



**Response from the Faculty of Advocates
to
the call for Evidence from the Independent Commission on UK Public Health
Emergency Powers**

The Faculty of Advocates is grateful for the opportunity to respond to the call for Evidence from the Independent Commission on UK Public Health Emergency Powers.

Topic 1: Existing legislative options during a public health emergency

Question 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?

Faculty agrees with this starting point. It is clearly important that powers exist to enable urgent public health matters to be addressed through legislation.

Question 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?*

In its response, Faculty wishes to focus on the legislation which is of most significance in Scotland, namely the Coronavirus (Recovery and Reform) (Scotland) Act 2022. As part of the Scottish Parliament's scrutiny process, a number of amendments were made to the Bill. However, as the Independent Commission's Call for Evidence notes, a substantial number of proposals were not accepted and did not make their way into what became the Act.

Faculty notes the tension which inevitably exists between parliamentary desire for scrutiny of executive action, and the requirement for the executive to be able to act quickly in response to an evolving public health situation. The 2022 Act does not, in Faculty's view, presently strike the correct balance between the Scottish Parliament and the executive. Had all of the recommendations made by the Scottish Parliament Covid-19 Recovery Committee and Delegated Powers and Law Reform Committee made their way into the Act, they would have helped to achieve that balance. It appears to Faculty that the executive has afforded itself powers which risk exclusion of effective parliamentary scrutiny, and indeed scrutiny by the public.

Faculty sees no need to reiterate what has been said in the reports from the Scottish Parliament Committees referred to above. It largely endorses their views and would consider that had their proposals been followed the objectives mentioned in this question would have been better served. In the context of meeting international obligations, including human rights obligations, Faculty is particularly concerned about there being no requirement for an assessment of impact where provisions are made using the affirmative procedure.

It is, as yet, not possible to know how the executive might use the wide-ranging Henry VIII powers contained in the Act.



Question 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?

Reference is made to the answer to Question 2 above.

Topic 2: Legislation enacted during the Covid-19 pandemic

Question 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:

- 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?*

Faculty endorses the views of the various committees referenced in this call for evidence. In the absence of the implementation of these recommendations primary legislation did not meet adequately the aims of (a), (b) and (c).

Question 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?

The recommendations made by the various committees noted in this call for evidence all reflect an improved balance in addressing the aims in (a), (b) and (c) above. Should all of these recommendations be actioned then that would go a long way towards ensuring that any future primary legislation is compliant with these aims.

Question 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?*

Faculty endorses the views of the various committees referenced in this call for evidence. In the absence of the implementation of these recommendations secondary legislation did not meet adequately the aims of (a), (b) and (c).

Question 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?

The recommendations made by the various committees noted in this call for evidence all reflect an improved balance in addressing the aims in (a), (b) and (c) above. Should all of these recommendations be actioned that would go a long way towards ensuring that any future secondary legislation is compliant with these aims.



Question 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?

Without knowing the full extent of any prior steps by the government on this issue, it is difficult to answer the question. The Public Sector Equality Duty contained in the Equality Act 2010 provides a useful summary of measures in relation to various protected characteristics. Were there to be similar processes, including risk and impact assessments with meaningful advance consultation, the consideration of the issue could be improved.

Topic 3: The creation of offences and enforcement powers

Question 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?

Without knowing the full extent of any prior consultation by the government on this issue, it is difficult to answer the question. However, the key recommendations made by the parliamentary committees noted in this call for evidence all reflect Rule of Law values. Should all of these recommendations be actioned that would go a long way towards ensuring that any future legislation is compliant with human rights law and also reflects Rule of Law values.

It is suggested that any future consultation on this issue include the wider legal community rather than just the Ministry of Justice. If it is felt that there may not be sufficient time to achieve this in an emergency situation, then there is ample scope for agreement in advance on such issues, for example, by the creation of an 'agreed practice' document or algorithm setting out the procedure required to achieve compliance (including a list of the required checks and balances).

Question 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?

Reference is made to the answer to question 9 above.

Question 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?

If the processes envisaged by the key recommendations are all followed, and there is wider legal consultation, then any enforcement measures put in place are likely to be appropriate and proportionate. The keeping of and free access to data surrounding enforcement will allow reassessment of this issue for future learning purposes.

Topic 4: Divergences throughout the UK

Question 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?

Faculty notes and agrees with the summary by the Select Committee on the Constitution of the initial cooperation between the UK government and the devolved administrations during the period to about May 2020 and the subsequent divergence: (Select Committee on the Constitution, 'COVID-19 and the use and scrutiny of emergency powers' (2021-2022) HL 15, paras. 92-118).

In particular it is noted that in the early stages of the pandemic there was close and effective cooperation between the UK government and the devolved administrations. It is noted that the Civil Contingencies Committee (COBRA) played a key role; that other meetings between the UK government and the devolved administrations, including meetings of the ministerial implementation groups, also took place; and that the cooperation between the UK government and the devolved administrations led to such joint measures as the



publication of a UK-wide joint COVID-19 action plan, UK-wide lockdown restrictions and the Coronavirus Act 2020: (Select Committee report, paras. 94-99).

It is also noted that from about May 2020 onwards there was divergence between the UK government and the devolved administrations, albeit that some coordination between the four administrations remained in certain devolved areas. In particular it is noted that during this period differences arose between the administrations regarding, amongst other matters, the lockdown restrictions and guidance in place from time to time; public health messaging; quarantine restrictions for arrivals from other countries; and the use of face masks. It is noted that by June 2020 COBRA and the ministerial implementation groups had ceased to meet, with no effective replacement: (Select Committee report, paras. 100-116).

Faculty notes that the divergence between the UK government and the devolved administrations regarding COVID-19 restrictions and guidance continued in the period following the Select Committee's report of June 2021. For example, the requirement to wear a face mask in England was withdrawn in January 2022 ('Face coverings: when to wear one, exemptions and what makes a good one', updated 27th January 2022), but that step was not followed by the devolved administrations at that time. Similarly, the UK government's 'Living With Covid' plan, published in February 2022, and which ended the requirement to self-isolate after a positive test ('COVID-19 Response: Living With COVID-19', February 2022), was not followed by the devolved administrations at that time.

Faculty considers that divergences between the UK government on the one hand and the devolved administrations on the other hand in relation to their respective responses to a public health emergency are inevitable in circumstances where each administration has power to mount its own response, including the power to impose restrictions and issue guidance. Each administration will have its own priorities and preferred approaches. Further, the political dynamic makes it likely that each devolved administration will see as desirable a distinct response, independent of Westminster. The divergence of response was therefore likely in large part attributable to, and an inherent feature of, the framework of devolution.

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?*

While divergence between the administrations' respective responses to a public health emergency may in certain circumstances be desirable and indeed necessary in order to address the particular needs of each part of the UK, it is evident that a lack of effective coordination and communication between the administrations during the pandemic gave rise to significant issues. Issues arose, for example, in relation to international travel restrictions and travel within the UK: (Select Committee report, paras. 107-111). It is evident that such divergences may be detrimental to the rule of law.

Faculty considers therefore that careful consideration should be given to the issues that may arise in future public health emergencies as a result of divergence between the four administrations' respective measures, particularly as they may bear upon the rule of law, taking into account the experience of the COVID-19 pandemic.

Topic 5: Parliamentary scrutiny processes

Question 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?

Faculty notes that significant concerns have been raised regarding the scrutiny of legislation made during the pandemic, both in England and Scotland: (for example Select Committee on the Constitution, 'COVID-19 and the use and scrutiny of emergency powers' (2021-2022) HL 15, Chapter 2; 'Use of the made affirmative



procedure in Scotland: reflections from the pandemic', Edin. L.R. 2022, 26(2); 'The marginalisation of the House of Commons under Covid has been shocking; a year on, Parliament's role must urgently be restored', Hansard Society, London, 2021).

It is therefore clear that legislation made during the pandemic was to a significant extent not subject to appropriate parliamentary scrutiny. Faculty recognises that a tension exists between the need to make laws urgently during a public health emergency and the need for appropriate parliamentary scrutiny of such laws. Experience during the COVID-19 pandemic suggests however that it is the latter, rather than the former, which tends to be diminished. The reasons for that are likely to include the pressures upon government to react swiftly to a public health emergency; a resulting reluctance on the part of the executive to allow time for parliamentary scrutiny; and a greater use by the executive of the made affirmative procedure during a public health emergency.

Question 15

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

Faculty considers that parliamentary scrutiny processes could be improved, with a view to ensuring in particular that in the circumstances of a public health emergency legislation is subject to appropriate scrutiny. Appropriate measures could include a requirement to introduce new emergency powers, insofar as reasonably practicable, by way of primary rather than secondary legislation; a reduction in, and restrictions on, the use of the made affirmative procedure; a requirement that, insofar as reasonably practicable, parliamentary approval of instruments to be introduced under the made affirmative procedure be sought before they come into force; and a requirement that, insofar as reasonably practicable, adequate parliamentary time be made available for the scrutiny of legislation.

Question 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?

Faculty considers that additional measures are required to ensure that the UK and Scottish parliaments have appropriate oversight of such procedures. Reference is made to Faculty's response to question 15, above.

Question 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?

Faculty notes that criticism has been made of the publication of data informing the UK government's decision-making during the pandemic: (for example, House of Commons Public Administration and Constitutional Affairs Committee, 'Coronavirus Act 2020 Two Years On', Seventh Report of Session 2021-2022, paras. 60-66; House of Commons Public Administration and Constitutional Affairs Committee, 'Government transparency and accountability during Covid 19: The data underpinning decisions', Eighth Report of Session 2019-2021, paras. 41-47). It is also noted that when making regulations under the made affirmative procedure in Scotland the minister is not required to provide evidence or an explanation as to why they consider that the regulations require to be made urgently: (for example, Scottish Parliament Delegated Powers and Law Reform Committee, 'Inquiry into the use of the made affirmative procedure during the coronavirus pandemic', published 10 February 2022, SP Paper 110, 12th Report, 2022 (Session 6), paras. 31, 75 and 87).

Faculty considers therefore that an issue arises in both the UK and Scottish Parliaments as to the information and evidence which the government is required to provide to parliament in order to allow parliament to scrutinise the government's use of emergency powers. This could be addressed by, for example, requiring the minister introducing emergency legislation to provide parliament with a supporting statement and evidence justifying the urgency of the legislation.



Question 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?

Faculty considers that the cooperation between the four administrations during the initial part of the pandemic, to about May 2020, can be usefully considered as an illustration of the benefits of effective cooperation and the mechanisms for achieving such cooperation. Reference is made to Faculty's response to question 12 above.

Topic 6: The adaptation of parliamentary procedures

Question 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-10 pandemic and facilitate parliamentary oversight of executive action?

The Scottish Parliament implemented measures that ensured their members were able to vote at the same levels as prior to the pandemic and Faculty believes that is an important principle.

As these measures were principally offering on-line, as opposed to in-person debate and voting, Faculty considers that debates in advance of voting were inevitably likely to be somewhat less interactive than those held in-person prior to the pandemic.

It is Faculty's position that they should not provide an opinion on how successful the Scottish Parliament was in adopting measures to facilitate ongoing parliamentary oversight of executive action during the pandemic. However, Faculty considers that debating opportunities should not, as far as possible, be impeded by a move to on-line participation and that voting opportunities should operate at the same levels in all circumstances.

Question 20

Could any improvement be made in future public health emergencies?

To enable transparency, Faculty considers that all measures to facilitate parliamentary oversight of executive action during a public health emergency should be published and be publicly available. This will ensure that the public and parliamentarians can be aware of the intention that both debate and voting opportunities will not, as far as possible, be impeded by a move to on-line participation during a public health emergency.

Topic 7: The use of guidance vs. law

Question 21

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

Public health emergencies are likely to require significant restrictions on society and may affect or alter existing human rights. As a matter of principle, the rule of law offers checks and balances and facilitates cooperation, oversight and scrutiny. It is Faculty's position that the judiciary, in this regard, plays a vital role in effective governance by holding the executive legally accountable for its actions and decisions.

Faculty's position is that the circumstances where guidance, rather than legislation, should be used in public health emergencies should be clearly defined and prescribed. Enacting legislation takes longer than issuing guidance. Therefore, the test for the use of guidance rather than legislation should be that instant and urgent



action is required, by the nature of the public health emergency, that could not be met by recourse to legislation.

For certain types of interventions, it might be judged that observance and compliance would be improved if guidance, rather than legislation, was used. This could be part of the test when considering the balance between using guidance and law.

Question 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?

Faculty has no observations on whether the right balance between law and guidance was achieved to impose non-pharmaceutical interventions during the pandemic. However as noted in our response to question 21, the circumstances where guidance rather than law should be used in public health emergencies should be defined and prescribed and meet the type of test outlined in our response to question 21.

Question 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?

Faculty has no observations to make in relation to this.

Topic 8: Legal clarity

Question 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?

Faculty offers no comment on whether emergency public health laws governing the Covid-19 pandemic were sufficiently clear and accessible. However, Faculty agrees with the recommendations of the various committees which are referenced in this call for evidence.

Laws must be clear and accessible in order to maintain transparency of the law, which is essential for protecting and promoting the rule of law. Faculty endorses the following comment made by the Joint Committee on Statutory Instruments at paragraph 36 of their specialist Report:

“Where criminal offences are created, the terms of the restrictions must be cast with sufficient clarity and certainty to enable readers to determine in advance whether particular kinds of activity will or will not incur criminal liability. This is a fundamental requirement of the rule of law.”

Question 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?

Faculty is not able to comment on how far the use of government guidance affected public understanding of the legal restrictions that were placed on them during the Covid-19 pandemic.

The rule of law requires a clear distinction to be made between guidance and law. With regard to improvements which could be made to ensure that this distinction is made clear, Faculty agrees with the recommendations made by the various committees referenced in this call for evidence.

Question 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?



The recommendations made by the various committees referenced in this call for evidence document all reflect improvements which, if implemented, would go a long way to ensuring the clarity and accessibility of legislation and guidance in future public health emergencies.

Topic 9: International comparisons

Questions 27

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

Faculty has no observations to make in relation to this question.