislation being passed were sparse, with the main organ of Government communication being the guidance on the encyclopaedic Gov.UK webpages. These sometimes offered broad interpretations of the law. That lack of information limited the public's ability to respond to or influence the legislation being made.

19. The high number of made affirmatives reduced Parliament's ability to comment on legislation before it came into force, and often by the time such an instrument was debated it had been amended several times. Negative instruments coming into immediate effect amplified the problems of keeping track of the current law.

Topic 5: Parliamentary scrutiny processes

Q 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?

20. Although the House of Lords benefited during the pandemic from the uninterrupted flow of information from our reports, many of them drew attention to defects in the quality of the supporting information provided by the Government to explain its policy and its intended effects. In a number of cases we took the view that the gaps in the information provided indicated that major policies were being implemented without having been properly thought through: for example

⁵ Although the Remote Observation and Recording (Courts and Tribunals) Regulations 2022 (SI 2022/705) were made using new primary legislation we commented adversely on the fact that they were brought into effect within seven hours of laying. See paragraphs 31-33 [Ninth Report, Session 2022-23](#)

- *Health Protection (Coronavirus, International Travel and Operator Liability) (England) (Amendment) (No. 16) 2021 (SI 2021/1179)* which allowed “eligible travellers” (fully vaccinated) arriving in England to use a Lateral Flow Test, rather than the more accurate Polymerase Chain Reaction (PCR) test, to prove their COVID-19 status. Those who returned a positive result were required to isolate and take a PCR test provided at public expense. We commented “The Explanatory Memorandum focuses on the traveller’s experience and provides no analysis of the potential risk to the public as a result of this change, nor any explanation of why the taxpayer should subsidise the traveller in this way and how much it might cost. The House may wish to ask the Minister to provide more details to justify this change in policy and why the legislation was brought into immediate effect.” (See page 4 [17th Report, Session 2021-22](#))

Explanatory Memoranda

21. The key function of an Explanatory Memorandum (EM) is to explain to the lay reader the current situation, the change in legislation proposed, a rationale for making that change and an assessment of the effects it will have. Considering their major role in producing legislation to address the pandemic we were particularly disappointed with the Department of Health and Social Care’s (DHSC) approach to EMs. In the early stages, the Department used a standard format EM for coronavirus SIs which appeared to lose sight of the EM’s purpose. For example:

- Section 2 of the EM is intended to act as a signpost to the contents of the instrument and assist in distinguishing it from another SI with a similar title (of which there were many). Unhelpfully, DHSC instead used a standard paragraph which simply said that the regulations would provide for public health measures to deal with coronavirus.
- The policy explanations in DHSC’s EMs quickly turned into a cumulative history of the previous instruments for that geographical area, many of which were obsolete by the time the new SI was laid, and then ended with a short statement such as: “this instrument will apply easements made elsewhere in England on 25 July to the areas”, without mentioning what those “easements” were, offering any evidence as to why the change was justified or how it would affect the level of coronavirus controls in the area in question. [The original EM to SI 2020/954](#) is a particularly poor example (and was subsequently revised at our request).

22. We raised these deficiencies in an oral evidence session with the First Parliamentary Counsel, the Treasury Solicitor and the Head of the Civil Service Policy Profession (“the Permanent Secretaries”) when they attended to give oral evidence on 20 April 2021.⁶ They acknowledged that the exceptional circumstances of the pandemic did not provide a complete justification for the lapses we had identified and that there were still “lessons to be learnt and progress to be made, especially in relation to explanatory memoranda” (see paras 60-64 [Government by Diktat: A call to return power to Parliament](#)).

⁶ <https://committees.parliament.uk/publications/7862/documents/81684/default/>

Failing to provide information on impact

23. One key area of concern was Departments' failure to provide impact information alongside pandemic secondary legislation, instead falling back on another standard phrase:

“As this instrument will cease to have effect after less than 12 months, a Regulatory Impact Assessment is not required and would be disproportionate.”

24. Our concerns were not only about the financial costs but also about the discipline that the Impact Assessment (IA) process imposes, requiring the policy maker to think around the problem and what range of effects, both positive and negative, that the proposed legislation might have.

25. During the pandemic our reports highlighted several significant instruments where it was evident that the policy had been formulated without adequate analysis of the potential impact. The most prominent example related to the mandatory vaccination of health workers:

- In July 2021 we took oral evidence from the Minister on the *draft Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021*, which made it mandatory for anyone working in a care home to be fully vaccinated against coronavirus. We received several submissions from care providers expressing deep concern about the potential side effects of the regulations on staffing.⁷ Without an IA we were unclear about the basis on which DHSC had struck a balance between public health benefits, other care issues, the wider costs to society and the impact on the rights of individuals. A bullet point assessment was subsequently published on the day before the debate but the DHSC did not publish a standard version of the IA until November 2021 (see page 6 [Eighth Report, Session 2021-22](#) and [Tenth Report -Session 2021-22](#)).
- Also in November 2021 DHSC published a further instrument to extend mandatory COVID-19 vaccination to anyone working in the NHS who would have direct contact with a service user. The *Draft Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) (No. 2) Regulations 2021* ([Twenty First Report, Session 2021-22](#)) were accompanied by an “Impact Statement” in a format of the DHSC’s own devising.⁸ It was not, however, made available on the Legislation.gov website. A full IA in the standard format was promised by the Minister, “as soon as possible and before Members vote on the proposed legislation”.⁹ This is not good enough:
 - first because an IA should inform policy development and evolve with it, and explain other policy options explored and dismissed during that process;
 - it should be published at the same time as the instrument is laid so that it is available for the normal scrutiny process that Parliament applies;
 - it should also be published at the same time as the instrument so that those affected outside Parliament can understand the legislation’s practical implications and communicate with their Parliamentary representatives before the debates take place if there are residual concerns; and

⁷ <https://committees.parliament.uk/publications/6797/documents/72188/default/>

⁸ [Making vaccination a condition of deployment in the health and wider social care sector: impact statement \(publishing.service.gov.uk\)](#)

⁹ [Covid-19 Update - Hansard -10 November 2021](#)

- it should be in the standard format so that Parliament and the public have an assurance that it has been calculated using approved rates and formulae. The final version of an IA is routinely submitted for independent validation to the Regulatory Policy Committee (RPC).

We subsequently discovered that the RPC rated several sections of this IA as unfit for purpose, including the section dealing with wider consequences of the policy, the very points about which the SLSC was concerned.

- The Government subsequently revoked the legislation in March 2022 just before the compulsory dismissal provisions was due to take effect. Our Report on the *Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) (No. 3) Regulations 2022 (SI 2022/ 206)* also criticised these Regulations for failing to clarify the position of staff already dismissed. (See page 7 [Thirty Third Report Session 2021-22](#).)

26. We raised the lack of impact assessment for COVID-19 instruments with the Permanent Secretaries when they attended to give oral evidence on 20 April 2021.¹⁰ In written evidence, they had said that “a pragmatic and proportionate approach” had to be taken in the face of a national emergency, and that sometimes the impact information could be found in associated documents (such as in published Scientific Advisory Group for Emergencies (SAGE) documents). In oral evidence, it was however conceded that, if the information is to be easily accessible, reference to the relevant material should be included in the EM, but they repeated that the exigencies of the pandemic had made this difficult.

27. We had anticipated that there would be some improvement in the quality of impact information presented after that session, but not only did it not improve but the failure to provide adequate and timely information became an issue with non-coronavirus instruments. Having compiled an extensive body of evidence, we published a report [Losing Impact: why the Government's impact assessment system is failing Parliament and the public](#) 12th Report Session 2022-23.

28. Relevant to the context of this submission, we highlight three elements of that report:

- In oral evidence, Stephen Gibson, the Chairman of the RPC, said that the exemption from producing an IA for pandemic measures was a missed opportunity:

“We think we could have added a lot of value, perhaps not at the first lockdown stage but thinking about what we learnt from the first lockdown for the second and third lockdowns: was it right to close gyms, hairdressers, restaurants or whatever? Doing that monitoring and seeing how it worked the first time around would have informed better regulatory policy-making at a later stage.”¹¹

- The *Losing Impact* report reiterated our view that the use of a stock phrase such as “No IA required” was unhelpful and we emphasised the need for information on the costs and benefits of the change to be available to Parliament on the day a statutory instrument is laid, and that the information should be proportionate to the policy and the legislative change being made:

“The term Impact Assessment (IA) is used for the formal document produced and independently verified for instruments with a net annual cost above £5 million.” Impact

¹⁰ Q6 <https://committees.parliament.uk/publications/7862/documents/81684/default/>

¹¹ Q11 <https://committees.parliament.uk/oralevidence/10098/html/>

information” is used to indicate the information that should be in every Explanatory Memorandum and which, for a simple instrument, may comprise just a couple of sentences.”

- In winding up the Government’s response in the debate on the special reports *Government by Diktat* and *Democracy Denied*¹², Lord True, the Leader of the House of Lords said:

“The Government recognise that impact assessments and cost-benefit analyses were not always possible because of the emergency nature of Covid-19. However, we must learn for the future if we are to improve policy decisions and deal well with major challenges. What is needed when significant SIs are made, even in an emergency, is a simple assessment of costs and benefits, including knock-on interventions and costs. In the case of Covid lockdowns, these might have included a range of estimates—the increase in waiting times for cancer and other operations, the impact of school closures and other harms. As we said in our response to the *Government by Diktat* report, we agree that the provision of impact assessment is important to be able to fully consider the impact of policy changes. We will also look at that in relation to the points raised on secondary legislation.” [12 January 2023 – Lords Hansard -Col 1588](#)

Learning points

- 29. Emergency legislation needs more thorough explanation than a standard instrument.** This is because the House will be asked to approve it very quickly and without its usual ability to seek reactions and advice from affected parties. This is no less the case with many COVID-19 instruments: the fact that the majority were brought into effect within days and often within hours makes it even more important that their intention and likely consequences are made very clear to both Parliament and the public.
- 30. Impact information is essential for the reader to understand the scope and effects of the legislation proposed; in a future emergency departments should not be permitted to hide behind a “stock phrase” to the effect that assessment of the impact is not required.** It is a useful discipline that should inform policy development, even if done in a more rudimentary form for emergency legislation.
- 31. We have repeatedly been told that Departments are responsible for the quality of their own legislation – if they have not already done so, we would expect the Senior Responsible Official for legislation and the Minister with oversight for the quality of legislation in each Department to review both how the process operated for them in the pandemic, and which areas of activity within their Department might be prone to requiring emergency legislation in the future.** They should then draw up a contingency plan to work out how to meet those commitments within their existing resources, and how to simplify their internal processes to allow for presenting emergency legislation at pace without significant loss of quality.

¹² The SLSC’s 20th Report, Session 2021-22 [Government by Diktat: A call to return power to Parliament](#) and the Delegated Power and Regulatory Reform Committee’s 12th Report of Session 2021-22 [Democracy Denied? The urgent need to rebalance power between Parliament and the Executive](#) .

Topic 8: Legal clarity

Q 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?

Q 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?

Q26. 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?

Accessibility

32. We are not aware that any definitive list of secondary legislation passed to deal with the pandemic has been produced either at the time or since.

- Although the [Legislation.gov website has a dedicated page](#) – it only advises the user on suitable searches and a search for UK secondary legislation with the key word “Coronavirus” produces 450 results.
- The same search on Parliament’s [Find a Statutory Instrument website](#) produces 443 items, though that difference may be because that site only lists SIs subject to procedure which would, for example, exclude any Orders commencing provisions of the Coronavirus Act 2020.
- The [Secondary Legislation Scrutiny Committee has kept its own list](#), which includes all instruments subject to a parliamentary procedure that it has considered that respond to aspects of the pandemic, it includes 534 items of which 79% include the word Coronavirus in the title. (As an example, during the course of the pandemic we considered several instruments introducing mitigations to the system of allocating airport take-off and landing slots because of the severe reduction in air travel during the pandemic, but none included the word Coronavirus in the title) ¹³

Clarity of titles

33. When we took evidence from the Permanent Secretaries, we raised the fact that at that stage approximately 15% of the pandemic instruments we had considered did not have the word Coronavirus in the title. We were assured that to ensure transparency, guidance had been issued to departments to include the word “Coronavirus” in the title of any SI which they were making in response to the crisis. ¹⁴ At our latest count 21% of the SIs that we have considered to be related to the pandemic did not include that word in the title, in consequence we wonder how pandemic legislation can be properly evaluated if about a fifth of it cannot be identified.

¹³ See for example SI 2021/185 - Airports Slot Allocation (Alleviation of Usage Requirements) Regulations 2021 (included in [48th Report Session 2019-21](#))

¹⁴ Q5 Perm secs written evidence 20 April 2021

<https://committees.parliament.uk/publications/7862/documents/81684/default/>

34. The Committee also raised with the Permanent Secretaries the difficulties of the convoluted titles of early lockdown instruments, particularly those that imposed controls on local councils. Clarity was further blurred when, towards the end of the period of local lockdowns, to impose stronger infection control, DHSC moved council areas between the North of England regulations and the North East and North West regulations, regardless of the geographical location of the council affected.¹⁵ In their written evidence the Permanent Secretaries responded:

“ with the benefit of hindsight, we recognise that the approach to titling of some of the local lockdown regulations caused confusion. At the time, however, that problem was not apparent. The first local lockdown regulations were made in respect of Leicester in early July. At that time, the national lockdown regulations for England were set out in an SI called *The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020 (S.I. 2020/684)*. In that context, the obvious approach to titling an SI which applied only to Leicester was to include “Leicester” in the title – thus, *The Health Protection (Coronavirus, Restrictions) (Leicester) Regulations 2020 (SI 2020/685)*. This was, at that time, clearly preferable to a title which just included a number (e.g. “(No. 3) (England)” regulations, or similar) because the reader, looking at the title, would not have been able to tell from the title that the SI only applied in the Leicester area.

As more local lockdowns were decided on, we continued that approach (Blackburn, Luton, Bolton etc.). This remained the clearest way of titling those SIs “to give an accurate reflection of the nature of the SI”. The approach started to break down with the increasing policy imperative to move localities between levels of restrictions, and with the introduction of SIs for larger regions (North of England, North West of England etc.). However, the situation was largely resolved on 12 October, with new regulations introducing the Tiers system for the first time.”¹⁶

35. In reading every instrument we observed two things:

- the content of each of the local lockdown instruments rapidly became too detailed, leading to frequent amendments as it was deemed safe to reopen gyms in one town, but gyms and dance studios had to be closed in another:
- the speed and number of amendments required by that system, led to an increase in the number of errors, requiring yet more instruments to make corrections.

The simplified Tiered approach adopted later in the pandemic where the restrictions were set in bands at national level and many towns can be switched between bands using a single instrument, provided a much more manageable legislative solution and was also easier to communicate to the public. **We suggest that in any modelling measures to respond to any future health (or other) national emergency measures the Tiered approach should be given preference.**

¹⁵ See Health Protection (Coronavirus, Restrictions) (North of England and North East and North West of England Etc.) (Amendment) Regulations 2020 ([SI 2020/1074](#)) in [29th Report, Session 2019–21](#)

¹⁶ Q5 Perm secs written evidence 20 April 2021

<https://committees.parliament.uk/publications/7862/documents/81684/default/>

Corrections

36. We have acknowledged in our reports the remarkable work done by government lawyers and civil servants in producing legislation to keep pace with the events of the pandemic. However the object of the current exercise is to examine how it could be better managed on a future occasion and during the course of the pandemic we received a very high number of correcting instruments.
- For example, the *Health Protection (Coronavirus, Restrictions) (Blackburn with Darwen and Bradford) (Amendment) (No. 3) Regulations 2020 (SI 2020/935)* instrument, also referred to below, corrected SI 2020/930, laid less than 24 hours previously, because a particular parish had been omitted from the earlier instrument.
 - Similarly, the *Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place and on Public Transport) (England) (Amendment) (No. 2) Regulations 2020 (SI 2020/1021)* were corrected twice in 24 hours. [Twenty Seventh Report, Session 2019-21](#).
37. When we raised this with the Permanent Secretaries, the Treasury Solicitor acknowledged the problem and said that her department had responded to this by redeploying other departmental lawyers to support the drafting lawyers. As a result, she said, the quality of legislation had “held up pretty well”.¹⁷
38. **However, the number and frequency of corrections did significantly add to their workload** (as well as Parliament’s), **and we suggest that the checking process for both the content and legal drafting of emergency Statutory Instruments might benefit from review with the aim of finding a more effective and efficient method when dealing with legislation at speed.**

Keeping track

39. It is one of the Rule of Law tenets that the law should be clear and accessible. During the pandemic, however, the speed and volume of legislation meant that it was not always clear which regulations had been superseded or revoked or had expired.
40. We note and commend the excellent work by The National Archives which, on its Legislation.gov.uk website, published new pandemic regulations as a priority. It continued to play a vital role in aiding legal certainty by constantly updating those regulations with over 2,000 amendments, so that the complete and current version of the legislation was available as soon as possible, usually within two days of the commencement of the amending legislation.¹⁸
41. The National Archives also offered a dedicated webpage www.legislation.gov.uk/coronavirus which provides limited advice on how to search for COVID-19 legislation. In written evidence the Permanent Secretaries informed us that
- “this page receives approximately 15,000 page views per week, and is the first result when searching for “Coronavirus legislation” on Google. This approach was validated by targeted user research into the COVID-19 response in the summer of 2020, which also demonstrated that for the first time Legislation.gov.uk was being used more by members of

¹⁷ Q10 <https://committees.parliament.uk/oralevidence/10098/html/>

¹⁸ Perm secs written evidence 20 April 2021
<https://committees.parliament.uk/publications/7862/documents/81684/default/>

the public for personal use than by professionals, with one third of all users visiting the website specifically to view COVID-19 legislation. Since March 2020, COVID-19 legislation has received almost 25 million page views from 6 million users, which is an average of 115,000 users per week – increasing to over one million users in weeks when major changes to regulations are published.¹⁹

42. This demonstrates a clear appetite or need among the public for this information. However, the main flaw the page has is that does not provide any definitive lists of pandemic legislation, or one searchable by topic or current validity.

Sunseting

43. One of the key features of secondary legislation laid to deal with the pandemic was that it was intended to be temporary and therefore often included a sunset date. For major themes, like lockdown conditions or travel permissions, core regulations were identified and continually amended, this meant that the sunset date was always clear.
44. For other legislation the approach was inconsistent. Having recently seen examples of ordinary legislation being allowed to lapse due to government inattention,²⁰ this Committee made enquiries about where and how this wide variety of sunset dates was being monitored to ensure that there were no gaps in the restrictions. Finding no central source we wrote to Jacob Rees-Mogg MP, then the Leader of the House of Commons, and thereafter the Cabinet Office began to send us monthly update letters which we published.²¹ We also note that, being the result of a trawl exercise across Whitehall departments, the information was frequently out of date by the time we received it. **We suggest that for any future pandemic or situation for which large amounts of temporary legislation is required, the Cabinet Office establishes and monitors a dashboard on the Gov.UK website so that up-to-date information is available to all.**
45. Such a dashboard would have been of particular benefit in the early part of the pandemic when the Government was producing Statutory Instruments imposing local restrictions on towns with a high incidence of COVID-19. These were usually made using the made affirmative powers of the Public Health Act 1984 which imposes a 28 day deadline within which the legislation must be approved by Parliament.
46. On several occasions these instruments lapsed, although this was sometimes deliberate where the restrictions were no longer needed, this was not always the case. The Government itself was occasionally tripped up by the lack of a central reference point: as the timeline on Parliament's Find an SI website shows - [Timeline - SI 2020/935 - Statutory Instruments - UK Parliament](#) – the *Health Protection (Coronavirus, Restrictions) (Blackburn with Darwen and Bradford) (Amendment) (No. 3) Regulations 2020 (SI 2020/935)* were revoked by another instrument on 22 September but debated and approved in the Lords Chamber on 24 September and in the Commons on 29 September.

¹⁹ Perm secs written evidence 20 April 2021

<https://committees.parliament.uk/publications/7862/documents/81684/default/>

²⁰ Correspondence [Seventh Report, Session 2019-21](#)

²¹ Correspondence Appendix 2 [Thirteenth Report, Session 2019-21](#)

Learning points

- To improve resilience for a future emergency the Government might wish to identify in advance how legislation can be sensibly titled on a regional or local basis or where a Tiered approach would be better. All drafting lawyers should have access to that information to ensure a uniform approach.
- All legislation relevant to a future pandemic or other crisis should use the designated key word for example “coronavirus” or “foot and mouth disease” consistently in every title **and the Cabinet Office Parliamentary Business and Legislation Committee should enforce that convention.**
- **To aid both Parliamentary scrutiny and the public in a future pandemic the Government should provide one central dashboard, updated daily, that sets out in a searchable format** (including by geographical area) all of the temporary legislation that is currently in force and its date of sunseting.

Topic 7: The use of guidance vs. law

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

Q22. 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?

Q23. 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?

Blurring of the boundary

47. This Committee has been concerned for some time about the blurring of the boundary between primary and secondary legislation²² and between secondary legislation and guidance.²³

- In its report *Democracy Denied?*, the DPRRC also identifies three principal forms of guidance: pure guidance (guidance which simply assists but does not direct), guidance which the law requires those to whom it is directed “to have regard to” and mandatory guidance (guidance which must be complied with)²⁴ and comments on the blurring of these distinctions in pandemic guidance.
- In its report *Rule of Law Themes from COVID-19 Regulations*, the JCSI also expressed concern that “guidance has been used in the context of the pandemic response in a way

²² See page 23 [Response to the Strathclyde Review: Effective parliamentary scrutiny of secondary legislation](#) 32nd Report, Session 2015-16.

²³ See page 18 [Government by Diktat: A call to return power to Parliament](#) 20th Report, Session 2021-22.

²⁴ [Democracy Denied? The urgent need to rebalance power between Parliament and the Executive](#) DPRRC 12th Report, Session 2021-22

that appears to attempt to impose more severe restrictions than are imposed by law, by presenting the guidance to the public as if it were law that compelled compliance”.²⁵

48. A number of our weekly reports contain examples where guidance on secondary legislation which was only advisory has been presented as if it were stating the law, for example:

- guidance for the first lockdown said that “only one form of exercise a day” was allowed, whereas the legislation did not limit it in this way. In our 13th Report, we published an exchange of correspondence with the then Secretary of State for Health and Social Care, the Rt Hon. Matt Hancock MP, who confirmed that it was the instrument and not the guidance which was legally enforceable. [Thirteen Report Session 2019-21](#) page 12
- Guidance on the *Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 24) Regulations (SI 2020/1292)* which made an exemption to the pandemic travel restrictions to allow foreign poultry workers into the country, said that the employer should provide a translation of the local lockdown restrictions and the worker should sign to say that he or she had understood them. This provision was not included in the regulations. [Thirty Fifth Report, Session 2019-21](#) page 6

49. We have frequently criticised legislation where terms in the legislation are left undefined with the intention of clarifying them later in guidance. But this means that the full scope of the legislation is not clear when it is being scrutinised by Parliament. For example

- *Adoption and Children (Coronavirus) (Amendment) Regulations 2020 (SI 2020/445)* [Thirteen Report Session 2019-21](#) emergency legislation reliant on guidance that was not available - see in particular paragraph 36.
- *Heather and Grass etc Burning (England) Regulations 2021* demonstrate the uncertainties that arise when key aspects of a decision-making process are to be set out in guidance that is not available, even in draft form, when the Regulations are being scrutinised. [Forty Eighth Report, Session 2019-21](#) especially paragraphs 11-14
- *Draft Genetically Modified Organisms (Deliberate Release) (Amendment) (England) Regulations 2022*, which removed a regulatory burden for research and development trials involving certain genetically modified plants, we noted that the guidance, which is intended to clarify what type of plants will qualify for the lighter regulatory approach, had not yet been published despite numerous concerns having been raised during the consultation about the lack of clarity. [Twenty Ninth Report, Session 2021-22](#)

50. The immediacy of pandemic legislation exaggerated these problems because the legislation took effect very rapidly, so consequences were obvious immediately:

- The *Health Protection (Coronavirus, Restrictions) (No. 3) and (All Tiers) (England) (Amendment) Regulations 2021* which left a key definition, the meaning of “critical worker”, to guidance, demonstrate the potential for significant knock-on effects, as teachers reported the number of children of critical workers turning up to attend school in person had doubled overnight. [Forty First Report, Session 2019-21](#)
- *Draft Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) (No. 2) Regulations 2021* which required mandatory vaccination of workers and those

²⁵ See para 40 [Rule of Law Themes from COVID-19 Regulations](#), JCSI 1st Special Report, Session 2021–22.

“otherwise engaged” who would be “face to face” with patients, did not define those terms, instead referring to future guidance “to supplement this instrument”. We also identified discrepancies in the way the terms were defined between hospitals and care homes. [[Twenty First Report, Session 2021-22](#)]

51. In oral evidence to the Delegated Powers and Regulatory Reform Committee, the Leader of the House acknowledged that there should be a distinction :“... I very strongly agree with your point that guidance is guidance, and the law is the law. The Government should not give the impression that they can make law by guidance, because they cannot, and no British subject has any obligation to follow non-law”²⁶ And yet the Government continues to commit the same error: see for example: *Draft Voter Identification Regulations 2022* the grounds for refusing to allow someone a ballot paper were to be set out in guidance that was still being drafted when the legislation was laid. [Eighteenth Report, Session 2022-23](#) page 4

52. When we asked the Permanent Secretaries about the use of guidance during the pandemic, their written response said:

“...the Government has continued to evolve its approach to communicating clearly the effects of changes made to the law, alongside publication of the legislation and its associated guidance.

It is recognised that legislation needs to be detailed and clear enough that guidance does not need to be relied upon for the purposes of interpretation. However, in some instances, it is possible (and sometimes desirable) for legislation to refer to external publications and effectively give them the force of law (e.g. documents, maps or plans).

Guidance has continued to be an important and necessary way of supporting the public and supplementing legislation during this unique and difficult time. It would not have been possible or practicable to legislate for everything that the Government needed to do in response to the pandemic. Guidance can be a more proportionate way of encouraging changes in behaviour and has been an invaluable tool. It is for departments to make judgements about the right balance to strike between law and guidance in any particular case.”²⁷

53. We then asked whether any central body checks that the guidance that departments publish correctly represents the law. We were told that it is the responsibility of each department to ensure that guidance is complete and accurate, however for COVID-19 guidance, following these early difficulties, a central clearance process was established to quality assure the guidance and ensure that it was consistent with the law.²⁸

Learning points

54. Although the witnesses from all parts of government that we spoke to endorsed our view about the distinction that should be made between guidance and law, this seems to have made no practical difference to the legislation that is presented to us for scrutiny: we continue to see key terms left to guidance and interpretative guidance that is not available when the

²⁶ Q 10 DPRRC Oral evidence <https://committees.parliament.uk/oralevidence/2175/html/>

²⁷ [Permanent Secretaries' Written response Q9](#)

²⁸ [Permanent Secretaries' Written response Q10](#)

legislation is presented for scrutiny. As we have said in other contexts, while policy is a matter for Departments, central Government, perhaps during the process of PBL Committee clearance, should ensure compliance with the legislative standards that the House expects.

55. Our consistent view is that if it is relevant to the interpretation of secondary legislation guidance needs to be available alongside the legislation but **definitions that affect the scope or application of the law should always be in the legislation itself.**
56. Not just guidance but the material published on government websites needs to match the law, or to make plain where guidance is supplementary to its requirements. **We welcomed the information that, in the latter part of the pandemic at least a central control point checked the quality of the information published on the Gov.Uk website and hope that mechanism would be used again in any future pandemic to ensure consistent messaging.**

SLSC

21 March 2023