Witness Name: Pablo Grez Hidalgo
Statement No.:
Exhibits:
Dated: 12 December 2023

UK COVID-19 INQUIRY

WITNESS STATEMENT OF PABLO GREZ HIDALGO

I, Pablo Grez Hidalgo, will say as follows: -

General

1. I am a public lawyer whose research sit at the crossroads between administrative and constitutional law. I look at non judicial review mechanisms, i.a. routinary legality controls of administrative and legislative decisions performed by governmental lawyers, legislative drafters, the Law Officers and parliamentary select committees. I am currently a Lecturer in Public Law at Strathclyde Law School, having previously been a research associate at Birmingham Law School and a research assistant at Edinburgh Law School. I did a PhD in Law at The University of Edinburgh (2020), a Master in Public Law at UCL (2015), and an LLB at Universidad de Chile (2010). I am a qualified lawyer in my home country (Chile, 2010), where I was a governmental lawyer and an associate attorney at a law firm.
2. During my time at Birmingham Law School, I worked for the UKRI funded project "Pandemic Review: Rights and Accountability in COVID-19", led by Professor Fiona de Londras, and of whom Dr Daniella Lock was also a member. The project set out the COVID Review Observatory (CVRO), which recorded, tracked and assessed parliamentary review of responses. The team looked at what parliaments in Westminster, Belfast, Cardiff and Edinburgh were doing to subject government responses to the COVID-19 pandemic to review. Our research focused on a set of criteria, such as how independent, evidence-based, participatory these review processes were, and the extent to which parliamentarians took into account the human rights impact of the pandemic responses they were reviewing.
3. We published extensively on accountability in the pandemic context. Our publications include five academic journal articles, 20 blog pieces, as well as 16 submissions to UK

parliamentary committee inquiries, six to Scottish parliamentary committee inquiries, two Welsh parliamentary committee inquiries, and two submissions to UK and Scottish government's consultation processes. Professor Fiona de Londras, Principal Investigator of the project, also gave evidence to the Covid-19 Recovery Committee during stage 1 of the Coronavirus (Recovery and Reform) (Scotland) Bill. Our submissions, evidence and blogs remain available at the CVRO's website (https://blog.bham.ac.uk/cvro/). The list of our academic journal articles is as follows:

- Lock D, Grez Hidalgo P and de Londras F, 'Parliament's One-Year Review of the Coronavirus Act 2020: Another Example of Parliament's Marginalisation in the Covid-19 Pandemic' (2021) 92 The Political Quarterly 699 [PGH/1 - INQ000365976]
- Grez Hidalgo P, de Londras F and Lock D, 'Use of the Made Affirmative Procedure in Scotland: Reflections from the Pandemic' (2022) 26 Edinburgh Law Review 219 [PGH/2 - INQ000365984]
- Grez Hidalgo P, de Londras F and Lock D, 'Parliament, the Pandemic, and Constitutional Principle in the United Kingdom: A Study of the Coronavirus Act 2020' (2022) 85 The Modern Law Review 1463 [PGH/3 - INQ000365987]
- de Londras F, Grez Hidalgo P and Lock D, 'Rights and Parliamentary oversight in the pandemic: reflections from the Scottish Parliament' [2022] Public Law 582 [PGH/4 **INQ000365980**]
- Lock D, de Londras F and Grez Hidalgo P, 'Delegated legislation in the pandemic: further limits of a constitutional bargain revealed' Legal Studies <https://doi.org/10.1017/lst.2023.25> [PGH/5 - INQ000365982]

4. I have also written a response piece to two academic articles on parliamentary accountability and judicial scrutiny of the pandemic responses in Scotland and the UK in a recent symposium on Public Law and emergencies published in the Edinburgh Law Review, and a blog on the decision of the Outer House of the Court of Session in the case of Reverend Dr William J U Phillip and Others [2021] CSOH 32. The details are as follow:
    - Grez Hidalgo P, 'Legislative and Judicial Scrutiny of the Emergency Response to the Pandemic in the UK: Stubborn Accountability Gaps' (2023) 27 Edinburgh Law Review 310 [PGH/6 - INQ000365985]
    - Grez Hidalgo P, 'Hercules Comes to Scotland' (*Verfassunsblog*, 30 March 2021) <https://verfassungsblog.de/hercules-comes-to-scotland/>

Emergency legislative powers and procedures

5. Although there has been some discussion about the legality of the emergency response in the UK, in my view Professor Jeff King has made a compelling case for the legality of lockdown measures in England and Wales (see J King, 'The Lockdown is Lawful' UK Constitutional Law Blog U.K. Const. L. Blog (1 April 2020) (available at: https://ukconstitutionallaw.org/2020/04/01/jeff-king-the-lockdown-is-lawful/) and J King, 'The Lockdown is Lawful: Part II' UK Constitutional Law Blog U.K. Const. L. Blog (2 April 2020) (available at: https://ukconstitutionallaw.org/2020/04/02/jeff-king-the-lockdown-is-lawful-part-ii/). Professor King's arguments, as he notes, are fully applicable to Scotland and Northern Ireland because the enabling provisions contained in Schedules 19 and 18 of the Coronavirus Act 2020, respectively, were drafted following the relevant provisions of the Public Health (Control of Disease) Act 1984. In other words, those provisions ensured a level-playing field, so that each devolved nation had the same powers to respond to the Covid-19 pandemic that UK legislation had granted to the UK government, acting in its English capacity, and to the Welsh government.
6. In my view, the Covid-19 pandemic is a textbook example of legitimate use of emergency powers, including delegation of emergency law-making powers to the executive. A pandemic requires an effective, fast and flexible response that keeps pace with the ever-evolving nature of the virus. The legislative process is designed to slow the pace of law-making by requiring a series of readings that prompt reflection, debate and improvements in the quality of legislation. Hence, the normal pace of the legislative process may not be suited for situations of emergency, although as I explain below an emergency may evolve, thus enabling a more paused law-making process.
7. A framework of emergency powers must strike a balance between the need for an effective response to the emergency, and the demands of constitutional principle. Among the latter is the requirement to secure parliamentary scrutiny of the governmental response. Parliament must hold the government to account for its Covid-19 policies, for instance to ensure that the response is evidence led, that, whenever reasonably practical to do so the government has consulted with relevant stakeholders, and that it fulfils human rights requirements, while also not having a disproportionate and unequal impact on those rights.
8. In an emergency context there will be a balance between competing considerations, and therefore parliamentary scrutiny will inevitably be compromised to a certain extent. Our research at the CVRO accepts that. However, we take the view that the balance between these competing considerations throughout the 'specific period' was dynamic. Emergencies have a temporal dimension. At the initial response is the where the demands of the emergency are most felt. Nevertheless, as we progress into the pandemic, the State should shift from emergency response to crisis management. During the crisis

management period the demands of constitutional principle can be better accommodated against those of effectiveness in the pandemic response.

9. When we consider the temporalities of the pandemic, what emerges in Scotland is in terms of emergency legislative powers and procedures is a mixed picture. The Scottish government's response was enacted by means of primary and secondary legislation. In this section I will focus on primary legislation. I will cover secondary legislation in the next section. However, it is worth noting from the outset two things. First, that the core of the Scottish government's response to the Covid-19 pandemic in terms of domestic measures such as public health measures and international travel restrictions were enacted through Scottish Statutory Instruments (SSIs), a form of secondary or subordinate legislation. Second, that the Scottish Parliament's ability to debate and scrutinise these measures was significantly impacted by the Scottish government's overreliance on the Made Affirmative Procedure (MAP), an emergency procedure for the making of SSIs. The MAP applies when a Scottish minister thinks that an SSI needs to be made urgently. The consistent use of the MAP throughout the pandemic indicates that the Scottish government took the view that there was a more or less constant condition of urgency. In other words, from their perspective, there was never a shift from emergency response to crisis management.
10. In terms of primary legislation, during the 'specified period', the Scottish Parliament enacted five pieces of Covid-19 related statutes. Three of them were fast-tracked under the 'emergency procedure', one was subject to an 'accelerated timetable' (the Scottish General Election (Coronavirus) Act 2021, see motion S5M-23471), and one to the standard parliamentary procedure (Coronavirus (Discretionary Compensation for Self-isolation) (Scotland) Act 2022).
11. In my view, the passage of the two latter Acts did not raise concerns from a legislative scrutiny perspective. While the Scottish General Election (Coronavirus) Act 2021 was subject to an accelerated timetable, its three stages were spread in different weeks during the month of December (10, 17 and 23 of December 2020, respectively). Furthermore, before its passage the Scottish government consulted the opposition parties, and MSPs had plenty of notice in advance, as the Bill had been introduced on 16 November 2020, four weeks before its stage 1. The Coronavirus (Discretionary Compensation for Self-isolation) (Scotland) Act 2022, on the other hand, introduced on 15 November 2021, had a narrow objective, namely, to extend emergency provisions in the Coronavirus Act (Scotland) 2020 that gave discretionary powers to health boards to compensate people who they asked to self-isolate due to an infectious disease. On the other hand, its stages were fairly spread across late January and early February (stage 1 on 20 January 2022, stage 2 on 27 January 2022 and stage 3 on 9 February 2022). This timetabling enabled

the Covid-19 Recovery Committee and the Delegated Powers and Law Reform Committee to scrutinise the Bill in advance of stage 1 debate at the floor of the Scottish Parliament.

12. In contrast, three pieces of Covid-19 related primary legislation were subject to the 'emergency procedure', namely the Coronavirus (Scotland) Act 2020, the Coronavirus (Scotland) (No. 2) Act 2020, and the Coronavirus (Extension and Expiry) Act 2021). The two Scottish Acts were complex pieces of legislation that formed a core part of the Scottish emergency response to the pandemic. They were subject to a sunset clause expiring on 30 September 2021. The purpose of the 2021 Act, therefore, was to extend most of their extraordinary powers until 31 March 2022, and to enable Scottish Ministers to further extend their expiry date until 30 September 2022. Applying the emergency procedure to these three Acts meant that there was limited time for parliamentary scrutiny.
13. Under the emergency procedure, regulated by Rule 9.21 of the Scottish Parliament's standing orders, the three stages of a Bill are taken on the same day, unless Parliament decides otherwise. However, the Scottish Parliament approached each Bill slightly differently. At one end of the spectrum is the Coronavirus (Scotland) Act 2020, passed at the very beginning of the pandemic. The three stages were taken on the 1 April 2020. At the other end is the Coronavirus Act (Scotland) (No. 2) 2020, passed in May 2020. This was a step forward in terms of legislative scrutiny, as its stages were timetabled in three separate and non-continuous days (13, 19 and 20 of May 2020, respectively).
14. However, this positive trajectory, reflective of due regard to the temporalities of the pandemic, was called into question by the passage of the Coronavirus (Extension and Expiry) (Scotland) Act 2021 in June 2021. At the CVRO, we argued that the passage of this Bill represented an opportunity for the Scottish Parliament to take stock after one year and three months of parliamentary scrutiny practices in the pandemic context. Therefore, we advocated for amending the Bill, among other objectives, to secure on a statutory footing good accountability practices developed in Scotland. It was also an opportunity to strengthen review and renewal processes by maximising the impact of the Covid-19 Recovery Committee's scrutiny work. However, none of this took place. The Bill was introduced on the 18 June 2021, and undertook its three stages on three consecutive days on the last week before summer recess (22, 23 and 24 June 2020).
15. It is worth noting that the standing orders do not set a threshold or criterion for treating a Bill under the 'emergency procedure'. Yet, it cannot be a unilateral imposition by the Scottish government because it requires a motion approved by a majority of the Scottish Parliament. There was controversy at the Scottish Parliament on whether to pass the 2021 Act under the emergency procedure, and on its timetabling. There were divisions on voting both motions (S6M-00447 and S6M-00397), with Conservative and LibDem MSPs

voting against them. They took the view that Parliament should have been given more time to consider this Bill. On the other hand, Labour MSPs criticised the narrow scope of the Bill, which meant that MSPs' ability to amend it to introduce further measures in response to the social and economic consequences of the pandemic was constrained (see Scottish Parliament, Official Report 22 June 2021, col 67, Jackie Baillie MSP [PGH/7 - INQ000365989]).

16. The 'emergency Bill' procedure to enact primary legislation has only been used a few instances since the Scottish Parliament's creation. Writing in 2015, Professor Alan Page identified seven instances of emergency Bills (Page A, Constitutional Law of Scotland (2015, W. Green) para 13.36). I cannot recall any other instances of emergency Bills between 2015 and the passage of the Coronavirus (Scotland) Act 2020.
17. The exceptional use of the 'emergency procedure' is a welcome practice because this procedure significantly constrains the time for MSPs to scrutinise the Bill. As the UK Select Committee on the Constitution argued (see *Fast-track Legislation: Constitutional Implications and Safeguards* (HL 2008-09, 116-I), para 16), fast-tracking legislation raises questions regarding Parliament's ability to effectively scrutinise legislation, the technical quality of legislation, the ability of interested bodies and affected organizations to influence the legislative process, the capacity to secure that legislation is a proportionate, justified and appropriate response to the matter at hand, that fundamental constitutional principles are not jeopardized, and that transparency in policy-making is maintained. For instance, when appropriately timetabled, the legislative process enables MSPs to read the Bill and its accompanying memorandums, to gather information and evidence, understand the implications of its provisions, and to engage with constituents and other stakeholders. Each of these opportunities were halted by the treatment of these Bills as emergency Bills.
18. In my view, it was appropriate to pass the two Scottish Coronavirus Acts under the emergency procedure. These Acts were part of the early response to the pandemic, where it was appropriate to have an emergency response. On the other hand, while the second Scottish Coronavirus Act was an emergency Bill, the political branches agreed to spread its stages on different and non-consecutive days. As we argued at the CVRO, this decision paid due regard to the pandemic temporalities and represented a sensible compromise between the demands of an effective response and those of parliamentary scrutiny. Unfortunately, a different approach to the 2021 Act was both possible and necessary. The decision to fast-track this Act meant that no changes were made to the Scottish government's approach to law-making in the pandemic context for the rest of the 'specified period' between July 2021 and 30 April 2022. This clearly represents a missed opportunity, given the accountability gaps failings that were apparent by June 2021.

19. I recall a few instances where MSPs did raise concerns about the practices and processes concerning Covid-19 legislation or regulations. As I explain below, the extensive use of the MAP during the first six months of the pandemic raised concerns in the Scottish Parliament which lead to discussions between governmental and parliamentary officials in Autumn 2020 to introduce a package of measures to enhance parliamentary scrutiny. On the other hand, as described above, the passage of the 2021 Extension Act in June 2021 raised concerns about its fast-tracking. The Scottish government did respond by launching a consultation process in August 2021 which eventually led to the passage of the Coronavirus (Recovery and Reform) (Scotland) Act 2022 in June 2022. This Act reached a fairer balance between the need for an effective response to a public health emergency, and the demands of constitutional principle. A third moment was in Autumn 2021, where the Covid-19 vaccination certificate scheme was considered. The policy had been announced in advance and was controversial. The Covid-19 Recovery Committee launched a consultation process. Despite this, Scottish ministers implemented this scheme through the Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No. 2) Regulations 2021 (SSI 2021/349), made under the MAP. 49 MSPs voted against this SSI, because they opposed the policy and were dissatisfied by the government's decision to use the MAP in this case (Scottish Parliament Official Report, 9 November 2021, Session 6, cols 68-71 [PGH/8 - INQ000365988]). By contrast, when the Scottish government introduced changes to the scheme by the end of November 2021, it opted make those changes through the affirmative procedure (The Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No. 4) Regulations 2021 (SSI 2021/453)).

Secondary legislation

20. While Scottish primary legislation performed a role in the legislative response to the pandemic, by a large margin, the core of the Scottish government's policy response was introduced by means of Scottish Statutory Instruments (SSIs). Schedule 19, Section 1(1) of the Coronavirus Act 2020 enabled the Scottish government to take domestic public health regulations to respond to the pandemic. They include restrictions on persons things or premises, such as stay at home orders, social distancing measures, mask wearing, mandatory isolation, bans or caps on social gatherings, mandatory testing, measures on home cares, closures or restrictions on the operation of business and places of worship, among others. On the other hand, Scottish ministers introduced international travel restrictions through SSIs made exercising powers granted by the Public Health etc. (Scotland) Act 2008.

21. During the pandemic, the Scottish government – and indeed other UK governments – relied heavily on the MAP to make these Covid-19 related SSIs. The MAP is an emergency procedure to make secondary legislation (SSIs) which applies where a Scottish Ministers considers there to be a reason of urgency for doing so. In a nutshell, it enables Ministers to bring regulations into force before being approved for parliament, for up to 28 sittings days. If the regulations are not approved within that timeframe, they lapse and cease to be in force.
22. Before the pandemic, the MAP had been rarely used in Scotland. According to the Scottish Delegated Powers and Law Reform Committee (DPLRC)'s data, between 1999 and 2019 the Scottish Parliament considered roughly one or two SSIs made under the MAP per year (DPLRC, Inquiry into the use of the made affirmative procedure during the coronavirus pandemic, SP Paper 110, 12th Report 2022, Session 6, paras 15 and 23 [PGH/9 - INQ000365983]). Furthermore, between 2011 and 2019, the Scottish Parliament had only considered 9 SSIs made under the MAP.
23. Between 20 March 2020 and 1 February 2022 (22 months) the DPLRC considered 146 SSIs made under the MAP, mostly exercising powers provided either in the Coronavirus Act 2020 or the Public Health etc. (Scotland) Act 2008 (DPLRC, Inquiry into the use of the made affirmative procedure during the coronavirus pandemic, SP Paper 110, 12th Report 2022, Session 6, para 37 [PGH/9 - INQ000365983]). Of these, 69 SSIs were made exercising powers granted by the Coronavirus Act 2020.
24. At the CVRO, we conducted research over a sample set of 64 SSIs made by Scottish ministers between 26 March 2020 and 29 November 2021 exercising powers granted by Schedule 19, Section 1(1) of the Coronavirus Act 2020 [PGH/10 - INQ000365977]. Our main objective was to identify which procedure had been employed, whether the SSIs had been debated and voted on a division, and more generally to track the lifecycle of Covid-19 regulations. The reasons why our SSIs sample differs from the DPLRC's sample (69) are twofold. First, we looked at every SSI made under powers granted by the Coronavirus Act 2020, regardless of the procedure. By contrast, the DPLRC only counted those made under the MAP. Second, while the DPLRC's covered a period of 22 months, ours was of 20 months.
25. We found that 63 out of the 64 SSIs in our sample were made under the MAP. This figure indicates that the MAP was indeed the default parliamentary oversight procedure chosen by Scottish ministers to make 'public health regulations'. In our sample, there was only one set of regulations made under the affirmative procedure (The Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No. 4) Regulations 2021). This SSI was laid in draft on 29 November 2021, approved by the Scottish Parliament on 2 December 2021, made on 2 December 2021, and entered into force on 6 December 2021.

26. An emergency powers framework is justified by the crucial aims of protecting individual lives and health, fulfilling positive human rights obligations, protecting the public health system and preventing it from being overwhelmed, among others. The danger that a public health emergency poses justifies in certain circumstances emergency modes of law-making. In my view, the MAP has an important role to perform as part of the inmediate response to a public health emergency, as well as when the epidemiological situation is uncertain and fast-evolving. We have learned that the public health emergency manifest itself in waves, and that parts of the response can be planned in advance and others need to be enacted under an emergency procedure. The MAP should therefore be part of the law-making toolkit in a public health emergency context.
27. Nevertheless, given that it is far from the ideal mode of law-making, it should be exercised with caution and governmental self-restraint. This means that the urgency threshold to trigger the MAP should be demanding, and that alternative measures to enhance parliamentary scrutiny should be put in place to enable pre-enactment scrutiny of government policies. At the CVRO, we argued that to the extent that we move from emergency response to crisis management, the case for the use of the MAP is less compelling. As noted below, the Covid-19 Committee reported five SSIs where it considered that the use of the MAP was not justified. We think that the Covid vaccine certification scheme, introduced by the Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No. 2) Regulations 2021 was one of those examples. We accept that the balance between the competing considerations of effectiveness in the emergency response and constitutional principle will remain dynamic, and therefore there may be moments where the country moves back from crisis management to emergency response. However, the idea that a public health emergency has different phases, and that the balance between these considerations changes as the emergency evolves, is a useful criterion to guide governmental decision-making in this area.
28. The main advantage of the MAP is that it enables the government to introduce a quick and effective response as it enables the government to make regulations that can enter into force immediately after being made. The flip side of the coin is that any debate and approval at the Chamber is retrospective, and therefore MSPs must consider public health regulations that are already in force, and therefore come as a *fait accompli*.
29. The MAP is not the only procedure for the making of public health regulations. Under Schedule 19 Section 6(1) of the Coronavirus Act 2020 public health regulations are subject to the affirmative procedure. Only in those exceptional circumstances where a Scottish minister takes the view that the regulations need to be made urgently, the MAP applies (Schedule 19 Section 6(2), (3), (4), (5) and (6) of the Coronavirus Act 2020). Nevertheless, our research demonstrates that in practice, during the pandemic the MAP

operated as the default – if not the only – position, and that Scottish ministers were of the view that during those 20 initial months of the pandemic the statutory condition of urgency remained constant. Furthermore, the first SSI containing Covid-19 regulations approved under the affirmative procedure was laid in draft on 29 November 2021, over 20 months after the start of the pandemic.

30. In my view there are clear differences between these procedures which indicate that, in theory, the affirmative procedure is more demanding from the point of view of parliamentary scrutiny when compared to the MAP. The affirmative procedure requires Covid-19 regulations to be laid in draft, and cannot be made, nor enter into force, before being approved by the Scottish Parliament. In sharp contrast, under the MAP, Covid-19 regulations can enter into force before parliamentary approval, although they lapse if not approved within 28-sitting days of being made.
31. Our research shows that it can take a matter of weeks before an SSI made under the MAP is brought to a vote. Furthermore, as I explain below, since no account is taken of any period during which the Scottish Parliament is dissolved or in recess for more than four days, this means that the approval of an SSI made under the MAP can extend beyond 28 calendar days. We found this to be the case in 34% of SSIs in our sample. In our view, the fact that SSIs made under the MAP containing Covid-19 regulations had been in force for weeks (or even months) meant that MSPs had very limited room to reject them. I will expand on this point below.
32. While there are noticeable differences between the affirmative and the made affirmative procedures, I think that three points are worth bearing in mind. First, that the affirmative and the made affirmative procedure share one feature, namely, that MSPs get an all or nothing vote, and cannot amend an instrument. That said, it is theoretically possible that an MSP raises a point concerning one or more regulations contained in a draft SSI, and the government in response withdraws the draft and reintroduces a new draft in an amended form addressing the MSP's concern. The MAP would not allow time for this.
33. Second, while in theory the affirmative procedure can call for enhanced scrutiny, in practice it can make no difference. In our sample, we found only one SSI that was laid in draft (The Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No. 4) Regulations 2021). Nevertheless, in practice the making of this SSI under the affirmative procedure made no significant difference. The government only laid the draft on 29 November 2021 and timetabled the SSI to be considered and voted on four days. Generally, affirmative SSIs can be laid in draft for up to 40 days. While the Covid-19 Recovery Committee and the DPLRC agreed to this expedited timetable, it was far from ideal. On the other hand, at the Chamber this draft instrument was approved on 2 December 2021 with no debate, nor division because no MSP raised a point about it.

34. This takes me to my third and final point. The standard procedures for the making of Statutory Instruments, namely, the negative and the affirmative procedure, are widely regarded as ineffective by UK parliamentary select committees, learned organisations and academics alike. Although the MAP is an extreme example of light touch parliamentary oversight, neither the affirmative nor the negative procedures are robust examples of parliamentary scrutiny. There is an argument that these problems are not as acute in the Scottish context as they are at the UK level. While this may be true as far as the House of Commons is concerned, it less clear whether it is more robust that the scrutiny performed by the House of Lords. Yet, the Lords very rarely vote down an SI and have developed a practice of approving motions of regret when they disagree with the SI. In contrast, there are a handful of examples where the Scottish Parliament has voted to annul a negative instrument, and at least one example where it has refused to approve a draft instrument. As in Westminster, at the Scottish Parliament the scrutiny of SSIs is mainly committee-driven (Standing Orders of the Scottish Parliament rules 10.2 and 10.3). The DPLRC scrutinises every SSI on technical grounds, looking at its vires and drafting, while the relevant subject committee scrutinises the SSI from a policy point of view.
35. Even if the Scottish Parliament performs slightly better than the UK Parliament when it comes to the scrutiny of secondary legislation, by design, the scrutiny of SSIs will be light touch at best. For this reason, when the Scottish Parliament delegates key matters of policy to Scottish ministers, it is highly likely that an accountability gap would arise. The point therefore is that although the extensive use of the MAP during the pandemic is problematic from an accountability perspective, it is not a new problem. Rather, it is better described as an exacerbation of a pre-existing problem with the scrutiny of secondary legislation, both at the UK and at the devolved level.
36. To employ the MAP, Scottish ministers must 'consider that the regulations need to be made urgently' (Schedule 19, Section 6(2) Coronavirus Act 2020). A similar test applies in section 122(6) of the Public Health etc. (Scotland) Act 2008. The test is subjective, in the sense that there is no objective threshold or criterion, rather it is about whether the Scottish minister thinks there is an urgency situation. On the other hand, during the 'specified period' there was no ministerial duty to give reasons, for instance in the form of an oral statement before Parliament or a set of explanatory notes attached to the SSI when laid. Nor a duty to provide evidence in support of the ministerial assessment. Scottish ministers enjoyed discretion to decide whether on a given situation the urgency test has been met.
37. Consequently, an SSI made under the MAP would only contain a bare statement that the minister considers that reasons of urgency apply. The Scottish government developed an inconsistent practice of sometimes providing a letter to the Presiding Officer which

explained why an SSI was made under the MAP, with varying degrees of detail as to the reasons. The DPLRC thought that the government should provide a written statement which should accompany the laid SSI with detailed justification and supporting evidence (DPLRC, Inquiry into the use of the made affirmative procedure during the coronavirus pandemic, SP Paper 110, 12th Report 2022, Session 6, para 75 [PGH/9 - INQ000365983]).

38. To the best of my knowledge, during the pandemic there was no clear precedent, guidance or constraint that applied when a Scottish minister decided whether reasons of urgency justify the making of an SSI under the MAP. While we lack an objective urgency threshold, this was not an obstacle for the DPLRC to report five SSIs to the Chamber on the grounds that the MAP was not justified, and therefore that in those instruments, the affirmative procedure would have instead been the appropriate choice of procedure (DPLRC, Inquiry into the use of the made affirmative procedure during the coronavirus pandemic, SP Paper 110, 12th Report 2022, Session 6, para 36 [PGH/9 - INQ000365983]). It is worth noting that these were exceptional cases, since the DPLRC had scrutinised 146 SSIs by the time it published its report.
39. When considering the impact of the MAP in parliamentary scrutiny, I think that looking at the key milestones in the lifecycle of an SSI is illustrative. These milestones are when an SSI is made, laid before Parliament, approved by Parliament, and when it enters into force. The key feature of the MAP is that it enables Scottish ministers to bring an SSI into force before being approved. However, this does not mean that the SSI would enter into force before being laid. By laying an SSI in advance of entering into force, the government gives notice about the making of an SSI, and provides room for the lead parliamentary committee (the Covid-19 Committee and its session 6 successor, the Covid-19 Recovery Committee) to scrutinise public health regulations, even if at short notice.
40. From a practical point of view, the laying of an SSI consists of delivering a copy of it to the Scottish Parliament. The SSI would appear in the Scottish Parliament's Minutes of Proceedings and copies would be made available for any MSP to check, including parliamentary committees such as the DPLRC and Covid-19 Committee (or its successor). If an SSI is laid before entering into force, at least this means that MSPs have had in theory an opportunity to look at it before it enters into force. Therefore, the Scottish government should aim at laying an SSI before it enters into force, to give MSPs notice in advance.
41. Our research on a sample of 64 SSIs found that only in exceptional circumstances SSIs had entered into force before being laid (9.3%). The first case comprised the first SSIs made to impose a lockdown in Scotland, made on the 26 March (The Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020, SSI 2020/103). The other

cases arose during the 2021 General Election recess, where five SSIs were made during this period and could only be laid on the May 2021, after Parliament reconvened. The cases where the following:

- The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 18) Amendment Regulations 2021, SSI 2021 No. 168 (made on 24 March 2021),
- The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 19) Amendment Regulations 2021, SSI 2021 No. 180 (made on 1 April 2021),
- The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 20) Regulations 2021, SSI 2021 No. 186 (made on 15 April 2021),
- The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 21) Regulations 2021, SSI 2021 No. 193 (made on 22 April 2021), and
- The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 22) Regulations 2021, SSI 2021 No. 202 (made on 4 May 2021).

42. On the other hand, we found that 18.6% of SSIs within our sample were laid on the same day they entered into force. In these cases, MSPs were unable to scrutinise these Covid-19 regulations in advance of being communicated to the public and enforced by the police.
43. A majority of SSIs made under the MAP were laid in advance of entering into force (72%). While this speaks of good practice in terms of accountability and transparency, in most cases MSPs only enjoyed a small window of opportunity of between one and four days to look at Covid-19 related SSIs in advance of them entering into force. Only two SSIs were laid seven days in advance.
44. Conversations between the Scottish government and Parliament in autumn 2020 led to the implementation of a package of measures to enhance parliamentary scrutiny of governmental decision-making in the pandemic context. These measures were implemented by the end of 2020. One relevant measure was the practice of making ministerial statements on Tuesdays, where Scottish ministers would update Parliament on any intended changes on the strategic framework to respond to Covid-19. Furthermore, the government committed to have a final draft of the SSI introducing changes on a Thursday and to delay its implementation until Friday. In practice this meant that the lead Covid-19 committee (and its successor, the Covid-19 Recovery Committee)

would have an opportunity to scrutinise the Covid-19 measures after these were made, but before these entered into force.

45. I think this was a helpful measure. Parliamentary committees perform a significant role in assisting the Chamber to scrutinise legislation, including secondary legislation. The Scottish Parliament nominated the Covid-19 Committee (and then its successor, the Covid-19 Recovery Committee) as the lead committee for the scrutiny of public health measures and policy. The committees benefited from this opportunity to scrutinise SSIs before entering into force, even if at short notice. During session 5, the Covid-19 Committee considered a total of 47 SSIs made under the MAP (Covid-19 Committee, Legacy Report, SP Paper 1010, 8th Report, Session 5, para 11 [PGH/11 - INQ000365978]). Then, during session 6, the Covid-19 Committee scrutinised 54 SSIs made under the MAP in advance of being voted by the Chamber (Covid-19 Recovery Committee, COVID-19 Recovery Committee Legacy Report, SP Paper 420, 4th Report, Session 6, para 8 [PGH/12 - INQ000365979]). On the other hand, the DPLRC performed technical scrutiny of the legality and drafting of these instruments. In total, the DPLRC considered 146 Covid-19 related SSIs made under the MAP, including 69 made under the Coronavirus Act 2020 (public health regulations) and 72 under the Public Health etc. (Scotland) Act 2008 (international travel restrictions).

46. In my view these arrangements did improve transparency and provided Parliament with an opportunity, even if short, to scrutinise a Covid-19 related SSI before entering into force. Nevertheless, it is worth nothing that many of the public health regulations were complex and contained numerous provisions. These measures therefore were far from perfect, and left accountability gaps. While efforts were made to enhance scrutiny, short notice periods did have a negative impact on the ability of MSPs to review and scrutinise the regulations.

47. Another related question is how much time passed between an SSI being made, entering into force, and being approved by the Scottish Parliament. Section 6(3)(b) and (5) of Schedule 19 Coronavirus Act 2020 provides that SSIs made under the MAP must be approved within 28 days sitting days of being made. However, no account is taken of any period during which the Scottish Parliament is dissolved or in recess for more than 4 days. Our research showed that in all but a small minority of cases within our sample, the Scottish government complied with the 28 sitting days rule.

48. However, in our view, a more complex picture emerges when we consider the spirit of the 28 days rule, which is no other than to bring an SSI made under the MAP for approval as soon as it is reasonably possible. 34% of SSIs sample were approved more than 28 calendar days after the SSI had been made. These delayed SSIs felt within one of the following four periods where Parliament was either dissolved or in recess in our sample:

2020 summer recess (27 June 2020 – 9 August 2020), 2021 General Elections (25 March 2021 – 13 May 2021), 2021 summer recess (26 June 2021 – 29 August 2021), and 2021 autumn recess (9 October 2021 – 24 October 2021).

49. For instance, six SSIs' approval were delayed due to the 2020 summer recess. While Parliament reconvened on the 9 August, these SSIs were only approved on 26 August, hence, two weeks and three days after. Likewise, after the 2021 General Elections, four SSIs were left pending approval. While Parliament reconvened on 14 May, these SSIs were only brought to a vote on 9 June, three weeks and three days after. Finally, the 2021 autumn recess resulted in two SSIs having their approvals delayed. While Parliament reconvened on 24 October 2021, these pending SSIs were only put for a vote on the 4 and 9 November 2021, respectively. In contrast, after the 2021 summer recess ended on 29 August 2021, seven pending SSIs were approved on 8 September 2021.

50. There were nine SSIs containing Covid-19 regulations whose approval took two months or longer after being made. In our view, this show how acute the problems with the operation of the 28-sitting rule potentially can be. The examples are as follows:

- The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment (No. 5) Regulations 2020 (SSI 2020/190) were approved two months after being made;
- The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 18) Regulations 2021 (SSI 2021/166) and The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 18) Amendment Regulations 2021 (SSI 2021/168) were approved two months and nine days after being made;
- The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 19) Regulations 2021 (SSI 2021/180) were approved two months and one week after being made;
- The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 27) Regulations 2021 (SSI 2021/238) were approved three months after being made;
- The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 28) Regulations 2021 (SSI 2021/242) were approved two months and three weeks after being made;
- The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 29) Regulations 2021 (SSI 2021/252) were approved two months and two weeks after being made;

- The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 30) Regulations 2021 (SSI 2021/255) were approved two months and one week after being made; and
- The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 31) Regulations 2021 (SSI 2021/262) were approved two months after being made.

51. In our view, it is within the gift of the Scottish government (and indeed, Parliament) to show greater respect for the 28-days rule by seeking parliamentary approval of pending SSIs as soon as it is reasonably possible to do so. We think that more could have been done to bring pending SSIs to an earlier approval, in particular after the 2020 summer recess and the 2021 General Elections.
52. As noted above, we found four SSIs that were never approved at all because they expired before a vote could be held. The cases were the following:
    - The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendments (No. 13) Regulations 2020 (SSI 2020/261) were made on 27 August 2020 and entered into force on 28 August 2020. These regulations were revoked by The Health Protection (Coronavirus) (Restrictions and Requirements) (Scotland) Regulations 2020 (SSI 2020/279), made on 11 September 2020.
    - The Health Protection (Coronavirus) (Restrictions and Requirements) (Additional Temporary Measures) (Scotland) Regulations 2020 (SSI 2020/318) were made on 9 October 2020, and entered into force on that day. This SSI had a sunset clause which expired on 26 October 2020. However, on 22 October 2020, the Scottish government made The Health Protection (Coronavirus) (Restrictions and Requirements) (Additional Temporary Measures) (Scotland) Amendment (No. 2) Regulations 2020 (SSI 2020/329), which extended the expiry date of SSI 2020/318 until 2 November 2020. Furthermore, SSI 2020/329 was never approved because its purpose expired on 2 November 2020.
    - The Health Protection (Coronavirus) (Restrictions and Requirements) (Additional Temporary Measures) Amendment (Scotland) Regulations 2020 (SSI 2020/325) were made on 15 October 2020 and entered into force on 16 October 2020. These regulations were revoked by Schedule 8 of the Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020 (SSI 2020/344).
53. Although these were exceptional cases, they highlight potential vulnerabilities. On the one hand, the MAP enables Scottish ministers to make regulations quickly in response to the ever-evolving nature of the Covid-19 pandemic. While this is an advantage of the

procedure, if the pace of law-making is too fast it cannot keep with the demands of parliamentary scrutiny. The outcome is that a set of Covid-19 regulations are superseded before being brought to a vote. That happened in the first and third examples identified above.

54. In my view, however, neither of these two cases represents an arbitrary exercise of powers. Firstly, these are exceptional cases, and secondly, they were a response to a changing epidemiological situation because during autumn 2020 infections rose in Scotland due to the summer relaxation of public health measures. Nevertheless, when thinking about future lessons from the Covid-19 pandemic, it is worth pointing out that the MAP enables Scottish ministers to make regulations that can be repealed even before Parliament has a chance to debate them.
55. The other example is more concerning. The fact that the expiry date of SSI 2020/318 was extended by SSI 2020/329, which in turn was never approved, indicates that the MAP has a significant vulnerability from a parliamentary oversight perspective. It shows that, in theory, a set of regulations made under the MAP could remain in force through various extensions without being subject to parliamentary approval, and without the 28-sitting days rule being upset. We only found one example where this was the case, and we found no evidence of the Scottish government exploiting this accountability gap. SSI 2020/329 was never brought to a vote because the Scottish government overhauled the system of public health regulations by introducing a 'five tier' system of restrictions on 30 October 2020 (Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020, SSI 2020/344). Nevertheless, we think that lessons should be learned to prevent abuse of powers in the future. It should not be possible that chains of SSIs made under the MAP enable a government to circumvent parliamentary scrutiny.
56. The MAP had a significant impact on the Chamber's ability to retrospectively scrutinise public health measures. When motions to approve SSIs were moved, MSPs were asked to consider public health regulations that had been in force for weeks, if not months in some cases. By the time the vote took place, the Scottish government had already published guidance to communicate the content of the regulations to the public, which was further communicated by the media. Hence, people, business and workplaces were abiding by these regulations, and the police enforcing them. For this reason, at the CVRO we argued that SSIs made under the MAP came before Parliament as a *fait accompli*.
57. I think there may have been other reasons why MSPs refrained from voting against SSIs. For instance, MSPs could take the view that voting down an SSI could confuse the population as it would require a new set of regulations to be put in place very quickly; it could undermine the overall pandemic response and the trust of the public in governmental decision-making; and/or it could be that they only had specific objections

concerning some but not all of the rules enacted by a set of public health regulations, and an 'all or nothing' vote on the SSI did not accommodate those distinctions.

58. No SSI made under the MAP in our sample ceased to be in force because a majority of the Scottish Parliament voted against it. Furthermore, we found that almost 90% of SSIs within our sample were approved without a debate and a division. Only six SSIs, representing 9% of our sample, were debated at the Chamber; and only seven SSIs, representing an 11% of our sample, were approved on a division.
59. Debates on Covid-19 related regulations took place only when an individual MSP raised concerns about an SSI's content, its broader policy, or made a procedural point about the lack of meaningful parliamentary oversight. The debates concerning SSIs within our sample were short, lasting between five and 10 minutes. They were limited to two or three interventions, including one by the MSP concerned and a response by a Scottish minister. In total, the Scottish Parliament spent mere 35 minutes debating the SSIs of our sample. Our sample, as noted above, comprised 64 SSI made between 26 March 2020 and 29 November 2021, hence, over 20 months.
60. From an approval point of view, 89% of SSIs in our sample were approved without a division. In practice, this meant that at decision time, a Scottish minister moved a motion to approve the instrument which would be announced by the Presiding Officer, either separately or in bloc with other motions concerning other SSIs. After the announcement, unless an MSP spoke against the motion, the motion would be taken as approved, either separately or bulk approved, respectively. It was within the gift of MSPs to speak against an SSI and trigger a debate and a vote which potentially could result in the government being defeated. Our research showed that MSPs very rarely spoke against an SSI, and never managed to defeat the government on a Covid-19 related SSI.
61. During autumn 2020, parliamentary and governmental officials engaged in conversations to enhance parliamentary scrutiny. The package sought to create more and earlier opportunities for MSPs to scrutinise the government's response and influence decision-making processes, and to improve transparency. These conversations led to changes in practices that had an overall positive impact on parliamentary scrutiny of public health regulations, and to an extent, even if limited, addressed the accountability gaps left by the extensive use of the MAP in the making of SSIs.
62. I have already described some of those measures and their positive impact on pre-enactment scrutiny of public health regulations. In a nutshell, those measures were as follows (see Covid-19 Committee, Legacy Report, SP Paper 1010, 8th Report 2021, Session 5, para 17 [PGH/11 - INQ000365978]). Firstly, when the government envisaged that changes to public health regulations were forthcoming, a minister would make on a Tuesday's afternoon a statement setting out what those changes would be. In this way,

MSPs would be told of the broad direction of travel in terms of public health regulations and were given an opportunity to make questions. Secondly, the government committed to providing a draft copy of an SSI implementing those changes on a Wednesday afternoon, for the benefit of the Covid-19 Committee (and its successor). Thirdly, the government made available Scottish ministers, including the Cabinet Secretary for Covid-19 and the Cabinet Secretary for the Constitution, Europe and External Affairs, as well as public health officials such as the National Clinical Director to appear on a weekly basis before the committee on a Thursday morning to answer questions on proposed public health regulations changes. Finally, the government agreed to generally make into law these changes on a Thursday evening, and for them to enter into force on a Friday, to enable this pre-enactment scrutiny.

63. As far as post-enactment scrutiny by the Chamber of SSIs made under the MAP are concerned, the Scottish government agreed for a minister to make a statement introducing the content and significance of the SSI when motions to approve Covid-19 regulations made under the MAP were moved. This practice was implemented on 23 December 2020, and applied to most SSIs approved thereafter. In my view, this was a helpful practice, as it fostered transparency, and clarity and accessibility to assist MSPs' decision-making.

64. Overall, these changes did improve the ability of the Scottish Parliament to scrutinise public health regulations and secured a more transparent decision-making process. However, it should be noted that prospective scrutiny of changes in policy direction was no substitute of the detailed scrutiny of the implementation of those policies as contained in SSIs.

65. There were other ways in which select committees, in particular the Covid-19 Committee and its successor scrutinised the government. One relevant strand of work were parliamentary inquiries. The DPLRC conducted a relevant inquiry into the use of the MAP in the pandemic context, which provided significant insights into the role that this emergency procedure had in the Scottish context. The Covid-19 Committee conducted inquiries on the two-monthly reports on the exercise of emergency powers (I refer those these reports below) and supported the Chamber's role in scrutinising government's proposals to extend the expiry date of the emergency powers granted by the two Scottish Coronavirus Acts ('six months review processes'). Furthermore, there were inquiries on the government's plans to easing restrictions in the Summer 2020 and on its long-term strategy for responding to the Covid-19 in 2021. Likewise, the Covid-19 Recovery Committee undertook inquiries on the government's proposals to introduce a Covid-19 vaccination scheme, on what public health measures should be retained for Winter 2022 and on excess deaths since the start of the pandemic, among others.

66. A final point worth making is that the Scottish government published policy documents outlining its strategic approach to managing the pandemic. Their significance for the purposes of providing alternative means of parliamentary scrutiny is that these documents outlined policies which would later be implemented in detail on SSIs made under the MAP. There were three key documents, namely, 'The Framework for Decision Making' (April 2020), 'Scotland's Route Map through and out of the crisis' (May 2020) and 'Scotland's Strategic Framework' (October 2020). The latter contained the 'tier system' of lockdown restrictions which was implemented by means of The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020. The Strategic Framework was updated four times throughout the pandemic. Each of these documents was the object of an inquiry by the Covid-19 Committee and its successor to scrutinise. These inquiries enabled these committees to gather valuable evidence and question ministers and public health officials, and informed their scrutiny of SSIs.

Comparison with the processes of the UK Parliament

67. Broadly speaking, I think that there were no stark differences between the UK government (in its English capacity) and Scottish government in terms of their approach to emergency law-making. The UK Coronavirus Act 2020 was fast-tracked, as the two Scottish Coronavirus were. The UK government, like its Scottish counterpart, relied heavily on the MAP. Nevertheless, there are differences in practice and approach which suggest that the Scottish government was both more transparent and less resistant to parliamentary scrutiny.
68. In my view, the following examples illustrate this difference. First, the UK government adopted the practice of announcing changes in public health measures in televised press conferences, rather than through a Prime Minister's or ministerial statement before Parliament. In sharp contrast, the First Minister of Scotland and other senior ministers such as the Cabinet Secretary for Covid-19 announced changes in public health policy through statements before the Scottish Parliament. This also gave an opportunity for opposition MSPs to ask questions arising from these policy announcements. In a parliamentary democracy, the place where major policy announcements should take place is at Parliament, not in press conferences.
69. Second, the UK and the Scottish government alike were subject to reporting duties arising from their respective statutory enabling frameworks. However, the Scottish reports strike by their breath and depth, when compared with their English counterparts. Thus, these were long and detailed reports running over 200 pages in some cases. They contained a descriptive account of how the government had exercised the powers under the UK Coronavirus Act, yet also evaluative considerations as to why the government thinks the

emergency measures continue to be necessary and proportionate, despite their human rights implications. Furthermore, the reports also referred to the evidence supporting government decision-making, cases where there was consultation with relevant stakeholders, figures, and statistics, and sometimes detailed human rights analysis (usually in 'supplementary information').

70. This strong practice of reporting to Parliament went beyond what is required under clauses 15 of the Coronavirus (Scotland) Act 2020 and 12 of the Coronavirus (Scotland) (No.2) Act 2020. Honouring a political commitment, the Scottish government reported as well on the exercise of its powers under the UK Coronavirus Act 2020, including on Scottish Statutory Instruments (SSIs) made under powers granted by that Act (although the reports did not include a statement of why Scottish Ministers considered these SSIs to be necessary).
71. For parliamentary scrutiny to be effective, the starting point is governmental transparency. To the extent that the government furnishes Parliament with data, analysis and evidence, the Chamber and indeed select committees, can hold more effectively ministers to account. Every time the Scottish government laid these two monthly reports, they were accompanied by a ministerial statement and time for debate, with questions to the relevant minister. This meant that there was a regular cycle of scrutiny and debate on the impacts and effects of the pandemic response within the Scottish Parliament. On the other hand, the Covid-19 Committee scrutinised these reports in detail and took evidence from the Cabinet Secretary for Covid-19 and other senior public health officials. These practices bear no resemblance to the ones developed by Whitehall.
72. Finally, Scottish ministers appeared on a weekly basis to give evidence and answer questions before the Covid-19 Committee (and its successor), along with senior public health officials. To the best of my knowledge, UK ministers in charge of the pandemic response, acting in their English capacity, did not appear as frequently before UK Parliament's select committees, as their Scottish counterparts. Furthermore, the First Minister of Scotland appeared at least two times before the Covid-19 Committee to give evidence and answer questions. During the pandemic, the UK Prime Minister only appeared before the Liaison Committee, and he delayed is appearance. To the best of my knowledge, he did not appear before the Health and Social Care Committee during the pandemic.

Lessons learned for the future

73. The Scottish Parliament and government have already taken action to improve public health emergency frameworks. In June 2022, the Scottish Parliament passed the Coronavirus (Recovery and Reform) (Scotland) Act 2022, which amended provisions

regulating the making of public health regulations in the Public Health etc. (Scotland) Act 2008. These changes reflect lessons already learnt by the Scottish government and Parliament and represent a step in the right direction.

74. In terms of the MAP, section 122 (12), as amended, provides that 'the Scottish Ministers must explain why they consider that the regulations need to be made urgently'. In other words, Scottish Ministers now have a duty to give reasons to support their claim that the MAP is an appropriate procedure to make an SSI. This change should set a higher bar for the use of the MAP, since the subjective judgment of a Scottish minister would not be enough. Instead, she will have to provide public reasons, which will be scrutinised by Parliament and the public.
75. From a procedural perspective, fourth improvements are worth mentioning. The first only applies to regulations made under the MAP and consists of incorporating a sunset clause which clearly defines when these regulations expire. The other three procedural safeguards are more general.
76. There is a new requirement to make a public health declaration in sections 86B and 86C to trigger the public health emergency enabling framework. This means that Scottish ministers cannot make public health regulations unless Parliament has approved the exercise of these powers (there is one exception regulated in section 86C). Before making such declaration, Scottish ministers must consult senior public health officials. Crucially, such declarations are subject to parliamentary scrutiny and approval. These declarations cease to have effect when Scottish ministers consider that the reasons that justify the making of the declaration no longer apply. In that case, they should revoke the declaration.
77. In my view, these declarations are a welcome development. Nevertheless, there is room for improvement. Under this new regime, there are no six months renewal processes, as built into the UK Coronavirus and the two Scottish Coronavirus Acts. Although the Scottish Parliament could put pressure on a minister to revoke a declaration, it would have been preferable that MSPs had the power to review the declaration every six months or had the power to revoke such declaration by motion approved by a majority of Parliament.
78. A second general duty on Scottish Ministers is to consult, in so far as it is reasonably practicable to do so, when making public health regulations (section 122 (3)). Finally, Scottish ministers now have a statutory duty in section 86I to review public health regulations every 21 days. This requirement was introduced during the Covid-19 pandemic by means of secondary legislation in October 2020, but lacked statutory footing. In my view, putting this requirement on statutory footing reflects good practice, as it requires future governments to continuously assess the necessity and proportionality of their public health measures.

79. The 2022 Act has also modified the substantive scope of the powers originally provided in the Public Health (Scotland) etc. Act 2008, to put them in line with the powers that the UK Parliament granted to Scottish ministers in Schedule 19, sections 1 to 5. There are some minor modifications both in terms of substantive limitations on the content of public health regulations, and in terms of the sort of things that Scottish ministers can do with these powers.
80. At the CVRO, we took the view that more could be done to achieve a better balance between primary and secondary legislation as far as public health measures are concerned ([PGH/13 – INQ000365986] and [PGH/14 INQ000365981]). We think that at least two alternative pathways are worth considering. First, to amend the enabling statutory frameworks so that different 'levels' of foreseeable elements of a public health response (such as a tiered system of public health restrictions) are outlined within primary legislation, with delegation to trigger these powers and tailor them according to level, extent, duration etc. being exercisable through secondary legislation. This would retain the necessary flexibility and urgency to respond to an ever-evolving public health emergency, while also securing a prominent role for Parliament in the crafting of the response. An alternative approach is to focus on pandemic preparedness and require the government to prepare draft public health regulations that are subject to pre-enactment scrutiny in advance of any future public health emergency. These draft regulations could be scrutinised by the Health, Social Care and Sport Committee and be consulted and communicated to those public bodies that will be at the forefront of the implementation of that response, such as the police, local authorities and the NHS.
81. A final recommendation is to incorporate a ministerial duty to report on the exercise of emergency powers every two months. As noted above, the Scottish government developed a strong practice of reporting to Parliament on the operation of the Scottish Acts, through two-monthly reports pursuant to by clauses 15 of the Coronavirus (Scotland) Act 2020 and 12 of the Coronavirus (Scotland) (No.2) Act 2020. There is no equivalent provision in the Public Health (Scotland) etc. Act 2008. The two monthly reports assisted the Scottish Parliament in holding the government to account and proved a meaningful source of information.
82. The CVRO argued that a good reporting duty should cover the following ground:
    - An explanation of relevant measures and what they are intended to achieve;
    - Information on whether and how the powers have been exercised;
    - Explanation of whether and why the powers remain necessary;
    - Evidence in support of the government's view regarding the continuing necessity of measures;

- Statement of whether the government has engaged with relevant stakeholders on continuation and operation of powers and, if so, who;
- Statement of human rights impacts of measures and of steps taken to ensure proportionality;
- Statement of equality impacts of measures and of steps taken to ensure non discrimination and mitigate any disproportionate impacts of measures.

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: 12 December 2023