

IN THE UK COVID-19 INQUIRY

Before the Right Honourable Baroness Hallett, D.B.E.

MODULE 2 (15 January)
THE WELSH GOVERNMENT’S CLOSING STATEMENT

Introduction

1. This closing statement reviews the evidence adduced in module 2 from ministers, officials and experts on intergovernmental relations in order to place it into its proper context before the Inquiry examines the decision-making of the devolved governments.

General points

2. Before turning to the detail, two general points are relevant: the first relates to the legal and practical reality of the Welsh devolution settlement, particularly as it concerns public health; the second relates to the Inquiry’s consideration of the question of inequalities.
3. When describing the actions taken by the governments of the United Kingdom, use of the term ‘divergence’ is misleading as it implies a default position, namely that adopted by central government. The Welsh Government touched on this matter in opening. The UK Government chose to use the Public Health (Control of Disease) Act 1984 (“**the 1984 Act**”) as the legal basis of the response to the pandemic with the understanding that executive power under that Act had been transferred to the Welsh Government. Part 2A of the 1984 Act (the relevant part for present purposes) was inserted by the Health and Social Care Act 2008. As reflected in Part 2A of the Act, the principle of subsidiarity in the context of infectious disease had Parliamentary approval.
4. In responding to the pandemic, the four governments not only had their own powers but also responsibilities in the field of public health. Using those powers, they made decisions that they considered to be in their nations’ best interests. If we understand the Chair correctly, the Inquiry will investigate how each government made decisions on behalf of the

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people they served and their effectiveness rather than how and why their decisions diverged from those of the UK Government. How well the governments worked with each other, the effectiveness of those relationships and, in particular, their impact on the ability of the devolved governments to respond to the pandemic is part of that wider question.

5. The second general point concerns inequalities. The Welsh Government positively welcomed the Chair’s proposal that her terms of reference should be broadened to allow the Inquiry to consider the effect of the virus and the response on pre-existing inequalities. It was, however, disappointing that the experts’ consideration of the complex picture of pre-pandemic inequalities paid only marginal attention to the picture in Wales. In module 2B, the Welsh Government will return to the fundamental issue of inequalities so the position in Wales can be considered. The effect of the pandemic on those who are most disadvantaged must be understood so any future recommendations which touch upon inequalities are fully effective and reflect differences across the UK.

Intergovernmental relations

6. In opening, the Welsh Government invited the Inquiry to consider three particular issues relating to intergovernmental relations:
 - (a) The nature, extent and timing of the UK Government’s dealings with the Welsh Government in relation to the imposition and relaxation of non-pharmaceutical interventions. In particular, whether and, if so, to what degree opportunities for effective inter-governmental working were lost;
 - (b) The funding arrangements governing the response to civil emergencies between HM Treasury and the devolved governments; and
 - (c) The realities and benefits of effective devolved decision-making.

The nature of co-operation between the UK Government and the Welsh Government

7. Until May 2020, the then Prime Minister engaged with the First Ministers of the devolved governments in COBR. In May 2020 the UK Government unilaterally decided to reorganise its Cabinet structures. Despite the Prime Minister agreeing the use of the Joint Ministerial Committee

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structure for ongoing engagement with devolved governments at this time¹, no use was made of it at all, even though this mechanism was in relatively good working order because it was used during Brexit. Instead, in May 2020, as easements out of lock down were being engaged the practical consequence of ending, not only the First Ministers’ attendance at COBR, but the opportunity for strategic engagement within the UK, removed the choice of a co-ordinated approach by governments across the UK resulting in different approaches and timescales for easements.

8. As several witnesses have explained, it does not matter whether the meetings with the First Ministers were in COBR, Joint Ministerial Committee meetings or otherwise. What mattered was the need for a regime of regular meetings, attended by the Prime Minister and the First Ministers, in which the heads of the four governments were able to raise, discuss and decide matters of mutual interest and concern. That is what the First Minister of Wales regularly called for.²

9. Notwithstanding the clear and pressing need, there were no meetings between the heads of government between May and September 2020. On any view, it is profoundly unfortunate that no such meetings were convened by the then Prime Minister with whom the institutional initiative lay to organise them. Unsatisfactory reasons have been given for not organising those meetings. Thereafter, the First Ministers were invited only to Covid-O meetings, chaired by Michael Gove MP, then the Chancellor of the Duchy of Lancaster. However, Lord Sedwill explained that the “big” decisions were made by the Prime Minister in Covid-S.³ By contrast, the “second order” decisions that could be made by lower-ranking ministers were considered at Covid-O. Put differently, the devolved governments were invited to the forum that dealt with implementation, rather than one that set strategic direction.

10. Michael Gove said that there was no perfect solution to the problem whether to include the devolved governments in UK Government decision-making structures or to invite them on an ad hoc basis.⁴ That answer ignores the basic point that the devolved governments were asking for a regular pattern of meetings particularly between heads of government. As Professor Henderson pointed out in her oral evidence, Mr Gove complains of a problem the UK Government created and which was in its gift to solve. Devolved governments were not asking to be included within UK Government decision-making structures (COBR excluded) and they were not seeking a particular form for those

¹ Johnson, §368 [INQ000255836].

² Drakeford, 2nd statement, §18.

³ Transcript, p. 114.

⁴ Transcript, pp. 113 – 114.

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meetings. The compelling and obvious need was for arrangements that allowed for effective and efficient participation by the heads of the devolved governments in strategic consideration of how best to respond to the pandemic in the four nations of the UK.

11. Boris Johnson was more forthcoming about the reason why he did not regularly meet with the First Ministers for long periods. He wanted to avoid creating the impression that the United Kingdom was a federal state,⁵ an apprehension shared by the territorial Secretaries of State who described regular meetings between the Prime Minister and the First Ministers as a “potential federalist Trojan horse”.⁶ Mr Johnson’s concern with appearances did not recognise, and so did not meet, the scale of the events confronting the four nations. As a reflection of the UK Government’s attitude to the need for close and effective co-ordination between the heads of the four governments, Mr Johnson’s evidence is telling.

Funding arrangements between HM Treasury and the devolved governments

12. On 20 March 2020, it was decided at COBR that regulations should be made to enforce the closure of the hospitality sector. It was decided that the powers of delegated legislation in the 1984 Act would be used. That meant that the delegated legislation would be made by the Welsh Ministers for Wales, because it was a transferred function.⁷

13. The legitimacy of the UK fiscal framework is undermined by the way HM Treasury which operates UK-wide, explicitly directed by, and accountable solely to, UK Ministers.

14. In opening, the Welsh Government set out in some detail the limitations imposed by the funding arrangements, and the unresponsiveness of HM Treasury, some of which were illustrated by the discussions which led to the firebreak in Wales in October 2020. The enhanced Job Support Scheme was a UK-wide scheme, implemented by HM Treasury, due to start on 1 November 2020. Following the Welsh Cabinet’s decision in principle to introduce a firebreak in Wales at a time when the UK Government had no intention of taking the same action, on 16 October 2020 the First Minister asked Rishi Sunak MP, then the Chancellor of the Exchequer, to bring forward the start of the scheme by one week to coincide with the beginning of the firebreak in Wales. He explained why

⁵ Johnson, statement, §188 [INQ000255836].

⁶ [INQ000091348].

⁷ Schedule 1 to the National Assembly for Wales (Transfer of Functions) Order 1999 and section 162 of, and paragraph 30 of Schedule 11 to, the Government of Wales Act 2006.

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many staff in Wales would not be able to make claims on the job retention scheme for that period. He even made an offer to reimburse HM Treasury the additional cost of bringing the scheme forward. The request was declined due to “limitation on HMRC delivery timelines”. The First Minister expressed his disappointment and explained that this decision was likely to lead to redundancies in the hospitality and leisure sectors. Mr Sunak in his oral evidence on 11 December 2023 suggested that the Welsh Government could have used the up-front guarantee of additional funding to address the absence of the enhanced job support scheme during the initial period of the Welsh firebreak. The Welsh Government does not accept that evidence and will explain why during the course of Module 2B. The problem was not the amount of money provided by the UK Government, but the timing of public health decisions in Wales and the availability of support from HM Treasury.

15. Although this was a significant example of the problems that could be caused by the existing funding arrangements, unfortunately, the October 2020 firebreak was not the only instance⁸ and the issue remains unresolved. HM Treasury’s unresponsiveness to the needs and public health requirements of the devolved governments meant that actions taken by HM Treasury to put in place interventions were based solely on instructions from the UK Government.

The reality and benefits of effective devolved decision-making

16. Some current and former ministers of the UK Government have suggested that in a future pandemic legislative power should solely rest with the UK Government.

17. As set out above, the UK Government chose to use the 1984 Act in the full knowledge that executive power under that Act had been transferred to the Welsh Government.⁹

18. Professor Henderson points to the fact that the deliberate decision of the UK Government positively facilitated different decision-making by the four nations. For example, the Coronavirus Act 2020 anticipated variation between the four nations and a consensual approach between them.¹⁰ The Coronavirus Action Plan, published on 3 March 2020, also provided for differentiation of approach between the nations of the United Kingdom.¹¹

⁸ Drakeford, 1st statement, §§ 124, 141 and 181 [INQ000273747].

⁹ Schedule 1 to the National Assembly for Wales (Transfer of Functions) Order 1999 and section 162 of, and paragraph 30 of Schedule 11 to, the Government of Wales Act 2006.

¹⁰ Transcript, Professor Henderson p. 139.

¹¹ Transcript, Professor Henderson p. 143.

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19. When making regulations, the devolved governments were legally required to consider the scientific and medical advice for their countries and the proportionality of the regulations independently. Once that is understood, the Welsh Government believes the term ‘divergence’ is misleading. From the outset, decision-making was independent. That is not to deny the benefits of consistency which were, where possible, agreed upon. But it was also recognised that, even if the direction of travel was the same, there would be a difference in pace and implementation.¹²

20. There are decisive reasons of principle and practicality as to why it is right that the devolved governments exercised public health powers in response to the Covid-19 pandemic:

(a) First, within the UK there are now four legislatures and governments, each democratically accountable to the people they serve. Under the Welsh constitutional settlement, responsibility for health and public health matters in Wales rests with Welsh Ministers, and the Welsh Government is expected to respond to any development that threatens the health of the people of Wales.

(b) Secondly, the sectors most affected by the public health emergency (the NHS in Wales; education; social care and local government) were devolved and had been for more than 20 years when Covid-19 struck. None of these sectors had been controlled by Whitehall for more than two decades and each of them operated under different legislative, policy and funding arrangements from England and the rest of the UK. As the UK Government was unfamiliar with those arrangements the idea that central government could “swing in” and make decisions for Wales is misconceived.

(c) Thirdly, the Welsh Government is responsible for the operation of the NHS in Wales.¹³ The Welsh Government was best placed to ensure the Welsh NHS was not overwhelmed. The NHS in Wales is structured and operates very differently to some parts of the UK, and public services are delivered via public sector partners also in a very different way – the Shadow Social Partnership Council is a very strong example of how sectors engage closely with each other in Wales.

(d) Fourthly, although Matt Hancock was correct to observe that the virus did not respect borders, its pattern of spread across the UK did differ. No good reason has been advanced as to why the principle of subsidiarity should not lead to different governments, accountable to local populations, exercising their powers to respond according to local circumstances. Indeed, the Inquiry

¹² [PA-00004468]; Drakeford, 1st statement, §§90-91 and 145 [INQ000273747].

¹³ National Health Service (Wales) Act 2006.

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has already received evidence that electorates of the devolved nations had significantly higher trust in the devolved governments than the UK Government.¹⁴

(e) Fifthly, gaining public confidence is an important aspect of the implementation of interventions by government. The principle of subsidiarity was important during the pandemic, where government could demonstrate to the public it had considered matters relevant to local circumstances, thus enabling decisions to be made closer to those affected by them – so decisions affecting those in Wales being made in Wales.

21. Although on 12 October 2020 COBR was advised by the UK Chief Scientific Adviser that a three-week circuit breaker would reduce the R rate below 1, the UK Government chose not to act upon that advice and instead chose to persevere with the tier system. By contrast, the Welsh Ministers introduced a circuit breaker on 23 October 2020 which successfully reduced the “R” rate below 1¹⁵. The emergence of the more infectious Kent variant meant that the gains were more short-lived than modellers could have reasonably anticipated. Had the UK Government made decisions on behalf of the whole UK as one epidemiological unit, the beneficial firebreak would not have happened in Wales and that would not have been in the interests of the people of Wales.

22. Current and former ministers of the UK Government recognise that differences in approach, pace and emphasis between the four nations were reasonable. For instance, Boris Johnson stated that the interests of the devolved governments did not always align with those of England, and that was an inevitable part of a devolved system.¹⁶ He also says that he understood why, given that the incidence of the virus was rising in Wales and tiering had not worked well, the Welsh Government had imposed the firebreak.¹⁷

23. On 28 May 2020, he told the First Ministers that he “fully appreciated” the different ways in which the devolved governments were responding based on different transmission rates and that he would communicate that clearly.¹⁸ In oral evidence, he accepted that the UK Government had excellent relations with the devolved governments and overwhelmingly things worked well across the UK.¹⁹ He also stated that there was a greater degree of caution in Wales and Scotland than there

¹⁴ Transcript, Professor Henderson, p. 173.

¹⁵ Welsh Government Cabinet meeting, 16 November 2020 [INQ000048798].

¹⁶ Johnson, statement, §191 [INQ000255836].

¹⁷ Johnson, statement, §519 [INQ000255836].

¹⁸ Drakeford, 1st statement, §102 [INQ000273747].

¹⁹ Transcript 7 December 2023, p. 107.

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was in the UK Government, and the greater caution went with the grain of public opinion.²⁰ He rationalised the less cautious approach of the UK Government on the basis that there was no point in getting R below 1 if you were not going to take advantage of the freedom that resulted. However, he accepted that the devolved governments have the perfect right to announce policies that were different.

24. Michael Gove acknowledged that in May 2020 the UK Government accepted that measures needed to change in different ways at different times in different parts of the UK.²¹ Mr Gove fairly said that he understood the reasoning behind the Welsh firebreak and that he did not seek to dissuade the Welsh Government from taking that course as he was aware that the measure had been under consideration for some time.²² He also conceded that the purpose of devolution is to allow different parts of the UK to tailor decisions according to local need and that it was reasonable for the devolved governments to take the decisions they considered necessary for the differing circumstances in their countries.²³ In oral evidence, he accepted the suggestion that different parts of the UK would approach the same problem in different ways because of differences in the epidemiological position and available healthcare facilities, so there were bound to be difficulties in terms of an absolutely common approach, which was unrealistic.²⁴

25. Dominic Raab MP stated that as a result of his experience during the pandemic, he was not persuaded that decision-making should be centralised because there were benefits in the devolved governments taking difficult decisions and working with the UK Government.²⁵ In evidence, Mr Raab reiterated that he felt that the devolved governments worked effectively with the UK Government and there were strong examples of teamwork. He thought that the case for more centralised power in similar circumstances in the future had not been made.²⁶

26. Accordingly, the weight of the evidence is that the principle of subsidiarity, to use Boris Johnson’s language, “overwhelmingly...worked well”. Those Ministers who have suggested that in the future the response should in some way be centralised have simply not established a case for doing so – a point which Dominic Raab fairly accepted.

²⁰ Transcript 7 December 2023, pp. 129 – 130.

²¹ Gove, §61 [INQ000259848].

²² Gove, §106 [INQ000259848].

²³ Gove, §§171 and 184 respectively [INQ000259848].

²⁴ Transcript, pp. 115 – 116.

²⁵ Raab, §230 [INQ000268041].

²⁶ Transcript, pp. 233 – 234 and 257.

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27. There is, however, an important point to be made about how differences in the four nations are to be communicated. On this, the evidence reflects Boris Johnson’s concern about the United Kingdom appearing to be a federal state. In general, the absence of a clear message from the UK Government that its measures applied exclusively to England was a more significant contribution to confusion in the minds of the public.²⁷ Lee Cain told the Inquiry that Boris Johnson was told about the objections of the devolved governments to England-only measures being announced on a UK-wide basis, but for purely political reasons he disregarded those objections.²⁸ In short, Mr Johnson wilfully contributed to the confusion. There have been devolved laws for more than 20 years now, and the populations of Wales, Scotland and Northern Ireland are well used to different laws applying in their respective countries and they should not cause any difficulty at all provided that public health messages are sufficiently clear.

28. These matters will be examined in module 2B. However, two examples illustrate how intergovernmental relations affected the response to the pandemic:

- a. By not engaging with devolved nations the UK Government denied the opportunity to develop common approaches. The UK Government’s refusal to co-ordinate communication with the devolved governments was reflected in its routine failure to make it clear that the UK Government’s rules and messaging applied only to England;
- b. The Treasury’s unresponsiveness to the needs and public health requirements of the devolved governments meant that it treated the needs and public health requirements of England more favourably than the nations of the United Kingdom.

Recommendations

29. The Inquiry will consider the entirety of the evidence when making recommendations, the substance of which will flow directly from the findings made in the module 2 report. The First Minister’s evidence highlights matters that he would invite the Inquiry to consider, and the Welsh Government would highlight one proposal in particular at this stage: in the event of a future pandemic, better arrangements should be put in place to allow a devolved government to seek funding from HM Treasury to fund measures which that government considers to be necessary and desirable to protect public health or the social and economic wellbeing of its nation. The detail of this recommendation will be addressed in the Welsh Government’s opening statement for Module

²⁷ Report, Professor Henderson, §§ 151 and 153 [INQ000269372].

²⁸ Transcript, Lee Cain, p. 51.

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2B and the criteria that should govern such applications are a matter of detail to be discussed by the four governments in due course. However, the point is that those four governments should be treated equally, with each devolved government able to make its case for funding on the same basis as the UK Government.

Dated 15 January 2024