

EXECUTIVE POWER AND CORONAVIRUS REGULATIONS

The volume of and speed with which Government has been



passing regulations in response to the COVID-19 threat has been substantial and 'unprecedented'. The quantity of and the way it is being passed is extraordinary, circumventing usual parliamentary procedure, say Robert Botkai and Sarah Grant of Winckworth Sherwood

In normal times we can go months without new legislation impacting the retail sector. Now, barely a day goes by without the publication of new laws, often coming into force within hours. And, of course, we get guidance and ministerial statements that at times conflict with each other and the laws!

Where does the power to make regulations come from?

The Government is relying mainly on two statutes which have given it the ability, albeit with some restrictions, to enact wide-reaching regulations in the name of public health.

Public Health (Control of Disease) Act 1984

The Public Health (Control of Disease) Act 1984 gave ministers the power to pass regulations "for the purpose of preventing, protecting against, controlling or providing a public health response" to infection in England and Wales, including those that impose restrictions or requirements on people and premises, and is being relied upon in relation to COVID-19 regulations concerning social distancing.

These regulations may be imposed without prior Parliamentary approval if the appropriate minister deems it necessary due to urgency, although Parliament must be given the opportunity to retrospectively agree or reject them within 28 days.

Coronavirus Act 2020

The Coronavirus Act 2020 built upon the theme of executive power given by the 1984 Act, giving Ministers the power to restrict extensive parts of everyday life, including the ability to close venues, schools and isolate those at risk of spreading COVID-19.

Similarly to the 1984 Act, the primary restriction on regulations passed under it is that Ministers must make a declaration that COVID-19 presents a serious and imminent threat to public health, and that using the powers given by the 2020 Act will help suppress it. Ministers should also have regard to relevant advice given by the Chief Medical Officer.

Devolved powers

While the Government represents the whole of the UK, for many matters most affected by COVID-19, such as schools, public health and some public services, responsibility lies not with Westminster but with the devolved governments of Holyrood, Stormont and the Welsh Assembly. The 2020 Act recognised and responded to this, conferring additional powers in these areas, such as the ability to close schools. The regulations between the various parts of the UK were initially largely uniform, but have since diverged significantly, with Scotland and Northern Ireland taking a more cautious approach to the easing of restrictions than England and Wales and operating under their own variants of the 1984 Act.

Within England itself, regional power against the executive is exercised to varying degrees. Notably, when the Government requested schools reopen in June, local authorities, who have some responsibility for schools, were more hesitant, with only 67% of schools opening.

More recently, there was considerable discord between the Prime Minister and Andy Burnham, Mayor of Greater Manchester, over the conditions under which the area would move to Tier 3 regulations.



Is there a drive for more scrutiny?

When the 2020 Act was moving through Parliament in March, it seemed there was a consensus that the powers within it were necessary. There is arguably now a movement, within Parliament and outside, to revert towards traditional Parliamentary procedure. This was demonstrated in September when the House of Commons voted on whether to renew the emergency powers given in 2020 Act, in accordance with the stipulation within it that these must be reviewed every six months. The Speaker, Sir Lindsay Hoyle, criticised the "totally unsatisfactory" way the Government has enacted COVID-19 regulations.

The Government opposes having to undergo full Parliamentary procedure given the ever-changing and urgent nature of the pandemic, although it is notable that both the imposition and easing of the COVID-19 restrictions were enacted through emergency legislation. However, it was stated that, where possible, a vote on future legislation would be undertaken in Parliament prior to regulations coming into force. A vote on the new 'Three Tier' regulations occurred in the House of Commons the day before the regulations came into force.

Conclusion

Despite opposition and calls for greater scrutiny, Parliament voted to extend the emergency powers given by the 2020 Act, and it is likely the Government will continue to exercise the powers given to them under both the 1984 Act and the 2020 Act. It will be a further six months before Parliament votes to review the powers again and, given the rapid pace of change in the last six months, all bets are off as to the situation then!

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