

Witness Name: Michael P Clancy

OBE,WS.

Statement No.:

Exhibits:

Dated:

UK COVID-19 INQUIRY

WITNESS STATEMENT OF MICHAEL P CLANCY OBE, WS

Director of Law Reform, The Law Society of Scotland

I, Michael P Clancy, will say as follows: -

Introduction

The Law Society of Scotland offers its sincere condolences to all those who lost family, loved ones and friends during the pandemic and sympathises with those who suffered personally and who continue to suffer from the effects of Covid-19.

Question 1.

1. As at 1 November 2023 the Law Society of Scotland is the professional body for 13,346 Scottish solicitors.
2. We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession.
3. We also represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.
4. We were established by the Legal Aid and Solicitors (Scotland) Act 1949. The Solicitors (Scotland) Act 1980 is our current governing statute, section 1 of which states that the objects of the Society shall include the promotion of the interests of the solicitors' profession in Scotland and the interests of the public in relation to that profession¹.

¹ <https://www.legislation.gov.uk/ukpga/1980/46/section/1> (Ref LSS/247) (INQ000371602MC)

5. We must also have regard to the regulatory objectives enacted by the Legal Services (Scotland) Act 2010². These objectives include supporting the constitutional principle of the rule of law and the interests of justice; protecting and promoting the interests of consumers and the public interest generally; promoting access to justice and competition in the provision of legal services; promoting an independent, strong, varied and effective legal profession; encouraging equal opportunities within the legal profession; and promoting and maintaining adherence to the professional principles.
6. Our response to the pandemic engaged these regulatory objectives, though we particularly highlight the maintenance of the rule of law and its principles as enunciated by Lord Bingham in his book, *The Rule of Law*:
The law must be accessible, intelligible, clear and predictable.
Questions of legal right and liability should ordinarily be resolved by the exercise of the law and not the exercise of discretion.
Laws should apply equally to all.
Ministers and public officials must exercise the powers conferred in good faith, fairly, for the purposes for which they were conferred – reasonably and without exceeding the limits of such powers.
The law must afford adequate protection of fundamental Human Rights.
The state must provide a way of resolving disputes which the parties cannot themselves resolve.
The adjudicative procedures provided by the state should be fair.
The rule of law requires compliance by the state with its obligations in international as well as national laws.
7. We believe that a number of these principles were challenged through the response to the pandemic, as we will articulate in our response below. The pandemic was an unprecedented civil emergency, and legislative and policy changes were implemented with understandable urgency; evaluating the impact of these as we recover from the pandemic is an important step in ensuring society's resilience for the future.
8. Key facts and figures relating to the composition of the solicitors' profession are published annually in our Annual Report. Our most recent published report, for the year to 31 October 2022,³. Details on the equality and diversity of Scottish solicitors are available online⁴.
9. We also welcomed the creation of the independent, judge led Scottish Covid-19 Inquiry (covid19inquiry.scot).(**Ref LSS/249**) (**INQ00371604MC**) The Society has been appointed as a Core Participant in the inquiry see the Inquiry's Core Participant Protocol.(**Ref LSS/250**) (**INQ00371605MC**)

² <https://www.legislation.gov.uk/asp/2010/16/section/1> (**Ref LSS/248**) (**INQ00371603MC**)

³ <https://www.lawscot.org.uk/about-us/strategy-reports-plans/annual-reports/annual-report-2022/> (**Ref LSS/271**) (**INQ00371626MC**)

⁴ [diversity-data-pc-renewal-2020-21.pdf](#) (lawscot.org.uk) (**Ref LSS/251**) (**INQ00371606MC**)

10. The activities we undertook in the relevant period as they relate to the response to the COVID-19 pandemic by the Scottish Government include:
11. Making representations to the Scottish Parliament and Scottish Government about the legislative response to the COVID-19 pandemic, including the Coronavirus (Scotland) Act 2020⁵ ⁶, the Coronavirus (Scotland) (No. 2) Act 2020⁷ ⁸, the Coronavirus (Extension and Expiry) (Scotland) Act 2021⁹, the Coronavirus (Discretionary Compensation for Self-isolation) (Scotland) Act 2022¹⁰ ¹¹ and the Coronavirus (Recovery and Reform) (Scotland) Act 2022.¹²
12. Making representations to the UK Parliament and the UK Government about the legislative response to the COVID-19 pandemic, including the Coronavirus Act 2020.¹³
13. Liaising with Registers of Scotland and other stakeholders to ensure that property transactions could continue in a remote environment.
14. Promoting the policy change of disapplication of physical presence requirements in the execution of documents. This first appeared in the Coronavirus (Scotland) (No. 2) Act 2020 and was made permanent in the Coronavirus (Recovery and Reform) (Scotland) Act 2022 section 39.
15. Securing financial support for the legal aid sector, to mitigate the financial impact of the pandemic, particularly because of the delays to court business.

⁵ <https://www.lawscot.org.uk/media/368600/200331-coronavirus-scotland-bill-briefing.pdf> (Ref LSS/01) (INQ000362569MC)

⁶ <https://www.lawscot.org.uk/news-and-events/law-society-news/coronavirus-scotland-bill/> (Ref LSS/145)

⁷ <https://www.lawscot.org.uk/media/368825/12-05-20-coronavirus-no-2-bill-stage-1-briefing.pdf> (Ref LSS/03) (INQ000362571MC)

⁸ <https://vimeo.com/lawsocietyscotland/review/420626055/8896b0b75e>

⁹ <https://www.lawscot.org.uk/media/371214/21-06-21-coronavirus-extension-and-expiry-bill-stage-1.pdf> (Ref LSS/04) (INQ000362572MC)

¹⁰ <https://www.lawscot.org.uk/media/372031/25112021-coronavirus-discretionary-compensation-for-self-isolation-scotland-bill-003.pdf> (Ref LSS/05) (INQ000362573MC)

¹¹ <https://www.lawscot.org.uk/media/372255/07022022-coronavirus-discretionary-compensation-for-self-isolation-scotland-bill-stage-3-briefing.pdf> (Ref LSS/06) (INQ000362574MC)

¹² <https://www.lawscot.org.uk/research-and-policy/influencing-the-law-and-policy/our-input-to-parliamentary-bills/bills-202122/coronavirus-recovery-and-reform-scotland-bill/> (Ref LSS/144)

¹³ <https://www.lawscot.org.uk/media/368572/200322-coronavirus-bill-second-reading-briefing.pdf> (Ref LSS/07) (INQ000362575MC)

16. Conducting research to establish key issues for the profession and its clients, including the overall impact of the pandemic^{14 15 16 17 18}, the use of virtual custody hearings¹⁹, the impact on civil court hearings²⁰ and other issues.
17. We engaged with the Scottish Government and a number of non-departmental public bodies or independent statutory bodies such as the Scottish Legal Aid Board, the Registers of Scotland, the Scottish Courts and Tribunals Service and Office of the Public Guardian (Scotland) and Revenue Scotland on matters of importance to the public of Scotland and to the Scottish Solicitor profession. The matters which were raised included access to and functioning of the criminal and civil courts, the use of remote access by virtual means for court appearances, the provision of legal aid for clients, the recording of property deeds and powers of attorney and matters relating to tax. Annex XX contains detailed correspondence on these issues.

Question 2

18. The following paragraph details activities we undertook carrying out our statutory purposes in the relevant period as they relate to the response to the COVID-19 pandemic by the UK Government and the Scottish Government include:
19. Making representations to the Scottish Parliament by briefing MSPs and to the Scottish Government about the legislative response to the COVID-19 pandemic, including the Coronavirus (Scotland) Act 2020^{21 22}, the Coronavirus (Scotland)

¹⁴ <https://www.lawscot.org.uk/media/368868/covid-19-financial-impact-survey-private-practice-preliminary-analysis.pdf> (Ref LSS/08) (INQ000362576MC)

¹⁵ <https://www.lawscot.org.uk/media/369032/in-house-heads-of-legal-general-counsel-corona-virus-pandemic-survey-june-2020.pdf> (Ref LSS/09) (INQ000362577MC)

¹⁶ <https://www.lawscot.org.uk/media/369221/in-house-online-survey-proofed.pdf> (Ref LSS/10) (INQ000362578MC)

¹⁷ <https://www.lawscot.org.uk/media/369974/november-2020-financial-impact-of-covid-private-practice-final-2-dec-2020.pdf> (Ref LSS/11) (INQ000362579MC)

¹⁸ <https://www.lawscot.org.uk/media/371886/covid-19-third-financial-impact-survey-report-november-2021.pdf> (Ref LSS/12) (INQ000362580MC)

¹⁹ <https://www.lawscot.org.uk/media/369189/2020-07-28-crim-report-on-virtual-custody-courts.pdf> (Ref LSS/13) (INQ000362581MC)

²⁰ <https://www.lawscot.org.uk/media/370952/covid-civil-courts-survey-responses-may-2021.pdf> (Ref LSS/14) (INQ000362582MC)

²¹ <https://www.lawscot.org.uk/media/368600/200331-coronavirus-scotland-bill-briefing.pdf> (Ref LSS/01) (INQ000362569MC)

²² <https://www.lawscot.org.uk/news-and-events/law-society-news/coronavirus-scotland-bill/> (Ref LSS/02) (INQ000362570MC)

(No. 2) Act 2020²³ ²⁴, the Coronavirus (Extension and Expiry) (Scotland) Act 2021²⁵, the Coronavirus (Discretionary Compensation for Self-isolation) (Scotland) Act 2022²⁶ ²⁷ and the Coronavirus (Recovery and Reform) (Scotland) Act 2022.²⁸

20. Making representations to the UK Parliament by briefing Peers and MPs, the Joint Committee on Human Rights, the Public Administration and Constitutional Affairs Committee, the Scottish Affairs Committee and the UK Government about the legislative response to the COVID-19 pandemic, including the Coronavirus Act 2020.²⁹
21. Liaising with Registers of Scotland and other stakeholders to ensure that property transactions could continue in a remote environment.
22. Promoting the removal of physical presence requirements in the execution of documents. This first appeared in the Coronavirus (Scotland) (No. 2) Act 2020 and was made permanent in the Coronavirus (Recovery and Reform) (Scotland) Act 2022.
23. Securing financial support for the legal aid sector, to mitigate the financial impact of the pandemic, particularly because of the delays to court business.

²³ <https://www.lawscot.org.uk/media/368825/12-05-20-coronavirus-no-2-bill-stage-1-briefing.pdf> (Ref LSS/03) (INQ000362571MC)

²⁴ <https://vimeo.com/lawsocietyscotland/review/420626055/8896b0b75e>

²⁵ <https://www.lawscot.org.uk/media/371214/21-06-21-coronavirus-extension-and-expiry-bill-stage-1.pdf> (Ref LSS/04) (INQ000362572MC)

²⁶ <https://www.lawscot.org.uk/media/372031/25112021-coronavirus-discretionary-compensation-for-self-isolation-scotland-bill-003.pdf> (Ref LSS/05) (INQ000362573MC)

²⁷ <https://www.lawscot.org.uk/media/372255/07022022-coronavirus-discretionary-compensation-for-self-isolation-scotland-bill-stage-3-briefing.pdf> (Ref LSS/06) (INQ000362574MC)

²⁸ <https://www.lawscot.org.uk/research-and-policy/influencing-the-law-and-policy/our-input-to-parliamentary-bills/bills-202122/coronavirus-recovery-and-reform-scotland-bill/> (Ref LSS/144)

²⁹ <https://www.lawscot.org.uk/media/368572/200322-coronavirus-bill-second-reading-briefing.pdf> (Ref LSS/07) (INQ000362575MC)

24. Conducting research to establish key issues for the profession and its clients, including the overall impact of the pandemic^{30 31 32 33 34}, the use of virtual custody hearings³⁵, the impact on civil court hearings³⁶ and other issues.

Question 3

25. We issued Guidance to the Profession on the following topics:

- a. Court Civil and Criminal, including legal aid
- b. CPD requirements
- c. Civil Legal Aid Quality Assurance Scheme
- d. Key Workers and Essential Businesses
- e. Conveyancing and property
- f. Guidance on electronic signatures
- g. Anti-money Laundering
- h. Contingency and continuity plans
- i. Complaints
- j. Crown Office and Procurator Fiscal Guidance
- k. Revenue Scotland issues
- l. HMRC issues
- m. Financial Compliance
- n. Notary Public – execution of documents
- o. Personal Injury Cases
- p. Commissary issues
- q. Non face to face identification and verification
- r. Police Scotland guidance
- s. Powers of Attorney
- t. Price transparency
- u. Scams and Fraud
- v. Specialist Accreditation renewal
- w. Building Standards information
- x. Wills

³⁰ <https://www.lawscot.org.uk/media/368868/covid-19-financial-impact-survey-private-practice-preliminary-analysis.pdf> (Ref LSS/08) (INQ00036256MC)

³¹ <https://www.lawscot.org.uk/media/369032/in-house-heads-of-legal-general-counsel-corona-virus-pandemic-survey-june-2020.pdf> (Ref LSS/09) (INQ000362577MC)

³² <https://www.lawscot.org.uk/media/369221/in-house-online-survey-proofed.pdf> (Ref LSS/10) (INQ000362578MC)

³³ <https://www.lawscot.org.uk/media/369974/november-2020-financial-impact-of-covid-private-practice-final-2-dec-2020.pdf> (Ref LSS/11) (INQ000362579MC)

³⁴ <https://www.lawscot.org.uk/media/371886/covid-19-third-financial-impact-survey-report-november-2021.pdf> (Ref LSS/12) (INQ000362580MC)

³⁵ <https://www.lawscot.org.uk/media/369189/2020-07-28-crim-report-on-virtual-custody-courts.pdf> (Ref LSS/13) (INQ000362581MC)

³⁶ <https://www.lawscot.org.uk/media/370952/covid-civil-courts-survey-responses-may-2021.pdf> (Ref LSS/14) (INQ000362582MC)

26. We also provided Guidance on the following areas:

- a. Information and support
- b. Business Support
- c. Trainees and Students
- d. Adopting alternative ways of working.

27. All relevant pages in this guidance can be found at:

<https://www.lawscot.org.uk/news-and-events/law-society-news/coronavirus-updates-copy/> (Ref LSS/167)

28. All the updates we added during the pandemic have been republished on this copy of the original webpage. Some sections have been updated or superseded. Occasionally there are different versions of an update which appears in evidence for information.

Legal rules and competency relating to law making in the Covid-19 pandemic in and affecting Scotland

Question 4

29. The law relating to emergency powers is reserved under the Scotland Act 1998 Schedule 5, Section B10. It is therefore the responsibility of the UK Parliament to legislate on such matters while the UK Government is responsible for policy development and execution of emergency powers.

30. On the other hand, the law relating to health is devolved. The NHS was created 75 years ago with the National Health Service Act 1946 for England and Wales and the National Health Service (Scotland) Act 1947 both coming into effect on 5 July 1948. Accordingly, the existence of separate health services in each part of the UK predates devolution. Responsibilities of the devolved authorities include organisational control and funding of the NHS systems, provision of health services and the prevention, treatment and alleviation of disease, illness, injury, disability and mental disorder: [Devolution and the NHS | Institute for Government](#). (Ref LSS/154)

31. The Coronavirus Act 2020 was a UK Parliament Statute which in terms of its long title was “An Act to make provision in connection with coronavirus; and for connected purposes”. On this basis it was legislation about health and protection against the virus rather than legislation about an emergency. This is an important distinction because health is a devolved competence. The Act contained provisions which applied to all parts of the UK in different combinations dependent on the provisions being enacted.

32. Section 28 of the Scotland Act 1998 provides:

“(7) This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.

(8) But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.”

33. Because the Coronavirus Act 2020 legislates on devolved matters it engaged the Legislative Consent convention (sometimes called the Sewel convention). Devolution Guidance Note 10 provides that “Only Bills with provisions in category III are subject to the convention requiring the consent of the Scottish Parliament.”. Category III bills are those which contain, “provisions applying to Scotland and which are for devolved purposes...”: [Post-Devolution Primary Legislation affecting Scotland \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/86422/post-devolution-primary-legislation-affecting-scotland.pdf) . (Ref LSS/29) (INQ000362597MC)
34. In order to ensure that consent was agreed by the Parliament, the Scottish Government lodged a Legislative Consent Motion (LCM-S5-36) on 20 March 2020. The Parliament’s Finance and Constitution Committee considered the LCM on 24 March 2020. The Parliament then considered the LCM and the Scottish Government motion for its approval later that day. The text of the LCM was “That the Parliament agrees that the relevant provisions of the Coronavirus Bill, introduced in the House of Commons on 19 March 2020, so far as they fall within the legislative competence of the Scottish Parliament or alter the executive competence of the Scottish Ministers, should be considered by the UK Parliament.” The Parliament voted in favour of the LCM on 24 March 2020.
35. The overall approach of the UK and devolved administrations was to treat the pandemic as a public health matter. At the start of the pandemic, acting under powers contained in the Public Health (Control of Disease) Act 1984, the UK Health Secretary made the Health Protection (Coronavirus Restrictions) (England) Regulations 2020.
36. This was followed by the Welsh Government, which enacted the Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020.
37. In Northern Ireland, the Executive Department of Health, using powers under the Public Health Act (Northern Ireland) 1967 as amended by the Coronavirus Act 2020 enacted the Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland).
38. In Scotland the position was similar, the Scottish Government, acting under powers in the Coronavirus Act 2020, enacted the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020.
39. Divergence appeared in the way in which the regulations (which were similar but not identical) and Guidance published by all four Governments evolved³⁷.
40. Cooperation between the four nations had predated the Coronavirus action plan with legislation passed under the Public Health (Control of Disease) Act 1984³⁸ to enable the quarantine and detention of individuals found to be infectious.

³⁷ COVID-19: guidance and support - GOV.UK (www.gov.uk) (Ref LSS/275) (INQ000371630MC), [Coronavirus \(COVID-19\) in Scotland - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/coronavirus-covid-19-in-scotland/guidance-and-support/pages/default.aspx) (Ref LSS/276) (INQ000371631MC), [Coronavirus \(COVID-19\) | Topic | GOV.WALES](https://www.gov.wales/coronavirus-covid-19) (Ref LSS/277) (INQ000371632MC) [Coronavirus \(COVID-19\) | nidirect \(Ref LSS/146\)](https://nidirect.nidirect.gov.uk/coronavirus-covid-19)

³⁸ <http://www.legislation.gov.uk/ukpga/1984/22/contents> (Ref LSS/17) (INQ000362585MC)

41. In February 2020 the Secretary of State for Health and Social Care made the Health Protection (Coronavirus) Regulations 2020³⁹ which applied in England and Wales.
42. The Regulations (now revoked) applied to two categories:
 1. Cases involving people whom the Secretary of State or a registered public health consultant have reasonable grounds to believe are or may be contaminated with coronavirus provided they also consider that there is a risk that these people might infect or contaminate others (domestic cases);
 2. Cases concerning people who have arrived in England on an aircraft, ship or train from outside the UK and who the Secretary of State or a registered public health consultant have reasonable grounds to believe left an infected area within 14 days immediately preceding their arrival in England (overseas cases).
43. The Regulations provided for the detention by the Secretary of State or a consultant of members of the public “for screening, assessment and imposition of any restrictions” (on travel, activities and contact) for up to 48 hours or alternatively if screening has been undertaken, and restrictions are applied, the end of those restrictions.
44. Regulations were made in Scotland and Northern Ireland making COVID-19 a notifiable disease under the Public Health (Scotland) Act 2008 and the Public Health Act (Northern Ireland) 1967 which provided detention and quarantine powers.
45. *The Coronavirus Action Plan*
46. The Coronavirus Action Plan (AP) was published on 3 March 2020 by the UK Department of Health and Social Care, the Scottish Government, the Department of Health for Northern Ireland and the Welsh Government.
47. The AP recognised the respective roles and responsibilities of the UK Government and Devolved Administrations and set out:
 - a. what was known about the virus and the disease it causes,
 - b. how the Administrations had planned for an infectious disease outbreak, such as the coronavirus outbreak.
 - c. the actions the Administrations had taken so far in response to the current coronavirus outbreak.
 - d. what the Administrations were planning to do, depending upon the course the outbreak took.
 - e. the role of the public in supporting the Administrations’ response.

³⁹ <https://www.legislation.gov.uk/ukxi/2020/129/made/data.pdf> (Ref LSS/30) (INQ000362598MC)

48. The AP set out four phases to respond to COVID-19:
- i. Contain: detect early cases, follow up close contacts, and prevent the disease taking hold in this country for as long as is reasonably possible,
 - ii. Delay: slow the spread in this country, if it does take hold, lowering the peak impact and pushing it away from the winter season,
 - iii. Research: better understand the virus and the actions that will lessen its effect on the UK population; innovate responses including diagnostics, drugs and vaccines; use the evidence to inform the development of the most effective models of care,
 - iv. Mitigate: provide the best care possible for people who become ill, support hospitals to maintain essential services and ensure ongoing support for people ill in the community to minimise the overall impact of the disease on society, public services and on the economy.
49. The AP was clearly a document which indicated a high level of cooperation and coordination between the four nations in respect of the initial phase of the crisis. The Cabinet Office guidance on responding to emergencies assumed that this would be the approach to be followed⁴⁰.
50. Between 26 and 28 March 2020, all Governments in the UK responded to medical evidence and advice that lockdowns must be imposed and enforced in order to save lives, prevent the National Health Service from being overwhelmed and constrain the spread of Coronavirus and began a significant legislative effort.
51. The Guidance contained information on how to protect one another from the virus (including vulnerable people and those who are shielded), maintain health and deal with employment, financial and work issues. It also covered topics such as business matters, education, schooling, housing, transport, travel and immigration, healthcare workers, volunteering and support when there is a death.
52. However, the Guidance evolved as the effect and understanding of the virus developed, and as Government priorities changed among the Four Nations, the Guidance which each Government had issued, diverged.
53. The controversy between “staying alert” in England and “staying at home” in Scotland, Wales and Northern Ireland is an example of this divergence.
54. Consequently, the position was reached where the Guidance and the law were not the same in each part of the UK (indeed divergences in guidance may not have been reflected in amendments to regulations). Examples of how confusing the situation became occurred when considering at one time how many people could meet up in person, in England and Northern Ireland it was 6, in Scotland up to 8 people from 3 households.

⁴⁰ Emergency response and recovery - GOV.UK (www.gov.uk) (Ref LSS/278) (INQ000371633MC)

55. This is understandable, given that the virus may have spread in each jurisdiction at different times and rates, with each nation having its own institutions and capacities to address the problems as they arise.
56. Care had to be taken to ensure that the regulations applicable to whichever part of the UK were being followed, as a breach could result in legally enforceable penalties. To assist the public in following the relevant law and guidance it would have been particularly relevant, when broadcasting, for UK Government Ministers and officials to emphasise the jurisdiction to which their statements applied which could be the UK as a whole but often applied only to England. Otherwise, citizens in other parts of the UK might easily assume that the statements are being made in respect of the whole of the UK.
57. Moreover, effective communication about what was the law and what was guidance in each jurisdiction must be seen as essential for the proper operation of the rule of law.

Question 5

58. UK Legislation

59. The Coronavirus Act 2020 (legislation.gov.uk) **(Ref LSS/252)** **(INQ000371607MC)** was the main bespoke primary legislation passed by the UK Parliament. In terms of section 100, 49 sections apply to the whole UK, 5 sections apply only to England Wales and Scotland and 16 sections and 8 Schedules apply only to Scotland.
60. We note that the bill was enacted, in the words of the Joint Committee on Human Rights “despite the fact it included some of the most sweeping powers seen in modern times and interferes with human rights on an unprecedented scale”.
61. The areas covered by the Act include:
 - a) Modification of duties relating to health and social care considering reprioritisation of NHS resources;
 - b) Treatment of the deceased;
 - c) Access to education and childcare;
 - d) Sick pay: The situation for self-employment;
 - e) Port suspensions;
 - f) Powers of the Secretary of State, police and immigration officers as concerns potentially infectious persons;
 - g) Restrictions on events and gatherings; and
 - h) Court proceedings and access to justice.
62. The Act includes powers to make further provision by statutory instrument, and other measures such as directions which can have profound effects on rights. As noted above the Coronavirus Act 2020 was a UK Parliament Act which legislated on devolved matters.

63. Those sections dealing with devolved matters included:

4 Emergency arrangements concerning medical practitioners: Scotland (and Schedule 3)
 7 Temporary registration of social workers: Scotland (and Schedule 6);
 10 (2) Temporary modification of mental health and mental capacity legislation (and Schedule 9)
 12 Indemnity for health service activity: Scotland
 16 Duty of local authority to assess needs: Scotland
 17 Section 16: further provision
 18 (2) Registration of deaths and still-births etc. (and Part 2 of Schedule 13);
 20 Review of cause of death certificates and cremations: Scotland (and Schedule 14);
 22 Appointment of temporary Judicial Commissioners
 24 Extension of time limits for retention of fingerprints and DNA profiles (a reserved matter but touching on devolved record holding
 26 Authorities which may require information
 34 Temporary disapplication of disclosure offences: Scotland
 35 Power to reclassify certain disclosure requests: Scotland
 36 Vaccination and immunisation: Scotland
 37(2) (and Part 2 of Schedule 16); Temporary closure of educational institutions and childcare premises
 38(2) (and Part 2 of Schedule 17) Temporary continuity: education, training and childcare
 46 NHS pension schemes: suspension of restrictions on return to work: Scotland
 49 Health protection regulations: Scotland (and Schedule 19)
 69 Postponement of Scottish Parliament elections for constituency vacancies
 70 Postponement of local authority elections in Scotland for casual vacancies
 87 Commencement,
 88 Power to suspend and revive provisions of this Act,
 89 Expiry,
 95 Procedure for certain regulations made by the Scottish Ministers made provision for Scottish Ministers to exercise functions under the Coronavirus Act 2020 as a relevant national authority if the provisions applied only in Scotland.

64. The legislative provisions were clear and ensured that the Scottish Ministers had legislative competence to undertake those areas of activity at that time in relation to the pandemic.

65. In areas which the Scottish Ministers needed devolved power which was created by the Scottish Parliament they were able to bring forward a range of legislative provisions which enabled them to undertake further activity to control the pandemic in devolved matters which was scrutinized directly by the Scottish Parliament.

Scottish Legislation

66. Accordingly during the specified period the Scottish Parliament enacted:

- a. The Coronavirus (Scotland) Act 2020,
- b. The Coronavirus (Scotland) (No 2) Act 2020,

- c. The Coronavirus (Extension and Expiry) (Scotland) Act 2021.

Many aspects of these Acts are examined in the following answers to the Inquiry's questions.

Question 6

67. This is a difficult question to answer for a professional body such as the Society. The assessment of "appropriateness" is a subjective matter on which the Society, whose members may have a range of views on the way that the UK and Scottish Governments exercised their powers in the management of the pandemic, cannot have a view.
68. It may be easier to make an assessment after both the UK and Scottish Covid-19 Inquiries have concluded gathering evidence and come to conclusions.

Question 7

Legislation relating to the Covid-19 pandemic

- (a) The Coronavirus Bill 2020 (came into legal force in Scotland when the Scottish Parliament gave consent to The Coronavirus Act 2020 on 25 March 2020);
69. We would like to clarify the comment in question 7(a) that the Coronavirus Act 2020 "came into legal force in Scotland when the Scottish Parliament gave consent to The Coronavirus Act 2020...". In our view, the Coronavirus Act 2020 became law which applied to Scotland when it received the Royal Assent on 25 March 2020 and not when the Parliament consented to it on 24 March 2020.

Parliamentary Process

70. The Coronavirus Bill Second Reading, Committee Stage and Third Reading all took place on 23 March 2020. The Second Reading lasted from 4:01pm-8:00pm: Coronavirus Bill - Hansard - UK Parliament (**Ref LSS/253**) (**INQ000371608MC**). In Committee of the whole House the debate lasted from 8:01pm-10:00pm Report Stage concluded shortly before Third Reading which concluded at 10:16pm. Proceedings in the House of Lords were taken at pace with the Bill being introduced and being given a Second Reading on 24 March 12:06pm-2:13pm and 3:38pm-6:10pm and Committee, Report and Third Reading taking place on 25 March. The bill received the Royal Assent on 25 March. If anticipatory legislation is adopted outwith a period of pandemic criticisms around the speed of the parliamentary passage and the consequent lack of proper scrutiny would be substantially resolved.
71. It is clear that there was considerable activity in Government in advance of the introduction of the bill which led to the Coronavirus Act 2020 but the understandable pace of the parliamentary passage meant that scrutiny of the bill was inadequate and the opportunity for amendment (except Government amendments) was limited. Indeed, only one non-government amendment was passed: the new clause 1 on the postponement of General Synod elections.

72. The Government brought forward 53 amendments at Committee Stage some of which were substantial, for example amendments to the Social Security Administration Act 1992 and enabling regulations under clause 60 making retrospective, supplementary provision in respect of the postponement of elections. Many were new clauses (some which introduced new schedules) on Emergency arrangements concerning medical practitioners in Wales, Disapplication of limits under section 8 of the Industrial Development Act 1982, Elections and referendums due to be held in England after 15 March 2020, Elections and referendums due to be held in Wales after 15 March 2020, the strongly debated six month Parliamentary review, Local Authority meetings, Extension of Business improvement districts (BID) arrangements: England, Extension of BID arrangements: Northern Ireland, Extension of time limits for retention of fingerprints and DNA profiles, Residential tenancies: protection from eviction, HMRC functions, Up-rating of working tax credit etc. , Business tenancies in England and Wales: protection from forfeiture etc., Business tenancies in Northern Ireland: protection from forfeiture etc., amendments to schedules 7, 18, 20, 21, 23, 25, 27, and new schedules on Emergency arrangements concerning medical practitioners: Wales and Residential tenancies: protection from eviction.

Scotland specific provisions

73. We also had concerns about Section 10 and schedule 9 which made temporary changes to mental health legislation, specifically the Mental Health (Care and Treatment) (Scotland) Act 2003, the Criminal Procedure (Scotland) Act 1995, and associated subordinate legislation. Scotland's existing mental health legislation contains a number of safeguards to protect the fundamental rights of those subject to the legislation, and in particular the rights of individuals' arising from Articles 3, 5, 6 and 8 ECHR. We took the view that schedule 9 had the potential to remove or reduce these safeguards, leading to potential significant human rights violations.
74. Lord Bethell acknowledged towards the end of the Second Reading in the House of Lords that the bill... *"is an incredibly technical Bill; it is nearly 400 pages long. It was drafted on the hoof, at pace and in quick time."* Coronavirus Bill - Hansard - UK Parliament (**Ref LSS/254**) (**INQ000371609MC**).
75. This comment by a UK Government Minister indicates an approach to law making which, while understandable in the pandemic circumstances of 2020, should not be allowed to recur. As a general proposition, making good law involves legislative practices which involve consultation and proper scrutiny. Bad law-making practices create the risk that the legislation which results will be subject to challenge.
76. In other circumstances the Society would have highlighted the need to scrutinise the legislation carefully and not to sacrifice that scrutiny for speed. However on balance, the nature of Covid19 and the serious and imminent threat it posed to the community at large were potentially so devastating that it was right that Parliament's response matched the level of threat.

Recommendations for further Scrutiny Proposals

77. We suggested a Joint Coronavirus Committee of both Houses to coordinate detailed scrutiny of Government through the pandemic in much the same way as the Joint Committee on Human Rights deals with human rights issues and the Covid-19 Committee in the Scottish Parliament deals with Coronavirus issues.

78. We also suggested a quadripartite parliamentary group, bringing together all the UK legislatures to share experience, best practice and knowledge about legislating in the pandemic, using as a model the Interparliamentary Forum formed to consider Brexit⁴¹.

79. We have already commented on the LCM procedure in the Scottish Parliament. MPs representing Scottish constituencies were able to scrutinise the legislation through the mechanisms provided for in the Act. These included aspects of parliamentary control including regular reporting, the sixth month Parliamentary review and the one year status report which are explained below.

80. Parliamentary Control

Parliamentary control was a key feature of debates about the bill which resulted in the Act. Some aspects had been anticipated by the Government before the bill was introduced such as the limited duration of the legislation and regular reporting.

81. Expiry After 2 Years

Section 89(1) stated that the legislation would expire after a two-year period from the date on which the act was passed. Section 90 empowered a “relevant national authority” (a Minister of the Crown, Scottish Ministers, Welsh Ministers or a Northern Ireland Department) to alter the expiry date of the Act.

82. Regular Reporting

Section 97 provided that the Secretary of State must lay before Parliament a report every two months, after the Act is passed detailing the Part 1 provisions which are in force and including in the report a statement that the Secretary of State is satisfied that the status of those provisions is appropriate. The two-monthly reports can be found at: Coronavirus Act reports - GOV.UK (www.gov.uk) (**Ref LSS/279**) (**INQ000371634MC**). These reports covered the status of certain non-devolved provisions. The last non-devolved temporary provisions expired at the end of 24 September 2022. This means that all of the temporary, non-devolved provisions in the Act have now either expired or been repealed.

83. Six-month Parliamentary Review

Section 98(3) provided that a Minister of the Crown must make arrangements for a motion that “the temporary provisions of the Coronavirus Act 2020 should not

⁴¹ <https://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-select-committee/newsparliament-2017/sixth-interparliamentary-forum-statement/> (**Ref LSS/255**) (**INQ000371610MC**)

yet expire”, should be debated and voted on by the House of Commons after each six-month review period.

84. One Year Status Report

Section 99 of the Coronavirus Act 2020 applied where the Act operated for more than a year from 25 March 2020. Under this section, a Minister of the Crown was obliged to bring forward a motion in neutral terms to be moved in the House of Commons to the effect that the House has considered the one-year status report: [Coronavirus Act one-year report: March 2021 - GOV.UK \(www.gov.uk\)](#) (Ref LSS/256) (INQ000371611MC). This was considered by the House of Commons on 25 March 2021: [Coronavirus - Hansard - UK Parliament](#) (Ref LSS/257) (INQ000371612MC). A motion to take note of the report was considered by the House of Lords on the same day: [Covid-19: One Year Report - Hansard - UK Parliament](#) (Ref LSS/258) (INQ000371613MC).

- (b) The Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 (passed 26 March 2020);

85. The UK Coronavirus Act 2020 received Royal Assent on 25 March 2020. The Scottish Government used powers conferred by paragraph 1(1) of schedule 19 of that Act to bring forward the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 (“the Principal Regulations”), to ensure that action to implement social distancing and impose restrictions on gatherings, events and operation of business activity could be enforced. The Principal Regulations came into force at 7.15 pm on 26 March.

86. The Law Society did not comment on these regulations. There was no formal consultation in advance of the regulations being laid in Parliament.

87. The instrument is subject to the made affirmative procedure by virtue of paragraph 6(3) of schedule 19 of the Act. This provides that if Scottish Ministers consider that regulations need to be made urgently— “the regulations (the “emergency regulations”)— (a) must be laid before the Scottish Parliament; and (b) cease to have effect on the expiry of the period of 28 days beginning with the date on which the regulations were made unless, before the expiry of that period, the regulations have been approved by a resolution of the Parliament.”

88. The Scottish Ministers were required to review the need for restrictions and requirements imposed by these Regulations at least once every 21 days, with the first review being carried out by 16 April 2020.

89. From 14 September 2020 they were replaced by the Health Protection (Coronavirus) (Restrictions and Requirements) (Scotland) Regulations 2020. From 9 October 2020 those Regulations were suspended and replaced by [The Health Protection \(Coronavirus\) \(Restrictions and Requirements\) \(Additional Temporary Measures\) \(Scotland\) Regulations 2020 \(legislation.gov.uk\)](#) . (Ref LSS/19) (INQ000362587MC) The levels-based approach was introduced on 2 November 2020, when [The Health Protection \(Coronavirus\) \(Restrictions and Requirements\) \(Local Levels\) \(Scotland\) Regulations 2020 \(legislation.gov.uk\)](#) (Ref LSS/20) (INQ000362588MC) came into force and revoked the previous regulations. [The Health Protection \(Coronavirus\) \(Requirements\) \(Scotland\)](#)

[Regulations 2021 \(legislation.gov.uk\)](#) (Ref LSS/21) (INQ000362589MC) revoked the previous Regulations and came into force on 9 August 2021.

90. We also responded to the Inquiry into use of the 'made affirmative procedure' during the coronavirus pandemic⁴² by the Parliament's Delegated Powers and Law Reform Committee (DPLRC). We commented on made affirmative procedure by drawing attention to the significant number of statutory instruments where that procedure was used.
 91. Made affirmative procedure is a form of fast-track procedure for subordinate legislation, which needs to be carefully scrutinised. In Scotland such regulations are made on the basis that Scottish Ministers consider them to be needed urgently. Between 20 March 2020 and 2 December 2021 the DPLRC considered 132 made affirmative regulations.
 92. The House of Lords Constitution Committee, in its report *House of Lords - Fast-track Legislation: Constitutional Implications and Safeguards*⁴³ said: "The made affirmative procedure is often used in Acts where the intention is to allow significant powers to be exercised quickly. It is a kind of 'fast-track' secondary legislation. In most cases the parent Act specifies which form of procedure should be applied to instruments made under it. In some cases, however the Act may provide for either the draft affirmative or the made affirmative procedure to be used. If the made affirmative procedure is used, then the instrument is effective immediately."
- The report went on to say: "Instruments laid as made instruments almost inevitably place a serious time pressure on those drafting them. The JCSI's 8th report of this session drew the special attention of both Houses to three statutory instruments which had been laid as made affirmatives ... 'revisions were being made to the terms of the instruments down to the moment that they were made'", and there had been "serious time pressure" in the making of the instruments".
93. The parliamentary counsels' offices and the solicitors in the Governments' legal departments are expert in drawing up instruments but the policies and the challenging conditions which prevail require speed of scrutiny so those carrying out that scrutiny need to be additionally careful about the legislation they are considering.
 94. Furthermore, made affirmative regulations are subject to specific expiry deadlines if the Scottish Parliament does not approve them within 28 days of being made (Coronavirus Act 2020 Schedule 19 paragraph 6(3)(b) and Public Health etc. (Scotland) Act 2008 section 122(7)(b)).
 95. We echo concerns about the clarity and accessibility of subordinate legislation under made affirmative procedure which is subject to frequent and significant amendment for example The Health Protection (Coronavirus) (International

⁴² Inquiry into use of the 'made affirmative procedure' during the coronavirus pandemic | Scottish Parliament Website (Ref LSS/147)

⁴³ House of Lords - Fast-track Legislation: Constitutional Implications and Safeguards - Constitution Committee (parliament.uk) (Ref LSS/148)

Travel and Operator Liability) (Scotland) Amendment (No. 13) Regulations 2021 or The Public Health (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment (No. 13) Regulations 2021. In 2020 some regulations were amended as many as 25 times The Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 25) Regulations 2020 (revoked).

96. It is difficult to be certain of the state of the law when there are such frequent amendments, and the instrument is not presented as a consolidated version. When amending an instrument, the Government should produce a consolidated version showing the whole instrument as amended. The drafting and policy teams must be working with a marked up consolidated version, and it ought not to take extra time to produce a consolidation instrument.
97. Made affirmative legislation is permitted under several Acts of both the UK and Scottish Parliaments including the Public Health etc. (Scotland) Act 2008, Corporate Insolvency and Governance Act 2020 Direct Payments to Farmers (Legislative Continuity) Act 2020 and the Coronavirus Act 2020. Other legislation under which made affirmative regulations have been made includes the Public Services Reform (Scotland) Act 2010, Land and Buildings Transaction Tax (Scotland) Act 2013 and Articles 69(1) and 75(3) of Regulation (EU) No. 1306/2013.
98. We carried out an analysis of the agendas of the DPLRC over 2020 and 2021 and have identified that made affirmative regulations under the Coronavirus Act 2020 were considered on 61 occasions and those under the Public Health etc. (Scotland) Act 2008 on 67 occasions. These acts provide the powers to Scottish Ministers to make the majority of made affirmative regulations. Specifically, they do not refer to “made affirmative” regulations but rather to powers deployed on the basis of “urgency” which is translated into “emergency” regulations. As stated above the powers under the Coronavirus Act 2020 derive from Schedule 19 Paragraphs 1(1) and 6 which provide:
 - “(2) Sub-paragraph (1) does not apply if the Scottish Ministers consider that the regulations need to be made urgently.
 - (3) Where sub-paragraph (2) applies, the regulations (the “emergency regulations”)— (a) must be laid before the Scottish Parliament; and (b) cease to have effect on the expiry of the period of 28 days beginning with the date on which the regulations were made unless, before the expiry of that period, the regulations have been approved by a resolution of the Parliament”.
 The powers under the Public Health etc. (Scotland) Act 2008 derive from sections 94 (International Travel) and section 122 (Regulations and Orders) which provides:
 - (6) Subsection (5) does not apply to regulations made under section 25(3) or 94(1) if the Scottish Ministers consider that the regulations need to be made urgently.
 - (7) Where subsection (6) applies, the regulations (the “emergency regulations”)— (a) must be laid before the Scottish Parliament; and (b) cease to have effect at the expiry of the period of 28 days beginning with the date on which the regulations were made unless, before the expiry of that period, the regulations have been approved by a resolution of the Parliament.

99. There is no definition of “urgency” nor an explanation of the criteria which Scottish Ministers apply to arrive at a decision that a regulation should be made on the basis of urgency. However, as the regulations under both acts are termed “emergency regulations” that suggests that Scottish Ministers must consider that an emergency exists and requires the Scottish Ministers to act with the minimum of delay to make regulations to meet the nature of the emergency. It is noticeable that most introductory paragraphs in such regulations, after citation of the specific powers under the legislation, include a phrase such as “and all other powers enabling them to do so”. It would be helpful were the Scottish Government to explain to what powers this refers.
100. We also noted that the Coronavirus (Discretionary Compensation for Self-isolation) (Scotland) Act 2022 provides that Scottish Ministers are required to lay before Parliament a statement of their reasons as to why the regulations should be made. In addition, under section 4(6) *If emergency regulations are made, the Scottish Ministers must, at the same time as laying the regulations before the Parliament, lay before the Parliament a statement of their reasons for making the regulations and for making them urgently without their being subject to the affirmative procedure.*
- This amendment improves Scottish Government accountability and should be considered best practice and we hope that in future use of made affirmative regulations such a reporting mechanism will be adopted. Were such a provision adopted in UK parliamentary procedure it would enhance ministerial accountability to Parliament.
101. We also agreed with the amendment which introduces to section 4 a new subsection (2A) which obliges Scottish Ministers before making regulations under section 3 to consult every Health Board and other persons the Scottish Ministers consider appropriate.
102. As we have pointed out above there are many statutes which confer urgent regulation making powers on Ministers. It is up to the legislatures to limit the occasions on which UK or Scottish Ministers are granted the power to make subordinate legislation subject to the made affirmative procedure, such as by defining what is an emergency or urgency, who is to determine it, the use of sunset clauses both in the parent Act and in the regulations and not enabling that procedure to be used twice in relation to the same instrument.
103. It is a feature of the treatment of Scottish made affirmative regulations that although they are approved by the Parliament they are not debated in the Chamber. There should be a regular scheduled Chamber debate where MSPs are able to discuss and comment upon such regulations and question the Minister about the use of made affirmative procedure.
104. Ultimately, the alternative to made affirmative regulations is primary legislation made under emergency procedure (Scottish Parliament Standing Orders Rule 9.21 of which the Coronavirus (Scotland) Act 2020 is an example. Scottish Ministers should include information in any supporting statement about occasions when primary legislation has been considered and why it has been decided to proceed with made affirmative regulations. See also: [Use of the Made Affirmative](#)

[Procedure in Scotland: Reflections from the Pandemic | Edinburgh Law Review \(eupublishing.com\)](https://eupublishing.com). (Ref LSS/22) (INQ000362590MC)

- (c) The Coronavirus (Scotland) Act 2020 (which was introduced as an Emergency Bill in the Scottish Parliament on 31 March, gained Royal Assent on 6 April 2020);

Parliamentary Passage

105. The Act was a significant measure which touched on many aspects of life and limited many rights. It contained 17 Sections and 7 Schedules and was considered under Rule 9.21 of the Standing Orders of the Parliament relating to Emergency Bills. It was introduced on 31 March 2020 and went through all three stages on 1 April. It received the Royal Assent on 6 April.
106. The Coronavirus (Scotland) Act 2020 (legislation.gov.uk) **(Ref LSS/259) (INQ000371614MC)** was the principal relevant Scottish legislation, and contained many provisions of importance to life in Scotland, including law relating to evictions, moratoriums on diligence (enforcement), children and vulnerable adults, justice matters, alcohol licensing and public bodies and a number of other areas. That Act contains provisions requiring Scottish Ministers to report on the *necessity* of such legislation rather than, as in England and Wales, the *appropriateness* of the status of the legislation.
107. In other circumstances we would have highlighted the need to scrutinise the legislation carefully and not to sacrifice that scrutiny for speed. However, the nature of Covid-19 and the fast-evolving threat it posed to the community at large was potentially devastating. The bill was judged to merit emergency procedure at the time.
108. The Covid-19 Committee's remit and responsibilities were 'to consider and report on the Scottish Government's response to COVID-19 including the operation of powers under the Coronavirus (Scotland) Act, the Coronavirus Act and any other legislation in relation to the response to COVID-19 and any secondary legislation arising from the Coronavirus (Scotland) Act and any other legislation in relation to the response to COVID-19': COVID-19 Committee - Parliamentary Business : Scottish Parliament.
109. Similar safeguards are built into the Coronavirus Acts applicable across the UK and in Scotland. The provision for a two-month review period in section 95 of the Coronavirus Act 2020 is replicated in section 12 of the Coronavirus (Scotland) Act 2020 and sections 12 and 14 of the Coronavirus (Scotland) (No 2) Act 2020.
110. Automatic expiry is also a safeguard and is a significant factor in section 89 of the Coronavirus Act 2020, section 12 of the Coronavirus (Scotland) Act 2020 and section 9 of the Coronavirus (Scotland) (No 2) Act 2020.
111. The Act's expiry section originally was to take effect on 30 September 2020. It was extended ultimately until 1 October 2022.

112. Scottish Ministers were obliged to review and report on the measures every 2 months: <https://www.gov.scot/publications/coronavirus-acts-two-monthly-report-scottish-parliament/>.

(d) The Coronavirus (No 2) (Scotland) Act 2020 (passed on 20 May 2020);

113. The Coronavirus (Scotland) (No.2) Act 2020 ([legislation.gov.uk](https://www.legislation.gov.uk)) **(Ref LSS/260) (INQ000371615MC)** was passed to help public services operate during the coronavirus pandemic and support businesses and individuals. The Act includes provisions to ensure business and public services can operate, change public service duties, provide protections for student tenants and support for carers and make changes to criminal procedure. It also allowed Scottish notaries public to execute documents by video technology.

Parliamentary Passage

114. The bill followed an expedited procedure in the Scottish Parliament. This enabled Parliamentary scrutiny of the bill to be significantly curtailed. It was introduced on 11 May 2020, Stage 1 debate was scheduled on 13 May, Stage 2 on 19 May and Stage 3 on 20 May. It received the Royal Assent on 26 May. This was a short period for scrutiny, though it was more generous than that which applied to either the Coronavirus Act 2020 or the Coronavirus (Scotland) Act 2020.

115. Under the Act, Scottish Ministers were also obliged to review all coronavirus related Scottish Statutory Instruments under section 14 of the Act see the reports at Coronavirus Acts: fifteenth and final report to Scottish Parliament (October 2022) - gov.scot (www.gov.scot) **(Ref LSS/261) (INQ000371616MC)**.

(e) The Coronavirus (Extension and Expiry) (Scotland) Act 2021 (passed on 24 June 2021) including any of their temporary provisions and associated public health/coronavirus regulations in Scotland.

116. The Coronavirus (Extension and Expiry) (Scotland) Act 2021 ([legislation.gov.uk](https://www.legislation.gov.uk)) **(Ref LSS/262) (INQ000371617MC)** extends or expires aspects of the Coronavirus (Scotland) Act 2020 and the Coronavirus (No.2) (Scotland) Act 2020. These provisions were primarily temporary and originally provided that they would expire on 30 September 2020. That sunset date was amended to provide for the expiry of these Acts on 30 September 2021.

117. After the Scottish Parliament General Election in May 2021, the Scottish Government decided that many of the temporary measures would remain necessary beyond 30 September 2021. The Coronavirus (Extension and Expiry) (Scotland) Bill for this Act was introduced on 18 June 2021 (as an emergency Bill) to extend the Coronavirus (Scotland) Act 2020 and the Coronavirus (No.2) (Scotland) Act 2020 to 31 March 2022 and then by regulations to extend both Acts to 30 September 2022. Stage 1 debate took place on 22 June, Stage 2 took place on 23 June and Stage 3 took place on 24 June at the end of which the bill passed and received the Royal Assent on 4 August 2021 (coming into effect the following day although some provisions commenced on 30 September 2021). It expired some temporary provisions of the 2020 Acts on 30 September 2021.

118. We briefed MSPs on the Bill in advance of the Stage 1 debate.⁴⁴ We commented on a range of issues which were derived from either the Coronavirus (Scotland) Act 2020 or the Coronavirus (Scotland) Act 2020. The Bill removed expired provisions from these Acts that were no longer required and initially extended those still required until the end of March 2022. On 22 March 2022, Parliament agreed to further extend certain of those provisions and certain temporary UK Coronavirus Act 2020 **(Ref LSS/252) (INQ000371607MC)** provisions for which the Scottish Parliament gave legislative consent, to the end of September 2022
119. We agreed with the general principles of the Act relating to extension of the extended notice period for most evictions, the extended moratorium on bankruptcy enforcement, the repeal of the “stop the clock provisions” relating to vulnerable adults, the extension of the conduct of court business by electronic means (whilst making points about the need for a secure and reliable data link, or HD standard or better sound and video quality, the presentation of documents and the participation of parties), extended flexibility in the payment of legal aid, extended use of electronic hearing in licensing applications in remote areas (although we favoured a return to in person hearings), and various other provisions.
120. We were concerned about the extension of time limits in criminal cases. We accepted the inevitability of this provision whilst making the point that resourcing, elimination of backlog, respect for human rights and the rule of law were particularly important in the context of the delivery of justice in the criminal courts.

Question 8

Coronavirus Act 2020

121. In our response to the policy issues arising from the COVID-19 pandemic, we sought to emphasis the crucial importance of ensuring that the fundamental protections for people across Scotland through the framework of equality and human rights laws were maintained. We note that the UK Coronavirus Act 2020 was enacted, in the words of the Joint Committee on Human Rights “despite the fact it included some of the most sweeping powers seen in modern times and interferes with human rights on an unprecedented scale”.
122. We have mentioned above our concerns about the effect of the legislation on the Mental Health (Care and Treatment) Scotland) Act 2003, the Criminal Procedure (Scotland) Act 1995, and associated subordinate legislation on the rights of individuals. We took the view that schedule 9 had the potential to remove or reduce safeguards arising from Articles 3, 5, 6 and 8 ECHR.

Coronavirus (Scotland) Act 2020

123. In particular, the Scottish Government's response to COVID-19 directly engaged the fundamental rights of some of the most vulnerable members of society during the COVID 19 pandemic. We were proactive in highlighting our concerns in these areas since the early stages of the pandemic.

⁴⁴ 21-06-21-coronavirus-extension-and-expiry-bill-stage-1.pdf (lawscot.org.uk) **(Ref LSS/04) (INQ000362572MC)**

124. In relation to the Coronavirus (Scotland) Act 2020 the Scottish Government was satisfied that the provisions of the Bill were compatible with the ECHR. Both the Cabinet Secretary for Constitution, Europe and External Affairs Michael Russell MSP and the Parliament's Presiding Officer, Rt Hon Ken MacIntosh MSP certified that the bill was "within the legislative competence of the Scottish Parliament". Legislative competence imports compatibility with Convention rights.
125. The Scottish Parliament COVID-19 Committee's consultation: Coronavirus Acts: third report to Scottish Parliament considered issues in connection with human rights compliance: [Coronavirus Acts: third report to Scottish Parliament - Scottish Parliament - Citizen Space](#) (Ref LSS/164)
126. We expressed significant concerns on the emergency powers applicable to vulnerable adults in Section 4 and Schedule 3, paragraph 11 of the Act. This provision was not commenced and expired under the Coronavirus (Scotland) Acts (Early Expiry of Provisions) Regulations 2020. We were satisfied with this outcome.
127. Paragraph 11 also contained the so-called 'stop the clock' provisions for guardianship orders under the Adults with Incapacity (Scotland) Act 2000. We highlighted our concerns regarding the 'stop the clock' provisions, particularly in relation to orders granted subject to short time limits in order to comply with Article 5 EHCR. Whilst we acknowledge that these provisions were enacted against the challenging background of the emerging pandemic, and may have been necessary at that time, we suggested that continued restrictions on the rights of adults subject to interventions under the 2000 Act were no-longer required. A compelling set of circumstances would be needed to justify these provisions being reinstated at a future date.
128. We [responded to the Equalities and Human Rights Committee of the Scottish Parliament's Inquiry on the Impact of COVID-19](#) (Ref LSS/23) (INQ000362591MC) in May 2020, including a number of case histories informed by the experience of our members and others. Amongst these case histories were our earliest comments on the potentially unlawful movement of adults lacking capacity from one care setting to another, and on potentially inappropriate use of DNACPR.
129. In November 2020, we issued a [news release](#) (Ref LSS/149) calling on Scottish Government to provide data on the legal basis for transfers of hospital patients discharged to care homes during the height of the pandemic. We highlighted our concerns as to whether appropriate legal processes were followed to safeguard the human rights of patients who could not or did not consent to such moves. These concerns were [subsequently confirmed by a report published by the Mental Welfare Commission in May 2021](#). (Ref LSS/150)
130. In addition to engaging with legislative scrutiny of emergency legislation arising from the pandemic we also commented on [National clinical and practice guidance for adult care homes in Scotland during the COVID-19 pandemic \(version 1.3\)\(July 2020\)](#), (Ref LSS/24) (INQ000362592MC) highlighting our concerns regarding

Anticipatory Care Planning (ACP), apparent ‘blanket’ prohibitions on transfer to hospital for care home residents, and use of DNACPR.

131. Whilst emphasising the crucial importance of continuing to apply existing legal safeguards for the fundamental rights of individuals during the pandemic, we have also been proactive in highlighting areas where we consider that the experience of the pandemic has strengthened the case for law reform.
We have consistently highlighted the urgent need for Scotland to introduce a regime to govern deprivations of liberty in hospitals, care homes and other care settings in terms of Article 5 ECHR, most recently in our [response to the Scottish Mental Health Law Review’s consultation](#) (Ref LSS/25) (INQ000362593MC) and [final report](#). (Ref LSS/151) This could include transfers from hospital to care homes, and vice versa.
132. We published a paper which set out our recommendation to address the deficiencies in the law in relation to advance choices and medical decision-making in intensive care situations, including decisions about refusing or withdrawing life-sustaining treatment.
133. We also [responded to proposals for adults living in care homes to maintain family and friendship connections \(“Anne’s Law”\)](#). (Ref LSS/27) (INQ000362595MC)
134. We were also most concerned at the Justice provisions in section 5, Schedule 4, Part 5, paragraph 11 which would permit regulations to provide for the most serious cases to be heard by a court sitting without a jury and expressed that concern to Ministers and MSPs in our briefings on the bill. The Scottish Government withdrew Part 5 of the schedule as the Stage 1 debate on the bill opened.

Coronavirus (Scotland) (No.2) Act 2020

135. We commented on a number of provisions in the bill which resulted in the Coronavirus (Scotland) (No.2) Act 2020 especially in the area of criminal justice and compliance with convention rights. The Coronavirus (Scotland) Act 2020 made changes to several time periods and the Government identified additional areas that require change. Some of these measures did not specify a fixed time period and we believed that it is important that they did so, to provide clarity and ensure compliance with human rights.
136. We supported custody arrangements on the basis that otherwise there would be a need for Police Officers to carry out the duties required to operate the video-linked custody courts. The change minimised the movement of persons and freed up police resources for front line duties. We supported the change regarding undertakings by the accused in so far as providing that a warrant should not be obtained where the accused has contacted a solicitor or the court indicating that they cannot for COVID-19 related reasons appear in person.
137. We welcomed the respect for human rights in the Policy Memorandum accompanying the bill and we highlighted some particular features. Provisions engaged the ECHR in a number of respects including Article 5 which asserts the right to liberty and security of the person and that no one should be deprived of

liberty except in accordance with a lawful procedure (Art 5(1)(e)) and Article 6 (right to a fair trial). Provisions also engaged Article 8 (Right to respect for private and family life) and Article 1 of Protocol No. 1 (protection of property) and Article 14 (protection from discrimination). The Scotland Act 1998 provides that Legislative and Executive competence require compliance with Convention rights contained in the ECHR.

138. When legislating for emergency laws, we considered that it is even more important to take care that such compliance is satisfied. We expected that human rights and the rule of law would be fully respected when applying the provisions of the coronavirus legislation. We also wished to ensure that scrutiny of legislation is carried out properly and that Government is held to appropriate account for its actions.
139. The Scottish Government was satisfied that the provisions of the Bill which resulted in the Coronavirus (Scotland) (No2) Bill were compatible with the ECHR. Both the Cabinet Secretary for Constitution, Europe and External Affairs Michael Russell MSP and the Parliament's Presiding Officer, Rt Hon Ken MacIntosh MSP certified that the bill was "within the legislative competence of the Scottish Parliament". Legislative competence imports compatibility with Convention rights.

Coronavirus (Extension and Expiry) (Scotland) Act 2021

140. We agreed with the general principles of the Act relating to many provisions concerning time limits and the repeal of the "stop the clock provisions" relating to vulnerable adults (see our comments above), the extension of the conduct of court business by electronic means.
141. We accepted the inevitability of the extension of time limits in criminal cases whilst making the point that respect for human rights and the rule of law were particularly important in the context of the delivery of justice in the criminal courts.
142. The Joint Committee on Human Rights report entitled [The Government's response to COVID-19: human rights implications \(parliament.uk\)](#) (Ref LSS/263) (INQ000371618MC) explained the obligations of the Government in connection with respecting Human Rights obligations under Article 2 (Right to life) and the need for proportionality in the actions which it took.
143. The Joint Committee acknowledged the balance which the Government must take in the paragraph entitled *The necessity to act and the human rights framework*. "In order to ensure compliance with human rights law, it is crucial that the Government can justify the steps it has taken to protect the right to life under Article 2 ECHR as well as justifying the proportionality and necessity of interferences with other rights through the measures taken to control the pandemic. Importantly, the Government must be transparent in justifying its decision-making, including in explaining how it has balanced competing interests and the evidence on which the balancing decision has been made.
144. This applies, for instance in relation to the right to family life (Article 8 ECHR) for partners or families who could not see each other during lockdown, or the right to

peaceful enjoyment of one's possessions for businesses who could not operate during lockdown (Article 1 of Protocol 1 ECHR) or the freedom of religion for those who could no longer attend religious services during lockdown (Article 9 ECHR). Any interferences with human rights in the Government's response to Covid-19 need to be justified, along with decisions to act (or not to act) to take protective measures to protect life.

145. We agreed with the analysis by the Joint Committee. It is important to note the report which stated that it was not necessary during the pandemic for the UK Government to derogate from any of ECHR obligations. The Joint Committee took into account the lockdown regulations enacted across the UK and their impact on human rights. These regulations engaged Article 6 (the right to a fair trial, Article 8 (the right to respect for private and family life), Article 9 (freedom of religion), Article 11 (freedom of association), Article 1 of Protocol 1 (the right to peaceful enjoyment of property).
146. We take the view that Government must ensure that it sets out clearly and transparently how it is protecting human rights during a pandemic. It must ensure that its assessments as to the proportionality and necessity of measures are up-to-date and based on the latest scientific evidence as well as a precautionary approach to minimising the overall risks to life. Importantly, the Government must be transparent in justifying its decision-making, including in explaining how it has balanced competing interests and the evidence on which the balancing decision has been made.

Question 9

147. Given that most of the Coronavirus Act 2020 has expired or been repealed the primary legislation which currently exists and is available for use in a future health emergency consists of two main Acts of Parliament; the Public Health (Control of Disease) Act 1984 (which does not apply in Scotland) and the Civil Contingencies Act 2004. We will restrict our comment to the Civil Contingencies Act 2004 (CCA).
148. The CCA applies UK wide. Part 2 contains the provisions regarding emergency powers.
149. An argument was articulated during the debates on the Coronavirus bill that the CCA would have been sufficient to deal with the coronavirus pandemic: David Davies MP stated during the Committee Stage of the Coronavirus Bill after discussing the Public Health (Control of Disease) Act 1984 that, *"The other Act is the Civil Contingencies Act 2004. As the hon. Gentleman [Mr Bryant] said, the Government could have used that. The Government have argued, most recently last week at business questions, that this is the wrong sort of emergency—sort of like the wrong kind of snow—to fall under the remit of the Civil Contingencies Act. I have to tell the Government that they are plain wrong. I was here for the debates on the Civil Contingencies Act. I remember the arguments about what it would and would not apply to, and this is specifically the case. It is not just me. I am not a lawyer, but a number of public lawyers of my acquaintance think the Government are wrong. Most importantly—my right hon. Friend the Member for Sutton Coldfield (Mr Mitchell) alluded to this—we can call on an even greater authority. After business questions last week, I made a point of order to ask Mr Speaker if we*

could get the opinion of his counsel, Mr Daniel Greenberg. I will read the relevant paragraph to the House—it is only a couple of lines. He said: “The 2004 Act (which I wrote), including the powers to make emergency provision under Part 2, is clearly capable of being applied to take measures in relation to coronavirus.”

150. The man who wrote the Act, the most authoritative source in this House, Mr Speaker’s Counsel, who is completely impartial, says that the Government are wrong, and they could have used the Civil Contingencies Act.”.
151. The Cabinet Office guidance states that the CCA should only be used for a “category three” emergency (the highest level), and only as a last resort. The examples it gives for such an emergency are major natural disasters or a Chernobyl-scale industrial accident.
152. The House of Commons Public Administration and Constitutional Affairs Committee report Parliamentary Scrutiny of the Government’s handling of Covid-19 - Public Administration and Constitutional Affairs Committee - House of Commons (**Ref LSS/152**) considered whether the CCA should have been used instead of the bespoke approach of the Coronavirus Act 2020. The Government proffered the following arguments for not using the CCA:
 - A. Although epidemics are included in the types of emergency for which the CCA might be used the circumstances were not appropriate for its use.
 - B. The CCA is designed to address sudden, unanticipated events rather than the gradual onset of an epidemic:
 - C. the powers the CCA confers on Government are sweeping and it is specifically designed to be used when there is unexpected emergency rather than a developing threat.
 - D. There was time for bespoke legislation to be passed by Parliament. There is a risk—the rule of law applies throughout—that using the CCA would have been and could have been challenged on the basis that its use was inappropriate in circumstances where some of the requirements for dealing with the Coronavirus were foreseen in advance.
153. These arguments appear to limit the circumstances in which the Act can be used. In addition to Mr Greenberg other legal experts took the view that the Government was incorrect. Professor Aileen McHarg, Professor of Public Law and Human Rights at Durham Law School, said it was not clear why the Government took this view of the Act, and that the COVID-19 emergency, and pandemic emergencies in general, clearly falls within this act. She set out that: “Section 19 clearly envisages an event that threatens severe damage to human welfare, including loss of human life and human illness, so it is within the scope of the Act”.
154. We take the view that the CCA could have been used to deal with Covid-19. Noting that Professor McHarg is a member of our Constitutional Law and Human Rights Sub-committee, we agree with her analysis that the Covid-19 pandemic is within the scope of the CCA. Differences between the Coronavirus Act 2020 and

the CCA may indicate why the Government decided against deploying the CCA and decided in favour of a bespoke provision.

155. We agreed with the Public Administration and Constitutional Affairs Committee's conclusion in paragraphs 34 and 35 of its report that:

“The Government’s desire to find alternatives...to using ...the CCA... is understandable...However, the Committee is not convinced that the CCA could not have been used for COVID-19 and believes there was a potential role for the CCA in providing a “stop-gap” for more detailed scrutiny of the Coronavirus Bill to take place. The potential use of the CCA as a “stop-gap” should be considered by the Government in response to emergencies in the future. Furthermore, the Coronavirus Act does not have the same safeguards as the CCA. It is troubling the Paymaster General referred to these safeguards as a reason not to use that Act. Any separate legislation to deal with civil contingencies—and particularly legislation that needs to be passed very quickly—should include safeguards and scrutiny provisions that are equivalent to those in the CCA, with regular renewal of powers allowing for more detailed Parliamentary scrutiny that, due to expediency, cannot be given during the passing of emergency legislation.

The Government’s reticence to use the Civil Contingencies Act in response to a genuine national emergency calls into question how fit for purpose that legislation is.”.

156. The debate about which legislation to use in relation to the pandemic may have played a part in focusing the Cabinet Office Post-Implementation Review and the National Preparedness Commission Independent Review of the Civil Contingencies Act 2004 and its supporting arrangements both published in 2022.

Overview of the CCA

157. The CCA repealed the earlier Civil Defence legislation from the 1930s, 40s and 50s and the Emergency Powers legislation from the 1920s.
158. Part 2 of the Act contains most of the emergency powers. It confers a power on His Majesty or a senior Minister of the Crown to make regulations if an “emergency” has occurred or is about to occur and it is necessary and urgent to make provision for the purposes of preventing, controlling or mitigating an aspect or effect of the emergency. 158. “Emergency” is defined broadly in Part 2 to include events and situations which threaten serious damage to human welfare in the United Kingdom, a Part or a region (as well as damage to the environment or war or terrorism which threatens the security of the United Kingdom). Damage to human welfare is defined in section 19 as “an event or situation which causes or may cause— (a) loss of human life, (b) human illness or injury... or (h) disruption of services relating to health”.

Our Comment

159. The CCA details what may or may not be included in emergency regulations and provides safeguards to prevent misuse. The Act expressly allows for emergency powers to have effect in a Part or region. We noted that “region” is defined with reference to the Regional Development Agencies Act 1998 which has been substantially repealed by the Public Bodies Act 2011. In that context we agree with recommendation 91 of the National Preparedness Commission Independent Review of the Civil Contingencies Act 2004 and its supporting arrangements to the effect that the Regional Nominated Coordinator role in the CCA Part 2 should be “removed at the next available opportunity as it is a legacy of the former regional arrangements”.
160. The CCA section 29 provides for consultation with and conferral of functions on the devolved administrations. We commend the so-called “triple lock” which must be met before emergency regulations can be made. The three tests are:
- that an emergency has occurred, is occurring or is about to occur;
 - the provisions sought are necessary for the purpose of preventing, controlling or mitigating an aspect or effect of the emergency;
 - the need is urgent, and existing legislation and other means would risk serious delay.
161. We take the view that the fact that emergency regulations under section 27(1) must be laid before Parliament “as soon as is reasonably practicable” and that they lapse if not approved within seven days, constitute a significant protection for the individual. Furthermore, we note that Section 27 regulations are amendable if a resolution of each House is passed to amend them and that under section 26 the regulations lapse after 30 days from the date on which they are made. In conclusion these protections in the CCA contain more stringent accountability provisions and better parliamentary control of executive action than the Coronavirus Act 2020.
162. CCA regulations can make provision of any kind that an Act of Parliament or by Royal Prerogative could make (other than amending CCA Part 2 or the Human Rights Act 1998 (the HRA)). They are subject to a requirement that the Monarch or Minister make a statement: (a) specifying the nature of the emergency, and (b) declaring that the person making the regulations is satisfied that —
- i) all the conditions in section 21 are met,
 - ii) the regulations contain only provision which is appropriate for the purpose of preventing, controlling or mitigating an emergency,
 - iii) the effect of the regulations is in due proportion to the emergency,
 - iv) the regulations are compatible with the Convention rights under the HRA 1998 and
 - v) in the case of subsection (2) regulations (those made by a Minister), there would be delay arranging an Order in Council.

163. The emergency regulations engage ECHR Art 2 by aiming to protect human life, health or safety, treat human illness or injury or protect or restore the provision of services relating to health. The compatibility statement is a clear indication of the importance of Convention Rights compliance.
164. The regulations may not a. require a person to serve in the military, b. prohibit a strike or other industrial action...c. create an offence triable on indictment or punishable with imprisonment for a period exceeding three months, or (ii) with a fine exceeding level 5 on the standard scale, or d. alter procedure in relation to criminal proceedings.
165. Taking a broad assessment, we concluded that the human rights protections in the CCA are significant and embed protection for human rights in a way in which the Coronavirus Act 2020 did not. Furthermore, we took the view that the CCA complies with Rule of Law principles. For example, the legislation is relatively clear and accessible, use of Ministerial discretion is closely monitored by Parliament, there is explicit protection for Human Rights and Ministers cannot proceed with regulations which lack convention Rights compliance. The rule of law is specifically acknowledged in section 22(5) which provides that “any person making emergency regulations must have regard to the importance of ensuring that Parliament, the High Court and the Court of Session are able to conduct proceedings in connection with the regulations, or action taken under the regulations”. The intention is therefore to ensure that there is adequate parliamentary and judicial oversight of both the content of the regulations and of action taken under them.

CCA Reviews

166. The CCA has been the subject of reviews, a. The Cabinet Office Post-Implementation Review and b. the National Preparedness Commission Independent Review of the Civil Contingencies Act 2004 and its supporting arrangements. We highlight the recommendations dealing with CCA Part 2.
 - a. The Cabinet Office *Post-Implementation Review* (PIR) Civil Contingencies Act 2004: post implementation review report (2022) - GOV.UK (www.gov.uk)_ (**Ref LSS/280**) (**INQ000371635MC**) concluded that:
167. The Act continues to achieve its stated objectives. Duties are placed upon local responders, with the principle of subsidiarity ensuring they retain the flexibility to collaborate in a way that is suitable to their specific needs. The recommendations... aim to strengthen the fulfilment of the Act’s objectives, but there is no case at this stage for a fundamental overhaul of the legislation...the evolving risk landscape, as well as work on the Integrated Review commitments to consider strengthening LRFs and develop a National Resilience Strategy, may create a need for further changes to the Act in future.
168. The PIR took into account devolved issues and confirmed that the Government “has worked with the Scottish Government, to ensure that any changes proposed which impact on Scotland are in accordance with existing resilience structures, and accountability and assurance arrangements. Any future amendments, or

improvements, to arrangements in Scotland could be made by amending The Civil Contingencies Act 2004 (Contingency Planning) (Scotland) Regulations 2005 (legislation.gov.uk), **(Ref LSS/28) (INQ000362596MC)** and updating the set of comprehensive guidance documents, *Preparing Scotland* The national guidelines, *Preparing Scotland* (ready.scot)". **(Ref LSS/153)**

Our Comment

169. We noted that the PIR considered that the primary conditions placed on the use of Part 2 powers are deliberately stringent, preventing misuse of the power and ensuring that, wherever possible, any legislation required to respond to an emergency goes through Parliament in the normal way.
170. We also noted Paragraph 83 which reveals how the UK Government views emergency legislation, "There will be times, however, where new legislation is required to respond to an emergency. In recent years the government has carefully considered using CCA powers to help deal with some of the most serious of emergencies, such as the coronavirus pandemic. Ultimately though, the Part 2 emergency powers have not needed to be used. However, the government cannot foresee every eventuality, and therefore the CCA powers remain an important option of last resort to ensure that Ministers have the tools they need to respond to the most serious of emergencies."
171. We considered the PIR recommendations:
- "88. The powers continue to be fit for purpose as an option of last resort and the 'triple lock' conditions on their use provide robust and necessary safeguards that should not be amended,
89. Wherever possible, the government should continue to rely on sector or issue specific emergency legislation and powers which provide bespoke and tailored solutions to certain risks or incidents, as opposed to the broad powers in the CCA. We note that the wider landscape of emergency powers is being considered as part of the development of the Resilience Strategy and that no changes should be made to the emergency powers set out in Part 2 of the CCA."
172. As regards Part 2 the PIR stated, "The provisions to create special temporary legislation, as set out in Part 2 of the CCA, continue to provide government with the capability needed to respond to emergencies in a timely but proportionate manner. Part 2 of the CCA therefore remains a suitable option of last resort. Should further legislative change to the CCA be required to deliver on these ambitions, this will be carefully considered and could take place outside of the five-yearly statutory review cycle."
173. We agree with most of these recommendations although we take issue with recommendation 89 which stands out as re-enforcing the policy approach which led to the rushed creation of the Coronavirus Act 2020 rather than the deployment of the CCA as a stop-gap which would have provided immediate emergency powers whilst allowing time for the development of more tailored legislation.

- b. The National Preparedness Commission (NPC) carried out an *Independent Review of the Civil Contingencies Act 2004 and its supporting arrangements* during 2022 which reached the following conclusions about the CCA:

174. The NPC believes that “There are no current systematic, routine arrangements to monitor the performance of all bodies with legal duties, and of the way in which those bodies act in partnership. UK Government departments should be subject to the same disciplines of accountability for their performance, to the UK Parliament. Ministers and Accounting Officers of designated departments should have personal accountability for the performance of their organisations against the duties placed on their departments and associated standards captured in an amended Act or future legislation. Given current machinery of government structures and roles, accountability for cross-government activity should sit with the National Security Adviser or a nominated Deputy who should be appointed as the ‘UK Government Chief Resilience Officer’, a single, identifiable senior official who cares and is seen to care about the quality of resilience in the UK. In addition to the UK Government Chief Resilience Officer a designated Cabinet Office Minister for the quality of resilience in the UK should be set out in...future legislation.”.
175. On matters relating to accessibility and clarity the NPC found that “designation of Lead Government Departments is valuable and should continue – and indeed be reinforced with legal duties... and stronger arrangements for validation and assurance of performance, and sharpened accountabilities... It is equally clear, however, that the distribution of responsibilities between the Cabinet Office, DLUHC and DCMS is not...”.
176. The NPC made some interesting recommendations with which we agree for example, that Civil Protection terminology should be refreshed and made a more accessible, user-friendly, reference document. It should then be used consistently to inform the writing of all single- and multi-agency doctrine and guidance (recommendation 78). We take the view that this recommendation could enhance the accessibility of guidance.
177. Recommendation 80 concluded: As part of updating doctrine and guidance, the UK Government should examine whether legal and other developments, including the recommendations of public Inquiries, mean that some areas of current non-statutory guidance, especially on safeguarding, humanitarian assistance and emergency co-ordination structures, should now be made statutory.
178. We take the view that recommendation 80 would bring areas of non-statutory guidance within the purview of parliamentary scrutiny.
179. Some of the recommendations of the two reviews of the CCA could enhance the existing legislative framework. The outcome of the UK and Scottish Covid-19 Inquiries may also produce recommendations which will result in improvements on the existing framework.
180. We consider that any changes to the law should comply with certain principles, namely that there should be adequate pre-legislative consultation, proper parliamentary scrutiny of any resulting bill, compliance with the rule of law and

human rights law and, where appropriate due respect of the position of the devolved legislatures and administrations.

Question 10

181. The use of regulations to deal with the pandemic was a necessary and proportionate response to enable Governments in the UK to make law which in their view would be implemented swiftly and be agile enough to deal with the aspect of the pandemic which prompted the regulations.
182. Regulations made by Scottish Ministers are subject to Sections 54, 29 and 57 of the Scotland Act 1998. Section 54(2) provides: “It is outside devolved competence— (a) to make any provision by subordinate legislation which would be outside the legislative competence of the Parliament if it were included in an Act of the Scottish Parliament, or (b) to confirm or approve any subordinate legislation containing such provision.” Section 29(2) states that a provision is outside the legislative competence of the Scottish Parliament if it is incompatible with any of the Convention rights. There are also convention rights compatibility provisions under section 57 which provides “A member of the Scottish Government has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights.”
183. Accordingly, subject to subsequent challenge, such subordinate legislation will have been cleared by Scottish Government legal advisers as complying with Convention Rights. Few Scottish Statutory Instruments were challenged in comparison with England see: [Covid in the courts challenges to lockdown measures in the United Kingdom.pdf \(lmu.ac.uk\)](#) (Ref LSS/264) (INQ000371619MC).

Such a challenge was however successful in the case of *Reverend Dr William JU Philip and others v Scottish Ministers* [2021] CSOH 32, 2021cs0h032.pdf (scotcourts.gov.uk) (Ref LSS/281) (INQ000371636MC)

184. Where the Court of Session held that regulations closing churches for worship were beyond the devolved competence of Scottish Ministers. The legislation under scrutiny was the Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No 11) Regulations 2021 (SSI 2021/3) which provided that “*A person who is responsible for a place of worship must close that place of worship, except for a use permitted in paragraph (2)*”. Permitted uses included “a funeral or commemorative event, a broadcast of an act of worship, a marriage ceremony which consists of no more than 5 persons...”
185. The petitioners maintained that the Scottish Ministers lacked the power to make the regulations insofar as they contravened the historic freedom of churches in Scotland to practise religion and threatened the independence of the church; and that the regulations were unlawful because they were a disproportionate infringement of ECHR articles 9 (freedom of thought, conscience and religion) and 11 (freedom of assembly and association). On the human rights point, the Court came to the decision that the regulations did constitute a disproportionate interference with the article 9 right and as such were beyond the legislative competence of the Government.

Question 11

186. We take the view that guidance should be used only to advise the public as to how they can best protect themselves, or to explain the Government's objectives in broad terms. It is never constitutionally appropriate (in the sense of complying with the rule of law) to use guidance in any way that suggests guidance is equivalent to rules with which there should be compliance. The content of guidance should not be written as if it had force of law, and possibly more importantly, politicians and others (including the police) should never refer to, use or rely on guidance as if it had the force of law. The Institute for Government in their paper *The government must draw a clear line between law and guidance during the coronavirus crisis* | Institute for Government published on 1 April 2020 made the point that police forces should be enforcing the law rather than Government Guidance.
187. Rules should be dealt with in primary or subordinate legislation, with appropriate sanctions for their non-observance. In other words, guidance should never be used if the intention is to achieve the same effect as rules. Rules are rules and guidance should only be used to provide guidance as to what the rules are intended by the Government to mean (although determination of their actual meaning is a matter for the courts).
188. It is important to make this distinction, or there may be a temptation for policy makers to make up rules in guidance, which may conflict with what is stated in rapidly changing legislation during an emergency. There is a grey area where it is desired to explain how the rules are intended to operate in particular situations. This is where there may be some confusion between guidance and rules especially when it is difficult to know what the law itself is when it has been amended multiple times in a short space of time.
189. To some extent this confusion can be avoided because it is possible to draft rules which illustrate how they are intended to operate in particular situations. Where this is not done, the guidance should expressly make it clear that it is only providing guidance.
190. Public understanding of what could and could not lawfully be done during the pandemic was likely adversely affected by a blurred distinction between guidance and the law. Often this lack of clarity meant that guidance appeared to be more stringent than the law, see: [The government must draw a clear line between law and guidance during the coronavirus crisis | Institute for Government](#) (Ref LSS/155)
191. The Institute for Government highlights that "Published government [guidance](#) (Ref LSS/265) (INQ000371620MC) remains more restrictive than the regulations. For example, it says that people should only leave home for specified "very limited purposes". It also suggests that people can exercise only once a day, although in England the law does not say this. The government advises people, further, to "stay local and use open spaces near home where possible", rather than drive, but the legislation does not say this either.

192. We take the view that Ministerial announcements should have clearly distinguished between the applicable law and applicable guidance. UK Ministerial announcements should also have made clear to which jurisdiction in the UK the respective law or guidance applied.

Question 12

193. Divergencies in approach is a natural consequence of devolution and should be expected when dealing with policy or legislation being developed within devolved matters. That having been said there should be room for cooperation between governments to meet common challenges.

194. The Blavatnik School of Government, University of Oxford has conducted research on the divergence among the 4 UK jurisdictions which is published in its paper, [Variation in the response to COVID-19 across the four nations of the United Kingdom | Blavatnik School of Government \(ox.ac.uk\)](#). (Ref LSS/156) That research makes the following findings:

- All four nations of the UK (England, Scotland, Wales, and Northern Ireland) have diverged in the timing, duration, and stringency of their responses highlighting their autonomy and legislative powers as devolved nations.
- While the broad pattern over the past year has been that the UK nations increased and decreased the stringency of closure and containment policies at similar times, within a similar range of stringency, there is some variation within this.
- Scotland had the highest average Stringency Index value during all days in 2020 (with an average value of 58.09). England had the lowest average stringency during all days in 2020, (with an average value of 54.94).
- All four nations reached their highest Stringency Index levels (87.96) for the first time in early January 2021, as the international travel controls value increased due to bans on inbound travel from countries linked to the emergence of variants.
- Stay-at-home orders in 2020 were in place in England for 92 days, Wales for 99 days, Scotland for 68 days, and Northern Ireland for 50 days.
- The Stringency Index values for all four nations were slowly decreasing as restrictions ease in tandem with the extensive vaccine rollout.

195. Key differences in policy were:

- Stay-at-home orders: The first stay-at-home order from March 2020 ended in England and Northern Ireland on 3 May 2020, ending two weeks later in Scotland on 29 May, and Wales on 1 June. England and Wales required people to stay at home for several weeks in October and November of 2020 while Northern Ireland and Scotland did not. While Wales ordered a second national stay-at-home order on 20 December 2020, England, Scotland, and Northern Ireland didn't introduce another legally enforceable national stay-at-home order until January 2021.

- School closures: After the first round of restrictions in March 2020, England reopened some levels of schooling on 1 June 2020, followed by all levels in Wales on 29 June, while education remained closed in Scotland until 22 July, and in Northern Ireland on 24 August. Schools were closed in Scotland again on 26 December 2020, and in Wales on 14 December, followed by Northern Ireland on 4 January 2021, and England on 5 January 2021.
 - ‘Circuit breakers’: Scotland was the only UK nation not to implement a national ‘circuit breaker’ style lockdown in October and November 2020.
 - Internal movement: All nations of the UK except England introduced distance restrictions on internal movement.
196. The Oxford COVID-19 Government Response Tracker (OxCGRT) provides a systematic way to measure and compare government responses to COVID-19 across the four nations from 1 January 2020 to the present (2022) and will be updated continuously going forward. The tracker combines individual indicators into a series of novel indices that aggregate various measures of government responses. These can be used to describe variation in government responses, explore whether the government response affects the rate of infection, and identify correlates of more or less intense responses.
197. In our submission to the House of Lords Constitution Committee Inquiry we commented on the emerging diversity as at June 2020 as follows:
- “In February 2020 the Secretary of State for Health and Social Care made the Health Protection (Coronavirus) Regulations 2020
<https://www.legislation.gov.uk/uksi/2020/129/made/data.pdf> **(Ref LSS/19)**
(INQ000362587MC) which applied in England and Wales. The Regulations (now revoked) applied to two categories:
1. Cases involving people whom the Secretary of State or a registered public health consultant have reasonable grounds to believe are or may be contaminated with coronavirus provided they also consider that there is a risk that these people might infect or contaminate others (domestic cases);
 2. Cases concerning people who have arrived in England on an aircraft, ship or train from outside the UK and who the Secretary of State or a registered public health consultant have reasonable grounds to believe left an infected area within 14 days immediately preceding their arrival in England (overseas cases). The Regulations provided for the detention by the Secretary of State or a consultant of members of the public “for screening, assessment and imposition of any restrictions” (on travel, activities and contact) for up to 48 hours or alternatively if screening has been undertaken, and restrictions are applied, the end of those restrictions.”
198. Regulations were made in Scotland and Northern Ireland making COVID-19 a notifiable disease under the Public Health (Scotland) Act 2008 and the Public

Health Act Northern Ireland) 1967 which provided detention and quarantine powers.

Question 13

199. The creation of new offences during the pandemic included under The Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 (legislation.gov.uk) restrictions on meeting with others in public places; leaving a dwelling; business activities; and in separate regulations on the movement of people both within and into the United Kingdom. The enforcement powers included prosecution under summary procedure (judge sitting without a jury) with the fine on conviction being no more than the statutory maximum (£10,000) and for the police to issue a fixed penalty notice. Under subordinate legislation such as The Health Protection (Coronavirus) (International Travel) (Scotland) Regulations 2020 (legislation.gov.uk), a made affirmative instrument, regulations 5 and 9 may engage convention rights in so far as they are enforced by fixed penalty notices.
200. Coronavirus regulations broadly engaged article 6, 7 and 8 convention rights in relation to fixed penalty notices. Furthermore, better pre-legislative consultation would improve understanding of the law. The law should also be seen to apply to everyone, there should be greater clarity about the individual's obligations under the law (see the comments about the distinction between law and guidance in response to question 11), the defences which can be advanced and the penalties which apply.
201. In our view, Ministers could be required to make a statement analogous to that under the CCA that the regulations are compatible with the Convention rights under the HRA 1998. The regulations should be examined from a human rights perspective by the relevant parliamentary committees charged with that responsibility in each legislature.

Question 14

202. We have already set out our views concerning at-risk and vulnerable people affected by the Coronavirus legislation. It might be helpful to the Inquiry were we to set out some views on the Public Health etc. (Scotland) Act 2008 (legislation.gov.uk) (PHSA).
203. The PHSA includes quarantine, detention and medical examination, and other powers, for local authorities and Health Boards.

Statutory Duties under the PHSA

204. The PHSA sets out a number of statutory duties to protect public health on Scottish Ministers, Health Boards and designated Health Board competent persons, local authorities and local authority competent persons. It also requires cooperation between health boards, local authorities and integration joint boards under the Public Bodies (Joint Working) (Scotland) Act 2014, the common services agency, Healthcare Improvement Scotland and the Scottish Ministers.

205. Scottish Ministers have the power to intervene if health boards or local authorities are failing to protect public health and may in writing direct the board or the authority to exercise the function; or to exercise it in such a manner, within such period and subject to such other conditions as they consider appropriate.
206. Scottish Ministers can also direct that a function of a health board or local authority should be exercised by a person specified in the direction. The person referred to in the direction can be (a) a health board; (b) the common services agency; (c) a local authority; (d) an employee of a health board; the agency; or a local authority; (e) a member of staff of the Scottish Administration; (f) such other person Ministers consider appropriate. The direction must specify (a) the function of the board or authority to which it applies; (b) the person who is to exercise the function; (c) the period for which the direction applies; (d) the extent to which that person is to exercise the function; and (e) any other conditions they consider appropriate.
207. Part 2 of the PHSA concerns notifiable diseases and organisms listed in schedule 1. Scottish Ministers may by regulation amend either list, for example with the addition of Coronavirus disease which was added by [The Public Health etc. \(Scotland\) Act 2008 \(Notifiable Diseases and Notifiable Organisms\) Amendment Regulations 2020 \(S.S.I. 2020/51\)](#). (Ref LSS/266) (INQ000371621MC)
208. Doctors are placed under statutory duties to inform health boards about a patient who the doctor suspects has a notifiable disease or an infection or contamination. The health board in turn must inform the common services agency and Public Health Scotland. Similar notification duties are imposed on a director of a diagnostic laboratory if a notifiable organism is identified.

Public Health Investigations

209. Part 3 contains provisions dealing with public health investigations (PHI) covering infectious diseases and contamination. A PHI can be carried out by an investigator appointed by Scottish Ministers, a health board competent person; the common services agency, Public Health Scotland, a local authority competent person, two or more of these persons acting together. The investigator can exercise powers relating to entry to premises (section 22), other investigatory powers (section 23), and the power to ask questions (section 24).
210. The powers apply only where there are reasonable grounds to suspect that certain defined circumstances are likely to give rise to a significant risk to public health. Part 3 also makes provision about offences and the compensation for any loss or damage caused during an investigation.
211. Part 4 – Health Board public health functions replaced the powers of local authorities in connection with infected people. Powers transferred to health boards included: the exclusion of persons from a wide range of settings including work and school; application to a sheriff for an order for a person to be medically examined; and the removal and detention in hospital of a person with a serious infectious disease or who is contaminated.
212. Health boards have the power to restrict activities so as to reduce the spread of contamination and infection and to quarantine individuals. There is also a power to

require a person to be disinfected, disinfested or decontaminated where there is a significant risk to public health.

213. With the exception of exclusion orders and restriction orders, all health board powers will be exercisable only where the health board has obtained an order from a sheriff. The procedures for applying for and granting orders contain safeguards with regard to personal freedom, include a right of appeal, restrictions on duration and regular reviews. It will be an offence to breach the terms of any order.
214. Part 5 – Public Health Functions of Local Authorities contains powers to order a range of public health measures in relation to premises and things, including disinfection, disinfestation and decontamination to prevent the spread of infectious disease or contamination.
215. Part 7 – International Travel provides the Scottish Ministers with a wide regulation making power to implement international health regulations and otherwise protect public health from risks arising from vehicles arriving in or leaving Scotland, including examination, quarantine and detention of individuals regulations and to comply with the [International Health Regulations \(2005\) – Third edition \(who.int\)](#). (Ref LSS/157)
216. The PHSA also covers Mortuaries, Regulation of Sunbeds, Statutory Nuisances, information disclosure and penalties for offences under the Act. It sets out the procedures that will apply to the making of subordinate legislation.

Complying with the UK's international legal obligations, including those relating to human rights

217. We note that the Scottish Government was satisfied that the provisions of the Bill which resulted in the PHSA were compatible with the ECHR. Both the Cabinet Secretary for Health and Wellbeing, Nicola Sturgeon MSP and the Parliament's Presiding Officer, Alex Ferguson MSP certified that the bill was "within the legislative competence of the Scottish Parliament". Legislative competence imports compatibility with Convention rights.
218. The Policy Memorandum, paragraphs 90-98 sets out the effects on Human Rights by commenting on the provisions concerning quarantine, detention, medical examination, local authority powers to enter and undertake works and the powers of entry in respect of public health investigations.
219. The purpose of the PHSA is to protect the public from significant public health risks and the Convention itself envisages that certain rights can lawfully be interfered with on public health grounds.
220. The provisions relating to quarantine (sections 39-40), detention (sections 41-47), and medical examinations (sections 33-36) engage Articles 5 (Right to liberty and security) and 8 (Right to respect for private and family life) the Convention.
221. Article 5 provides that no one shall be deprived of his liberty save in the following cases, and in accordance with procedure prescribed by law. The "following cases"

includes “(e) the lawful detention of persons for the prevention of the spreading of infectious diseases...”. The criteria for such detention were considered in the case of *Enhorn v Sweden* [2005] E.C.H.R. 56529/00.

222. Article 5.4. provides that “Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”. The provisions relating to quarantine and detention comply with Article 5. The deprivation of an individual’s liberty occurs only if it is determined that such deprivation is necessary to prevent the spread of disease.
223. Article 8 of the Convention provides:
“1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”
The provisions in the Act relating to detention, quarantine and medical examination engage Article 8 but the Government concluded that any interference is for a legitimate aim, namely that of the protection of health and as such can be justified and raises no issue of incompatibility with the Convention.
224. The right to appeal (sections 60-65) ensures that any decisions made in relation to detention, quarantine or medical examination is available at every stage of proceedings thus ensuring the lawfulness of the procedure.
225. Consideration was also given to the human rights implications arising from the provisions relating to the powers to enter premises in Part 3 in connection with public health investigations, and in Part 5 in connection with the powers of a local authority to enter premises to disinfect, disinfest or decontaminate the premises or anything in them.
226. These powers engage Article 1 Protocol 1 which provides:
“1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. A state can only justify an interference with the enjoyment of possessions if it can show that a fair balance has been struck between the public interest and the rights of the person entitled to the enjoyment of the property: *Beyeler v. Italy* [GC], § 107; *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia* [GC], § 108.
227. The powers in Parts 3 and 5 were justified by the Government due to the public interest in investigators being able to carry out effective public health investigations, or to prevent the spread of infectious disease by disinfecting

property, and any interference with the peaceful enjoyment of possessions is a proportionate interference with property rights.

228. Safeguards are built into the legislation to minimise the impact on individuals and there is provision for compensation to be paid in certain cases where there has been loss or damage to property. In terms of compliance with Article 8(1) the European Court of Human Rights has taken the view that house searches or visits to and seizures on business premises may comply with the requirements of Article 8, *Keslassy v. France* (dec.); *Société Canal Plus and Others v. France*, §§ 55- 57.
229. We take the view that the PHSA complies with Rule of Law principles. The legislation is relatively clear and accessible. Furthermore, provisions introduced into the PHSA by the Coronavirus (Recovery and Reform) (Scotland) Act 2022 limit the regulation and declaration making powers so that regulations under section 86A(1) can only be made whilst a public health declaration has effect. The Scottish Ministers must consult the Chief Medical Officer on the declaration. The declaration must be public and approved by the Scottish Parliament unless it is not practicable to do so. In which case the Scottish Ministers must make a statement explaining why parliamentary approval is not practicable. In these circumstances the declaration has effect for 28 days unless it is approved by the Parliament. Regulation and decision-making powers include an obligation on Scottish Ministers and others to consider that a restriction or requirement is proportionate. Furthermore, the regulations under section 86A(1) must be reviewed by Scottish Ministers every 21 days after coming into effect. The Coronavirus Act 2000 schedules 21 and 22 contained analogous provisions for the declaration of a serious and imminent threat to public health in Scotland: [Coronavirus \(COVID-19\): Declaration of a serious and imminent threat to public health - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/coronavirus-covid-19/declaration-a-serious-and-imminent-threat-to-public-health/pages/declaration-a-serious-and-imminent-threat-to-public-health.aspx) . (Ref LSS158) The PHSA provides that any interference should be for the legitimate aim of protecting public health and given that there are adequate procedural safeguards including in sections 60-65 a range of appeals against orders for medical examination and further appeal on exclusion and restriction orders, quarantine and hospital detention, exclusion and restriction. In our view sections 86A-J ensure that rule of law components are complied with by Scottish Ministers and public officials and that human rights must be complied with and disputes resolved fairly. These sections ensure that there is adequate parliamentary and judicial oversight of both the content of the regulations and of action taken under them.

Question 15.

230. The Society participated in an Action Group which brought together Police Scotland, the Public Defence Solicitors Office, Scottish Government, Crown Office and Procurator Fiscal Service, Scottish Appropriate Adult Network, and the Convention of Scottish Local Authorities. Topics discussed remote physical and remote access to persons in custody at the Police station, appropriate use of advice by telephone or video conference, changes to the Police estate to accommodate Courts within the existing buildings, provision of PPE (masks in particular), arrangements for consultations to be in private and potential changes required to the accused's rights and Solicitor Access Forms.

Question 16

231. I note that the Convention of Scottish Local Authorities participated in the Action Group referred to in paragraph 230.

Question 17

232. There is no question attached to Question 17.

Question 18 (a)

233. See my answer to Question 8 regarding the Coronavirus (Scotland) Act 2020 where we expressed our concerns regarding the impact of legislation on at risk and vulnerable groups. In relation to our comments about the Coronavirus (Extension and Expiry) (Scotland) Act 2021 we agreed with the general principles of the Act concerning time limits and the repeal of the “stop the clock provisions” relating to vulnerable adults.

Question 18 (b)

234. See my answer to Questions 8 and 9 particularly. Human rights are referred to in response to a number of questions.

Question 18 (c)

235. We raised the following NPIs with the Scottish Government or Non-departmental public Bodies or statutory independent bodies including, aspects of the two lockdowns (March 2020 - July 2020; and January 2021 - April 2021) including remote court appearances, the use of remote systems, social distancing, court closures and modifications when they opened, closures of various governmental offices and remote signing of certain documents.

Question 19

236. I have not in the available time been able to carry out the research in detail or consultation with those who were involved to answer this question.

Question 20

237. I have indicated in the above responses where we raised matters of compatibility of the key decisions made by the Scottish Government in imposing NPIs as part of its response to Covid-19 with the rule of law, human rights or civil liberties.

Lessons learned and documents

- I. Any oral or written evidence the LSS provided to UK Parliament Select Committees investigating the government response to the pandemic;

Question 21

238. The Public Administration and Constitutional Affairs Committee of the House of Commons mounted an Inquiry into the Coronavirus Act 2020 Two Years On.

- [Find out more about the Inquiry](#) (Ref LSS/267) (INQ000371622MC)
- [Read our response to the Inquiry - January 2022](#) (Ref LSS/238) (INQ000371595MC)

239. The House of Lords Constitution Committee carried out an inquiry into the constitutional implications of Covid-19 in 2020.

- [The Law Society's response](#) (July 2020) (Ref LSS/36) (INQ000362604MC)

240. The Scottish Affairs Committee inquired into the Covid -19 pandemic, focusing on the four-nation approach, intergovernmental communication, scientific advice, policy divergence, and the impact of coronavirus on various sectors in Scotland.

- View the inquiry on the [UK Parliament's website](#) (Ref LSS/160)
- View [our response](#) (Ref LSS/37) (INQ000362605MC)

241. The Public Administration and Constitutional Affairs Committee of the House of Commons mounted an Inquiry into the work of the Cabinet Office in April 2020.

- [Find out more about the Inquiry](#) (Ref LSS/161)
- [Read our submission - April 2020](#) (Ref LSS/38) (INQ000362606MC)

II. Any oral or written evidence you provided to the Scottish Parliament Committees investigating the ways in which decisions were taken by the Scottish Government in connection with the management of the pandemic;

Written Evidence

242. The Scottish Government published a discussion paper on 14 April 2020 which set out potential options to inform discussions between the Cabinet Secretary for Justice and key stakeholders on the most effective approach to manage the impact of the Covid-19 outbreak on serious criminal cases where trial would be before a Sheriff or Judge and jury.

243. As well as being represented on roundtable discussions on the proposals, we submitted a written response.

- See the [discussion paper](#) (Ref LSS/39) (INQ000362607MC) on the Scottish Government's website.
- Read [our response](#) (Ref LSS/40) (INQ000362608MC) submitted on 17 April 2020.
- We also prepared a [briefing for MSPs](#) (Ref LSS/162) on the proposals.

244. Electricity Capacity Regulations 2014 (the Regulations) and Capacity Market: proposal to relax the rules temporarily in response to COVID-19 (April 2020).

245. Covid-19 and Solemn Criminal Trials: Scottish Government Discussion Document and briefing for MSPs (April 2020).
246. Coronavirus (Scotland) Bill: briefing, amendment to be introduced at Stage 2 concerning the Mental Health Tribunal, further amendment in relation to the period of effect of the advance notice under the Land Registration etc. (Scotland) Act 2012, and statement on the Bill (April 2020).
247. We responded to the Scottish Government's outline to the Coronavirus (Scotland) (No.2) Bill (May 2020) and Coronavirus (Scotland) (No. 2) Bill: briefing and amendment to be introduced at stage 2 (May 2020).
- [Read our response](#) (Ref LSS/41) (INQ000362609MC)
248. The Scottish Parliament Covid-19 Committee took evidence on 9 September 2020 on the Coronavirus (Scotland) Acts (Early Expiry of Provisions) Regulations 2020 (SSI 2020/249); and the Coronavirus (Scotland) Acts (Amendment of Expiry Dates) Regulations 2020.
249. The Criminal Law Committee made the following submission to the Scottish Parliament's Justice Committee:
- [Restarting jury trials](#) (Ref LSS/43) (INQ000362611MC)
 - Scottish Parliament Justice Committee - COVID-19 (Ref LSS/163)
250. Equality and Human Rights Committee: Response to Inquiry on the Impact of COVID-19 (May 2020)
251. Call for Evidence on impact of COVID-19 on the rural economy and connectivity in Scotland (June 2020)
252. Reporting on Coronavirus Acts: Adults with Incapacity provisions (July 2020)
253. Clinical Guidance for NHS Scotland: Using Physical Restraint For Patients With Confirmed Or Suspected Covid-19 (version 1) (July 2020)
254. National Clinical and Practice Guidance for Adult Care Homes in Scotland during the COVID-19 Pandemic (version 1.3) (July 2020)
255. Covid-19 Related Legislation: SSI2020/249: The Coronavirus (Scotland) Acts (Early Expiry of Provisions), Regulations 2020 The Coronavirus (Scotland) Acts (Amendment of Expiry Dates) Regulations 2020 (September 2020)
256. Letter to the COVID 19 Committee of the Scottish Parliament: Adults with Incapacity (September 2020)
257. Letter to the COVID-19 Committee: The Coronavirus (Scotland) Acts (Amendment of Expiry Dates) Regulations 2020 (the Regulations)- Detention of Young Persons (September 2020)

258. Restoring the Courts post Covid-19 (September 2020)
259. The Scottish Parliament's Covid-19 committee asked for views on how the Scottish Government's powers have been used over August and September 2020.
- Read **the Scottish Parliament's consultation (Ref LSS/164)**
 - Read **the Law Society of Scotland's response** (October 2020) **(Ref LSS/52) (INQ000362620MC)**
260. Coronavirus Acts: third report to Scottish Parliament (October 2020)
261. **Scottish Government COVID-19 guidance improvement project - November 2020 (Ref LSS/246)** The Scottish Government issued a consultation seeking feedback on its coronavirus guidance.
- Read the consultation on **the Scottish Government's website (Ref LSS/165)**
 - Read **the Law Society of Scotland's response** (November 2020) **(Ref LSS/53) (INQ000362621MC)**
262. Scottish General Election (Coronavirus) Bill: response to the Standards, Procedures and Public Appointments Committee consultation (November 2020) and stage 1 briefing for MSPs (December 2020)
263. COVID-19 legislation: next steps in 2021 (February 2021)
264. Registers of Scotland Digital Submissions 2020 (February 2021)
265. COVID-19 legislation: next steps in 2021 (Licensing Law) (March 2021)
266. Briefing - Recover Renew and Transform, Scottish Parliament – Justice Debate Thursday- 10 June 2021

Oral Evidence

267. The Scottish Parliament Covid-19 Committee took oral evidence Subordinate Legislation Coronavirus (Scotland) Acts (Early Expiry of Provisions) Regulations 2020 (SSI 2020/249) Coronavirus (Scotland) Acts (Amendment of Expiry Dates) Regulations 2020 [Draft]
268. 9 SEPTEMBER 2020 Official Report (parliament.scot)
269. The Scottish Parliament Covid-19 Committee took oral evidence from the Society on 4 March 2021 : [Official Report \(parliament.scot\)](#). **(Ref LSS/42) (INQ000362610MC)**
270. The Scottish Parliament Covid-19 Recovery Committee took oral evidence from the Society on 2 December 2021 on the Coronavirus (Discretionary Compensation for Self-isolation) (Scotland) Bill [Official Report \(parliament.scot\)](#) **(Ref LSS/245)**

Any Reviews

271. I gave written and oral evidence to the [Independent Commission on UK Public Health Emergency Powers \(biicl.org\)](https://www.biicl.org/) (Ref LSS/166)

Question 22

272. When the pandemic began this statement by WHO was of global significance. The World Health Organisation (WHO) stated that “Countries must take a whole-of-government, whole-of-society approach, built around a comprehensive strategy to prevent infections, save lives and minimise impact”. At a media briefing on 11 March 2020, WHO’s Director General, Tedros Adhanom Ghebreyesus said. “We’re in this together, to do the right things with calm and protect the citizens of the world.”
273. There are four broad themes which set the context for our comments on Coronavirus legislation as it passed through the UK and Scottish Parliaments. They were Parliamentary scrutiny and the rule of law, respect for human rights, devolution and other public health legislation.
274. In particular the explanatory notes to the UK Coronavirus Bill included this statement: There are different legal systems operating in the various jurisdictions but there needs to be a “consistency of outcomes [to be] achieved by making the range of tools and powers consistent across the UK.”

Question 23

275. There were several key (sometimes competing) challenges for Governments and Society:
- a. The first major global pandemic in the 21st Century;
 - b. The challenge to keep people safe;
 - c. The challenge to preserve the NHS and provide care;
 - d. The need to enable emergency systems to function;
 - e. To maintain the food chain;
 - f. To communicate clearly and accurately;
 - g. To maintain the justice system
 - h. To maintain the education system
 - i. To protect the economy
 - j. To ensure equality before the law;
 - k. To act with compassion;
 - l. To offer real consolation;
 - m. To provide encouragement.
275. Whilst some preparation had been done for a pandemic affecting the UK it is fair to say that this was a new and unexpected experience for most people and the Legislatures, Executives and the Judicial systems across the UK.
276. What went well and what did not is difficult to assess because each individual’s experience throughout the pandemic was unique to that individual. It will be some time before a proper assessment can be made. The two Covid-19 Inquiries are significant developments which provide some of the answers but the voices of

those who suffered by bereavement, loss and illness will need to be listened to come to any reasonable conclusion.

Question 24

277. Even if legislation is needed to be enacted urgently this does not mean that there should not be close scrutiny of how the legislation will work in practice. Each legislature in the UK will need mechanisms in the future to ensure that scrutiny will take place in a searching and comprehensive manner. We suggested that there should be a quadripartite parliamentary group (representing a whole-of-government approach) should be formed to undertake this task.
278. The four broad themes which set the context for our comments on Coronavirus legislation referred to above were Parliamentary scrutiny and the rule of law, respect for human rights, devolution and other public health legislation.
279. Inadequate periods for scrutiny of important bills run the risk of making bad law. Such an approach may be justified by reference to the emergency in which the country finds itself but swift corrective legislation must be put in place when any defects in the law become apparent.
280. The Human Rights Act 1998 applies to the acts of public authorities under the and we encourage public authorities which undertake coronavirus functions to ensure that compliance with Convention rights continues and that human rights and the law are respected when applying the provisions of the Coronavirus legislation.
281. Compliance with Convention rights is a key aspect of devolution legislation including the Scotland Act 1998 which applies to Legislative and Executive Competence and applies to for example Scottish Public Authorities.

Question 25

282. Governments across the UK should accept that we will face further collective problems from future infectious diseases — this has been recognised by the World Health Organisation (WHO). Two years ago, WHO began a global process to draft and negotiate an agreement to strengthen pandemic prevention, preparedness and response. An Intergovernmental Negotiating Body has been established and has been working on the text of the agreement and is likely to submit its final outcome to the 77th World Health Assembly in May 2024.
283. The objective of the WHO CA+ “guided by equity, the right to health and the principles and approaches set out herein, is to prevent pandemics, save lives, reduce disease burden and protect livelihoods, through strengthening, proactively, the world’s capacities for preventing, preparing for and responding to, and the recovery of health systems from, pandemics”. The UK Government (taking into account the views of the Devolved Administrations) should participate fully in the WHO initiative and Governments around the UK should not wait for a future public health emergency to legislate, they should set about preparing for legislation now.
284. Consulting widely, formulating policy, drafting legislation and engaging in parliamentary activity now ideally should allow the time for a considered approach which takes into account the views of many (including the views of other

jurisdictions) in a relatively calm atmosphere. In turn such a process should result in better law. This approach acknowledges that human diseases have a distinct placing on the National Risk Register of Civil Emergencies (NRR) **(Ref LSS/268) (INQ000371623MC)** and builds on the approach developed in the UK Influenza Preparedness Strategy 2011 **(Ref LSS/269) (INQ000371624MC)** and the learning from Exercise Cygnus. Crucially the pandemic Influenza draft bill set out the arrangements for devolved and UK response activities. The Government acknowledged that the pandemic influenza draft legislation was “essential in forming the basis of the Coronavirus Act 2020” **(Ref LSS/252) (INQ000371607MC)** : UK pandemic preparedness - GOV.UK (www.gov.uk) **(Ref LSS/270) (INQ000371625MC)**

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: 3 January 2024