



REGULATIONS REVIEW COMMITTEE KOMITI AROTAKE WAETURE

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Parliamentary scrutiny of COVID-19 legislation

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Abstract:

In May 2020, the New Zealand Government introduced legislation to provide a bespoke legal framework for responding to the COVID-19 pandemic. This replaced the general provisions of the Health Act which provided the legal framework for emergency measures until then.

The bill was passed through all stages of the legislative process in two days, without select committee scrutiny or broad public consultation. Following the passage of the Act, the New Zealand House of Representatives instructed the Finance and Expenditure Committee to inquire into the operation of the Act.

The COVID-19 Public Health Response Act 2020 empowered the Executive to make “COVID-19 orders” to require people to comply with public health restrictions and measures.

There were various safeguards put in place to enable Parliament to maintain its oversight of the legislation:

- COVID-19 orders were revoked 60 days after they were made unless approved by the House of Representatives.
- Under Sessional Orders from the 53rd Parliament, the Regulations Review Committee was required to examine each COVID-19 order and report to the House within 6 sitting days or 16 working days after the day on which the order was presented to the House of Representatives. A motion to approve the order could not be moved until the committee had presented its report or the deadline for the report had passed.
- Originally the Act was required to be renewed by a resolution of Parliament every 90 days, and had a sunset provision which provided that the Act would be automatically repealed within two years of commencement.

This paper will review the New Zealand Parliament’s scrutiny of primary and secondary legislation made in response to the COVID-19 pandemic and the effects of this scrutiny.

Introduction:

In December 2019, a novel coronavirus (SARS-CoV-2) was identified from an outbreak in Wuhan, China. The virus spread within China and then globally. Before this, the last time New Zealand had experienced a global pandemic of this scale was in 1918. Since the first death was reported on 11 January 2020, the disease resulting from this virus, later named

COVID-19, has led to more than 7 million confirmed deaths worldwide.¹ The actual number of deaths is likely to be much higher.

Following the outbreak of COVID-19, the New Zealand Parliament had to discharge its constitutional functions in unprecedented circumstances.

This paper will focus on New Zealand's immediate legislative response to COVID-19, and the more considered and bespoke legislation made after the initial period of the pandemic. It will also examine New Zealand's parliamentary scrutiny of COVID-19 legislation and the effects of this scrutiny, with a particular focus on the scrutiny done by the Regulations Review Committee.

New Zealand's immediate response to COVID-19

Before the COVID-19 pandemic, New Zealand had a range of systems, legislation, and plans in place to help prepare for, and respond to, a pandemic. Two main pieces of legislation provided the Government with powers to manage the pandemic.

The Epidemic Preparedness Act 2006 enables the Prime Minister, with the Minister of Health's agreement, to issue an epidemic notice declaring that the effects of a quarantinable disease are likely to significantly disrupt essential government and business activity.²

Section 70 of the Health Act 1956 gives medical officers of health powers which may be exercised for the purpose of preventing the outbreak or spread of an infectious disease. These powers are activated when a state of emergency is declared, or an epidemic notice is issued, or when authorised by the Minister of Health.³ Section 70 was heavily relied upon in the initial legislative response to COVID-19.

New Zealand's initial legislative response to the COVID-19 pandemic was rapid. On 30 January 2020, the Infectious and Notifiable Diseases Order 2020 came into force.⁴ It amended the Health Act 1956 to add the "novel coronavirus" to the list of infectious diseases notifiable to a medical officer of health. The effect of this was that legal steps could be taken under the Act to prevent the spread or outbreak of COVID-19.

New Zealand's first case of COVID-19 was confirmed on 28 February 2020. On 21 March 2020 the Prime Minister announced a four-stage alert level framework.⁵ The alert levels set out the public health and social measures required of communities and businesses. This included restrictions which were intended to be proportionate to the level of COVID-19 containment.

On 24 March 2020 the Prime Minister gave notice of the COVID-19 pandemic under section 5 of the Epidemic Preparedness Act.⁶ The notice activated a range of special powers

¹ The World Health Organization (WHO) [COVID-19 dashboard](#) recorded that globally, as of 11.15am CEST, 17 September 2024, there have been 7,061,330 confirmed details reported to WHO.

² Section 5, [Epidemic Preparedness Act 2006](#).

³ Section 70, [Health Act 1956](#).

⁴ The [Infectious and Notifiable Diseases Order 2020](#) can be found on the New Zealand Legislation website: <http://legislation.govt.nz>.

⁵ Nation steps up to COVID-19 Alert Level 2, <https://www.beehive.govt.nz/release/nation-steps-covid-19-alert-level-2>.

⁶ [Epidemic Preparedness \(COVID-19\) Notice 2020](#), 24 March 2020.

including some to make other secondary legislation. The Government used these powers to make:

- Epidemic Management Orders under section 8 of the Epidemic Preparedness Act to activate dormant provisions in other Acts
- Immediate Modification Orders under section 15 of the Epidemic Preparedness Act to modify requirements of various Acts.

The Government also made orders under section 70 of the Health Act. These orders:

- required all people in New Zealand to be isolated or quarantined in their homes
- required persons arriving in New Zealand by air to be isolated or quarantined
- required all premises to be closed
- forbid outdoor congregations.

On 25 March 2020, the New Zealand House of Representatives agreed a motion to establish the Epidemic Response Committee, with the agreement of the Business Committee.⁷ The Epidemic Response Committee was established for the purpose of conducting the scrutiny that would usually occur in the House. The committee met remotely three days a week, to hear from Ministers and senior public servants. It was disestablished on 26 May 2020 after 24 meetings.⁸

The Regulations Review Committee's scrutiny role

The role of the Regulations Review Committee under Standing Order 326(1) is to examine all secondary legislation.⁹ This function has important constitutional significance in assisting Parliament to retain control over the content of all laws made under powers that Parliament has delegated to the Executive. When the committee examines secondary legislation, it considers whether it should be drawn to the special attention of the House on any of the grounds set out in Standing Order 327(2). Those grounds are, that the secondary legislation:

- (a) is not in accordance with the general objects and intentions of the enactment under which it is made
- (b) trespasses unduly on personal rights and liberties
- (c) appears to make some unusual or unexpected use of the powers conferred by the enactment under which it is made
- (d) unduly makes the rights and liberties of persons dependent upon administrative decisions which are not subject to review on their merits by a judicial or other independent tribunal
- (e) excludes the jurisdiction of the courts without explicit authorisation in the enactment under which it is made
- (f) contains matter more appropriate for parliamentary enactment
- (g) is retrospective where this is not expressly authorised by the enactment under which it is made

⁷ The Business Committee plays an important role in deciding how Parliament and select committees are run. This committee decides the membership of select committees and recommends when Parliament should meet.

⁸ The committee was disestablished with the agreement of the House of Representatives.

⁹ [Standing Order 326\(1\), New Zealand Parliament website: ww.parliament.nz](http://www.parliament.nz).

- (h) was not made in compliance with particular notice and consultation procedures prescribed by applicable enactments
- (i) for any other reason concerning its form or purport, calls for elucidation.

The committee also considers the constitutional principles for good legislative design as outlined in the Legislation Design and Advisory Committee's *Legislation Guidelines (2021)*, many of which overlap with Standing Order 327.¹⁰

The committee does not examine the policy behind secondary legislation, but instead considers whether instruments are made in accordance with the intention of Parliament as set out in the empowering enactment.

The committee has powers that can lead to the disallowance of secondary legislation. However, disallowance rarely occurs.¹¹ When the committee has concerns about secondary legislation, it writes to the law-maker responsible for the instrument concerned. The committee almost always works constructively with the organisation, department, or Minister to discuss any issues it identifies.

The Regulations Review Committee's scrutiny of section 70 orders

The committee's scrutiny function is particularly important during periods of emergency or crisis. During periods of emergency, secondary legislation is used to manage extraordinary circumstances and may adversely affect the rights and freedoms usually enjoyed by people. Because of this, the committee's scrutiny of emergency response secondary legislation serves as a critical safeguard to ensure proper use of the power delegated to the Executive by Parliament.

In April 2020, the committee initiated a briefing to review secondary legislation made in response to COVID-19. The committee presented its first interim report to the House of Representatives on this briefing in May 2020.¹² The briefing was initiated as a mechanism for the committee to report to the House on the findings of its scrutiny of secondary legislation made in response to the outbreak of COVID-19. In its report, the committee outlined four main types of concerns that it came across in its scrutiny:

- unauthorised sub-delegation of the power to make secondary legislation
- unauthorised retrospectivity
- legislation that is unclear or is drafted as guidance rather than rules
- instrument titles not reflecting their COVID-19 purpose.

Orders made under section 70 of the Health Act are not required to be drafted by the Parliamentary Counsel Office, New Zealand's law drafting and publication office. They are also not required to be published on the legislation website. Before the outbreak of COVID-19, the Ministry of Health, which drafted section 70 orders, had drafted secondary legislation infrequently. In its 2023 report on an inquiry into COVID-19 secondary legislation, the Regulations Review Committee noted that entities that draft secondary legislation

¹⁰ [Legislation Guidelines: 2021 edition](#), Legislation Design and Advisory Committee.

¹¹ Disallowance has only occurred once – in 2013. However, members of the Regulations Review Committee have initiated disallowance on six occasions.

¹² First interim report of the Regulations Review Committee, [Briefing to review secondary legislation made in response to COVID-19](#), May 2020.

infrequently do not tend to retain drafting experience.¹³ The effect of this was that section 70 orders raised concerns on several occasions in terms of the grounds for bringing secondary legislation to the attention of the House in Standing Order 327(2).

In its final report about orders made under section 70 of the Health Act 1956, the Regulations Review Committee acknowledged that the section 70 orders made in response to the COVID-19 pandemic were made under very challenging circumstances. It noted that the quality of orders made under section 70 had improved over time. As the pandemic continued, these orders were drafted by the Parliamentary Counsel Office and were published on the New Zealand Legislation website. Other improvements included:

- that the criteria for discretionary decisions by the Director-General of Health were set out in the secondary legislation, making those decisions administrative rather than legislative
- all aspects of requirements were provided in the secondary legislation, rather than the secondary legislation incorporating guidance material on the Government's COVID-19 website.

Borrowdale vs Director-General of Health

While this paper is focussed on parliamentary scrutiny of legislation made in response to COVID-19, it is worth mentioning the Judiciary's consideration of challenges to New Zealand's COVID-19 response. The maintenance of the right to challenge COVID-19 secondary legislation in court is a critically important safeguard.

Section 70 orders, along with COVID-19 orders and immediate modification orders made under the Epidemic Preparedness Act 2006 can be invalidated by the senior courts if they are contrary to their empowering Act or breach the New Zealand Bill of Rights Act 1990.¹⁴ The express requirement for compliance with the Bill of Rights Act opens a route for challenging the validity of orders in the courts that would not exist if they were enacted in primary legislation.¹⁵

The restrictions imposed under section 70 of the Health Act imposed New Zealand's first lockdown. The legality of this lockdown and the first three orders made under section 70 were challenged in *Borrowdale v Director-General of Health*.¹⁶ A full bench of the High Court rejected the challenge to the orders. The Court ruled that the power to require isolation and quarantining in section 70, as was done through these orders, was broad enough to be used to impose such requirements on all New Zealanders.

The Court also considered a challenge to the requirement for New Zealanders to stay at home for the first nine days of New Zealand's lockdown. The Court found that, because the requirement to stay at home was not prescribed by law, the limitation on rights under the New Zealand Bill of Rights Act 1990 was unlawful. The decision of the High Court was also upheld by the Court of Appeal.¹⁷

¹³ Report of the Regulations Review Committee, [Inquiry into COVID-19 secondary legislation](#), June 2023.

¹⁴ [Section 13](#), COVID-19 Public Health Response Act 2020.

¹⁵ [Inquiry into COVID-19 secondary legislation](#), Regulations Review Committee, June 2023, p 13.

¹⁶ *Borrowdale v Director-General of Health* [2020] [NZHC 2090](#).

¹⁷ *Borrowdale v Director-General of Health* [2021] NZCA 520.

The need for bespoke legislation to respond to the COVID-19 pandemic

In its 2016 report on Parliament's legislative response to future national emergencies, the Regulations Review Committee of the 51st Parliament concluded:

“...we do not recommend passing general legislation in advance for national emergencies. While superficially attractive, the wide range of different types of potential national emergencies we face in New Zealand means that unduly broad powers would need to be conferred to cover all possible eventualities. Rather, we prefer bespoke legislation with appropriate safeguards that can be tailored to the needs of the particular emergency concerned.”

A full Court of the High Court made a similar observation in *Borrowdale v Attorney-General*:

“When a public health crisis is ongoing, the democratic nature of our constitution means that there comes a point when Parliament ought to pass bespoke legislation to ensure that critical policy decisions are made by ordinary Cabinet decision-making.”

A hybrid approach was taken to New Zealand's legislative response to COVID-19. As discussed earlier in this paper, this involved the use of existing legislation designed to deal with health emergencies. New legislation was also specifically designed to meet the needs of the COVID-19 pandemic. This bespoke legislation is described below.

In his first reading speech on the COVID-19 Public Health Response Bill, the Attorney-General said that existing legislation was not well suited to provide the more nuanced response required to move New Zealand down alert levels in the COVID-19 Alert Level system.¹⁸ He noted that alert level 2 involved detailed measures that could not be given effect by section 70 orders due to the restrictive and inflexible nature of the empowering Act. Urgency was accorded to the bill so that the stricter lockdown under the section 70 of the Health Act could be replaced with less stringent but necessary rules to combat the spread of the virus.

COVID-19 Public Health Response Act 2020

On 12 May 2020, the Government introduced an omnibus bill to provide a bespoke legal framework for responding to COVID-19. This bill was designed to avoid reliance on the Health Act 1956 regime. The bill was considered by the Government to be urgently needed to provide a clear legal basis for the country to move down the alert levels to level 2. The Government provided an exposure draft of the bill to political parties and legal academics the night before its introduction and the Attorney-General acknowledged the feedback received during his first reading speech.¹⁹

Due to the extreme urgency inherent in implementing a legislative response to the still-unfolding health emergency, the bill went through all stages of the legislative process in two days, without select committee scrutiny or broad public consultation. The COVID-19 Public Health Response Act 2020 came into force on 13 May 2020.

¹⁸ Hon David Parker (Attorney-General), first reading, COVID-19 Public Health Response Bill, [Parliamentary debates \(Hansard\)](#).

¹⁹ *Ibid.*

The purpose of the COVID-19 Public Health Response Act 2020 was to support a public health response that²⁰:

- prevents and limits the risk of the outbreak or spread of COVID-19
- avoids, mitigates, or remedies the actual or potential adverse effects of the COVID-19 outbreak
- is coordinated, orderly, and proportionate
- has enforceable measures in addition to the relevant voluntary measures, and public health and other guidance that also support that response.

The Act provided the Minister with the power to make “COVID-19 orders” to require people to do or not do things to achieve these objectives. This included requiring people to physically distance from others, refrain from going to specified places, carry out specified activities, and associate with specified people.²¹

The Act was referred to Parliament’s most senior subject select committee, the Finance and Expenditure Committee, for review after its passage. This was partly a result of suggestions by legal academics that post-legislative scrutiny of the Act be undertaken.²² The time allowed for select committee scrutiny using the inquiry function was relatively short in comparison to the usual six-month timeframe in which bills are scrutinised by select committees. The referral also relied on the initiative of the Government moving a motion in the House.

The Finance and Expenditure Committee invited the Regulations Review Committee to provide its views on the powers to make secondary legislation in the Act. The committee responded that it had concerns with two of the powers in the Act to make COVID-19 orders to grant exemptions from compliance with any provisions, and to authorise a specified activity that would otherwise be prohibited by the order.²³ The Regulations Review Committee was concerned about these powers because:

- They had the potential to vary the scope of the Act without the usual scrutiny from Parliament when Acts are amended.
- They lacked the usual safeguards the committee expected to see when Acts grant powers of exemption.
- They contained no limits on who could be authorised to grant an exemption or authorisation.

In its report to the House, the Finance and Expenditure Committee noted the Regulations Review Committee’s concerns and stated that the majority of its members were comfortable that the Act did not require a legislative amendment to address these concerns.²⁴

The Finance and Expenditure Committee concluded that:

²⁰ [Section 4](#), COVID-19 Public Health Response Act 2020 (as enacted).

²¹ [Sections 9](#) and [11](#), COVID-19 Public Health Response Act 2020 (as enacted).

²² Hon David Parker (Attorney-General), COVID-19 Public Health Response Act 2020 – Finance and Expenditure Committee Inquiry – Referral, [Parliamentary debates \(Hansard\)](#).

²³ [Briefing to review secondary legislation made in response to COVID-19](#), final report of the Regulations Review Committee, August 2020, p 13.

²⁴ [Inquiry into the operation of the COVID-19 Public Health Response Act 2020](#), report of the Finance and Expenditure Committee, July 2020.

- the Act was necessary and appropriate
- its extraordinary powers were justified because the COVID-19 emergency itself was unprecedented and extraordinary
- the Act required no urgent amendments.

Safeguards under the COVID-19 Public Health Response Act 2020

The Act provided various safeguards to help protect the rights and freedoms of New Zealanders and to ensure that the broad powers delegated to the Executive would be used appropriately.

The Act originally needed to be renewed by a resolution of Parliament every 90 days.²⁵ It had a sunset provision which originally provided that the Act would lapse within two years after commencement. This was later extended to three years. On 26 November 2022, section 3 of the Act, which provided for the repeal of the Act, was amended to state that the Act would not be repealed until 26 November 2024.

Any order made under section 11 had to meet the Act's purpose.²⁶

Sections 8 and 9 of the Act set out other requirements that needed to be met before the Minister could make a COVID-19 order.

Section 8 provided that orders could only be made if one of the following was in force:

- an epidemic notice
- a state of emergency or transition period in respect of COVID-19 under the Civil Defence Emergency Management Act 2002
- a notice by the Prime Minister, after being satisfied that there is a risk of an outbreak or the spread of COVID-19, authorising the use of COVID-19 orders (either generally or specifically).²⁷

Section 9 provided that before making a section 11 order, the Minister was required to:

- have regard to advice from the Director-General of Health about the risks of the outbreak or spread of COVID-19 and the nature and extent of measures that are appropriate to address those risks
- have regard to any decision by the Government on the level of public health measures appropriate to respond to those risks and avoid, mitigate, or remedy the effects of the outbreak or spread of COVID-19
- be satisfied that the order does not limit or is a justified limit on the rights and freedoms in the New Zealand Bill of Rights Act 1990
- consult the Prime Minister, the Minister of Justice, Minister of Health, and any other Minister that the Minister thinks fit.

Section 11 of the Act empowered the Minister to make COVID-19 orders setting out requirements for a range of purposes under the following categories: self-isolation, masks,

²⁵ This safeguard was superseded on 25 November 2022 by the COVID-19 Public Health Response (Extension of Act and Reduction of Powers) Amendment Act 2022 when powers under the Act were substantially narrowed.

²⁶ [Section 4](#) sets out the purpose of the Act.

²⁷ [Section 8 of the COVID-19 Public Health Response Act 2020](#) sets out the pre-requisites for all COVID-19 orders.

persons arriving in New Zealand, and tests. Notably, the Act provided these powers to the Minister, an elected representative, rather than the Director-General of Health, an unelected public servant (as is provided for by section 70 of the Health Act). This was seen as an improvement by government and opposition representatives as it made ministerial responsibility and political accountability clearer.

COVID-19 orders prevailed over other statutes, including the Health Act 1956, to the extent that they were inconsistent.²⁸ They were required to be published at least 48 hours before they come into force, except when urgency is required to prevent or contain the outbreak or spread of COVID-19, or when restrictions are being removed or reduced.²⁹ COVID-19 orders were also required to be confirmed by Parliament within 60 days or they would lapse.³⁰

Section 14(5) of the Act required the Minister to keep their orders under review. In its report on an inquiry into COVID-19 secondary legislation, the Regulations Review Committee noted that this obligation implied a legislative intention to monitor the justification for orders in light of changing circumstances. The committee said that it is an “appropriate place” for reassessment of orders, given the fast-changing nature of the pandemic and the need to respond to it promptly.

Section 16 provided for COVID-19 orders to be automatically revoked after 60 days (or 10 sitting days, whichever is longer) unless the order was first approved by the House of Representatives.

Regulations Review Committee scrutiny of COVID-19 orders

The Regulations Review Committee examined the initial COVID-19 orders under its briefing to review secondary legislation made in response to COVID-19. The committee presented four interim reports and one final report to the House on this briefing. The committee reported to the House about its scrutiny of COVID-19 orders under a faster timetable than usual. This was to ensure that the committee was able to provide advice to those making the legislation as quickly as possible. Examples of the problems found by the committee during its scrutiny of secondary legislation in the 52nd Parliament are discussed below.³¹ These examples show how the committee’s scrutiny improved the drafting of future COVID-19 orders.

Unclear impact on personal rights and liberties

On 5 June 2020, the committee presented a second interim report on its briefing to review secondary legislation made in response to COVID-19.³² The report detailed the committee’s scrutiny of the COVID-19 Public Health Response (Alert Level 2) Order and the COVID-19 Public Health Response (Alert Level 2) Amendment Order. The initial order imposed physical distancing requirements on individuals, people carrying out a business or service, and participants and organisers of gatherings. The committee was concerned that the order created uncertainty as to the intended impact on a person’s right to manifest their religion or

²⁸ [Section 13](#) of the Act.

²⁹ [Section 14](#) of the Act.

³⁰ [Section 16](#) of the Act.

³¹ The 52nd Parliament opened on 7 November 2017 and dissolved on 6 September 2020.

³² [Briefing to review secondary legislation made in response to COVID-19](#), second interim report of the Regulations Review Committee, June 2020.

belief. It noted that there could be contradictory interpretations of how the order affected church services—whether they were gatherings (subject to a limit of 10 people) or business and services (subject to a limit of 500 people). The committee considered that any intended impact on fundamental freedoms must be clear from the order itself, not just from guidance about the order.

Uncertainty in offence provision

The committee was also concerned that the order would allow a business, service, or organiser of a gathering to create the basis of criminal liability. The order required people to comply with reasonable measures put in place by a business or service or by the organiser of a gathering to meet the requirements of the order, and that are brought to the attention of that person. Failure to comply these measures would be an infringement offence. The committee noted that, in this case, the only limit on the requirements that the business, service, or organiser may impose on customers and clients is that the measures are reasonable “to meet the requirements of this order.”

Improvements were made that addressed the committee’s concerns

The committee wrote to the Minister about its concerns with the initial order. The Amendment Order clarified the rules for faith-based gatherings, stating that the rules for social gatherings applied rather than the rules for business and services. It also linked the infringement offence to a failure to comply with requirements specified in the order. In its report on the orders, the committee recorded that both of its concerns were addressed in the Amendment Order.

Concerns about the appropriateness of persons responsible for public health decisions

In its fourth interim report, the committee detailed its consideration of the COVID-19 Public Health Response (Air Border) Amendment Order 2020.³³ The order’s main purpose was to transfer certain decisions from the Director-General of Health to the chief executive of the Ministry of Business, Innovation and Employment. Those decisions included the required period of isolation and quarantine, and whether to permit a person to leave isolation or quarantine for exceptional reasons. The order provided the matters that the chief executive was required to take into account or be satisfied of, which appeared to include health matters. The committee said it was not clear whether the chief executive of the ministry was an appropriate person to have responsibility for decisions involving health matters. It wrote to the Minister asking why the chief executive was the appropriate decision maker.

The Minister replied that the matters covered by the order required operational decision-making with clinical input, rather than being solely clinical decisions. He told the committee that public health requirements were integrated into the new decision-making processes through the development of cross-agency operating procedures and access to health advice.

Given the Minister’s explanation, the committee concluded that the order was not an unusual or unexpected use of the power to make secondary legislation in terms of Standing Order 327(2)(c). However, the committee considered this to be an example of poor legislative

³³ [Briefing to review secondary legislation made in response to COVID-19](#), fourth interim report of the Regulations Review Committee, August 2020.

design resulting from the operational practicalities of managed isolation and quarantine becoming apparent after the Act came into force.

Assessment of COVID-19 secondary legislation against the recommendations in the Regulations Review Committee's 2016 inquiry into Parliament's legislative response to future national emergencies

In 2014, the House of Representatives had referred an inquiry to the Regulations Review Committee following the devastating earthquakes that hit Christchurch in 2010 and 2011. The purpose of the inquiry was to establish constitutional principles for the arrangement and delegation of recovery powers in the event of a national emergency. The committee reported to the House in December 2016 and made 11 recommendations to the Government.³⁴ The recommendations were made to ensure that the design of future legislative responses to emergencies was consistent with constitutional principles.

In its final report on its briefing to review secondary legislation made in response to COVID-19, the Regulations Review Committee considered those recommendations as part of its scrutiny. The committee considered the following themes:

- Executive powers to override enactments should extend only as far as is necessary to deal with the emergency itself and should only be exercised for that purpose.
- Emergency legislation should incorporate safeguards.
- Any legislative response to a national emergency should be designed to ensure that recovery from the emergency begins on day one.

The committee found that these recommendations had been largely and satisfactorily observed in the legislative response to COVID-19.

The Regulations Review Committee's scrutiny of COVID-19 orders in the 53rd Parliament

Under Sessional Orders from the 53rd Parliament, the Regulations Review Committee was required to examine each COVID-19 order and report to the House within 6 sitting days or 16 working days after the day on which the order was presented to the House of Representatives. A motion to approve the order under section 16 of the Act could not be moved until the committee had presented its report or the time for the report had expired. This Sessional Order was adopted by the House on 8 December 2020.

Between November 2020 and December 2021, the committee presented 28 reports to the House about 97 COVID-19 orders. The committee frequently met remotely via Zoom videoconference. During this time, the committee wrote to the relevant Minister 16 times about concerns regarding 27 different COVID-19 orders. The following concerns were commonly found in these orders:

- undue trespass on rights and liberties
- lack of clarity
- inconsistency with the purpose of the empowering provision
- inappropriate application of infringement offences.

³⁴ [Inquiry into Parliament's legislative response to future national emergencies](#), December 2016, report of the Regulations Review Committee, 2016.

Following 2021, the number of COVID-19 orders made decreased. In 2022, the committee presented 27 reports to the House about 65 orders. The committee wrote to the relevant Minister 18 times about COVID-19 orders. Concerns identified by the committee in 2022 included:

- some aspect of the order requiring elucidation or clarification
- the order unduly trespassing on personal rights and freedoms
- potential drafting issues
- the offences created by the order being unclear.

In 2023, the COVID-19 pandemic eased further, and the number of COVID-19 orders reduced greatly. The committee presented only 4 reports to the House (including one interim report) about 3 COVID-19 orders. Two of these orders were revocation orders, which revoked prior COVID-19 orders that were no longer needed as the effects of the pandemic were starting to ease.

Did Regulations Review Committee scrutiny of COVID-19 secondary legislation improve the legislative response to COVID-19?

Throughout the committee's scrutiny of COVID-19 orders, recommendations made by the committee were taken into account when future orders were made. The Regulations Review Committee was able to monitor the uptake of its recommendations through its communication with the relevant Minister and its scrutiny of future versions of COVID-19 orders. When the committee had remaining concerns after communicating with the relevant Minister, it presented an interim report to the House in order to meet its reporting deadlines. This allowed the committee to undertake further scrutiny and present a final report to the House once its concerns were resolved.

One example of where this occurred is during the committee's examination of the COVID-19 Public Health Response (Air Border) Order (No 2) Amendment Order 2021. The order amended the COVID-19 Public Health Response (Air Border) Order (No 2) 2020 to require pre-departure testing for COVID-19 for persons arriving in New Zealand from specified places. The order provided that specified places would be designated by the Director-General of Health by Gazette notice. The committee wrote to the Minister about its concern that this was an unauthorised sub-delegation of the power to make legislation.

In an interim report to the House on this order, the committee said that the delegation by Parliament of a power to make legislation cannot be sub-delegated unless that is expressly permitted by the empowering enactment.³⁵ The committee considered that this was not the case for this order. It found that there was nothing in the explanatory note of the order that explained the authority for this sub-delegation.

The Minister responded that the power delegated to the Director-General was authorised by a power for the Minister to sub-delegate the power to grant exemptions or authorise activities that are otherwise permitted. The committee remained concerned about this matter and wrote to the Minister again reiterating its concerns.

³⁵ COVID-19 Public Health Response (Air Border) Order (No 2) Amendment Order 2021, [Interim report of the Regulations Review Committee](#), February 2021.

The committee presented a final report to the House on this order two months later.³⁶ This report discussed the Minister's response to the committee's second letter which stated that sub-delegation processes and provisions generally would be reviewed for proposals for an amendment bill.

When the order was confirmed in the House, the Minister indicated that the committee had a legitimate point that the power delegated to the Director-General was an unusual or unexpected use of the delegation ability within the Act. He said that the order would be amended accordingly.

Effectiveness of parliamentary scrutiny of COVID-19 legislation

Reflecting particularly on the work done by the Regulations Review Committee during the COVID-19 pandemic, the effectiveness of this scrutiny can be seen in how legislation continued to improve during the pandemic.

Jane Calderwood Norton and Dean R Knight view the committee's work as notable for its thoroughness.³⁷ They noted that the committee's appraisal of orders and identification of concerns were sometimes picked up in debates in the House on pandemic matters, in which committee members participated actively. The work of the committee was regarded as especially valuable when considering the significant improvements made to the nature and quality of COVID-19 orders as a result of Regulations Review Committee recommendations.

Others have commented on the effectiveness of parliamentary scrutiny more generally, stating that, overall, Parliament performed its legislative role successfully in responding to COVID-19.³⁸

New Zealand's legislative response to the COVID-19 pandemic entailed unparalleled, and rare rights to override legislation and impose restrictions via executive orders that substantially constrained people's civil liberties. New Zealand had amongst the lowest COVID-19 death rates in the world. As vaccination replaced isolation as the main measure to control the spread of COVID, restrictions were lifted.

There are various views in society on the adequacy and effectiveness of the safeguards provided for during the legislative response. The New Zealand Bill of Rights Act 1990 sat at the heart of citizens' ability to challenge the legality of orders through the Courts.

The operation of the legislation, and orders made under it, are being considered by a Royal Commission of Inquiry.

The effectiveness of measures and safeguards, including the role of the Regulations Review Committee, will be considered for years to come, as we reflect on the lessons learned from the COVID-19 pandemic and how the New Zealand Parliament discharged its constitutional functions in unprecedented circumstances.

³⁶ COVID-19 Public Health Response (Air Border) Order (No 2) Amendment Order 2021, [Final report of the Regulations Review Committee](#), April 2021.

³⁷ [Balancing Rights and Civic Freedoms with Effective Pandemic Governance: the Aotearoa New Zealand Experience](#), Jade Calderwood Norton and Dean R Knight, August 2024.

³⁸ [Assessing Parliament's Response to the COVID-19 Pandemic](#), Gabor Hellyer, Policy Quarterly, Volume 17, Issue 1, February 2021.