

Witness Name: Dylan Hughes

Statement No: 1

Exhibits: 17

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UK COVID-19 PUBLIC INQUIRY

WITNESS STATEMENT OF DYLAN HUGHES

I, Dylan Hughes, Y Prif Gwnsler Deddfwriaethol, Llywodraeth Cymru/First Legislative Counsel, Welsh Government, will say as follows; -

Background and qualifications

1. I qualified as a solicitor of England and Wales in 1997. Before that I studied Law and Economics at the University College of Wales, Aberystwyth (graduating with upper second-class honours) before completing the legal practice course at the College of Law, Chester (passing with commendation). I later completed a master's degree in European Law at King's College, London (passing with distinction).
2. I joined the Welsh Government (then the National Assembly for Wales) in 1999, having previously worked for four years in one of Wales's largest law firms. Since joining the government, I have worked in a range of roles, developing expertise in a number of areas including housing, local government, transport, economic development, competition law and public procurement. I was promoted to the role of senior lawyer in 2004 and became Deputy Director of Legal Services (responsible for economic development, transport and commercial legal services) in 2006.
3. I have also had the invaluable experience of completing two secondments in Brussels, one at DG Competition of the European Commission and one at the European Free Trade Association Surveillance Authority.
4. I have extensive experience of legislation, having initially worked for the committee of the then National Assembly for Wales that scrutinised the government's subordinate legislation, before drafting a number of the most significant Welsh Statutory Instruments in the early years of devolution.

5. I later became the First Legislative Counsel, and head of the Office of the Legislative Counsel, in 2011. The Office of the Legislative Counsel (OLC) is a team of specialist lawyers who draft Welsh laws. OLC's primary role is to give effect to Welsh Government policies by drafting Acts of the Senedd, but the office also drafts complex subordinate legislation upon request, advises the government on matters of statutory interpretation and procedure and assists the management of the government's Legislative Programme. OLC was established in 2007 in response to the transfer of the more legislative powers to the then National Assembly, something that expanded further in 2011 following a referendum on conferring competence upon the Welsh legislature to pass primary legislation. OLC is as a specialist, independent drafting office, developed in accordance with the model adopted in Whitehall in the 19th century (of parliamentary counsel) and subsequently replicated across the common law world. At the time relevant to this statement, OLC was a Directorate within the Office of the First Minister.
6. As First Legislative Counsel I also lead the Counsel General for Wales's programme on making Welsh law more accessible, including through the novel step of developing Codes of Welsh Law. I have put great emphasis on the significance of Welsh law being bilingual and have responsibilities also within the Government for certain aspects of Welsh language policy. As well as being a native Welsh and English speaker, I speak reasonable French and more basic Portuguese.
7. I have written a chapter entitled "From canon to confusion: is the inaccessibility of the statute book undermining the rule of law?" for a forthcoming book, *Modern Legislative Drafting – a Research Companion*, edited by Professor Constantin Stefanou of the Institute of Advanced Legal Studies (University of London). I have also had articles published in the Statute Law Review, the Welsh Journal of Law and Policy, the DG Competition Journal, the 'Loophole' (the journal of the Commonwealth Association of Legislative Counsel) and Welsh language magazine 'Barn'. I have spoken at numerous conferences and seminars, most often about the problem of inaccessibility of the law in the United Kingdom.

My role as First Legislative Counsel

8. OLC does not routinely draft subordinate legislation. We are generally instructed to draft Bills (by lawyers from the Legal Services Department) after a process of policy development and legal analysis has already been undertaken. However, OLC's

specialism and expertise in legislation is recognised within the Welsh Government, and legislative counsel are often involved in a range of matters. As a relatively small organisation, although officials have defined responsibilities, it is not uncommon for these to cross over – or even for those with the most expertise and experience to lead on a particular matter despite it not being, strictly speaking, part of their job description. This is something that happens often when developing legislation, in particular in so far as legislative counsel are concerned.

9. As alluded to above, OLC also plays a law policy role in so far as the accessibility of the law is concerned. The Welsh Government has made a long-standing commitment to making Welsh law more accessible. This includes developing a website to provide explanatory material about the law ([Cyfraith Cymru–Law Wales](#)) and a number of initiatives to bring order to the Welsh statute book, specifically [classifying, consolidating and codifying legislation](#). The [Legislation \(Wales\) Act 2019](#), as well as operating as an “Interpretation Act” for Wales, commits the Welsh Ministers and the Counsel General to keep the accessibility of Welsh law under review and to take steps to improve it.
10. Much of the work done to make Welsh law more accessible is undertaken by a small team of administrators, the Legislative Codes Office, which is part of OLC. In late 2019 the Legislative Codes Office also took responsibility for managing the process of signing and registering Statutory Instruments, working with The National Archive – which ultimately publishes the legislation on the [legislation.gov.uk](#) website.
11. As First Legislative Counsel, although I am a Director of the Welsh Government and am responsible for leading and managing OLC, I put great emphasis on the specialist, technical aspect of my role. As a result, I generally spend a large proportion of my time drafting legislation, assessing the legislative drafting of others within OLC or otherwise contributing to the process of developing legislation. In doing so, I have considerable experience of, and (I believe) expertise in, solving problems and offering practical solutions. And although we are normally formally instructed by lawyers, this involves working with a range of officials as well as Ministers, the Counsel General and the First Minister (who has ultimate responsibility for the Legislative Programme).

Overview of interaction with the First Minister, other Welsh Ministers and senior civil servants in relation to core decision-making during the coronavirus pandemic

12. I played a central role in core decision-making in so far as the legal restrictions imposed on the people of Wales were concerned. This began with my taking responsibility for drafting the relevant Regulations (meaning OLC took a role unlike the other specialist drafting offices in the UK) and quickly expanded into an all-encompassing role in respect of the restrictions. This involved playing a pivotal role in advising Ministers on the parameters of their powers in light of the available evidence – advice that related both to legal and practical matters – before leading a small team (ranging from 2 to 4 legislative counsel depending on the situation) drafting the resulting legislation. This process inevitably resulted in further consideration of more detailed issues with special advisers, Ministers and other officials. After ensuring that the appropriate legislation was accurately drafted (in both Welsh and English), signed and published, I then played an integral role in ensuring that the restrictions imposed was communicated clearly. This involved writing some of the Welsh Government communications about the restrictions, and editing the vast majority of them, as well as developing specific guidance. (Although these communications (and guidance) were not my responsibility, it soon became clear that an in-depth understanding of the Regulations was essential in order to be able to draft them accurately. And as is explored further below their importance was very significant in so far as compliance with the restrictions were concerned.)
13. During the pandemic, especially in the earlier months, I generally worked long hours, 7 days a week, and was involved in nearly all (if not all) Ministerial meetings that involved taking decisions about the legal restrictions. I attended the daily (9am) Ministerial call most days, Cabinet meetings, as well as regular meetings with the First Minister, Health Minister and Counsel General. In any meeting that involved discussions of the legal restrictions I was generally the lead official responding (normally to the First Minister) and providing challenge where this was required. This also involved an immeasurable number of meetings and other informal discussions with Jane Runeckles, the principal Special Adviser to the First Minister and Counsel General, who was unrelenting in her role assisting Ministers at the centre of decision-making process.
14. Despite attending Cabinet and having daily meetings with Ministers, senior officials and others, the only formal group I was a member of was the Health Protection

Advisory Group Outbreak Subgroup. This Group involved disseminating information, within a very fast-moving environment, weekly to the core response team. It also involved analysing statistical information received from local response teams and Public Health Wales, and reporting concerns to the main Health Protection Advisory Group. I understand that a chronology of these meetings has been provided to the inquiry.

15. From my perspective the purpose of my membership of this group was twofold: it was an opportunity to communicate changes in the rules proposed or made, and it enabled me to have an overview of the issues we were monitoring and seeking to address. This was particularly important throughout the pandemic due to the significant flexibility in lines of responsibility already referred to. There was no attempt to compartmentalise or otherwise restrict information, and despite this meaning that I played a far more prominent role in establishing what was happening and what needed to be done than would be normal, it was an essential part of the process. Without this knowledge – and contribution to the policy-making – we would simply not have been able to respond as quickly as we needed to when decisions to change the restrictions were taken.
16. More detail about how we went about developing and drafting the restrictions during the pandemic can be found below.

The period between January and March 2020

17. In contrast with what was to follow, I was not involved in preparations to any significant degree between January and March 2020. Beyond what was in the public domain, my first recollection of becoming aware of the significance of the problem was when I attended a meeting on 20 January 2020 with Ministers to discuss the Government's legislative programme. At the end of the meeting reference was made to the coronavirus and to the risk that it could affect all of the planning. After that I was also given some further information about the situation (generally informally) by my line manager, Des Clifford, who was the Director General of the Office of the First Minister. I was aware of the development of the (UK) Coronavirus Bill but did not play a significant part in the Welsh Government's contribution to it. Similarly, I was not involved in any discussions about the possible use of powers under the Civil Contingencies Act 2004.

18. I first became directly involved in the response to the coronavirus on Saturday, 21 March 2020 when I was asked to assist the process of drafting regulations requiring certain businesses (such as cafés and public houses) to close their premises. A draft of the Regulations had been shared by the UK Government and I produced Welsh language text for a Welsh version (see exhibited email exchange at **M2BDH/01-INQ000271454**), as well as suggesting that a small number of changes be made to the English language text (at least one of which was essential to ensure that the drafting of Regulations was technically correct).
19. On Monday 23 March 2020, I was asked to attend a meeting with Ministers and senior officials (exhibited email at **M2BDH/02- INQ000271460**). By this point I was among the high proportion of Welsh Government officials who had begun to work from home, but this meeting took place in the First Minister's office in Cathays Park, Cardiff. Amongst those present were the First Minister, the Health Minister, the Counsel General, special advisors and the Chief Medical Officer for Wales. The meeting had been called due to concerns about the number of people who had travelled to Wales (or within Wales) that weekend, either to second homes or holiday parks. The many thousands of people in question had the potential to overwhelm health services in counties such as Gwynedd, Pembrokeshire and Ceredigion. In addition, fine weather had led to large numbers of people congregating in parks and other public places in Wales.
20. Although the Coronavirus Bill had not yet been passed, the Welsh Ministers had powers under the Public Health (Control of Disease) Act 1984 that were extensive in scope (the powers that had been used to close certain business premises the previous Saturday). During the meeting I gave advice on the powers and a discussion ensued about how they could be exercised. I recall the First Minister making it clear that whatever action we were to take, it was to happen immediately. It was decided holiday caravan sites, camping sites, amusement arcades and indoor play centres would have to close. In addition, an obligation was placed on local authorities, National Park authorities, Natural Resources Wales and the National Trust to close footpaths and land upon which people may congregate in close proximity to each other. Imposing more general restrictions on gathering together were also considered but not pursued. My recollection is that this was partly because of concerns of non-compliance, and partly because it was considered more proportionate to concentrate initially on the specific problems that had been identified that weekend.

21. I understand that the First Minister updated Cabinet that day, and I exhibit the minutes at **M2BDH/03-INQ000048923**. I was not present, however, as I was drafting the Regulations until late in the evening.
22. In drafting the Regulations that afternoon and evening, themes emerged that would become apparent as the legal response progressed. The first was that the Regulations involved imposing rules or restrictions that were highly unusual in the sense that they criminalised what would otherwise be completely normal behaviour. The second, related, point was that the nature and breadth of the rules or restrictions – inevitably in my view – meant that complex issues had to be addressed before legislating. The third was the unprecedented speed within which we had to work – analysing, taking decisions and drafting law within hours rather than within weeks or months. The fourth was that, partly due to that speed, working on the Regulations was quite clearly the Welsh Government's top priority – which meant that access to Ministers or officials for the purposes of explaining issues, discussing problems and taking decisions was almost immediate (something assisted from the beginning by being able to communicate easily online). And the fifth was that events would often occur that would necessitate a change in approach at short notice.
23. The process for the Regulations made on 23 March 2020 began during the meeting in the First Minister's office referred to above. That meeting took place between approximately 12pm and 1pm and the Regulations were signed at 10pm that night. As an example of the complexities involved, closing holiday parks was a more difficult issue than would perhaps be expected because many people live permanently (unlawfully) in mobile homes that are intended for holiday use – meaning that there was a risk of inadvertently making people homeless. Another example involved understanding who exactly owned land upon which thousands have people had been congregating the previous weekend, which led to duties being imposed on Natural Resources Wales and the National Trust as well as local and National Park authorities.
24. Also that evening, as the Regulations were being finalised, we became aware of the decision taken (after consultation with the First Minister) by the UK Government to impose a UK-wide "lockdown". A decision was taken to proceed with the Regulations despite this as I advised that – notwithstanding the then Prime Minister's announcement and the text message sent to the population informing us that "new

rules were in force” – the Regulations imposing lockdown had not been made; and unless the UK Government had already been working on draft Regulations without informing us, I was confident that the nature and length of the provisions that would be needed meant they would not be made imminently.

The first “lockdown” Regulations

25. Despite the Public Health (Control of Disease) Act 1984 containing extensive powers for Ministers to respond to a public health risk or emergency, the Coronavirus Act 2020 conferred specific, but similar, powers upon Ministers in relation to the coronavirus. It was on this basis that we started to work on a Direction that would need to be made under that Act in order to put the restrictions announced in place. The overarching policy position of the UK Government, agreed to by Welsh Ministers, had been shared with us and we made contact with the lawyer drafting the appropriate legislation for England.

26. When a draft enactment was subsequently shared with us the following day (24 March 2020 at 12.01 pm – email exhibited at **M2BDH/04- INQ000271461**) by the UK Government, it transpired that the powers to be used were those contained in Part 2A of the Public Health (Control of Disease) Act 1984. I spoke to the UK Government's drafter that morning, but I don't recall any explanation being given for this, but at the time I assumed that it was because the Coronavirus Bill had not yet been passed. However, the Coronavirus Act 2020 was passed on that day (Wednesday 25 March 2020), with the relevant provisions of the Act coming into force immediately, which eventually pre-dated the making of the Regulations. These Regulations, imposing lockdown, were not made until Thursday 26 March 2020 (at 1pm in relation to England and at 2.45pm in relation to Wales). It later became apparent that a more likely reason for using the 1984 Act was that provision had not been made in the Coronavirus Act 2020 for enforcement by way of fixed penalty notices (a key part of the system that eventually emerged).

27. That the UK Government had shared a draft of the Regulations was obviously appreciated. This was for a number of reasons. Firstly, given that we had concurred with the UK Government's decision to impose a lockdown, as officials our assumption was that our starting point was that our policy (and Regulations) for Wales should be consistent with that adopted for England unless there a good reason not to. Secondly, having a draft helped focus our thinking on the detail of the policy we wanted to adopt for Wales, in particular it made it easier to consider

whether we wanted to, or needed to, have different provisions applicable to Wales. Thirdly, from a practical perspective, especially bearing in mind our need to produce Regulations bilingually, having text to work from speeded up the process. And finally, this also led to contact with the drafter of the English Regulations – something that was also helpful (mutually so, I hope, as we also raised some concerns that led, I believe, to changes to the draft).

28. My colleague Terry Kowal, Senior Legislative Counsel, and I worked on the Regulations on Tuesday 24 March 2020, calling upon the assistance of others as required. I circulated a near final draft at 22.38 that day. The email sent at that point (exhibited as **M2BDH/05-INQ000222509**) informed Ministers and senior officials of the position, noting that the “wide-ranging effect of the Regulations is extraordinary”. I indicated that the aim was that the Regulations would be made and come into force the following day. I summarised the content (noting that as well as reflecting a “lockdown”, the Regulations consolidated the Regulations made the previous evening and on the previous Saturday). Most notably regulation 7 imposed restrictions on people’s movements – requiring everybody to stay at home unless they had a “reasonable excuse” and restricting public gatherings (with some exceptions) to two people.
29. As is the normal practice when imposing a legal requirement, there are corresponding provisions in the Regulations making it a (criminal) offence to breach the requirement. Such offences would need to be prosecuted (as “summary” offences) in the Magistrates’ Court. However, as mentioned above, the Regulations also made provision for fixed penalty notices to be issued. Fixed Penalty Notice were first introduced to deal with parking offences but they are now a more widely used alternative to prosecution before the magistrates court. The Regulations, therefore, gave enforcement officers (the police or local authority environmental health officers) an option to give a person they considered to have breached the restrictions the opportunity to pay a financial penalty as an alternative to being convicted by the courts. I do not recall there being any significant discussion about the principle of issuing fixed penalty notices – though I’m sure I would have advised that they were a sensible option given that the restrictions were to apply to the public at large. It may be worth noting however that a lower level of penalty was imposed for repeat offenders in Wales. (In England, the second time a person received a fixed penalty notice, the penalty doubled to £120 and on each subsequent occasion it doubled again up to a maximum of £960 for the fifth and subsequent notices. In Wales the

penalty doubled to £120 on the second occasion and remained at £120 for each subsequent notice. This was a decision taken by Ministers, who considered £120 to be a sufficient deterrent.)

30. In the event, the Regulations were not made the following day but rather were made more than 24 hours later. This delay was caused partly by the fact that we still had issues to resolve in the drafting of our Regulations and partly by the fact that the equivalent Regulations for England had still not been made. Again, given the circumstances (the principle of imposing a lockdown had been led by the UK Government), it was felt that we should wait for sight of the final draft of the Regulations that were to apply to England. I understood from a conversation that I had with the lawyer drafting the English Regulations (I believe in Wednesday 25 March) that “number 10” had required changes to be made to those Regulations and she had not yet had Ministerial clearance. We also received correspondence, on 25 March 2020, from a UK Government lawyer informing us of a “last minute intervention by the centre”. I exhibit that email at **M2BDH/06- INQ000271464**. It would appear that one of the reasons for this was that some of the provisions imposing social distancing restrictions were removed from the earlier drafts that I had seen. Comparing a draft of the Regulations sent to me on 24 March (exhibited above) with the Regulations eventually made on Thursday 26 March 2020 (see exhibit **M2BDH/07-INQ000271875**), I noted that 6 provisions relating to maintaining a two-metre distance had been omitted.

31. This led to the most significant difference between the Welsh Regulations and the English Regulations at the beginning of the pandemic. This was something referred to in a detailed memorandum on the Regulations prepared by Terry Kowal and me (a memorandum worked up periodically when time allowed and completed on 9 April 2020, exhibited at **M2BDH/08- INQ000271465**). When referring to the obligation contained in regulation 6 of the Regulations to take all reasonable measures to ensure that a distance of two metres is maintained between persons on certain premises, we noted that: *“The English Regulations have no equivalent of this requirement, though earlier drafts of their Regulations did – we understand that this and other similar provisions based on social distancing were not pursued due to concerns about over-policing.”* The basis for this understanding was my discussions with the lawyer who was drafting the English Regulations.

32. Although we of course made our own Regulations, some of which were different, it was my sense in the early stages that the Welsh Government was mainly reacting to what was happening in London. That was not, however, a sense that lasted long after those very early days. This was reflected from my perspective in the tailing off of contact with the drafter of the corresponding Regulations for England in the weeks that followed. My recollection is that this occurred for two reasons: the first was that we in Wales very quickly began to assess the position in Wales, from a Welsh perspective – meaning that we were considering the Regulations (as the law required) on their own merits rather than by reference, to any significant extent, to what was happening elsewhere; and the second was that it soon became apparent, in what was a very fast moving environment, that the UK Government drafter was more detached from the decision-making process than I was. (I was receiving instructions, and discussing issues, directly with Ministers, but from the discussions I had with the English drafter my understanding was that she was being instructed second or third hand – i.e. either by special advisors or policy officials, or by other lawyers who, in turn, were being instructed by special advisors or policy officials). Also relevant was the fact that once the policy underpinning the Regulations had begun to diverge, there was little purpose in seeking any further degree of uniformity of approach.

The coronavirus pandemic restrictions – legal constraints

33. One of the features of the Regulations made was the establishment of an emergency period that was to be reviewed every three weeks. This led to a three-week cycle in which the Welsh Government reviewed the position, took decisions and changed the law – and, although changes were at times made outside that cycle, this process helped bring more order to what was a frantic period in the early days of the pandemic.

34. The Regulations are made under section 45C of the Public Health (Control of Disease) Act 1984, subsection (1) of which gives the Welsh Ministers powers to make Regulations *‘for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in... Wales’*. Subsection (3)(c) provides that the Regulations may make provision *‘imposing or enabling the imposition of restrictions or requirements on or in relation to persons, things or premises in the event of, or in response to, a threat to public health.’*

35. Section 45D(1) of the Act provides that regulations may not impose a restriction or requirement, unless the Welsh Ministers consider that the restriction or requirement is proportionate to what is sought to be achieved by imposing it. Reflecting this the Regulations provided that:

"As soon as the Welsh Ministers consider that a requirement or restriction imposed by these Regulations is no longer necessary to prevent, protect against, control or provide a public health response to the incidence or spread of infection in Wales with the coronavirus, the Welsh Ministers must publish a direction terminating the requirement or restriction."

36. This meant that in carrying out each review, the Welsh Ministers considered firstly, whether the restrictions or requirements were still *needed* for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection of the coronavirus in Wales; and, secondly, whether the restrictions or requirements remained a *proportionate* response to that purpose.

37. Although this is an oversimplification, partly as the two questions were to an extent inter-dependant, the answer to the first of those questions was generally based on an objective assessment of data and scientific advice about the spread (and likely spread) of the coronavirus. Meanwhile, the process for answering the second of those questions was more subjective and depended more on political judgement. This second question was, however framed, in a legal context. This involved an assessment not only of the enabling power for making the regulations (set out above), but of convention rights and equalities.

38. Also used to assess proportionality was a consideration of what was referred to as the "four harms". These were: (1) direct harm to individuals from SARS-CoV2 infection and complications; (2) indirect harm caused if services including the NHS became overwhelmed; (3) harms from non-Covid-19 illness, for example if individuals do not seek medical attention for their illness early and their condition worsens, or more broadly from the necessary changes in NHS service delivery made during the pandemic in Wales to pause non-essential activity; (4) socioeconomic and other societal harms such as the economic impact of not being able to work, impacts on businesses of being closed or facing falling customer demand, and psychological harms to the public caused by social distancing.

39. Although I am confident that the process referred to above was followed in accordance with the legal requirements, there is no doubt that the sophistication of the analysis, and of the recording of it in documentation, developed over time. In the early weeks of the pandemic the analysis was more general, although this was partly because there was little doubt that the 'lockdown' approach (in general) was to continue. More specific and detailed assessments of each restriction, including from a human rights and equalities perspective, were in place by the time the prospect of lifting restrictions became realistic.
40. To provide a framework for the assessment of potential changes to the coronavirus restrictions, I produced a document entitled 'Welsh Government decision making process for easing coronavirus restrictions', which I exhibit at **M2BDH/09- INQ000227963**. This was one of a series of supporting documents to Ministerial Advice document MA/FM/1722/20, which provided advice in respect of the 21-day review due on 28 May 2020, and which I exhibit at **M2BDH/10- INQ000176849**.
41. I also understand that the Inquiry has received detailed evidence about the approach to the 21-day review process, the methodology by which different options were assessed, and the decision-making role of Cabinet.
42. In my opinion the system that was set up ensured that decision making was evidence-based, objective and took account of legal advice. Ministers were also consistent, in my view, in taking decisions based on a precautionary principle. In other words where decisions were taken to impose or lift restrictions, where there was doubt Ministers would generally be cautious and would seek to avoid being in a position where inaction meant it could become more difficult to later limit the spread of the virus. (Ministers were often advised about the threat of exponential increases in the spread of the virus).
43. However, from a legal and drafting perspective, as the restrictions were lifted, there were some tensions within the decision-making system that were difficult to reconcile. Medical and scientific advice would often provide for what was referred to as "headroom" in the number of Covid-19 cases, something that would be assessed against the capacity of the Welsh NHS and the risk of significant (or even exponential) growth in the spread of the virus. This headroom would enable some restrictions to be lifted, something that would in turn lead to a further consideration of convention rights and equalities issues.

44. This was theoretically logical but in practice, another consideration that I would raise periodically was that the restrictions – in order to be coherent and understandable to the public – needed to be internally logical. In other words, if restriction ‘X’ (say, opening libraries) is lifted how do we justify retaining closely related or similar restriction ‘Y’ (that community centres, say, remained closed)? My concern was that a breakdown in this internal logic would make the restrictions arbitrary, or (just as importantly) would lead to the public *thinking* that they were arbitrary. This was a conundrum. Ministers would often face decisions in which they received advice that essentially said “you can either lift restriction ‘X’ or restriction ‘Y’ without too much risk of the number of cases exceeding a tolerable level” but there would be little or no logical justification for differentiating the two types of restriction. Lifting restriction ‘X’ would lead people to question why restriction ‘Y’ was being retained, which over time (in my view) undermined the integrity of the restrictions. However, Ministers also had to be conscious that for members of the public (especially those who may have been disproportionately affected by the restriction), lifting that one restriction was better than lifting none. There was often no fully logical way of approaching the situation and decisions were often justified by indicating that the restrictions were being lifted gradually (in other words saying that restriction Y would soon be lifted as well). This, however, led to more and more changes to the Regulations, something that had the potential of confusing the public. I understand this is mentioned in the statement of Toby Mason in response to M2B-CD-01.

45. One thing that I became more and more conscious of as the pandemic wore on was the limitations of the law. By this I mean that despite the Welsh Government’s best efforts to make the law as clear as possible and to communicate it effectively (something considered further below), in my view there were times when the law could not deliver the desired results with precision. In other words, it was a much blunter instrument than it may have appeared. The notion of making relatively minor amendments to Regulations relaxing certain restrictions in accordance with headroom assessed by reference to the data we held about cases was a perfectly sensible one. However, it relied not only on there being high levels of compliance with the Regulations not just in broad terms but in some detail. For example, at one point we provided that up to 4 people could meet in a public house. However, the rationale for this was based on an assessment of ‘headroom’ that pre-supposed that no more than 4 people would meet and that those 4 would not mix with anyone else present. In practice larger groups would book two or more tables together and more

generally it was surely inevitable that many of those present would mix with others. So, the more complex or detailed the provision, it seemed to me, the less likely it would be that it would be complied with.

46. This was a view that I expressed to Ministers as more and more specific decisions were taken as the pandemic went on, and it was something that was certainly understood by the First Minister (at least). But they were faced with difficult decisions. They were often given a choice between having less complexity at the 'macro' level by not lifting certain similar restrictions until they could all be lifted together, or lifting them incrementally such that some restrictions were lifted sooner (something that meant more changes to the law) – and they generally went with the latter approach.

Legislating during the pandemic: how we went about it

47. In so far as are working practices for developing the Regulations imposing restrictions were concerned, very little of what Welsh Government officials did followed normal practice. Although this was primarily motivated by practical considerations, I believe that the changes we made generally led to better outcomes. A number of factors contributed positively to the process although this was not always by design. Probably the most important factors, from my perspective, were that—

- there was continuity in personnel – the same core group remained in place throughout, meaning that we all understood what had gone before;
- the core group of officials and (in the early days) Ministers was relatively small, meaning that we all knew each other and knew who did what and who was responsible for what;
- demarcation of who was responsible for what was not rigid but (except in the case of very specific expertise or experience) based on who was best placed to do whatever was required;
- the expertise in developing and drafting legislation that exists in the Office of the Legislative Counsel was deployed not only to draft the Regulations but also to assist (and sometimes lead) the process more generally.

48. The overwhelming feature of the way we worked during the pandemic was speed. This necessitated a departure from established ways of working purely because there was insufficient time to work in those ways. In so far as the restrictions were concerned this meant that the traditional policy role was filled very differently.

Developing policy in practice was based on statistical analysis and specialist scientific advice underpinning a “policy” that was largely based on what could and could not sensibly be done in legislation. As the overarching aim was relatively straightforward – minimising the spread of the coronavirus with as little disruption as possible – this meant that those of us who were primarily tasked with drafting the legislation were just as able to fulfil the ‘traditional’ policy role. In other words, the overarching policy, in so far as the Regulations were concerned, was to impose legal restrictions on people coming together - with the severity of these restrictions essentially being based on our understanding of the spread of the virus and its impact (how many people had it, where were they, and what was the impact on public services, mainly the NHS). So when it came to the restrictions themselves, determining what they should be was largely driven by an understanding of the practical effect and an understanding of how the law could be applied. This meant that in some, important, ways we were more able to develop policy as we understood the legislation better than everybody else, and had a better sense of what could and could not be done by legislation within the legal constraints that applied.

49. This manifested itself early in the pandemic in me (unexpectedly) taking the lead on two distinct matters – the conduct of funerals (and who could attend) and outdoor exercise, including the vexed issue of how far people could travel from their homes. Consistent with the approach outlined above, having explained the legal position on the conduct of funerals to the Minister for Local Government, despite it not falling within my normal responsibilities she asked if I could help explain what this would mean in practice. As it was apparent that I was able to take the responsibility (given the context outlined above), this led to me developing guidance, in the former case in light of numerous concerns raised by local authorities with the Minister for Local Government and in the latter due to the sheer number of queries being raised by members of the public in Wales. I exhibit the guidance at **M2BDH/11-INQ000271478**, and my email to the Minister for Local Government seeking approval for the guidance at **M2BDH/12-INQ000271471**.

50. Later in the first ‘lockdown’ period I also developed the policy for what essentially became a bespoke health and safety regime in the Regulations relating to the spread of the coronavirus in the workplace or other premises that were open to the public. This process began, somewhat surprisingly, because of concerns raised by Ministers about construction sites remaining open. Jane Runeckles (Special Advisor to the First Minister) indicated that Ministers wanted us to explore what could be done to

restrict construction. However, Ministers eventually accepted advice I gave that there was no justification for singling out the construction sector (as had been done to an extent in Scotland in guidance), not least because much construction work could be done without people being in close contact with each other and because a high proportion of it was outside (a factor that became clearer as the pandemic went on).

51. The alternative developed was a universal obligation that was adaptable depending on the circumstances, both in so far as the nature of the premises and the extent to which other restrictions applied to the premises. It was developed, firstly, on the basis of scientific advice about what was known about how the coronavirus was spread, and secondly, to take account of advice on practical matters provided by local authority environmental health officers (who would enforce the system). Unlike the remainder of the Welsh coronavirus restrictions, this system was enforced not only by fines or fixed penalties but by the possibility of closure of premises (either after an “improvement notice” was served on the person responsible for the premises or without in the case of the most serious breaches). The main requirements of this system are set out at exhibit **M2BDH/13-INQ000271661**, however in summary what is notable is that this was set out a relatively prescriptive, four-step, process that was supported by guidance that the Welsh Government also issued. The Regulations themselves set out general requirements that would apply on most if not all premises, such as limiting face to face interaction, staying outdoors where possible, improving ventilation and maintaining good hygiene. Guidance then provided more information about how this could be done in practice in different types of premises. I exhibit an example of the guidance at **M2BDH/14-INQ-000081814**.

52. Although not universally popular, as would be expected, it was my understanding from what other officials said to me that businesses in Wales were in general supportive of the system as they (rightly) recognised that taking the measures required made it more likely that their premises could remain open to the public. In my view this system was also more transparent and clearer than numerous (less comprehensive) provisions that had similar aims set out in guidance that applied in England and Scotland. The Welsh provisions were significantly more comprehensive, set out in law, and enforced in a noticeable way (due to the “improvement” and “closure” notices, copies of which can be found in the guidance exhibited in paragraph 51 above).

53. More generally, and throughout the pandemic, we in OLC were – in practice – were responsible for developing much of the detail of the policy that was adopted. This is because the process outlined above, under which we were instructed directly and orally by Ministers, inevitably meant that the direction we received was relatively high level. The process of drafting or amending the subsequent Regulations then, almost always, led to a series of further – second order – issues arising. Occasionally also, the further thought given to a matter as part of the drafting process led us to have concerns about the logic or lawfulness of the original instruction. In both scenarios the role played by Jane Runeckles (in particular) and Clare Jenkins as special advisers to the First Minister and Health Minister, respectively, was crucial. We would explain the issue in urgently convened meetings before we decided on one of three course of action: (1) a decision to proceed as we would be confident that the more detailed provisions were consistent with or consequential upon the decision already taken; (2) a decision to obtain a further steer from Ministers (normally to confirm a proposal we made) through special advisers; or (3) a meeting with the First Minister (or with the First Minister, Health Minister and Counsel General). This often had to be done at some speed and as referred to above Jane Runeckles would generally lead the process and bring in officials and Ministers as appropriate.

54. Having said all of this, as well as taking the decisions, a great deal of the policy for restrictions was actually developed by Ministers “live” in meetings, responding to issues and events in a rapid fashion. After receiving advice from the Chief Medical Officer or from me or others on legal or practical matters, Ministers would often work through issues themselves. In the first few months of the pandemic this generally meant the First Minister and the Health Minister, often joined by the Counsel General and sometimes by the Minister for Local Government. Other Ministers would become involved where an issue had a specific effect on their area – the economy being an obvious example. As time went on this process became more collegiate and involved the Cabinet as a whole. Although this made decision-making a longer process, it also meant that there was probably more focus on the interests of particular groups, for example children or disabled people.

55. The then Counsel General (Jeremy Miles MS) played an important role. He would meet regularly with those of who made up the “core” legal team (Helen Lentle and Neil Buffin from the Legal Services Department, Terry Kowal and me from OLC). There were two main purposes to these meetings – the first was to keep the Counsel General up-to-date and the second was to enable us to escalate our more significant

problems, which sometimes led to the Counsel General raising them with the First Minister. The closeness of those of us tasked with developing the Regulations to the decision-makers was a key feature of the way we worked. Throughout the pandemic our access to Ministers (including, most importantly, the First Minister) was either direct – as we would meet them frequently, sometimes daily – or through one other person – be that Jane Runeckles (most often), Clare Jenkins or the Counsel General. This close contact was crucial in enabling us to work quickly because information was vital – and we knew about most things that were happening either straight away or very soon afterwards.

56. In so far as procedure was concerned, most decisions to amend Regulations were taken as part of the 21-day review process referred to above. Some changes were however made at different times. In all cases I would be present in all meetings in which the possibility of making changes arose, and I was also present in the vast majority of meetings in general. There was a Ministerial call at 9am almost every day from April to June 2020 (and they continued but less frequently for the rest of the year) and there were more formal cabinet meetings on Mondays and Thursdays. Other *ad hoc* meetings also happened frequently.
57. No matter in what type of meeting decisions were taken by Ministers, either Terry Kowal or I would be present, and almost always it was both of us. Helen Lentle and Neil Buffin from the Legal Services Department would also be present as well as Tom Smithson or another member of the Covid-19 Project Team that was formed shortly after the pandemic began. Other senior officials would also be present though not always as consistently.
58. My main role in advising Ministers tended to involve explaining the existing law and parameters and responding to suggestions or proposals, orally, in meetings. In other words, I was often a central part of the discussion, not in so far as the decision-taking itself was concerned but rather by helping to frame what the options could be. I would also offer a view on the practical implications of the options at times because Ministers were generally keen to take into account as much information as was practicable in the time allowed. Little if any of this advice would have been recorded (or at least not recorded in detail with comments assigned as mine) because this was essentially done as part of the thought process of the First Minister before he eventually made decisions. The documentation would then focus on the decision itself – what it was, and the justification for it. More formal legal advice, in particular in

relation to human rights and equalities, would also be included (provided by the Legal Services Department, generally by Neil Buffin, who would share a draft with Helen Lentle, Terry Kowal and me).

59. After a decision was taken (either by the First Minister or by the Cabinet in these cases) I would convene a meeting of the OLC team. Generally, this meant bringing in Terry Kowal and **NR** (who would undertake the drafting along with me), and **NR** as the head of OLC's Legislative Codes Office. Terry, **NR** and I were involved from the beginning before **NR** was brought in initially to help us with the Welsh language text of our Regulations. Over time, however, Dewi took a wider drafting role and developed an encyclopaedic knowledge of what became lengthy and much amended Regulations. Also important was that **NR** worked essentially behind the scenes while Terry Kowal and I would frequently be in meetings. This was a system that worked well as it enabled **NR** to proceed unhindered to complete important points of detail such as working out what amendments consequential to a change of policy were needed and how new restrictions would fit in with existing enforcement provisions. This was our "core" OLC team but we were helped also by **NR** (international travel) and **NR** (close contact and tracing provisions).

60. The purpose of this initial OLC meeting was twofold: to allocate drafting tasks and to share information about what needed to happen and when. Although drafting the Regulations themselves was the priority, a number of things had to happen simultaneously in order for deadlines to be met. So our Legislative Codes Office (normally **NR** would immediately liaise with the Covid Legislation Team. Between them they would start the task of producing the supporting documentation for making Regulations, which meant a Ministerial Advice (MA) for the decisions taken, and Explanatory Memorandum for the Regulations, a Written Statement (for the Senedd) and either a further MA or another written record for making the Regulations themselves. **NR** was more experienced than others in the process of making legislation and often had more information about the details as she had liaised with the drafters – this meant that she would either write or review and amend all of the documentation.

61. In parallel to this we would share drafting with officials from the wider organisation as it emerged. The way this was done would depend on the circumstances. Where there was any uncertainty about what was being done we would consult more widely,

sometimes asking specific questions of specific officials. Similarly if draft Regulations specifically affected a particular sector (or affected it more than others) we would consult the officials concerned with that sector. We would sometimes also ask questions of lawyers in the Legal Services Department who had particular experience or relevant knowledge. Conversely where matters were more straightforward draft Regulations would be circulated for information without any real expectation of a substantive response. Again how this would be done would vary. At the beginning of the pandemic, and where there were particularly complex issues to be addressed, we would consult others directly. However, more often this would be done through the Covid-19 Project Team.

62. As to who we would be consulting when developing the Regulations this would again depend on the circumstances. In addition to the Covid-19 Project Team (with whom we worked closely, in particular Tom Smithson) we would speak to many other depending on the issue. When we needed to understand more about the virus we would consult the Chief Scientific Adviser for Health, Rob Orford, or Fliss Bennee, who were co-chairs of the Technical Advisory Cell, or, less frequently, statisticians or officials from Public Health Wales. Where we were concerned with the practical application, or implications, of the restrictions we would speak to Welsh Government officials with relevant responsibility, for example for the economy, schools or higher education. We would also speak to officials from local authorities (Cardiff County Council co-ordinated issues on behalf of environmental health officers) about enforcement, and although I personally did not speak to them first hand, other Welsh Government officials were liaising also the police. As mentioned elsewhere we would also speak very often with Clare Jenkins (Special Advisor to the Health Minister) and, in particular, Jane Runeckles (Special Advisor to the First Minister) who was at the heart of the whole operation – without that link I have no doubt that we would not have been able to work as effectively and as quickly as we did.

63. The Legislative Codes Office had only recently taken over responsibility for managing the process of making Statutory Instruments and arranging for them to be registered and published (through The National Archive). The role the Codes Office played (NR) in particular but also (NR) was probably not widely understood, but it was a vital part of the machinery in getting Regulations signed and made available to the public in very difficult circumstances. Similarly, officials at The National Archive were important and were often called upon very late in the evening and on weekends to make sure Statutory Instruments were

registered and published (something they were doing also for England, Scotland and Northern Ireland).

64. As soon as Regulations were ready in draft form, the Codes Office would undertake a further check of the document, including the formatting, before it was submitted to the relevant Minister for signature. This was done electronically, a relatively new process, but one that had been reviewed immediately after the Codes Office had taken over responsibility. This process had ensured that a proper record of when Ministers had formally agreed to their signature being applied before this was done on their behalf by the relevant Private Office. The next step would be to formally register the Regulations with the Registrar at The National Archive (who would have been informed as long as possible beforehand that the Regulations were on their way). This then provided the basis for publication of the Regulations on the [legislation.gov.uk](https://www.legislation.gov.uk) website.
65. Simultaneously the Regulations would also be laid before the Senedd accompanied by a Written Statement from the Minister. A debate of the Regulations and scrutiny by the Senedd's Legislation, Constitution and Justice Committee would follow, though due to the ongoing urgency the Regulations would generally already have been made and come into force by that stage.
66. By the end of the pandemic, 301 items of subordinate legislation had been made in Wales in response to the pandemic. This was made up of 155 in 2020, 126 in 2021 and 20 in 2022. I understand that tables listing the regulations made in each year have been exhibited to Helen Lentle's statement in response to M2B-WG-01.

Legislating during the pandemic: making the law understandable and accessible

67. The process for making and publishing Regulations outlined above is standard and long-established. However, from early on in the pandemic I wanted us to do more than what was standard because I was clear that the circumstances demanded it. I was conscious also that having made numerous commitments to making Welsh law more accessible, not least the statutory commitment made by the Legislation (Wales) Act 2019, that there was no more important test for doing that than the one we were facing. Normally, legislation (be that primary or subordinate legislation) is drafted, scrutinised and adopted with little being done to help members of the public to access it and understand it. Explanatory notes are produced but these vary greatly in quality and usefulness. The legislation is also promulgated but generally only by being published on the [legislation.gov.uk](https://www.legislation.gov.uk) amongst many thousands of other

enactments, organised only in chronological order and by reference to where (e.g. Senedd Cymru) or by whom (e.g. the Welsh Ministers) the enactment was made. It is not organised by reference to its subject matter and providing an updated version of the legislation when it is amended is only a recent development (especially in relation to the Welsh language version).

68. From the beginning it was obvious to me that what we needed to do would not be finished once we had drafted each set of Regulations. We became conscious that compliance with the law was probably going to depend more on our wider efforts to communicate with the public than on the drafting of the regulations themselves. We were also very conscious that our media here in Wales is not strong and that many people receive their news from UK or English sources, where of course the rules were often different. Not surprisingly there was an unparalleled demand for information about the rules.
69. Time was of the essence because generally once a decision was taken there was a need to implement it as soon as possible, while at the same time we wanted to give as much warning as we could of what was going to happen.
70. So from an early stage political decisions, the law and communications were intertwined – and in my view this was vital.
71. In addition to the process of publishing legislation outlined above, the Codes Office produced updated (“Keeling”) versions of the main Welsh Regulations each time they were amended (in both Welsh and English). This was the first time this had ever been done and the first time (any) amended Welsh law was available in its up-to-date form in Welsh. In addition, the Codes Office ensured that we published the Regulations on the Welsh Government’s website (in a prominent place along with other information about the pandemic) as well as on legislation.gov.uk. In this way, we were also able to ensure that we always published the Regulations before they came into force (something that was not always done elsewhere).
72. As the Regulations were so frequently amended as the pandemic progressed, we in OLC also consolidated the rules in order to make them more accessible – and eventually developed a “levels” system within the Regulations to try to make the future restrictions more predictable.

73. As well as the customary explanatory notes to the regulations, the Welsh Government also produced, and routinely amended, a huge amount of guidance and frequently asked questions responses on the practical application of the regulations. This was reviewed (and often extensively re-written) in all cases by us in OLC, normally by me personally. And because speed and an in-depth understanding of the regulations was paramount, this was in many cases written by us. The “Frequently Asked Questions” document that I wrote and later helped keep under review was based either on actual questions received or what we anticipated as questions. It became, I believe, the most read page on the Welsh Government’s website for a prolonged period. An example of the document that underpinned the web pages is exhibited at **M2BDH/15- INQ000271472**.
74. Also unprecedented was the extent to which we engaged with the press office. This manifested itself both by fielding questions at all hours and by us (normally me) ensuring that anything that was said in press releases – and the First Minister’s daily press conferences – was clearly communicated in a way that was consistent with the legislative process. We also had to be aware of what was being said on social media. This was very important as the complexity of the Regulations meant that incorrect or misleading statements were often made in draft but were corrected.
75. In addition to the production of documents another prominent part of my role (and to a lesser extent of my colleagues’ role) was to attend meetings with those involved in the process or particularly affected by the restrictions. This again was highly unusual. In normal times this kind of activity would happen less, would happen more slowly and would not involve me. Although it was a considerable burden, discussing practical matters with enforcement officers, and the effect of the Regulations with stakeholders, proved to be very valuable. This was both because it gave me the opportunity to correct misconceptions or matters that had been understood, and it gave others the opportunity to explain to me how the restrictions worked (or didn’t work) in reality.
76. While this was a process we led, it involved many people who were all pursuing the same aim – which was making sure people were aware of and understood the law. This was done far more effectively than is normally the case despite the lack of time and the pressure that we were under. In my view the response to the pandemic showed how important it is not only for the state to make law but to explain it.

77. According to a study by University College London, the end result of our efforts was that the rules were significantly better understood in Wales than in England. This was quite remarkable especially in light of the media context. I exhibit articles reporting this study, from nation.cymru and from The House magazine, at **M2BDH/16-INQ000338872** and **M2BDH/17-INQ000338873**.

The difference between law and guidance

78. At various points during the pandemic questions were raised about the difference between law and guidance. This was important because there was considerable scope for guidance (or ‘guidelines’ or ‘advice’), which is non-binding, to be mistaken as law, which of course is binding.

79. The reason for this is that the restrictions, especially the main “stay at home” provisions had to be made subject to exceptions due to the extraordinary breadth of their application. It was clearly not practicable (or justifiable) for a requirement to stay at home to be absolute. Life could not stop completely, the economy needed to function as best it could and people who had serious illnesses still needed to be treated. So the first version of the restriction provided that the requirement to stay at home was subject to a “reasonable excuse” not to. The Regulations then went on to provide examples of what may constitute a reasonable excuse, but often these examples were themselves further caveated. So in the text below we see that it is a reasonable excuse to leave home to go to work, but *only* if it is not reasonably practicable to work from home. This, therefore, leads you to the question of when exactly is it “not reasonably practicable” to work from home.

8—(1) During the emergency period, no person may leave the place where they are living without reasonable excuse.

(2) For the purposes of paragraph (1), a reasonable excuse includes the need—

....

“(f) to travel for the purposes of work or to provide voluntary or charitable services, where it is not reasonably practicable for that person to work, or to provide those services, from the place where they are living;”

80. Guidance can assist this question but, ultimately, while this question needed to be considered objectively, it depended on a range of specific issues related to the individual concerned and the nature of the work the individual did. So there is a real

danger that in providing guidance that is not carefully worded and nuanced that it will appear like law.

81. As an example, set against a similar statutory context another of the UK's governments provided the following guidance early in the pandemic that said (among other things) that "non-essential [construction] works should cease". It went on to say that "Work on construction sites, unless it is for essential projects, should stop immediately, as confirmed in new guidance for the construction industry."
82. The fairly unequivocal nature of the language used here suggested that this was a legal requirement, especially if read against the relevant statutory background as to what was "reasonable" in so far as leaving home was concerned (it is basically saying that construction work is not "reasonable" unless it is for an "essential project"). It may be that those issuing this would point to the word "should" as suggesting this is not an obligation, but in my view this not sufficient.
83. I mention this not to criticise those who issued the guidance (not least because I know how difficult the circumstances were in the first few months of the pandemic), but because this actually proved to be useful to me as I always had it in mind when looking at the Welsh Government's guidance. As I was aware (and other lawyers were aware) of the issue, and how it could be confusing or inappropriate, we ensured that nothing similar happened in Wales. I believe that there was one issue early on when Welsh Government guidance may have been misleading but we made sure that this never happened again (and my recollection is that I personally read it all with this issue in mind).
84. In addition, although we did not (and probably could not) fully resolve the issue that arises when needing to decide what is "reasonable", we did improve the "stay at home" provision over time. This was done by differentiating between those circumstances in which there was definitely an exception to the main rule, and those circumstances in which there may have been an exception.

Communications and ways of working

85. After the meetings and adoption of Regulations on Monday 23 March 2020, referred to above, I worked exclusively from home. I was already able to work from home effectively, but I took further equipment with me from the office that evening, which

meant that I had two monitors and the monitor of my laptop on my desk at home. Working through Microsoft Teams also proved to be a highly effective way of communicating quickly. Having multiple screens, and the ability to discuss and amend drafting on screen simultaneously with others, was also very important. Although this sounds relatively trivial it was absolutely vital to many of us, especially when needing to draft Regulations so quickly.

86. As we were working from home, Teams or Zoom was also the way that we communicated with external parties, including for my one appearance during the pandemic before a Senedd Committee (appearing in support of the Minister for Health and Social Services, Vaughan Gething MS) before the Legislation, Justice and Constitution Committee on 8 June 2020. I did not speak.

87. In addition to communicating through Teams and Outlook, the circumstances were such that we also set up two WhatsApp groups on our personal phones. One included Jane Runeckles, Helen Lentle, Terry Kowal, Neil Buffin and me, and the other included everyone except Jane. The former group was started first, as an easy means for Jane to contact the rest of us whenever urgent work was required late in the evening or on weekends. It would essentially be a case of Jane explaining to us on WhatsApp that we were needed, and we would then return to Teams to discuss whatever issue was in hand. As examples, this was how we were convened late on a Friday evening before making regulations at 3.30am the following morning because of concerns about a Covid outbreak in a mink farm in Denmark, and how we were convened on the Saturday before Christmas in 2020 as we had to make the restrictions stricter than planned unexpectedly. The second group was created for the same reason, i.e. if any one of us from the 'core' legal group needed to speak to the others. Over time the groups were also used for wider communications and trivia. They were never in my recollection used for anything substantive. I also have some other messages, which include exchanges between Terry Kowal and me, and between Helen Lentle and me – again concerned either with something practical or trivia. I am content to share the messages that I still have and have arranged for them to be disclosed to the Inquiry.

Relations with other jurisdictions

88. In so far as my dealings with officials from other governments were concerned, they were rare. Although many other officials had frequent contact with their colleagues in

the other UK governments, our contact with other drafters did not continue after the first week for the reasons set out above. The reality was that from a policy and legal perspective we had diverged and there was little to be gained by further discussion. This may, however, have been different had the Regulations elsewhere been drafted by the specialist drafting offices, as we have long-standing relations with them. Given that they were the most significant laws of the day, I was surprised that the specialist drafting offices in London, Scotland and Belfast were not tasked with drafting the main restrictions Regulations, despite it not normally being their role.

Lessons learned and conclusions

89. In reflecting upon the pandemic from a legal perspective, despite the good practice I refer to in this statement, there are some things that we probably could have done better.

90. Reflecting on the early period of the pandemic, during the period immediately preceding March 2020, I was obviously aware of the coronavirus due to what was in the media. I was also aware in broad terms, from my discussions with my line manager (Des Clifford, Director General of the Office of the First Minister), that “COBRA” and “SAGE” meetings were being held at the UK level. I was also in meetings where the Chief Medical Officer for Wales reported back to the Welsh Government Senior Leaders Group on his discussions with the other medical officers, and more generally on what the UK Government was doing. From a legal perspective I was of course aware of the relevant content of the Coronavirus Bill, and I was also aware (in general terms) that the Welsh Ministers had extensive powers under the Public Health (Control of Disease) Act 1984. I have asked myself several times since whether I should have done more at that stage to prepare for any legislative drafting that may have been needed. The answer is ‘perhaps’, at least to have a more detailed understanding of how the powers could have been applied (i.e. what could be done under the powers). But producing speculative drafts of what might be done was probably not a good use of time, bearing in mind that there was considerable uncertainty as to how governments would be responding.. There was possibly an element of waiting to see what exactly was going to be determined through the UK level process, in particular given that SAGE already had a prominent role.

91. But if there was hesitancy on my part (or on the part of the Welsh Government), in early 2020, there is no doubt in my mind that by mid-March, Ministers and officials

very quickly took responsibility in so far as the public health response on Wales was concerned and stepped up to do whatever was required, whenever it was required.

92. It may also have been that my expectation during early 2020 that the UK Government would deploy powers under the Civil Contingencies Act 2004, so that the response was undertaken in a uniform way across the UK. However, it is my view that the UK Government took the right decision not to do so as the impact of the pandemic varied across the four nations and within them. And ultimately the main purpose of the restrictions was not to overwhelm the NHS, which is of course something for which the responsibility has been transferred. As health and public health is a matter for Senedd Cymru and the Welsh Ministers, it was entirely logical for the response to a public health crisis to be led by the Welsh Ministers. And this rationale became stronger as the impact of the pandemic on other devolved public services become more and more significant.
93. Linked to this issue also, it is notable – speaking as somebody who is normally concerned with the development of primary legislation – that the powers that the Welsh Ministers had under the Public Health (Control of Disease) Act 1984 were wide and straightforward. This enabled the Welsh Ministers to operate without the normal constraints that apply when developing primary legislation, where legislative competence is narrow and complex, and the consent of UK Ministers is frequently required for matters that can be trivial. Similarly the way the Regulations were published made it clear – in the titles of the Regulations themselves – that different rules applied in England, Wales, Scotland and Northern Ireland. Primary legislation for England only by contrast would not appear in this way, and different laws for Wales and England form part of one legal jurisdiction – something that is highly confusing given that the purpose of a legal jurisdiction is to denote legal uniformity across a defined territory.
94. In so far as the drafting of any laws that may be necessary in the future is concerned, as alluded to above, it may also be possible to consider drafting some forms of template Regulations dealing with different scenarios that could be used as a starting point. However, it should be recognised that this work is unlikely to lead to drafts that could be easily deployed, and there is a risk also the future policy decisions could be overly influenced by what is in the draft Regulations. This is however worth considering as the drafting of the Regulations improved over time during the

pandemic, as we refined them not only from a presentational perspective but occasionally in substance too.

95. I have referred above to my reflections that the law, at least applied in this kind of context, is a blunter instrument than would appear. In an emergency response, in which behaviour that is otherwise normal becomes criminalised, it is vital that the restriction is as clear as possible. When restrictions become detailed, numerous and frequently changed I believe it is inevitable that a high proportion of people will comply with the law in broad terms rather than to the letter. As I say above, there were times when I believe we sought a level of precision in law that may have been unachievable.
96. Linked to this is the struggle that I believe we sometimes had to retain the internal logic of our restrictions (the issue I refer to in paragraph 43 above in which I explain that it could be difficult to justify the lifting of one restriction when a related and similar restriction was retained). Our answer to this was often to make three or four different changes to the law within a three-week review period rather than one. This led to us making more changes at different times than I believe we should have, leading to a 'rules fatigue' amongst the public. In my view the result of this was that people who may have meticulously followed the law began to justify, generally minor, breaches on the basis that the Regulations were too complex and changed too often – meaning that they may have felt it was unreasonable to have to “keep up”.
97. I am conscious, however, that I had a particular perspective of these issues and (due to the nature of my role) I was probably concerned more about the rationality of the law than its practical impact on citizens. It was obvious to me throughout the pandemic that the impact of the restrictions on citizens weighed heavily on Ministers and, while they took a cautious approach in so far as the risk of spread of the virus was concerned, they were also very wary of imposing any restrictions that weren't necessary. Similarly, on the point about the precision of the law, there was another perspective. The First Minister would often refer to the feedback that was given to Ministers from the focus group sessions organised to gauge the opinions of members of the public on the restrictions – and that feedback consistently indicated that a relatively high proportion followed the rules meticulously.
98. Overall, it is my view that the Welsh Government did a very good job under extremely difficult circumstances. In so far as the work I was involved in was concerned, decisions were taken objectively and cautiously, and communicated very well. As

somebody who has been with the institution almost from the beginning, it felt in some ways as though the Welsh Government had come of age, both in the way we worked and in the way we were perceived by the people of Wales. And I was proud to play my part in it.

Statement of Truth

I believe that the facts stated in this witness statement are true. I understand that proceedings may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief of its truth.

Signed:

Personal Data

Dylan Hughes

Dated: 13 Rhagfyr 2023