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The UK's PPE procurement scandal reminds us why we need ways to hold ministers to account

Martin McKee looks at what lessons we can learn from the government's many failures in procuring personal protective equipment during the pandemic

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It is never easy to explain, to someone from elsewhere who is unfamiliar with the constitutional settlement, how politicians are held to account in the UK. There is no written constitution constraining what ministers can do. They can bypass parliament altogether by means of the royal prerogative. The composition of the House of Commons is wildly out of alignment with the share of votes of the political parties represented in it. And the unelected House of Lords includes some members who are there because of something their long dead ancestors did or because they hold positions in the established church.

It is hardly surprising that this so often leads to laws and policies that are unintelligible. As three judges, wrestling with the 2003 Criminal Justice Act, famously declared, "The most inviting course for this court to follow would be for its members, having shaken their heads in despair, to hold up their hands and say: 'the holy grail of rational interpretation is impossible to find.'" Indeed, the UK's legislative process is so dysfunctional that it has generated enough examples to fill a book entitled *The Blunders of Our Governments*.

Yet even in this arcane system there are some fundamental principles, of which perhaps the most important is the rule of law. Ministers cannot simply do what they want because it is expedient. As Prime Minister Boris Johnson discovered, you cannot ask the Queen to do something that is illegal, reminding us of the famous quotation from the late Lord Denning, citing an earlier jurist, "Be ye never so high, the law is above you." Of course, ministers don't like being constrained and they have been working hard to be free of the inconvenience of judicial review. Fortunately, they have so far not managed to do so.

Health secretary Matt Hancock has just been reminded of this principle in a damning judgment in the High Court. Early in the pandemic, the government was faced with a crisis. The amount of personal protective equipment (PPE) available to the NHS and, even more so, social care providers, was inadequate. There was a global scramble to buy up supplies and a real danger that the UK would be left behind.

Public procurement, the spending of government money to purchase goods and services, is subject to strict rules. These are set out in European Union directives. The basic principles are that the process should be transparent and it should deliver value for money. The purchaser should say what they want, in an invitation to tender. Anyone who thinks they can provide what is wanted can make an offer, saying

what they can provide and at what price. These rules do allow considerable flexibility. For example, they recognise that the purchaser may not know exactly what they want and the provider may have some clever ideas that the purchaser has not thought of. Consequently, the legislation allows for a number of alternative processes, such as competitive dialogues and innovation partnerships. It also allows for special procedures in an emergency, with contracts being agreed without prior publication of the call for tenders. But this is not a free rein. Those who are seeking to purchase things must show that they have accepted the most economically advantageous offer, although this does not just mean the cheapest, as it can take into account things like the ability to deliver rapidly. But above all, they must publish details of all contracts within 30 days of them being awarded so that others can scrutinise what has been agreed. And this is what Matt Hancock did not do.

The struggles that patient facing health and social care workers faced when trying to obtain PPE are well known, although seemingly not to the health secretary when he told the BBC that there had been no national shortage. Some of the best accounts are in books by two British doctors, Rachel Clarke and Dominic Pimenta. Indeed, Pimenta stepped away from medicine to create a charity to source PPE for the NHS.

Yet equally shocking were the stories of how the procurement process was operated. In one of the most visible cases, only a fraction of 400 000 gowns ordered from a Turkish t shirt manufacturer arrived. When they did arrive they were late, despite the Royal Air Force being sent to collect them, and they were found to be unusable. Fifty million face masks, purchased through a company specialising in currency trading and offshore property, part of a £252m (€291m; \$348m) contract, were also unusable. A Miami jewellery designer, awarded a £250m contract for PPE, was found to have paid £21m to a consultant to broker the deal. A pest control company with net assets of £19 000 was given a £108m contract for PPE. A highly critical report by the National Audit Office provides more examples.

These vast sums of money were being spent as schools and community groups were using their spare time to make PPE using their 3D printers. Then there have been other concerns, including the use of "VIP lanes" allowing some providers direct access to government, and the role of what has been termed the "chumocracy," whereby those with political connections seemed especially privileged.

The government's defence of its actions is that it was faced with an emergency and, in the circumstances, it was inevitable that problems would arise. What counted was that PPE was obtained. Yet it is clear that a lot of what was procured was unusable. The government also bought far more than was needed, without considering how it would distribute it. As a consequence, the port of Felixstowe, through which a large share of the country's imports pass, was blocked with 11 000 containers of PPE just as it was struggling to implement new Brexit related processes. Meanwhile, companies that did have expertise and capacity were ignored and patient facing health and social care workers were making their own PPE out of bin liners.

So what are the lessons we can learn? Most obviously, this saga has revealed problems with the UK's preparedness and procurement ability. But the lessons go much further.

Firstly, the judicial review was initiated by the Good Law Project, an organisation founded by the barrister Jo Maugham, along with three members of parliament. Maugham could be considered one of the "activist lawyers" that some ministers have criticised in words that some consider undermine the rule of law. Yet, as this example shows, they play a crucial role in holding ministers to account.

Secondly, as noted earlier, the government has been seeking to limit the scope of judicial review. It must not be allowed to succeed.

Finally, the existing rules on public procurement have sufficient flexibility for emergencies. Yet, like many other provisions inherited from the UK's EU membership, the government has expressed a wish to diverge or, as the prime minister put it, "fundamentally change" them. Given the evidence of abuses, and not just in relation to PPE, this is something we should be concerned about.

Competing interests: M McK is a member of Independent SAGE. He has donated to the Good Law Project in a personal capacity. He is co-rapporteur on a EU report on public procurement.

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