



Independent Commission on UK Public Health Emergency Powers

Call for Evidence – February 2023

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Executive summary

This Call for Evidence has been issued by the [Independent Commission on UK Public Health Emergency Powers](#), which is chaired by Sir Jack Beatson and supported by the Bingham Centre for the Rule of Law.

The Independent Commission is providing a legal and constitutional analysis of emergency public health laws in the UK; parliamentary oversight of emergency public health powers; and the ways in which emergency laws and public health guidance were made, scrutinised, utilised and disseminated during the Covid-19 pandemic.

The Commission's work is forward-facing: the Commission is learning from the Covid-19 pandemic in order to make recommendations for the future. It will make recommendations for changes in law, policy, practice and procedure, and plans to publish its findings in a report in the autumn of 2023. The Commission's overarching strategic purpose is to make recommendations that represent best practice both from a Rule of Law perspective and in enabling a swift legislative response so as to achieve optimum public health outcomes. The Commission aims to assist the UK and Scottish Covid-19 Inquiries, and is in contact with both Inquiry teams.

The Commission is now seeking evidence to assist with its analysis. This Call for Evidence contains 27 questions split over nine topics. You are welcome to focus on the questions and topics which are of most interest to you, and you are not expected to answer every question. The Commission's focus is UK-wide and it is seeking evidence on the emergency powers regime in all four nations.

Please send your responses by 20th March 2023. This will enable the Commission to review the written evidence it receives in advance of oral evidence sessions that it intends to hold on 28th April and 26th May 2023.

You can submit your responses by email or post.

Email: ep.commission@binghamcentre.biicl.org

Post: The Independent Commission on UK Public Health Emergency Powers, Bingham Centre for the Rule of Law, British Institute of International and Comparative Law, Charles Clore House, 17 Russell Square, London WC1B 5JP

Summary list of topics and questions

We have set out below a list of the topics and questions covered in this consultation, with page references to a more detailed discussion of each topic. These more detailed discussions also contain summaries of existing recommendations from relevant

parliamentary committees, as the Commission intends for its work to build upon existing research and policy outputs.

Topic 1: Existing legislative options during a public health emergency (pages 9-14)

1. The Commission's starting point is that any primary legislation designed to address public health emergencies must contain provision for urgent law making. Do you agree with this position? If not, why?
2. To what extent does existing primary legislation available for use in a future public health emergency allow for urgent law-making while:
 - a. promoting adequate levels of accountability, transparency and appropriate parliamentary control of executive action in the context of an emergency situation;
 - b. complying with the UK's international legal obligations, including those relating to human rights; and
 - c. otherwise reflecting Rule of Law values?
3. What, if any, changes should be made to the existing legislative framework for public health emergencies to facilitate urgent law-making while also satisfying (a), (b) and (c) above?

Topic 2: Legislation enacted during the Covid-19 pandemic (pages 14-18)

4. During the Covid-19 pandemic, bespoke primary legislation was made by the UK and Scottish Parliaments. How far did these pieces of legislation allow for urgent law-making while also:
 - a. promoting adequate levels of accountability, transparency and appropriate parliamentary control of executive action in the context of an emergency situation;
 - b. complying with the UK's international legal obligations, including those relating to human rights; and
 - c. otherwise reflecting Rule of Law values?
5. What measures should be taken to ensure that primary legislation made during a future public health emergency allows for urgent law-making while also satisfying (a) (b) and (c) above?

6. How far do you consider that secondary legislation made in response to the Covid-19 pandemic facilitated urgent law-making while:
 - a. promoting adequate levels of accountability, transparency and appropriate parliamentary control of executive action in the context of an emergency situation;
 - b. complying with the UK's international legal obligations, including those relating to human rights; and
 - c. otherwise reflecting Rule of Law values?
7. What measures should be taken to ensure that secondary legislation made during a future public health emergency facilitates urgent law-making while also satisfying (a), (b) and (c) above?
8. Were the concerns and interests of different groups, in particular marginalised and disadvantaged groups, properly taken into account in the formulation and review of emergency powers? If not, how could this be improved in future public health emergencies?

Topic 3: The creation of offences and enforcement powers (pages 18-20)

9. Did the creation of new offences and the legal framework for enforcing these offences during the Covid-19 pandemic reflect Rule of Law values? If not, how could this be improved in future public health emergencies?
10. Do additional safeguards need to be put in place to ensure that the creation of new offences and the legal framework for enforcing these offences are compliant with human rights law?
11. Is the use of fixed penalty notices and/or the Single Justice Procedure an appropriate and proportionate way of enforcing emergency public health restrictions? If not, how should emergency public health powers be enforced in the future?

Topic 4: Divergences throughout the UK (pages 20-22)

12. What were the key divergences in the legislative responses to the coronavirus pandemic in England, Wales, Scotland and Northern Ireland? What caused these divergences?
13. Did such divergences:

- a. demonstrate best practice that could be instructive to the work of the Commission; or
- b. impact upon the Rule of Law in ways that could be better managed in future public health emergencies?

Topic 5: Parliamentary scrutiny processes (pages 22-25)

14. Did existing parliamentary scrutiny processes facilitate urgent law-making while enabling appropriate scrutiny of legislation made during the Covid-19 pandemic? If not, why?
15. Could parliamentary scrutiny processes be improved to facilitate urgent law-making while enabling appropriate scrutiny of legislation in future public health emergencies?
16. Do additional measures need to be taken to ensure that the UK and Scottish Parliaments, Welsh Senedd and/or Northern Ireland Assembly have appropriate oversight of the use of urgent procedures to enact secondary legislation in public health emergencies?
17. Were the UK and Scottish Parliaments, Welsh Senedd and/or Northern Ireland Assembly provided with sufficient information and evidence to properly scrutinise Government use of emergency powers during the Covid-19 pandemic? If not, how could this be improved in future public health emergencies?
18. How far did the four parliaments in the UK work together during Covid-19? Are there improvements that could be made in future public health emergencies?

Topic 6: The adaptation of parliamentary procedures (pages 26-28)

19. How successful was the adaptation of parliamentary procedures in order to manage the meeting of the UK and Scottish Parliaments, Welsh Senedd and/or Northern Ireland Assembly throughout the Covid-19 pandemic and facilitate parliamentary oversight of executive action?
20. Could any improvements be made in future public health emergencies?

Topic 7: The use of guidance vs. law (pages 28-29)

21. When it is constitutionally appropriate to use guidance rather than law to respond to public health emergencies?
22. Was the right balance struck during the Covid-19 pandemic between the use of law and guidance to impose non-pharmaceutical interventions? If not, what could be improved in future public health emergencies?
23. How and when was public health guidance incorporated into law during the Covid-19 pandemic? Were any Rule of Law issues caused by this incorporation and, if so, how could these be addressed in future public health emergencies?

Topic 8: Legal clarity (pages 29-32)

24. Were the emergency public health laws governing the Covid-19 pandemic sufficiently clear and accessible? If not, how could this be improved in future public health emergencies?
25. How far did the use of Government guidance affect public understanding of restrictions imposed during the Covid-19 pandemic? Could improvements be made in future public health emergencies?
26. Are there any other matters that affected the clarity and accessibility of coronavirus legislation and guidance? Could improvements be made in future public health emergencies?

Topic 9: International comparisons (page 32)

27. Are there any examples of best practice from other jurisdictions that could be instructive for the work of the Commission?

About the Independent Commission

The [Independent Commission on UK Public Health Emergency Powers](#) is chaired by The Rt. Hon. Sir Jack Beatson FBA. It is reviewing the UK's public health legislative framework and institutional arrangements, alongside Government decision-making during the Covid-19 pandemic, to consider how far current legal frameworks and parliamentary procedures protect the Rule of Law and human rights, and promote accountability, transparency and parliamentary control of executive action. The Commission is exploring these issues in the context of the need to secure timely and effective public health outcomes. It will make recommendations for changes in law, policy, practice and procedure, and plans to publish its findings in a report in the autumn of 2023.

The aim is that the Independent Commission's findings and recommendations will help to inform planning for future public health emergencies. More immediately, the Independent Commission's final report will be published in order to assist the UK and Scottish Covid-19 Public Inquiries. The Independent Commission will provide a legal and constitutional analysis of emergency public health laws in the UK, parliamentary oversight of emergency public health powers, and the ways in which emergency laws and public health guidance were made, scrutinised, utilised and disseminated during the Covid-19 pandemic. In this way, the Independent Commission will meet a need [identified](#) by the House of Lords Select Committee on the Constitution for "a review of the use of emergency powers by the [UK] Government, and the scrutiny of those powers by Parliament, [to] take place in advance of the public inquiry" and "be completed in time to inform the public inquiry and planning for any future emergencies". The Commission intends to build upon work already conducted by parliamentary committees, policy institutes and academic researchers.

The [12 Commissioners](#) are leading policy experts, practitioners, parliamentarians and academics working in the field. The Commissioners are working in smaller groups to focus on key issues, including the legislative framework, parliamentary oversight of executive action, and international comparisons.

The Commission's Terms of Reference

The Commission's [Terms of Reference](#) set out its aims and scope as follows.

The Commission will:

- Review the legislative powers available for use in a public health emergency, and associated procedural safeguards;
- Consider how emergency legislation was made, used, disseminated and enforced during the Covid-19 pandemic;
- Assess how far current legal frameworks and parliamentary procedures protect the Rule of Law and human rights, and promote accountability, transparency and parliamentary control of executive action;
- Explore these issues in the context of securing timely and effective public health outcomes; and
- Make recommendations for changes in law, policy, practice and procedure in time to inform the UK and Scottish Covid-19 Public Inquiries.

The issues examined by the Commission will include:

- The legislative framework that enables the Government to adopt emergency powers during a public health crisis;

- The primary and secondary legislation that was used and created in response to the Covid-19 pandemic, including the clarity and accessibility of that legislation, and the process of parliamentary scrutiny of that legislation;
- The consideration of safeguards to ensure that the formulation, exercise and enforcement of emergency public health powers is consistent with human rights law;
- The interplay between reserved and devolved powers for dealing with public health emergencies;
- How Government decision-making during the pandemic was communicated to Parliament, including the transparency of the evidence and advice relied upon by the Government;
- The extent to which Government messaging distinguished between binding law and non-binding public health advice;
- The extent to which the concerns and interests of different groups, in particular marginalised and disadvantaged groups, were taken into account in the formulation and review of emergency powers; and
- The formulation, review and exercise of emergency public health powers during the pandemic in selected jurisdictions outside the UK.

What type of information is the Commission seeking?

The Commission's focus is UK-wide and it is seeking evidence on the emergency powers regime in all four nations. The Commission's overarching strategic purpose is to make recommendations that represent best practice both from a Rule of Law perspective and in enabling a swift legislative response to a crisis so as to achieve optimum public health outcomes.

The Commission intends for its work to build upon existing research and policy outputs. If possible, we would be grateful if you could indicate in your response how far you agree with the central conclusions and recommendations made in existing research and policy outputs of which you are aware. In order to assist with this, we have outlined some of the key findings from parliamentary committees at the start of each set of questions. **We do not intend for these recommendations to narrow or restrict the scope of our enquiry, or to limit the scope of responses to the consultation.**

The Commission's work is forward-facing: it aims to learn from the Covid-19 pandemic in order to make recommendations for the future.

How does the Commission differ from the UK and Scottish Covid-19 Inquiries?

The Commission is an independent body that operates separately from the UK and Scottish Covid-19 Inquiries. The Independent Commission intends for its work to assist the UK and Scottish Inquiries, and it is in contact with both Inquiry teams with the aim of ensuring where possible that the Commission's work supplements and does not duplicate the work of the inquiries.

How to Respond

You are welcome to focus on the questions and topics which are of most interest to you. You are not expected to answer every question. Where appropriate, we would encourage you to illustrate your thoughts with reference to evidence from your professional experience as well as with reference to research or other relevant data.

In its final report the Commission will acknowledge all the responses it receives, including names and affiliations, and will almost certainly quote from some responses. Responses that are quoted from will be made public. **If you do not wish for your response to be quoted from or made public, or do not wish to be included in the list of names and affiliations, please state this when you submit the response.**

You can submit your responses by email or post.

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Post: The Independent Commission on UK Public Health Emergency Powers, Bingham Centre for the Rule of Law, British Institute of International and Comparative Law, Charles Clore House, 17 Russell Square, London WC1B 5JP

Deadline for Submissions

Please respond by 20th March 2023. This will enable the Commission to review the written evidence in advance of two sets of oral evidence sessions that it intends to hold on 28th April and 26th May 2023.

Detailed Topics and Questions

*As noted above, the Commission intends for its work to build upon existing research and policy outputs. In order to assist with this, we have outlined some of the key relevant findings from parliamentary committees at the start of each set of questions. **Please note that we do not intend for these recommendations to narrow or restrict the scope of our enquiry, or to limit the scope of responses to the consultation.***

Topic 1: Existing legislative options during a public health emergency

Context

The Commission is reviewing the legislative framework that enables the Government to adopt emergency powers during a public health crisis. As part of this exercise, the Commission seeks views on the pre-existing legislative options available for use in a future public health emergency, including whether existing legislation should be amended, supplemented or replaced. For the first five questions, the Commission is particularly interested in receiving comments on the:

- Civil Contingencies Act 2004;
- Public Health (Control of Disease) Act 1984;
- Public Health etc. (Scotland) Act 2008;
- Coronavirus (Recovery and Reform) (Scotland) Act 2022; and
- Public Health Act (Northern Ireland) 1967

However, please feel free to comment on any legislation that you believe to be relevant.

The Civil Contingencies Act 2004 was designed to deliver a single framework for civil protection in the UK. Part 2 of the Act enables regulations to be made in response to emergencies, including for the protection of health. To date, the emergency powers in the Act have never been used.

The Public Health (Control of Disease) Act 1984 consolidated earlier public health legislation. The Act was amended in 2008 to update its provisions in light of the SARS pandemic, and to implement the International Health Regulations 2005. The amended Act enables UK and Welsh ministers to enact emergency public health regulations, and most of the main public health interventions adopted in England and Wales during the Covid-19 pandemic were implemented using powers in the 1984 Act.

At the start of the Covid-19 pandemic, schedules 18 and 19 of the Coronavirus Act 2020 temporarily extended to the Northern Ireland Department of Health and Scottish Ministers almost identical emergency public health powers to those in the Public Health (Control of Disease) Act 1984. The Scottish Parliament recently made permanent equivalent powers by enacting the Coronavirus (Recovery and Reform) (Scotland) Act 2022. This Act imports into the Public Health etc. (Scotland) Act 2008 emergency powers similar to those in the 1984 Act, with some modifications (such as a requirement to issue a public health declaration before emergency regulations can be made).

The Public Health Act (Northern Ireland) 1967 empowers the Northern Ireland Department of Health to make regulations for preventing and controlling certain infectious diseases. Aside from temporary amendments made by the Coronavirus Act 2020, the 1967 Act has not been updated in any significant respect since its enactment. A review of the Act was commissioned by the Department of Health, Social Services and Public Safety in October 2013, which concluded that a new public health bill should be introduced in Northern Ireland to replace the 1967 Act. However, as far as the Commission is aware, this recommendation has not yet been implemented.

Key recommendations made by parliamentary committees

The Public Health (Control of Disease) Act 1984 and the Civil Contingencies Act 2004

The House of Lords Select Committee on the Constitution reviewed the UK Government's decision to use the Public Health (Control of Disease) Act 1984 as the main vehicle for making emergency regulations during the pandemic, rather than the Civil Contingencies Act 2004. The Committee noted that the 2004 Act grants much broader delegated powers to make emergency regulations than those provided for in the 1984 Act, but that the 2004 Act also has superior parliamentary scrutiny safeguards. These safeguards include the requirement to re-make regulations every 30 days and the ability for Parliament to amend regulations.¹ Therefore, the Committee found that Parliament would have been more involved in the process of making coronavirus regulations had the 2004 Act been used. It concluded that the scrutiny safeguards in the 2004 Act show that Parliament can have, and expects to have, a central role in legal changes during periods of national crisis.² Both the Select Committee on the Constitution and the House of Commons Public Administration and Constitutional Affairs Committee recommended that the UK Government consider

¹ Select Committee on the Constitution, 'COVID-19 and the use and scrutiny of emergency powers' (2021-22) HL 15, paragraphs 40-41

² Ibid., paragraph 41

the use of the Civil Contingencies Act as a “stop-gap” in response to emergencies in the future.³

However, the Public Administration and Constitutional Affairs Committee also queried how fit for purpose the Civil Contingencies Act is, given the UK Government’s reticence to use it during the Covid-19 pandemic.⁴ The House of Lord’s Select Committee on the Constitution noted that section 21(5) of the Civil Contingencies Act may have been a significant barrier to its use, because it prevents the use of the Act if equivalent legislative powers are already available to the Government in existing legislation which can be relied on without the risk of serious delay. The Committee recommended that section 21(5) be reconsidered.⁵

The Public Health etc. (Scotland) Act 2008 and the Coronavirus (Recovery and Reform) (Scotland) Act 2022

As part of its scrutiny of the Coronavirus (Recovery and Reform) (Scotland) Act 2022, the Scottish Parliament’s COVID-19 Recovery Committee reviewed the efficacy of the Public Health etc. (Scotland) Act 2008. The Committee cited written evidence which found that the 2008 Act was “based on flawed assumptions about the nature of the potential public health threats Scotland might face, and the kinds of regulatory responses which may be required”.⁶

The Coronavirus (Recovery and Reform) (Scotland) Act 2022 was enacted partly to rectify perceived deficiencies with the 2008 Act, by importing into the 2008 Act emergency powers that are broadly similar to those that apply in England and Wales under the Public Health (Control of Disease) Act 1984. The COVID-19 Recovery Committee noted that the emergency public health provisions in the 2022 Act “will bring Scotland into line with comparative public health legislation in England and Wales and the International Health Regulations 2005”, but the Committee was divided in their overall assessment of the Act. Some members agreed that the new provisions would enable Scottish Ministers to coordinate a national response to future public health threats. Others thought that the Scottish Government had not made a sufficient case for why the powers should be made permanent (having been available to Scottish Ministers temporarily during the Covid-19 pandemic via Schedule 19 of the

³ Public Administration and Constitutional Affairs Committee, ‘Parliamentary Scrutiny of the Government’s handling of Covid-19’ (2019-21) HC 377, paragraph 34; Select Committee on the Constitution, ‘COVID-19 and the use and scrutiny of emergency powers’ (2021-22) HL 15, paragraphs 40-41

⁴ Public Administration and Constitutional Affairs Committee, ‘Parliamentary Scrutiny of the Government’s handling of Covid-19’ (2019-21) HC 377, paragraph 35

⁵ Select Committee on the Constitution, ‘COVID-19 and the use and scrutiny of emergency powers’ (2021-22) HL 15, paragraph 215

⁶ The Scottish Parliament Covid-19 Recovery Committee, ‘Stage 1 Report on the Coronavirus (recovery and Reform) (Scotland) Bill, (2022) SP Paper 161, paragraph 18

Coronavirus Act 2020), and instead thought that “similar powers could be brought forward quickly under primary legislation if required in future”.⁷

The Scottish Parliament’s COVID-19 Recovery Committee and Delegated Powers and Law Reform Committee made a number of specific recommendations when the 2022 Act was passing through the Scottish Parliament, some of which were incorporated into the Act. The 2022 Act was amended to reflect recommendations that:

- Where the Act empowers Scottish Ministers to make regulations using the made affirmative procedure, it should require Scottish Ministers to provide a written statement explaining the need for urgency.⁸
- The Act must require regulations enacted using the made affirmative procedure to be subject to a sunset clause.⁹

However, other recommendations were not incorporated within the Act, including that:

- The Act should set out a non-exhaustive list of factors for Scottish Ministers to consider when determining whether a threat to public health is “serious and imminent” (the existence of a “serious and imminent threat to public health” is one of the thresholds that must be met before emergency regulations can be made which impose particularly severe restrictions).¹⁰
- The Scottish Government should consider alternative approaches to the inclusion of Henry VIII powers, such as removing the provision entirely, or delaying its commencement until a public health emergency arises and giving Parliament a role in scrutinising the decision to commence the powers in those circumstances.¹¹
- The Scottish Government should consider whether more detail could be set out on the face of the Bill to note the types of scenarios when Scottish Ministers may consider that legislation is required to be made urgently.¹²
- The Act should contain assurances that any provisions using the made affirmative procedure will include an assessment of the impact of the instrument on those affected.¹³
- The use of public health protection regulations should be accompanied by a reporting process to Parliament on how relevant provisions have been used.¹⁴

⁷ Ibid., paragraph 31

⁸ Scottish Parliament’s Delegated Powers and Law Reform Committee, ‘Coronavirus (Recovery and Reform) (Scotland) Bill: Stage 1’ (2022) SP Paper 147, paragraph 23

⁹ Ibid., paragraph 23

¹⁰ The Scottish Parliament Covid-19 Recovery Committee, ‘Stage 1 Report on the Coronavirus (recovery and Reform) (Scotland) Bill, (2022) SP Paper 161, paragraph 42

¹¹ Ibid., paragraph 152

¹² Ibid., paragraph 51

¹³ Scottish Parliament’s Delegated Powers and Law Reform Committee, ‘Coronavirus (Recovery and Reform) (Scotland) Bill after Stage 2’ (2022) SP Paper 208, paragraph 10

¹⁴ The Scottish Parliament Covid-19 Recovery Committee, ‘Stage 1 Report on the Coronavirus (recovery and Reform) (Scotland) Bill, (2022) SP Paper 161, paragraph 64

- Scottish Ministers should also be required to notify Parliament of the outcome of the mandatory reviews of public health protection regulations, which must take place every 21 days. This notification should include the options considered by Scottish Ministers and the evidence that underpins any decisions taken.¹⁵

New “off the shelf” legislation?

When considering whether new “off-the-shelf” legislation should be created to respond effectively to future public health emergencies, the Public Administration and Constitutional Affairs Committee advised that the UK Government should introduce a new piece or range of draft emergency legislation to allow for scrutiny of prior emergency planning before an emergency occurs, and to create a flexible framework which looks at parliamentary processes and best practices. The Committee suggested that this framework should be robust enough to cover a range of eventualities with only small add-ons needed to address specific emergencies.¹⁶ The Select Committee on the Constitution has noted that the Civil Contingencies Act 2004 provides a clear model for parliamentary consultation on any future draft legislation prepared on a contingency basis to address a potential emergency.¹⁷

Questions:

1. The Commission’s starting point is that any primary legislation designed to address public health emergencies must contain provision for urgent law making. Do you agree with this position? If not, why?
2. To what extent does existing primary legislation available for use in a future public health emergency allow for urgent law-making while:
 - a. promoting adequate levels of accountability, transparency and appropriate parliamentary control of executive action in the context of an emergency situation;
 - b. complying with the UK’s international legal obligations, including those relating to human rights; and
 - c. otherwise reflecting Rule of Law values?

¹⁵ Ibid., paragraph 65

¹⁶ Public Administration and Constitutional Affairs Committee, ‘Coronavirus Act 2020 Two Years On’ (2021-22) HC 978, paragraph 59

¹⁷ Select Committee on the Constitution, ‘COVID-19 and the use and scrutiny of emergency powers’ (2021-22) HL 15, paragraph 48

3. What, if any, changes should be made to the existing legislative framework for public health emergencies to facilitate urgent law-making while also satisfying (a), (b) and (c) above?

Topic 2: Legislation enacted during the Covid-19 pandemic

Context

The Commission is considering the primary and secondary legislation that was made during the Covid-19 pandemic, in order to make recommendations for law-making during future public health emergencies. The Commission's scope includes how far the concerns and interests of different groups, in particular marginalised and disadvantaged groups, were taken into account in the formulation and review of emergency powers.

In March 2020, the UK Parliament passed the Coronavirus Act 2020 in four sitting days. Among other things, the Act was used to postpone some local elections, implement the "furlough" scheme, and expand NHS capacity. The Scottish Parliament also passed the Coronavirus (Scotland) Act 2020 and Coronavirus (Scotland) (No. 2) Act 2020. The Scottish Acts implemented policy in areas within devolved legislative competence, including adjusting criminal procedure, the law on evictions, and provisions relating to care homes.

Most of the main public health interventions adopted during the Covid-19 pandemic were made using secondary legislation. Regulations were made under a wide variety of Acts of Parliament, but the most frequently used enabling provisions were:

- In England and Wales, Part 2A of the Public Health (Control of Disease) Act 1984;
- In Scotland, Schedule 19 of the Coronavirus Act 2020 and sections 94 and 122 of the Public Health etc. (Scotland) Act 2008;
- In Northern Ireland, Schedule 18 of the Coronavirus Act 2020, which temporarily amended the Public Health Act (Northern Ireland) 1967.

Key recommendations made by parliamentary committees

The Coronavirus Act 2020

The House of Lords Select Committee on the Constitution concluded that the Coronavirus Bill met the criteria it had previously established for fast-tracking

legislation, i.e., that fast-tracking was acceptable “only in exceptional circumstances and with the agreement of the usual channels”.¹⁸

Various Committees reviewed the detail of the Coronavirus Act 2020, either during its passage through Parliament or after enactment. When scrutinising the Coronavirus Bill, the House of Lords Delegated Powers and Regulatory Reform Committee advised that the two-year sunset clause should be reduced to one year without a power to extend, to enable the Government to exercise the powers needed in the immediate future while allowing a further bill to be introduced and subjected to parliamentary scrutiny over a longer timeframe.¹⁹ The Public Administration and Constitutional Affairs Committee recommended that any future use of sunset clauses in relation to emergency legislation should come with a clear explanation about why the Government believes that the length of the sunset being proposed is proportionate to the emergency being addressed.²⁰ The Committee also noted that Parliament was unable to amend individual provisions of the Coronavirus Act, and advised that greater consideration should be given in future to Parliament’s ability to scrutinise and amend emergency provisions while not affecting the overall integrity of the legislation.²¹ The Committee made a general recommendation that primary legislation which needs to be passed very quickly should include safeguards and scrutiny provisions that are equivalent to those in the Civil Contingencies Act 2004, with regular renewal of powers allowing for more detailed Parliamentary scrutiny that, due to expediency, cannot be given during the passing of emergency legislation.²²

The Delegated Powers and Regulatory Reform Committee noted that the Coronavirus Act 2020 conferred powers that were too widely drawn and also not, on the face of each individual clause, explicitly linked to coronavirus. This meant that there was nothing to require a number of powers to be exercised only in connection with the coronavirus outbreak or any other health emergency.²³

In addition, the Select Committee on the Constitution advised that parliamentary oversight of the use of lockdowns in England would have been improved had a general lockdown power been included in the Coronavirus Act 2020, and this might also have enhanced legal clarity and public awareness of the law.²⁴

¹⁸ House of Lords Select Committees on the Constitution, ‘Coronavirus Bill’ (2019-21) HL 44, paragraph 6

¹⁹ Delegated Powers and Regulatory Reform Committee, ‘9th Report of Session 2019–21’ HL 42, paragraphs 4 and 28

²⁰ Public Administration and Constitutional Affairs Committee, ‘Coronavirus Act 2020 Two Years On’ (2021-22) HC 978, paragraph 27-28

²¹ *Ibid.*, paragraph 36

²² Public Administration and Constitutional Affairs Committee, ‘Parliamentary Scrutiny of the Government’s handling of Covid-19’ (2019-21) HC 377 paragraph 34

²³ Delegated Powers and Regulatory Reform Committee, ‘9th Report of Session 2019–21’ (2019-2021) HL 42, paragraphs 8-16

²⁴ Select Committee on the Constitution, ‘COVID-19 and the use and scrutiny of emergency powers’ (2021-22) HL 15, paragraph 55

The Coronavirus (Scotland) Act 2020 and Coronavirus (Scotland) (No. 2) Act 2020

The Scottish Parliament's Covid-19 Committee noted that one of the main checks and balances that was built into emergency coronavirus legislation in Scotland was a two-monthly reporting requirement in the Coronavirus Scotland Acts. The Committee advised that the reporting requirements worked well in supporting parliamentary scrutiny, especially as the Committee prioritised scrutiny of the two-monthly reports during the pandemic by seeking views on what had been reported and taking evidence from Scottish Ministers.²⁵ The Committees' findings on this point can be contrasted with concerns raised in the UK Parliament that the UK Government initially treated similar reporting requirements in the Coronavirus Act 2020 as "a Parliamentary afterthought, something to get through Parliament, rather than a genuine attempt to engage on the merits".²⁶

Secondary Legislation

The Public Administration and Constitutional Affairs Committee raised concerns about the scale of Covid-19 legislation and the inability of parliamentarians to effectively amend it.²⁷ The Joint Committee on Statutory Instruments also critiqued the inclusion of sub-delegated powers in coronavirus legislation in cases where Parliament had not (or not clearly) intended to confer legislative discretion. The Committee advised that powers for subordinate legislation in primary legislation should include express powers of further sub-delegation only where justified by clear need; and those powers should be no broader than is justified in the context, should be subject to clear and express parameters, and should make appropriate provision for safeguards.²⁸ In addition, the Select Committee on the Constitution advised that there should be a presumption in favour of using sunset provisions in all regulations introduced during a national emergency, which should expire after three months unless renewed by a resolution of both Houses.²⁹

In relation to English lockdown regulations, the Joint Committee on Statutory Instruments advised that there were a number of provisions where restrictions had not been cast with sufficient clarity, such the concept of "reasonable excuse" which was used without regulatory or other relevant context to provide guidance to courts and other readers.³⁰ The Joint Committee on Human Rights noted that this lack of clarity raised concerns regarding the Rule of Law and Article 7 of the European

²⁵ The Scottish Parliament COVID-19 Committee, 'Legacy Report' (2021) SP Paper 1010, paragraphs 14 and 19

²⁶ Public Administration and Constitutional Affairs Committee, 'Coronavirus Act 2020 Two Years On' (2021-22) HC978, paragraphs 37-40

²⁷ Public Administration and Constitutional Affairs Committee, 'Parliamentary Scrutiny of the Government's handling of Covid-19' (2019-21) HC377, paragraph 48

²⁸ Joint Committee on Statutory Instruments, 'Rule of Law Themes from Covid-19 Regulations' (2021-2022) HL57 HC600, paragraphs 26-27

²⁹ Select Committee on the Constitution, 'COVID-19 and the use and scrutiny of emergency powers' (2021-22) HL 15

³⁰ Joint Committee on Statutory Instruments, 'Rule of Law Themes from Covid-19 Regulations' (2021-2022) HL57 HC600, paragraphs 30-31

Convention on Human Rights. In addition, the Committee advised that the defence of ‘reasonable excuse’ alone was insufficient to adequately protect the right to protest. It was not obvious how to determine whether any individual protest amounted to a reasonable excuse and too much of the policing of protest was left to police discretion and interpretation of what constitutes a reasonable excuse.³¹

More broadly, the Joint Committee on Human Rights advised that the Government must show clearly and transparently how human rights are being protected during a public health emergency by ensuring that its assessments as to the proportionality and necessity of measures are up-to-date and based on the latest scientific evidence as well as a precautionary approach to minimising the overall risks to life.³² The Welsh Senedd’s Legislation, Justice and Constitution Committee raised similar points, noting that there were inadequacies in the Welsh Government’s reporting of its assessment of the extent to which any interference with human rights caused by subordinate legislation was justified and proportionate in pursuit of the legitimate aim of protecting public health.³³ The Committee advised that the data available was often not of sufficient quality to adequately assess equality impacts, and advised the Welsh Government to take immediate action to improve the quality of recording of ethnicity and disability employment data across health and social care services, and to improve data gathering and publication on coronavirus cases and health outcomes disaggregated by sex, ethnicity, disability and key worker status.³⁴ The Scottish Parliament’s Equalities and Human Rights Committee also noted that impact assessments are crucial to fully understanding the impact of measures taken to mitigate harm.³⁵

Questions:

4. During the Covid-19 pandemic, bespoke primary legislation was made by the UK and Scottish Parliaments. How far did these pieces of legislation allow for urgent law-making while also:
 - a. promoting adequate levels of accountability, transparency and appropriate parliamentary control of executive action in the context of an emergency situation;
 - b. complying with the UK’s international legal obligations, including those relating to human rights; and
 - c. otherwise reflecting Rule of Law values?

³¹ Joint Committee on Human Rights, ‘The Government response to covid-19: freedom of assembly and the right to protest’ (2019-2021) HC1328 HL252, paragraph 68 and 75

³² Joint Committee on Human Rights, ‘The Government’s response to COVID-19: human rights implications’ (2019-21) HC262 HL125, paragraph 13

³³ Welsh Senedd Legislation, Justice and Constitution Committee ‘Fifth Senedd Legacy Report’ (2021), paragraph 13

³⁴ Ibid., ‘Fifth Senedd Legacy Report’ (2021), paragraphs 19-29

³⁵ Scottish Parliament Equalities and Human Rights Committee, ‘Report on the impact of the Covid-19 pandemic on equalities and human rights’ (2021) SP Paper 966, paragraph 10

5. What measures should be taken to ensure that primary legislation made during a future public health emergency allows for urgent law-making while also satisfying (a) (b) and (c) above?
6. How far do you consider that secondary legislation made in response to the Covid-19 pandemic facilitated urgent law-making while:
 - a. promoting adequate levels of accountability, transparency and appropriate parliamentary control of executive action in the context of an emergency situation;
 - b. complying with the UK's international legal obligations, including those relating to human rights; and
 - c. otherwise reflecting Rule of Law values?
7. What measures should be taken to ensure that secondary legislation made during a future public health emergency facilitates urgent law-making while also satisfying (a), (b) and (c) above?
8. Were the concerns and interests of different groups, in particular marginalised and disadvantaged groups, properly taken into account in the formulation and review of emergency powers? If not, how could this be improved in future public health emergencies?

Topic 3: The creation of offences and enforcement powers

Context

The Commission is reviewing the creation of new offences and the enforcement powers granted to public agencies – particularly the police – during the pandemic, including the structuring of police charging powers, and whether additional safeguards should be put in place to help ensure that the role of the police and other enforcement agencies in relation to emergency public health powers is proportionate and compliant with human rights law.

Many of the public health interventions adopted in response to Covid-19 were underpinned by criminal offences designed to limit the spread of the virus, and the enforcement of these offences across the UK largely relied upon the use of fixed penalty notices ('FPNs'). UK Government ministers have explained that use of FPNs was designed to deter people from breaching coronavirus restrictions, while avoiding criminalising a large number of people.

FPNs offer an alternative to criminal prosecution, but in some cases coronavirus offences were prosecuted in court. In England and Wales, statutory instruments were passed enabling coronavirus prosecutions to be dealt with using the Single Justice Procedure. Under this procedure, defendants receive a notice by post containing their charge and giving them the option to plead guilty or ask for a court hearing. If the defendant pleads guilty or does not respond, their case will be decided in private by a single magistrate and a legal advisor on the basis of the prosecution's written evidence.

Key recommendations made by parliamentary committees

The House of Commons Justice Committee recommended that, in all but the most exceptional circumstances, the Ministry of Justice should be consulted on the creation of new criminal offences to ensure they are proportionate and necessary and to consider their impact on the wider justice system.³⁶ The Committee advised that, to facilitate effective scrutiny of new criminal offences in statutory instruments, it would be helpful if the Government would ensure that the accompanying explanatory memorandum contained a specific section detailing any new offences, the reasons behind their creation, and the justification for the penalty applied. The memorandum should also contain a short statement setting out why the offence is considered both proportionate and necessary.³⁷

The Committee also considered the use of FPNs to enforce compliance with lockdown regulations, and advised that, where offences in question are complex, difficult to apply and give rise to significant sanctions, it should ordinarily be the responsibility of a court, rather than an official to determine liability.³⁸ The Joint Committee on Human Rights concurred, and noted that the FPN process seems to disproportionately impact the least well off.³⁹ The Joint Committee on Human Rights also advised that the review processes for FPNs were not clear, consistent or transparent, and the Government should have introduced a way of challenging FPNs by way of administrative review or appeal.⁴⁰ However, the Justice Committee noted that the UK Government was limited in the methods of enforcement that could be used due to its reliance on the Public Health (Control of Diseases) Act 1984 as the framework for creating new offences, and that the Government needs to have a greater range of options at its disposal to introduce public health restrictions swiftly in a proportionate and predictable way.⁴¹

The Justice Committee also reviewed the use of the Single Justice Procedure to prosecute breaches of coronavirus regulations. It found that the UK Government was right to look for ways to reduce pressure on the court system and to avoid overwhelming the magistrates' courts with Covid-19 related cases, but that the Single

³⁶ The Justice Committee, 'Covid-19 and the criminal law' (2021-22) HC71, paragraph 21-22

³⁷ Ibid., paragraph 31

³⁸ The Justice Committee, 'Covid-19 and the criminal law' (2021-22) HC71, paragraph 54

³⁹ Joint Committee on Human Rights, 'The Government response to covid-19: fixed penalty notices' (2019-21) HC1364 HL272, paragraph 92

⁴⁰ Ibid., paragraph 83

⁴¹ The Justice Committee, 'Covid-19 and the criminal law' (2021-22) HC71, paragraph 60

Justice Procedure was problematic in the wider context of public uncertainty over what was prohibited and what was allowed, caused by the fast-changing nature of the Covid-19 regulations. The Committee also noted transparency concerns about the Single Justice Procedure. It advised that the Ministry of Justice should review the transparency of the procedure and consider how the process could be made more open and accessible to the media and the public.⁴²

Finally, the Welsh Senedd's Legislation, Justice and Constitution Committee found that it was difficult to review the enforcement of coronavirus restrictions in Wales because the Welsh Government does not have data on the number of incorrectly issued penalty notices or incorrectly pursued prosecutions. The Committee noted that this was an inherent problem in the existing constitutional settlement, as the Welsh Government, in certain circumstances, may create new offences but has little subsequent control over the largely reserved aspects of enforcement.⁴³

Questions:

9. Did the creation of new offences and the legal framework for enforcing these offences during the Covid-19 pandemic reflect Rule of Law values? If not, how could this be improved in future public health emergencies?
10. Do additional safeguards need to be put in place to ensure that the creation of new offences and the legal framework for enforcing these offences are compliant with human rights law?
11. Is the use of fixed penalty notices and/or the Single Justice Procedure an appropriate and proportionate way of enforcing emergency public health restrictions? If not, how should emergency public health powers be enforced in the future?

Topic 4: Divergences throughout the UK

Context

The Commission is reviewing how and why the administrations and parliaments in England, Wales, Scotland and Northern Ireland diverged in their legislative response to the coronavirus pandemic, in order to consider (i) examples of best practice; and (ii)

⁴² Ibid., paragraphs 89-91

⁴³ Welsh Senedd Legislation, Justice and Constitution Committee 'Fifth Senedd Legacy Report' (2021), paragraph 13

whether such divergences impacted upon the Rule of Law in ways that could be better managed in future public health emergencies.

In the early phase of the Covid-19 pandemic, there was close co-ordination between the different nations in the UK, with near identical legal requirements adopted in all four nations. However, divergences began to appear in the late spring of 2020 with the easing of the first lockdown, and continued over the course of the pandemic.

Key recommendations made by parliamentary committees

The Select Committee on the Constitution noted that legal divergence between the four parts of the UK increased throughout the pandemic, occasionally accidentally, which created practical difficulties for members of the public, particularly those living and working close to internal UK borders, as well as those seeking to travel abroad. The Committee expressed concern that this indicated decreased intergovernmental communication and cooperation.⁴⁴

The House of Commons Scottish Affairs Committee found that the UK Government failed to make clear when its messaging applied only to England, causing unnecessary confusion in the devolved nations. The Committee advised that all Government policy announcements must state clearly to which nation they apply.⁴⁵ The Committee also found that it was unclear whether the advice given by the Scientific Advisory Group for Emergencies (SAGE) and the Scottish Government's Covid-19 Advisory Group to their respective Governments had been the same through-out the pandemic. It advised that a commitment to transparency around scientific advice would provide the public and Parliament with the means necessary to scrutinise decisions around the pandemic.⁴⁶

The Joint Committee on Human Rights noted that a review of prosecutions under the lockdown regulations in England and Wales found that errors usually involved Welsh regulations being applied in England or vice versa.⁴⁷ The Welsh Senedd's 'Senedd Research' also discussed how differences in coronavirus restrictions in England and Wales caused some confusion for police forces, especially as guidance on police enforcement was only initially only issued to police forces in England.⁴⁸

Questions:

⁴⁴ Select Committee on the Constitution, 'COVID-19 and the use and scrutiny of emergency powers' (2021-22) HL 15, paragraph 117

⁴⁵ Scottish Affairs Committee, 'Coronavirus and Scotland: Interim Report on Intergovernmental Working' (2019-21) HC314, paragraphs 41-2

⁴⁶ Ibid., paragraph 84

⁴⁷ Joint Committee on Human Rights, 'The Government's response to COVID-19: human rights implications' (2019-21) HC262 HL125, paragraph 49

⁴⁸ Senedd Research 'Coronavirus: policing' (2020) < <https://research.senedd.wales/research-articles/coronavirus-policing/>>

12. What were the key divergences in the legislative responses to the coronavirus pandemic in England, Wales, Scotland and Northern Ireland? What caused these divergences?

13. Did such divergences:

- a. demonstrate best practice that could be instructive to the work of the Commission; or
- b. impact upon the Rule of Law in ways that could be better managed in future public health emergencies?

Topic 5: Parliamentary scrutiny processes

Context

The Commission is considering how far parliamentary review processes enable the Government to respond quickly to public health emergencies whilst also preserving Parliament's scrutiny role as far as possible. It is also considering how Government decision-making during the pandemic was communicated to Parliament, including the transparency of the evidence and advice relied upon by the Government.

Most of the main public health interventions adopted during the Covid-19 pandemic were made using secondary legislation. This highlighted existing tensions with the processes by which secondary legislation is reviewed and approved by Parliament, such as the inability of Parliament to amend most secondary legislation. There were discussions in all four parliaments in the UK as to whether parliamentary oversight of executive law-making could have been better facilitated during the pandemic.

The Covid-19 pandemic also saw a sharp increase in the amount of secondary legislation being subject to the "made affirmative" procedure, also referred to as the "urgent procedure". This is a procedure whereby secondary legislation can be made and come into force in advance of being laid before parliament, but will cease to have effect unless approved by parliament within a certain number of days specified by the enabling statute (often 28 days in the context of coronavirus legislation). The Public Health (Control of Disease) Act 1984, the Coronavirus Act 2020 and the Coronavirus (Recovery and Reform) (Scotland) Act 2022 enable regulations to be subject to the made affirmative procedure when the person or department making the regulations believes they need to be made urgently.

Key recommendations made by parliamentary committees

The Public Administration and Constitutional Affairs Committee found that the UK Government should give higher priority to facilitating parliamentary scrutiny of emergency legislation. The Committee also expressed concern that the use of the urgent procedure during the pandemic was not always justified, and strongly advised that the UK Government should schedule debates on any made affirmative regulations in a much more timely fashion than had happened in relation to Covid-19.⁴⁹ The Joint Committee on Statutory Instruments advised that care should be taken to distinguish between legislation that is truly urgent, and so needs exceptionally to be brought into force before being laid, and legislation that, despite being part of the fast-paced response to an extraordinary challenge, could survive a few hours' delay in commencement to allow for proper notice.⁵⁰

The Select Committee on the Constitution made similar points, and found that the use of the urgent procedure had not always been justified. The Committee considered ways in which parliamentary scrutiny of the use of the urgent procedure could be improved. The Committee recommend that the Government should outline the rationale for using the urgent procedure in the explanatory memorandum accompanying an instrument made using that procedure, including explaining why the particular measures in the instrument need to be made urgently.⁵¹ The Committee also advised that, for all affirmative instruments introduced during a national emergency, the Government should commit to holding a debate and vote on regulations before they come into force wherever possible. Where this is not possible, the Government should set out in the explanatory memorandum why it considers it necessary for the regulations to come into force before a parliamentary debate; and should commit to holding a debate and vote on regulations within 21 days of regulations coming into force.⁵²

The Scottish Parliament's Delegated Powers and Law Reform Committee also investigated parliamentary scrutiny of the made affirmative procedure. It advised that further justification from the Scottish Government is required where the made affirmative procedure is used on the grounds of urgency. The Committee suggested that the Scottish Government should provide a written statement prior to any made affirmative instrument coming into force explaining and giving evidence as to why the Scottish Ministers consider the regulations need to be made urgently. This statement should also include an assessment of the impact of the instrument on those affected by it and Ministers' plans to publicise its contents and implications. However, the Committee noted that, if the Scottish Government has not sufficiently justified its choice to use the made affirmative procedure, there is no obvious current parliamentary process by which Members could debate the issue with sufficient

⁴⁹ Public Administration and Constitutional Affairs Committee, 'Parliamentary Scrutiny of the Government's handling of Covid-19' (2019-21) HC377, paragraphs 51-52

⁵⁰ Joint Committee on Statutory Instruments, 'Rule of Law Themes from Covid-19 Regulations' (2021-2022) HL57 HC600, paragraphs 73

⁵¹ Select Committee on the Constitution, 'COVID-19 and the use and scrutiny of emergency powers' (2021-22) HL 15, paragraph 64 and 177-8

⁵² *Ibid.*, paragraph 83

speed.⁵³ The Committee is working with the Scottish Government to develop a protocol for an 'expedited affirmative procedure' which could be used on a case-by-case basis in place of the made affirmative procedure where Parliament needs to consider an affirmative statutory instrument in a shorter timeframe than usual.⁵⁴

In general, the Scottish Parliament's Covid-19 Committee found that enhanced scrutiny arrangements agreed between the Scottish Parliament and Government worked well. These arrangements included a commitment by the Scottish Government to make a weekly ministerial statement on Covid-19 on Tuesday; to provide a draft copy of proposed regulations on Wednesday; and to make Scottish Ministers available to give evidence to the Covid-19 Committee each week on Thursday morning. The draft regulations were often made into law on Thursday afternoon or on the following day.⁵⁵ The Committee was also able to draw upon the Scottish Parliament Research Centre's register of academic experts to seek views on Scotland's overall strategy for tackling the pandemic, including any gaps in data and understanding.⁵⁶

In terms of parliamentary access to the evidence and advice relied upon by Government, the Public Administration and Constitutional Affairs Committee advised that the UK Government should commit to set out a more consistent approach to publishing all data that inform decision-making, including how those data have been utilised, in any future emergency.⁵⁷ The Committee noted that statistics quoted by Ministers have not always been underpinned by published data, which goes against the UK Statistics Authority (UKSA) Code of Practice, and means that numbers may be used to make politicised points which parliamentarians have no way of verifying.⁵⁸ The Committee advised that the Ministerial Code needs to be strengthened so it is clear that Ministers are required to abide by the UKSA Code of Practice in their presentation of data, and that Ministerial statements published on Government websites must include hyperlinks or footnotes directing to the detailed data underpinning any numbers or statistics quoted.⁵⁹

The House of Commons Health and Social Care and Science and Technology Committees also advised that, during a pandemic, scientific advice from the SAGE co-chairs to the Government should be published within 24 hours of it being given, or the policy being decided, whichever is the later. In addition, minutes and SAGE papers

⁵³ The Scottish Parliament Delegated Powers and Law Reform Committee 'Inquiry into the use of the made affirmative procedure during the coronavirus pandemic' (2022) SP Paper 110, paragraph 76

⁵⁴ The Scottish Parliament Delegated Powers and Law Reform Committee 'Annual Report 2021-22' (2022) SP Paper 175, paragraph 18

⁵⁵ The Scottish Parliament COVID-19 Committee, 'Legacy Report' (2021) SP Paper 1010, paragraphs 17 and 20

⁵⁶ Ibid., 'Legacy Report' (2021) SP Paper 1010, paragraph 34

⁵⁷ Public Administration and Constitutional Affairs Committee, 'Coronavirus Act 2020 Two Years On' (2021-22) HC978, paragraph 67

⁵⁸ Public Administration and Constitutional Affairs Committee, 'Government transparency and accountability during Covid 19: The data underpinning decisions' (2019-21) HC803, paragraph 44

⁵⁹ Ibid., 'Government transparency and accountability during Covid 19: The data underpinning decisions' (2019-21) HC803, paragraphs 46-47

should be published within 48 hours of the meeting taking place.⁶⁰ The Science and Technology Committee also noted that a gap existed in the transparency of the advice that was given to the Government, outside of the auspices of SAGE, particularly on the topic of non-medical impacts of the pandemic and related Government interventions.⁶¹

Finally, the Secondary Legislation Scrutiny Committee advised that, where instruments enable powers that can be switched on or off according to current infection levels, or are subject to review every 21 or 28 days, then the Explanatory Memorandum should include specific information about how and where the outcome of any review is to be promulgated and how Parliament is to be informed of any change of status.⁶²

Questions:

14. Did existing parliamentary scrutiny processes facilitate urgent law-making while enabling appropriate scrutiny of legislation made during the Covid-19 pandemic? If not, why?
15. Could parliamentary scrutiny processes be improved to facilitate urgent law-making while enabling appropriate scrutiny of legislation in future public health emergencies?
16. Do additional measures need to be taken to ensure that the UK and Scottish Parliaments, Welsh Senedd and/or Northern Ireland Assembly have appropriate oversight of the use of urgent procedures to enact secondary legislation in public health emergencies?
17. Were the UK and Scottish Parliaments, Welsh Senedd and/or Northern Ireland Assembly provided with sufficient information and evidence to properly scrutinise Government use of emergency powers during the Covid-19 pandemic? If not, how could this be improved in future public health emergencies?
18. How far did the four parliaments in the UK work together during Covid-19? Are there improvements that could be made in future public health emergencies?

⁶⁰ House of Commons Health and Social Care, and Science and Technology Committees, ‘Coronavirus: lessons learned to date’ (2021-2022) HC92, paragraph 161

⁶¹ Science and Technology Committee, ‘The UK response to covid-19: use of scientific advice’ (2019-21) HC136, paragraph 100

⁶² Secondary Legislation Scrutiny Committee, 19th Report of Session 2019-21 (2019-21) H84, paragraph 3

Topic 6: The adaptation of parliamentary procedures

Context

The Commission is considering how far parliamentary procedures were adapted during the pandemic, and if any changes can be made in future public health emergencies in order better to manage the meeting of Parliament and facilitate greater parliamentary oversight of executive action.

During the last three years, the UK and Scottish Parliaments, Welsh Senedd and Northern Ireland Assembly all introduced changes to their Standing Orders to facilitate their continued operation in hybrid form. Adaptations made during the pandemic include parliamentarians participating in debates and committee meetings via video link, and voting remotely and/or by proxy.

Key recommendations made by parliamentary committees

UK Parliament

The House of Commons Procedures Committee noted that the House was able to debate, legislate and hold the Government to account at every stage of the pandemic, but at times aspects of the House's essential functions were limited by time or breadth of participation.⁶³ The Committee advised that the House should be able to express its views on where the balance should be struck between meeting physically and managing infection risk.⁶⁴ It also recommended that the form of proceedings should not incentivise physical over virtual participation, or vice versa: no Member ought to be disadvantaged in their ability to participate in House proceedings under any temporary procedural modification made in consequence of public health restrictions.⁶⁵ The Committee also advised that any changes to House procedures should be strictly time-limited and a period of no longer than six weeks would be appropriate in the first instance. This period should be extended only by express agreement of the House and after consideration by the Procedure Committee.⁶⁶

The House of Lords Select Committee on the Constitution noted that changes to House of Lords procedures as a result of hybrid proceedings, particularly the loss of spontaneity in members' interactions during a bill's committee stage and the need for speakers' lists on more business, had resulted in the House's essential scrutiny role

⁶³ House of Commons Procedures Committee, 'Back to the future? Procedure after coronavirus restrictions' (2019-21) HC1282, paragraph 13

⁶⁴ *Ibid.*, paragraph 15

⁶⁵ House of Commons Procedures Committee, 'Procedure under coronavirus restrictions: proposals for remote participation' (2019-21) HC300, paragraph 11

⁶⁶ *Ibid.*, paragraph 25

becoming less effective. However, the Committee recognised that hybrid proceedings are a necessary solution to maintaining business continuity while a significant number of members are unable to attend the House of Lords in person.⁶⁷ The Committee advised that the House of Lords Commission should conduct a lessons-learned exercise on Parliament's response to the pandemic as part of revising its business continuity plans. In doing so, the Commission should seek input from members and take into account the importance of Parliament continuing to hold the Government to account whatever the circumstances.⁶⁸

Scottish Parliament

The Scottish Parliament's Standards, Procedures and Public Appointments Committee noted that the hybrid Scottish Parliament faced challenges in conducting effective scrutiny. The Committee advised that Parliament is currently most effective when its Members come to Holyrood to represent their constituents and participate in person in Chamber business. The dynamic in debate can be lost with fewer interventions, while those participating remotely have little sense of the atmosphere in the Chamber and feel physically distanced from proceedings. The informal contacts between parliamentarians are also reduced.⁶⁹ Nonetheless, the Committee advised that the Scottish Parliament should commit to retaining the facility for hybrid meetings and aim to continually improve the infrastructure and use of technology to deliver those meetings. The Committee noted that, should the need to revert to fully virtual meetings arise, it will be much more straightforward if hybrid meetings continue, and Members are used to participating remotely and staff have the expertise and the technology to facilitate such meetings.⁷⁰ The Committee also noted that provision in the Scottish Parliament to vote remotely, while at times cumbersome, has been extremely important in allowing members to vote at the same levels as prior to the pandemic and this should continue.⁷¹

Northern Ireland Assembly

The Northern Ireland Assembly's Committee on Procedures praised the temporary provisions for enabling proxy voting in plenary sittings; the wholesale introduction of remote participation in committee proceedings (either in fully virtual or hybrid committee meetings); proxy voting in committees; and decision-making by committees without meeting.⁷² In addition, the Committee on Standards and Privileges noted that All Party-Groups (APGs) adapted well during the pandemic by meeting virtually on a regular basis.⁷³

⁶⁷ Select Committee on the Constitution, 'Covid-19 and Parliament' (2021-22) HL4, paragraphs 83-86

⁶⁸ Ibid., 'Covid-19 and Parliament' (2021-22) HL4, paragraph 106

⁶⁹ Scottish Parliament 'Standards, Procedures and Public Appointments Committee, 'Report on inquiry into future parliamentary procedures and practices (2022) SP Paper 213, paragraphs 8 and 15

⁷⁰ Ibid., paragraph 31

⁷¹ Ibid., paragraphs 9 and 29

⁷² Northern Ireland Assembly Committee on Procedures, 'Legal Report 2017-22' NIA 200/17-22, paragraph 15

⁷³ Northern Ireland Assembly Committee on Standards and Privileges, 'Legacy Report 2017-22' NIA 215/17-22, paragraph 15

Welsh Senedd

The Welsh Senedd's Committee on Senedd Electoral Reform noted that remote participation enabled Members to hold Ministers to account, gather evidence and discuss issues with stakeholders. However, the Committee also recognised that virtual meetings can limit the potential for free-flowing debates, for Members to ask supplementary questions, or for Members to interact informally within parties, on a cross-party basis, or with Ministers, stakeholders and the public.⁷⁴

Questions:

19. How successful was the adaptation of parliamentary procedures in order to manage the meeting of the UK and Scottish Parliaments, Welsh Senedd and/or Northern Ireland Assembly throughout the Covid-19 pandemic and facilitate parliamentary oversight of executive action?
20. Could any improvements be made in future public health emergencies?

Topic 7: The use of guidance vs. law

Context

The Commission is considering when it is constitutionally appropriate to use guidance rather than law to respond to public health emergencies.

During the pandemic, public health interventions were implemented across the UK using both legal measures and non-statutory public health advice and guidance. At times guidance was incorporated into law, such as in the [lockdown restrictions](#) that applied in England between 29 March to 18 July 2021, which permitted certain gatherings to take place only if the organisers had taken into account relevant guidance issued by the government.

Key recommendations made by parliamentary committees

The Joint Committee on Human Rights discussed the process by which school closures were implemented from March to September 2020 and noted that, instead of issuing a

⁷⁴ Committee on Senedd Electoral Reform, 'Senedd reform: The Next Steps' (2020), paragraph 34

direction under the Coronavirus Act 2020 to close educational establishments, the UK Government, through communications and press announcements, encouraged schools not to allow pupils to attend except for certain groups and encouraged parents not to send their children to school. The Committee found that measures which are likely to affect human rights should have a proper legal basis and be properly justified, rather than being announced through a press notice.⁷⁵

Similarly, the Joint Committee on Statutory Instruments noted that there are many contexts in which exercising influence through soft-letter law such as statutory or voluntary guidance is preferable to seeking to control through hard-letter primary or subordinate legislation. But where control rather than influence is required, it can be achieved only through legislation enacted through a formal legislative process that provides certainty, transparency and accountability, albeit at the expense of a certain amount of flexibility.⁷⁶ The Committee also advised that guidance (and particularly non-statutory guidance) should not be used to fill in gaps in law as if it were the law itself. Defective wording should be rectified through amending legislation.⁷⁷

Questions

21. When it is constitutionally appropriate to use guidance rather than law to respond to public health emergencies?
22. Was the right balance struck during the Covid-19 pandemic between the use of law and guidance to impose non-pharmaceutical interventions? If not, what could be improved in future public health emergencies?
23. How and when was public health guidance incorporated into law during the Covid-19 pandemic? Were any Rule of Law issues caused by this incorporation and, if so, how could these be addressed in future public health emergencies?

Topic 8: Legal clarity

Context

The Commission is reviewing the clarity and accessibility of coronavirus legislation and guidance to consider whether improvements can be made in future public health emergencies.

⁷⁵ Joint Committee on Human Rights, 'The Government's response to COVID-19: human rights implications' (2019-21) HC262 HL125, paragraph 172

⁷⁶ Joint Committee on Statutory Instruments, 'Rule of Law Themes from Covid-19 Regulations' (2021-2022) HL57 HC600, paragraph 24

⁷⁷ *Ibid.*, paragraph 55

During the Covid-19 pandemic there were a number of sources of potential confusion as to what the law required, including the law changing frequently, new laws being implemented via amending legislation, and public health advice differing from restrictions imposed by law.

Key recommendations made by parliamentary committees

The Joint Committee on Human Rights found that the communication of coronavirus guidance and laws was at times confusing, leading to widespread misunderstanding as to what people were and were not permitted to do. The Committee concluded that there were a number of causes of this, including (i) guidance usually being stricter than restrictions imposed by accompanying legal regulations, (ii) regulations being made and published a substantial time after a new lockdown had been announced, (iii) regulations being widely and often ambiguously worded and (iv) ministers not being clear as to whether they were stating activities were illegal or simply advising against them. The Committee noted that the UK Government sometimes did not draw any distinction between what was law and what was advice or guidance.⁷⁸

Similarly, the Welsh Senedd's Legislation, Justice and Constitution Committee found that there were instances where the guidance or messaging from the Welsh Government did not reflect the law entirely accurately.⁷⁹ The Committee advised that when Government Ministers say a person 'must' or 'should' do something, this is generally understood by the public as being the law.⁸⁰

The Select Committee on the Constitution advised that all Government guidance during a public health emergency should conform to five conditions to enable people accurately to understand the law:

1. Guidance should clearly distinguish information about the law from public health advice;
2. Where guidance provides information about the law, this should be accurate and complete. Where the law is too complex to be set out in full, guidance should make clear that the account is partial;
3. All relevant legal instruments should be identified wherever legal requirements are referred to in guidance, accompanied by up-to-date hyperlinks to the underlying regulations on [legislation.gov.uk](https://www.legislation.gov.uk);
4. Guidance should make clear when opinions are being offered about the interpretation of the law, including a clear statement of the source and status of such opinions;

⁷⁸ Joint Committee on Human Rights, 'The Government response to covid-19:', paragraph 44

⁷⁹ Welsh Senedd Legislation, Justice and Constitution Committee 'Fifth Senedd Legacy Report' (2021), paragraph 13

⁸⁰ Ibid., paragraph 13

5. A consistent approach to use of the terms “advice”, “guidance”, “recommendation”, “rules” and “restrictions” should be adopted in all Government publications and public statements, in each case making clear whether the term is referring to obligations required by law, or to public health advice.⁸¹

To improve legal clarity, the Joint Committee on Statutory Instruments advised that where usual conventions as to notice—such as the 21-day rule—cannot be upheld, the Government should do as much as it practicably can to ensure that those who are affected by legislation have the greatest amount of notice that circumstances allow. The Committee noted that, where much of the policy has been determined and the remaining details are relatively trivial, it would help the public significantly to have advance notice of the expected content of regulations through the publication of a draft.⁸²

The Select Committee on the Constitution also considered ways to improve the clarity of emergency regulations that are frequently amended, and advised that, for every set of amending regulations, the Government should set out in the explanatory memorandum: (i) the regulations that are being amended; (ii) the substance of the amendments being made; and (iii) the reason for those amendments. The Committee also recommended that, whenever amending regulations are made, the Government should publish an accompanying Keeling Schedule, which is a document showing the changes that amendments have made to the original version of a piece of legislation, similar to the “track changes” function in Word. The Committee advised that the Keeling Schedule should be published on legislation.gov.uk alongside the original instrument.⁸³

The Scottish Parliament’s Delegated Powers and Law Reform Committee gave similar advice to the Scottish Government. The Committee advised that any consolidated regulations should be published as soon as possible, and prior to them coming into force; the Government should clearly signpost to the public where the most up-to-date and consolidated regulations might be read; and the Government should ensure that the policy note and explanatory note accompanying each Scottish Statutory Instrument is written in plain English and is sufficiently detailed so those affected can clearly understand the law and how it impacts them.⁸⁴

Questions

⁸¹ Select Committee on the Constitution, ‘COVID-19 and the use and scrutiny of emergency powers’ (2021-22) HL 15, paragraph 166

⁸² Joint Committee on Statutory Instruments, ‘Rule of Law Themes from Covid-19 Regulations’ (2021-2022) HL57 HC600, paragraphs 75-76

⁸³ Select Committee on the Constitution, ‘COVID-19 and the use and scrutiny of emergency powers’ (2021-22) HL 15, paragraphs 187-8

⁸⁴ The Scottish Parliament Delegated Powers and Law Reform Committee ‘Inquiry into the use of the made affirmative procedure during the coronavirus pandemic’ (2022) SP Paper 110

24. Were the emergency public health laws governing the Covid-19 pandemic sufficiently clear and accessible? If not, how could this be improved in future public health emergencies?
25. How far did the use of Government guidance affect public understanding of restrictions imposed during the Covid-19 pandemic? Could improvements be made in future public health emergencies?
26. Are there any other matters that affected the clarity and accessibility of coronavirus legislation and guidance? Could improvements be made in future public health emergencies?

Topic 9: International comparisons

Context

Commissioners are interested in how emergency public health powers have been exercised in other jurisdictions in order better to determine best practice in a UK-context.

Questions

27. Are there any examples of best practice from other jurisdictions that could be instructive for the work of the Commission?