

**Witness Name: Joe Griffin**

**Statement No.: 4**

**Exhibits: JG4**

**Dated: 05 December 2023**

**UK COVID-19 INQUIRY  
MODULE 2A**

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**WITNESS STATEMENT OF THE DIRECTOR GENERAL STRATEGY AND EXTERNAL AFFAIRS**

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**Further to the issues raised by the Rule 9 notice dated 10 March 2023 served on the Scottish Government, in connection with Module 2A, the Director General Strategy and External Affairs (DG SEA) will say as follows: -**

**Introduction**

1. This statement is one of a suite provided for Module 2A of the UK Covid Inquiry and these should be considered collectively. This statement has been prepared to address further questions from the Inquiry and should be considered an addendum to the corporate statements provided for Module 2A both DG Strategy and External Affairs and DG Education and Justice (Justice), provided to the Inquiry on 23 June 2023.
2. During the pandemic, legislation was used to create and update at pace the legal framework for responding to the public health emergency created by a virus capable of both spreading and mutating rapidly and of causing significant harm, including deaths. Ministers considered such legislation, and the use of emergency procedures, to be necessary, proportionate, and justified.

**Emergency Bills**

3. The Scottish Parliament's Standing Orders set out the process that bills must follow. The ability to progress Emergency Bills is specifically provided for in the Standing Orders, with Rule 9.21 setting out the special requirements of the Emergency Bill process. These

procedures are explained in paragraph 13 of the earlier Module 2A DG Strategy and External Affairs (Legislation) corporate statement, provided on 23 June 2023. A normal bill will usually take around nine months from introduction to completion of Stage 3. In the case of an Emergency Bill, however, the three Parliamentary Stages all usually take place in one plenary session in the Parliament. This contrasts with normal Bills which are referred at Stage 1 for committee consideration, evidence taking and report and at Stage 2 (the principal amending stage) which is normally taken in committee. Proposals can be made to extend the default timetable for an Emergency Bill.

4. The other key difference is that the Standing Order requirements for the Finance and Public Administration Committee to consider the financial implications of the Bill and the Delegated Powers and Law Reform Committee (DPLRC) to consider delegated powers are set aside in relation to Emergency Bills. However, either or both of those committees could decide to consider the relevant implications of an Emergency Bill and set out their views for the rest of the Parliament. The Standing Orders also provide for a shorter period for lodging amendments.
5. Taken together these procedures allow swift action to be taken by primary legislation where the Parliament decides that a Bill should be designated as an Emergency Bill.
6. Before a bill can be designated as an Emergency Bill it must first be introduced as a normal Government Bill. Only if the Parliament subsequently approves a motion by a Government Minister seeking an emergency designation will the bill be defined as an Emergency Bill. The Standing Orders do not specify criteria that a bill must meet, but in order to obtain the necessary parliamentary support for this motion, the Scottish Government must provide a strong case to explain why an emergency designation is necessary and justified. It should be remembered that in the 2016 to 2021 term of the Scottish Parliament, the Scottish Government was a minority administration and therefore the support of MSPs from opposition parties was required for such a motion. The timetable for an Emergency Bill is proposed by the Parliamentary Bureau and must be agreed by the Parliament.
7. Since the establishment of the Parliament in 1999, 12 Bills have been designated as Emergency Bills. During the Covid-19 pandemic, three of the Scottish Government's Covid-19 related bills were designated as Emergency Bills. There was unanimous Parliamentary approval to treating the Coronavirus (Scotland) Bill and the Coronavirus (Scotland) (No.2) Bill as Emergency Bills. The Parliament also agreed that the Coronavirus (Extension and Expiry) (Scotland) Bill be treated as an Emergency Bill by a Parliamentary majority of 92 to 27. Of

these three bills, only the Coronavirus (Scotland) Bill was considered by the Scottish Parliament on a single day (1 April 2020). The Coronavirus (Scotland) (No. 2) Bill was introduced on 11 May 2020 and passed on 20 May 2020, with Stage 2 scrutiny being undertaken in Committee, while the Coronavirus (Extension and Expiry) (Scotland) Bill was introduced on 18 June 2021 and was passed on 24 June 2021, but with all three stages taking place in the Chamber of the Parliament. The Scottish Government proposed expanded timetables in two of these instances to seek to maximise the scrutiny time available to the Scottish Parliament.

#### Expedited Bills

8. An expedited Bill timetable is a timetable which is shorter than normal but is not that of an Emergency Bill. The Parliament's Standing Orders make no provision for expedited procedure so expedited timetables are negotiated by the Scottish Government with the parliamentary authorities and proposed by the Parliamentary Bureau for agreement by the Parliament. An expedited bill process complies with the procedures set out in Standing Orders but the period for Parliamentary stages is reduced. Sometimes the minimum gap provided for in Standing Orders is reduced by agreement of the Parliament. Other parts of the bill process set out in Standing Orders remain the same; for example, a Stage 1 report by the lead committee would still be prepared ahead of the Stage 1 debate and vote on a bill's general principles.
9. During the Covid-19 pandemic, three of the Scottish Government's Covid-19 related bills followed an expedited timetable. The Scottish Parliament agreed to expedited timetables for the Scottish General Election (Coronavirus) Bill, the Carer's Allowance Supplement (Scotland) Bill and the Coronavirus (Discretionary Compensation for Self-Isolation) Bill. These bills were taken forward with expedited timetables, rather than as Emergency Bills, to maximise the time available to the Scottish Parliament for scrutiny.

#### 'Made affirmative' procedure

10. Similarly, the urgency with which Ministers required to act largely dictated the procedure that required to be used for subordinate legislation during the pandemic. As discussed in the earlier Module 2A DG Strategy and External Affairs corporate statements, both provided on 23 June 2023 (para 141 of the DG Strategy and External Affairs corporate statement and para 37 of the DG Strategy and External Affairs (Legislation) corporate statement) many of the regulations required use of the 'made affirmative' procedure. This was the case for both

Covid-19 Health Protection Regulations and International Travel Regulations. Where Ministers required to act urgently, the enabling power in the parent Act allowed regulations to come into force before being approved by the Parliament including, but only where absolutely necessary, for those regulations to come into force before they had been laid before the Scottish Parliament. If this procedure had not been available, regulations would have required to follow the normal 'draft affirmative' procedure under which regulations are laid before the Parliament in draft and cannot be made and come into force until they have been approved by the Parliament. This process normally takes up to 54 days. Although the 'made affirmative' procedure is unusual, it is envisaged for use in times of emergency, where swift action requires to be taken. Due to the need to put additional measures in place to stem any increase in virus transmission, or to remove any restrictions rapidly when they were no longer necessary, it was not practical for Ministers to wait up to 54 days to make legislative changes and, as a result, the 'made affirmative' procedure was used to allow urgent action to be taken. As mentioned in previous statements, this was just as important when removing restrictions as it was when imposing them.

11. There are a small number of other examples where Acts provide for regulations to be brought into force quickly to deal with urgent issues. These powers are often associated with protecting public health and safety. From 1999 to 2005 a series of Scottish Statutory Instruments (SSIs) were made using the 'made affirmative' procedure to prevent consumption of poisonous shellfish. These were made under the Food and Environment Protection Act 1985 which provides for an emergency order to be made imposing restrictions if there is food that is unsuitable for human consumption and if consumed is a hazard to human health. These SSIs were used to impose restrictions such as the movement of scallops in certain areas or the use of such scallops. In these circumstances, use of the 'made affirmative' procedure was needed so the SSI could come into force quickly and protect public health.
12. Where it was possible to do so, some Covid-19 Health Protection Regulations followed 'draft affirmative' procedure but an expedited timetable was agreed with the Parliamentary authorities. For example, the Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No. 4) Regulations 2022 were laid in the Scottish Parliament on 9 February 2022. These regulations extended the expiry date of the existing legislation for a further six months. These regulations followed the draft affirmative procedure because this was part of the Scottish Government's planned approach to extending the then baseline measures. The Regulations were made by Ministers on 24 February 2022, after Parliament had approved the SSI [JG4/001-INQ000247389] [JG4/002-INQ000078441].

### **Inclusion of 'made affirmative' procedure powers in Coronavirus Act 2020**

13. Use of the 'made affirmative' procedure to make regulations was discussed in the Parliament when the Legislative Consent Memorandum (LCM) for the Coronavirus Bill, provided, [JG4/003-INQ000131052] was debated.
14. The LCM lodged by the Scottish Ministers on 20 March 2020 under Rule 9.B.3.1(a) of the Parliament's standing orders provided the Parliament with full information regarding powers to make provision for Ministers to make regulations for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination (whether from risks originating there or elsewhere). It also made clear that these provisions were to mirror existing provision already available in England and Wales (paragraph 99) and therefore ensure greater consistency across the UK. This position had been set out in the draft LCM agreed by the Cabinet Sub Committee on Legislation earlier the same day.
15. Paragraph 101 of the LCM was also clear that "any Regulations made under these provisions are subject to the 'draft affirmative' procedure, with an emergency procedure ('made affirmative' procedure) in cases of urgency", whilst also clarifying the various safeguards that applied in relation to the use of this power, including the need for the regulations to be approved by the Parliament within the 28 days.
16. The Scottish Parliament's DPLRC considered the subordinate legislation powers in the Coronavirus Bill on 24 March 2020. There was then a plenary debate in the Parliament on the same day in which the motion to give legislative consent was passed without opposition [JG4/004-INQ000285952]. The Cabinet Secretary for the Constitution, Europe and External Affairs confirmed to the Parliament the Scottish Government's intention to "immediately make regulations under the emergency procedure of the Parliament" (i.e. the 'made affirmative' procedure), and that this emergency provision conferred the same powers on the Scottish Government that the UK Government already had under section 45C of the Public Health (Control of Disease) Act 1984. He further added that those powers allowed Ministers to make emergency regulations if they considered that there was an urgent need for them, which they did.
17. During the debate, the Convener of the DPLRC, Bill Bowman (North East Scotland, Conservative) commented as follows:



18. *"The committee is interested in the bill in relation to the powers that are being delegated to Scottish ministers to make legislation. Of those, the power that the committee considered to be the most significant is the one that allows Scottish ministers to make regulations for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence of, or spread of, infection or contamination.*
19. *"That power is necessarily broad given the wide range of responses that may be required to control an outbreak. However, the bill puts in place important and appropriate restrictions on the use of that power. The committee is also reassured that the affirmative procedure, or the made affirmative procedure in urgent cases, will apply. We think that that strikes the right balance between allowing the Government to act quickly and allowing the Parliament to scrutinise those actions."*
20. The Parliament then passed the motion to give legislative consent to the Bill without opposition. The Bill was then passed at Westminster and given Royal Assent to come into force as the Coronavirus Act 2020.

#### **Use of 'made affirmative' procedure for Covid-19 Health Protection Regulations**

21. The framework set out in the Coronavirus Act 2020 reflects that, when they considered urgent action was necessary, the Scottish Ministers could implement statutory controls with immediate effect. Ministers did this in the context of a rapidly changing and uncertain situation. The regulations also placed a duty on Scottish Ministers to keep measures in place no longer than necessary to prevent, protect against, control or provide a public health response to the incidence or spread of infection in Scotland with Covid-19. Ministers were legally required to review these regulations at least every 21 days.
22. As noted above in paragraph 10, in the interests of parliamentary scrutiny and ministerial accountability, any SSI made under the 'made affirmative' procedure is required to be approved by the Parliament within the period specified in the parent Act. If the SSI is not approved within the specified period, it ceases to have effect. In the case of the Covid-19 Health Protection Regulations, the specified period was 28 days beginning with the date on which the regulations were made (Coronavirus Act 2020, schedule 19, para 6(3)(b)).
23. During the Covid-19 pandemic, there were some instances when an SSI was revoked or amended such that it was superseded without being approved by the Parliament within the specified period. Of the 75 sets of Covid-19 Health Protection Regulations, this occurred in the case of four instruments:

- The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment (No. 13) Regulations 2020 [JG4/005-INQ000285954]
- The Health Protection (Coronavirus) (Restrictions and Requirements) (Additional Temporary Measures) (Scotland) Regulations 2020 [JG4/006-INQ000285955]
- The Health Protection (Coronavirus) (Restrictions and Requirements) (Additional Temporary Measures) (Scotland) Amendment Regulations 2020 [JG4/007-INQ000285956]
- The Health Protection (Coronavirus) (Restrictions and Requirements) (Additional Temporary Measures) (Scotland) Amendment (No. 2) Regulations 2020. [JG4/008-INQ000285957].

24. Instances of the revocation or amendment of SSIs in advance of their formal approval by Parliament were consistent with the statutory framework and enabled regulations to be adapted at speed in line with rapidly changing circumstances.

25. For example, in October 2020, there was an increase in transmission across Scotland and it was necessary to implement further restrictions to bring these numbers down. The principal regulations which were then in place (the Health Protection (Coronavirus) (Restrictions and Requirements) (Scotland) Regulations 2020) were suspended by the Health Protection (Coronavirus) (Restrictions and Requirements) (Additional Temporary Measures) (Scotland) Regulations 2020 (the Temporary Regulations) which came into force on 9 October 2020. The Temporary Regulations set out additional temporary restrictions as well as suspending the principal regulations while the temporary measures were in force.

26. The Temporary Regulations were then amended by two further SSIs. The Health Protection (Coronavirus) (Restrictions and Requirements) (Additional Temporary Measures) (Scotland) Amendment Regulations 2020 came into force on 16 October 2020 and made adjustments to the Temporary Regulations in relation to face covering requirements. The Health Protection (Coronavirus) (Restrictions and Requirements) (Additional Temporary Measures) (Scotland) Amendment (No. 2) Regulations 2020 came into force on 24 October 2020 and changed the expiry date of the Temporary Regulations so that the temporary measures could remain in force until a new levels-based approach was implemented across Scotland.

27. The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020 came into force on 2 November 2020, introducing a levels-

based approach across Scotland. The Local Levels Regulations revoked the Temporary Regulations and the two sets of amendment regulations. The Temporary Regulations and the amendment regulations were not formally approved by the Parliament because they were revoked prior to the expiry of the 28 day specified period discussed above at paragraph 15.

### Parliamentary Scrutiny

28. The Scottish Parliament closely scrutinised the Scottish Government's Covid-19 response, both its overall strategy and Covid-19 Health Protection Regulations in particular. Formal approval by the Parliament, including a debate on the regulations in the Chamber, was only one part of the process of parliamentary scrutiny of the Covid-19 Health Protection Regulations. These regulations were subject to other forms of scrutiny and accountability. These regulations were scrutinised in the Parliament by the DPLRC and the Covid-19 Committee and its successor, the Covid-19 Recovery Committee. In addition, questions would follow the First Minister's statement to Parliament on the changes being made by the regulations. A description of the procedure is set out in paragraph 142 of the Module 2A DG Strategy and External Affairs corporate statement, provided 23 June 2023. Ministers also reported to the Parliament on the operation of powers in Covid-19 legislation every two months, further details of which can be found in paragraph 143 of the Module 2A DG Strategy and External Affairs corporate statement and paragraphs 71-76 of the DG Strategy and External Affairs (Legislation) corporate statement, both provided 23 June 2023.
29. The Covid-19 Health Protection Regulations which were put to a vote in the Parliament were all approved.
30. The Scottish Government does not consider the revocation of the relevant instruments prior to formal approval by the Parliament to have been detrimental to parliamentary scrutiny and, in revoking them, had no such intent. This reflects normal practice in circumstances such as these where an SSI has been revoked before the end of the specified period.

### Advice on use of the 'made affirmative' procedure

31. The inclusion of the procedure in the Coronavirus Act 2020 for use in cases of urgency is described at paragraph 13 to 14 above and was covered in the advice that went to Ministers



on the Cabinet Sub-Committee on Legislation as part of the legislative consent process. Use of the 'made affirmative' procedure for Covid-19 Health Protection Regulations depended on the circumstances at the time and the urgency of the situation when the regulations were being made. Ministers were, therefore, advised about timing of the regulations and use of the 'made affirmative' procedure when regulations were sent to the Minister for approval. Advice in relation to approval of regulations was sent by the officials responsible for co-ordinating the Covid-19 Health Protection Regulations. This was in the form of submissions to the relevant lead Minister responsible for signing the regulations. For the period to spring 2021 this was done by officials in Constitution and Cabinet Directorate and from spring 2021, by a team in Covid Co-ordination Directorate. Parliamentary procedure was also often covered in the Cabinet Paper where proposals for changes to the regulations were discussed and, as such, was advice from the Deputy First Minister, as discussed in paragraph 125 of the DG Strategy and External Affairs corporate statement, provided 23 June 2023. A Chronological list of all Coronavirus Health Protection Regulations passed in Scotland is provided in general disclosure.

#### Advice on use of the Emergency Bill procedure

32. As discussed in the DG Strategy and External Affairs corporate statement, provided 23 June 2023, the Coronavirus (Scotland) Bill, the Coronavirus (Scotland) (No.2) Bill and the Coronavirus (Extension and Expiry) (Scotland) Bill were treated as Emergency Bills. Paragraph 13 of that statement provides an explanation of Emergency Bill procedure, and this is also discussed above at paragraphs 3 to 7. The Scottish General Election (Coronavirus) Bill, the Carer's Allowance Supplement (Scotland) Bill and the Coronavirus (Discretionary Compensation for Self-Isolation) Bill were not treated as Emergency Bills but did follow expedited timetables. See above at paragraphs 8 and 9 for discussion of expedited bills. The other Covid-19 related bills discussed in the Module 2A DG Strategy and External Affairs (Legislation) corporate statement, provided 23 June 2023, followed normal timetabling rules and were neither Emergency Bills nor followed an expedited timetable.
33. Advice to Ministers about the timetabling of bills, including advice on following Emergency Bill procedure or following an expedited timetable, was provided on a case-by-case basis for each bill. The advice for each bill was provided by the bill team responsible and has been provided, [JG4/009-INQ000285961], [JG4/010-INQ000285962], [JG4/011-INQ000285963], [JG4/012-INQ000285964].

#### Coronavirus (Scotland) Bill (an Emergency Bill)

34. The Coronavirus (Scotland) Bill, was introduced to the Scottish Parliament on 31 March 2020 by the Cabinet Secretary for the Constitution, Europe and External Affairs, Michael Russell MSP [JG4/013-INQ000285932]. The justification for the use of Emergency Bill procedure was set out in the Policy Memorandum, published on the day of the Bill's introduction. In summary, the Memorandum set out that the Scottish Government considered that in order for essential public services to continue to be able to discharge their functions in the way they were intended to, some temporary changes needed to be made to the way they operated and the way that they were regulated. In addition, further support and flexibility for business, and for those using public services, was necessary to reflect new restrictions, in both guidance and legislation, on the way people could live and work. The Policy Memorandum, Financial Memorandum, Statements on Legislative Competence and Delegated Powers Memorandum are provided: [JG4/014-INQ000183263] [JG4/015-INQ000183268] [JG4/016-INQ000183269] [JG4/017-INQ000183267]
35. The Policy Memorandum also set out, for each measure or set of measures in the Bill, a particular justification for the use of emergency procedure, or the reasons why alternatives to emergency procedure were not practicable. The preparation and publication of the Policy Memorandum, and the explanations and justifications contained in it for emergency law-making, was effectively the process by which Ministers were advised of, considered, and publicly set out the need both for an Emergency Bill generally, or for the inclusion of each policy area in emergency legislation.
36. At the meeting of the Scottish Parliament on 1 April 2020, the Parliament agreed to treat the Bill as an Emergency Bill. As no MSP indicated that they wished to vote against the motion, it was carried without a vote. MSPs had the opportunity to consider the explanations and justifications for the use of Emergency Bill procedure set out in the Policy Memorandum in advance of this vote.
37. The emergency timetable agreed for the Bill required all of the Bill's stages to be taken in the Chamber in one day. This was done on 1 April 2020. The Bill received Royal Assent on 6 April 2020.
38. The preparation and publication of the Policy Memorandum, and the explanations and justifications contained in it for emergency law-making, was effectively the process by which Ministers were advised of, considered, and publicly set out the need both for an Emergency

Bill generally, or for the inclusion of each policy area in emergency legislation. The Official Report is provided: [JG4/018-INQ000285933].

#### Coronavirus (Scotland) (No.2) Bill (an Emergency Bill)

39. During the passage of the Coronavirus (Scotland) Bill, the Scottish Government committed to considering the need for further devolved legislation to respond to the pandemic, principally because the abbreviated passage of the first Coronavirus Bill meant that certain issues could not be considered in sufficient detail. This led to the introduction of the Coronavirus (Scotland) (No.2) Bill to the Scottish Parliament on 11 May 2020 by the Cabinet Secretary for the Constitution, Europe and External Affairs.
40. The justification for the use of Emergency Bill procedure was set out in the Policy Memorandum, published on the day of the Bill's introduction. The Policy Memorandum set out, for each measure or set of measures in the Bill, a particular justification for the use of emergency procedure, or the reasons why alternatives to emergency procedure were not practicable.
41. At the meeting of the Scottish Parliament on 12 May 2020, the Parliament agreed to treat the Bill as an Emergency Bill. The motion was agreed to without a vote. MSPs had the opportunity to consider the explanations and justifications for the use of Emergency Bill procedure set out in the Policy Memorandum in advance of this vote. The Official Report is provided: [JG4/019-INQ000285958]
42. The emergency timetable agreed for the Bill was set out by motions of the Parliamentary Bureau and the Bill passed on 20 May 2020. The Bill received Royal Assent on 26 May 2020. The Policy Memorandum, Financial Memorandum, Statements on Legislative Competence and Delegated Powers Memorandum are provided: [JG4/020-INQ000215059] [JG4/021-INQ000215060] [JG4/022-INQ000215061] [JG4/023-INQ000215063].

#### Coronavirus (Extension and Expiry) (Scotland) Bill (an Emergency Bill)

43. The temporary measures brought in under the Coronavirus (Scotland) Act 2020 and the Coronavirus (Scotland) (No. 2) Act 2020 were due to expire on 30 September 2021. Given the pre-election period ahead of the Scottish Parliament election on 6 May 2021 and the summer recess period which began on 26 June 2021, to ensure that those measures, which

were considered to be essential, could continue beyond 30 September 2021, it was necessary for the Bill to complete its passage before 26 June 2021.

44. The primary purpose of the Bill was to extend measures temporarily until 31 March 2022 (or 30 September 2022 with the agreement of Parliament by way of an affirmative instrument) and expire those that were no longer required after 30 September 2021. It did not introduce any additional measures. Neither did it modify or amend any of the temporary measures. Passing the Bill in June 2021 took account of the time needed for it to come into effect, and crucially gave public services, and people in Scotland, more time to plan for what extension or expiry of those measures would mean for them.
45. Advice to the Deputy First Minister (DFM) was provided recommending a Bill be taken forward to expire certain provisions and extend the life of the two Scottish Coronavirus Acts. That advice provided options for timing of this Bill, with further, more detailed, advice being provided on specific timings (including implications for parliamentary procedure and discussions with parliamentary officials) and the provisions to be expired or extended as the Bill was developed. The DFM sought collective agreement from the Cabinet Sub-Committee on Legislation (which has delegated authority from Cabinet on matters of legislation) to add this Bill to the primary legislative programme and for introduction to be in June 2021, with the Bill being progressed to an emergency timetable (and with early commencement of provisions the day after Royal Assent ahead of expiry of the two Coronavirus Acts).

#### Scottish General Election (Coronavirus) Bill (expedited timetable)

46. In consultation with electoral stakeholders (principally, the Electoral Management Board for Scotland and the Electoral Commission) and representatives of all political parties with MSPs elected to the Scottish Parliament, Scottish Ministers decided that a number of primary legislation measures required to be put in place ahead of the Scottish Parliament General Election on 6 May 2021, to ensure that it could be held safely during the pandemic or, if conditions required, postponed.
47. In order to have the necessary legislative changes enacted in time, the Scottish General Election (Coronavirus) Bill followed an expedited timetable, with Parliament agreeing on 25 November 2020 to Standing Order requirements being suspended in relation to the minimum periods between Bill stages. Stage 1 concluded on 10 December 2020, Stage 2 on 17 December 2020 and Stage 3 on 23 December 2020. One of the measures in the Bill was to alter pre-election dissolution arrangements, with the Bill changing the date of dissolution



for the Scottish Parliament from 25 March 2021 to 5 May 2021. The Policy Memorandum, Financial Memorandum, Statements on Legislative Competence and Delegated Powers Memorandum are provided: [JG4/024-INQ000215065] [JG4/025-INQ000215066] [JG4/026-INQ000215067] [JG4/027-INQ000215068] [JG4/028-INQ000215069].

48. The Bill also brought forward the cut-off date for postal vote applications from 20 April to 6 April 2021 as a result of a request by electoral administrators. The primary purpose of the Bill was to set out measures in relation to the 6 May 2021 election. It made no permanent changes to electoral law. Passing the Bill in December 2020 took account of the time needed for it to come into effect, and crucially gave political campaigners, electoral administrators and people in Scotland advance notice of the changes in relation to the May 2021 election.
49. Advice to the Cabinet Secretary for Constitution, Europe and External Affairs and the Minister for Parliamentary Business and Veterans was provided in July 2020, recommending the Bill be taken forward and on options for its provisions, in order to achieve the range of measures set out above. The Cabinet Secretary was provided with material to brief Cabinet and subsequently sought collective agreement from the Cabinet Sub-Committee on Legislation to add this Bill to the primary legislative programme. It was introduced in December 2020, and progressed through Parliament on an expedited timetable.

#### Carer's Allowance Supplement (Scotland) Bill (expedited timetable)

50. As set out in the Policy Memorandum accompanying the Bill, having identified a clear need to provide further increased support to unpaid carers to help address the on-going impact of the pandemic, the Scottish Government considered a range of options. Options other than a top up to the Carer's Allowance Supplement 'the Supplement' paid according to the planned payment cycle would have had dependencies on the UK Government, and/or would have required the development by Social Security Scotland of a new delivery mechanism which would have put existing benefits and support, and the roll out of new benefits, at risk. The need for additional support was sufficiently urgent that waiting until the next scheduled payment of the Supplement in June 2022 would have risked leaving carers in greater hardship for a further six months.
51. Making a payment alongside the December 2021 payment of the Supplement was, therefore, the only way to ensure additional support could be provided timeously and ensure that there was no risk to Social Security Scotland's capacity to deliver the nine existing benefits it was



already providing to people on low incomes and ensure there was no impact on the Department for Work and Pensions.

52. Advice to Scottish Ministers recommended a standalone Bill be taken forward and that this should follow an expedited timetable. A timetable was identified that would allow for the Bill's introduction before the 2021 summer recess. This also allowed sufficient time for completion of the required Parliamentary processes following the summer recess and Royal Assent in November 2021 ahead of the December 2021 payment. The Bill also sought to take an enabling power to ensure that any future increases to the Supplement could be made through subordinate legislation and could, therefore, be made more quickly while still subject to appropriate levels of Parliamentary scrutiny. A submission on further Coronavirus Carer's Allowance Supplement in December 2021 is provided: [JG4/029-INQ000285960].

#### Coronavirus (Discretionary Compensation for Self-Isolation) Bill (expedited timetable)

53. The Coronavirus (Discretionary Compensation for Self-Isolation) Bill was required to continue the suspension of the duties on Health Boards to pay compensation to people they asked to isolate or not attend a specified place, or to carers (those duties being set out in the Public Health etc. (Scotland) Act 2008, sections 56 and 58). The suspension of those duties had been provided for in the Coronavirus Act 2020 (schedule 21, paragraph 46). The effect of that provision was to modify the duties so that Health Boards had discretionary powers to pay compensation. This provision in the Coronavirus Act 2020 was due to expire on 24 March 2022. The Bill needed to be in force and gain Royal Assent before the expiry date on 24 March 2022 to continue the suspension of the compensation duty conferred on Health Boards in respect of requests to self-isolate for Covid-19. If suspension of the compensation duty in the Coronavirus Act 2020 was not continued beyond 24 March 2022 the potential financial liability to the Scottish Government was estimated to be £380m annually because the compensation duty was not designed to operate to the scale of a pandemic.
54. Rule 9.53B of the Scottish Parliament's standing orders states that: "*The minimum period that must elapse between the day on which Stage 2 is completed and the day on which Stage 3 starts is 10 sitting days.*" When considering the potential Bill timetable, it was clear that adhering to standing orders on minimum periods between Stage 2 and Stage 3 would likely prevent the Bill coming into force and gaining Royal Assent before the expiry date on 24 March 2022. This would have meant that health boards would be once again under a duty to provide compensation to people they asked to isolate in relation to Covid-19. The scale of activity at territorial board level in relation to contact tracing cases meant that this was a

significant financial and administrative resource risk, on top of the very substantial resource constraints within health services as a result of Covid-19 health protection and public health activity.

55. The Deputy First Minister received advice outlining this risk and recommending seeking the agreement of Parliament to suspension of Rule 9.5 3B of the standing orders. This advice noted discussions with Parliamentary clerks, requiring suspension of standing orders, as a potential to avoid the risk of multiple votes taking place around the time of the Scottish Budget, as outlined as a concern by the Minister for Parliamentary Business. The Bill proceeded to an expedited timetable and was passed by the Parliament on 9th February 2022 and received Royal Assent on 23rd March 2022, in advance of the expiry date on 24 March 2022.

Key debates of the Scottish Parliament or meetings of the Cabinet at which the use of the 'made affirmative' or Emergency Bill procedure was discussed

56. In relation to use of the 'made affirmative' procedure, the Parliament's DPLRC conducted an inquiry into the use of the made affirmative procedure during the Covid-19 pandemic between December 2021 and January 2022. The Committee's report was published on 10 February 2022. The Report is provided: [JG4/030-INQ000285934].
57. The Report was debated at the meeting of the Parliament on 22 February 2022 and the Official Report of that debate is provided: [JG4/031-INQ000285935].
58. Use of Emergency Bill procedure was debated in the Scottish Parliament on each occasion when it was proposed that the procedure be used. As discussed above, this would be proposed on a Government motion. An example of a Government motion in relation to the Coronavirus (Scotland) Bill is provided: [JG4/018-INQ000285933].

**Parliamentary commentary on 'made affirmative' and the Emergency Bill procedure**

The 'made affirmative procedure'

59. As explained in paragraph 16 above, the view of the Scottish Parliament's DPLRC, reported to the whole Parliament when it unanimously gave legislative consent for the LCM for the Coronavirus Bill on 24 March 2020, was that the affirmative procedure, or the 'made

affirmative' procedure in urgent cases, struck "*the right balance between allowing the Government to act quickly and allowing the Parliament to scrutinise those actions*".

60. There was correspondence in late 2021 between the Parliament's DPLRC and the Scottish Government about use of the 'made affirmative' procedure for the regulations that implemented the "Covid Certification" scheme. See the exchange of letters between the Committee Convener and the Minister for Parliamentary Business dated 7 September 2021, provided: [JG4/032-INQ000285936], and 9 September 2021, provided: [JG4/033-INQ000285937] The Covid-19 Recovery Committee also wrote to the Minister for Parliamentary Business on 10 September echoing the points that the DPLRC made in their letter of 7 September (an acknowledgement from the Minister's Private Office was made rather than a formal response as the points raised were similar to those already addressed in the Minister's response to the DPLRC to which the Covid-19 Recovery Committee were copied.) At the meeting of the DPLRC on 14 September 2021, there was a discussion of the matter with the Minister for Parliamentary Business. A report of the meeting is provided, and the relevant content can be found on page 7: [JG4/034-INQ000285953]. Following that meeting, there was a further exchange of letters between the Convener and the Minister for Parliamentary Business dated 8 October 2021, provided: [JG4/035-INQ000285938] and 21 October 2021 [JG4/036-INQ000285939] as well as another letter from the Minister for Parliamentary Business of 26 November 2021, which also referred to the committee's concerns: [JG4/037-INQ000285940].
61. On 11 January 2022, the DPLRC scrutinised four sets of regulations that implemented amendments to respond to the Omicron variant prior to Christmas 2021. The Committee Report is provided: [JG4/038-INQ000285941] and includes commentary on the 'made affirmative' procedure.
62. As mentioned above, the DPLRC carried out an Inquiry into use of the 'made affirmative procedure'. The Deputy First Minister gave evidence for that Inquiry on 11 January 2022, provided: [JG4/038-INQ000285941]. The Committee's report made recommendations and is provided: [JG4/030-INQ000285934].
63. The Deputy First Minister provided an interim response to the report in a letter of 21 February 2022, provided: [JG4/039-INQ000285942], and the Committee's report was debated by the Parliament on 22 February 2022. The Official Report of this debate is provided: [JG4/031-INQ000285935]. During that debate, the Deputy First Minister reflected on the use of the 'made affirmative' procedure by the Scottish Government and noted that the procedure was

necessary when operating within a constantly evolving set of circumstances and under intense time constraints (Page 25).

64. The Scottish Government's final response to the report was set out in a letter from the Deputy First Minister to the Convener of the DPLRC of 7 March 2022, provided: [JG4/040-INQ000285943]. The annex to that letter, provided: [JG4/041-INQ000285944], sets out the Scottish Government's response to the Committee's recommendations on clarity and accessibility of law, changes to how 'made affirmative' instruments are brought forward, future 'made affirmative' powers, and expedited affirmative procedure.

#### Emergency Bill procedure

65. Examples of discussion in the Scottish Parliament about use of the Emergency Bill procedure are set out below:

- During a debate on the Coronavirus (Scotland) (No.2) Bill on 13 May 2020, Adam Tomkins MSP noted that the shortened timescale would impact on the ability for MSPs to consider the Bill and to consult on it, and that it would impact on individual rights, including the right to marry. In response, the Minister for Culture, Europe and International Development emphasised that while this emergency situation demanded emergency legislation, in development of the Bill, the impact of each measure on human rights was considered and would be at the heart of the Government's approach to reviewing and reporting on the Emergency Bills. The Official Report is provided: [JG4/042-INQ000285945], and the exchange can be found on page 26.
- On 22 June 2021, during the debate on a motion to treat the Coronavirus (Extension and Expiry) (Scotland) Bill as an Emergency Bill, objections were raised by Stephen Kerr MSP on the basis that the Government should use the summer recess to consult and see how Covid-19 develops over the summer months. Alex Cole-Hamilton MSP also raised objections. The Minister for Parliamentary Business explained that not having the powers in place at that stage in the pandemic would put the situation at risk and that waiting to see how the pandemic develops was not a way forward. In the subsequent vote, Parliament voted in favour of treating the bill as an Emergency Bill by 87 votes to 31. The full transcript of the MSP's point, along with the Minister for Parliamentary Business' response, can be found on pages 3 and 8 of the Official Report provided [JG4/043-INQ000285946].

#### Questions about regulations in Parliament



66. Members had the opportunity to ask questions about regulations at Committee in the course of the normal scrutiny procedures - in the DPLRC and the Covid-19 Committee and its successor, the Covid-19 Recovery Committee - and when the regulations were debated in the Chamber.

67. Members were also able to ask questions following the First Minister's Parliamentary statement on changes to regulations, mentioned above. Members could also lodge written and oral questions in Parliament on matters regarding the regulations. Such questions could be asked orally at First Minister's Questions and at Portfolio Question Time, or could be asked as Written Questions. Members could also write to Ministers themselves or on behalf of their constituents regarding these matters.

68. Members could also lodge motions for debate or raise points within relevant debates. For example, there was a debate in Parliament on 19 November 2020 regarding Scotland's Strategic Approach to Covid-19, provided: [JG4/044-INQ000285947]. This debate was part of a package of enhanced scrutiny measures which gave members an opportunity to scrutinise changes being proposed by the Scottish Government, particularly on international travel, ahead of the Parliament's normal process for scrutinising the regulations.

**Enacting Covid-19 legislation/regulations and identifying 'at risk' groups and clinically vulnerable people**

69. Scottish Ministers were committed to ensuring that groups with protected characteristics and clinically vulnerable persons were properly identified and given particular consideration within the four harms framework. The processes that were in place in this regard were discussed in the DG Strategy and External Affairs corporate statement, provided 23 June 2023, particularly from paragraph 72 onwards. Furthermore, as detailed in paragraphs 84-85 of that statement, decisions concerning NPIs took account of the impacts on different sectors, communities and groups within the population. Those considerations were built in to the four harms process and decision-making was also supported by impact assessments.

70. The four harms process, including considerations of clinically vulnerable people and groups with protected characteristics, was an integral part of the decision-making process that underpinned regulations. Further details of how the Scottish Government has systematically implemented a process of assessing the impacts on groups with protected characteristics which could result from significant changes to policies can be found in the Module 2A DG



Communities (Equality, Inclusion and Human Rights Directorate (EIHRD)) corporate statement, provided 23 June 2023.

71. It is important to note that while regulations were an important part of the Scottish Government's response, decisions were reflected in a combination of guidance and legislation, as stated in paragraphs 80-81 of the DG Strategy and External Affairs corporate statement and in paragraphs 40-42 of the DG Strategy and External Affairs (Legislation) corporate statement, both provided on 23 June 2023. Consequently, we have not limited our answer solely to legislation and have also included guidance measures in our response.
72. While there is some overlap between groups with protected characteristics and those at higher clinical risk, they are distinct and how each featured in our considerations and response differed, so for the purpose of clarity we have separated our response into two parts.

#### Highest Clinical Risk

73. There was alignment across the four UK CMOs around the initial groups identified as being at higher risk of negative outcomes from Covid-19. These were:
- Group 1 – Solid organ transplant recipients
  - Group 2 – People with specific cancers
  - Group 3 – People with severe respiratory conditions
  - Group 4 – People with rare diseases
  - Group 5 – People on immunosuppression therapies which increased risk of infection
  - Group 6 – People who are pregnant and have significant heart disease.
74. Initially, approximately 136,000 individuals were identified and, in March 2020, added to Scotland's Shielding list, which later became known as the Highest Risk List.
75. On 26 March 2020, the CMO wrote to Nursing and Medical Directors in NHS Scotland Boards advising of the highest risk groups and asking for clinicians to identify patients within these six groupings who may not have been identified through the national identification process, provided: [JG4/045-INQ000285948]. Clinicians could also, based on their clinical judgement, add to the Shielding/Highest Risk list people that were clinically at higher risk from Covid-19, but were not included in the groups 1-6 above set by the four CMOs, and a 'Group 7 – clinician identified' cohort was established. If someone thought that they were in

the highest risk group but had not received a letter, Scottish Government advice was they should contact their doctor. If people were newly diagnosed, or if clinicians felt it was required, we continued to add to the central list to ensure people could be supported to shield.

76. An interim Equality Impact Assessment of the support required by people who were at clinically higher risk of severe illness from Covid-19 (Shielding Programme) was carried out at the beginning of April 2020. This highlighted a range of ways in which people with protected characteristics may be negatively impacted by the Shielding policy. It also set out recommendations to mitigate these outcomes, and highlighted where there were already mitigations in place
77. In line with the four harms approach, it is worth noting that while the Covid-19 health risks to this group were higher, the increased social isolation associated with shielding also presented a significant risk to the mental health and wellbeing of this group. This balance between these risks shifted over the course of the pandemic and to ensure the response remained proportionate, surveys of this segment of the population were carried out in May and July 2020 to ensure considerations reflected an understanding of the lived experience of those shielding.
78. Further details on how the advice to those on the Highest Risk List changed over the course of the pandemic is covered in the Module 2A DG Health and Social Care corporate statement, provided 23 June 2023.
79. Although the advice to shield ended in July 2020, specific consideration of this group did not. Given the changing environment, self-isolating shielding advice was updated. Updated guidance was based around individual assessment of risk, to support individuals to make their own risk-based decisions. The Strategic Framework published on 23 October 2020 included specific advice for the Highest Risk List in relation to the five protection levels. In line with the Four Harms approach specific consideration was also given to the impact of those at highest risk when restrictions were lifted, for example when the requirement to wear a face covering was lifted in most indoor public settings there was in depth consideration on how this would impact those who were previously on the Highest Risk List. Research showed that while the risk of serious illness within this group had significantly reduced, this population remained highly nervous which meant that there was an increased risk of social isolation should they feel at risk when in public settings.

80. In May 2022 the Scottish Government published an assessment of the impact of ending the Highest risk list, provided: [JG4/046-INQ000285949], as well as guidance to help people at highest risk start to make their own risk-based decisions. The Scottish Government's Distance Aware campaign [JG4/047-INQ000285950] also gave those who were vulnerable the option to identify themselves to others in a non-stigmatising way so that people would be more cautious and take additional precautions.

81. As well as communications and guidance aimed at those at highest risk the Scottish Government's approach reflected the need for the general public to take additional care to protect those who were more vulnerable. As the pandemic progressed the risk of serious illness and death within the young and healthy reduced, however, there was still a significant minority for whom Covid-19 presented a significant threat. The Scottish Government policy, as stated in the Strategic Framework, of suppressing Covid-19 to the lowest level reflected a need for the majority of the population to take measures to protect those who were more vulnerable. This message of taking precautions to protect the vulnerable featured in many of the Scottish Government's public communications and in the First Minister's statements.

82. The terms "at risk" and "clinically vulnerable" were not used in Scottish Covid-19 legislation.

#### Protected Characteristics

83. The DG Strategy and External Affairs corporate statement provided on 23 June 2023 outlines how the four harms process fed into the decision-making . Within that process consideration was also given to the relative impacts on different groups in society. Throughout the pandemic officials across Scottish Government continued to engage with stakeholders to understand the lived experience of the population. This understanding was then fed into the process and influenced decision-taking in three significant ways:

- When considering a package of measures input was sought from relevant policy areas on how this might impact and what alternatives should be considered as part of the process
- Impact assessments on proposed regulations

84. Covid Coordination Directorate operated a hub and spoke model, engaging the whole of Scottish Government to gather intelligence and feedback from stakeholders to feed into the decision-making process. This network included representatives from the Faith and Belief team, the Equalities team, Children and Families Directorate and Disability networks. Given the requirement for a quick response to changes in the pandemic it was not always possible to engage fully with all stakeholders ahead of changes being made, however given the

ongoing engagement between Scottish Government officials and stakeholders, and the experience and expertise within relevant policy areas, it was possible to include specific considerations of the impact on different groups within the advice to Ministers. This was not limited to protected characteristics but also covered groups that would be economically disadvantaged.

85. In some instances, the use of guidance allowed for language that was clear that people should not participate in certain activities, but recognised that people would have different needs and that there would be reasonable exceptions. For example, there were allowances within the guidance for increased contact for those whose circumstances may mean that increased social isolation may have a higher impact, that included those in an unsafe home environment, people with poor mental health, or families who might need additional informal support with a new baby or disabled child. This approach recognised that people would have a diverse set of needs and avoided a need for very detailed lists within regulations.

86. As well as the particular considerations given to older people as a result of increased clinical risk discussed above, consideration was also given to the needs of children. Given the importance of early years development, parent and toddler groups were permitted to meet when others were not. For children under 12, the ability to play was protected throughout, firstly in outside spaces and then within indoor settings, as the clinical risk to them was deemed low. The continuation of sports and clubs to enable children to continue to meet with their peers and experience a level of normality, that provided specific benefits to their physical and mental health, were also permitted, with numbers and mixing determined by age and a tiered clinical risk approach, including to adults providing those activities. Special consideration was also given to the social and development needs of school age children who were permitted to gather for organised activities at an earlier stage with different limits on socialising applied.

87. Careful consideration was also given to impacts on faith groups where there were differences in how restrictions impacted on acts of worship, as well as considerations given to different religious festivals. For example, some faith groups found that the face covering requirement impacted on communal singing, or chanting, whereas for others it was more important to be able to worship without physical distancing, for example praying shoulder to shoulder. There was also consideration given to removing restrictions around religious festivals in an inclusive way to facilitate different religious celebrations. Some faith groups who used full immersion baptism as part of their practices highlighted strong wishes for this to be permitted and after consultation with faith groups and Public Health Scotland, guidance was amended to permit



full immersion baptisms with some additional health driven precautions. The guidance on safe use of Places of Worship was developed in collaboration with faith groups who fed into many policy developments and legislative consideration.

88. A number of changes were also made in recognition of the challenges faced by families with a disabled member to allow for adapted health and social care support to be delivered as well as facilitating respite and support for carers. The 'stay at home' guidance was also amended to accommodate different health and rehabilitation needs, for example the need to exercise more than once a day.
89. These are just some of the many examples of how consideration given to those with protected characteristics resulted in positive actions from the Scottish Government. These considerations were documented within advice to Ministers and Equality impact assessments, Childrens Rights and Wellbeing Impact Assessments (CRWIA's), Equality and Fairer Scotland Duty Assessments and other research papers, examples of which are provided: [JG4/048-INQ000182793] [JG4/049-INQ000182794] [JG4/050-INQ000182797] [JG4/051-INQ000182773] [JG4/052-INQ000182780] [JG4/053-INQ000182782] [JG4/054-INQ000182783].
90. As well as giving careful consideration to the clinically vulnerable and protected characteristics, specific consideration of these groups was also given in the Scottish Government's approach to vaccines. Those at higher risk were prioritised as part of the vaccine roll out and bespoke targeted communications were designed to address low take up in minority communities and this is discussed further in Module 2A DG Health and Social Care corporate statement, provide on 23 June 2023

#### International Travel Regulations

91. International Travel Regulations are detailed in paragraph 58 of the Module 2A DG Strategy and External Affairs (Legislation) corporate statement, provided on 23 June 2023. In terms of International Travel regulations, groups with protected characteristics, "at risk" groups and other clinically vulnerable persons were considered primarily through the EQIA process. When the Health Protection (Coronavirus) (International Travel) (Managed Accommodation and Testing) (Scotland) Regulations 2021 were being developed, although these regulations positively impacted on "at risk" and clinically vulnerable groups, as they sought to reduce the spread of the virus which disproportionately negatively affected them, it was recognised that there may have been accessibility requirements that the hotels were unable to meet. Where



possible, mitigations and provisions were put in place in hotels and a small number of exemptions from testing and the requirement to enter managed accommodation were built into the regulations.

92. Regard was had to the impact of the International Travel Regulations in relation to children, who were recognised as a vulnerable group. Provision was made for unaccompanied children travelling to self-isolate at home rather than in managed accommodation and for boarding school pupils to self-isolate at their schools. The impacts relating to children and young people were always considered in depth in conjunction with relevant teams across the Scottish Government, including the Children and Families Directorate, School Funding, the Independent and Home Education team, Family Law Policy (Civil Law and Legal System Division) as well as the Children's Commissioner and Public Health Scotland. Impact Assessments were routinely completed.

93. Impact assessments for the Covid-19 Health Protection Regulations, the International Travel Regulations and the Scottish Bills were provided to the Inquiry as part of the inventory for the Module 2A DG Strategy and External Affairs (Legislation) corporate statement, provided on 23 June 2023.

#### **Collaboration on development of legislation with the UK Government**

94. Following the Coronavirus Act 2020, the central scheme of public health regulations which imposed restrictions and other legal requirements in Scotland used devolved powers. However, the Scottish Government sought to continue a collaborative approach to legislation throughout the pandemic. As discussed in para 148-9 of the Module 2A DG Strategy and External Affairs corporate statement, provided on 23 June 2023, legislation was a constant feature of discussions between the four nations. In particular, there was close liaison on the Covid-19 public health regulations through the two years of the pandemic. The Scottish Government also worked closely with officials in the other nations in relation to expiry and suspension of provisions in the Coronavirus Act 2020 and Scottish Government officials took part in regular four nation meetings chaired by the Department of Health and Social Care to ensure a coordinated understanding of expiry of the Act.

95. For the international travel regulations, collaboration continued on alignment of regulations made under existing public health legislation in each jurisdiction, with the UK Government often sharing draft regulations for England relating to the overall framework of country lists, testing, quarantine and vaccination requirements for the Scottish Government to consider.

The UK Government also informed the Scottish Government in advance of the use of existing reserved immigration powers by Border Force to deny entry to persons who were not British or Irish citizens or had the right to reside in the UK who had recently been in an acute risk or 'red list' country, with the first imposition of these enhanced restrictions being around the outbreak of the mink-related variant in Denmark in November 2020.

### **Statements to Parliament on the two-monthly reports**

96. The Module 2A DG Strategy and External Affairs (Legislation) corporate statement, provided on 23 June 2023, provides detail on the two-monthly reports which reviewed the operation of Covid-19 legislation. Initially these were the subject of a ministerial statement to Parliament, with an opportunity for members to ask questions. Later this approach changed and the reports were instead scrutinised by the Covid-19 Committee and its successor the Covid-19 Recovery Committee, with no statement to Parliament.
97. This change in approach reflected the development of the pandemic. By August 2021 when the 8<sup>th</sup> report was published, provided: [JG4/055-INQ000183095], the most intense period of the pandemic had passed and, while Ministers remained willing in principle to give statements on the two monthly reports, in particular if there was any sense of demand for this, reports were no longer routinely accompanied by Ministerial statements. Publication of these reports continued to be accompanied by communication with the Parliament, in the form of a letter to the Presiding Officer, and the reports continued to be scrutinised, as before, by the Parliament's Covid-19 Recovery Committee. This ensured that the Parliament could provide focussed scrutiny of the reports and ensured appropriate and proportionate use of Parliamentary resources.
98. The two-monthly reports were just one element of a range of mechanisms by which the Scottish Parliament scrutinised Covid-19 legislation and the Government's use of statutory powers. In addition to the reports being scrutinised by Committee, the First Minister continued to make Parliamentary statements in relation to changes to regulations. The usual legislative scrutiny processes did not change. Members of the Scottish Parliament continued to scrutinise legislation in the normal way with regulations scrutinised by the Parliament and Committees as normal, and Parliamentary scrutiny of Covid-19 related bills continued.
99. The Scottish Government is not aware of any debates in the Scottish Parliament or discussions at Cabinet about the decision to stop ministerial statements to Parliament about the two-monthly reports.

100. The Scottish Government is not aware of any concerns or objections from Scottish Parliament officials or members of the Scottish Parliament about the two-monthly reports not being the subject of a ministerial statement to Parliament.

### **Criminal Sanctions**

#### How were criminal sanctions first proposed

101. Further information regarding the use of criminal sanctions, in relation to the enforcement of Covid-19 regulations can be found in the DG Education and Justice (Justice) corporate statement, provided to the Inquiry on 23 June 2023, specifically under the 'Fixed Penalty Notices' section - paragraph numbers 92 to 99.
102. When developing the initial 'stay at home' regulations for Scotland (the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020) Ministers decided to replicate the policy approach being taken by the UK Government in England as far as practicable, but in a way that was appropriate for the Scottish context.
103. These regulations imposed restrictions on people in Scotland in order to mitigate the harm caused by the virus, but also themselves caused harm, for example through social isolation. If compliance with the restrictions had been weak, the harm caused by the virus would have been greater, including for those who complied with restrictions, and increased spread caused by non-compliance would in turn would have required restrictions to be imposed for longer, causing greater harm. Sanctions for non-compliance were therefore considered necessary, proportionate and justified in order to reduce public health risk and harm in the most effective way, and with only the minimum necessary harm from the restrictions themselves.
104. Within this context, it was agreed that ensuring criminal sanctions were available was necessary to deliver the intended benefits of the restrictions. Effective and nationwide enforcement would be possible through Police Scotland if provision was made for criminal sanctions. Approaching enforcement of the restrictions with the availability of criminal sanctions as an option would also mean a similar approach to enforcement was taken across the nations of the UK.

#### Other means of enforcement considered

105. The approach in Scotland and across the UK overall was always one that combined regulations and public guidance. They were not alternatives, but essential, complementary aspects of the overall approach. Comprehensive public guidance over a range of media and formats (web, TV, print etc, including provision of material in other languages) was available throughout the pandemic, with public information campaigns to ensure awareness of restrictions and encourage compliance and appropriate behaviours. Further information about the Scottish Government's approach to public health messaging during the pandemic can be found in the draft DG Corporate statement addendum, provided on 14 August 2023. Due to the urgency of ensuring measures were in place to limit the spread of the virus, the Scottish Government consistently focused on providing the most proportionate and administratively efficient way of delivering the same effect as the UK Government's regulations within as short a timescale as possible. Further details on polling are included in the draft DG Strategy and External Affairs addendum, provided 08 September, 2023.

Consideration given by the Scottish Government to the likely impact on at-risk, vulnerable, or people with protected characteristics of criminal sanctions

106. The criminal offences were put in place by the initial set of 'stay at home' regulations. Given the pressures and requirements to put measures in place as a matter of urgency, no impact assessments were undertaken for these initial regulations, however, the policy note for these regulations, provided [JG4/056-INQ000285951], stated that *"Impact Assessments have not been prepared for this instrument because of the need to make and lay the instrument urgently to encourage self-isolation and minimise the risks to public health arising from Covid-19. The provisions of the Regulations are however subject to strict obligations on the Scottish Government to review their necessity."*

107. While criminal sanctions were made available, use of criminal sanctions in any situation arising would be at the discretion of law enforcement agencies. In line with the general approach to enforcing criminal laws, discretion was acknowledged as a key part of how Covid-19 related laws would be enforced including considering the circumstances of specific individuals who may be involved in potential breaches of Covid-19 legislation. The criminal offences were subject to a broad 'reasonable excuse' defence which was applicable to a variety of circumstances, including in relation to people at-risk, vulnerable or with protected characteristics. From the outset of the pandemic, the Chief Constable of Police Scotland emphasised his commitment to 'policing by consent' and issued officers with guidance about



following the 'Four Es' approach (i.e. Engage, Explain, Encourage and, only when necessary, Enforce), which was utilised throughout the course of the pandemic.

108. In April 2020, in the context of the imposition of the restrictions due to the pandemic, the Chief Constable of Police Scotland and the Scottish Police Authority (SPA) agreed to establish an Independent Advisory Group (IAG) to provide additional, human rights based, scrutiny of the use of the new emergency powers by Police Scotland. The role of the IAG and the final report from the IAG on the Police Use of Temporary Powers related to the Coronavirus Crisis are provided within the Module 2A DG Education and Justice (Justice) corporate statement, provided on 23 June 2023.

Consultation with Police Scotland, Crown Office and Procurator Fiscal Service (COPFS) and Scottish Courts and Tribunals Service (SCTS) on the decision to use criminal sanctions

109. Police Scotland, Crown Office and Procurator Fiscal Service (COPFS) and Scottish Courts and Tribunals Service (SCTS) were specifically consulted from the earliest stages of the development of proposals to make available criminal sanctions in respect of breaches of Covid-19 Health Protection Regulations. While the decision whether to use criminal sanctions as a component of the necessary response to the pandemic sat with the Scottish Ministers and Scottish Parliament, this consultation sought to ensure that proportionate enforcement tools were available under a criminal sanction regime. This included outlining the key core principles that underpinned the approach on the appropriate levels of Fixed Penalty Notices that could usefully be available and which had initially been shared with these bodies in March 2020. Further information around criminal sanctions in relation to the enforcement of Covid-19 Health Protection Regulations is provided within the Module 2A DG Education and Justice (Justice) corporate statement provided on 23 June 2023.
110. Police Scotland, COPFS and SCTS fed in advice relevant to their operational experience, within the context of the independent discretion of these bodies, in terms of how they would operate use of criminal sanctions for Covid-19 Health Protection Regulations. Their comments were taken into account, and in some cases, these led to specific policy proposals being adopted. For example, in March 2020, advice went to Ministers explaining that following discussions with Police Scotland, COPFS and SCTS, officials believed it would be preferable to ensure that an important element of how the criminal sanctions contained in Covid-19 legislation could be proportionately enforced was the use of a Fixed Penalty Notice (FPN) scheme based on the existing FPN scheme under antisocial behaviour legislation in Scotland. These views would inform advice and decisions made by the Scottish Government in terms of



how best to frame the availability of criminal sanctions. Sometimes advice was not followed, where this differed from overall agreed position. For example, SCTS provided comments on the operability of the fine structures set at £40 i.e., that it was possible to set the fine structures at £40, should this have been considered justified, necessary and proportionate. However, regulations reduced this to £30 to be on a par with position in England and Wales.

#### Communication about enforcement

111. The enforcement of criminal sanctions in individual cases is a matter for independent decision-making by Police Scotland and the Crown Office and Procurator Fiscal Service. In particular, the Lord Advocate is head of the system of prosecutions in Scotland and independent decision-making in this role is protected by section 48 of the Scotland Act 1998. The Chief Constable of Police Scotland is responsible for the operational decision-making of Police Scotland. Further information about the power of the three justice agencies is provided within the Module 2A DG Education and Justice (Justice) corporate statement provided on 23 June 2023. The independence of the prosecutorial function and of the police necessarily constrains communications between the SG (Cabinet Secretary for Justice, DG Education and Justice and other SG officials) and the Lord Advocate or any other public body such as Police Scotland about the approach to the enforcement of Covid-19 Health Protection Regulations or any other restrictions carrying criminal penalties. The Scottish Government has not in fact identified any such communications.
112. In short, once it was decided by the Scottish Government and Scottish Parliament that criminal sanctions should be available in respect of Covid-19 Health Protection Regulations, it was entirely a matter for these justice agencies to determine how to approach use of their new powers including in relation to the availability of fixed penalty notices.
113. The Cabinet Secretary for Justice, the Lord Advocate (in the role as the Scottish Government's chief legal adviser) and the Director General for Justice and Education are all part of the Scottish Government
114. As is normally the case with Ministerial advice, Ministers and officials with a relevant portfolio interest would be copied into submissions to the lead Ministers on how the criminal sanction regime was proposed to be developed. Such advice did not relate to the independent operational decision-making of justice agencies.

115. In respect of the development of powers relating to criminal sanctions, normal processes of formulating advice were followed, including collaboration between relevant Scottish Government teams, which would then be provided to Ministers for approval..

116. Consultation with Police Scotland, COPFS and SCTS was undertaken on a frequent basis – both through planned meetings and on an ad hoc basis. The nature of consultation reflected the pace at which work on the legal provisions was progressing. Any communications to or from the Lord Advocate as head of criminal prosecutions were done through the office of COPFS.

#### Ministerial statements on Covid-19 Health Protection Regulations

117. As noted in para 137-138 and 143 of the Module 2A DG Strategy and External Affairs corporate statement, provided 23 June 2023, when changes to the Covid-19 Health Protection Regulations had been agreed by Cabinet, or on occasion by the First Minister following a delegation from Cabinet, these would typically be announced to Parliament by the First Minister later that day, typically on a Tuesday. The statement explained the changes to regulations which were being made. These statements continued throughout the pandemic.

#### **Statement of Truth**

I believe that the facts stated in this witness statement are true. I understand that proceedings may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief of its truth.

**Signed:**

**Personal Data**

**Dated:** 6 December 2023