

The contribution of science to government in the UK: Untangling and updating constitutional ‘fault lines’ in the light of the Covid-19 Pandemic?*

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Nella cornice della recente pandemia da Covid-19, questo articolo riflette sul meccanismo costituzionale di accountability e sul ruolo della scienza nell’ambito della pubblica amministrazione del Regno Unito. I consulenti scientifici ebbero un impatto significativo in tempo di guerra, ma negli anni ‘60 il Rapporto Fulton ne rilevò una grave sottovalutazione nel sistema amministrativo. Il saggio illustra quindi come l’emergenza pandemica abbia rilanciato le competenze degli scienziati ai massimi livelli di governo, con lo scienziato del Governo e l’ufficiale medico più esperti che appaiono regolarmente al fianco del Primo Ministro e di altri alti Ministri in TV. Si sostiene che un simile cambiamento di status non solo abbia comportato la perdita dell’anonimato per i consulenti scientifici, ma abbia anche sottratto al Governo il ruolo di principale artefice delle politiche pubbliche. Allo stesso tempo, questa evoluzione ha avuto un impatto sul riparto delle responsabilità per il contrasto alla pandemia tra la politica e i consulenti scientifici governativi.

1. *Introduction*

It will be argued in this article that the role of scientists, and professional experts more generally as part of the government service in the UK, have been transformed as a result of the government response to the Covid-19 pandemic. Such changes not only illustrate the importance of scientific involvement in the policy process, but have also profound implications for the government’s constitutional accountability. In relation to this discussion it is important to remember that the Covid emergency prevented Parliament from

meeting, except in virtual form, for months at a time in 2020¹. This meant that the opposition were unable to fully exercise their constitutional right of reply, and that Parliament was in danger of being side lined². As a practical alternative to the established protocol of announcements in Parliament the government used regular televised press conferences over a prolonged period from March 2020 to July 2021 to not only make policy announcements, but also to set out some of the most repressive laws imposed on UK citizens since the end of the second world war³. The politicians representing the government (PM and Secretary of State for Health most frequently, but including other senior ministers) were nearly always supported by senior scientific figures in the guise of the Government Chief Scientist, the Chief Medical Officer, Deputy Chief Medical Officer or other leading experts⁴. In assisting the government in presenting its policy the scientists responded directly to questions relating to the pandemic itself, and the rules which were set in place in response to it. In view of the extreme threat to public health posed by the pandemic the re-assurance provided by the stamp of scientific and/or medical authority is understandable but this practice carried with it further consequences relating to constitutional accountability. However, the study is not presented in the form of a continuous narrative describing the handling of the Covid-19 emergency, but rather the main objective is to probe beneath the surface to investigate the relationship between government decision-making, the role of the civil service and how scientific advice fed into the policy-making process. The first section considers the gradual integration of scientists as specialists within government as this increased profile highlights the clash with the traditional civil service ethos. The uppermost echelons of the service advising ministers has been dominated by an elite body of 'generalists' with little or no

* I would like to thank Professor Andrew Harding for detailed comments on an earlier draft of this paper.

¹ See eg <https://commonslibrary.parliament.uk/coronavirus-mps-use-of-virtual-participation-and-proxy-voting-by-gender>.

² P. LEYLAND, *The Constitution of the United Kingdom*, 4th edn, Oxford, Hart Publishing, p. 6ff.

³ C. HARLOW, R RAWLINGS, *Law and Administration*, Cambridge, Cambridge University Press, 2021, p. 80ff.

⁴ A similar approach was followed at the level of devolved government in Scotland, Wales and Northern Ireland.

grounding in science, statistics, medicine and more recently, information technology. Reviewing the lineage of the contribution of scientists as part of the civil service leads us into an evaluation of the effectiveness of the mechanisms assembled for inputting scientific advice to high level decision-making bodies. In particular, the role of COBRA and SAGE governmental panels (explained below) which have been tasked with responding to the pandemic. The second half of the article develops the argument that the changes in the day to day handling of the Covid crisis by the government in policy presentation impacts upon the traditional channels of constitutional accountability applying to the main actors.

2. *Scientists and the Civil Service*

Since the implementation of the Northcote Trevelyan reforms⁵ in the mid to late nineteenth century governments of all political persuasions have been served by a permanent body of public servants⁶. A hierarchical civil service emerged and it has been led by a mandarin class of mainly Oxbridge educated graduates, recruited at an elite level by examination, most of whom, once appointed, were and still are destined for a career of public service. As the highest ranking officials within the department, the permanent secretary and assistant secretaries have played a key part behind the scenes in advising ministers, and in the task of policy formulation more generally. In view of the crucial significance of scientific data during the pandemic, it is worth noting that the Civil Service code requires that in performing their duties civil servants must: 'provide information and advice, including advice to ministers, on the basis of the evidence, and accurately present the options and facts; take decisions on the merits of the case; take due account of expert and professional advice'⁷. Although senior officials take their cue from ministers who also

⁵ Northcote-Trevelyan Report on the Organisation of a Permanent Civil Service, 1854. See P. HENNESSEY, *Whitehall*, London, Pimlico, 2001, p. 36ff; D. CANNADINE, *Victorious Century: The United Kingdom, 1800-1906*, London, Viking Books, 2017, p. 296.

⁶ Civil Service Code requires that CS '...serve the government, whatever its political persuasion, to the best of your ability in a way which maintains political impartiality and is in line with the requirements of the code'.

⁷ The code sets out standards of behaviour for officials under the headings of: integrity, honesty, objectivity, impartiality, political impartiality, rights and responsibilities.

draw upon the expertise of special advisers and scientists, the highest echelons of the service have come to make a substantial contribution to the development of policy. For example Professor King observes that: 'The new relationship between ministers and civil servants is thus strikingly unlike the old one. The senior civil servants of the twenty-first century are by no means dogsbodies, waiting patiently to hear their master's voice. Far from it: they are frequently, indeed typically, activists, can-do men and women, intimately involved with ministers in developing policy as well as implementing it'⁸. This elite class of civil servants with accumulated experience and departmental expertise advising ministers on the formulation of policy undoubtedly exercise considerable power and influence in the process of government with lines of communication extending to other departments and to interest groups in the wider community⁹.

It would not be correct, however, to conclude that the importance of scientific advice in government was not recognised by earlier generations. To take an example relevant to this discussion, the post of Chief Medical Officer was introduced in 1855. One of the office holders prime responsibilities has always been advising the government of the day on the spread of epidemics while also having a role establishing a liaison between government and the medical profession¹⁰. Nevertheless, the modernisation of the civil service to face contemporary challenges has been a constant concern for critics of the internal workings of government. The traditional ethos of the civil service based, as it has been, on the 'generalist' tended to ignore the complexity of dealing with the scientific and other technical issues which confront governments in grappling with many of the most sensitive decisions. While the contribution of scientists in government may have been prominent for generations, their institutional status as part of the process has depended on the

<https://www.gov.uk/government/publications/civil-service-code/the-civil-service-code>. The current version 6 March 2015.

⁸ A. KING, *The British Constitution*, Oxford, Oxford University Press, 2007, p. 227.

⁹ C. TURPIN, *Ministerial Responsibility*, in J. JOWELL, D. OLIVER (eds.), *The Changing Constitution*, 3rd edn, Oxford, Oxford University Press, 1994, pp. 120, 124.

¹⁰ *Science advise in a crisis*, Institute for Government, December 2020, p. 10.

politicians at the helm. PM's have appointed special advisers based in Downing Street with their own particular brief, with the second World War witnessing the introduction of a profusion of talented outsiders into the service¹¹. Turning to one famous example, as PM, Winston Churchill, recognising the need to understand statistical information and to grasp the full implications of technical developments in conducting the war effort created a Statistical Section within 10 Downing Street reporting directly to him. He was in regular contact with its head, Frederick Lindemann, referred to as 'The Prof'. Lindemann had vast scientific knowledge and a pedagogic talent which enabled him to sum up (in two page memos) any scientific question for Churchill¹². As one of the PM's close confidantes Lindemann did not merely provide explanations and supply technical information, but he frequently expressed forthright and sometimes perverse opinions on the wider geopolitical implications¹³. In turn, such views drew attention to rivalries and disagreements (reminding us of the current debates between scientists discussed below) with other government scientists, including for instance Sir Henry Tizard, Chairman of the Aeronautical Research Committee and RV Jones¹⁴. According to one of his biographers Churchill was 'accessible, imaginative, decisive and suggestible about technological innovation' enabling him to differentiate between the scientific options presented to him¹⁵.

The Fulton Report commissioned by PM Harold Wilson in 1968 to modernise public administration was intent on creating '... a civil service that is truly professional - expert both in the subject-matter and in the methods of public administration'¹⁶. Although, as we have just noted, the post of Chief Medical Officer (CMO) had long been established the

¹¹ V. BOGDANOR, *The Civil Service*, in V. BOGDANOR (ed.), *The British Constitution in the Twentieth Century*, Oxford, Oxford University Press, p. 251.

¹² T. DOWNING, *Churchill's War Lab*, London, Abacus, 2010, p. 154.

¹³ A. BLICK, G. JONES, *At Power's Elbow*, London, Biteback Publishing, 2013, p. 180.

¹⁴ R. JONES, *The Wizard War: British Scientific Intelligence 1939-1945*, Coward, McCann & Geoghegan, New York, 1978. See in particular chapter 12 which gives a vivid insiders account of the contribution of senior government scientists during World War Two.

¹⁵ M. HASTINGS, *Finest Years: Churchill as Warlord*, London, Harper Press, 2009, p. 84ff.

¹⁶ Fulton Report, 46 para 134.

report recommended that many departments needed to appoint a chief scientist or chief engineer to be in charge of these operations¹⁷. The Fulton critique called into question the culture at the highest level, not so much whether the mandarin generalist, lacking technical knowledge should contribute in some way to the policy process, but rather it pointed to a general problem arising from the structure itself. This was a deficiency that meant that the contribution of experts tended frequently to be marginalised. This was because their status within the service was not sufficiently recognised. The report noted that scientists, engineers and members of other specialist classes were frequently given neither full responsibilities and opportunities, nor the corresponding authority they ought to have exercised and it further recommended that ‘for promotions to posts at the level of Assistant Secretary, Under Secretary ... the Permanent Secretary should be assisted by a small committee [which] should always include one of the specialists in the department’¹⁸.

Indeed, a Fulton inspired approach to professionalization has continued to resonate in Whitehall. An internal report compiled in 2019 recommends that: ‘Every department should have a clearly defined science system. A central role here is leadership in the articulation of the entire range of a department’s science needs in a single document which is endorsed by the department’s Executive Committee. This should form an integral part of overall business planning within departments: unlike Areas of Research Interest ... it should address the whole range of science activity conducted within the department and at arm’s length from it. Further, it should include mechanisms for how non-government funded R&D (Research and Development) will be used and incentivised’¹⁹. The report also concludes that ‘a core part of the departmental Chief Scientific Adviser’s role is to be made accountable for the existence of such a plan’²⁰. A policy involving the appointment of expert scientists at senior level has been pursued by most civil service departments and there are still

¹⁷ Fulton Report, 60 para 185.

¹⁸ Fulton Report, 41, para 120.

¹⁹ *Realising Our Ambition Through Science: A Review of Government Science Capability*, Government Office for Science, November 2019, 20.

²⁰ *Ibid.*, *Accountability within the department?*

issues related to recruitment and the retention of experts, including scientists and doctors. There is also a chronic lack of skills in a number of other fields such as mathematics, statistics, procurement science and engineering. Within the service there is a Modernisation and Reform team and a new Skills and Curriculum Unit²¹. It is further noted that the Functions Initiative launched in 2013 to address this problem has been ‘frustratingly slow’²². The problem often boils down to possessing sufficient pay flexibility for the government service to compete in a market place of available talent.

In sum, the appointment of a chief scientist within a government department impacts on the input to the decision-making process. The Chief Scientific Advisers (CSAs) work alongside the other analytical disciplines and with ministers and senior teams. In the field of medicine, which concerns us here, the Chief Medical Officer has published a report of the state of the public’s health in England for more than 150 years using statistical data and scientific evidence to inform this assessment²³. The intention is to ensure that joined-up evidence is at the core of decisions within departments and across government. To this end, a vast quantity of health statistics are constantly generated by a range of organisations across government, academia, industry and the third sector. The surveillance of this information allows for the monitoring of progress and the prioritisation of areas for action to improve policy making and thereby also improve the nation’s health.

3. The Covid Pandemic and the Framework of Crisis Management

Turning to the current administration of PM Johnson, the Covid-19 pandemic has provided a rigorous test for the system in place at the heart of government to deal with emergencies²⁴. While the events surrounding

²¹ B. GUERIN, A. THOMAS, R. CLYNE, S. VIVRA, *Finding the right skills for the civil service*, Institute for Government, April 2021.

²² *Specialist Skills in the civil service*, Report House of Commons, Public Accounts Committee, Thirty-Second Report of Session 2019-21, 11 December 2020, HC 686, p. 5ff.

²³ Chief Medical Officer’s Annual Report 2020, Health trends and variation in England.

²⁴ Johnson took office in July 2019 and then won the general election called in December 2019 obtaining an overall majority of 77 seats in the House of Commons.

the development of policy reveal that government was ill prepared for a crisis of this magnitude, the pandemic has shone a spotlight on the operation of decision-making mechanisms and the contribution of science in reaching such decisions. From the moment that signs of a pandemic manifested themselves politicians were heavily reliant on scientific evidence supplied by experts in many fields, and it is therefore useful to consider how the status of scientific advice impacted on the efficacy of the existing policy-making mechanisms. Crisis management is conducted by Civil Contingencies Committee (COBRA)²⁵ which is convened as a high-level government committee supported by the National Security Secretariat in the Cabinet Office to co-ordinate decision-making during national emergencies. As such, this committee is usually chaired by the PM or other senior minister. During the initial stages (January/February 2021) the PM and his chief political adviser did not attend COBRA in person because Covid-19 was regarded as no more than a scare story from Asia²⁶. The alert was only fully sounded with the whirlwind spread of the disease in other European nations such as Italy in March 2020. The composition of COBRA will include relevant ministers and officials from the UK government and, if applicable, the devolved administrations in Edinburgh, Cardiff and Belfast, officials, police, military, as well other experts, in particular, during this emergency the Government Chief Scientific Advisor (CSA) and the Government Chief Medical Officer (CMO) made an important contribution.

Once COBRA was specially activated to deal with this national emergency it drew upon scientific data and advice supplied by the Scientific Advisory Group for Emergencies (SAGE). SAGE is an official governmental structure conceived in 2009 as a forum for government scientists (and other experts) to prepare a response to national emergencies. The main task before it is to coordinate peer reviewed scientific and technical advice to inform decision-making²⁷. SAGE is dormant except in emergencies,

²⁵ COBR(A) is also an acronym for Cabinet Office Briefing Room where its meetings are held.

²⁶ *Coronavirus: Lessons learnt*, Health and Social Care Committee and Science and Technology Committee, 26 May 2021, House of Commons HC 95, Q1000.

²⁷ *Enhanced SAGE Guidance: A strategic framework for the Scientific Advisory Group for Emergencies (SAGE)*, Cabinet Office, October 2012.

and it has only been activated on nine occasions since its inception. In respect to Covid-19, it met for the first time on 22 January 2020 but it has operated on a continual basis since, dealing with a vast workload. It was not foreseen that it would operate in permanent session for such a long period of time and this prolonged timespan introduces related questions of sustainability and support²⁸. SAGE seeks to ensure the full range of issues are considered as it is recognised that advice needs to stem from a range of disciplines, including the scientific, technical, economic and legal. This guidance focuses on the coordination of scientific and technical advice to inform strategic UK cross-government-decision making during the emergency response and recovery phases²⁹.

Before attempting any sort of evaluation of the contribution of SAGE a number of preliminary points are worth mentioning. The first concerns the composition of SAGE itself and who has the right to attend its meetings. SAGE is usually chaired by the Government Chief Scientific Adviser who represents SAGE at COBRA meetings, but in response to the pandemic it has been co-chaired by the CMO. Although it comprises core participants, the attendees will vary according to the nature of the emergency and the subject matter under consideration at any particular meeting. In this instance, the main players have included: epidemiologists, clinicians, therapeutics and vaccine experts, public health experts, virologists, environmental scientists, data scientists, mathematical modellers and statisticians, genomic experts and behavioural and social scientists. More than 80 doctors and scientists are recorded as having attended group meetings of Sage and related sub-groups during the course of the first year³⁰. In order to manage a diverse array of expertise the group may divide down into sub-groupings, reporting back on particular issues. In gathering expertise from such a range of scientists and experts SAGE is well equipped with expertise to perform the function assigned to it.

²⁸ *The UK response to covid-19: use of scientific advice*, House of Commons Science and Technology Committee, First Report of Session 2019-21, 8 January 2021, HC 136, 75.

²⁹ SAGE explainer 5 May 2020.

³⁰ There are a plethora of sub-groups including: New and Emerging Respiratory Virus Threats Advisory Group, Scientific Pandemic Influenza Group on Modelling, Independent Scientific Pandemic insights Group on Behaviours, COVID-19 Genomics UK, Health Data Research UK.

Clearly, the CSA and CMO occupy a pivotal role as conduits for presenting the evidence from SAGE to COBRA and also at Cabinet level. The dichotomy between political decision-making and the scientific evidence on which decisions are based is reflected in the differences in composition between COBRA and SAGE (see above). However, as the Covid emergency unfolded it became apparent that the PM's office at Number 10 was represented at some SAGE meeting by Dominic Cummings³¹, the PM's senior political adviser (despite being a non-scientist) and by Ben Warner, a special adviser to the PM with a scientific background and thoroughly versed in statistical modelling. Warner was delegated to report back to Number 10 on the implications of the evidence brought before SAGE³².

Second, it is important to stress that feeding back any advice to COBRA (the Cabinet and other government departments) is a daunting task³³. This is, in part, because of the sheer volume of information in some areas, and the lack of reliable 'peer reviewed' information and data modelling in others, but also because the evidence may have conflicting implications, not to mention the fact that the experts might disagree over the interpretation of the data under consideration.

Third, SAGE meets in secret and the identity of those attending meetings is not officially revealed, although the anonymity of SAGE membership during the pandemic has not been maintained. The confidentiality element has been justified for the usual reasons such as the need to ensure there is a safe space in which the group can provide – and ministers can consider – free and frank advice. Equally, there may be national security reasons or operational considerations for non-disclosure of the group's deliberations. However, the minutes of SAGE meetings and supporting documentation (scientific data and analysis used to inform SAGE discussions) are typically published at the conclusion of the relevant emergency. During the unexpectedly long running pandemic minutes of meetings

³¹ *Who's who on secret scientific group advising UK Government*, *The Guardian*, 24 April 2020. SAGE mainly consists of eminent scientists from inside and outside government.

³² *Coronavirus: Lessons learnt*, Health and Social Care Committee and Science and Technology Committee, 26 May 2021, House of Commons HC 95, Q 977.

³³ *Science Advice in a Crisis*, Institute for Government 2020, 6.

have been published at regular intervals, with sensitive information redacted from the documentation³⁴. As will be apparent later in our discussion the confidentiality element is difficult to reconcile with an emerging 'informational' function performed by SAGE and its co-chairs during the pandemic, associated with updating and explaining the latest scientific information. In view of the controversies surrounding Covid-19, its containment and its treatment, there is a danger of government scientists straying beyond debunking falsehoods into the domain of providing justification for policy choices which are ultimately made by ministers at a political level.

Finally, in relation to the accountability framework discussed below, it is important to remember that SAGE is not a body that has any direct accountability for operational aspects, whether that be testing, PPE, NHS delivery more generally, vaccination policy etc³⁵. As stated above, in formulating policy relating to Covid-19 it is the PM and Cabinet that have had to weigh into the balance the political input from government ministers, the views of independent experts and the input from political advisers (SPADS). In line with policy-making at the Cabinet level it was envisaged that SAGE would work behind the scenes in national emergencies of various kinds in order to provide the Government with high quality independent advice.

4. Independent Advice and the avoidance of 'Group Think'

Lessons may well be learned from the experience of managing Covid and specifically from the evolution of government policy over the course of a few months from January to April 2020. Some critics have claimed that the initial policy response to Covid demonstrated a near break down of the advice system with the result that government was very close to being committed to a fatally flawed policy based on the acceptance of herd immunity, rather than deciding in favour of the introduction of a rigor-

³⁴ <https://www.gov.uk/government/publications/scientific-advisory-group-for-emergencies-sage-coronavirus-covid-19-response-membership/list-of-participants-of-sage-and-related-sub-groups>; <https://www.gov.uk/government/organisations/scientific-advisory-group-for-emergencies>.

³⁵ Sir Patrick Vallance, Chief Scientific Adviser, *Sunday Telegraph*, 31 May 2020.

ous lockdown strategy designed to prevent the spread of the disease³⁶. In consequence, a drastic policy reversal occurred with the decision to introduce the first lockdown without a plan to implement a lockdown. Of course, the lockdown had many economic and social implications for the entire population, including the need to formulate supporting laws and regulations and to co-ordinate policy with the devolved governments across the United Kingdom³⁷.

How had such a complete reversal of policy occurred? The government's chief scientific adviser admits that 'SAGE is not an infallible body of experts ... *nor is there cosy group think*. Rather [t]here is a range of opinions in all of discussions and there is wide reading of the latest research, but what SAGE endeavours to do is come down to a position or a range of positions, to provide options ministers could consider and explain the uncertainties and assumptions inherent in that science and evidence'³⁸. However, faced with this health crisis of unprecedented proportions, it appears to have been particularly difficult for SAGE to avoid elements of what has come to be identified as 'Group Think'. This term refers to the drift towards a locked in mindset where the experts end up talking to each other, each with their own particular take on the situation from their technical standpoint. In consequence, Sage as an expert body may lack the capacity to not only question basic assumptions but also to formulate their advice taking account of the bigger picture and the wider implications for any options under consideration.

Dominic Cummings in his select committee evidence maintained that SAGE reflected a form of uncritical 'group think' encouraged by secrecy: 'There is absolutely no doubt at all that the process by which SAGE [operated] was secret, and overall the whole thinking around the strategy (which included at least the partial acceptance of herd immunity) was secret, [it] was an absolutely catastrophic mistake, because it meant that there was no proper scrutiny of the assumptions and the underlying

³⁶ See generally *Coronavirus: Lessons learnt*, Health and Social Care Committee and Science and Technology Committee, 26 May 2021, House of Commons HC 95.

³⁷ See eg G. EVANS, *Devolution and Covid-19: towards a 'new normal' in the territorial constitution*, PL 2021, Jan, pp. 19-27.

³⁸ Sir Patrick Vallance, Chief Scientific Adviser, *Sunday Telegraph*, 31 May 2020.

logic³⁹. Furthermore he claimed that ‘One of the critical things that was completely wrong in the whole official thinking in SAGE and the department of Health in February/March was first of all the British public would not accept a lockdown and secondly the British public would not accept what was thought of as an east Asian style track and trace-type system⁴⁰. Another independent report observes that: ‘In the initial months, ministers put too much weight on SAGE – relying on it to fill the gap in government strategy and decision making that it was not its role to fill. At times the PM and ministers waited until the scientific evidence was overwhelming rather than using it alongside other inputs to make their own judgments. This was captured in the government’s rhetoric, which wrongly suggested that science could simply be “followed” – and appears to have been a big factor behind the costly delay to the first lockdown⁴¹. A central problem is that ministers as decision-makers like to maintain that their actions are justified by scientific advice, but as we have just noted, the use of such evidence is not entirely free from bias, and the scientific advice selected from the options available may have profound political implications with very different outcomes (depending on the advice followed). A leading epidemiologist, Professor Neil Ferguson⁴², has argued that the positions of Chief Scientific Adviser (CSA) and Chief Medical Officer (CMO) should be made independent of government, as is the practice in some other nations⁴³. Currently, the office holders are, at least partly, constrained in what they are permitted to say and do in public by their positions within government⁴⁴. The duty to serve the government and promote the policy adopted (recently involving personal appearances before the TV cameras at news conferences) po-

³⁹ *Coronavirus: Lessons learnt*, Health and Social Care Committee and Science and Technology Committee, 26 May 2021, House of Commons HC 95, Q1000.

⁴⁰ *Ibid.*

⁴¹ *Science advice in a crisis*, *Institute for Government*, December 2020, p. 12ff.

⁴² Ferguson was a member of the Department of Health’s advisory group on emerging respiratory virus threats (NERVTAG) but resigned from SAGE in May 2020 after breaching social distancing guidelines.

⁴³ *Government Advisers: Independence urged for Vallance-Whitty roles*, *Financial Times*, 7 August 2021.

⁴⁴ <https://www.gov.uk/government/publications/civil-service-code/the-civil-service-code>.

tentially interferes with the complex task of interrogating and processing scientific advice from a relatively neutral standpoint. Moreover, any open criticism of government policy by a government scientist might result in dismissal from post or forced resignation. It is further argued that more direct access is important to allow a wider range of scientists direct communications with politicians and ministers rather than having their views filtered through SAGE and/or the intervention of the CSA or CMO. In fact, Sir David King, a former government Chief Scientific Adviser has set up an (distinct) Independent Sage of experts unaffiliated with Whitehall to take on this role.

On the other hand, the evidence relating to the handling of the Covid pandemic indicates that senior scientific advisers and SAGE perform a pivotal role within government decision-making at the highest level. As mentioned earlier, on occasion the density of information which is presented to SAGE might raise the issue of the quality of the advice it is able to supply to government. However, as insiders with direct access to the decision-makers at the highest level of government, the most senior government scientists perform an invaluable function as advocates for the incorporation of the best possible scientific advice. In turn, they perform a role in seeking to ensure that defensible policies are put in place by politicians and civil servants, and that catastrophes will thereby be averted. Nevertheless, the task of reaching decisions prompted by Covid-19, for example to impose lockdowns, were inevitably challenging as such decisions involved calibrating complex data and weighing unsavoury options, with the medical implications for the NHS given a high priority. At the same time, many conflicting considerations have to be taken into account across government, including allowance for the commercial impact and the impact on the wider community. Faced with the Covid-19 pandemic it will be obvious that none of the available options offered anything like an ideal outcome.

5. Ministerial Responsibility and Constitutional Accountability

This section examines the implications for constitutional accountability of exposing the civil service and in particular, government experts to the public gaze during the Covid-19. The civil service assists in the formulation of policy, and it is primarily responsible for the implementation

policy⁴⁵, but according to constitutional orthodoxy (however discredited and mythical) ministers are identified as the authors of government policy⁴⁶. In theory at least, they not only take the credit and the blame for it, but also explain or account for the actions of their department. In order to perform this function all ministers must be a Members of Parliament. The policy or action taken will be defended by the minister in formal debates in Parliament, at Question Time and before Departmental Select Committees. The orthodox view of ministerial responsibility reflected in the Ministerial Code unequivocally recognises that ‘The Minister in charge of a department is solely accountable to Parliament for the exercise of the powers on which the administration of that department depends’⁴⁷. This adds up to ministers being held responsible before Parliament for the actions of their departments in a formal and procedural sense but it also unsatisfactory and rather simplistic in identifying a ‘chain of accountability’ in which officials answer to ministers, who answer to Parliament, which, in turn, answers to the electorate⁴⁸. While accountability in the sense used here refers to the procedural requirements of answerability before Parliament⁴⁹ no clear guidance is offered on the vexed question, much debated by constitutional commentators, of ultimate responsibility for policy failure when one or more ministerial resignations might be expected or when a general election might be triggered⁵⁰. A more detailed assessment of the numerous accountability issues thrown up by the government response to the pandemic is well beyond the

⁴⁵ This might be directly, through executive agencies or by contractual arrangements with the private or independent sector. See e.g. A. DAVIES, *Beyond New Public Management: Problems of Accountability in the Modern Administrative State*, in N. BAMFORTH, P. LEYLAND (eds.), *Accountability in the Contemporary Constitution*, Oxford, Oxford University Press, 2013.

⁴⁶ D. WOODHOUSE, *Ministerial responsibility*, in V. BOGDANOR (ed.), *The British Constitution in the Twentieth Century*, Oxford, Oxford University Press, 283.

⁴⁷ Ministerial Code 2019, para 4.6.

⁴⁸ C. TURPIN, *Ministerial Responsibility*, in J. JOWELL, D. OLIVER (eds.), *The Changing Constitution*, 3rd edn, Oxford, Oxford University Press, 1994, 127.

⁴⁹ See *Giving Evidence to Select Committees: Guidance for Civil Servants*, Cabinet Office, October 2014 (Osmotherly Rules). Evidence is given to Select Committees on behalf of ministers and under their directions.

⁵⁰ For detailed up-to-date discussion of political responsibility for departmental actions see ALISON L. YOUNG, 2021, p. 684ff.

scope of an article focusing on the deployment of scientists and scientific advice within the government service⁵¹. However, it should already be apparent that the orthodox constitutional position of ministers simply taking the credit and the blame for policy has been heavily qualified. Moreover, the ministerial codes as an effective mechanism for control have also been called into question once again by the pandemic. During the initial stages of the crisis medical staff were being exposed to the virus as a result of the absence of supplies of Personal Protective Equipment (PPE) which were fit for purpose and fresh supplies needed to be obtained with immediate effect. At the same time, the elderly in care homes were particularly susceptible to fatal infection unless steps were taken to protect them. The personal conduct of the Health Secretary appears to have fallen well short of ‘maintaining high standards of behaviour or behav[ing] in a way that upholds the highest standards of propriety’ as set out in the Ministerial codes of practice⁵². Evidence from the PM’s former Senior Adviser before the combined select committees on Science and on Health indicates that highly misleading information had been repeatedly presented to COBRA and to the Cabinet by Health Secretary in respect to the availability of PPE and the efficacy of arrangements for the shielding of patients in care homes for the elderly (with catastrophic results)⁵³. The Public Accounts Committee of the House of Commons following an investigation by the National Audit Office reported on the procurement policy adopted for the supply of PPE and found a lack of transparency and a lack of adequate documentation of decisions surrounding the way the Department of Health and the Secretary of State had identified and managed potential conflicts of interests in

⁵¹ See for example, R. GIRARD, *Accountability, populism and expertise: the UK Government’s response to COVID 19*, in *Public Law*, 2021, pp. 707-726 at 719ff.

⁵² Ministerial Code, Cabinet Office, August 2019, para 1.1. See also the linked Seven Principles of Public Life under Annex A which provides that ‘Holders of public office must avoid placing themselves under any obligation to people or organisations that might try inappropriately to influence their work. They should not act or take decisions in order to gain financial or other benefits for themselves, their family and their friends. They must declare and resolve any interests and relationships’.

⁵³ *Coronavirus: Lessons Learnt*, Science and Technology Committee, Health and Social Care Committee Joint Inquiry, Oral Evidence 26 May 2021, Q1087.

the awarding procurement contracts⁵⁴. Further questions have been raised over the appointment of Health Secretary's mistress as a non-executive director at the Department of Health and the use of his personal email to negotiate government contracts. A high level ministerial resignation or re-shuffling of ministers at the height of crisis would have had a disruptive impact for the government, but, nevertheless, it is striking and ironic that in contrast the Secretary of State's eventual resignation was triggered by a relatively trivial intimate encounter with his mistress. Matt Hancock was obliged to resign as Secretary of State for Health in June 2021 after being caught on camera kissing his mistress who was also a special adviser in his departmental office⁵⁵. This liaison had been in clear breach of the government's own Covid-19 rules and his position rapidly became politically untenable through the loss of support of MPs from his own party as well as those from opposition parties⁵⁶.

6. Scientific advice, 'open' government and the loss of anonymity

This article addresses the evolving contribution of scientific advice supplied to government in the light of the Covid-19 pandemic, and the starting point for us is to note that a corollary to the convention of individual ministerial responsibility just outlined (as it applies to ministers) is that civil servants remain anonymous and are not held formally accountable for the advice they provide to government ministers. The latest version of the Ministerial Code, further requires that ministers must uphold the political impartiality of the Civil Service, and not ask civil servants to act in any way that would conflict with the Civil Service Code⁵⁷. Ministers are further placed under a duty to give due weight to informed and impartial advice from civil servants, as well as to the considerations and advice in

⁵⁴ *Initial lessons from the government's response to the COVID-19 pandemic, Committee of Public Accounts*, Thirteenth Report of Session 2021-22, HC 175, 25 July 2021; Investigation into government procurement during the Covid-19 pandemic, NAO, November 26, 2020.

⁵⁵ *Matt Hancock resigns as health secretary after day of humiliation, The Guardian*, 26 June 2021.

⁵⁶ Further lockdown breaches associated with the 'Partygate' affair in 2021 led to the resignation of a number of high ranking officials and robust criticism of the Prime Minister.

⁵⁷ Constitutional Reform and Governance Act 2010, section 5.

reaching policy decisions, and should have regard to the Principles of Scientific Advice in Government⁵⁸.

It has just been explained in the previous section that this is because, according to the constitutional convention of individual ministerial responsibility, ministers, as the visible architects of policy and nominal decision-makers, take the credit and also the blame. The blanket confidentiality which shrouded government in a veil of secrecy⁵⁹ meant that officials of earlier generations appearing before departmental select committees were able to refuse to reveal the advice given to ministers⁶⁰. However, well before the introduction of the Freedom of Information Act 2000 we can identify a trend towards a limited form of direct accountability, prompted by the introduction of the parliamentary ombudsman and the reform of departmental select committees investigating the inner workings of government. In the follow up to the Sachsenhausen case it was already recognised that the complete anonymity of the civil servants forms no part of the current doctrine of ministerial accountability⁶¹. The revision of the Osmotherly Rules and the adoption of a code of practice for civil servants⁶² provided that the central principle to be followed is that it is the duty of officials to be as helpful as possible to select committees and that any withholding of information should be limited to reservations that are necessary in the public interest⁶³. The relaxation of the rules allowing officials to give evidence directly suggests that civil servants are answerable to Parliament through select committees where they provide a form of explanatory accountability. This should not mean that blame for any policy pursued is routinely apportioned between ministers and

⁵⁸ Ministerial code 2019, para 5.1, 5.2.

⁵⁹ See e.g. Official Secrets Act 1911 and 1989.

⁶⁰ Current version of the *Osmotherly rules Giving Evidence to Select Committees: Guidance for Civil Servants, Cabinet Office*, October 2014 reflects this change.

⁶¹ G. MARSHALL, *Constitutional Conventions*, Oxford, Oxford University Press, 1984, 71.

⁶² *Giving Evidence to Select Committees: Guidance for Civil Servants, Cabinet Office*, October 2014.

⁶³ A. TOMKINS, *The Constitution After Scott: Government Unwrapped*, Oxford, Oxford University Press, 1998, 109.

civil servants⁶⁴. However, in defiance with the convention recently senior civil servants rather than the Secretary of State have been blamed and dismissed for conspicuous policy failures⁶⁵.

Over roughly the same time-frame, civil service re-organisation under the Thatcher government (1980-90) went further in undermining the principle of civil service anonymity. The New Public Management (NPM) initiative involved hiving off parts of departments into executive agencies, each responsible for delivering particular areas of policy⁶⁶. This was often in controversial fields (prison service) and an almost inevitable consequence was the promotion of the public profile of the agency chief executive who was required to defend the actions of the agency in public to the media and before parliamentary committees⁶⁷.

The David Kelly affair drew attention to issues of constitutional importance regarding the visibility of political actors, special advisers (SPADS), civil servants, and in particular expert advisers in decision-making at the highest levels of government⁶⁸. As one of the most senior government scientific advisers the job description of Dr David Kelly included communicating issues to the media over the threat posed by Iraq at the time of the invasion by the Americans and British in 2002. Of course, this was under the assumption that any disclosures would be approved at the highest level. But Kelly had leaked information to BBC journalists in unofficial briefings and the prospect of disclosure of his identity as the source of the leak appears to have prompted his suicide⁶⁹. Kelly had claimed that scientific data supplied by him had been doctored on orders

⁶⁴ ALISON L. YOUNG, *Turpin and Tomkins' British Government and the Constitution*, 8th edn, Cambridge, Cambridge University Press, 2021, 696.

⁶⁵ One such example concerned the Chief Executive of Ofqual in 2020 forced to resign over the adoption of defective algorithms to calculate examination results during Covid. See C. HARLOW, R. RAWLINGS, *Law and Administration*, 4th edn, Cambridge, Cambridge University Press, 2021, 254

⁶⁶ *Civil Service Management Reform: The Next Steps*, Cm 524, (1988).

⁶⁷ V. BOGDANOR, *The Civil Service*, in V. BOGDANOR (ed.), *The British Constitution in the Twentieth Century*, Oxford, Oxford University Press, p. 269.

⁶⁸ S. ROGERS (ed.), *The Hutton Inquiry and its impact*, London, Guardian Books, 2004.

⁶⁹ See *The Decision to go to War in Iraq*, House of Commons, Foreign Affairs Committee, Ninth Report of Session 2002-03, 7 July 2003, HC 813, 77 and *Evidence from Mr Andrew Gilligan to the Committee's Inquiry into the Decision to go War with Iraq*, House of Commons Foreign Affairs Committee, First Report of Session 2002-3, 17 July 2003, HC 1044.

from 10 Downing Street. These amendments included prominent reference to weapons of mass destruction (WMDs) in the form of chemical and biological weapons capable of being activated within 45 minutes. This intervention was political dynamite as the 'dossier' of intelligence information was deployed by the Blair government to justify the legality of the invasion of Iraq⁷⁰. The conclusions of the Hutton inquiry into the circumstances surrounding his death have been criticised for too readily exonerating the PM and 10 Downing Street in relation to the compilation of the dossier itself⁷¹, however, the fallout is directly relevant to this discussion. The first point of note concerned the willingness of the government to ignore the principle of civil service anonymity by consenting to Kelly's appearance as a principal witness before the parliamentary Foreign Affairs Committee and Intelligence and Security Committee and the decision to unmask the identity of Kelly as the source of the leak⁷². Rather than preserving confidentiality at all costs, the government was revealing sensitive and, in this case, highly secret, information on a selective basis to suit its political needs⁷³.

The second point concerns the open manner in which the subsequent inquiry into the heart of government was conducted. As a follow up to his death, the Hutton Inquiry not only subjected officials and scientists to detailed questioning opening a window on the inner working of government⁷⁴ but nearly all the material placed before the Hutton Inquiry was published on the inquiry website. The Freedom of Information Act 2000 provides that the formulation of government policy is an exempt category 'if in the reasonable opinion of a qualified person disclosure

⁷⁰ P. LEYLAND, *The Westminster Parliament and Executive Accountability: the oversight function of departmental select committees with reference to the Millennium Dome and the David Kelly Affair*, in E. ROSSI (ed.), *Studi pisani sul Parlamento*, Edizioni Plus, Pisa University Press, 2008, p. 423.

⁷¹ See chapters 12 and 13; and R. NORTON-TAYLOR, *Introduction*, in S. ROGERS (ed.), *The Hutton Inquiry and its impact*, London, Guardian Books, 2004, p. 8.

⁷² *Iraqi Weapons of Mass Destruction – Intelligence and Assessments*, in *Intelligence and Security Committee*, September 2003, Cm 5792, p. 8.

⁷³ Report of the Inquiry into the Circumstances Surrounding the Death of Dr David Kelly by Lord Hutton, HC 247, 28 January 2004.

⁷⁴ Chapter 6 and chapter 9 of the Hutton report features evidence from senior civil servants, government scientists and special advisers to the PM and other ministers.

would otherwise prejudice or would be likely to prejudice, the effective conduct of public affairs'. However, it should be noted that under section 2 in restricting disclosure of factual information used in the formulation of policy the onus will be on those justifying secrecy⁷⁵. In the words of one commentator: 'Essentially the ... Inquiry showed how the Freedom of Information Act could work in practice. Virtually all documents and emails, including those headed confidential and restricted, were regarded as public information'⁷⁶. The upshot is that the Hutton approach to disclosure established an important precedent for future public inquiries but also a more general movement towards disclosure by governmental bodies has been discernible since⁷⁷.

Despite the obvious trend towards greater openness across the civil service alluded to in this discussion supported by the passage of the Freedom of Information Act 2000, the latest version of the Ministerial Code continues to reflect an orthodox interpretation of the convention of individual ministerial responsibility suggesting that the entire process is conducted in secret. For example, it states that: 'The internal process through which a decision has been made, or the level of committee by which it was taken should not be disclosed. Neither should the individual views of ministers or advice provided by civil servants as part of that internal process be disclosed'⁷⁸.

7. *A redirection of avenues of accountability?*

Returning to the present, it has already been pointed out that the management of the Covid-19 emergency by the UK government and the devolved administrations prompted a radical departure from previous practice. The traditional approach to policy-making not only places great

⁷⁵ Freedom of Information Act 2000 Section 35 and 36 cover 'Formulation of government policy' and 'Prejudice to the effective conduct of public affairs'; P. BIRKINSHAW, M. VARNEY, *Government and Information Rights*, 5th edn, Haywards Heath, Bloomsbury Professional, 2019, pp. 79-81.

⁷⁶ D. HENCKE, T. HAPPOLD, *The Inquest Begins*, in S. ROGERS (ed.), *The Hutton Inquiry and its impact*, London, Guardian Books, 2004, p. 85.

⁷⁷ See Report of the Inquiry into the Circumstances Surrounding the Death of Dr David Kelly by Lord Hutton, HC 247, 28 January 2004. The Scott Report is a comparable example of a public inquiry of this type in recent times but without a supporting website. See HARLOW and RAWLINGS.

⁷⁸ Ministerial Code 2019, para 2.3.

emphasis on the confidentiality of the policy process, but it also supports the impression that ministers are responsible for the presentation of that policy before Parliament and to the public. The appearance on national media of the senior government scientists and the publication of minutes from SAGE has departed from routine practice in regard to the presentation of policy and many of the assumptions relating to the accountability of ministers and government officials. In particular, the capacity of select committees to interrogate the executive during lockdowns was reduced⁷⁹.

As noted in the introduction, the channel of communication between the Westminster Government and the general public from the imposition of the first lockdown in March 2020 was marked by daily televised news conferences, typically featuring ministers and scientists as the main performers in presenting and explaining the complex implications of Covid and the rules designed to control the disease⁸⁰. Their formal presentations were followed up by taking detailed questions from the press and from members of the public. The multiple appearances of the ‘experts’, lifted a veil of confidentiality concerning key aspects of the question of policy formulation and the advice provided on the application of the resulting policy.

The change brought about by this visibility has constitutional implications which are at extreme variance with the notion of ministerial responsibility where individual civil servants and scientific advisers are shielded from the attention of the public. To the contrary, the Chief Medical Officer, Chris Whitty was landed ‘... in an impossible position during this pandemic: he [represents] the face of “the science”, the deliverer of bad news and hard facts, and one of the only people who could be made a scapegoat for unpopular decisions [and the irony is] ... that since the pandemic began he has reportedly urged the government to do the exact opposite to what it ended up doing and yet Boris Johnson always has

⁷⁹ *The constitution under Covid-19, Constitution Unit, Monitor* 75/July 2020, p. 4.

⁸⁰ C. HARLOW, R. RAWLINGS, *Law and Administration*, 4th edn, Cambridge, Cambridge University Press, 2021, pp. 79/80. ‘Reflecting and reinforcing the resurgence of executive power, the sheer scale and fast-moving character of the regulations cannot go unremarked. Extending through the various “tiers” of restriction and successive “lockdowns”, ministers laid some 330 coronavirus-related statutory instruments before the UK Parliament in 2020 ...’.

the excuse of saying that he isn't an expert, merely a politician doing his best to follow doctor's orders⁸¹. Another critic puts it slightly differently, suggesting that the 'hugging of experts by politicians is a future blame avoidance tactic involving blame-sharing and blame displacement'⁸². In a different sense, any limitations of a policy supposedly underpinned by science is liable to be used to question the credibility of scientific advice more generally. In turn, any debasement of reputable science appears to strengthen the hand of those peddling pseudo-science and misinformation⁸³. This phenomenon manifested in 'anti-vax' movements in many nations on social media has the potential of undermining policy delivery to the detriment of the wider community. Moreover, the exposure of the nation's leading government medical expert on nationwide TV and social media had far reaching personal implications⁸⁴. As a result of these appearances Chris Whitty was identified and then assaulted in St Jame's Park on the 27 June 2021 by a group of thugs reacting to the effects of government policy relating to lockdown conditions and vaccination strategy (Ostensibly reached on the basis of scientific advice)⁸⁵. This incident indicates that some experts might now require personal protection as the 'shoot the messenger' syndrome applies increasingly to high profile civil servants and, in particular, to government scientists.

8. Conclusion

As the shockwaves caused by the pandemic are still reverberating it is re-assuring that the Science and Technology Committee of the House of Commons reported that: "The public had benefitted from seeing and hearing directly from scientists advising the Government, and overall trust in science has remained high despite the inevitability that scientific

⁸¹ *How the internet dehumanised Chris Whitty*, in *New Statesman*, 29 June 2021.

⁸² M. FLINDERS, *Democracy and the Politics of Coronavirus: Trust, Blame and Understanding*, in *Parliamentary Affairs* (2021) 74, pp. 483-502, 493.

⁸³ For further discussion of issues to populism and science see: R. GIRARD, *Accountability, populism and expertise: the UK Government's response to Covid-19*, in *Public Law*, 2021, pp. 707-726.

⁸⁴ The intrusion into personal life of a government official caused by public exposure has some affinity with the David Kelly predicament alluded to earlier.

⁸⁵ *Chris Whitty's attacker given suspended jail sentence*, in *The Times*, 30 July 2021.

advice has often been associated with restrictions on people's activities and sometimes the focus of contention⁸⁶. On a more critical note this discussion has underlined the fact that the orthodox concept of ministerial responsibility⁸⁷ which underpins the current Codes of Practice applying to ministers and civil servants is now seriously outmoded. The handling of the Covid pandemic has exposed the identity of the main actors whether ministers, officials or scientists reflecting a wider trend towards more open government. This new style of government calls for a comprehensive revision of these codes of practice and also to the manner of their enforcement⁸⁸.

An independent public inquiry into Covid-19 has been promised for 2022 by the PM to learn the lessons at every stage of the pandemic. In view of the scale of the crisis it will be challenging even to establish terms of reference sufficiently self-contained for any such inquiry. However, the task will be to endeavour to analyse the mistakes that were made as the crisis unfolded by calling upon the main players to provide evidence. It has been argued in some quarters that there is an obsessional focus on «policy failures, catastrophes and disasters» and Professor Flinders further maintains that an obsessive culture of blame potentially undermines trust in the political process. In addition, it is suggested this excessive emphasis on blame tends to neglect the celebration of 'structural successes, policy achievements and democratic innovations'⁸⁹. It will be apparent from this discussion that in the contemporary world policy delivery is placed under relentless 24 hour scrutiny from the mass media, online chat, as well as having to face established parliamentary scrutiny, and that this exposure has stressful consequences for the individual politicians, civil servants and special advisers – all as policy contributors in different ways. At one

⁸⁶ *The UK response to Covid-19: use of scientific advice*, House of Commons, Science and Technology Committee, First Report of Session 2019-21, 8 January 2021, 5.

⁸⁷ The root of the problem is that there is no alternative or supplementary theory of the responsibility to Parliament which has yet been devised to secure proper accountability. See C. TURPIN, *Ministerial Responsibility*, in J. JOWELL, D. OLIVER (eds.), *The Changing Constitution*, 3rd edn, Oxford, Oxford University Press, 1994, p. 120.

⁸⁸ There are serious deficiencies in the way the codes are enforced and relating to the role of the PM *vis à vis* the codes.

⁸⁹ FLINDERS, p. 499.

level such a critique overlooks the capacity of high profile politicians to boast about government achievements (for example in this instance the relative success of the vaccination programme). At another, the fear of a «veritable tsunami of complex and aggressive blame games» resulting from Covid-19 grossly underplays the importance of the various accountability mechanisms. As well as where necessary apportioning blame, the investigations which have followed offer different forms of constitutional oversight in order to obviate the repetition of previous failures. Finally, the government has declared its commitment to a civil service which places ‘... data at the heart of decision-making, learning explicitly from the approach we have taken in responding to Covid-19 The Government will set a presumption in favour of openness and a requirement to share data across departments and to championing innovation and harness[ing] science, engineering and technology to improve policy and services’⁹⁰. The question now is whether this commitment to openness will be implemented in practice?

⁹⁰ See Declaration on Government Reform, para 9 and 10. <https://www.gov.uk/government/organisations/modernisation-and-reform>.