



Northern Ireland
Assembly

Research and Information Service Briefing Note

Paper 01/21

23 November 2020

NIAR 360-20

Public Health (Coronavirus Restriction) Regulations: emergency procedures

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This briefing should not be relied on as legal or professional advice (or as a substitute for these) and a suitably qualified professional should be consulted if specific advice or information is required.

Key Points

This briefing note has been prepared following a request from the Committee for Health. It considers the use across the UK of an 'emergency procedure' to make public health regulations which, due to the coronavirus pandemic, place restrictions on a range of activities. It also considers the ability of the relevant legislatures to scrutinise these measures.

The power to make public health regulations rests with different governments in the four parts of the UK. Devolved authorities make regulations for Scotland, Wales and Northern Ireland. The UK Government makes regulations for England.

In each jurisdiction in the UK the regulation making powers contained in the relevant public health primary legislation are the same or similar. In each case, the primary legislation sets out an 'Emergency Procedure' and specifies the matters to which, and circumstances in which, it may be employed.

The emergency procedure (or 'made affirmative' procedure) allows certain regulations, which would otherwise have been subject to the draft affirmative procedure, to be made without a draft of the regulations first having been laid before and approved by the legislature. When making the regulations, however, the relevant authority is required to include a declaration that it is of the opinion that use of the procedure has been necessary by reason of urgency.

The emergency procedure has been used by governments in each jurisdiction and an advantage of the procedure is that it enables ministers to respond quickly in a fast moving environment. A clear disadvantage, however, is the procedure means that regulations can be brought into force prior to any parliamentary scrutiny.

At Westminster, the House of Commons' Public Administration and Constitutional Affairs Committee has concluded that the current system of parliamentary scrutiny in relation to 'lockdown regulations' is not satisfactory. In response to pressure from some MPs, the Minister for Health has stated that he would, wherever possible, consult parliament and would hold votes before regulations come into force.

In Wales, the Speaker of the Senedd, in her capacity as Chair of the Parliament's Business Committee, has engaged with the Chair of the Legislation, Justice & Constitution Committee in regard to 'COVID-19 regulations'. The Chair of the Committee did not agree, however, with the suggestion that approval for some legislation could be on an 'in principle' basis.

Experts who have given evidence to an ongoing House of Lords Constitution Committee inquiry have compared the emergency procedure with the scrutiny provisions contained within the Civil Contingencies Act 2004. This Act provides that emergency regulations must be laid before Parliament as soon as reasonably practicable and lapse at the end of seven days thereafter unless each House of Parliament passes a resolution approving them. In addition, provisions enable Parliament, by resolution of both Houses, to provide that the emergency regulations shall cease to have effect or have effect subject to an amendment.

Experts have also suggested that Ministers could be required to provide a brief statement to the legislature on their reasoning, on each occasion emergency powers are used or a regulation comes into force before the legislature has been able to consider it.

The Oireachtas Special Committee on COVID-19 Response has been critical of the regulation making process and the government's use of powers contained within the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020.

Concerns regarding the use of the emergency procedure in relation to public health and coronavirus related regulations are the latest manifestation of a long standing wider concern regarding the use of secondary legislation and its scrutiny by parliament.

1 Introduction

This briefing note addresses the use by relevant authorities of an emergency procedures when making corona virus related public health regulations, when these are required to be made as a matter of urgency.

Section 2 of the paper provides an outline of the legal framework relating to the use of the 'emergency procedure'.

Section 3 contains a number of case studies to illustrate use of procedure and the scrutiny undertaken prior to or after the laying/making of the legislation.

Section of the paper, 4, addresses concerns over the use of the emergency procedure.

The paper concludes with some brief comments regarding the long standing concern over the use by governments of secondary legislation which, as its critics argue, involves 'a diffusion of law-making authority' away from parliamentarians to ministers and executive bodies.

2 Public Health Restriction Regulations – parliamentary control.

The power to make public health regulations rests with different governments in the four parts of the UK. Devolved authorities make regulations for Scotland, Wales and Northern Ireland. The UK Government makes regulations for England. Regarding coronavirus related public health restriction regulations:

- In England and Wales, powers have (mostly) been exercised under [Part 2A of the Public Health \(Control of Disease\) Act 1984](#) (as amended).
- In Scotland, powers have (mostly) been exercised under [Schedule 19 of the Coronavirus Act 2020](#).
- In Northern Ireland, powers have (mostly) been exercised under [Schedule 18 of the Coronavirus Act 2020](#),¹ which amends the [Public Health Act \(Northern Ireland\) 1967](#).²

The parliamentary procedure to which any regulation is subject is set out in the parent legislation and the different types of Assembly procedure are:

- [Negative Resolution Procedure](#)
- [Affirmative Resolution Procedure](#)
- [Draft Affirmative Resolution Procedure](#)
- [Confirmatory Resolution Procedure](#)

¹ The Assembly passed the Legislative Consent Motion for the Act on 24th March, ahead of it receiving Royal Assent on 25th March.

² House of Commons Library (06 October, 2020) *Coronavirus: Parliamentary scrutiny and lockdown regulations* - see commonslibrary.parliament.uk/coronavirus-parliamentary-scrutiny-and-lockdown-regulations/, retrieved on 23 November 2020

Each piece of primary public health legislation listed above provides for the use of an 'Emergency Procedure' (or 'made affirmative' procedure) which allows certain regulations, which would otherwise have been subject to the draft affirmative procedure, to be made without a draft of the regulations first having been laid before and approved by the legislature. When making the regulations, however, the relevant authority is required to include a declaration that it is of the opinion that use of the procedure has been necessary by reason of urgency.³

The Assembly's Examiner of Statutory Rules provides the following explanation in relation to the emergency procedure used in relation to some coronavirus regulations:

Section 25Q of the Public Health Act (Northern Ireland) 1967 sets out the Assembly procedure to be used in defined circumstances when using some of these powers. This is called the 'emergency procedure'.

The emergency procedure allows certain regulations, which would otherwise have been subject to the draft affirmative procedure, to be made without a draft of the regulations first having been laid before the Assembly and approved by the Assembly. It may be used if the regulations contain a declaration that the Department is of the opinion that, by reason of urgency, it is necessary to make the regulations without a draft first being laid and approved.

It is a confirmatory procedure. Regulations made by the emergency procedure must be laid before the Assembly. The regulations made by the emergency procedure will cease to have effect at the end of the period of 28 days beginning with the day on which they are made unless, during that 28 day period, the regulations are approved by a resolution of the Assembly. If the Assembly, during the 28 day period, decides to reject the regulations, the regulations cease to have effect at the end of that day instead.⁴

The same or similar emergency procedure is contained in the public health primary legislation listed above under which powers have (mostly) been used to implement lockdowns, or other lesser restrictions on gatherings, movement and trading.⁵ The following section of this paper provides a case study example of the use of the emergency procedure for in England, Scotland, Wales and Northern Ireland.

³ See Article 45Q of the Public Health (Control of Disease) Act 1984, which applies in England & Wales; section 25Q of the Public Health Act (Northern Ireland) 1967, as amended by Schedule 18 of the Coronavirus Act 2020; and article 6 of schedule 19 of the Coronavirus Act 2020, which applies in Scotland.

⁴ <http://www.niassembly.gov.uk/assembly-business/covid-19-statutory-rules/faq/#Procedures>

⁵ House of Commons Library, *Lockdown laws* (2020) p3-4

3 Use of the ‘emergency procedure’

This section of the paper provides four cases studies which describe the use of the emergency procedure in England, Wales, Scotland and Northern Ireland.

Northern Ireland: 16 October four-week lockdown

Public health restrictions relating to COVID-19 were first introduced in Northern Ireland by the Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020. These were made and came into effect on 28 March, three days after the Coronavirus Act received Royal Assent.

On 23 July, these regulations were revoked and replaced by The Health Protection (Coronavirus, Restrictions) (No. 2) Regulations (Northern Ireland) 2020. At the time of writing, these regulations had been amended 15 times.

Table 1 below is a brief timeline of events relating to the making and approval of the most recent major restrictions: the Health Protection (Coronavirus, Restrictions) (No. 2) (Amendment No. 9) Regulations (Northern Ireland) 2020, which implemented four-week lockdown measures in Northern Ireland from 16th October.

Table 1: the Health Protection (Coronavirus, Restrictions) (No. 2) (Amendment No. 9) Regulations (Northern Ireland) 2020

Date	Event
14 Oct	First Minister Arlene Foster made a Ministerial Statement to the Assembly on the proposed regulations implementing the lockdown measures. There is no legislative requirement for such a Statement, and there was no opportunity for the Assembly to approve (or reject) a motion in relation to this Statement. ⁶
16 Oct	Regulations were made by the Department for Health and immediately came into force. ⁷
19 Oct	Regulations were laid before the Assembly. ⁸
04 Nov	The Assembly Examiner of Statutory Rules considered the regulations and reports to the Assembly. ⁹
05 Nov	The Health Committee considered the regulations and recommended that the Assembly approve these. ¹⁰
09 Nov	Following an extended sitting, the Assembly approved the regulations (along with three other COVID regulations including the temporary Derry & Strabane restrictions and other, more minor amendments). ¹¹

⁶ Northern Ireland Assembly, *Official Report 14 October (2020)*

⁷ *The Health Protection (Coronavirus, Restrictions) (No. 2) (Amendment No. 9) Regulations (Northern Ireland) 2020*

⁸ As cited immediately above

⁹ See <http://www.niassembly.gov.uk/globalassets/documents/legislation/statutory-rules/2017---2022/twenty-sixth-report-of-the-examiner-of-statutory-rules-2019---2020.pdf>, retrieved on 20th November 2020

¹⁰ Northern Ireland Assembly, *Committee for Health: Draft Minutes of Proceedings, 5 November (2020)* p4

¹¹ Northern Ireland Assembly, *Official Report 9 November (2020)*

England: November lockdown

Table 2 below provides a brief timeline of events relating to the making and approval of the Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations 2020, which implemented the November lockdown in England:

Table 2: the Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations 2020

Date	Event
03 Nov	At 1.17pm, a motion was passed in the House of Lords enabling the regulations to be passed by the House, in the absence of a report from the Joint Committee on Statutory Instruments. ¹²
	The regulations were made at 2.45pm, and laid before Parliament at 4.10pm. ¹³
04 Nov	Prime Minister Boris Johnson moved the motion for the regulations to be approved in the House of Commons at 1.31pm. After approximately two and a half hours debate, the regulations were approved by the House of Commons. ¹⁴
	Lord James Bethell moved the motion for the regulations to be approved in the House of Lords at 5.02pm. After approximately three and a half hours debate, and a vote on one amendment which fell, the House of Lords approved the regulations. ¹⁵
05 Nov	The Regulations came into force. ¹⁶
17 Nov	The House of Lords Secondary Legislation Scrutiny Committee considered the regulations. They formally drew the attention of the House to the regulations on the basis of their political, legal or policy importance, particularly the fact that ‘A new tiered system will therefore have to be put in place. It is essential that the Government provide an analysis of the performance of the previous three-tier system and a clear, evidence-based explanation for any differences between the previous system and the new one to be put in place post-lockdown.’ ¹⁷

It is perhaps worth noting the background to the debate referred to in Table 2 above. In September 2020, several MPs (including former Speaker John Bercow, Sir Graham Brady – the Chairman of the Conservative backbench 1922 Committee – and shadow justice secretary David Lammy) expressed a desire for increased parliamentary scrutiny of COVID-19 regulations.¹⁸ Mr. Brady then proposed an amendment to a

¹² HL Deb 03 November 2020 vol. 807 c637

¹³ *The Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations 2020*

¹⁴ HC Deb 04 November 2020 vol. 683 c331 & 384

¹⁵ HL Deb 04 November 2020 vol. 807 c740 & 795

¹⁶ *The Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations 2020*

¹⁷ House of Lords, *Secondary Legislation Scrutiny Committee: Thirty Fourth Report of Session 2019-21* (2020) p10

¹⁸ BBC, *Coronavirus: Support grows for rebel MPs over law* (2020), retrieved on 18 November 2020 <https://www.bbc.co.uk/news/uk-54315320>

Government motion extending temporary provisions of the Coronavirus Act, aiming to ensure that:

Ministers ensure as far as is reasonably practicable that in the exercise of their powers to tackle the pandemic [. . .] Parliament has an opportunity to debate and to vote upon any secondary legislation with effect in the whole of England or the whole United Kingdom before it comes into effect.¹⁹

In response, on 30 September, the Minister of Health Matt Hancock stated the following in the House of Commons:

Today, I can confirm to the House that for significant national measures with effect in the whole of England or UK-wide, we will consult Parliament; wherever possible, we will hold votes before such regulations come into force. But of course, responding to the virus means that the Government must act with speed when required, and we cannot hold up urgent regulations that are needed to control the virus and save lives. I am sure that no Member of this House would want to limit the Government's ability to take emergency action in the national interest, as we did in March.²⁰

Scotland: Introduction of five-tier system of restrictions

Table 3 below provides a brief timeline of events relating to the passage and approval of The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020, which implemented the five-tier system of local restrictions:

Table 3: the Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020

Date	Event
23 Oct	The Scottish Government published its COVID-19 Strategic Framework. This specified five levels of restrictions for localities within Scotland, ranging from Level 0 (relatively few restrictions) to Level 4 (closer to a full lockdown). ²¹
27 Oct	First Minister Nicola Sturgeon introduced a motion for debate on the Framework to the Scottish Parliament. After just over three hours' debate, the motion was passed following amendment. The motion is very long, but opens as follows: 'the Parliament notes the publication of COVID-19: Scotland's Strategic Framework, which sets out the intended approach to managing the suppression of COVID-19 across Scotland in the coming months.' ²²

¹⁹ House of Commons, *Order Paper for Monday 28 September (2020)*

²⁰ HC Deb 30 September 2020 vol. 681 c389

²¹ See <https://www.gov.scot/publications/covid-19-scotlands-strategic-framework/pages/2/>, retrieved on 18 November 2020

²² SP OR 27 October 2020 c115

30 Oct	The regulations were made at 12.40pm, and laid at the Scottish Parliament at 2.45pm.
02 Nov	The regulations came into force at 6am. ²³
04 Nov	The Scottish Parliament COVID-19 Committee received evidence on the regulations, and the Government's approach more generally, from Nicola Sturgeon and the Scottish Chief Medical Officer. ²⁴ The COVID-19 Committee held its first meeting on 24 th April, and works to 'consider and report on the Scottish Government's response to COVID-19 including the operation of powers under the Coronavirus (Scotland) Act, the Coronavirus Act and any other legislation in relation to the response to COVID-19 and any secondary legislation arising from the Coronavirus (Scotland) Act and any other legislation in relation to the response to COVID-19.' ²⁵
10 Nov	The Delegated Powers and Law Reform Committee (which reviews all Scottish SIs for legislative competence and quality) agreed to 'draw the attention of Parliament' to the regulations on the basis of drafting errors, which the Scottish Government have 'undertaken to legislate in early course to correct'. ²⁶
18 Nov	The COVID-19 Committee recommended approval of the Regulations to the Parliament. It appears likely that the Parliament will have the opportunity to consider and approve the regulations at some point of the week commencing 23 rd November – over three weeks after the regulations came into force. (The Scottish Government will then continue to review the Local Levels allocated to local authorities every Tuesday; if a change to regulations is required, the Committee will consider the relevant regulation at a future meeting.)

Whilst the Scottish Parliament will not have the opportunity to approve the regulations until significantly after they came into force, it did have the opportunity to approve the Government's approach in principle, before regulations were made.

The Scottish Parliament thus had the opportunity to consider and approve the proposed five-tier approach – in principle – in advance of any regulations.

²³ *The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020*

²⁴ SP COVID-19 Committee Minutes 20th Meeting, 2020 – Wednesday 4 November (2020) p1

²⁵ See <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/114997.aspx>, retrieved on 20 November 2020

²⁶ SP Delegated Powers & Law Reform Committee Official Report: Tuesday 10 November (2020) p3-4

Wales: “Fire break” lockdown, 23rd October

Table 4 below is a brief timeline of events relating to the passage and approval of the Health Protection (Coronavirus Restrictions) (No. 3) (Wales) Regulations 2020, which introduced a short “fire break” lockdown across Wales to help regain control of the spread of COVID-19:

Table 4: the Health Protection (Coronavirus Restrictions) (No. 3) (Wales) Regulations 2020

Date	Event
19 Oct	The Welsh Government published a press release announcing that a ‘short, sharp’ lockdown would be introduced across Wales at the end of the week, and stating that ‘the fortnight-long action is needed to save lives and prevent the NHS from being overwhelmed.’ ²⁷
20 Oct	The Welsh Parliament debated a motion on the lockdown for just over one and a half hours, before approving it: <i>‘To propose that the Senedd</i> <i>1. Recognises the seriousness of the position created by growing numbers of cases and of Covid-19 in Wales and the increasing number of people in hospitals and ICUs as a result;</i> <i>2. Agrees that a short ‘fire break’ period as proposed by SAGE and the WG Technical Advisory Group should be introduced to bring down R, reduce chains of transmission, minimise clusters of infection in the community and to further strengthen the Test Trace Protect system [. . .]’²⁸</i>
21 Oct	The regulations were made.
22 Oct	The regulations were laid at the Welsh Parliament.
23 Oct	The regulations came into force.
02 Nov	The Legislation, Justice and Constitution Committee agreed to report to the Parliament on the regulations, including the following: <i>‘Whilst the Committee acknowledges these Regulations have been made in response to a public health emergency the Committee note the widespread reporting in the media of dissatisfaction at the short notice given by the Government in relation to the introduction of these Regulations.’²⁹</i>
03 Nov	The Parliament passed the regulations after approximately half an hour of debate.

In October, the Speaker of the Senedd, in her capacity as Chair of the Parliament’s Business Committee, wrote to the Chair of the Legislation, Justice & Constitution Committee in regard to COVID-19 regulations. The letter advised that the Business Committee had considered the appropriate balance between sufficient time for committee scrutiny and ensuring the Parliament could debate regulations in a timely manner, and was content that ‘the Welsh Government’s more recent pattern of

²⁷ Welsh Government, *National coronavirus firebreak to be introduced in Wales on Friday* (2020), retrieved on 18 November 2020 <https://gov.wales/national-coronavirus-fire-break-to-be-introduced-in-wales-on-friday>

²⁸ Welsh Parliament, *Votes and Proceedings – Plenary, Tuesday 20 October* (2020) p9

²⁹ Welsh Parliament, *SL(5)641 – The Health Protection (Coronavirus Restrictions) (No. 3) (Wales) Regulations 2020*, p4

scheduling debates within two weeks of Regulations having been laid, combined with the ability of the Legislation, Justice and Constitution Committee to consider and report on those Regulations within that timescale, struck a satisfactory balance'.³⁰

The Business Committee had, however, also considered an alternative approach to scrutiny. In this approach where the general purpose of a set of regulations had previously been considered and agreed by Parliament, the Business Committee suggested that one option could be for the 'Welsh Government to flag new Regulations where the underlying principle had already been scrutinised, to enable a decision to be taken by the Business Committee about the level of further scrutiny which might be required before the debate'³¹, and asked the LCJ Committee for its views on such an approach.

The LCJ Committee Chair advised that the committee did not feel this would be appropriate. The committee did not agree that approval for any legislation should be on an 'in principle' basis and did not see itself as having a role in endorsing or rejecting 'any assessment by the Welsh Government that a particular set of regulations were in principle the same as a previous set'.³² The Committee also expressed concern that even if new regulations were similar in their policy objective they would still be subject to report under Standing Orders. The committee stated that its scrutiny of regulations had been timely and that this had in turn allowed the Parliament to vote on them well within the timeframes permitted by the Public Health (Control of Disease) and Coronavirus Acts.³³

The committee considered whether it could meet more or on a different day to quicken scrutiny, but felt this would increase pressure on Members and the Welsh Government, particularly in the context of increasing Brexit-related legislation demands. The Committee therefore encouraged the Government to utilise the 'draft affirmative' procedure when making urgent regulations, and finally stated that 'we do not believe that our scrutiny function should be compromised in any circumstances'.³⁴

³⁰ Welsh Parliament, *Letter from Chair of the Business Committee to Chair of the Legislation, Justice and Constitution Committee – 8 October (2020)* p1

³¹ As cited immediately above

³² Welsh Parliament, *Letter from Chair of the Legislation, Justice and Constitution Committee to the Chair of the Business Committee – 22 October (2020)* p1

³³ As cited immediately above

³⁴ As cited in footnote 32, p3

4 Parliamentary control – concerns and consideration

In addition to the concerns highlighted above, a number of parliamentary committees have addressed the issue of parliamentary control of public health restriction regulations relating to COVID-19.

House of Commons - Public Administration and Constitutional Affairs Committee

In September 2020, the committee published its report entitled 'Parliamentary Scrutiny of the Government's handling of Covid-19'.³⁵ The report stated that:

The current system of Parliamentary scrutiny in relation to lockdown regulations is not satisfactory. The fact that this legislation, which contains stark restrictions on people's civil liberties, is not amendable by Members, made under the urgent procedure and therefore without parliamentary scrutiny or effective oversight, coupled with the extremely quick passing of the Coronavirus Act means the framework Parliamentary scrutiny of the Government's handling of COVID-19 is inadequate. (Paragraph 49)

Parliamentary processes and debates help to confer legitimacy upon policy changes made through emergency legislation, particularly when the legislation is so striking in its curtailment of liberties that would normally be taken for granted. Such debates also provide opportunities for parliamentarians to raise problems that exist in the legislation or guidance, be it on their own initiative or things that have been brought to their attention by constituents or by experts. The Committee recommends that the Government gives higher priority to facilitating parliamentary scrutiny of such legislation in future.

The use of the urgent procedure has not always been justified, particularly when the Government has announced that measures will be introduced some weeks in advance. Examples of this are provided by the regulations mandating the use of face coverings on public transport, which were announced on 4 June, introduced on 15 June but not debated until 6 July. It is unclear why the urgent procedure was necessary when the planned legislation was announced over a week before it was to come into force. It is even more unclear why debate was not possible until over a month after their announcement.

In the event the Government believes it is necessary for the urgent procedure to be used to make affirmative statutory instruments, it behoves it, especially with legislation as important to the national interest as lockdown measures, to schedule debates on those regulations in a much more timely fashion than it has so far in relation to COVID-19.

³⁵ See <https://publications.parliament.uk/pa/cm5801/cmselect/cmpubadm/377/37702.htm>, retrieved on 23 November 2020

House of Lords - Constitution Committee

The UK Government's response to the COVID-19 pandemic is also subject to an ongoing Inquiry by the House of Lords Constitution Committee. The Inquiry is focussed on the constitutional and health, social & economic implications of the Government's response, including:

- The ability of Parliament to hold the Government to account
- Scrutiny of emergency powers
- The operation of the courts³⁶

Questions which the Committee are considering include:

- What can Parliament do to maximise its scrutiny of the emergency regulations and to hold the Government to account effectively during lockdown? [. .]
- What emergency powers has the Government sought during the pandemic and what powers has it used and how? What lessons are there for future uses of emergency powers, their safeguards and the processes for scrutinising them?

This inquiry is ongoing at the time of writing but the committee has held evidence sessions with, amongst others, the Hansard Society and the Institute for Government, as both organisations have been particularly active in addressing the issue of use and scrutiny of emergency powers.

In September 2020, the Hansard Society published a briefing on how Parliament could scrutinise coronavirus regulations more effectively. The briefing set out the pros and cons of the emergency 'made affirmative' procedure and noted the scrutiny protections afforded by the procedures contained within the Civil Contingencies Act year:

The advantages for government of using the emergency 'made affirmative' procedure are clear: the procedure enables ministers to act quickly in response to a fluid public health situation without having to wait for parliamentary scrutiny. Importantly, 'made' SIs can also be laid before Parliament during periods of adjournment (that is, weekends and recesses). SIs laid before both Houses in draft form cannot be laid unless both Houses are sitting.

The clear disadvantage of the 'made affirmative' procedure is that a measure can be brought into force by ministers immediately, but may not be debated by MPs for many days. This is particularly the case if 'made affirmative' SIs are laid before Parliament in the run-up to or during a parliamentary recess. Although such SIs must be approved by both Houses within (usually) 28 days, the clock stops for parliamentary adjournments of over four days. When 'made affirmative' SIs are laid during recess, the scrutiny clock therefore does not start ticking until the day the House returns. [. .]

The briefing went on to consider two possible reforms which might enhance parliamentary scrutiny:

³⁶ See <https://committees.parliament.uk/work/298/constitutional-implications-of-covid19/publications/>, retrieved on 19 November 2020

Require ministers to account for 'urgency' at the despatch box

If ministers wish to use the urgent 'made affirmative' procedure in future, then MPs should demand that they come to the despatch box on the first sitting day after the SI is made and explain to the House the reasons for urgency [. . .] it would force ministers to make a hard-headed assessment of whether the SI they are making really does need to be brought into effect so quickly, or whether a few extra days to facilitate scrutiny would be advisable. [. . .]

Require ministers to adopt the scrutiny timetable set out for SIs subject to the urgent procedure in the Civil Contingencies Act 2004

MPs could also seek further procedural comfort by demanding that ministers voluntarily honour the spirit of the urgent provisions in the Civil Contingencies Act 2004 [author's note: whereby approval is required within 7 days of the making of a regulation, instead of 28] Ministers would not be statutorily bound to do so, but if they demonstrated sufficient goodwill it would represent a pragmatic solution to the debate dilemma. Ministers would be required to schedule a debate and approval motion on a 'made affirmative' SI within seven days (rather than 28); and if the House failed to agree the approval motion then the provisions would lapse.³⁷

The Institute for Government, a London-based think tank working for more effective government³⁸, published a report on Parliament's role in the coronavirus crisis in April 2020. Whilst acknowledging that government has to 'make decisions fast' in the context of the pandemic³⁹, the report also argued that parliamentary scrutiny was important in ensuring the effectiveness and legitimacy of the government's response. The report contained several recommendations to this end:

[. . .] The government should make statements to parliament explaining the basis of any decisions taken in the mandatory 'reviews' of the lockdown, and should make provision for regular parliamentary renewal of the regulations. If further regulations are required, the government should seek parliament's approval for these prospectively, rather than using the emergency procedure and seeking parliament's approval retrospectively.

The government should ensure measures taken under the Coronavirus Act 2020 are subject to scrutiny and safeguards equivalent to those provided for in the Civil Contingencies Act 2004.

If the government needs to take further powers to respond to the crisis, it should ensure those powers are subject to scrutiny and safeguards equivalent to those provided for in the Civil Contingencies Act 2004.⁴⁰

³⁷ Ruth Fox, *Building on the 'Brady amendment': how can Parliament scrutinise Coronavirus regulations more effectively?* (2020)

³⁸ See <https://www.instituteforgovernment.org.uk/about-us>, retrieved on 19 November 2020

³⁹ Raphael Hogarth, *Parliament's role in the coronavirus crisis: Ensuring the government's response is effective, legitimate and lawful* (2020) p1

⁴⁰ As cited immediately above, p2

Oireachtas – Special Committee on COVID-19 Response

In October 2020, the Oireachtas Special Committee on COVID-19 Response published its 'Final Report'.⁴¹ The report is wide-ranging and includes reflections on the Irish Government's response in test & trace, the economy, education, travel & transport and care homes. In addition to this, the legislative framework utilised by the Government in response to the pandemic is considered.

Regarding the use of the regulation making powers contained within The Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020 the committee report states, amongst other things, that:

Covid-19 has placed enormous and unprecedented constraints on society especially in the areas of travel and on trade. Emergency legislation was enacted by the Oireachtas and this enabled the Government, and the Minister for Health in particular, to make regulations that did not require approval by the Oireachtas. In practice, neither the Oireachtas nor this Committee had an opportunity to consider these regulations. Regulations were not published adequately and in some [cases] after they purported to come into effect which breached one of the basic tenets of the rule of law... the Committee will ask that all Covid-19 related legislation has a short sun-set clause and, where legislation is being renewed, that it require the express approval of the Oireachtas to do so. Every opportunity must be given to the Oireachtas to consider measures prior to their enforcement.⁴²

⁴¹ Houses of the Oireachtas, *Final Report: Special Committee on Covid-19 Response* (2020)

⁴² As cited immediately above, p20

5. Concluding commentary

Concern over the use by governments of secondary legislation is long-standing.⁴³ Critics say that it involves ‘a diffusion of law-making authority’ away from parliamentarians to ministers and executive bodies. This shift, some argue, undermines the constitutional values of representative democracy and creates the potential for abuses of power.⁴⁴ Three factors appear to have contributed to a relatively recent renewed interest in the need to develop more efficient and effective scrutiny mechanisms of its use:

- Firstly, the growing volume of delegated legislation due to the increasing inclusion within primary legislation of delegated law-making powers.⁴⁵
- Secondly, the growing use of broad delegated powers and skeleton bills that leave considerable discretion to ministers.
- Thirdly, delegated legislation has featured in some high profile court cases at both the UK and NI level.

The use of the emergency procedure to pass public health restriction regulations has added a fourth factor to this list and, as the Bingham Centre for the Rule of Law has observed: there is no doubting there are some short-term benefits for Government in relegating Parliament to a subordinate role in authorising regulations weeks after they are made. But it is a habit which is becoming addictive and one which is increasingly parting company with the proper law-making processes required by the Rule of Law.⁴⁶

⁴³ For example, in an article published in 1944 it was observed that “John Citizen may not know it but he is confronting a problem which has for a long time past engaged the attention of many wise learned men, and bids fair to become an active issue of practical politics – the problem of Ministerial powers by delegated legislation and of judicial or quasi-judicial decision”. [Delegated legislation](#), *The Round Table*, 34:135, 204-210. Key texts date back almost a century to C.T. Carr, *Delegated Legislation: Three Lectures* (Cambridge University Press, 1921); G. Hewart, *The New Despotism* (Ernest Benn, 1929); R. Fox and J. Blackwell, *Devil is in the Detail: Parliament and Delegated Legislation* (Hansard Society, 2014); E.C. Page, *Governing by Numbers: Delegated Legislation and Everyday Policy Making* (Hart, 2001); A. Tucker, ‘Parliamentary Scrutiny of Delegated Legislation’ in A. Horne and G. Drewry (eds), *Parliament and the Law* (Hart, 2018).

⁴⁴ Reid, L. (2010) “Oversight of Regulations by Parliamentarians” *Canadian Parliamentary Review*. Vol.33 Iss. 7.

⁴⁵ Volume encompasses not just the number of SIs but also their length. Regarding the latter, the House of Lords Secondary Legislation Scrutiny Committee has expressed concern about the length of some SIs, including the draft Product Safety and Metrology etc. (Amendment etc.) (EU Exit) Regulations 2019, which runs to 619 pages. House of Lords, Secondary Legislation Scrutiny Committee (Sub-Committee B), Seventeenth Report of Session 2017/19, 21 February 2019, [Source IfG Monitoring Report]

⁴⁶ Bingham Centre for the Rule of Law (Sept 2020) *Parliamentary Scrutiny of Coronavirus Lockdown Regulations: A Rule of Law Analysis* by Dr. Ronan Cormacain